REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

MAYOR, COUNCILLORS AND CITIZENS OF THE CITY OF ESSENDON . . . } PLAINTIFF;

AND

CRITERION THEATRES LIMITED AND OTHERS . . . . . } DEFENDANTS.

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MELBOURNE, *Mar.* 14, 17, 18; *June* 2.

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

Constitutional Law (Cth.)—Taxation of Commonwealth by State—Municipal rates—Land in temporary occupation of Commonwealth—Acquisition of "property"—"Property . . . belonging to the Commonwealth"—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (*xxxi.*), 114.

Statute—Construction—Presumption of intention not to bind the Crown—State statute—Application to the Crown in right of the Commonwealth.

Local Government (Vict.)—Rates—Liability imposed on "every person who occupies . . . or if the occupier is the Crown . . . the owner of" ratable property—Land occupied by the Commonwealth for defence purposes—Liability of the Commonwealth as occupier—Liability of owner—Local Government Act 1928 (*Vict.*) (*No.* 3720), *s.* 265 (*b*).*

The *Local Government Act* 1928 (Vict.) provided, by s. 265 (*b*), that municipal rates should be levied "upon every person who occupies . . . or if the occupier is the Crown . . . then upon the owner of" ratable property.

Held, by *Latham* C.J., *Dixon*, *McTiernan* and *Williams* JJ. (*Rich* J. dissenting), that "the Crown" meant the Crown in right of the State of Victoria, so that, where ratable property was occupied by the Commonwealth, the liability for rates was not imposed on the owner of the property.

* See, now, *Local Government Act* 1946 (No. 5203), s. 265 (*b*).

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Held, further, that, where the Commonwealth had occupied land under reg. 54 of the *National Security* (*General*) *Regulations*, it was not ratable under s. 265 (*b*) as being within the expression "every person who occupies" ratable property, because—

By *Latham* C.J., if the words "every person" were read as including the Commonwealth, the section would have the effect of imposing a tax on property of the Commonwealth contrary to s. 114 of the Commonwealth Constitution: For that reason (and not because there was any presumption that a State statute did not bind the Crown in right of the Commonwealth) the words should be construed as not being intended to apply to the Commonwealth.

By *Rich* J., in so far as the section provided that rates should be levied on "every person who occupies" ratable property, it would not be applicable, as a matter of construction, where the occupier was the Crown in right of the State of Victoria or in right of the Commonwealth or otherwise, the general rule being that an Act does not bind the Crown in any of its capacities unless an intention in that behalf appears by express words or necessary implication: The legislature had recognized this by adding the provision that, where the occupier was the Crown (which included the Crown in right of the Commonwealth), the liability should fall upon the owner of the land.

By *Dixon* J., municipal rates are a tax which, as a necessary consequence of the system of government established by the Commonwealth Constitution, a State has no power to levy directly on the Commonwealth in the exercise of its functions.

By *McTiernan* J., the words "every person" were not apt, in the context, to include a body politic; therefore, on its true construction, the section did not purport to impose liability for rates on the Commonwealth.

By *Williams* J., the Crown, whether in right of the Commonwealth or of the State, was not bound by a State statute unless an intention to that effect was indicated expressly or by necessary implication, and no intention to bind the Commonwealth was indicated by the expression "every person" or its context.

DEMURRER and QUESTION referred to Full Court.

The municipal corporation of the city of Essendon brought an action in the High Court against Criterion Theatres Ltd. and others, the owners of land within the municipality, and the Commonwealth, which had occupied the land, for the recovery of rates.

The plaintiff's statement of claim alleged that the defendants were the owners of the land in question at all material times and that the land was ratable to the city of Essendon (pars. 1-8); between 30th September 1942 and 11th September 1944 the Commonwealth was the occupier of the land (par. 9); general rates were made and levied by the council of the city on the owners of the land for the period, 1st October 1942 to 30th September 1943, and also for the

period, 30th September 1943 to 11th September 1944 (pars. 10-13); the occupier of the land at the material times, being the Commonwealth, was the Crown within the meaning of s. 265 (*b*) of the *Local Government Act* 1928 (Vict.), and in consequence the rates were properly made and levied upon the defendants other than the Commonwealth as owners of the land (par. 14); on or about 24th August 1946 the plaintiff caused to be served on those defendants demands in writing in accordance with the Act for payment of the total amount of the rates, but the amount remained wholly unpaid (pars. 14-19); alternatively with pars. 10-13, the rates were levied on the Commonwealth as occupier of the land (par. 20); alternatively with pars. 14-19, the Commonwealth was at all material times an occupier, within the meaning of s. 265 (*b*) of the Act, of the land and was not exempt from liability for the rates, which were in consequence properly made and levied on the Commonwealth as occupier (par. 21); on or about 24th August 1946 the plaintiff caused to be served on the Commonwealth a demand in writing for payment of the amount of the rates, but the amount remained wholly unpaid (pars. 22, 23).

The plaintiff claimed, against the defendant owners, and, alternatively, against the Commonwealth, the amount of the rates.

The Commonwealth demurred to the statement of claim on the grounds that the *Local Government Act* did not confer power on the plaintiff to make and levy rates on the Commonwealth as occupier of the land and under the Act no liability in respect of any rates attached to the Crown in right of the Commonwealth.

The other defendants delivered a defence in par. 1 of which they admitted the allegations in pars. 1-13 and 15-19, but not those in par. 14, of the statement of claim. Paragraphs 2 and 3 of the defence were substantially as follows:—2. Prior to the levying of the rates sued for, the Commonwealth Minister of State for the Army, acting pursuant to reg. 54 of the *National Security* (*General*) *Regulations*, took possession of the land in question, which at all material times was in the occupation of, and used exclusively by, the military forces of the Commonwealth and by reason thereof (*a*) was exempt from rating by the plaintiff; (*b*) was property belonging to the Commonwealth, within the meaning of s. 114 of the Commonwealth Constitution, so that the levying of rates thereon by the plaintiff was contrary to s. 114 and void. 3. Alternatively, the occupier of the land was not, at any material time, the Crown within the meaning of s. 265 (*b*) of the *Local Government Act*, and the owners were not liable to be rated as such.

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When the action came on for trial it was directed, by consent, that the demurrer and the following question be argued before the Full Court :—

> Are the defendants other than the Commonwealth of Australia or any and which of them liable to pay to the plaintiff the moneys or any part thereof claimed from it, them or him, in this cause ?

The demurrer and the question now came before the Full Court as directed, and, at the instance of the Court, counsel for the plaintiff began.

Phillips K.C. (with him *Revelman*), for the plaintiff. Under s. 265 (*b*) of the *Local Government Act* 1928 (Vict.) the liability for rates is imposed primarily on " every person who occupies " ratable land ; but, if (so far as is relevant to this case) " the occupier is the Crown," the section relieves the Crown of liability, and at the same time ensures that rates shall be payable, by transferring the liability to the owner. By taking possession of the land in question under reg. 54 of the *National Security* (*General*) *Regulations*, the Commonwealth became the occupier of the land within the meaning of s. 265 (*b*). The next question is whether that fact brings the case within the exception provided by s. 265 (*b*) where " the occupier is the Crown " ; that is, whether the words " the Crown " include the Crown in right of the Commonwealth as well as in right of the State. The plaintiff's first submission is that that is the case : that the defendants other than the Commonwealth are liable as owners of the land. In the alternative, the plaintiff will submit that, if the Commonwealth is not " the Crown," then it is liable as occupier, being within the earlier words of the section, " every person who occupies." The first submission is that, when " the Crown " is mentioned in a State statute, the prima-facie meaning is the Crown in all its capacities. This follows from the principle that the Crown is not bound by a statute unless it is expressly mentioned. In Australia, it is submitted, this principle has the effect that, prima facie, a State statute does not bind the Crown in any of its capacities, whether in right of the State or of the Commonwealth or in any other right. That was the view of *Rich* and *Williams* JJ. in *Minister for Works* (*W.A.*) v. *Gulson* (1), and, although not stated in so many words, seems to be the basis of the judgment of *Starke* J. in the same case. The judgment of *Dixon* J. in *Farley* v. *Federal Commissioner of Taxation* (2) tends in the same way, though it does not actually hold to that effect.

(1) (1944) 69 C.L.R. 338.

(2) (1940) 63 C.L.R. 278, at pp. 303, 304.

Support for this view is also to be found in *Pirrie* v. *McFarlane* (1), per *Isaacs* J.; *Criterion Theatres Ltd.* v. *Melbourne and Metropolitan Board of Works* (2); *In re Silver Bros. Ltd.*; *Attorney-General (Quebec)* v. *Attorney-General (Canada)* (3). Accordingly, "the Crown" in s. 265 (*b*) must be taken as including the Commonwealth unless an intention to the contrary appears from the Act, and there is nothing in the Act to show such an intention. If this view is not correct, it follows that the intention of s. 265 (*b*) was not to exclude the Commonwealth, as an occupier, from liability and that the section is not to be construed subject to any presumption in favour of the Commonwealth. If that is so, the words "every person who occupies" are wide enough to fix the Commonwealth with liability. It is important to observe that s. 265 does not determine the incidence of the rate; it merely provides machinery for the collection of the rate. What is rated is *land* (s. 249); apart from the exceptions, the rate is levied in the first instance on the occupier, who normally recovers it from the owner of the land under s. 340. In the ultimate result, the rate is imposed on the owner because of his ownership of the land, although, for convenience of collection, it must be paid by the occupier in the first instance. In this view of s. 265 (*b*), it does not impose any such tax on property belonging to the Commonwealth as is prohibited by s. 114 of the Federal Constitution. It is not to the point that the Commonwealth acquired "property" in the land within the meaning of s. 51 (xxxi.) of the Constitution by taking possession as it did (*Minister of State for the Army* v. *Dalziel* (4)). It cannot be said that the *Local Government Act* taxes "property" of the occupier. [He referred to *Attorney-General (Queensland)* v. *Attorney-General (Cth.)* (5); *Smith* v. *Municipality of Vermilion Hills* (6); *Montreal City* v. *Attorney-General (Canada)* (7); *Halifax City* v. *Estate of Fairbanks* (8).]

Menzies K.C. (with him *Dean* K.C. and *H. Walker*), for the defendant owners. It is submitted that the owners of the land are under no liability for rates in respect of the period of the Commonwealth's possession. This submission is put on two grounds: one, that no rate could lawfully be imposed on the land while the Commonwealth was in possession; the second, that the Commonwealth's occupation was not that of "the Crown" within s. 265 (*b*), and, as the land was in fact occupied, the owners were not ratable under the section. As to the first ground, s. 114 of the Constitution would prohibit the

(1) (1925) 36 C.L.R. 170, at p. 189.
(2) (1945) V.L.R. 267, at pp. 270, 271.
(3) (1932) A.C. 514, at pp. 523, 524.
(4) (1944) 68 C.L.R. 261.
(5) (1915) 20 C.L.R. 148, at p. 174.
(6) (1916) 2 A.C. 569, at pp. 572 et seq.
(7) (1923) A.C. 137, at pp. 138 et seq.
(8) (1928) A.C. 117.

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levying of the rate if the terms of s. 265 (*b*) were sufficient to authorize it. Regulation 54 of the *National Security* (*General*) *Regulations* gave the Commonwealth the widest control over the land acquired. The plaintiff's argument on this point does not give effect to the decision in *Dalziel's Case* (1). The land was a " place acquired by the Commonwealth for public purposes," within the meaning of s. 52 (i.) of the Constitution, which shows that the Commonwealth is the proprietor of what is acquired (*Commonwealth* v. *New South Wales* (2)). Of necessity, therefore, the imposition of the rate was the imposition of a tax on property belonging to the Commonwealth within the prohibition in s. 114. As to the second ground, the doctrine of the indivisibility of the Crown is not inconsistent with its acting through different agencies, and the true rule is that in a State statute " the Crown," prima facie, means the Crown in right of the State (*R.* v. *Registrar of Titles* (*Vict.*) (3)). The decision in *Gulson's Case* (4) is not inconsistent with this view. [He also referred to *Pirrie* v. *McFarlane* (5).] If the plaintiff's argument that " the Crown," in s. 265 (*b*), includes the Commonwealth has not the support of the presumption which it seeks to invoke, it gets no support from any positive evidence of intention to be found in the Act ; the numerous references to " the Crown " and to " His Majesty " which occur in other sections either point to the intention to refer to the Crown in right of the State only, or, at most in the plaintiff's favour, are no clearer than s. 265 (*b*) itself.

Hudson K.C. (with him *Adam*), for the Commonwealth. The Commonwealth accepts the plaintiff's argument to the extent to which it construes the words " the Crown " as including the Crown in right of the Commonwealth and proceeds to the conclusion that in the circumstances of this case the owners are liable under s. 265 (*b*), but, even if that is not correct, submits that the Commonwealth is, nevertheless, not liable. This would mean that no rate could be levied on anyone in respect of the period in question, that the purported rate was invalid. The plaintiff's argument was to the effect that, if the Commonwealth was not " the Crown," the only possible reading of the section was that the Commonwealth was liable as occupier, being within the words " every person who occupies." This appears to assume that, if the Court rejects the proposition that, prima facie, a reference in a State statute to the Crown must be treated as referring to the Crown in all its capacities,

(1) (1944) 68 C.L.R. 261 : See pp. 285, 286, 289, 290, 295, 299.
(2) (1923) 33 C.L.R. 1, at p. 46.
(3) (1915) 20 C.L.R. 379.
(4) (1944) 69 C.L.R. 338 : See pp. 347-350, 359.
(5) (1925) 36 C.L.R., at pp. 179, 189, 190, 218, 220, 225, 226.

it must necessarily reject the rule that, prima facie, a State statute does not bind the Crown in any of its capacities. This does not follow as of course. Further, the argument leaves out of account the possibility that evidence of the actual intention of the Victorian legislature is discoverable in the context of s. 265 (*b*). The first submission on behalf of the Commonwealth is that, as to the meaning of " the Crown," the plaintiff's rule of construction is correct : Even if it is not correct, the presumption still remains that the Act was not intended to bind the Crown in right of the Commonwealth any more than in right of the State, and there is nothing in the Act to rebut this presumption. [He referred to *Gulson's Case* (1), per *Starke* J. ; *Farley's Case* (2), per *Rich* J.] Quite apart from presumptions, however, there is sufficient evidence in the Act and its history to show affirmatively that the legislature intended by the words " the Crown " to refer to the Crown in all its capacities or, at all events, that it did not intend to include the Crown in any of its capacities in the phrase " every person who occupies." The legislation goes back, substantially in its present form, as far as the *Local Government Act* 1903 (No. 1893 : See ss. 249, 265), which departed as a matter of words (though not, it is submitted, so far as intention was concerned) from the prior form : The change of words appears to have been necessitated by, and merely consequential upon, the bringing in of new classes of ratable property. The prior form of words had persisted without any alteration that is material here since 1863 (Act No. 176 : See ss. 181, 183 ; see also No. 506 (1874), ss. 253, 257 ; No. 1112 (1890), ss. 246, 257) : The exemption was of lands occupied by the Crown or the Government of Victoria. The use of the two expressions, the Crown, and the Government of Victoria, is significant : The latter, one would suppose, was sufficient to protect the Crown in right of Victoria ; the use of the former suggests that it was contemplated that land in Victoria might be occupied by the Imperial Crown or the Crown in right of New South Wales, for instance, and it was thought desirable that the exemption should cover such cases. There is nothing in the new form of words to suggest any intention to alter the law so far as the liability of the Crown is concerned ; on the contrary, it rather suggests that the reference to the Crown was thought sufficient of itself to preserve the old exemption. It will be seen that the problem of construction which presents itself here is not one created by Federation. Even if the words " the Crown " in s. 265 (*b*) must be limited by construction so that they are to be read as referring only to the Crown in right of

(1) (1944) 69 C.L.R., at p. 358. (2) (1940) 63 C.L.R., at p. 292.

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the State of Victoria, regard may be had to the course of the legislation together with certain other considerations to be found in the rating scheme which are not consistent with the conception of the Commonwealth or the Crown in any of its capacities as a ratepayer. The principle of the Act is taxation with representation. The scheme of enrolment of ratepayers and the provisions relating generally to the municipal franchise (*Local Government Act*, ss. 71 et seq.) take no account of the Commonwealth as a ratepayer. It is submitted, therefore, that it cannot have been the intention of the legislature to include the Commonwealth in the words " every person who occupies." If, on the other hand, that is the intention, then the effect of the section is to impose a tax which is prohibited by s. 114 of the Constitution: On this point the Commonwealth adopts the argument put on behalf of the owners of the land. Also, quite apart from s. 114, it is submitted that it is implicit in the Federal Constitution that a State has no power to impose such a liability on the Commonwealth.

Phillips K.C., in reply. Section 52 (i.) of the Constitution does not apply here: There is no " place acquired." To bring the land within this description, complete ownership would have to be acquired. In any event, s. 108 would apply to keep State law applicable.

Cur. adv. vult.

June 2.

The following written judgments were delivered :—

LATHAM C.J. In this action the municipality of the city of Essendon sues the owners of certain land and the Commonwealth for municipal rates. The land is owned by the defendants other than the Commonwealth. Under National Security (General) Regulation 54 made under the *National Security Act* 1939-1943 the Minister for the Army took possession of the land and it was used during the relevant period for purposes of defence. The Commonwealth demurred to the statement of claim on the ground that the *Local Government Act* 1928 (Vict.) did not confer power on the plaintiff to levy rates on the Commonwealth as occupier of the land and on the ground that under that Act no liability in respect of any rates attached to the Crown in right of the Commonwealth. This demurrer is before us for argument. The other defendants delivered a defence in which all the allegations in the statement of claim were admitted, except an allegation that the Crown was the occupier of the land and other allegations which were argumentative in character. An order was made referring to the Full Court for argument the following question :—

"Are the defendants other than the Commonwealth of Australia or any and which of them liable to pay to the plaintiff the moneys or any part thereof claimed from it, them or him, in this cause ?"

The *Local Government Act* 1928 (Vict.), s. 265, provides as follows :—

"Every general rate which the council of any municipality is by this Act authorized to make or levy shall be made and levied by it . . .

(*b*) Upon every person who occupies, or if there is no occupier or if the occupier is the Crown or the Minister of Public Instruction or any of the persons or corporations mentioned in sub-section (3) of section two hundred and forty-nine of this Act, then upon the owner of any rateable property whatsoever within the municipal district."

Thus the rate is made and levied upon the occupier, but if there is no occupier or if the occupier is the Crown, upon the owner.

The plaintiff submits alternative contentions. First, it is contended that in the words "if the occupier is the Crown" the Commonwealth is included in "the Crown." Accordingly, it is argued, as the occupier is the Crown, the owners are liable to pay the rates. Secondly, and as an alternative argument, it is submitted that if the Commonwealth is not included in the words "the Crown" then the Commonwealth is included in the earlier words of the section "every person who occupies" and accordingly is itself liable as occupier.

One argument for the Commonwealth adopted the contention of the plaintiff that the words "the Crown" in the phrase "if the occupier is the Crown" include the Commonwealth. If this is the case, the owners but not the Commonwealth are liable to pay the rates. If, on the other hand, the Commonwealth is not included in the words "the Crown" then, it was contended, the words "every person who occupies" do not apply to the Commonwealth because, (1) the presumption that the Crown is not bound by a statute applied in favour of the Commonwealth in the case of a State statute as well as of a Commonwealth statute; (2) s. 114 of the Commonwealth Constitution forbade the imposition of any tax upon property of any kind belonging to the Commonwealth and the rights of the Crown in the land were property of the Commonwealth; (3) the State had no power to tax the Commonwealth; and (4) the land was a place acquired by the Commonwealth for public purposes with respect to which the Commonwealth had exclusive power (and the State therefore no power) to make laws—Commonwealth Constitution, s. 52 (i).

The first question to be determined is whether the words "the Crown" in the phrase "if the occupier is the Crown" apply to the

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Commonwealth. If they do so apply, then the section does not purport to impose any liability upon the Commonwealth but does impose a liability upon the owners of the land.

There are many sections in the statute which refer to the Crown, to Crown lands and to departments of the Crown. The references to Crown lands and to departments of the Crown are plainly references to lands of the Crown in right of the State of Victoria and to Victorian State Departments. In s. 265 there is an exclusion of liability where the occupier is the Crown or " the Minister of Public Instruction or any of the persons or corporations mentioned in sub-section (3) of section two hundred and forty-nine." Those persons or corporations are the Victorian Railways Commissioners, the Board of Land and Works, and certain harbour and sewerage trusts, which are public bodies constituted under the laws of Victoria. In s. 387 the same words appear as in s. 265. Section 387 provides that rates are not to be a charge upon any land which is " the property of the Crown or vested in the Minister of Public Instruction or the other persons or corporations referred to in sub-section (3) of section two hundred and forty-nine hereof." Where the words " the Crown " occur in such an association there is every reason for treating them as prima facie referring to the Crown in the right of the State of Victoria.

In the case of *Municipal Council of Sydney* v. *The Commonwealth* (1), the Court had to consider whether a provision contained in the *Sydney Corporation Act* 1902, which declared that Crown lands were not liable for rates, applied to lands which had become vested in the Commonwealth under the Constitution. It was said by *Griffith* C.J. that " The term ' the Crown ' as used in the *Sydney Corporation Act* must be taken to mean the Crown in its capacity as representing the State of New South Wales " (2). In *R.* v. *Registrar of Titles (Vict.)* ; *Ex parte The Commonwealth* (3), the Court considered s. 238 of the *Local Government Act* 1903 (Vict.) corresponding to s. 238 (1) of the Act of 1928, which conferred power upon a municipality to let land to " His Majesty or the Board of Land and Works." The Board of Land and Works is a corporation created by Victorian law. It was held by all the members of the Court except *Griffith* C.J. that " His Majesty " in the section mentioned referred to His Majesty in right of Victoria, that it meant " ' His Majesty ' in the same sense as ' The King's Most Excellent Majesty ' in the enacting declaration of the Act, and the expression ' His Majesty ' in other sections of

(1) (1904) 1 C.L.R. 208.
(2) (1904) 1 C.L.R., at p. 231.
(3) (1915) 20 C.L.R. 379.

the Statute "—per *Isaacs* J. (1). See also per *Higgins* J. (2) and *Powers* J. (3). It was pointed out that the context strengthened this conclusion because the Board of Land and Works meant the Victorian Board of Land and Works. Similarly, in the case of s. 265, the Minister of Public Instruction and the other persons and corporations referred to are all Victorian in character, so that it may be said in this case also that the context supports the view that the reference to the Crown is a reference to the Crown in right of Victoria. To these cases may be added a reference to *Pirrie* v. *McFarlane* (4), where *Isaacs* J. quotes *Gauthier* v. *The King* (5), a case dealing with a similar question in Canada. There a Provincial Act provided that the Act should apply to " an arbitration to which His Majesty is a party." It was unanimously held that the Crown in right of the Dominion of Canada was not bound by the Act and it was said in a passage quoted by *Isaacs* J. from the judgment of *Anglin* J.—" It may be accepted as a safe rule of construction that a reference to the Crown in a provincial statute shall be taken to be to the Crown in right of the province only, unless the statute in express terms or by necessary intendment makes it clear that the reference is to the Crown in some other sense " (6).

For these reasons I am of opinion that the words " the Crown " in the phrase " if the occupier is the Crown " in s. 265 of this State statute do not include the Commonwealth. It follows, therefore, that the owners of the land are not made liable by s. 265. There is no other provision in the Act which makes the owners liable and, accordingly, the question submitted to the Court which asks whether the defendants other than the Commonwealth are liable to pay to the plaintiff the moneys claimed should be answered in the negative.

The next question which arises is whether the Commonwealth is liable as a " person who occupies " ratable property. The Commonwealth was, during the relevant period, the occupier of the land in fact. It was contended that the words are general words which are wide enough to include the Commonwealth ; the subject matter of the legislation (municipal rates) is within the constitutional competence of the State Parliament ; general words should therefore be construed as applying to the Commonwealth. In *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (7), it was held that a Commonwealth law authorized by general words in the Constitution could be validly applied to a State and would so apply if on its true construction it appeared that it was

(1) (1915) 20 C.L.R., at p. 391.
(2) (1915) 20 C.L.R., at p. 397.
(3) (1915) 20 C.L.R., at p. 405.
(4) (1925) 36 C.L.R. 170, at p. 190.
(5) (1918) 56 Can. S.C.R. 176.
(6) (1918) 56 Can. S.C.R., at p. 194.
(7) (1920) 28 C.L.R. 129.

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intended to apply. In the present case similar reasoning was used to support the proposition that State legislation which a State Parliament is constitutionally competent to enact can and will bind the Commonwealth if, upon the true construction of the statute, it applies to the Commonwealth. Thus it was argued that in the present case the Commonwealth was bound by the general words of s. 265 relating to the liability of occupiers: Cf. *Pirrie* v. *McFarlane* (1). In the case of the statute which was under consideration in the *Engineers' Case* (2), namely the *Commonwealth Conciliation and Arbitration Act* 1904-1918, the intention to bind the State in respect of employment in an industry carried on by or under the control of a State appeared from express words in the definition of "industrial dispute" in s. 4 of the Act. In *Pirrie* v. *McFarlane* (1) the Court considered a statute which expressly applied to servants of the Crown, but this reference was interpreted as applying to the Crown in right of the State. There was no statement of intention in express terms to bind servants of the Commonwealth, but they were nevertheless held to be bound by a provision which referred to persons in general terms—"No person shall drive a motor car upon any public highway without being licensed for that purpose." In the present case there is no express statement of intention to make the Commonwealth liable to pay municipal rates.

The question whether the Act should be construed as intended to include the Commonwealth within the expression "person who occupies" may be approached, first, by asking whether there is any applicable presumption which may be used as an aid in construction, and, secondly, by inquiring, if there is no such presumption which is decisive, what is the intention of Parliament as disclosed by the words of the section taken in the context of the provisions of the Act.

In the first place, reliance is placed for the Commonwealth upon the presumption that the Crown is not bound by a statute unless it is expressly so provided or the intention to bind the Crown appears by necessary implication. It is argued that this presumption applies in the case of a State statute in favour of the Commonwealth. On the other hand, it is argued that the presumption, in the case of a State statute, applies only to the Crown in right of the State. I have given my reasons for supporting the latter opinion in *The Minister of Works (W.A.)* v. *Gulson* (3). I based my conclusion upon (*inter alia*) the decisions of this Court in *R.* v. *Sutton* (4), and *Pirrie* v. *McFarlane* (1). Upon this question the members of the Court who dealt with it

(1) (1925) 36 C.L.R. 170.
(2) (1920) 28 C.L.R. 129.
(3) (1944) 69 C.L.R. 338.
(4) (1908) 5 C.L.R. 789.

(in *Gulson's Case* (1)) were equally divided in opinion. In accordance with the opinion which I then expressed I consider that the presumption in question is inapplicable in the present case and that it therefore does not assist the argument for the Commonwealth by excluding the Commonwealth as a matter of construction from the words " every person."

If then, the Commonwealth is not excluded by the presumption mentioned from the application of the statute, it is contended for the plaintiff that the Commonwealth is included within the general words " every person " and that there is no reason why, in the case of municipal rates, the Commonwealth should not be held to be liable where in fact it occupies land and receives all the benefits of municipal service.

In my opinion an answer to this contention is provided by s. 114 of the Constitution. If the words " every person " are construed so as to include the Commonwealth, the result is that a tax is imposed upon the Commonwealth in respect of its occupation of land. Section 114 of the Constitution provides that " A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State." (I call attention to the words " of any kind.") In *Municipal Council of Sydney* v. *The Commonwealth* (2), to which reference has already been made, it was held that where rates were levied by a municipal council under a *Local Government Act* there was an imposition of a tax by a State within the meaning of s. 114. It was further held that municipal rates so levied primarily imposed a personal liability upon individuals, but imposed that liability in respect of property to which those individuals bore a certain relation and that the tax was in substance a " tax on property " : See per *Griffith* C.J. (3). In *Minister of State for the Army* v. *Dalziel* (4), it was decided that when the Minister for the Army took possession of land under reg. 54 of the *National Security (General) Regulations* the result was that the Commonwealth acquired property within the meaning of s. 51 (xxxi.) of the Constitution. Thus the Commonwealth acquired *a kind of property* when it entered into occupation of the land in respect of which occupation the plaintiff council now seeks to recover rates. I can see no escape from the proposition that property which is acquired by the Commonwealth becomes property of *some* kind belonging to the Commonwealth. The rates

(1) (1944) 69 C.L.R. 338.
(2) (1904) 1 C.L.R. 208.
(3) (1904) 1 C.L.R., at pp. 231, 232.
(4) (1944) 68 C.L.R. 261.

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are assessed upon the net annual value of the land, with a provision that the minimum annual value shall be not less than five per centum of the fair capital value. The net annual value is " the rent at which " the land " might reasonably be expected to be let from year to year "—*Local Government Act* 1928, s. 252 (2). Thus the rates are imposed in respect of what is normally the value of the land to a tenant occupier. In the present case, therefore, they would be assessed in respect of the value of the occupation by the Commonwealth. Even where a tax is assessed by reference to a percentage of the capital value, the tax may still be a tax upon the interest of the occupier : See *City of Montreal* v. *Attorney-General (Canada)* (1). Accordingly, I am of opinion that, if the initial words of s. 265 of the Act were read as applying to the Commonwealth, the result would be that a tax was imposed upon property belonging to the Commonwealth, that such a provision would be invalid by reason of s. 114 of the Constitution, and that therefore, in accordance with the principle applied in *McLeod* v. *Attorney-General (N.S.W.)* (2), the provision should be construed as not being intended to apply to the Commonwealth. For this reason the demurrer of the Commonwealth should be allowed.

This conclusion makes it unnecessary for me to consider the further argument for the Commonwealth that a State cannot tax the Commonwealth. The Commonwealth can impose customs duties upon importation of goods by a State (*Attorney-General (N.S.W.)* v. *Collector of Customs (N.S.W.)* (3) the *Steel Rails Case*) but it has never been held that the general Commonwealth power of taxation extends to a State or that a State can tax the Commonwealth. This question was not fully argued. As at present advised I am of opinion that it seems to be necessarily involved in the very conception of a Federal Constitution that the Commonwealth or Dominion cannot, except within some limits which would need very careful definition, tax the States or Provinces and that the States or Provinces cannot tax the Commonwealth or Dominion. But as, in my opinion, the case can be decided upon other grounds, it is not necessary for me to deal with this question or with the further argument for the Commonwealth based upon s. 52 (i.) of the Commonwealth Constitution.

In my opinion, for the reasons which I have stated, the question referred to the Court should be answered in the negative (i.e. in favour of the defendants other than the Commonwealth) and the demurrer of the Commonwealth should be allowed.

(1) (1923) A.C. 137.
(2) (1891) A.C. 455.
(3) (1908) 5 C.L.R. 818.

RICH J. The questions of law before us are whether the Commonwealth as occupier, or, if not the Commonwealth, the remaining defendants as owners, are liable to pay rates on certain lands occupied by the Commonwealth in Essendon. They turn primarily upon the proper construction of s. 265 of the *Local Government Act* 1928 of Victoria.

After providing by s. 249 that all land shall be ratable, with certain specified exceptions, the Act goes on to provide by s. 265 upon whom general rates may be levied in respect of such property as is ratable.

So far as relevant, s. 265 is in the following terms :—

" 265. Every general rate which the council of any municipality is by this Act authorized to make or levy shall be made and levied by it . . .

(*b*) Upon every person who occupies, or if there is no occupier or if the occupier is the Crown or the Minister of Public Instruction or any of the persons or corporations mentioned in sub-section (3) of section two hundred and forty-nine of this Act, then upon the owner of any rateable property whatsoever within the municipal district."

Thus, in the first instance, the section provides that general rates shall be made and levied upon every person who occupies ratable property. This part of the section is in general terms. Hence, if it stood alone, it would have two results. First, it would not apply where the occupier was the Crown occupying in any of its capacities, whether in the right of the State of Victoria, of the Commonwealth, or of any other part of the Empire ; because of the general rule that an Act does not bind the Crown in any of its capacities unless an intention in that behalf appears by express words or necessary implication : *Minister for Works* (*W.A.*) v. *Gulson* (1) ; *Province of Bombay* v. *Municipal Corporation of the City of Bombay* (2). Second, the section would apply to every occupier other than the Crown who was within the legislative competence of the Parliament of Victoria. The draftsman of the section was evidently alive to both these points, and he proceeded to provide for each of them. He provided that if the occupier is the Crown (and therefore, he recognizes, not liable) liability shall fall upon the owner. He provided also that if the Minister of Public Instruction or any of the persons or corporations mentioned in s. 249 (3) is the occupier (and therefore prima facie liable), not he or they but the owner is to be liable. It is contended that because the Crown is mentioned in conjunction with the Minister of Public Instruction and certain persons (including the Minister) and bodies who are all functionaries of the State of Victoria, the

(1) (1944) 69 C.L.R. 338, at pp. 356, 357. (2) (1947) A.C. 58.

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legislature must, by necessary implication, have meant to restrict the meaning of the word " Crown " as here used to the Crown in the right of the State of Victoria, with the remarkable result that, although, if the Crown in the right of Victoria is in occupation, the owner has to pay the rates ; yet, if the Crown in any other right is in occupation, the owner goes scot free. I am unable to find any such necessary implication of intention. The reason for mentioning the Crown as well as the other persons and bodies specified is obvious. I have mentioned it above. The fact that the others are mentioned in sequence after the Crown does not, in my opinion, justify the inference sought to be founded upon it. The fact that similar phraseology is used in ss. 271, 345 and 387 does not assist such an inference. In each case, the phraseology is obviously referable to s. 265 (*b*), and it is upon the proper interpretation of that section that its meaning depends.

For these reasons, I am of opinion that the Commonwealth is not liable, but that the other defendants are. I would uphold the demurrer, and answer the question in the affirmative.

Dixon J. In this suit, brought in the original jurisdiction of the Court, a municipality seeks to recover rates.

The rates were levied upon or in respect of land of which the Minister for the Army had taken possession. The land was used and occupied by the Military Forces of the Commonwealth. Throughout the period for which rates are claimed the Army's possession of the land continued and the country was still actively at war.

Ordinarily it is the occupier upon whom the direct liability to pay rates falls in the first instance. But, as the occupier was the Commonwealth, the municipality makes alternative claims. It claims the rates from the owners of the fee simple upon the hypothesis that the Commonwealth incurred no liability. But, failing this, it makes an alternative claim against the Commonwealth for the rates, a claim based on the contrary hypothesis.

Clearly enough this claim, being against the Commonwealth, falls within the original jurisdiction, but the Commonwealth is not a party to the alternative cause of action, the foundation of which is, moreover, State law. As it is an independent assertion of liability against other parties, it might be thought that it is outside the Court's jurisdiction. But, as will appear, the immediate liability for the rates cannot under the State law attach to the owners of the land, if the Commonwealth is liable as occupier. There are two grounds upon which the Commonwealth disclaims such a liability. One of them depends upon the interpretation of the State provision, but

the other rests upon the Constitution and so falls within the Court's original jurisdiction.

For my part, I cannot see how the Commonwealth can be made liable for rates in respect of the Army's use or occupation of land for military purposes during the war. It is, I think, better to give at once my reasons for this opinion before entering upon the questions of statutory interpretation which govern the liability of the owners of the land. To adopt this order is to conform, at all events, with the conventional view that all questions turning upon the Constitution rank altogether higher in importance and interest than matters which touch more nearly the private rights of the subject.

The first step in the reasoning upon which I rely is a simple proposition about the nature of the rates. The rates are not a charge for services. They go into the general funds of the municipality to be applied to any objects within its powers. The municipality levies the rates as a subordinate authority of the State and they are a tax (*Municipal Council of Sydney* v. *The Commonwealth* (1)). The second step is a proposition no less simple but one concerning the law of the Constitution. It is that the State may not levy a tax directly upon the Commonwealth in respect of the execution of its duties or the exercise of its functions. That proposition I shall proceed to justify. But before doing so it is necessary to say what I do not rely upon to support it. First I do not rely on s. 114 of the Constitution. If the Commonwealth's occupation of the land were property belonging to the Commonwealth within the meaning of that expression in s. 114 and the levying of the rate upon the land were considered the imposing of a tax upon that property, then the express and positive protection from liability given by the section would apply. But both these propositions are denied on the part of the municipality and there is, I think, sufficient doubt about them to make me prefer to take what I consider surer ground. A combination of factors gives rise to the doubt. Rates are levied in respect of the land and, although the occupier is the person made immediately liable, yet if he pays rent, then in the absence of any agreement to the contrary he may deduct the rates or recover them from the person to whom he pays the rent. If there is no occupier, the owner is immediately liable. In any case, the rates are a charge upon the land. It is, therefore, urged that the rates are not a tax on occupation. Then, on the other hand, the Commonwealth has no interest other than that of bare occupier entering for temporary purposes. The Minister for the Army went into possession in pursuance of a power given by a regulation enabling

(1) (1904) 1 C.L.R. 208.

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him to take possession of land if it appears necessary or expedient to do so in the interests of the public safety, the defence of the Commonwealth or the efficient prosecution of the war. Taking possession and occupying under the regulation have been held to amount to an acquisition of property within s. 51 (xxxi.) of the Constitution requiring just terms of compensation (*Minister of State for the Army* v. *Dalziel* (1)), but that, I think, throws but little light on the application of s. 114. It has been thought that perhaps the purpose in the Constitution of so much of s. 114 as gives to Commonwealth property immunity from State taxation and of so much as creates the reciprocal immunity for State property is to ensure that mere ownership by State or Commonwealth of property is enough to give the property protection from the taxes of the other government. That is to say mere ownership by Commonwealth or State is made enough, in order that immunity should not depend upon the nature or purpose of the use, if any, to which the property might be put or upon the difference between taxing property as a *res* and placing a direct liability on a government or its agencies or upon any distinction that might be taken between uniform taxes that happened to include government and private property alike and taxes aimed at or specially affecting government property. This view it will be seen places the emphasis on ownership.

The foregoing considerations are used on behalf of the municipality for the purpose of showing that in this case the connection of the Commonwealth with the land does not amount to the ownership which on the one hand s. 114 contemplates and on the other hand a valid imposition of rates would affect. But if this be right, it implies by consequence that the aspect in which the occupation of the land by the Commonwealth should be regarded is not that of passive ownership but of the actual carrying on of measures of defence. At all events I so regard the matter and prefer to base my decision upon the ground that the Constitution does not permit the State to tax that kind of action of the Commonwealth. It is not open to denial that this is an aspect which the entry upon the land by the Minister for the Army and its subsequent use and occupation does in fact wear. Clearly enough the Commonwealth took and retained possession of the land in executing a function of government. Let it be added, should there still be those who think it matters, one of " the primary and inalienable functions of a constitutional government " (*Coomber* v. *Justices of Berks* (2)). The imposition of the tax that is attempted is directly upon the Commonwealth itself and to make it

(1) (1944) 68 C.L.R. 261.

(2) (1883) 9 A.C. 61, at p. 74.

worse the occasion of the imposition is the act of the Commonwealth in so taking and retaining possession of the land. I believe that I am on sound ground in saying that the Constitution does not allow this. I say sound ground because I do not think it is a proposition involved in the general overthrow of the discredited doctrine by which a wide immunity from State legislation was given to agents and instruments employed by the Federal government. There is a world of difference between, on the one hand, a denial to the States of a power to tax the Commonwealth in respect of the execution of its duties or the exercise of its authority and, on the other hand, the earlier doctrine protecting so-called instrumentalities of government, Federal or State, from the exercise of some legislative power of the other government on the ground that to concede that they fell within the operation of the power at all would concede to the second government a means, an indirect means, of burdening, or interfering with, the first. But even when the earlier doctrine was abandoned by this Court an express reservation was made covering, among other things, the power of taxation. The reservation is expressed in a somewhat indefinite manner, perhaps designedly, but it appears at least certain that, because of the special nature of the power to tax, it was considered that there might be implied restraints upon its use to which the legislative powers of neither government were generally subject: *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (1).

The retreat from the earlier doctrine began in the United States later, I think, and its abandonment was effected by progressive steps and not, as here, *uno ictu*. But though there remains standing one important application of the old theory which some may think could not otherwise have been reached, namely the immunity from tax of government bonds, State and Federal (cf. *Smith* v. *Davis* (2)), yet I think that the abandonment by the Supreme Court of the United States of the old doctrine may be fairly said to be now complete. Abandonment may seem too absolute a description of the change that has taken place in the limitations implied upon the taxing powers of the respective members of the Federal system, and perhaps it is, for the Supreme Court itself has described the process in other words:—"In recent years this Court has curtailed sharply the doctrine of implied delegated immunity" (*United States* v. *Allegheny County* (3)). "All agree that not all the former immunity is gone" (per *Rutledge* J., *New York* v. *United States* (4)). But it is of the doctrine or principle in its entirety that I speak and the old

(1) (1920) 28 C.L.R. 129, at p. 143.
(2) (1944) 323 U.S. 111, at pp. 114-116 [89 Law. Ed. 107, at pp. 110, 111].
(3) (1944) 322 U.S. 174, at p. 177 [88 Law. Ed. 1209, at p. 1214].
(4) (1946) 326 U.S. 572, at p. 584 [90 Law. Ed. 326, at p. 335].

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doctrine possessed a scope and depended upon reasoning which separate it logically from the conceptions that now appear to prevail. The steps by which the change was accomplished may be traced if first the dissent of *Holmes* J. is read in *Panhandle Oil Co.* v. *Mississippi* (1) (a State tax upon a vendor to the Federal government) and next that of *Stone* J. in *Indian Motocycle Co.* v. *United States* (2) (a Federal excise tax upon a sale to a State authority) and then in order the decisions in *James* v. *Dravo Contracting Co.* (3) (a denial to a contractor with the Federal government of protection against a State occupation tax), in *Helvering* v. *Mountain Producers Corporation* (4) (a denial of immunity from Federal tax upon income derived by the taxpayer from oil leases granted to him by the State subject to a royalty), in *Helvering* v. *Gerhardt* (5) (a denial of the immunity from Federal tax of the salaries of the employees of a State authority).

The shifting of judicial opinion shown in the foregoing formed a prelude to the decision of the Court in *Graves* v. *New York* (6), where the Court thought it " imperative " to " consider anew the immunity . . . for the salary of an employee of a Federal instrumentality " (7) from State income tax and decided that there should be no immunity. *Frankfurter* J. remarked :—" In this Court dissents have gradually become majority opinions and even before the present decision the rationale of the doctrine had been undermined " (8). This case marked the end of the old doctrine. That it did so is confirmed by the footing upon which the Court dealt with the problems raised by three subsequent cases. It is enough briefly to mention them. The first is *United States* v. *Allegheny County* (9), where a State had levied a tax upon the value of a munition factory in private ownership but containing machinery belonging to the United States ; the majority of the Court held it a tax upon the government's property and, therefore, incompetent, while *Frankfurter* J. and *Roberts* J. dissented, holding it to be a tax on the realty of the factory owner. The second is *S.R.A. (Inc.)* v. *Minnesota* (10). There a purchaser in possession under an uncompleted contract from the United States was held not to be

(1) (1928) 277 U.S. 218, at pp. 223-225 [72 Law. Ed. 857, at pp. 859, 860].
(2) (1931) 283 U.S. 570, at pp. 580-583 [75 Law. Ed. 1277, at pp. 1283-1285].
(3) (1937) 302 U.S. 134 [82 Law. Ed. 155].
(4) (1938) 303 U.S. 376, at pp. 383-387 [82 Law. Ed. 907, at pp. 912-914].
(5) (1938) 304 U.S. 405 [82 Law. Ed. 1427].
(6) (1939) 306 U.S. 466 [83 Law. Ed. 927].
(7) (1939) 306 U.S., at p. 485 [83 Law. Ed., at p. 936].
(8) (1939) 306 U.S., at p. 491 [83 Law. Ed., at p. 939].
(9) (1944) 322 U.S. 174 [88 Law. Ed. 1209].
(10) (1946) 327 U.S. 558 [90 Law. Ed. 851].

protected from a State tax upon his interest in the land. The third is *New York* v. *United States* (1). A Federal tax on mineral waters sold was held to include mineral waters from the Saratoga Springs belonging to the State of New York and bottled and sold by an agency of that government. In his opinion *Frankfurter* J. described the course run by the old doctrine and its final rejection.

As yet in America there has been neither the occasion nor need for a definite formulation of the principle which invalidates an attempt by means of the tax power on the part of one member of the Federal system to interfere with the other. A study of the opinions in the case of the Saratoga Springs, beginning with the treatment which the problem receives from *Frankfurter* J., will show that, if it is not easy to frame a test, it is still more difficult to obtain its acceptance. *Frankfurter* J. considered that Congress may not in a tax discriminate against State activities and may not tax a State, as a State, but proposed no other restrictions. With this *Rutledge* J. tentatively agreed as did the Chief Justice. But *Reed*, *Murphy* and *Burton* JJ. thought that these limitations on the power were not enough and *Douglas* and *Black* JJ. dissented altogether.

I have said so much about the way the old doctrine has been dealt with in the United States because, as it appears to me, the development leaves untouched the proposition upon which my decision depends. That proposition is expressed in the judgment of the Court in the *Allegheny County Case* (2) thus :—" Unshaken, rarely questioned, and indeed not questioned in this case, is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of State taxation " (3). In the same judgment it is remarked :—" Rarely does a state or municipality pursue the Federal Government itself. Most of the immunity cases we have been called upon to deal with involved assertion of a right to tax Government property against an individual" (4). In his dissent, which was based upon the character of the tax, *Frankfurter* J. said :— " Implicit in our federal scheme is immunity of the Federal Government from taxation by the States. After having long been the subject of differences of opinion, the extent of this implied immunity was greatly curtailed. The basis of the doctrine was shifted from that of an argumentative financial burden to the Federal Government to that of freedom from discrimination against transactions with the

(1) (1946) 326 U.S. 572 [90 Law. Ed. 326].
(2) (1944) 322 U.S. 174 [88 Law. Ed. 1209].
(3) (1944) 322 U.S., at p. 177 [88 Law. Ed., at p. 1214].
(4) (1944) 322 U.S., at p. 88 [88 Law. Ed., at p. 1219].

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Government and freedom from direct impositions upon the property and the instrumentalities of the Government " (1).

Indeed in the majority opinion it is claimed that, from the basic doctrine that properties, functions and instrumentalities of the Federal Government are immune from taxation by its constituent parts, the Court has never departed or wavered in its application. The justification for this claim lies in the distinction between the basic doctrine of the Federal Government's immunity from State taxation and the doctrine now renounced giving extensive intergovernmental immunity. Thus in *S.R.A. (Inc.)* v. *Minnesota* (2) the Court says :—" The supremacy of the Federal Government in our Union forbids the acknowledgment of the power of any state to tax property of the United States against its will. Under an implied Constitutional immunity, its property and operations must be exempt from state control in tax, as in other matters " (3).

To my mind the incapacity of the States directly to tax the Commonwealth in respect of something done in the exercise of its powers or functions is a necessary consequence of the system of government established by the Constitution. It is hardly necessary at this stage of our constitutional development to go over the considerations which make it impossible to suppose that the Constitution intended that the States should levy taxes upon the Commonwealth—the nature of the Federal Government, its supremacy, the exclusiveness or paramountcy of its legislative powers, the independence of its fiscal system and the elaborate provisions of the Constitution governing the financial relations of the central government to the constituent States. To describe the establishment of the Commonwealth as the birth of a nation has been a commonplace. It was anything but the birth of a taxpayer.

The idea that a tax liability might be directly imposed upon the Commonwealth by State law would not, I think, have been entertained, if it had not been for misapprehensions which obtain concerning the effect of the *Engineers' Case* (4). One such misapprehension is that the decision meant that the Constitution implies nothing ; that it means nothing that it does not say in express words. I shall repeat two statements upon this subject which I thought it necessary to make in *West* v. *Commissioner of Taxation (N.S.W.)* (5). One deals with what the *Engineers' Case* (6) actually did

(1) (1944) 322 U.S., at pp. 195-196 [88 Law. Ed., at pp. 1223-1224].
(2) (1946) 327 U.S. 558 [90 Law. Ed. 851].
(3) (1946) 327 U.S., at p. 561 [90 Law. Ed., at p. 855].
(4) (1920) 28 C.L.R. 129.
(5) (1937) 56 C.L.R. 657, at pp. 681-682.
(6) (1920) 28 C.L.R. 129.

decide: the other with implications that are to be made in the Constitution:—"There is little justification for seeking to find in the *Engineers' Case* (1) authority for more than was decided. The importance alike of the principle there applied and of the application given to it is sufficiently great and far reaching. It is a principle adopted for the interpretation of the legislative powers of the Parliament. 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 two reservations, the power must be construed as extending to the States. The first reservation is that in the *Engineers' Case* (1) the question was left open whether the principle would warrant legislation affecting the exercise of a prerogative of the Crown in right of the States. The second is that the decision does not appear to deal with or affect the question whether the Parliament is authorized to enact legislation discriminating against the States or their agencies" (2). To this should be added a third reservation, namely, that to which I have already referred concerning the taxation powers of the governments. The second passage contains almost all that I have to say about the need of implying some restraints on State action with reference to the Commonwealth. "Surely it is implicit in the power given to the Executive Government of the Commonwealth that the incidents and consequences of its exercise shall not be made the subject of special liabilities or burdens under State law. The principles which have been adopted for determining for the purposes of s. 109 whether a State law is consistent with a Federal statute are no less applicable when the question is whether the State law is consistent with the Federal Constitution. Since the *Engineers' Case* (1) a notion seems to have gained currency that in interpreting the Constitution no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments a written constitution seems to be the last to which it could be applied. I do not think that the judgment of the majority of the court in the *Engineers' Case* (1) meant to propound such a doctrine" (3).

(1) (1920) 28 C.L.R. 129.
(2) (1937) 56 C.L.R., at p. 682.
(3) (1937) 56 C.L.R., at pp. 681-682.

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The expression "special liabilities or burdens under State law" relates to "the incidents and consequences" of the exercise of Commonwealth power. But a tax directly upon the Commonwealth is subject to the same objection.

It is, perhaps, desirable to add that this case cannot be considered as one in which the Commonwealth comes in to avail itself of privileges, facilities or a course of business established by or under State law to which a charge or even a tax is incident. In the *Panhandle Oil Co's. Case* (1) the United States as a purchaser suffered the increase in price which resulted from the sales tax on the vendor, and *Holmes* J. in reference to this said of the Federal Government, "It avails itself of the machinery furnished by the State and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than any one else. The cost of maintaining the State that makes the business possible is just as necessary an element in the cost of production as labor or coal" (2).

On the other hand, in the *Allegheny County Case* (3), although again the incidence or burden of the tax was indirect, the Court (4) dealt at length with the just application of such considerations which the Court concluded involved an adjustment of benefits and burdens outside the judicial functions. They are considerations which have no place where there is a claim directly to tax the Federal Government in respect of an exercise of its functions.

For the foregoing reasons, I am of opinion that the Commonwealth is not liable to the municipality for the rates it seeks to recover.

The liability of the owners of the land for rates depends upon the provisions of s. 265 (*b*) of the *Local Government Act* 1928 of Victoria. It provides that every general rate shall be made and levied by the Council upon every person who occupies or if there is no occupier or if the occupier is the Crown or the Minister of Public Instruction or any of the persons or corporations mentioned in s. 249 (3) of the Act, then upon the owner of any ratable property whatsoever within the municipal district.

The question upon which the owner's liability depends is whether the occupation of the land by the Commonwealth satisfies the condition expressed by the words "if there is no occupier or if the occupier is the Crown." It is contended for the municipality that the reference to the Crown is not confined to the Crown in right of the State of Victoria, but includes the Crown in right of the Commonwealth. An alternative contention depending upon a much less

(1) (1928) 277 U.S. 218 [72 Law. Ed. 857].
(2) (1928) 277 U.S., at p. 224 [72 Law. Ed., at p. 859].
(3) (1944) 322 U.S. 174 [88 Law. Ed. 1209].
(4) (1944) 322 U.S., at pp. 190-191 [88 Law. Ed., at pp. 1220-1221].

simple proposition is conceivable and was in fact mentioned during the argument. It is that the word " occupier " in the condition " if there is no occupier " is exactly co-extensive as a negative with the corresponding positive which immediately precedes it, viz. " every person who occupies " and means " if there is no such occupier." If that be so, the suggestion then is that the Commonwealth is not covered by the words " no such occupier," because the expression " every person who occupies " does not include the Commonwealth owing to the artificial rule of construction which restrains general expressions within the constitutional competence of the Legislature responsible for the enactment. This rule has statutory expression in Victoria. Section 2 of the *Acts Interpretation Act* 1930 (Vict.) provides that every Act shall be read and construed subject to the *Commonwealth of Australia Constitution Act* and so as not to exceed the legislative power of the Parliament of Victoria to the intent that briefly, it shall be valid to the extent to which it does not exceed power. It would, no doubt, be a very satisfactory result if s. 265 (*b*) received a construction which imposed upon the owner a liability for rates when his land was in the occupation of the Commonwealth, as it is an occupier not liable to be rated. For it would be in keeping with the general policy disclosed by the provision. But I do not think that such a construction is justified.

To deal first with the suggestion concerning the words " upon every person who occupies, or if there is no occupier." The answer to the suggestion is that the actual meaning of the words is absolute and implies no exception. " If there is no occupier " means if no one in fact occupies the land. The artificial construction required by the law may force down for legal purposes the meaning of the words " upon every person who occupies " ; but it does not operate upon the ensuing words because they are open to no constitutional objection. There is no sufficient warrant for notionally inserting the word " such " before occupier.

The contention that the words " if the occupier is the Crown " include the Commonwealth does not, in my opinion, conform with the actual meaning of the expression. The words are followed by the reference to the Minister of Public Instruction and to the list of exempt persons and bodies contained in s. 249 (3). The context strongly suggests a reference only to the Crown in relation to the State of Victoria.

It is unnecessary to discuss in detail the history of the legislation, but it goes back through ss. 265 and 249 of the *Local Government Act* 1903 (when it was recast to its present form), to s. 253 of the Act of 1874 (No. 506) which, in turn, reproduced substantially s. 181 of the Act of 1863 (No. 176). It is plain that the provisions were framed

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with a unitary form of government in view. No doubt in 1863 the provision would have been regarded as extending to any land within the Colony for which the responsibility might lie with the home authorities, if any such land there was. But that does not mean that the Crown would have been regarded as exercising the functions of government in another right. It would still be the Crown considered as acting in relation to the Colony, though the responsibility would not lie with the local Ministers. The Royal Mint was given as an instance, though I think the Mint was not opened in Victoria until 1872. It must be remembered, too, that the entire management and control of the waste lands belonging to the Crown in the Colony of Victoria had been vested in the legislature of the Colony in 1855.

There is no logical ground for expanding the meaning of the references to the Crown in s. 249 or s. 265 (*b*) to cover the Commonwealth. The presumption is the other way. Speaking of the same legislation, but in reference particularly to s. 238, *Higgins* J. in *R.* v. *Registrar of Titles* (*Vict.*) (1) said :—" ' His Majesty ' in this State Act " (the sections are found in the former Local Government Statute of 1874) " obviously means His Majesty in his Victorian capacity—the Government of Victoria." *Isaacs* J. dissents from the conclusion of the Court, but on this point he spoke (2) of a reference to the Crown only without some words of extension and said it would mean the Crown in right of Victoria. His Honour then said :—" I am not able to adopt the view that s. 238 of the Victorian *Local Government Act* 1903 confers power to let on lease to the Commonwealth. I accept the Commonwealth in its corporate capacity as equivalent to His Majesty, for, in accordance with the theory of our law, His Majesty represents every portion of his dominions. But ' His Majesty ' in s. 238 of the Victorian Act means, in the absence of contrary intention, His Majesty in right of Victoria ; it means ' His Majesty ' in the same sense as ' The King's Most Excellent Majesty ' in the enacting declaration of the Act, and the expression ' His Majesty ' in other sections of the Statute " (3).

This view accords with that expressed by *Anglin* C.J. in *Gauthier* v. *The King* (4) (cited in *Pirrie* v. *McFarlane* (5) by *Isaacs* J.)—" It may be accepted as a safe rule of construction that a reference to the Crown in a provincial statute shall be taken to be to the Crown in right of the province only, unless the statute in express terms or by necessary intendment makes it clear that the reference is to the Crown in some other sense."

(1) (1915) 20 C.L.R. 379, at p. 397.
(2) (1915) 20 C.L.R., at p. 390.
(3) (1915) 20 C.L.R., at p. 391.
(4) (1918) 56 Can. S.C.R. 176, at p. 194.
(5) (1925) 36 C.L.R. 170, at pp. 190-191.

It is to be noticed that in *Municipal Council of Sydney* v. *The Commonwealth* (1) *Griffith* C.J. said :—" The term ' the Crown ' as used in the *Sydney Corporation Act* must be taken to mean the Crown in its capacity as representing the State of New South Wales."

Counsel for the owners in his argument examined the various references to the Crown contained in the statute. I agree in his contention that confirmation is found in them for the conclusion that the expression does not cover the Commonwealth. As he pointed out, s. 387 has a particular significance because it represents the material phrases of s. 265, but in a context strongly suggesting that only the Crown in right of the State was in contemplation.

I am of opinion that the claim of the municipality against the owners fails.

I think that the demurrer of the Commonwealth should be allowed and the question directed to be argued before the Full Court should be answered—No.

McTiernan J. The rates for which the plaintiff sues are, in legal theory, taxes, not compensation for services. They are made and levied in the exercise by delegation of the power of the State to tax for the purposes of government. The rates are made and levied in respect of property and impose a personal liability upon whomsoever is made a ratepayer by the State Act, the *Local Government Act* 1928. This view of the nature of the rates sued for in this action is justified by the case of *Municipal Council of Sydney* v. *The Commonwealth* (2). The Commonwealth is sued as " the person " who occupied the lands to which the case relates. It was the occupier in the sense that it had taken possession of the lands for the purposes of defence and they were in its possession for the relevant period. The Commonwealth is sued alternatively to the other defendants, who are sued as owners. The authority which the plaintiff exerted to impose these rates upon the Commonwealth or the other defendants is to be found in s. 265 (*b*) of the *Local Government Act*. The section confers power upon the Council to impose such rates " upon every person who occupies " or, in the events stipulated in the section, upon the owner. It follows that if the liability of the Commonwealth is established, none of the other defendants is liable. But if the Commonwealth is not liable, neither are the other defendants unless one of the conditions upon which the owner is made the ratepayer is fulfilled. The relevant condition is " if the occupier is the Crown." Since the Commonwealth was the occupier, it is necessary, in order to establish the liability of the other defendants, that the term " the Crown," in that context, includes the Crown in right of the Commonwealth.

(1) (1904) 1 C.L.R., at p. 231. (2) (1904) 1 C.L.R. 208.

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According to the doctrine of *R.* v. *Sutton* (1), the rule against construing an Act in such a way as to impose a burden upon the Crown comes into play here in favour of the State, not the Commonwealth.

But in order to establish the liability of the Commonwealth, it is necessary to show that the Act manifests an intention to authorize the making and levying of rates upon the Commonwealth, and that, if the Act does so, it is within the constitutional power of a State to give legal effect to such an intention.

The words " every person " in s. 265 (*b*) indicate a corporation as well as a natural person (*Acts Interpretation Acts* (Vict.), s. 16). In so far as the words indicate a natural person, they are obviously not apt to apply to the Commonwealth. The notion of corporate capacity is only to a degree applicable to the Crown, and, although the word " person " extends to " corporation," I think that it is not a reasonable construction of the word in this context to apply it to any body politic. The section ought not to be construed to intend to authorize a council to impose a rate upon the Commonwealth unless the intention to authorize a council to do so is apparent: Cf. *Roberts* v. *Ahern* (2). In my opinion, s. 265 (*b*) does not manifest that intention. I think that the language of the section indicates a contrary intention. The words " or if " preceding the words " the Crown is the occupier " are not a proviso to or a qualification of the words " every person who occupies." Taking the language of the section, I think that there is an antithesis between the words " every person " and the words " the Crown," considered as words of classification. It does not appear to me to be a reasonable or fair construction of the words " every person who occupies " to apply them to any body politic or to the Crown in any right: Cf. *United States* v. *United Mine Workers of America* (3). Such aids as may be got from a history of the legislation bear out this construction: a point that was, I think, demonstrated by the survey of the legislation which Mr. *Hudson* made in the course of the argument. I think, therefore, that upon the true construction of s. 265 (*b*) the State has not purported to authorize the making and levying of these rates upon the Commonwealth.

If the Act purported to authorize the plaintiff to impose the taxes upon the Commonwealth it would be necessary to decide the questions whether the State power of taxation extends to the Commonwealth at all or whether the imposition of these rates upon the Commonwealth is prohibited by s. 114 of the Constitution. These are very important questions and would create great difficulties for the plaintiff, even if the initial question whether s. 265 (*b*) applied to

(1) (1908) 5 C.L.R. 789.
(2) (1904) 1 C.L.R. 406.
(3) (1947) [91 Law. Ed. Adv. Op. 595.]

the Commonwealth was decided in its favour. But I am of opinion that it is not necessary to decide these questions of power in the present case, as I think that initial question must be decided against the plaintiff.

The next question is whether the defendants other than the Commonwealth are liable for the rates sued for. I agree that, in the context which has to be considered in this case, the term " the Crown " ought to be interpreted to mean the Crown in right of the State. This view is supported by the reasoning in *Municipal Council of Sydney* v. *The Commonwealth* (1), and *R.* v. *Registrar of Titles (Vict.)* (2). It follows that the condition " if the Crown is the occupier " was not fulfilled. There is no possibility of holding that any of the other conditions upon which an owner is made liable as a ratepayer is satisfied, the Commonwealth having been the occupier for the relevant period. The result is that the plaintiff's claim against the defendants other than the Commonwealth must also fail.

I should allow the demurrer and answer the question referred to the Court in the negative.

WILLIAMS J. The questions raised by the demurrer of the defendant, the Commonwealth of Australia, and the reference under s. 18 of the *Judiciary Act* 1903-1946 are whether the defendant, the Commonwealth of Australia, as occupier or alternatively the other defendants as owners are liable to pay rates under the *Local Government Act* 1928 (Vict.) in respect of the occupation by the Commonwealth under the provisions of reg. 54 of the *National Security (General) Regulations* of certain land owned by the defendants situated in the city of Essendon. The material section of the Act is s. 265, which authorizes a council to make and levy a general rate (*b*) upon every person who occupies, or if there is no occupier or if the occupier is the Crown or the Minister of Public Instruction or any of the persons or corporations mentioned in sub-s. (3) of section 249 of the Act, then upon the owner of any ratable property whatsoever within the municipal district.

It is sought to make the Commonwealth liable as being the person in occupation of the property but not exempt as being the Crown within the meaning of the section. Alternatively, if the Commonwealth is the Crown, it is sought to make the other defendants liable because they are the owners of the property.

After considering the various sections of the Act in which the expression " the Crown " occurs, and, in particular, considering the expression in s. 265 (*b*) and its three associated sections, 271, 345 and 387, as part of a collection of words which include the State Minister

(1) (1904) 1 C.L.R., at p. 231. (2) (1915) 20 C.L.R. 379.

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of Public Instruction and a number of State officials and corporations, I am of opinion that the reference to the Crown in s. 265 (*b*) is a reference to His Majesty in right of the State of Victoria and does not include His Majesty in right of the Commonwealth.

The property was in fact occupied by the Commonwealth. It could not be said to be property of which there was no occupier. But the occupier was not the Crown within the meaning of the section. No liability therefore devolved upon the other defendants to pay the rates.

The next question is whether the Commonwealth is included in the expression " every person who occupies . . . ratable property." I adhere to the view expressed in *Minister of Works (W.A.)* v. *Gulson* (1), that the Crown, whether in right of the Commonwealth or of the State, is not bound by an Act of the Parliament of the Commonwealth or of a State unless it is expressly mentioned or there is a necessary implication to that effect. The Crown is not expressly bound by the *Local Government Act* as a whole. There are sections in which the Crown in right of the Commonwealth or of the State is expressly mentioned. The Crown may be bound by necessary implication to be gathered from the purpose and provisions of other sections of the Act. But in my opinion no necessary implication arises from the expression under discussion or from s. 265 as a whole to indicate that the Parliament of Victoria intended to attempt to make the Crown in right of the Commonwealth liable to pay rates to a council in respect of its occupation of land.

It is therefore unnecessary to discuss whether the land was a place acquired by the Commonwealth within the meaning of s. 52 (i.), or property belonging to the Commonwealth within the meaning of s. 114 of the Constitution.

For these reasons I would uphold the demurrer and answer the question in the negative.

Demurrer of the defendant Commonwealth of Australia allowed; judgment for the said defendant with costs. Question directed to be argued before Full Court answered: No. Order that the other defendants recover from the plaintiff their costs of and incidental to the reference, hearing and determination of the said question.

Solicitors for the plaintiff: *C. J. McFarlane and Dougall.*

Solicitors for the defendants: *Bernard Nolan*; *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

E. F. H.

(1) (1944) 69 C.L.R. 338.