[HIGH COURT OF AUSTRALIA.]

IN RE RICHARD FOREMAN & SONS PTY. LTD.;

UTHER . . . . . APPLICANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION AND ANOTHER . . . . RESPONDENT.

ON REMOVAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug*, 14, 15; *Dec.* 2.

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

Constitutional Law (Cth.)—Debts due to Crown in right of Commonwealth—Prerogative right to priority of payment—Legislative power of State to restrict or abolish priority—Inconsistency of State and Commonwealth legislation—Winding up of companies—Debts due for sales tax and pay-roll tax—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 61, 109—*Sales Tax Assessment Act* (*No.* 1) 1930-1942 (*No.* 25 *of* 1930—*No.* 54 *of* 1942), *ss.* 30, 32—*Pay-roll Tax Assessment Act* 1941-1942 (*No.* 2 *of* 1941—No. 48 *of* 1942), *ss.* 28, 30—*Companies Act* 1936 (*N.S.W.*) (*No.* 33 *of* 1936), *ss.* 199, 282, 297.

Held, by the whole Court, that it was the intention of the Parliament of New South Wales that the Crown in right of the Commonwealth should be bound by the provisions of the *Companies Act* 1936 (*N.S.W.*) relating to the priority of debts in the winding up of insolvent companies.

Held, further, (1) by *Latham* C.J., *Rich*, *Starke* and *Williams* JJ. (*Dixon* J. dissenting), that it is within the constitutional competence of the Parliament of New South Wales, in legislation relating to the winding up of companies, to restrict or abolish the prerogative right of the Crown in right of the Commonwealth to payment of debts due to it in priority to all other debts of equal degree; (2) by *Latham* C.J., *Rich*, *Starke* and *Williams* JJ. (*McTiernan* J. dissenting), that the *Sales Tax Assessment Act* (*No.* 1) 1930-1942 and the *Pay-roll Tax Assessment Act* 1941-1942 do not confer any statutory right of priority of payment of debts due for sales tax and pay-roll tax; therefore there is no inconsistency, within the meaning of s. 109 of the Constitution, between those Acts and the provisions of the *Companies Act* (*N.S.W.*) depriving the

Crown in right of the Commonwealth of priority in the winding up of insolvent companies.

Operation of s. 32 of the *Sales Tax Assessment Act* (*No.* 1) and s. 30 of the *Pay-roll Tax Assessment Act* considered, with particular reference to *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd.*, (1940) 63 C.L.R. 278, and later amendments of the legislation relevant in that case.

CAUSE removed to the High Court under s. 40 of the *Judiciary Act* 1903-1946.

Arthur Weymouth Uther, the liquidator of Richard Foreman & Sons Pty. Ltd., a company in voluntary liquidation under the *Companies Act* 1936 (N.S.W.), applied to the Supreme Court of New South Wales in Equity for the determination of the following questions :—

1. Is the Commissioner of Taxation entitled to be paid in priority to all other unsecured creditors amounts owing to him by the liquidator in respect of (*a*) sales tax and (*b*) pay-roll tax respectively ?

2. If the answer to question 1 is no, then should the Commissioner of Taxation be paid *pari passu* with the said ordinary creditors when the liquidator is making a final distribution to creditors ?

The respondents to the application were the Federal Commissioner of Taxation and Best & Gee Pty. Ltd., a creditor of the company.

The position of the winding up was that there was a credit balance of £1,459 13s. 7d. in the hands of the liquidator. A first distribution of 4s. in the pound had been paid in respect of the claims of unsecured creditors other than the Federal Commissioner of Taxation. A claim had been received from the Federal Commissioner of Taxation for £594 8s. 10d. sales tax and £172 9s. 3d. pay-roll tax, in respect of which the Federal Commissioner of Taxation informed the liquidator that he claimed priority over all unsecured creditors.

Roper J., before whom the application came, was of opinion that a question arose as to the respective powers *inter se* of the Commonwealth and the State of New South Wales within the meaning of s. 40A of the *Judiciary Act* 1903-1946, and proceeded no further with the cause. Upon the matter coming on for hearing before the High Court that Court, without deciding whether an *inter se* question arose, made an order under s. 40 of the *Judiciary Act* removing the cause into the High Court on the ground that it involved the interpretation of the Constitution.

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

Larkins, for the applicant, submitted to such order as the Court thought fit to make.

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Kitto K.C. (with him *McKay*), for the respondent, the Federal Commissioner of Taxation. The taxes are Crown debts (*Sales Tax Assessment Act* (No. 1) (No. 25 of 1930), ss. 30, 32, as amended by Acts No. 29 of 1934, s. 5, and No. 78 of 1936, s. 15) to which would attach, in the absence of any valid statutory provisions to the contrary, the common law priority of the Crown over unsecured creditors. On its true construction the *Companies Act* 1936 (N.S.W.) did not purport to bind the Crown in right of the Commonwealth (*Re Scottish Loan & Finance Co. Ltd.* (1)). The State legislature was concerned to set out an order of priorities and in that order it was prepared to give income tax and land tax a certain place, assuming they had not a higher place by virtue of the prerogative.

[*Dixon* J. referred to *In re Silver Bros Ltd.*; *Attorney-General* (*Quebec*) v. *Attorney-General* (*Canada*) (2).]

Essendon Corporation v. *Criterion Theatres Ltd.* (3) supports the view that in s. 199 of the *Companies Act* " the " Crown means the Crown in right of the State. [He referred also to ss. 212, 218, 282, 286, 301 and 302 of the *Companies Act*.] Assuming that the State legislature did intend to bind the Crown in right of the Commonwealth, the Act is ineffective to deprive the Commonwealth of its prerogative right to priority. It is a proper inference from the nature and scheme of the Constitution that the State Parliaments were not intended, in the exercise of their powers to legislate on specific subjects, to have power to detract from those rights which the Federal Executive obtained on its creation (*Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd.* (4)). The Federal Constitution was erected in a common law system, which attached to the Crown in right of the Commonwealth certain prerogative rights, including the prerogative right of priority of payment of debts. [He referred to the Constitution, ss. 61, 81, 82.] The right which the State legislature would have had before Federation to affect the Crown's prerogative within its own territorial limits has been cut down as a logical consequence of the establishment of a Federal Executive (*Farley's Case* (5); *Municipal Council of Sydney* v. *The Commonwealth* (6)). By submitting a proof the Crown did not waive its right to priority: it asserted all its rights (*The Commonwealth* v. *New South Wales* (7)). [He referred also to *In re Oriental Bank Corporation*; *Ex parte The Crown* (8); *Commissioners of Taxation for New South Wales* v. *Palmer* (9); *In re Oriental Holdings Pty. Ltd.*

(1) (1944) 44 S.R. (N.S.W.) 461, at p. 467; 61 W.N. 255, at p. 258.
(2) (1932) A.C. 514.
(3) (1947) 74 C.L.R. 1.
(4) (1940) 63 C.L.R. 278, at p. 308.
(5) (1940) 63 C.L.R., at pp. 301, 304.
(6) (1904) 1 C.L.R. 208.
(7) (1923) 33 C.L.R. 1, at pp. 27-28.
(8) (1884) 28 Ch. D. 643.
(9) (1907) A.C. 179, at pp. 184, 185.

(*In liquidation*) (1).] The *Sales Tax Assessment Act* (*No.* 1) 1930-1942 and the *Pay-roll Tax Assessment Act* 1941-1942, by providing that the taxes shall be paid and that there should be granted priority in respect of certain administrative expenses, are exhaustive on the question of priorities, and there is a conflict to which s. 109 of the Constitution applies if the State purports to grant anything else priority over those debts.

Wallace K.C. (with him *Bruxner*) for the respondent, Best & Gee Pty. Ltd. In the winding-up provisions of the *Companies Act* (N.S.W.) the State purports and intends to bind the Crown in right of the Commonwealth: see ss. 199, 282, 297. In s. 297 the State has expressly given to very important Commonwealth debts a postponed priority, and it was intended that all other Commonwealth debts should rank *pari passu* in accordance with the provisions of s. 282 with all other unsecured debts. The scheme of the Act is that which has prevailed in companies and Bankruptcy Acts for many years. There is nothing in *Essendon Corporation* v. *Criterion Theatres Ltd.* (2) which detracts from the proposition that if a State or the Commonwealth expressly purports to bind the Crown in any other right it can do so providing it is constitutionally permissible. In this case the intention to bind the Crown in right of the Commonwealth is manifest. [He referred to *R.* v. *Registrar of Titles* (*Vict.*); *Ex parte the Commonwealth* (3).] The law of the domicile is the law which is applicable in a winding up. The Commonwealth is in a less favourable position than was the Crown in *Commissioner of Taxation for New South Wales* v. *Palmer* (4) and its prerogative is subject to the Constitutions both of itself and of other plenary States. The prerogative cannot be used to sweep aside the proper law of a State operating in State territory. The prerogative of the Commonwealth ranks lower than the statutory powers of the Commonwealth Parliament. There is no constitutional or logical reason why the State of New South Wales, providing it is acting within its powers to legislate for the peace, welfare and good government of New South Wales and is not invading Commonwealth legislative territory and is not discriminatory in its legislation, cannot in its own interests curtail the Commonwealth prerogative (*Attorney-General for Ontario* v. *Attorney-General for Canada* (5)). This aspect depends on what is the prerogative and what is meant by the proposition that the King is one and indivisible and yet acts through separate fiscal agencies.

(1) (1931) V.L.R. 279, at p. 284.
(2) (1947) 74 C.L.R. 1.
(3) (1915) 20 C.L.R. 379.
(4) (1907) A.C. 179.
(5) (1947) A.C. 127, at p. 146.

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If the Commonwealth had imported the prerogative into a statute there would have been a simple issue under s. 109 of the Constitution. But when the Commonwealth claims that it has a right to exercise its prerogative in connection with the law dealing with the administration of companies, which is an exclusive State field, or a proper field for the State legislature to deal with, the prerogative cannot be used so as to qualify by limiting State power so exercised. Assuming this is a matter which goes to the fisc of the Commonwealth, it does not follow that the State cannot control incidental rights which enure for the benefit of the fisc. Where you find a State Parliament legislating for the whole community and for the peace, welfare and good government of the State, unless that Act is in conflict with some exclusive power of the Commonwealth or with some valid Commonwealth Act under the concurrent jurisdiction, that Act is binding on Commonwealth servants and Commonwealth instrumentalities. [He referred to *D'Emden* v. *Pedder* (1); *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (2); *Pirrie* v. *McFarlane* (3).] The Commonwealth derives this prerogative, not expressly under the Constitution, but by implication as a result of the Governor-General being a special agent of the King. [He referred to *Re Post* (4); *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (5).] In the *Sales Tax Assessment Act*, s. 32, and the *Pay-roll Tax Assessment Act*, s. 30, the Parliament was not concerned with priorities; it was dealing with the proportion of the assets to which the Commonwealth was entitled, in order to prevent there being any escape of those assets. *In re Scottish Loan and Finance Co. Ltd.* (6), cannot be a factor in deciding this case. *Ashton* v. *Cameron County* (7) and *In re Silver Bros. Ltd.* (8) are distinguishable, the former because the Commonwealth has not purported to use the bankruptcy power in this case, the latter because there was there a specific charge. The nature of the prerogative was discussed in *Attorney-General for New South Wales* v. *Butterworth & Co. (Australia) Ltd.* (9).

Kitto K.C., in reply. Section 32 of the *Sales Tax Assessment Act* and s. 30 of the *Pay-roll Tax Assessment Act* cover the field of the debts which are to be paid in priority to debts due for sales tax and income tax. The Commonwealth Executive derives its priority, in the absence of statute, from the common law plus the Constitution.

(1) (1904) 1 C.L.R. 91.
(2) (1920) 28 C.L.R. 129.
(3) (1925) 36 C.L.R. 170.
(4) (1920) 20 S.R. (N.S.W.) 457; 37 W.N. 136.
(5) (1920) A.C. 508, at p. 526.
(6) (1944) 44 S.R. (N.S.W.) 461; 61 W.N. 255.
(7) (1936) 298 U.S. 513 [80 Law Ed. 1309].
(8) (1932) A.C. 145.
(9) (1938) 38 S.R. (N.S.W.) 195; 55 W.N. 49.

The Constitution is an Imperial statute which applies in New South Wales and the Commonwealth Executive has all the rights that attach to the King according to the law of New South Wales. The New South Wales Parliament has power no doubt to deal with property rights, but s. 297 of the *Companies Act* is not a law on the subject of property rights. The question is: Can the New South Wales Parliament deal with the right of the Commonwealth to extract money from property where that right depends on the common law prerogative attached to the Commonwealth by the Federal Constitution?

Cur. adv. vult.

Dec. 2.

The following written judgments were delivered:—

LATHAM C.J. Richard Foreman & Sons Pty. Ltd. is a company which is in voluntary liquidation under the *Companies Act* 1936 (N.S.W.). Debts of unsecured creditors amounting to more than £29,000 have been proved, a dividend of 4s. in the pound has been paid and a sum of £1,459 13s. 7d. is in the hands of the liquidator. A claim has been received from the Commissioner of Taxation for £594 8s. 10d. sales tax and £172 9s. 3d. pay-roll tax. Sales tax and pay-roll tax are debts due to the King on behalf of the Commonwealth (*Sales Tax Assessment Act* 1930-1942, s. 30; *Pay-Roll Tax Assessment Act* 1941-1942, s. 28). The Acting Deputy Commissioner has informed the liquidator that he claims priority over all unsecured creditors for the payment of sales tax and pay-roll tax as debts due to the Crown. The liquidator applied to the Supreme Court of New South Wales under s. 286 of the *Companies Act* to determine the question whether the Commissioner was entitled to be paid in priority to all ordinary unsecured creditors, and, if not, whether he should be paid *pari passu* with such creditors. *Roper* J. was of opinion that a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of the State of New South Wales arose and proceeded no further with the matter (*Judiciary Act* 1903-1946, s. 40A.) This Court was of opinion that the matter involved the interpretation of the Constitution and made an order removing the cause into this Court (*Judiciary Act*, s. 40).

The *Companies Act* 1936, s. 282, provides that, subject to the provisions of the Act as to preferential payments, the property of a company shall, on its winding up, be applied in satisfaction of its liabilities *pari passu*. Section 199 (3) provides, *inter alia*, that the winding-up provisions of the Act relating to the priorities of debts shall bind the Crown. Section 297 deals with preferential payments or priorities. It provides that, subject to the provisions of the Act,

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in a winding up there shall be paid in priority to all other debts (*a*) the costs and expenses of winding up, including the remuneration of the liquidator and certain audit costs; (*b*) certain wages and salaries; (*c*) in certain cases amounts due in respect of compensation under the *Workers' Compensation Act* 1926-1929; "(*d*) all land tax and income tax assessed or to be assessed under any Act or Commonwealth Act due from the company at the relevant date," and having become due within a specified period or to become due and payable thereafter, with a limit of one year's assessment; (*e*) certain rent. Section 297 (4) provides that, after provision is made for the costs and expenses of winding up referred to in par. (*a*) of sub-s. (1), the debts referred to in the following paragraphs shall rank equally among themselves and be paid in full unless the assets are insufficient to meet them, in which case they shall abate in equal proportion.

The effect of these provisions, therefore, is to give the costs and expenses of winding up a first priority, to place claims for State and Commonwealth land tax and income tax in the same class as the debts mentioned in pars. (*b*), (*c*) and (*e*) of sub-s. (1), and to leave claims for Commonwealth sales tax and Commonwealth pay-roll tax in the class of unsecured debts which can be satisfied only after effect has been given to the provisions for preferential payment contained in s. 297 (1). The question which arises is whether the liquidator is bound to conform to s. 297 according to its terms, or whether, on the other hand, the Commonwealth has a priority in respect of debts due to it for sales tax and income tax over all the unsecured creditors. In the present case no question arises as to any debts due to a State.

Where a claim of the Crown and a claim of a subject come into competition the Crown has priority. In relation to Crown debts the law, if not varied by statute, is that Crown debts are paid in priority to all other debts of equal degree. This is a prerogative existing at common law which the Commonwealth upon its creation carried with it into the Federal system established by the Commonwealth Constitution (*Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd.* (1))—and see *R.* v. *Kidman* (2); *Liquidators of Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (3).

The prerogative can be limited by a statute passed by a competent Parliament, and a statutory provision can be made in such terms that a statutory right is substituted for a prerogative right existing at common law (*Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (4)).

(1) (1940) 63 C.L.R. 278.
(2) (1915) 20 C.L.R. 425, at pp. 435-436.
(3) (1892) A.C. 437.
(4) (1920) A.C. 508.

The intent of the Parliament of New South Wales to bind "the Crown" is explicitly stated in s. 199 (3). Prima facie the words "the Crown" in a State statute should be understood as applying only to the Crown in right of the State (*Essendon Corporation* v. *Criterion Theatres Ltd.* (1) and the cases there cited). But s. 297 of the *Companies Act*, with its express reference to taxes payable under Commonwealth Acts as well as to taxes payable under State Acts, shows an intention to bind the Commonwealth. It was argued for the Commissioner that s. 297 did not purport to determine priorities in respect of any debts due to the Commonwealth—that it merely prescribed a rule of administration for the liquidator which was subject to any claim which the Commonwealth might make by virtue of a prerogative right. But the effect of the directions given to a liquidator by s. 297 is that Commonwealth debts for land tax and income tax are not to be given a first priority, but are to be paid upon the same footing as certain other classes of debts, and that other debts due to the Commonwealth are left, if unsecured, in the same class as other unsecured debts, i.e., without any priority. Before considering whether it is within the power of the State Parliament to enact such legislation, mention should be made of two matters which were raised in argument.

In the first place, it was contended that if the Commonwealth made a claim in the liquidation of a company under State law, the Commonwealth must accept all the provisions of that law, whatever they may be, and that the Commonwealth could not claim the benefit of the State law and at the same time refuse to submit to some of its provisions. This argument was supported by reference to what was said in *The Commonwealth* v. *New South Wales* (*Royal Metals Case*) (2). But in the present case the Crown is not seeking to come into the general scheme provided by the *Companies Act* for the distribution of the assets of a company which is being wound up. On the contrary, the Commonwealth has distinctly claimed a first priority in respect of the taxes in question, notwithstanding the provisions of the Act. The property of the company is held by the liquidator on behalf of the company and the Commonwealth makes its claim, insisting upon the prerogative right. Further, it has been expressly held that where a company is being wound up and a claim is made in the liquidation for priority in respect of a Crown debt, the making of such a claim against the liquidator does not involve any abandonment of the prerogative. In *In re Oriental Bank Corporation*; *Ex parte The Crown* (3) *Chitty* J. said that,

(1) (1947) 74 C.L.R. 1.
(2) (1923) 33 C.L.R. 1, at pp. 26-28.
(3) (1884) 28 Ch. D. 643, at p. 648.

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where the Crown came in under a liquidation and sought to prove, the Crown could still retain its right of priority as against the other creditors. The Crown might, however, stand out and insist on its prerogative and then "the assets to be administered would be the assets of the company, less that portion of the assets which the Crown had taken away." In *Commissioner of Taxation for New South Wales* v. *Palmer* (1), Lord *Macnaghten* said :—"It is difficult to understand the suggestion made in the Court below that, because the Crown puts forward its claim to priority in the case of the administration of a bankrupt's estate, it must therefore be held to have abandoned an undoubted prerogative on which it is actually at the time insisting, and to have elected to come in with the ordinary creditors." Thus it cannot be said that the Crown, by making a claim in a liquidation for priority, has impliedly agreed to accept the provisions of the State *Companies Act* which deprive it of priority.

In the second place, the power conferred upon the Commonwealth Parliament by s. 51 (ii.) of the Constitution to make laws with respect to taxation enables the Commonwealth Parliament to provide that Commonwealth taxes shall be paid by taxpayers in priority to other debts, including debts for taxes owing under State Acts (*South Australia* v. *The Commonwealth* (2)). The Commonwealth Parliament might therefore have provided that sales tax and pay-roll tax should be paid by taxpayers or by the liquidators of taxpayer companies in priority to other debts, or that debts in respect of such taxes, though not having first priority, should have a certain defined preference. If the Commonwealth Parliament had made any such provision, then s. 297 of the State Act, so far as inconsistent with the Commonwealth Act, would, to the extent of the inconsistency, be invalid and the law of the Commonwealth would prevail (Constitution, s. 109).

The Commonwealth Parliament, however, has not enacted any such legislation with respect to sales tax and pay-roll tax. It is true that in s. 32 of the *Sales Tax Assessment Act* and in s. 30 of the *Pay-Roll Tax Assessment Act* the Commonwealth Parliament has made specific provisions referring to the liquidation of a company. By sub-s. (1) of these sections the liquidator of a company is required, within a specified time, to give notice in writing to the Commissioner of his appointment as a liquidator. Sub-section (2) provides that the Commissioner shall notify to the liquidator the amount which appears to the Commissioner to be sufficient to provide for tax which then is or will thereafter become payable by the company, and sub-s. (3) of the *Pay-Roll Tax Assessment Act* (sub-s. (2A) of the *Sales Tax Assessment Act*) prevents the liquidator parting with assets of the

(1) (1907) A.C. 179, at p. 185. (2) (1942) 65 C.L.R. 373.

company until he has been so notified, and requires him to set aside out of the assets " available for the payment of the tax " assets to the value of the amount notified or the whole of the assets, if necessary. It is further provided that the liquidator shall, to the extent of the value of the assets which he is so required to set aside, be liable as trustee to pay the tax. Sub-section (6) of the *Pay-Roll Tax Assessment Act* (sub-s. (4) of *Sales Tax Assessment Act*) provides as follows :—" Notwithstanding anything contained in this section, all costs, charges and expenses which, in the opinion of the Commissioner, have been properly incurred by the liquidator in the winding-up of a company, including the remuneration of the liquidator, may be paid out of the assets of the company in priority to any tax payable in respect of the company."

This provision relates only to costs &c. of winding up which *in the opinion of the Commissioner* have been properly incurred. The *Companies Act*, s. 297 (1) (*a*), gives a first priority to all such costs without any reference to the opinion of the Commissioner.

In *Farley's Case* (1) s. 32 of the *Sales Tax Assessment Act* was considered by the Court, and it was held that the section did not deal with priorities. It required the liquidator to make provision towards securing the payment of tax by setting aside assets, but the section did not create any charge on the assets, and the liquidator was to set aside a sum only out of " assets available for the payment of the tax." The provision in sub-s. (4) of the *Sales Tax Assessment Act* (sub-s. (6) of the *Pay-Roll Tax Assessment Act*) has no further effect than that of entitling the liquidator to meet the costs, charges and expenses which, in the opinion of the Commissioner, have been properly incurred in the winding up before setting aside a sum under sub-s. (2A) of the *Sales Tax Assessment Act* (sub-s. (3) of the *Pay-Roll Tax Assessment Act*) to meet actual or future tax liabilities. A liquidator will comply with these sections of the two Acts if he pays costs, charges and expenses of winding up to the extent mentioned in sub-s. (4) of the *Sales Tax Assessment Act* (sub-s. (6) of the *Pay-Roll Tax Assessment Act*)—an amount which depends upon the opinion of the Commissioner. He must then set aside and retain in his hands the assets to the extent required by sub-s. (2A) of the *Sales Tax Assessment Act* (sub-s. (3) of the *Pay-Roll Tax Assessment Act*). The assets must then be applied by the liquidator according to law—i.e., according to common law or any valid statute law. There is nothing in the Commonwealth Acts to prevent him from then applying the provisions contained in s. 297 of the *Companies Act* of New South Wales. Accordingly, there is no inconsistency in

(1) (1940) 63 C.L.R. 278.

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this case between Commonwealth and State legislation. The question, therefore, is whether, there being no abandonment by the Commonwealth of its prerogative, and there being no Commonwealth legislation inconsistent with any relevant State Act, a State Parliament has power to determine where debts due to the Commonwealth shall rank in the winding up of a company.

The State Parliament has full power to legislate with respect to the winding up of companies. Such power as the Commonwealth Parliament may have with respect to this subject is limited to foreign corporations and trading and financial corporations formed within the limits of the Commonwealth (Commonwealth Constitution, s. 51 (xx.); *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (1)). But there is no doubt as to the complete power of the State Parliament to legislate on the subject.

In the well-known case of *R.* v. *Burah* (2), Lord *Selborne*, referring to the Indian Legislature, said that it "has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself"—see also *Croft* v. *Dunphy* (3). I proceed to examine, in the light of this general principle, the powers of the Parliament of New South Wales with respect to Crown debts of varying descriptions.

(1) *Crown debts in right of the State of New South Wales.* There can be no doubt as to the full power of the Parliament of New South Wales to legislate with respect to the priority to be accorded to these debts in the liquidation of a company under the *Companies Act* of New South Wales. It can reduce or abolish such priority.

(2) *Crown debts in right of another State of the Commonwealth, e.g., Victoria.* I can see no reason why the Parliament of New South Wales should not be regarded as having full power to legislate with respect to the priority to be accorded to such debts. The Parliament of Victoria could not enact a statute which would operate as law in New South Wales with respect to this (or any other) matter. There is, however, no reason whatever for denying to the Parliament of New South Wales the right to determine the rules to be applied in the forum of New South Wales in relation to debts owed to the Crown in right of Victoria and other Australian States. The power of that Parliament in relation to this matter is as plenary as that of the Parliament of the United Kingdom.

(1) (1908) 8 C.L.R. 330.
(2) (1878) 3 App. Cas. 889, at p. 904.
(3) (1933) A.C. 156, at p. 163.

(3) *Crown debts in right of other parts of the British Commonwealth e.g., Canada, Newfoundland, Jamaica.* The same considerations apply as in the case of class No. 2. The Parliament of New South Wales has full power to determine how such Crown debts shall rank in a liquidation.

(4) *Crown debts in right of the United Kingdom.* The plenary power of the New South Wales Parliament to deal with the liquidation of companies within New South Wales enables that Parliament to determine the priority, if any, to be accorded to Crown debts in right of the United Kingdom. Otherwise the power of the Parliament of New South Wales would not be plenary with respect to this subject. The Parliament of the United Kingdom has power, as a matter of law, to legislate for New South Wales and, accordingly, has itself power to make laws relating to the priority to be accorded in New South Wales to Crown debts arising in any right or, indeed, in relation to any debts at all. But the existence of this overriding power of the Imperial Parliament does not affect the scope and extent of the power of the Parliament of New South Wales, which remains plenary, though subject to the possible operation of paramount legislation, if any, passed by the Parliament of the United Kingdom.

(5) *Crown debts in right of the Commonwealth of Australia.* It is argued that, even though the State Parliament may have the powers stated in respect to Crown debts in right of the various parts of the British Commonwealth mentioned, the position is different in the case of debts owed to the Crown in right of the Commonwealth. It is contended that the prerogative right of the Commonwealth to priority in payment of debts due to the Commonwealth is a governmental right with respect to which a State Parliament has no power to make laws. In the recent case of *Melbourne Corporation* v. *The Commonwealth* (1) it was held by this Court that the Commonwealth Parliament had no power to make laws which were directed against and impaired the exercise of an essential governmental function of the State. It is argued that the considerations which led to this conclusion apply equally to protect Commonwealth governmental functions against destruction or impairment by State laws. It is contended that the prerogative priority of Commonwealth debts is a governmental right of the Commonwealth, with which a State Parliament has no power to interfere. In *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd.* (2), *Dixon* J. referred to this matter. He pointed out that the priority belonging to Crown debts was a priority of the Executive Government founded upon public policy in order to protect the

(1) (1947) 74 C.L.R. 31.

(2) (1940) 63 C.L.R. 278, at p. 308.

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public revenue. His Honour was of opinion that though, in many respects, the Executive Government of the Commonwealth may be incidentally affected by the content or condition of the general law, " governmental rights and powers belonging to the Federal Executive as such " were matters which were beyond the legislative powers of the State Parliament. His Honour held that the prerogative right of priority in payment of debts due to the Commonwealth was such a governmental right or power.

The principle enunciated and applied in the *Banking Case* (1) cannot, in my opinion, be applied in favour of the Commonwealth in the same way as it may properly be applied in favour of a State. A State has no means of protecting itself against Commonwealth legislation if that legislation is valid. The position in the case of the Commonwealth, however, is very different. The Commonwealth Constitution, s. 109, provides that when a law of a State is inconsistent with a law of the Commonwealth the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid. This provision, as has often been pointed out, relates only to State laws which, apart from s. 109, would be valid. A valid Commonwealth law prevails over an otherwise valid State law where the latter is inconsistent with the former. Accordingly, the Commonwealth Parliament is in a position to protect the Commonwealth against State legislation which, in the opinion of the Parliament, impairs or interferes with the performance of Commonwealth functions or the exercise of Commonwealth rights. It has been recognized that the Commonwealth Parliament has this power in the case of laws relating to Commonwealth elections: *R.* v. *Brisbane Licensing Court*; *Ex parte Daniell* (2)—Federal legislation excluding the operation of State legislation as to elections; and to Commonwealth borrowing: *The Commonwealth* v. *Queensland* (3)—Commonwealth legislation preventing the application of State income tax law to interest on certain Commonwealth stock or Treasury bonds; and to the Commonwealth Public Service: *West* v. *Commissioner of Taxation (N.S.W.)* (4)—where the power of the Commonwealth Parliament to enact legislation inconsistent with State legislation for the purpose of protecting rights conferred by Commonwealth legislation is fully discussed.

The present case relates to the Commonwealth prerogative in respect of debts due to the Commonwealth for Commonwealth taxes. It was held in *South Australia* v. *The Commonwealth* (*Uniform Tax Case*) (5), that the power of the Commonwealth to legislate with respect to taxation enabled the Commonwealth Parliament to legis-

(1) (1947) 74 C.L.R. 31.
(2) (1920) 28 C.L.R. 23.
(3) (1920) 29 C.L.R. 1.
(4) (1937) 56 C.L.R. 657.
(5) (1942) 65 C.L.R. 373.

late so as to give priority to Commonwealth taxes over all State taxes. It is an *a-fortiori* proposition that the Commonwealth Parliament can, if it thinks proper, provide for priority to be given to debts for Commonwealth taxes over debts due to creditors other than State Governments.

Accordingly, there is no need to invoke any principle of non-interference with governmental functions for the purpose of protecting the prerogative right of the Commonwealth to priority in payment of debts due to the Commonwealth. The Commonwealth Parliament has the means of protection in its own hands, and by suitable legislation can prevent the application of inconsistent State legislation. I do not suggest, however, that, because the Commonwealth has an extensive power of protecting itself in relation to its governmental functions against State legislation, the result is that any State legislation with respect to the Commonwealth should be held to be valid unless the Commonwealth Parliament produces counter-legislation. There are some subjects which are completely beyond State legislative power; for example, the functions of the Governor-General in relation to the summoning and the dissolution of the Commonwealth Parliament are matters with respect to which State legislatures have no power whatever. The Parliament of New South Wales has power to make laws "for the peace, welfare and good government of New South Wales in all cases whatsoever"—*Constitution Act* 1902 (N.S.W.) s. 5. Laws upon the subjects mentioned would not be laws for the peace, &c., of New South Wales. Any State legislation relating to such matters would be invalid and the Commonwealth Parliament would not be put to the necessity of passing a statute inconsistent with a State statute which attempted to regulate such matters.

Thus some matters of Commonwealth concern are entirely beyond State legislative power. Is the Commonwealth prerogative right of priority in respect of debts owed to the Commonwealth one of these matters?

The Commonwealth of Australia was not born into a vacuum. It came into existence within a system of law already established. To much of that law the Commonwealth is necessarily subject; for example, the Commonwealth has no general power to legislate with respect to the law of property, the law of contract, the law of tort. In relation to those subjects, speaking generally, it lives and moves and has its being within a system of law which consists of the common law (in the widest sense) and the statute law of the various States. The question of the application of general law to the Commonwealth came before this Court in *Pirrie* v. *McFarlane* (1). It was there held

(1) (1925) 36 C.L.R. 170.

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that general provisions in a Traffic Act relating to motor cars applied to the Commonwealth when there was no Commonwealth law with which the State law was inconsistent: see the report (1). Provision for the ranking of debts *inter se* in the liquidation of companies in the forum of a State is a common feature of ordinary company law. It is as much a part of the general law of the community as a traffic law. It usually involves distinction between classes of creditors. It is a general law which can be applied to the Commonwealth where the Commonwealth is a creditor in the same way as to other creditors. If the State legislation abolishes or reduces the priority in payment to which the Commonwealth is entitled at common law the Commonwealth may, by Commonwealth legislation, prevent that State law from operating. But, in my opinion, until the Commonwealth Parliament passes such legislation, the State law is applicable according to its terms.

The questions submitted by the liquidator for the determination of the Court are as follows:—

"1. Is the Commissioner of Taxation entitled to be paid in priority to all ordinary unsecured creditors amounts owing to him by the liquidator in respect of (*a*) sales tax and (*b*) pay-roll tax respectively?

2. If the answer to Question 1 is no, then should the Commissioner of Taxation be paid *pari passu* with the said ordinary creditors when the liquidator is making a final distribution to creditors?"

In my opinion the first question should be answered: No, and the second question should be answered: Yes.

RICH J. The company here in question, which was incorporated by registration in New South Wales on 19th January 1914, went into voluntary liquidation on 31st March 1942. On 31st March 1947 its ordinary unsecured debts amounted to £29,217 19s. 7d., and its only asset is a sum of £1,459 13s. 7d. The Federal Commissioner of Taxation claimed payment from the liquidator of a total sum of £766 18s. 1d. made up of sales tax £595 8s. 10d. and pay-roll tax £172 9s. 3d. incurred up to February 1942; and to be entitled to priority over all other unsecured creditors. The liquidator thereupon applied to the Supreme Court of New South Wales on a summons for directions as to whether the Commissioner was entitled to the priority which he claimed, or only to be paid *pari passu* with the ordinary creditors; and this has been treated by that Court as raising a question as to the respective powers *inter se* of the Commonwealth

(1) (1925) 36 C.L.R., at pp. 182-183, 213-214, 228-229.

of Australia and of the State of New South Wales. In this Court we considered that the matter involved the interpretation of the Constitution and ordered that the cause should be removed into the High Court (*Judiciary Act*, s. 40).

The claim to priority which has been made on behalf of the Commonwealth is based on the prerogative right of the Crown, which prima facie it possesses in the right of the Commonwealth, as it does also in the respective rights of all other parts of the Empire, to be paid the amount of any debt owing to it in priority to the payment of any debts of equal degree owing to subjects, if the fund for payment of debts is insufficient to pay all. It is necessary, therefore, to consider the nature and operation of this part of the Royal prerogative.

As I have already pointed out in *Minister for Works (W.A.)* v. *Gulson* (1) there is but one Crown for the whole Empire, and that Crown possesses certain prerogative rights which it enjoys and exercises not for its personal benefit or at its personal initiative but for the benefit of some particular part of the Empire on the advice of responsible Ministers officiating in that part. One of these prerogative rights is the right in question in the present proceedings. It is well established that when the funds of a debtor are under the control of a particular part of the Empire, this prerogative of priority prima facie attaches to all debts owing by the debtor to the Crown, whether to the Crown in the right of that part or in the right of any other part of the Empire; and, if the debtor's funds are insufficient to pay even his debts to the Crown, the amounts owing to the Crown in each of its respective rights rank *pari passu*. But the legislature of any part of the Empire which controls the fund may, as a general rule, abridge or abrogate this prerogative by legislation so providing either in express terms or by necessary implication. As regards the prerogative now in question, the legislature of New South Wales can, as to any funds within its legislative competence, abridge or abolish it *qua* the Crown in the right, for example, of Great Britain, or of South Africa, or of any of the States of Australia. In so far as the right of the Crown in the right of the Commonwealth to rank as a preferential creditor is based merely on the prerogative of the Crown as such, I see no reason why the State legislature cannot validly abridge or abolish it just as it could any other Crown prerogative of this sort. Quite different questions would arise if the Commonwealth legislature, in the exercise of some of its constitutional powers, enacted that debts owing to the Commonwealth, or debts

(1) (1944) 69 C.L.R. 338, at pp. 356-357.

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of certain kinds owing to the Commonwealth, should have specified priorities in relation to funds subject to the jurisdiction of the Commonwealth. Assuming such legislation to be valid, the Commonwealth would clearly be entitled to the priority so provided for, but it would be a statutory, not a prerogative, priority (*South Australia* v. *The Commonwealth* (1)).

In the present case, s. 199 of the New South Wales *Companies Act* 1936 provides that the provisions of Part X relating, *inter alia*, to the priorities of debts shall bind the Crown. Section 297, which is included in Part X, provides by sub-s. (1) that subject to the provisions of the Act in a winding up there shall be paid in priority to all other debts five specified classes of debts. In the fourth class come certain land tax and income tax assessed under any Act or Commonwealth Act. Since the New South Wales legislature has in s. 297 made express provision as to priority of payment of debts in company liquidations, and has in s. 199 provided that these provisions shall bind the Crown, there is no room in this field for the operation of the Royal prerogative in respect of Crown priorities, and, in this field, Crown priorities in all rights by virtue of the Royal prerogative must be regarded as abrogated (*Attorney-General* v. *De Keyser's Hotel Ltd.* (2)).

It follows that the first question should be answered No, and the second Yes.

STARKE J. This was a summons for directions issued pursuant to the *Companies Act* 1936 of the State of New South Wales.

The Supreme Court of that State was of opinion that the summons raised questions as to the limits *inter se* of the constitutional powers of the Commonwealth and the State and was consequently removed into this Court by force of s. 40A of the *Judiciary Act*. This Court, without deciding whether the summons did raise such questions, ordered that the summons be removed into this Court pursuant to s. 40 of the *Judiciary Act* 1903-1946.

The questions raised for determination by the summons are :—

(1) Is the Commissioner of Taxation entitled to be paid in priority to all ordinary unsecured creditors amounts owing to him by the liquidator in respect of (*a*) sales tax and (*b*) pay-roll tax respectively ?

(2) If the answer to question 1 is no, then should the Commissioner of Taxation be paid *pari passu* with the said ordinary

(1) (1942) 65 C.L.R. 373, at pp. 434-435, 440-441, 464-465.

(2) (1920) A.C. 508, at p. 561.

creditors when the liquidator is making a final distribution to creditors ?

Sales tax, when it becomes due and payable, is a debt due to the King on behalf of the Commonwealth (*Sales Tax Assessment Act (No.* 1) 1930-1942, s. 30).

Likewise pay-roll tax when it becomes due and payable is a debt due to the King on behalf of the Commonwealth (*Pay-roll Tax Assessment Act* 1941-1942, s. 28).

Except so far as the legislature has thought fit to interfere, whenever the right of the Crown and the right of a subject with respect to payment of a debt of equal degree come into competition the claim of the Crown must prevail (*Commissioner of Taxation for New South Wales* v. *Palmer* (1)). But the *Companies Act* of New South Wales has interfered with this prior right of the Crown and the combined effect of the *Companies Act* 1936, ss. 282, 297, is that Crown debts have no claim to priority of payment other than such priority as is given by the statute : see s. 297, sub-s. (1) (*d*) ; *Food Controller* v. *Cork* (2). It is said, however, that the Act only binds the Crown in the right of New South Wales. But, I apprehend that it would preclude the Crown from claiming any priority in respect of debts due to it in right of the Imperial Government or in right of any of the Crown's dominions or possessions other than such priority as is given by the statute. And that is so because the Act is within the constitutional power of New South Wales to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever (*Constitution Act* 1902 (N.S.W.) s. 5).

It is claimed, however, that the position is otherwise in the case of debts due to the Crown in right of the Commonwealth. The Constitution sets up a dual system of government based upon a separation of organs and of powers. And it has been said that neither Commonwealth nor State governments may destroy the other nor curtail in any substantial manner the exercise of its powers or detract or adversely affect each other's rights (*Melbourne Corporation* v. *The Commonwealth* (3) ; *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd.* (4)). This conclusion is based upon implications derived from the Federal structure of the government established by the Constitution.

But it is necessary to consider the precise right claimed by the Crown in right of the Commonwealth. It is a prerogative right because it is a right which belongs to the Crown " over and above all other persons." It is not expressly conferred upon the Crown

(1) (1907) A.C. 179.
(2) (1923) A.C. 647.
(3) (1947) 74 C.L.R. 31.
(4) (1940) 63 C.L.R. 278, at p. 308.

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by the Constitution but flows, however, from the fact that the executive authority of the Commonwealth is vested in the Crown. It is what *Blackstone* calls an incidental prerogative and but an exception in favour of the Crown to those general rules that are established for the rest of the community: such as, that no costs shall be recovered against the King; that the King can never be a joint tenant; and that his debt shall be preferred before a debt to any of his subjects (*Blackstone's Commentaries* (1778), 8th ed., vol. 1, Book 1, c. 7, pp. 239-240, "Of the King's Prerogative"). It is a peculiar right which the King has in enforcing the payment of his debts. It relates to procedural matters and not the substantive right of the King. But procedure is governed by the *lex fori*. As between subjects "the *lex fori* determines all priorities which in any administration of assets may be allowed to certain classes of creditors or of unsecured debts, the assets being first cleared of all securities affecting them, for the question of security is one of property" (*Westlake's Private International Law*, 6th ed. (1922) s. 351, p. 406; *The Tagus* (1); *The Colorado* (2); *Beale, Conflict of Laws* (1935), vol. 3, pp. 1599-1601, 1615-1616).

In my opinion, the same rule applies in the case of the Crown. The proper method for levy of execution by the Crown must be determined by the law of the forum and so also, I think, must that law govern the determination of priorities among competing creditors including the Crown. And in New South Wales the law of priorities in the case of the winding up of a company under the *Companies Act* 1936 is determined by that Act.

It was not suggested during the argument of this case that the *Sales Tax Assessment Act* 1930-1942, s. 32, or the *Pay-roll Tax Assessment Act* 1941-1942, s. 30, conferred any statutory priority upon the Commissioner of Taxation having regard, I suppose, to the decision of this Court in *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd.* (3). But that case is not decisive of the proper construction of the section now appearing in the Acts just mentioned. It is to be observed, however, that the liquidator is to set aside the amount of the tax out of "the assets available for the payment of the tax." And that depends, I think, upon a proper and due course of the administration and distribution of the assets. The sections do not confer any new right of priority upon the Commissioner.

Consequently the questions submitted for determination should be answered :—1. No, 2. Yes.

(1) (1903) P. 44.
(2) (1923) P. 102.
(3) (1940) 63 C.L.R. 278.

DIXON J. The question for decision is whether the Commonwealth in a winding up of an insolvent company is entitled to any priority in respect of amounts owing by the company for sales tax and pay-roll tax.

The winding up is voluntary and commenced on 31st March 1942. The sales tax became payable in December 1941 and January and February 1942, the pay-roll tax in January and February 1942. The relevant legislation is Part X of the *Companies Act* 1936 (N.S.W.) and Part VI. of the *Sales Tax Assessment (No. 1) Act* 1930-1942 and Part V. of the *Pay-roll Tax Assessment Act* 1941-1942.

Section 297 (1) and (4) of the *Companies Act* 1936 provide, in effect, that, after payment of the costs and expenses of the winding up certain preferred debts—employees' wages up to £50, workers' compensation up to £200, one year's land tax and income tax, Commonwealth and State, due within twelve months, and three months' rent—shall be paid next, abating, should the fund be insufficient, ratably among themselves. Subject to such provisions, s. 282 directs that the property of the company shall be applied in satisfaction of its liabilities *pari passu*.

The reference to Commonwealth land tax and income tax, which occurs in par. (*d*) of s. 297 (1), makes it clear that the State Act intends to comprehend debts owing to the Crown in right of the Commonwealth within the order of priority it prescribes. There is, therefore, no point in the question whether the express statement, contained in s. 199 (3), that the provisions relating to priorities of debts shall bind the Crown refers to the Crown in right of the Commonwealth as well as to the Crown in right of the State of New South Wales. But, in my opinion, the expression " the Crown " in this State provision ought not to be understood as referring to the Crown in right of the Commonwealth. Upon this I shall not repeat what I so recently said in *Essendon Corporation* v. *Criterion Theatres Ltd.* (1).

The Federal legislation makes both the sales tax and the pay-roll tax debts due to the King on behalf of the Commonwealth and payable to the Commissioner (*Sales Tax Assessment Act (No. 1)* 1930-1942, s. 30, and *Pay-roll Tax Assessment Act* 1941-1942, s. 28 (1)).

The consequence at common law of giving the taxes this character of Crown debts is to entitle the Commonwealth to priority over other creditors of equal degree. Such a result was described by Lord *Watson* as " in strict accordance with constitutional law." He spoke with reference to a Canadian decision but, paraphrasing his language so as to apply to Australia, what he said would amount to this—that the property and revenues of the Commonwealth are vested in

(1) (1947) 74 C.L.R. 1, at p. 26.

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the Sovereign, subject to the disposal and appropriation of the legislature of the Commonwealth, and that the prerogative of the Crown when it has not been expressly limited by local law or statute is as extensive in the Dominions as in Great Britain (*Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1)).

Can s. 282 of the *Companies Act* 1936 of New South Wales operate as a local statute to limit or destroy this priority of the Commonwealth ? This is perhaps the chief question in the case and my answer to it is a very definite denial of the constitutional competence of the State to prescribe for the Commonwealth the relative rights of the subjects of the Crown and the Crown in right of the Commonwealth in a competition between them.

We are here concerned with nothing but the relation between the Crown in right of the Commonwealth as a creditor for public moneys and the subjects of the Crown as creditors for private moneys. There are no conflicting claims between State and Commonwealth. The conflict is between the Commonwealth and its own subjects. What title can the State have to legislate as to the rights which the Commonwealth shall have as against its own subjects ?

The fact that the priority claimed by the Commonwealth springs from one of the prerogatives of the Crown is an added reason, a reason perhaps conclusive in itself, for saying that it is a matter lying completely outside State power. But there is the antecedent consideration that to define or regulate the rights or privileges, duties or disabilities, of the Commonwealth in relation to the subjects of the Crown is not a matter for the States. General laws made by a State may affix legal consequences to given descriptions of transaction and the Commonwealth, if it enters into such a transaction, may be bound by the rule laid down. For instance, if the Commonwealth contracts with a company the form of the contract will be governed by s. 348 of the *Companies Act*. Further, State law is made applicable to matters in which the Commonwealth is a party by s. 79 of the *Judiciary Act*. But these applications of State law, though they may perhaps be a source of confusion, stand altogether apart from the regulation of the legal situation which the Commonwealth, as a Government, shall occupy with reference to private rights. Take two examples. At common law the King in virtue of his prerogative might effectually assign, or take an assignment of, a legal chose in action, at all events if it were for a debt or thing certain. No law of the State could deprive the Crown in right of the Commonwealth of this special capacity or impose, for instance, the necessity of

(1) (1892) A.C. 437, at p. 441.

notice in writing. Again, in the interval before the *Claims against the Commonwealth Act* 1902 made the Commonwealth liable for tort no State law could have done so. Indeed it is interesting to notice that the Supreme Court of New South Wales has adopted the view that the substantive law of tort governing the Commonwealth is the State law in force when s. 56 of the *Judiciary Act* 1903 came into operation, treating the State as incompetent to affect the Commonwealth by any subsequent changes it might make in the law of tort and ascribing to s. 56 and s. 79 of the *Judiciary Act* no ambulatory operation or effect (*Washington* v. *The Commonwealth* (1)). In dealing with a claim by the government of the United States to recover for the loss of services of a soldier whom the defendant had negligently run down and injured, that is, a claim in tort, the Supreme Court of the United States held " that the creation or negation of such a liability is not a matter to be determined by State law " (*United States* v. *Standard Oil Co.* (2)). Indeed, the principle has been held to extend to " the rights and duties of the United States on commercial paper which it issues." These rights and duties are governed by Federal and not State law, because in disbursing its funds or paying its debts the United States is exercising a constitutional function or power. " The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state. . . . The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources " (*Clearfield Trust Co.* v. *United States* (3)).

A federal system is necessarily a dual system. In a dual political system you do not expect to find either government legislating for the other. But supremacy, where it exists, belongs to the Commonwealth, not to the States. The affirmative grant of legislative power to the Parliament over the subjects of bankruptcy and insolvency may authorize the enactment of laws excluding or reducing the priority of the Crown in right of the States in bankruptcy and it has been held that the taxation power extends to giving the Commonwealth a right to be paid taxes before the States are paid (*South Australia* v. *The Commonwealth* (4)). But these are the results of express grants of specific powers, plenary within their ambit, to the Federal legislature, whose laws, if within power, are made paramount. Because of their content or nature, the

(1) (1939) 39 S.R. (N.S.W.) 133; 56 W.N. 60.
(2) (1947) 91 Law. Ed. (adv. op.) 1507, at p. 1510.
(3) (1943) 318 U.S. 363, at p. 366 [87 Law. Ed. 838].
(4) (1942) 65 C.L.R. 373.

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express powers in question are considered to extend to defining the priority of debts owing to the States or postponing State claims to taxes. The legislative power of the States is in every material respect of an opposite description. It is not paramount but, in case of a conflict with a valid Federal law, subordinate. It is not granted by the Constitution. It is not specific, but consists in the undefined residue of legislative power which remains after full effect is given to the provisions of the Constitution establishing the Commonwealth and arming it with the authority of a central government of enumerated powers. That means, after giving full effect not only to the grants of specific legislative powers but to all other provisions of the Constitution and the necessary consequences which flow from them.

It is a fundamental constitutional error to regard the question of the efficacy of s. 282 of the *Companies Act* 1936 of New South Wales as if it were an exercise of an express grant, contained in the Constitution, to the States of a power to make laws with respect to the specific subject of the winding up of insolvent companies. It is a provision enacted in intended pursuance of a general legislative power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever. The content and strength of this power are diminished and controlled by the Commonwealth Constitution. It is of course a fallacy, in considering what a State may or may not do under this undefined residuary power, to reason from some general conception of the subjects which fall within it as if they were granted or reserved to the States as specific heads of power. But no fallacy in constitutional reasoning is so persistent or recurs in so many and such varied applications. In the present case the fallacious process of reasoning could not begin from s. 107 as the error has so commonly done in the past. For it is not a question whether the power of the Parliament of a Colony becoming a State continues as at the establishment of the Commonwealth. The Colony of New South Wales could not be said at the establishment of the Commonwealth to have any power at all with reference to the Commonwealth. Like the goddess of wisdom the Commonwealth *uno ictu* sprang from the brain of its begetters armed and of full stature. At the same instant the Colonies became States; but whence did the States obtain the power to regulate the legal relations of this new polity with its subjects? It formed no part of the old colonial power. The Federal constitution does not give it. Surely it is for the peace, order and good government of the Commonwealth, not for the peace, welfare and good government of New South Wales,

to say what shall be the relative situation of private rights and of the public rights of the Crown representing the Commonwealth, where they come into conflict. It is a question of the fiscal and governmental rights of the Commonwealth and, as such, is one over which the State has no power.

But the priority which the State Act, by s. 282, is supposed to have destroyed and, by s. 297 (1) (*d*) in the case of land and income tax, to have reduced, is a consequence of the King's prerogative. It is an adjunct of the "Executive power of the Commonwealth" that is vested by s. 61 of the Constitution in the Sovereign. The prerogative of the Crown representing the Commonwealth, being as extensive as in Great Britain, is part of the constitutional law of the Commonwealth: cp. *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1). The rule that when the title of the Crown and the title of a subject concur, that of the Crown is to be preferred, is a general rule of the common law of the Constitution. "It is founded not so much upon any personal advantage to the sovereign as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens and discharge the public debts" (Per *Story* J., *United States* v. *State Bank of North Carolina* (2)). "From Lord *Coke's* time to the present day it has never been questioned as a rule of law" (Per Lord *Macnaghten*, *Commissioner of Taxation for New South Wales* v. *Palmer* (3)). "It only means that the interests of the individuals are to be postponed to the interests of the community" (3).

Such a prerogative right of the Crown is exercisable by the Executive Government of the Commonwealth. It may be relinquished or modified by and with the consent of the Parliament of the Commonwealth. But from its very nature it must be outside the power of a State to detract from it.

Here the Commonwealth Parliament has, I think, confirmed the prerogative right to preferential payment. For can it seriously be doubted that a purpose of the express provisions that the taxes should be deemed debts due to the King in right of the Commonwealth (though at the same time made recoverable at the suit of the Commissioner) was to ensure that unpaid taxes owing should stand in the superior position which the law gives to claims by the Crown and should rank accordingly?

How far s. 109 of the Constitution may protect from the operation of State laws the consequences which are affixed by law

(1) (1892) A.C. 437 at p. 441.
(2) (1832) 31 U.S. 29, at p. 35 [8 Law. Ed. 308 at p. 310.].
(3) (1907) A.C. 179 at p. 182.

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to what Federal legislation enacts is perhaps a question; but I suppose that, if it sufficiently appears that the purpose of the Federal law is to bring about the consequences, a State law which defeats them must be regarded as inconsistent. However, as I am of opinion that the State law cannot affect the prerogative rights of the Crown in right of the Commonwealth and the consequential right of the Federal treasury in an administration of assets to be preferred in respect of the payment of taxes over debts of equal degree due to the subject, it is unnecessary to pursue the question what is the operation of s. 109 with reference to s. 28 (1) of the *Pay-roll Tax Assessment Act* and s. 30 of the *Sales Tax Assessment Act* (*No.* 1) by which the taxes are deemed to be debts due to the King.

But upon the question whether State law can affect the remedial rights of the Commonwealth for the collection of taxes, there is one matter that has been raised in the United States to which it is perhaps desirable to advert. It is stated in the following passage from the opinion of the Supreme Court in *United States* v. *Synder* (1). "The provision" (of the Constitution) "exacting uniformity throughout the United States itself imports a system of assessment and collection under the exclusive control of the general government. And both the grant of the power and its limitation are wholly inconsistent with the proposition that the states can by legislation interfere with the assessment of Federal taxes or set up a limitation of time within which they must be collected." The case adopts the view that the Federal tax system is regulated by Federal law and is not controlled by State enactments, but I refer to the passage because it directs attention to the anomaly which must arise if one State may exclude and another may allow the Commonwealth's claim to preferential payment of its taxes in a liquidation, notwithstanding that the Commonwealth itself could not make or authorize a similar discrimination.

In my opinion. s. 297 (1) (*d*) of the *Companies Act* 1936 of New South Wales is void in so far as it relates to Commonwealth land and income taxes and s. 282 cannot and does not operate to exclude the preferential claim of the Commonwealth in respect of sales tax and pay-roll tax or other Crown debts due to the Commonwealth.

This opinion disposes of the question raised by the case upon the ground which was argued before us. But I think that it is necessary to refer to a further matter. Both the *Sales Tax Assessment Act* (*No.* 1) and the *Pay-roll Tax Assessment Act* contain special sections laying upon a liquidator a particular duty to make provision for

(1) (1893) 149 U.S. 208, at p. 214 [37 Law. Ed. 705, at p. 707].

taxes and, although at the Bar it was considered that, by reason of a construction which this Court had placed upon the sections in the first of these Acts and a like section of the *Income Tax Assessment Act* as they stood in an earlier form, they could not be understood as giving the Commonwealth a further or other right to be preferred in the payment of the taxes due to it, my own examination of the sections in their present form has led me to doubt the correctness of this view.

In *Federal Commissioner of Taxation* v. *Official Liquidators of E. O. Farley Ltd.* (1) the Court construed s. 32 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1935 and s. 59 of the *Income Tax Assessment Act* 1922-1934 as doing no more than requiring the liquidator to hold a sufficient part of the fund for the protection of the revenue so that by parting with it the legitimate claims of the Commissioner for Taxes might not be defeated and as establishing no preferential or other right or claim of the Commissioner in or in respect of the fund. The provisions had, however, undergone very substantial changes after the facts of that case had occurred and before the decision. This present case is governed by the revised form of s. 32 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1942 and by s. 30 of the *Pay-roll Tax Assessment Act* 1941-1942 which follows the new form.

In the view I take it is unnecessary for me to decide what is the operation of these provisions and I shall do no more than call attention to certain considerations affecting the question. The first is that now the liquidator, to the extent of the value of the assets which he is required to set aside, is liable as trustee to pay the tax. The liability, no doubt, is regulated by s. 69 of the *Sales Tax Assessment Act* (*No.* 1) and s. 66 of the *Pay-roll Tax Assessment Act.* But it is a question whether " trustee " is not used in its ordinary sense to fix upon the liquidator fiduciary liabilities to the Commissioner in respect of the fund he must set apart. In *E. O. Farley's Case* (2) both in the Supreme Court and in this Court (1) great importance was attached to the question whether the provisions conferred upon the Commissioner or the Crown any rights in the fund. Indeed *Starke* J. made this the critical consideration. His Honour said :— " The solution of the problem presented for our consideration, namely, the overriding priority of the Commonwealth hinges, I think, upon whether the Acts appropriate and charge the moneys set aside with payment of the taxation for which they are set aside or whether they are merely administrative provisions directing the retention of funds to meet taxation before any distribution of assets

(1) (1940) 63 C.L.R. 278.

(2) (1939) 40 S.R. (N.S.W.) 240; 56 W.N. 203.

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is made but in no wise affecting substantive rights whether of priority or otherwise " (1).

Jordan C.J. (2) said that he was unable to discover in the former language of the section any sufficient indication of intention to create a charge such as would vest in the Crown rights *in rem* to the assets or some part of them. He added that, under the form of section that has been substituted, it is provided that the liquidator shall, to the extent of the value of the assets which he is required to set aside be liable as trustee to pay the tax. His Honour continued : " Since, however, a liquidator is not in law a trustee of the assets of the company . . . it may well be that the word ' trustee ' is not here used in any technical sense, and that the change in language is not material in relation to such cases as the present. This question does not, however, arise in the present case " (3). It does, of course, arise in the proceedings now before us and the operation of the provisions depends upon it. These citations appear to me enough to show that the interpretation of s. 32 of the *Sales Tax Assessment Act* (*No.* 1) and s. 30 of the *Pay-roll Tax Assessment Act* cannot be governed by *Federal Commissioner of Taxation* v. *Official Liquidators of E. O. Farley Ltd.* (4). Apart from the suggestion by *Jordan* C.J. of a possible secondary meaning of the word " trustee," the question upon which the operation of the sections now appears to depend is the meaning of the expression, in par. (*b*) of the sub-section numbered (2A) in s. 32 and (3) in s. 30, " out of the assets available for the payment of the tax." If these words throw you back on the application of assets directed by State law, the provision does not, of course, advance the matter. But, having regard to the express reservation of the deduction of costs, charges and expenses, it may be said that the provision is not concerned with applicability of assets under State law, but simply the existence of an available surplus.

However, I am content to rest my judgment on the single ground that it is not competent for the State legislature to destroy or reduce the priority to which the prerogative of the Crown in right of the Commonwealth entitles it.

In my opinion the first question in the liquidator's summons should be answered : Yes.

McTIERNAN J. I am of opinion that the liquidator must pay the sales tax and the pay-roll tax before the ordinary unsecured debts.

(1) (1940) 63 C.L.R., at p. 296.
(2) (1939) 40 S.R. (N.S.W.) at p. 251 ; 56 W.N., at p. 206.
(3) (1939) 56 W.N. at pp. 206, 207.
(4) (1939) 40 S.R. (N.S.W.) 240 ; 56 W.N. 203 ; (1940) 63 C.L.R. 278.

The taxes are due and payable by the company to the Commonwealth in accordance with the provisions of the *Sales Tax Assessment Act (No.* 1) 1930-1942 and the *Pay-roll Tax Assessment Act* 1941-1942. Each tax is, under the Act creating the obligation to pay it, a debt due to the King on behalf of the Commonwealth; and each tax is expressed to be payable to the Commissioner of Taxation. The winding up, which is voluntary, was instituted under the *Companies Act* 1936 (N.S.W.). The company's property is insufficient to satisfy the taxes and the ordinary unsecured debts. The Commissioner of Taxation came in under the liquidation and proved for the taxes. In s. 282 of the *Companies Act* the legislature of New South Wales has indicated that in a winding up, the company's liabilities, except the liabilities enumerated in s. 297, must be paid *pari passu*. In s. 199 (3) the legislature has said specially that this rule in s. 282 relating to the priorities of debts shall bind the Crown. In s. 297 the legislature has enumerated the debts that must be paid in priority to all other debts. Among these debts there are certain classes of Crown debts, including debts due to the Crown in right of the Commonwealth, but sales tax and pay-roll tax are omitted. It seems from these provisions that the *Companies Act* purports to draw into the winding up all the debts of the Crown in any right and to supersede the prerogative of the Crown in any right to be paid debts due to it in priority to other debts of equal degree. In *Giles* v. *Grover* (1), the judges give a full account of the prerogatives which the King had at common law with respect to debts: See, for example, per *Taunton* J. (2).

The Crown in right of the Commonwealth has certain of the King's prerogatives under the common law with respect to debts (*Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd.* (3)). If it were necessary to define these prerogatives it would be necessary to ascertain what the common law was at the time they accrued to the King in right of the Commonwealth. At common law the Crown has a right to come in under an administration of the assets of a company and claim that its debt should be preferred in payment to any debt of equal degree of a subject (*In re Henley & Co.* (4))—See also *Food Controller* v. *Cork* (5). It is established by *Farley's Case* (3) that the Crown in right of the Commonwealth has this special right beyond the common right of subjects whose debts are in competition with the debts of the Crown in that right in a winding up; and unless the Commonwealth Parliament has indicated

(1) (1832) 9 Bing. 128 [131 E.R. 563].
(2) (1832) 9 Bing., at p. 184 [131 E.R., at p. 584].
(3) (1940) 63 C.L.R. 278.
(4) (1878) 9 Ch. D. 469.
(5) (1923) A.C. 647.

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an intention that any debt due to the Crown in right of the Commonwealth is to be preferred in payment to a debt due to the Crown in right of the State, which is in competition with the Commonwealth debt, the prerogative right of the King in right of the Commonwealth does not prevail over the prerogative right of the King in right of the State, and the debts are payable *pari passu*. However, the rights of the State do not enter into this case.

The sales tax and the pay-roll tax are debts due and payable to the King on behalf of the Commonwealth : See s. 30 (1) of the *Sales Tax Assessment Act* (*No.* 1) 1930-1942 and s. 28 (1) of the *Pay-roll Tax Assessment Act* 1941-1942. The effect of each Act is that when the tax which is levied under it is due and payable, the tax is a debt to which the prerogative priorities of the King in right of the Commonwealth are appurtenant. But the provisions of the *Companies Act* 1936 of New South Wales purport to strip the debt of these incidents which it has under Commonwealth law. It follows, in my opinion, that these provisions are inconsistent with the provisions of the Commonwealth Acts which give force and obligation to the tax as a debt and in consequence of which it is to be preferred in an administration of assets to the debts of equal degree due to private creditors.

Section 109 of the Constitution therefore comes into play. The inconsistency must be resolved upon the principle that the Commonwealth law is paramount (*Amalgamated Society of Engineers* v. *Adelaide Steamships Co. Pty. Ltd.* (1)). It follows, in my opinion, that the provisions of the *Companies Act* 1936 are invalid to the extent to which they purport to supersede the prerogative priority of the Crown, that is, the Crown in right of the Commonwealth, with respect to the sales tax and pay-roll tax.

The first question should be answered : Yes ; it is unnecessary to answer the second question.

WILLIAMS J. The origin of this matter was an application to the Supreme Court of New South Wales in its Equitable Jurisdiction under s. 286 of the *Companies Act* 1936 (N.S.W.) by the liquidator of Richard Foreman and Sons Pty. Ltd., which is in voluntary liquidation, for the determination of the questions : (1) Whether the Commissioner of Taxation is entitled to be paid in priority to all ordinary unsecured creditors amounts owing to him by the liquidator in respect of (*a*) sales tax, and (*b*) pay-roll tax respectively. (2) If the answer to question 1 is no, then should the Commissioner of Taxation be paid *pari passu* with the ordinary creditors when the liquidator is making a final distribution to creditors. When the

(1) (1920) 28 C.L.R., at pp. 156-157.

application came on for hearing before the Supreme Court, *Roper* J. was of opinion that it raised an *inter-se* question within the meaning of s. 40A of the *Judiciary Act* 1903-1946, and therefore proceeded no further with the cause. Without deciding whether his Honour was right in holding that an *inter-se* question had arisen, this Court made an order under s. 40 of the same Act removing the cause into this Court on the ground that it involved the interpretation of the Constitution.

The relevant provisions of the *Sales Tax Assessment Act* (*No.* 1) 1930-1942 are ss. 30 and 32. Section 30 (1) provides that the tax shall be deemed when due and payable to be a debt due to the King on behalf of the Commonwealth. Section 32, as amended by s. 5 of the Act No. 29 of 1934, requires the liquidator of a company to give notice to the Commissioner of the winding up, and to set aside such sum out of the assets of the company as appears to the Commissioner to be sufficient to provide for any tax that is then or will thereafter become payable. It also provides that all costs, charges and expenses which, in the opinion of the Commissioner, have been properly incurred by the liquidator in the winding up of the company including the remuneration of the liquidator may be paid out of the assets of the company. Sections 28 and 30 of the *Pay-roll Tax Assessment Act* 1941-1942 correspond to ss. 30 and 32 of the *Sales Tax Assessment Act* (*No.* 1). The debts referred to in the application are therefore debts due to the Crown on behalf of the Commonwealth.

The effect of the decision in *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd.* (1) is that these sections do not operate to give priority in the winding up of a company under State law to debts owing to the Crown in right of the Commonwealth for taxes over debts owing to the Crown in right of a State. *Farley's Case* (1) related to the winding up of an insolvent company under the *Companies Act* 1899 (N.S.W.), which did not bind the Crown either expressly or by necessary implication. The present company is being wound up under the provisions of the *Companies Act* 1936 (N.S.W.), which provides by s. 199 that in a winding up the provisions of Part X. of the Act relating to the remedies against the property of a company, the priorities of debts and the effect of an arrangement with creditors shall bind the Crown.

I adhere to the opinion already expressed in *Minister of Works* (*W.A.*) v. *Gulson* (2) and *Essendon Corporation* v. *Criterion Theatres Ltd.* (3) that the Crown, whether in right of the Commonwealth

(1) (1940) 63 C.L.R. 278.
(2) (1944) 69 C.L.R. 338.
(3) (1947) 74 C.L.R. 1.

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or of a 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. Here the Crown is expressly mentioned, and it is a question of construction whether the intention is to bind the Crown only in right of the State of New South Wales or in every other right including the right of the Commonwealth.

Section 282 of the *Companies Act* 1936 provides that, subject to the provisions of this Act as to preferential payments, the property of a company shall, on its winding up, be applied in satisfaction of its liabilities *pari passu*. The provisions of the Act relating to preferential payments are contained in s. 297 (1) of the Act. The costs and expenses of the winding up, including the remuneration of the liquidator, are payable out of the assets of the company in priority to all other claims. Then follow four categories of debts which are to be paid *pari passu inter se* and in priority to all other debts. Category (*d*) comprises all land tax and income tax assessed or to be assessed under any New South Wales Act or Commonwealth Act due from the company at the relevant date and having become due or to become due and payable within twelve months next preceding that date or to become due and payable thereafter and not exceeding in the whole one year's assessment.

Many companies incorporated under the *Companies Act* 1936 would normally trade at least throughout Australia, and in many cases in other parts of the British Commonwealth and Empire, and could in the course of such trade incur debts to the Crown in right of the other States of Australia and of other parts of the British Commonwealth and Empire as well as in right of the Commonwealth. In *Farley's Case* (1) *Latham* C.J. cited the authorities and pointed out that " no distinction in respect of the prerogative is drawn in relation to Crown debts owing to the government of the United Kingdom, the government of a dominion, or the government of a colony. All such debts are treated upon the same footing, so that in the case of a deficiency of assets to meet the claims " (of creditors) " all Crown debts are paid *pari passu*." Unless s. 199 binds the Crown in every right, the whole scheme for the distribution of the assets of an insolvent company under the *Companies Act* 1936 would be liable to be destroyed. In *Food Controller* v. *Cork* (2) the Earl of *Birkenhead* said in reference to the corresponding English legislation that: " It would have been plainly impossible to adopt this form of legislation if it had been intended that other Crown debts should retain a priority inconsistent alike with the general language of s. 186 " (s. 282 in the New South Wales Act) " and with the motive

(1) (1940) 63 C.L.R., at p. 286. (2) (1923) A.C. 647, at p. 657.

which led to the specification of admitted exceptions contained in s. 209 " (s. 297 of the New South Wales Act).

In my opinion it is manifest that the Parliament of New South Wales did intend in s. 199 to bind the Crown in every right. In particular the provisions of category (*d*) in favour of the Commonwealth are quite inconsistent with any other intention than that the Crown should be bound in right of the Commonwealth, so that if the Parliament of New South Wales can bind the prerogative rights of the Crown in right of the Commonwealth the debts for sales tax and pay-roll tax in question are debts which only rank for dividend *pari passu* with the ordinary unsecured debts.

But Mr. *Kitto* contended (1) that it is beyond the constitutional power of the Parliament of New South Wales to deprive the Crown in right of the Commonwealth of its prerogative to have debts due to the Crown in such right paid in priority to the debts of the ordinary unsecured creditors; (2) that the relevant sections of the *Sales Tax Assessment Act* (*No.* 1) and the *Pay-roll Tax Assessment Act* provide that these debts shall be paid in priority to ordinary unsecured debts except the costs charges and expenses of the winding up including the remuneration of the liquidator to the extent to which the Commissioner is satisfied that they are reasonable, and that there is an inconsistency between these provisions and the provisions of s. 297 (1) within the meaning of s. 109 of the Constitution.

In my opinion both these contentions fail. Full effect must be given to the established principle recently applied by this Court in *City of Melbourne* v. *The Commonwealth* (1) that there is a necessary implication arising from the nature of the Federal compact that neither the Commonwealth or the States may exercise their respective constitutional powers for the purpose of affecting the capacity of the other to perform its essential governmental functions. The imposition and collection of taxation falls within this principle. But the application of the principle varies with the circumstances. It is usual for legislation relating to bankruptcy or the winding up of insolvent companies to provide that the Crown shall be bound in the manner provided by s. 199 of the *Companies Act*. Section 5 (3) of the Commonwealth *Bankruptcy Act* 1924-1945 makes that Act binding upon the Crown as representing the Commonwealth or any State to a similar extent. Section 84 of that Act only places Crown debts for land tax and income tax assessed under any Commonwealth Act or State Act prior to the date of sequestration and not exceeding in the whole one year's assessment sixth in the order of priority. Debts to the Crown in right of the Commonwealth for income tax

(1) (1947) 74 C.L.R. 31.

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and land tax are therefore placed in a higher order of priority under the *Companies Act* than are the corresponding State debts under the *Bankruptcy Act*.

The right to legislate for the winding up of companies incorporated under the *Companies Act* 1936 and for that purpose to determine in what order of priority the unsecured debts of an insolvent company shall be paid is clearly within the constitutional powers of the Parliament of New South Wales, and the provisions of s. 297 (1) are so much in accord with the usual provisions of an Act of that nature as to be really a law for the peace order and good government of New South Wales with respect to the winding up of insolvent companies incorporated there and not a law which, under colour of such a purpose, is really a law intended to interfere with the essential governmental functions of the Commonwealth.

(2) In *South Australia* v. *The Commonwealth* (1) it was held that the Parliament of the Commonwealth under its power to make laws with respect to taxation can, by aptly framed legislation, give priority to its taxes over those of a State. It would appear therefore that the Parliament of the Commonwealth could provide that debts to the Crown in right of the Commonwealth for taxes should have such priority as the Parliament thought fit to provide over the other debts of an insolvent company which was being wound up under the laws of a State. The State laws to the extent to which they were inconsistent with the Commonwealth laws would then be void under s. 109 of the Constitution. But it follows from *Farley's Case* (2) that the relevant sections of the *Sales Tax Assessment Act* (*No.* 1) and of the *Pay-roll Tax Assessment Act* do not give any such priority. They are not therefore inconsistent with the provisions of ss. 282 and 297 (1) of the *Companies Act*.

For these reasons I would answer the first question : No ; and the second question : Yes.

Questions answered as follows : (1) *No.* (2) *Yes. Costs of all parties in the Supreme Court and in the High Court to be paid out of the assets of the company, those of the liquidator as between solicitor and client.*

Solicitors for the applicant and the respondent, Best & Gee Pty. Ltd. : *John K. Cutler, D. H. Dwyer & Company.*

Solicitor for the respondent, the Federal Commissioner of Taxation : *G. A. Watson*, Acting Crown Solicitor for the Commonwealth.

J. M.

(1) (1942) 65 C.L.R. 373. (2) (1940) 63 C.L.R. 278.