[HIGH COURT OF AUSTRALIA.]

WYNYARD INVESTMENTS PROPRIETARY LIMITED . . . . . } APPELLANT;
DEFENDANT,

AND

COMMISSIONER FOR RAILWAYS (N.S.W.) . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1955.

SYDNEY, *Nov.* 7, 8; *Dec.* 15.

Williams, Webb, Fullagar, Kitto and Taylor JJ.

Landlord and Tenant—Commissioner for Railways (*N.S.W.*)—*Land held in fee—Lease to company—Termination of lease by effluxion of time—Holding over without consent—Ejectment proceedings in court of petty sessions—Commissioner statutory body representing Crown—Whether immune from tenancy legislation—Government Railways Act* 1912-1953 (*N.S.W.*) (*No.* 30 *of* 1912—*No.* 31 *of* 1953), *ss.* 4, 18—*Transport* (*Division of Functions*) *Act* 1932-1952 (*N.S.W.*) (*No.* 31 *of* 1932—*No.* 15 *of* 1952), *s.* 4 (2) (5)—*Landlord and Tenant Act* 1899-1948 (*N.S.W.*) (*No.* 18 *of* 1899—*No.* 43 *of* 1948), *ss.* 22, 23—*Landlord and Tenant* (*Amendment*) *Act* 1948-1952 (*N.S.W.*) (*No.* 25 *of* 1948—*No.* 55 *of* 1952), *ss.* 5, 62.

Held, by *Williams*, *Webb* and *Taylor* JJ. (*Fullagar* and *Kitto* JJ. dissenting), that s. 4 (2) of the *Transport* (*Division of Functions*) *Act* 1932-1952 (N.S.W.) which provides that "for the purposes of any Act the Commissioner for Railways shall be deemed a statutory body representing the Crown" means that for the purposes of any Act the commissioner must be deemed to represent the Crown as its servant or agent. Thus the commissioner so represents the Crown for the purposes of the *Landlord and Tenant* (*Amendment*) *Act* 1948-1952 (N.S.W.) and thereby qualifies for inclusion in the term "the Crown in right of the State" in s. 5 of such Act. The commissioner is accordingly not bound by the *Landlord and Tenant* (*Amendment*) *Act* 1948-1952.

Per Williams, *Webb* and *Taylor* JJ.: The operation of the railways in New South Wales having, with immaterial exceptions, always been a State authority, the creation by the *Transport* (*Division of Functions*) *Act* 1932 of a Ministry of Transport, with a separate Department of Railways administered by the

Commissioner for Railways, presided over by a responsible minister of the Crown and the complete subjugation of the commissioner to ministerial control effected by the addition of sub-s. (5) to s. 4 of such Act in 1950 are all factors which in themselves tend strongly to show an intention to create a corporation in the person of the commissioner not so that he would thereby become a separate independent entity but in order to set up an agency of the Crown, capable of acquiring property and of suing and being sued and having the administrative capacity to carry on in a convenient and permanent form an executive activity of the State.

Rural Bank of New South Wales v. *Hayes* (1951) 84 C.L.R. 149, distinguished.

Decision of the Supreme Court of New South Wales (Full Court), affirmed.

APPEAL from the Supreme Court of New South Wales.

The Commissioner for Railways (N.S.W.), being seised in fee of certain premises at Wynyard Railway Station, Sydney, by deed dated 9th May 1949 leased them to one Collins for a term of five years from 15th July 1949. On 17th July 1952 the interest of Collins under such deed was assigned to Wynyard Investments Pty. Ltd. (hereinafter called the company). Upon the expiry of the term on 14th July 1954 the company held over without the consent of the commissioner, who immediately by his duly authorized agent instituted proceedings in a court of petty sessions under s. 23 of the *Landlord and Tenant Act* 1899-1948 (N.S.W.) to recover possession of the premises. It was objected on behalf of the company on the hearing of such proceedings that the commissioner was bound by the provisions of the *Landlord and Tenant (Amendment) Act* 1948-1952 (N.S.W.), he not being the Crown in right of the State of New South Wales within the meaning of s. 5 of such Act, and that as he had failed to comply with its provisions, and in particular with s. 62, the information should be dismissed. This objection was overruled, and the commissioner, having otherwise made out his case, was adjudged entitled to possession.

The company then obtained from the Supreme Court of New South Wales a rule nisi for statutory prohibition, which after argument was discharged by the Full Court of the Supreme Court (*Street* C.J., *Roper* C.J. in Eq., *Ferguson* J.).

From that decision the company appealed, by special leave, to the High Court, the argument both in the court below and in the High Court being addressed solely to the correctness of the ruling on the objection given by the court of petty sessions. It was at all times admitted that the subject premises were " prescribed premises " as defined in the said Act.

H. C. OF A. 1955.

WYNYARD INVESTMENTS PTY. LTD. v. COMMISSIONER FOR RAILWAYS (N.S.W.).

The relevant statutory provisions appear sufficiently in the judgments hereunder.

H. W. May (with him *E. F. Milverton*), for the appellant. The Court is not here concerned with any general inquiry whether the Commissioner for Railways is for all purposes the Crown, but solely for the purposes of s. 5 of the *Landlord and Tenant (Amendment) Act* 1948-1952. [He referred to the provisions of ss. 22, 23 of the *Landlord and Tenant Act* 1899-1948.] The tenancy subsisted between Collins the assignor of the appellant and the commissioner as a body corporate seised in fee, and proceedings were instituted on his behalf in his own corporate capacity and not as agent for another. [He traced the legislative history of the office of Commissioner for Railways, referring in turn to the *Government Railways Act* 1912, ss. 4, 11 (f), 18; *State Transport (Co-ordination) Act* 1931, ss. 7, 9; *Ministry of Transport Act* 1932, ss. 5, 6, 7, 9, 14, 15; *Transport (Division of Functions) Act* 1932, ss. 3, 7, 14, 16, 17, 26 (3) (4); *Transport and Highways Act* 1950, ss. 3, 8 (1) (g), 13; *Transport (Division of Functions) Further Amendment Act* 1952, s. 2.] It is not enough to inquire whether there are in a statute general words that the commissioner shall be deemed to be a statutory body representing the Crown as in s. 4 (2) of the *Transport (Division of Functions) Act* 1932-1952 in order to determine the question here in issue. Such words fall far short of a direction that he is to be treated as the Crown. The words " for the purposes of any Act " at the commencement of s. 4 (2) are referential, indicating that where any Act employs the words " a statutory body representing the Crown the commissioner is a person to be included in that category. The sub-section does not purport to make him a body representing the Crown for all purposes, but merely for the purposes of any Act. If the former was intended the legislature could easily have said so. The words " the Crown " in s. 5 of the *Landlord and Tenant (Amendment) Act* do not include statutory bodies representing the Crown. To attract the immunity conferred by that section the commissioner must establish that he is the servant or agent of the Crown and not merely representative of it. *Electricity Trust of South Australia* v. *Linterns Ltd.* (1) points to the necessity of inquiring whether the particular corporate body is a servant or agent of the Crown for the purposes of immunity, and supports the appellant's view that the commissioner is not the Crown, though the decision itself turns on another matter. [He referred to *Grain Elevators Board (Vict.)* v. *Dunmunkle Corporation* (2);

(1) (1950) S.A.S.R. 133.

(2) (1946) 73 C.L.R. 70, at pp. 74-76.

Tamlin v. *Hannaford* (1).] The carrying on of a transport undertaking is not of the nature of a governmental function or within the province of government, and whilst governmental functions may be enlarged to include such an undertaking, it must be by the use of express language putting the matter beyond doubt. Merely to say, as here, that there shall be a department controlling the undertaking does not make it a governmental function. [He referred to *Victorian Railway Commissioners* v. *Herbert* (2).] The act of the commissioner in granting the present lease cannot be said to have been the act of the government or a Crown act. [He referred to *International Railway Co.* v. *Niagara Parks Commission* (3).] The cases on this subject are conveniently collected in the judgment of *Brereton* J. in *Electricity Commission of New South Wales* v. *Australian United Press* (4). The position of the Electricity Commission differs from that of the commissioner because in many respects it requires the approval of the minister before acting, whereas the latter is charged with the management of the undertaking and is not obliged to consult the minister, who might, however, give him direction. Section 4 (2) of the *Transport* (*Division of Functions*) *Act* does not deem the commissioner to be the Crown. [He referred to *Shire of Bland* v. *Rural Bank of New South Wales* (5).] Some illustrations of the distinction drawn by the legislature between the Crown and statutory bodies representing the Crown are to be found in the *Sydney Corporation Act* 1932-1940, s. 2 ; *Local Government Act* 1919, s. 4 ; *Rating* (*Exemption*) *Act* 1931, s. 5 ; *Metropolitan Water, Sewerage and Drainage Act* 1924-1954, s. 4 ; *Moratorium Act* 1932-1950, s. 4 ; *Profiteering Prevention Act* 1920, s. 2.

[WILLIAMS J. It is possible that s. 4 (2) means that the commissioner is not to be bound by the provisions of any Act unless expressly mentioned, just as the Crown cannot be bound by the provisions of an Act if not expressly mentioned or bound by necessary implication. In that event the commissioner would be outside the *Landlord and Tenant* (*Amendment*) *Act* although not within s. 5 thereof.]

Where the legislature has said expressly that a statute shall not bind the Crown and thereby its servants and agents, that is the limit of the immunity conferred, and a statutory body representing the Crown in such a case cannot invoke the Crown's general immunity or an immunity created under the particular statute, if not mentioned. When the commissioner granted this lease and

(1) (1950) 1 K.B. 18, at pp. 22-24.
(2) (1949) V.L.R. 211, at p. 214.
(3) (1941) A.C. 328, at pp. 341-343.
(4) (1954) 55 S.R. (N.S.W.) 118, at pp. 128-143.
(5) (1946) 47 S.R. (N.S.W.) 245, at p. 249 ; 64 W.N. 18, at p. 19.

H. C. OF A. 1955. WYNYARD INVESTMENTS PTY. LTD. v. COMMISSIONER FOR RAILWAYS (N.S.W.).

took the steps here under consideration such acts were no more the acts of the Crown than were those referred to in *Metropolitan Meat Industry Board* v. *Sheedy* (1).

J. D. Holmes Q.C. (with him *P. L. Head*), for the respondent. At all relevant times the commissioner was under ministerial control and the funds administered by him were Crown funds. [He referred to the *Government Railways Act* 1912-1953, ss. 4, 14, 18, 41B, 41C, 41D, 41F.] The matters dealt with by ss. 14, 41B et seq., if ministerial control of itself be insufficient, establish that the commissioner is entitled to the immunities of the Crown. [He referred to *Grain Elevators Board* (*Vict.*) v. *Dunmunkle Corporation* (2).] The commissioner satisfies both tests there laid down. From 1932 the railways have been a governmental body administered by a body corporate, the commissioner, who is upon the authority of *Repatriation Commission* v. *Kirkland* (3) entitled to the privileges and immunities of the Crown.

[FULLAGAR J. Leaving aside constitutional questions, would it follow from *Kirkland's Case* (4) that an Act such as the *Landlord and Tenant* (*Amendment*) *Act* would not bind the Repatriation Commission ?]

Yes. We apply that case in this way : where the question is whether the Crown is exempted by implication, taking that position first, from the operation of a statute upon the ordinary principles, then where a person corporate or not is equated in function to a servant of the Crown then the Crown's immunity innures to him in that function as a servant of the Crown. [He referred to *Bank voor Handel en Scheepvaart N.V.* v. *Administrator of Hungarian Property* (5).] It is *a fortiori* if there be an express statutory provision. Having regard to the provisions of ss. 3 (1) and 4 (5) of the *Transport* (*Division of Functions*) *Act* taken with the provisions of the *Government Railways Act* the department and the commissioner are under the control of the minister and this makes the commissioner a servant of the Crown entitled to all the immunities of the Crown other than those which by the legislation have been put aside, this argument being based upon general grounds and apart from s. 4 (2) of the *Transport* (*Division of Functions*) *Act*. The commissioner gains the immunity of s. 5 of the *Landlord and Tenant* (*Amendment*) *Act* as such servant. [He referred to *Electricity Commission of New South Wales* v. *Australian United Press Ltd.* (6) ;

(1) (1927) A.C. 899, at p. 905.
(2) (1946) 73 C.L.R. 70, at pp. 75, 76.
(3) (1923) 32 C.L.R. 1, at pp. 8, 15, 21.
(4) (1923) 32 C.L.R. 1.
(5) (1954) A.C. 584, at pp. 611, 614, 615, 617, 618, 621.
(6) (1954) 55 S.R. (N.S.W.) 118 ; 72 W.N. 65.

Minister for Works (*W.A.*) v. *Gulson* (1).] Turning to s. 4 (2) that sub-section confers on the commissioner such immunities as a statute confers upon the Crown. This construction gives meaning to the introductory words " for the purposes of any Act ", and, as the next step, says that a statutory body representing the Crown is entitled to the immunity of the Crown when that immunity is given by a statute. Section 5 of the *Landlord and Tenant* (*Amendment*) *Act* confers immunity on the Crown which passes to the commissioner by s. 4 (2). The words " representing the Crown " in the phrase " statutory body representing the Crown " are intended to give the statutory body the status of an agent of the Crown where that agency would innure for his benefit from any Act giving benefits to the Crown or representatives of the Crown.

[WILLIAMS J. Do you read s. 4 (2) as meaning that for the purpose of any Act the commissioner shall be regarded as a servant of the Crown ?]

Yes. [He referred to *Tamlin* v. *Hannaford* (2).]

[FULLAGAR J. My difficulty with s. 4 (2) is that the words " statutory body representing the Crown " convey very little as a piece of ordinary language. On the other hand they may be given a special meaning by a number of statutes.]

One view is that they have a special meaning; the other, the one for which the respondent contends, is that they mean a statutory body which is the agent of the Crown. Representing the Crown means acting for the Crown.

H. W. May, in reply.

Cur. adv. vult.

Dec. 15.

The following written judgments were delivered :—

WILLIAMS, WEBB AND TAYLOR JJ. This is an appeal from an order of the Full Supreme Court of New South Wales discharging a rule nisi for a writ of prohibition sought by the appellant directed to a magistrate and the Commissioner for Railways restraining them from further proceeding on an order made by the magistrate sitting as a Court of Petty Sessions on 23rd September 1954 whereby the commissioner was adjudged entitled to possession of certain premises situate at Wynyard Railway Station, Sydney, and a warrant was ordered to issue giving possession of these premises to the commissioner. The facts can be shortly stated. On 9th May 1949 the commissioner leased the premises in question to one

(1) (1944) 69 C.L.R. 338, at p. 363 et seq.

(2) (1950) 1 K.B. 18, at p. 25.

H. C. OF A. 1955.

WYNYARD INVESTMENTS PTY. LTD. v. COMMISSIONER FOR RAILWAYS (N.S.W.).

Williams J. Webb J. Taylor J.

Collins for a term of five years from 15th July 1949. The tenancy was assigned to the appellant on 17th July 1952. Immediately upon the expiry of the term the commissioner took proceedings under Pt. IV of the *Landlord and Tenant Act* 1899-1948 to recover possession of the premises. At the conclusion of the case for the informant the tenant asked that the information should be dismissed on the ground that the informant was not the Crown in right of the State of New South Wales within the meaning of s. 5 (a) of the *Landlord and Tenant (Amendment) Act* 1948-1952 and was therefore bound by that Act and could only bring proceedings for ejectment in accordance with its provisions. But the magistrate held that the informant was the Crown within the meaning of that sub-section and that the Act did not therefore apply to the informant. The question whether the magistrate was right or not in so holding was the only question at issue before the Supreme Court and it is the only question at issue before us.

Section 5 of the *Landlord and Tenant (Amendment) Act* is in the following terms: "5. This Act shall not bind—(a) The Crown in right of the Commonwealth or of the State; or (b) The Housing Commission of New South Wales."

The question at issue is a very familiar one. It arises with ever increasing regularity as Governments persistently enlarge the scope of their activities beyond those of a truly governmental character into the sphere of trade and commerce and for that purpose create statutory corporations which are not slow to claim that they are agents or servants of the Crown (these being the proper words of description: *International Railway Co.* v. *Niagara Parks Commission* (1)) and as such entitled to the benefit of the prerogatives, privileges and immunities of the Crown. And, as pointed out by Lord *Uthwatt* in *Adams* v. *Naylor* (2) when referring to the desirability of legislation in the United Kingdom to make the Crown liable in tort (since enacted): "Such legislation is long overdue and the increasing activities of the state in affairs which affect the ordinary man make the matter urgent. For the Crown —described by *Maitland* as 'the head of a highly organized corporation aggregate of many'—in the application of this rule embraces the state in all its activities" (3). Eighty years before, in *Mersey Docks* v. *Cameron* (4), the same principle had been expressed in different words by Lord *Westbury* when he said: "the public purposes must be such as are required and created by the government of the country, and are therefore to be deemed part of the

(1) (1941) A.C. 328, at p. 343.
(2) (1946) A.C. 543.
(3) (1946) A.C., at p. 555.
(4) (1865) 11 H.L.C. 443 [11 E.R. 1405].

use and service of the Crown" (1). The legislation creating the corporation more often than not does not contain any express statement of the extent to which the body is to be regarded as an agent or servant of the Crown. The question must then be resolved by a consideration of the purpose and effect of the particular Act by which the corporation is established and of any other Acts which relate to its corporate functions, duties and powers.

But, in the present case, as will be seen, the New South Wales legislature has expressed its intention on this question to a sufficient extent to enable us to dispose of this appeal, and this will relieve us from the task of examining the many authorities that bear upon it. In these circumstances it will be sufficient simply to mention four of the many cases where the relevant principles are discussed. The first is a case in the Supreme Court of New South Wales, *Skinner* v. *Commissioner for Railways* (2), the next two are cases in this Court—*Grain Elevators Board (Vict.)* v. *Dunmunkle Corporation* (3) and *Bank of New South Wales* v. *The Commonwealth* (4), and the fourth is the recent decision of the House of Lords in *Bank Voor Handel en Scheepvaart N.V.* v. *Administrator of Hungarian Property* (5). It will be sufficient at this stage to refer to the more important provisions of the New South Wales Acts which bring the question to a head. There is first the *Government Railways Act* 1912-1953. Section 4 of this Act incorporated the "Railway Commissioners for New South Wales" and provides that the corporation "by that name shall have perpetual succession and a common seal, and be capable of suing and being sued, and, subject to the provisions hereinafter contained, shall have power to take, purchase, sell, lease, and hold lands, goods, chattels, and other property for the purposes of this Act. But no sale or lease of any such lands, except as provided in section eighteen, shall have any force or effect until the same has been approved by the Governor". Section 18 provides that "The commissioners may lease any refreshment-room, shed, office, shop, stall, coal gears, sites for storage or for erecting sheds, right of entrance into any station by any public vehicle, right of advertising, or other convenience or appurtenance to any of the railways, for any term not exceeding five years on such conditions and at such rent as they may determine". The other material provisions of that Act and of the *Transport (Division of Functions) Act* No. 31 of 1932 are conveniently summarized by

(1) (1865) 11 H.L.C., at p. 505 [11 E.R., at p. 1429].
(2) (1937) 37 S.R. (N.S.W.) 261; 54 W.N. 108.
(3) (1946) 73 C.L.R. 70.
(4) (1948) 76 C.L.R. 1, at pp. 226, 227, 271-275, 321-323, 357-368, 396.
(5) (1954) A.C. 584.

H. C. OF A. 1955. WYNYARD INVESTMENTS PTY. LTD. v. COMMISSIONER FOR RAILWAYS (N.S.W.). Williams J. Webb J. Taylor J.

Jordan C.J. in *Skinner's Case* (1): "The *Government Railways Act* 1912, No. 30, as amended, provides for the appointment of Railway Commissioners who are a body corporate capable of suing and being sued (s. 4). All the railways, tramways and rolling stock constructed or acquired on behalf of the Crown are vested in them and they are empowered to conduct them as a trading business. All moneys payable to the commissioners are collected and received by them on account of His Majesty and must be paid into the Government Railways Fund in the Treasury: ss. 14 and 41B. . . . Section 143 of the Act, as amended by No. 19 of 1936, s. 5, provides that all actions against the commissioners or against any other person for anything done or omitted or purporting to have been done or omitted under the Act shall be commenced within one year after the act or omission complained of was committed or made. Section 144 requires a month's notice to be given before any such action may be brought. Sections 145 and 146 assume that the commissioners are liable in tort. By the *Transport (Division of Functions) Act* 1932, No. 31, it was provided that there should be a Ministry of Transport under the Minister of Transport which should be divided into departments, one of which is the Department of Railways which shall be administered by the Commissioner for Railways (s. 3). This Act provides that the commissioner is a body corporate and that for the purposes of any Act he shall be deemed a statutory body representing the Crown (s. 4 (1) (2)). He exercises the functions formerly exercised in respect of railways by the Transport Commission to whom the functions of the Railway Commissioners had been transferred by the Act No. 3, 1932, s. 9" (2). (The *Ministry of Transport Act*).

The only other Act to which reference need be made is the *Transport and Highways Act* No. 10 of 1950 which incorporated a commission by the name of "The New South Wales Transport and Highways Commission", and provides that the commission shall be deemed a statutory body representing the Crown and also that a member of the commission shall be the person for the time being holding the office of the Commissioner for Railways. Section 8 of that Act provides that the commission shall have power to—"(g) control and direct the Commissioner for Railways . . . in the exercise of any of . . . its powers, authorities, duties and functions". Section 13 of that Act amended the *Transport (Division of Functions) Act* by inserting at the end of s. 4 the following new

(1) (1937) 37 S.R. (N.S.W.), 261; 54 W.N. 108.

(2) (1937) 37 S.R. (N.S.W.), at pp. 271, 272; 54 W.N., at pp. 109, 110.

sub-section : " (5) In the exercise and performance of the powers, authorities, duties and functions conferred and imposed upon the Commissioner for Railways by or under this or any other Act, such Commissioner shall be subject to the control and direction of the Minister " (that is, the Minister of Transport).

It will be seen that, when the commissioner commenced the present proceedings (and this must be the material date for determining whether or not the tenancy was subject to the *Landlord and Tenant (Amendment) Act*), he was, by virtue of s. 4 (5) of the *Transport (Division of Functions) Act* 1932-1952, completely subject to the control of the Minister of Transport. The history of the New South Wales Railways showing that the railway system of New South Wales, with immaterial exceptions, has always been a State activity, the fact that the legislation of 1932 provided that there should be a Ministry of Transport, presided over by the Minister of Transport (later changed to Minister for Transport) who was made by the *Ministry of Transport Act* a responsible Minister of the Crown, divided into departments, one of these being the Department of Railways administered by the Commissioner for Railways, and the complete subjugation of the commissioner to ministerial control in all his activities by the legislation of 1950 would in themselves tend strongly to prove an intention on the part of the Parliament of New South Wales to create a corporation in the person of the commissioner not so that he would thereby become a separate independent entity but in order to set up an agency of the Crown, constituting a branch department of the Ministry of Transport, capable of acquiring property and of suing and being sued and having the administrative capacity to carry on in a convenient and permanent form an executive activity of the State.

But the provisions of s. 4 (2) of the *Transport (Division of Functions) Act* are decisive for present purposes. This sub-section provides that for the purposes of any Act the commissioner shall be deemed to be a statutory body representing the Crown. In *Skinner's Case* (1) *Jordan* C.J. said : " whatever might be the position of the Commissioner for Railways apart from this special provision of the Act of 1932, it is at least clear that he must now in New South Wales for the purposes of any Act be deemed a statutory body representing the Crown, and entitled to all such immunities as flow from that status " (2). It was contended by Mr. *May* that the sub-section is intended to have a referential and definitive operation

(1) (1937) 37 S.R. (N.S.W.) 261 ; 54 W.N. 108.

(2) (1937) 37 S.R. (N.S.W.), at p. 272 ; 54 W.N., at p. 110.

H. C. OF A. 1955.

WYNYARD INVESTMENTS PTY. LTD. v. COMMISSIONER FOR RAILWAYS (N.S.W.).

Williams J. Webb J. Taylor J.

and that after the words " for the purposes of any Act " there should be implied the words " where the expression statutory body representing the Crown occurs in that Act ". This construction found favour with *Roper* C.J. in Eq. in the court below. But, with respect, this requires that words that are not there should be implied in the sub-section, and the general rule is not to import into statutes words that are not there. It would not be legitimate to narrow down the words " for the purposes of any Act " in this way. Such a construction might well reduce the effect of the sub-section almost to impotence.

We were referred by Mr. *May* to several New South Wales Acts, where the same expression occurs, passed before or about the same time as the dignity of representing the Crown was conferred upon the Commissioner for Railways. The earliest of these Acts in point of time is the *Local Government Act* 1919. There, s. 4 provides that " statutory body " or " statutory body representing the Crown " includes certain bodies (amongst them being the Railway Commissioners of New South Wales) and any public body proclaimed under this Act as a statutory body representing the Crown. The section also provides that " Crown " includes any statutory body representing the Crown, and that the Crown shall be deemed to be the owner of all lands vested in a statutory body representing the Crown. The *Sydney Corporation Act* 1932-1940, s. 2, provides that " statutory body representing the Crown " means any body defined by or proclaimed under the *Local Government Act* 1919, as amended by subsequent Acts, as a statutory body representing the Crown and that " Crown " includes any statutory body representing the Crown. The *Rating (Exemption) Act* 1931, ss. 5, 6 and 7, amends the *Sydney Corporation Act* 1902, the *Metropolitan Water, Sewerage and Drainage Act* 1924-1930, and the *Hunter District Water and Sewerage Act* 1892-1928, by inserting definitions that " Crown " includes any statutory body representing the Crown. But in the case of each of these corporations amendments were also introduced to provide that " statutory body representing the Crown " means any body defined by or proclaimed under the *Local Government Act* 1919, as amended by subsequent Acts, as a statutory body representing the Crown. It may be that one purpose of enacting s. 4 (2) of the *Transport (Division of Functions) Act* was to make the Commissioner for Railways a statutory body representing the Crown for the purposes of these Acts since the corporation known as the Railway Commissioners of New South Wales referred to in the *Local Government Act* no longer existed. But this assumption, even if justified, would provide a very unsafe

foothold for confining the words "any Act" in this sub-section to these particular Acts and to any other Acts, if there be any such, in which the same expression occurs, because any such Act might be expected to contain its own means of identifying the statutory bodies in question. The same provision occurs in s. 7 (2) of the *Ministry of Transport Act* 1932 which provided that for the purposes of any Act the Board of Commissioners (now defunct) should be deemed a statutory body representing the Crown, in ss. 5 (2) and 6 (2) of the *Transport (Division of Functions) Act* which placed the Commissioner for Road Transport and Tramways and the Commissioner for Main Roads in the same notional position, and in s. 3 (2) of the *Transport and Highways Act* 1950 which provided that for the purposes of any Act the New South Wales Transport and Highways Commission should be deemed a statutory body representing the Crown. The only inference it is safe to draw from the presence of the expression in the Acts to which we were referred is that the draftsman of the various *Transport Acts* must have thought that this collocation of words, as it appeared to have been successful to place certain statutory bodies in the same position as the Crown for the purposes of particular Acts, would provide a suitable verbal formula to place the Commissioner for Railways and the other transport authorities in that position for the purposes of every New South Wales Act. It may seem strange at first sight that Parliament, having gone thus far, did not go further and make the Commissioner for Railways a representative of the Crown for all purposes, but the only bodies upon which the legislature would be likely to confer the privileges and immunities of the Crown would be, presumably, bodies created by some statute to perform activities which the legislature considered to be of sufficient public importance to qualify as executive activities of the State. They are called statutory bodies because such bodies are created by statute. It is correct in this sense to describe the commissioner as a statutory body and it is for the legislature to decide to what extent he is to enjoy what Lord *Cranworth* in *Mersey Docks & Harbour Board Trustees* v. *Cameron* (1) described as "the shield of the Crown". The legislature has said that he is to do so "for the purposes of any Act". Probably it has gone thus far and no further because the duties, powers and functions of the commissioner are derived so largely from statutes. Common law rights and obligations must often arise during their exercise but the Crown in New South Wales can be sued both in contract and in tort, and the commissioner would receive little benefit from any wider protection. He would

(1) (1865) 11 H.L.C., at p. 508 [11 E.R., at p. 1430].

H. C. OF A. 1955.

WYNYARD INVESTMENTS PTY. LTD. v. COMMISSIONER FOR RAILWAYS (N.S.W.).

Williams J. Webb J. Taylor J.

appear to receive substantially all the advantages which would accrue from representing the Crown by being placed in the same position as the Crown for the purposes of any Act and one of the principal advantages would appear to be his immunity from any Act which did not bind the Crown.

The only way a statutory body could represent the Crown would be to act as the agent or servant of the Crown and this must be the meaning of the word " represent " in this special provision. The representation is " for the purpose of any Act ", so that for the purpose of any Act the Commissioner for Railways must be deemed to represent the Crown. One such Act would be the *Government Railways Act*, another would be the *Landlord and Tenant Act* 1899-1948, so that in granting the lease of 9th May 1949 under s. 18 of the former Act and subsequently in taking the proceedings under Pt. IV of the latter Act to recover possession of the premises the commissioner must be deemed to have been acting as the agent or servant of the Crown. But in neither of these transactions would the commissioner derive any particular benefit from this privilege. Reliance was placed by Mr. *May* on the fact that the proceedings in the court of petty sessions were brought by the agent of the commissioner and from this fact he sought to raise a contention that in these proceedings at least the commissioner in whom the fee simple of the land was vested and who was in law the reversioner must be taken to be acting as a principal. But there is the highest authority that a person or corporation may still be an agent or servant of the Crown although he or it and not the Crown is the person or body authorized by statute to sue or be sued, and that if such a person or body is sued he or it may set up the privileges and immunities of the Crown: *Minister of Supply* v. *British Thomson-Houston Co. Ltd.* (1); *Minister of Health* v. *Bellotti* (2); *Tyne Improvement Commissioners* v. *Armement Anversois S/A* (*The Brabo*) (3). In the third of these cases the English legislation expressly provided that one of the defendants, the Minister for Supply, should have the same privileges as if the Crown were actually a party to the proceedings, but the British Iron & Steel Corporation Ltd., a British company, as an agent of the Crown, was nevertheless held to be entitled to claim the same privileges because of the general doctrine that, as Lord *Simonds* stated it: " inasmuch as the Act does not bind the Crown, it does not affect the right of its servants and agents, by whatever name the Act may choose to call them, to assert its and their

(1) (1943) K.B. 478.
(2) (1944) K.B. 298.
(3) (1949) A.C. 326.

immunity " (1). Another such Act would be the *Landlord and Tenant (Amendment) Act* and the commissioner must by virtue of the special provision be deemed to be a statutory body representing the Crown for the purposes of that Act. Accordingly in his transmogrified form the commissioner must qualify for inclusion in the term " The Crown in right of the State of New South Wales ", the expression " the Crown " having the wide meaning given to it by Lord *Uthwatt* in the passage already cited (2). But, even if the commissioner does not so qualify, the case for the appellant would not be advanced because the commissioner as representing the Crown could still rely on the general doctrine that the Crown is not bound by any statute except by express mention or necessary implication. The Crown is bound by necessary implication where it is manifest from the very terms of the statute that it was intended by the legislature that the Crown should be bound : *Province of Bombay* v. *Municipal Corporation of Bombay* (3). No such manifest intention can be found in the *Landlord and Tenant (Amendment) Act*. Section 5 of the Act indicates a contrary intention. But, without that section, there would be no necessary implication. *Minister for Works (W.A.)* v. *Gulson* (4) (the regulations there in question were the genesis of the *Landlord and Tenant (Amendment) Act* 1948). Section 5 of the *Landlord and Tenant (Amendment) Act* does, of course, expressly refer to the Crown and to the Housing Commission but the general doctrine would still prevail notwithstanding the insertion of an express exemption clause as to certain matters : *Hornsey Urban Council* v. *Hennell* (5) ; *Gorton Local Board of Health* v. *Prison Commissioners* (6) ; *Tyne Improvement Commissioners Case* (7).

The appellant relied on *Rural Bank of New South Wales* v. *Hayes* (8). But that case is clearly distinguishable. In the joint judgment it was pointed out (9) that the functions of the bank were not those of a department of the executive Government of New South Wales. Consequently it was not entitled to claim for itself, as being within the concept of the Crown, an immunity belonging to the Crown either under the common law or under statutory provision. A similar contention that the Grain Elevators Board (Vict.) was a branch of the Victorian Department of Agriculture, so that it was performing its functions, powers and duties as part of the executive Government of Victoria, failed in the *Dunmunkle Case* (10).

(1) (1949) A.C., at pp. 346, 347.
(2) (1946) A.C., at p. 555.
(3) (1947) A.C. 58, at p. 61.
(4) (1944) 69 C.L.R. 338.
(5) (1902) 2 K.B. 73, at pp. 80, 81.
(6) (1904) 2 K.B. 165(n), at p. 169(n).
(7) (1949) A.C., at pp. 345-347.
(8) (1951) 84 C.L.R. 140.
(9) (1951) 84 C.L.R., at p. 146.
(10) (1946) 73 C.L.R. 70.

H. C. OF A. 1955.

WYNYARD INVESTMENTS PTY. LTD. v. COMMISSIONER FOR RAILWAYS (N.S.W.).

Williams J. Webb J. Taylor J.

In the present case, quite apart from the special provision contained in s. 4 (2) of the *Transport (Division of Functions) Act*, the Commissioner for Railways is placed by the statutes that have been referred to in a completely different position to that of the Rural Bank because he is made by those provisions the very thing that the Rural Bank was not, that is to say he is made an integral part of a department which is one of the departments of the executive Government of New South Wales. It is impossible to deny the correctness of the statement by *Latham* C.J. in *South Australia* v. *The Commonwealth* (1) that " in a fully self-governing country where a parliament determines legislative policy and an executive government carries it out, any activity may become a function of government if parliament so determines " (2). The railways of the States have been built and maintained with public moneys and their extension, upkeep and management have always been considered to be a function of government. In *Young* v. *S.S.* " *Scotia* " (3) a similar view of a railway owned by the Government of Canada was taken with respect to a rail ferry boat built to connect one part of the railway with another. As long ago as *Farnell* v. *Bowman* (4) the Privy Council said that " It must be borne in mind that the local Governments in the Colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works for the construction of which it is necessary to employ many inferior officers and workmen. If, therefore, the maxim that ' the king can do no wrong ' were applied to Colonial Governments in the way now contended for by the appellants, it would work much greater hardship than it does in England " (5). The same view prevailed at the time the Constitution was being framed and we have in the Constitution itself provisions relating to the railways, namely s. 51, pars. (xxxii.), (xxxiii.) and (xxxiv.), particularly par. (xxxiii.), and ss. 98, 101, 102 and 104 which recognize that the railways are the property of the States. Any doubt that could have previously existed should, at any rate in New South Wales, have been set at rest when the Commissioner for Railways was made a branch of a department of State presided over and controlled by a responsible Minister of State. There is also nothing in the decision of the House of Lords in the *Bank Voor Handel Case* (6) that assists the appellant or, it may be said, assists either side for their Lordships were there

(1) (1942) 65 C.L.R. 373.
(2) (1942) 65 C.L.R., at p. 423.
(3) (1903) A.C. 501.
(4) (1887) 12 A.C. 643.
(5) (1887) 12 A.C., at p. 649.
(6) (1954) A.C. 584.

dealing with an altogether different and somewhat unusual problem. But Lord *Reid's* speech contains several statements which indicate that the question whether a person or corporation is a servant of the Crown or not depends upon the degree of control the Crown, through its ministers, can exercise over him in the performance of his duties and the question is not the degree of independence he in fact enjoys but how much he can assert and insist on by reason of the terms of his appointment or the nature of his office. In the present case the control of the New South Wales Transport and Highways Commission and the Minister for Transport over the Commissioner for Railways is as complete as it can be. It is at least as complete as the power to control the custodian given to the Board of Trade by the *Trading with the Enemy Act* 1939 (Imp.), s. 7. The right of the Minister for Transport to represent the Crown in New South Wales is at least as clear as the right of the Board of Trade to represent the Crown in England (*Halsbury's Laws of England*, 3rd ed., vol. 7, p. 421).

For these reasons the appeal should be dismissed with costs.

FULLAGAR J. I have had an opportunity of reading the judgment prepared by *Kitto* J. in this case, and I find it sufficient to say that I agree with it. The case is indeed, to my mind, covered by the decision of this Court in *Rural Bank of New South Wales* v. *Hayes* (1): cf. *Victorian Railways Commissioners* v. *Herbert* (2). It is true that neither of those cases involved the consideration of any such provision as that contained in s. 4 (2) of the *Transport (Division of Functions) Act* 1932-1952. But the interpretation given by *Kitto* J. to that provision is, in my opinion, correct.

KITTO J. The question in this case is whether the respondent, the Commissioner for Railways, is bound by the provision, contained in s. 62 (1) of the *Landlord and Tenant (Amendment) Act* 1948-1952 (N.S.W.) that, except as provided by Pt. III of that Act, the lessor of any prescribed premises shall not give any notice to terminate the tenancy or take or continue any proceedings to recover possession of the premises from the lessee or for the ejectment of the lessee therefrom.

On 9th May 1949 the commissioner granted by deed to one Collins what was described as an exclusive right and licence to occupy certain premises at Wynyard Railway Station for the term of five years commencing on 15th July 1949. It is common ground that the deed was in law a lease. The term was assigned during

(1) (1951) 84 C.L.R. 140. (2) (1949) V.L.R. 211.

H. C. OF A. 1955. WYNYARD INVESTMENTS PTY. LTD. v. COMMISSIONER FOR RAILWAYS (N.S.W.). Kitto J.

its currency to the present appellant, and when it expired, as it did on 14th July 1954, the appellant held over without the consent of the commissioner, and the latter at once took proceedings in a court of petty sessions under s. 23 of the *Landlord and Tenant Act* 1899-1948 (N.S.W.) to recover possession of the premises. At the hearing the commissioner proved all that was necessary to entitle him to succeed if he was not bound by s. 62 of the *Landlord and Tenant (Amendment) Act* 1948-1952, but he did not prove compliance with Pt. III of that Act. In particular he did not prove that he had given the appellant any notice to quit satisfying the conditions prescribed by sub-s. (3) of s. 62, or that any of the prescribed grounds enumerated in sub-s. (5) of that section existed. The magistrate, however, adjudged the commissioner entitled to possession and ordered a warrant to issue to give him possession accordingly. The appellant then obtained from the Supreme Court of New South Wales an order nisi for statutory prohibition. The Full Court, after argument, discharged the order nisi, and the appellant appeals to this Court by special leave.

It is not in dispute that the premises in question are "prescribed premises" in the sense which that expression has in s. 62 by virtue of the definition in s. 8 (1); nor that by reason of the provision in s. 8 (2) the appellant and the respondent are respectively the lessee and the lessor of the premises within the meaning of s. 62 notwithstanding that the lease has expired. It is clear, therefore, that if the commissioner is bound by s. 62 the magistrate's order was wrongly made and the order nisi for prohibition should have been made absolute. The commissioner, however, contends that the Crown is not bound by s. 62, and that as a consequence he himself is not bound by it. That the Crown is not bound is clear, for s. 5 specifically provides that the Act shall not bind the Crown in right of the Commonwealth or of the State. Whether the asserted consequence follows is the question we have to consider.

In the affidavit relied upon by the appellant the ground of prohibition was described in a familiar form of words. It was said that "the Commissioner for Railways is not the Crown and is bound by the *Landlord and Tenant (Amendment) Act* 1948-1952". It is, of course, quite common, where some immunity or advantage is claimed for an individual or a body by reference to a special position which the law accords to the Crown, to speak of the individual or body as being or not being the Crown. This use of language is open to the objection that not only is it for obvious reasons technically inexact but it tends to obscure the real nature of the problem. The Sovereign alone is the Crown. In this country,

where questions concerning the Monarch personally can seldom arise, the Crown normally means the Sovereign considered as the central government of the Commonwealth or a State. Ordinarily, therefore, to hold that a given statutory provision binds the Crown is to hold that it operates to destroy or curtail or impair some interest or purpose (*Bank voor Handel en Scheepvaart N.V.* v. *Administrator of Hungarian Property* (1)) of the Sovereign as so considered. Where the immunity is claimed by a subject of the Crown, whether an individual or a corporation, the question to be decided, whatever may be the language in which for convenience it may be expressed, cannot really be whether the subject is within a class of departments, organizations and persons generically (and loosely) described as the Crown. It must always be whether the operation of the provision upon the subject would mean some impairment of the existing legal situation of the Sovereign. This I take to be conclusively shown by the speeches, both of the majority and of the minority, delivered in the House of Lords, and the judgments delivered in the Court of Appeal, in the case of *Bank voor Handel en Scheepvaart N.V.* v. *Administrator of Hungarian Property* (2). The question in that case was whether income received by a subject was immune from income tax imposed by an Act which did not bind the Crown. The subject concerned was a government official and he received the income in his official capacity. The income was required to be held by him during the war and until its destination should ultimately be determined by the Crown. There was a cleavage of judicial opinion on the question whether the taxing of the income would be such a prejudice to the Crown as to be inconsistent with the Crown's immunity from tax, bearing in mind that the income formed no part either of the personal revenue of the Sovereign or of the revenue applicable for the government of the country. But the point of general importance, upon which there was unanimity as I read the judgments, was that the decision must depend upon an ascertainment of the effect which the taxing of the income would have upon interests or purposes of the Sovereign. The nature of the relation between the official himself and the Crown—whether he was a servant, or an agent or occupied some other position—was considered only in the course and for the purpose of determining that crucial matter.

The cases in which a statutory provision not binding on the Crown must be denied an incidence upon a subject of the Crown because that incidence would be in legal effect upon the Crown fall into a few

(1) (1954) A.C. 584, at p. 618.

(2) (1954) A.C. 584; (1953) 1 Q.B. 248.

H. C. OF A. 1955.

WYNYARD INVESTMENTS PTY. LTD. v. COMMISSIONER FOR RAILWAYS (N.S.W.).

KITTO J.

broad classes. There is first the class of cases where a provision, if applied to a particular individual or corporation, would adversely affect the exercise of an authority which he or it possesses as a servant or agent of the Crown to perform some function so that in law it is performed by the Crown itself: see e.g. *Cooper* v. *Hawkins* (1); *Reg.* v. *McCann* (2); *Public Works Commissioners* v. *Pontypridd Masonic Hall Co.* (3). Next there is the class of cases in which a provision, if applied to a particular individual or corporation, would adversely affect some proprietary right or interest of the Crown, legal equitable or statutory: see *Wirral Estates Ltd.* v. *Shaw* (4). And finally there is an anomalous class of cases where a provision creating a liability by reference to the ownership or occupation of property would, in its application in respect of certain kinds of property, impose a burden upon the performance of functions which, though not performed by servants or agents of the Crown, are looked upon by the law as performed for the Crown. These are cases in which the property concerned is used exclusively for "the purposes of the administration of the government of the country" (to use Lord *Westbury's* expression in *Greig* v. *University of Edinburgh* (5)); the *rationale* of the doctrine being that such purposes are "to be deemed part of the use and service of the Crown" because they are "public purposes of that kind which, by the constitution of this country, fall within the province of government and are committed to the Sovereign": *Mersey Docks* v. *Cameron* (6).

Before turning to the instant case, one further general remark may be made. As I have said, in order that a case should be held to fall within any of these three classes, it must be found that the application of the relevant provision to the subject who invokes the Crown's immunity would be, in legal effect, an application of it to the Crown. But here again care is needed lest convenient shorthand expressions prove misleading. The question in such a case is not fully stated by asking, as often is asked, does the particular subject "represent" the Crown. The question is really not one of attributing to the subject the status of a representative of the Crown; for, even where "representative" is an apt word to use, representation of the Crown generally is not what such a contention must be understood as necessarily asserting. The question concerns only the relationship to the Crown in which the individual

(1) (1904) 2 K.B. 164.
(2) (1868) L.R. 3 Q.B. 677.
(3) (1920) 2 K.B. 233.
(4) (1932) 2 K.B. 247.
(5) (1868) L.R. 1 Sc. & Div. 348, at p. 354.
(6) (1865) 11 H.L.C. 443, at pp. 505, 465 [11 E.R. 1405, at pp. 1429, 1413].

stands in respect of the particular matter in which the impact of the relevant provisions is incurred. Whatever features of a case are relied upon as bearing upon the claim to the benefit of the Crown's immunity, they must always be looked at, as the Full Court of Victoria pointed out in *Victorian Railways Commissioners* v. *Herbert* (1) " with due regard to the nature of the immunity or privilege of the Crown which is claimed, so that attention may be directed to what is relevant to the particular enquiry which is being made " (2).

We are here concerned with a provision which (except upon performance of conditions) denies to a person whose reversion upon a leasehold interest in prescribed premises has become an interest in possession the remedies which the law would otherwise give him for the recovery of possession from the tenant whose lease has determined. It is clear on the face of the Act that this provision would not apply to the Attorney-General of New South Wales if he were to sue on behalf of Her Majesty in an action of intrusion to recover possession of land upon the determination of a lease from the Crown. Nor would it apply to any person who sued in an action of ejectment in respect of land vested in him, if he could prove that he held the land on trust for Her Majesty so that the possession when recovered would belong beneficially to the Crown: *Perry* v. *Eames* (3). But the immunity of the Crown can never inure for the benefit of a subject. Whoever asserts it must assert it on behalf of and for the benefit of the Crown: see *Bank voor Handel en Scheepvaart N.V.* v. *Administrator of Hungarian Property* (4).

Now, the Commissioner for Railways is a corporation, suing in this case as a party principal to the litigation, and claiming to recover possession of land which is vested absolutely in him both at law and in equity. Unless, in the statutes which incorporate him and govern his corporate situation, there are provisions which require a contrary conclusion, the case cannot be distinguished in principle from that which we had to consider in *Rural Bank of New South Wales* v. *Hayes* (5), where a statutory corporation was held to be bound by the very section in question here, s. 62 of the *Landlord and Tenant (Amendment) Act* 1948-1949 (N.S.W.). It was said in that case: " A corporate lessor which is not the Crown is bound by the Act; and it is nothing to the point that land of which the corporation is the lessor is held on behalf of the Government. It is a necessary consequence of the vesting of land in the corporation

(1) (1949) V.L.R. 211.
(2) (1949) V.L.R., at pp. 213, 214.
(3) (1891) 1 Ch. 658.
(4) (1954) A.C. 584, at pp. 607, 615.
(5) (1951) 84 C.L.R. 140.

H. C. OF A. 1955.

WYNYARD INVESTMENTS PTY. LTD. v. COMMISSIONER FOR RAILWAYS (N.S.W.).

Kitto J.

that the immunity of the Crown from the operation of the Act has no relevance in proceedings by the corporation to recover possession of the land " (1). No doubt a corporate lessor found to be a bare trustee for the Crown, or found to have been placed by some statute in a position analogous to that of a bare trustee for the Crown, would be outside the contemplation of this passage, for what was there being referred to was a corporation having statutory functions to perform with respect to the land in question. Such a corporation could not be acting as a servant or agent of the Crown in suing to recover possession of the land, for the hypothesis is that it is suing by virtue of a title which confers the right to possession at law. A provision that the corporation shall hold the land on behalf of the Government—and the reference in the passage quoted was not to the possible existence of a trust but to s. 19 of the *Government Savings Bank Amendment Act* 1913-1945 (N.S.W.) which the Bank had contended had this effect—that fact cannot be to the point, because the possession, when recovered by the corporation, will be the corporation's own possession for the purposes of its Act, not the Crown's possession. The judgment went on to say : " This is clearly the position in the present case, because the appellant is given by s. 48A (3) (k) of the *Government Savings Bank Act*, 1906 (as amended by Act No. 38 of 1947) a power of leasing exercisable for the purpose of carrying on its general banking business, so that the appellant sues in this case as a lessor in its own right and not in any sense on behalf of the Crown " (1). *Fullagar* J. made the same point when he said : " The rights which are not to be affected by the *Landlord and Tenant (Amendment) Act* are rights of the Crown, and the rights asserted in these proceedings are not rights of the Crown " (2).

The point which I regard the cases as insisting upon is that when one turns, as one must, to examine the special legislation under which a statutory corporation acts (in a case where there is no express extension of the relevant Crown immunity to the corporation), one does so for a precise purpose. It is not to ascertain whether there is in some vague sense an approximation of the corporation to a government department. The object in view is to ascertain whether the Crown has such an interest in that which would be interfered with if the provision in question were held to bind the corporation that the interference would be, for a legal reason, an interference with some right, interest, power, authority, privilege, immunity or purpose belonging or appertaining to the Crown. In the present case this means that the object of the

(1) (1951) 84 C.L.R., at p. 152.

(2) (1951) 84 C.L.R., at p. 153.

examination must be to discover whether the recovery of possession with which the *Landlord and Tenant (Amendment) Act* interferes if the Act binds the Commissioner for Railways, would be, in some legal sense, a recovery for the Crown. It cannot be so here because of any interest of the Crown in the land at common law or in equity, for it is not disputed that the entire fee simple, both at law and in equity, is in the Commissioner for Railways. Nor is it to be considered so by reason of the doctrine referred to in *Mersey Docks* v. *Cameron* (1) by which subjects of the Crown may be held exempt from the operation of statutes relating to property on the special ground that the property is devoted to purposes which are to be considered within the use and service of the Crown notwithstanding that the subjects concerned are not strictly servants or agents of the Crown. The purposes which attract that doctrine are such only as fall within the description given by Lord *Blackburn* in *Coomber* v. *Justices of Berks.* (2) when he spoke of "the purposes of the administration, or those purposes of the Government which are, according to the theory of the constitution, administered by the Sovereign" (3). Lord *Watson* meant nothing different, I think, when he spoke of "the primary and inalienable functions of a constitutional Government" (4). The description excludes many purposes which may be served by public authorities subject to varying forms and degrees of supervision, direction or control by individual ministers of the Crown or even by the Crown itself. It is not satisfied by the existence of a long-standing practice in a community to commit the task of serving a particular purpose to the hands of public departments or bodies, even though in that community the practice has been so widespread and has lasted so long that the function may be described as having become a "traditional" function of government there. No doubt it is true that in the history of this country most railways (though by no means all) have been run, by virtue of statutory authority, as (in a broad sense) State-owned enterprises, and that may enable them to be described as a governmental function in one sense; but the function "is not 'strictly governmental' in the sense of being a function . . . without which a civilized State cannot be conceived, a function with which the State cannot part": per *Higgins* J. in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (5). I entirely agree with the remark which *Jordan* C.J. made in *Skinner* v. *Commissioner for Railways* (6) founding himself

(1) (1865) 11 H.L.C. 443 [11 E.R. 1405].
(2) (1883) 9 App. Cas. 61.
(3) (1883) 9 App. Cas., at pp. 69, 70.
(4) (1883) 9 App. Cas., at p. 74.
(5) (1920) 28 C.L.R. 129, at p. 170.
(6) (1937) 37 S.R. (N.S.W.) 261, at p. 271; 54 W.N. 108, at p. 109.

H. C. OF A. 1955.

WYNYARD INVESTMENTS PTY. LTD. v. COMMISSIONER FOR RAILWAYS (N.S.W.).

Kitto J.

upon what was said by *Higgins* J. in the words I have just quoted and by *Isaacs* and *Rich* JJ. in *Federated Municipal & Shire Council Employees' Union of Australia* v. *Melbourne Corporation* (1): " a State railway is no more an inalienable function of government than a State brickworks " (2).

There remains for consideration what *Dixon* J. described in *Grain Elevators Board (Vict.)* v. *Dunmunkle Corporation* (3) as " the further possibility of the statute itself creating in the Crown a special right or interest, or congeries of rights or interests, in relation to the land which, either because of the degree of control they involve or of the beneficial enjoyment they confer, should be regarded as amounting to a form of property, not common law or equitable, but statutory " (4). Here again the fact that in Australia railways have come to be regarded as more naturally the subject of public than of private enterprise seems to me to afford no assistance towards the solution of the problem. The investigation to be made is limited to the provisions of Acts, that is to say the Acts which apply specially to the commissioner; and its purpose is to see whether, in respect of the possession of land vested in the commissioner, the Crown has any statutory interest or purpose which would be defeated or interfered with if s. 62 were held to prevent the commissioner from succeeding in this case.

The main statute regulating the government railways in New South Wales is the *Government Railways Act* 1912-1953. That Act constituted a body corporate by the name of the " Railway Commissioners for New South Wales " consisting of a chief commissioner and two assistant commissioners, and it established the commissioners as the authority to carry out the Act: s. 4. This situation was altered by amending Acts in a manner which was discussed by this Court in *Commissioner for Railways (N.S.W.)* v. *Hailey* (5). The *Transport (Division of Functions) Act* 1932 (N.S.W.) established a Ministry of Transport divided into three departments. One of these is the Department of Railways, to be administered by the Commissioner for Railways (s. 3 (1) (a)). He is made a body corporate, and is to exercise and perform in respect of railways the powers, authorities, duties and functions formerly exercised and performed by a body called the Transport Commissioners of New South Wales: s. 4 (1), (3). These commissioners in turn had been set up by the *Ministry of Transport Act* 1932 (N.S.W.) and given the powers etc., of the Railway Commissioners for New South Wales. The *Government Railways Act* must therefore be read for

(1) (1919) 26 C.L.R. 508.
(2) (1919) 26 C.L.R., at p. 531.
(3) (1946) 73 C.L.R. 70.
(4) (1946) 73 C.L.R., at p. 84.
(5) (1938) 60 C.L.R. 83.

present purposes as if references to the commissioners were references to the Commissioner for Railways.

The first provision of that Act which should be mentioned here is s. 11. Read as I have indicated, it provides that for the purposes of the Act there shall be vested in the commissioner for an estate in fee simple (*inter alia*) all Crown and other lands taken under the authority of any Act authorizing the taking of land for railway purposes. Section 4 gives the commissioner power to take, purchase, sell, lease, and hold lands for the purposes of the Act, but qualifies these powers by providing that no sale or lease of any such lands, except as provided in s. 18, shall have any force or effect until the same has been approved by the Governor. What s. 18 provides is that the commissioner may lease certain kinds of premises for any term not exceeding five years on such conditions and at such rent as he may determine. This, however, is subject to a provision made in s. 4 (5) of the *Transport* (*Division of Functions*) *Act* 1932 (N.S.W.), inserted therein by s. 13 of the *Transport and Highways Act* 1950 (N.S.W.) which reads: "In the exercise and performance of the powers, authorities, duties and functions conferred and imposed upon the Commissioner for Railways by or under this or any other Act, such commissioner shall be subject to the control and direction of the Minister". The position with respect to the land we are considering, therefore, is that if the commissioner recovers possession of it from the appellant he may lease it for not more than five years subject to any directions of the minister (assuming that the land is, as it seems to be, within s. 18); or he may sell or lease it with the approval of the Governor under s. 4, subject to any directions of the minister; or he may make use of it himself for any purpose of the Act, subject again to any directions of the minister.

I do not think that there is any material provision of the Act except those I have mentioned. It is true that s. 14 requires all moneys payable to the commissioner under any Act to be collected and received by him on account of Her Majesty. This might entitle the commissioner to claim the benefit of the Crown's priority in respect of moneys owing to him under an Act; though it may be noticed in passing that, read with s. 41B (3), the provision differs from the South Australian provision considered in *Re Commonwealth Agricultural Service Engineers Ltd.* (1) and also from the Victorian provision considered in *Re Oriental Holdings Pty. Ltd.* (2). But we are not here concerned with that topic. We are concerned only with the recovery of possession of land of which the commissioner as a corporate body is the tenant in fee simple at law

(1) (1928) S.A.S.R. 342, at p. 348. (2) (1931) V.L.R. 279.

H. C. OF A. 1955.

WYNYARD INVESTMENTS PTY. LTD. v. COMMISSIONER FOR RAILWAYS (N.S.W.).

Kitto J.

and in equity, where the only statutory provisions which restrict his power to use the land as he sees fit within the scope of his corporate purposes are two, namely that which requires the Governor's approval to sales and certain leases and that which subjects him to the general control and direction of a minister.

Is it right to say that these provisions place the Crown in such a position in relation to the possession of such land that a decision that s. 62 binds the commissioner would be inconsistent with the undoubted proposition that that section does not bind the Crown ? I cannot think so. The Governor has only a power of veto in respect to sales and some leases, and the application of s. 62 to the commissioner cannot in any circumstances affect that power. The minister may exercise his power of control and direction in the exercise by the commissioner of the powers etc., conferred on him by any Act, but the possession of land which is vested in the commissioner remains his in every legal sense. He does not hold it, when he has it, as a trustee for either the minister or the Crown. If the land be put to uses outside the purposes of the *Government Railways Act*, it is the commissioner who alone can take action, curial or other, to terminate those uses. The use to which he puts the land may well be affected by directions he receives from the minister as to the exercise of his statutory powers, authorities, duties or functions ; but his exercise of the right of possession which his legal title gives him can never be, in law, an exercise by the Crown by its servant or agent. To paraphrase Lord *Haldane's* language in *Metropolitan Meat Industry Board* v. *Sheedy* (1), there is nothing in the Acts which makes the possession of the land the minister's as distinguished from the commissioner's and *a fortiori* there is nothing which makes the possession of the land the Crown's as distinguished from the commissioner's : see *Greig* v. *University of Edinburgh* (2).

It remains to consider one provision of the *Transport (Division of Functions) Act* 1932-1952 (N.S.W.) which I have not yet mentioned. Section 4 (2) of that Act provides : " For the purposes of any Act the Commissioner for Railways shall be deemed a statutory body representing the Crown ". In the Supreme Court a majority of their Honours treated this provision as if it meant that, in considering the applicability of any provision of any Act to the commissioner, he shall be deemed to represent the Crown. If that were the true meaning, the result in this case would necessarily be that the immunity of the Crown from s. 62 of the *Landlord and Tenant*

(1) (1927) A.C. 899, at p. 905.

(2) (1868) L.R. 1 Sc. & Div., at p. 353.

(*Amendment*) *Act* would involve the immunity of the commissioner as a notional agent of the Crown in relation to the possession of the subject land. But the language of s. 4 (2) does not appear to me to bear this construction. It is, no doubt, more than a definition section, but its natural meaning would seem to be that whenever you find in an Act a provision dealing with statutory bodies described as representing the Crown, you are to deem the Commissioner for Railways to be such a body and apply the Act to him accordingly.

Several considerations point to this construction. The limiting words, " for the purposes of any Act ", suggest an intention to prescribe a hypothesis as a means rather of extending the application of statutory provisions, even if they be exempting provisions, than of supplying a ground for their non-application. Moreover, it is difficult, as *Roper* C.J. in Eq. in effect pointed out, to suppose that an extension of the Crown immunity from the operation of statutes could have been intended without an intention to give the commissioner the advantages enjoyed by agents of the Crown not only for the purposes of Acts but for all the purposes of the law. Then, too, s. 4 (2) does not provide that the commissioner shall be deemed to represent the Crown : he is to be deemed " a statutory body representing the Crown ". The expression has about it the ring of a stereotyped formula used in statutes as a generic description of public bodies of a more or less fixed class which are repeatedly grouped with the Crown as a subject of legislation, that is to say as the subject of specific exempting provisions. This impression is strongly confirmed when one finds the very phrase occurring again and again in New South Wales statutes passed or amended in the last forty years : in s. 4 of the *Local Government Act* 1919 ; in s. 4 of the *Metropolitan Water, Sewerage and Drainage Act* 1924-1954 ; in s. 2 of the *Hunter District Water and Sewerage Act* 1892-1928 ; in s. 3 of the *Hunter District Water, Sewerage and Drainage Act* 1938-1952 ; in s. 2 of the *Sydney Corporation Act* 1932-1940 ; in s. 2 of the *Profiteering Prevention Act* 1920 ; in s. 4 of the *Moratorium Act* 1932-1950 ; (with " statutory " omitted) in s. 2 (2) of the *Gold Clauses* (*Construction*) *Act* 1934 ; in s. 3 of the *Broken Hill Water and Sewerage Act* 1938-1951, and in s. 4 of the *Drainage Act* 1939-1940. The course followed in these Acts is to exempt from some of their provisions not only the Crown but also, by the title of statutory body (or bodies) representing the Crown, certain named public bodies and (in most cases) such other public bodies as may be added to the list by proclamations. The natural meaning of s. 4 (2) of the *Transport* (*Division of*

H. C. OF A. 1955.

WYNYARD INVESTMENTS PTY. LTD. v. COMMISSIONER FOR RAILWAYS (N.S.W.).

Kitto J.

Functions) *Act* appears to me to be that the commissioner shall have such exemptions as are thus provided for. So understood, it is far from being a provision attracting to the commissioner the immunity which the Crown enjoys from the application of all statutes which do not bind the Crown by express words or necessary implication or expressly exempt the Crown. Indeed it suggests a deliberate decision by the legislature, when concerning itself with the very question of the extent to which statutes shall bind the commissioner, not to extend to him the immunities of the Crown, but to grant him those immunities only which statutes specially allow to a limited class of bodies considered to be sufficiently governmental in character. It was obviously a possible course, though no doubt it might have had its disadvantages as well as its advantages, to provide that in all that he does, or even in a limited class of things wide enough to include holding land and exercising rights with respect to the possession of land, the commissioner should be deemed to be acting on behalf of the Crown, or, more directly, that for all purposes or all the purposes of statutes he should enjoy the Crown's immunities. But what is actually provided is something strikingly different. A clear intention appears to me to emerge that, except as regards Acts which specially exempt statutory bodies described as representing the Crown, the commissioner shall be subject, to the same extent as other people, to the laws which Parliament sees fit to make from time to time. And when Parliament came to enact the *Landlord and Tenant* (*Amendment*) *Act* it did not exempt statutory bodies representing the Crown. It exempted only the Crown itself and one corporation, the Housing Commission of New South Wales.

In the result I am of opinion that the Commissioner for Railways is not entitled to invoke the Crown's immunity in order to escape from the provisions of the *Landlord and Tenant* (*Amendment*) *Act*.

Accordingly I would allow the appeal and reverse the order of the Supreme Court.

Appeal dismissed with costs.

Solicitors for the appellant, *Harold T. Morgan & Sons*.

Solicitor for the respondent, *Sydney Burke*, Solicitor for Railways.

R. A. H.