HIGH COURT OF AUSTRALIA

Minister for Works for Western Australia

Vs.

Gulson

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

3 October 1944

Latham C.J.

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

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

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

It was not contended that the Commonwealth Parliament could not, by suitably framed legislation, bind the Government of a State in respect of the subject matter of the Regulations. In the *Engineers'*

Case[3] it was decided that laws validly made by authority of the Commonwealth Constitution bind, so far as they purport to do so, not only the people of every State, considered as individuals, but also as political organisms called States—"in other words bind both Crown and subjects."

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

The appellant relies upon the general rule of construction that the Crown is not bound by a statute unless there is an express provision therein binding the Crown, or it appears by necessary implication that it was intended to bind the Crown. This principle is not a hard and fast rule, but a rule of construction intended to give effect to the intention of the legislature. The grounds of the presumption have been variously expressed, but, whatever the origin of the rule may be, it is now well established that prima facie legislation does not apply to the government of the country, but to the persons in the country who are subject to the legislative powers of the parliament. In the case of a unitary State the application of the principle does not meet certain difficulties which arise under a federal organization of legislative and other governmental power. In the case of a unitary State the principle may be expressed by saying that the King in Parliament is to be presumed to legislate for subjects and not for the Crown, unless a contrary intention clearly appears. In a federal system the States or provinces cannot be described as "subjects" of the federal government, but, as already shown by the passage to which I have referred in the *Engineers' Case*[4], the Commonwealth Parliament may legislate so as to bind a State. Similarly, a State may legislate so as to bind the Commonwealth (*Pirrie v. McFarlane*[5]).

The application of this particular rule of construction in a federal system was carefully considered in *R. v. Sutton*[6] (the *Wire Netting Case*), where it was held that the rule of construction which prevented the Crown being affected by statutes in the absence of express mention or necessary implication did not apply in respect of all governments in the world which represented the Crown, but only in respect of the government which had authority in the community for which the parliament was legislating. The Commonwealth Parliament has authority in the community of the Commonwealth; a State Government has authority in the community of the State. Mr. Justice *O'Connor* said that the rule was "applicable in the inquiry whether a Commonwealth Act binds the King as representing the Commonwealth. But where the inquiry is whether the Commonwealth Act binds the King as representing one of the States it can have no relevancy"[7]. All the Justices concurred in this view—see the report[8]. The same principle was applied in the *Steel Rails Case*—*Attorney-General of New South Wales v. Collector of Customs for New South Wales*[9].

The references in these two cases to the exclusive character of the customs power do not limit the scope of the principle to laws passed under an exclusive power. This clearly appears from the *Engineers' Case*[10], in the joint judgment of *Knox* C.J., *Isaacs, Rich* and *Starke* JJ.:—"No distinction is made in the Constitution as to Commonwealth authority between its exclusive and its concurrent powers. That distinction affects the legislative power of the States, but not the effect of Commonwealth Acts once made."

In *In re E. O. Farley Ltd.*[11] it was said by the Full Court of New South Wales that in the *Engineers' Case*[12] the doctrine enunciated in *R. v. Sutton*[13], as above stated, was emphatically repudiated. This view is evidently based upon what was said in the *Engineers' Case*[14] where reference was made to arguments before the Court in which distinctions, of which the Court

disapproved, had been drawn between the "Imperial King," the "Commonwealth King," and the "State King" as if they were separate "persons"; and the Court emphasized the unity of the Crown. But no critical reference was made to the decision in *R. v. Sutton*[15]. Indeed, the decision in the case was reaffirmed by the reference to it by *Knox* C.J., *Isaacs, Rich* and *Starke* JJ.[16] and by *Higgins* J.[17]. I can find nothing in the *Engineers' Case*[18] which should be regarded as overruling or disapproving the decision or the principle of the decision in *Sutton's Case*[19], except that it must be taken that the Court in the *Engineers' Case*[20] did not approve of the suggestion of *Griffith* C.J. made in *Sutton's Case*[21], and by *Isaacs* J.[22], that "the Crown, as the head of the Commonwealth Government, is for many, if not all, purposes a separate juristic person from the Crown as head of a State Government." In the *Engineers' Case*[23] the Court said the Crown was one juristic person, and not several juristic persons, but it did not comment upon the rule laid down in *Sutton's Case*[24], which was expressed by *Isaacs* J. in that case by saying, with respect to Commonwealth statutes, that "there can be no room for the contention that the Crown, as representing the States, is not bound without express words or necessary implication"[25]. Indeed, any comment upon that rule would have been clearly irrelevant in the *Engineers' Case*[26]. In that case the Court was considering whether a Commonwealth Act (the *Arbitration Act*) which expressly purported to bind the States could validly do so. In view of the explicit reference to the States in the Act, any consideration of the question whether or not a Commonwealth Act should be presumed not to bind the States unless they were expressly mentioned would have been completely irrelevant. No reference whatever to this question was made in the *Engineers' Case*[27], in which many decisions were reviewed and some were expressly overruled. *Sutton's Case*[28] was not expressly overruled, but was expressly said to be a correct decision that the Crown in right of a State was bound by a general Commonwealth Act (the *Customs Act*) which contained no reference to States.

After the *Engineers' Case*[29], in *Pirrie v. McFarlane*[30], *Higgins* J. referred to *Sutton's Case*[31] as a case in which it was held by all the judges of the Court that the rule of construction as to the King not being bound by a statute "in a Commonwealth Act applies to the King as head of the Commonwealth Government, not to the King as head of the State Government." In the last-mentioned case *Higgins* J. emphasized the distinction between the King in his Federal capacity and the King in his State capacity: "The King in his State capacity is presumed, prima facie, not to mean to bind himself; and it is generally expedient to use express words in a State Act in order to bind him and his State servants. But in a State Act no such presumption arises as to Federal servants—servants of the King in his Federal capacity; and where there is no such presumption, there is no need for express words"[32]. Accordingly a State Act was interpreted by *Higgins* J. and the majority of the Court as applying to Commonwealth servants, not by reason of an express provision in the Act stating that servants of the Crown should be bound, but, as explained by *Starke* J.[33] (with whom *Knox* C.J. agreed), because the State had power to make the general law in question, and there was no "limitation upon the States, expressed or implied in the Constitution, with respect to interference with persons who are Federal officers."

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

States.

What I have said appears to me to provide a reply to the contention that because the Crown is one and indivisible the rule that the Crown is not bound by a statute expressed in general words applies so as to create a presumption that a State Government is not bound by any Commonwealth Act (or regulation). The principle that the Crown is one and indivisible is very important and significant from a political point of view. But, when stated as a legal principle, it tends to dissolve into verbally impressive mysticism. It is of little assistance in a practical system of law where a Commonwealth can sue a State, a State can sue a Commonwealth, and a State can sue a State; where the same position exists as between a Dominion and a Province in Canada; and where, to take another example, the Dominion of New Zealand has the same share in the Government of the Union of South Africa as the Union has in the Government of the Dominion, namely, no share at all. Indeed, the statement that the Crown is one and indivisible is almost invariably followed by a sentence beginning with "but," or is introduced by a sentence beginning with "though." I take as an example a passage from *In re Silver Brothers Ltd.*[34]:—"It is true that there is only one Crown, but as regards Crown revenues and Crown property by legislation assented to by the Crown there is a distinction made between the revenues and property in the Province and the revenues and property in the Dominion. There are two separate statutory purses. In each the ingathering and expending authority is different." Another example is to be found in the *Engineers' Case*[35], where it is said that "though the Crown is one and indivisible throughout the Empire, its legislative, executive and judicial power is exercisable by different agents in different localities, or in respect of different purposes in the same locality, in accordance with the common law, or the statute law there binding the Crown." Similar statements that the Crown is indivisible, followed by the necessary and obvious qualification that in practice the law has to deal with a number of quite separate governments, all representing the Crown, can be found in *R. v. Sutton*[36]; the *Engineers' Case*[37] and *The Commonwealth v. Colonial Combing, Spinning and Weaving Co. Ltd.*[38].

It may be suggested that certain cases show that, in relation to all statutes of all parliaments within the Empire, the doctrine of the unity and indivisibility of the Crown does really operate because it has been held that Crown debts wherever arising take priority over other debts. Thus in *In re Oriental Bank Corporation; Ex parte The Crown*[39], Crown debts originating in Victoria, Ceylon, Mauritius and Natal were all treated as having priority over other debts in the winding up in England of a company incorporated in England. *Chitty* J. said: "No distinction was drawn in argument, and very properly, between the rights and prerogatives of the Crown suing in respect of Imperial rights, and the rights of the Crown with regard to the colonies"[40]—Cf. *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*[41]; *In re Silver Brothers Ltd.*[42]; *Federal Commissioner of Taxation v. Official Liquidator of E. O. Farley Ltd.*[43]. But it should be observed that in the *Oriental Bank Corporation Case*[44] what were called two prerogatives of the Crown were in question (as to which see *Food Controller v. Cork*[45])—not only the "prerogative" that the Crown was not bound by a statute in the absence of express words or necessary implication, but also the prerogative based upon the long-established rule of the common law that whenever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition, the Crown's right prevails: See *Oriental Bank Corporation Case*[46]; *In re Henley & Co.*[47]. The latter prerogative is based upon what was described in *R. v. Wells*[48] as "an incontrovertible rule of law, that where the King's and the subject's title concur, the King's shall be preferred"—see *Commissioners of Taxation (N.S.W.) v. Palmer*[49]. In the other cases just mentioned relating to priority of Crown debts (*Maritime Bank Case*[50], *Silver Brothers' Case*[51], *Farley's Case*[52]), no reference was made to the presumption that the Crown is not bound by a statute unless expressly mentioned, no reasoning was based upon

that presumption, and those cases are not authorities with respect to the meaning or the scope of that presumption. In the *Oriental Bank Corporation Case*[53] the court did not have to consider any question relating to the application of the presumption in a federal system of government. These cases are authorities that "the incontrovertible rule of law" as to priority of Crown debts should be applied unless a statute clearly overrides it. But they do not, in my opinion, affect in any way the clear decision of five Justices in *R. v. Sutton*[54] that the presumption as to the Crown not being bound by a statute enacted in general terms, with no express or implied reference to the Crown, should not be applied so as to bring about either State exemption from Federal statutes or Federal exemption from State statutes. The question as to whether a Commonwealth statute applies to a State or whether a State statute applies to the Commonwealth should be determined in each case as a matter of construction by reference to its object and purpose as ascertained by a consideration of the specific provisions of the statute concerned, independently of any presumption as to the Crown prima facie not being bound in either case. This view makes it unnecessary for me to consider the contention of the Commonwealth (intervening) based upon *Sydney Harbour Trust Commissioners v. Ryan*[55], that even if the rule of construction did apply, it was applicable only to the prerogative or regal rights of the Crown, and not to such matters as a weekly tenancy, in relation to which (it was contended) the Crown should be regarded as being in exactly the same position as any other landlord.

The question, therefore, in my opinion, is simply a question of construction of the Regulations. The question is whether the Regulations apply to a State Government and its Ministers. They are capable of so applying according to their terms, because the words "lessor" and "lessee" are wide enough to include State Governments and their Ministers. There is, as already stated, no difficulty arising from lack of power to bind State Governments. As *Higgins* J. said in the *Engineers' Case*[56], many Commonwealth laws must, without express mention of State Governments, be construed as applying to them: See also per *Griffith* C.J. in the *Steel Rails Case*[57]. I mention by way of example laws dealing with customs, postal services, lighthouses, quarantine, weights and measures, bills of exchange and promissory notes, and immigration. Such laws, though expressed in general terms, would, I suggest, prima facie bind the States and servants of the States.

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

The object and purpose of the Regulations is plainly to protect tenants in their occupation of premises at a time when there is a great shortage of accommodation, and when many heads of families are absent from their homes. The object is to prevent ejection of tenants by a landlord except in certain specified circumstances, which are set forth in reg. 15 (2). The Regulations are not designed to protect landlords, but to limit the rights of landlords in respect of tenants. The position of a tenant who hires a cottage from the Crown is exactly the same *qua* tenant as if an individual or a company were his landlord. I agree with what *Dwyer* J. said in the Full Court of Western Australia: "If war-time necessities require that some protection in the way of fixation of rent, security of tenure, and so forth, should be given to tenants, I can find no real reason why tenants of properties belonging to a State should be in any different position from other tenants. To leave any considerable body of tenants without protection would prejudice the stability of the whole protective structure. It is notorious that the State, through its various instrumentalities, for example those dealing with housing schemes, farm settlements, and similar matters, has a large number of tenants, probably far beyond those holding from any person." Accordingly, in my opinion, there is no reason to be derived from the general object and purpose of the Regulations which would exclude the

applicability of the Regulations to a State Government which had chosen to let premises as a residence.

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

The Regulations contain other provisions for the protection of tenants—e.g., prohibiting sale or leasing within twelve months after recovery of possession under the Regulations, preventing discrimination against tenants who have children, requiring a court to take into consideration the availability of alternative accommodation for a dispossessed tenant, prohibiting the receipt and giving of bonuses in addition to rent. These provisions, and the other provisions of the Regulations, are as capable of application to a State which is a landlord as to any individual person or corporation which is a landlord, and the necessity for the protection of tenants is the same in all cases.

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

Rich J.

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

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

statutes, and the Regulations in question are not expressed to bind the Crown. It has been contended that, in the case of a Commonwealth statute or regulation, the rule applies only to the Crown in the sense of the Government of the Commonwealth and not to the Crown in the sense of the Government of a State, and alternatively, if this be not correct, that an implication that the relevant regulation binds the Crown is necessarily involved in the nature of its provisions. I disagree with both contentions.

It has been decided by the highest authority that, in constitutional theory, the Crown is one and indivisible (*Williams v. Howarth*[58]). It is by the Crown that all legislative and administrative authority is exercised throughout the Empire, although in each constitutional area such authority can be exercised by the Crown only through the agencies of the appropriate parliament and the appropriate group of constitutional ministers, so that, legalistically, it would be more strictly accurate to speak of the State of Western Australia in the right of the Crown than of the Crown in the right of the State of Western Australia (*Theodore v. Duncan*[59]). Thus, the prerogatives of the Crown are the prerogatives of a single, universal Crown, and enure for the benefit of each and every part of the Empire, save to the extent to which in any part any particular prerogative has been abrogated or diminished (*In re Bateman's Trust*[60]). The principle was applied by this Court in *Federal Commissioner of Taxation v. Official Liquidator of E. O. Farley Ltd.*[61] in relation to competing rights of the Crown as creditor to be preferred above other creditors of equal degree, for the benefit of different treasuries. The constitutional principle that the Crown is one and indivisible is not limited to cases in which it is the scope of the prerogative which is in question. This is clear from *Williams v. Howarth*[62]. It applies to the Crown in all its capacities; but it is not inconsistent with this that the Crown should, by appropriate parliamentary action, be shorn, in certain of its fields, of rights or immunities which it retains in others. The theory of the unity of the Crown produces, in relation to the rule now in question for the construction of statutes, the twofold result that, first, the Crown in all its capacities is prima facie not bound by a statute made in any part of the Empire unless this is provided for expressly or by necessary implication, and second, a provision that a statute binds the Crown binds it prima facie in all its capacities unless a contrary intention appears. The second of these results is established by such cases as *Attorney-General for Quebec v. Nipissing Central Railway Co.*[63] and *Pirrie v. McFarlane*[64]: the first is a corollary of the second. It is true that a different opinion was expressed in *R. v. Sutton*[65], as one of the grounds for holding that the Government of New South Wales was bound by a *Commonwealth Customs Act*; but the ghost of the heresy of Crown schizophrenia propounded in that case was laid in such explicit terms in the *Engineers' Case*[66] (where *R. v. Sutton*[67] was cited to lead up to an observation that "the utmost confusion and uncertainty exist as the decisions now stand") that I feel some surprise at the attempt which has been made to resuscitate it.

The regulation in question not being expressed to bind the Crown, prima facie it does not bind the Crown in any of its capacities; and since there is, in my opinion, nothing in its nature or terms which necessarily implies an intention to bind the Governments of the States, I am of opinion that the appeal should be allowed: Cf. *Attorney-General v. Hancock*[68]; *In re Hutley's Legal Charge; Barnes v. Hutley*[69].

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

Starke J.

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

In July 1943 the premises were urgently required for official purposes, and the appellant determined the tenancy in accordance with its terms. But the respondent did not vacate the premises and ultimately relied upon the provisions of the *National Security (Landlord and Tenant) Regulations*, which provide that, except in certain cases immaterial here, the lessor of any prescribed premises shall not give any notice to terminate the tenancy or take or continue any proceedings to recover possession of the premises from the lessee or for the ejectment of the lessee therefrom. "Prescribed premises" means any premises, with certain exceptions immaterial here, and includes any part of any premises and any land or appurtenances leased with any premises and extends to any specified premises which the Minister administering the Regulations may by order declare.

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

The constitutionality of the Regulations was not attacked on the argument before this Court. By a rule of construction, it was said, however, that the Crown is not bound by a statute unless specially named or included by necessary implication despite the distinction taken in *R. v. Sutton*[70] between the Crown in right of the Commonwealth and the Crown in right of the States. A rule of construction is not, however, "inflexible, but is merely a presumption in favour of a particular meaning in case of ambiguity" (*Craies* on *Statute Law*, 4th ed. (1936), p. 7). So the construction of the Regulations depends upon the language used in relation to the subject matter. Ordinarily it may be said, as was said in *Attorney-General v. Donaldson*[71], that prima facie the law as made by Parliament is made for subjects and not for the Crown. And, assuming, that which I am not prepared to concede, that the Commonwealth can regulate the land policies of the States in relation to their tenants under the defence power, still such regulations would require the most explicit and the clearest words. The regulation in the present case certainly uses general words, but that is not enough, and an examination of various provisions in the Regulations indicates that they concern the relationship of landlord and tenant between subject and subject. Thus the Regulations, if they apply to the States, make no provision for determination of tenancies in cases in which the premises are urgently required, as in this case, for public purposes. And, further, they provide that the premises shall not be sold or agreed to be sold until after the expiration of a period of twelve months immediately succeeding the date on which possession was obtained (reg. 15 (10)), and prohibit the refusal to let dwelling-houses to an applicant with a family (See reg. 20, sub-regs. 1, 3 and 4), and require that an order shall not be made for the recovery of possession of any prescribed premises unless the court is satisfied that suitable alternative accommodation in lieu of the prescribed premises is immediately available for the accommodation of the person occupying the prescribed premises (reg. 15 (14)), and prohibit contracting out (reg. 17), all which provisions are singularly inapt if applied to political bodies such as the States and inconsistent, as I think, with their constitutional position.

The appeal should be allowed.

McTiernan J.

In my opinion this appeal should be dismissed.

It is settled by the case of *R. v. Sutton*[72] that the decision of the question whether the Executive Government of any State is bound by a Commonwealth statute is not governed by the rule of construction regarding the application of a statute to the Crown in a unitary system of government. That rule, generally stated, is that the Crown is not bound by a statute unless expressly mentioned or it appears by necessary implication that the statute was intended to bind the Crown.

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

The principle applied in reaching the decision was stated by *Griffith* C.J. in these words: "This being the meaning of the rule, it follows that it does not apply to every person who in any part of the world represents the Crown, but only to those representatives of the Sovereign who have executive authority in the place where the law applies, and, even there, only as to matters to which that executive authority extends"[73]. The principle is stated by *Barton* J. in these words: "It is its own Executive Government, in this case that of the Commonwealth, that the Parliament is deemed not to include by general words unless that construction be clear and indisputable upon the text of the Act. A State Executive cannot claim the protection of the doctrine where it is not the King's agent. The Federal Executive is the King's only agent in cases where the Federal power is exclusive. When that power wholly occupies the field, as in the case of the control of the customs, the State Governments are ex necessitate out of that field, which knows as occupants one government and one people, the Australian Government, and the Australian people who give it life"[74]. This statement is, it seems to me, applicable to a law made by the Commonwealth under concurrent powers: such a law is paramount over State law which is inconsistent with it. *O'Connor* J. said:—"Such being the principle upon which the rule of construction rests, it is obviously applicable only in the determination of the question whether the King, as representing the community whose legislation is under consideration, is or is not bound by enactment. It cannot be applied to determine whether the enactment binds the King as representing some other community. It is applicable in the inquiry whether a Commonwealth Act binds the King as representing the Commonwealth. But where the inquiry is whether the Commonwealth Act binds the King as representing one of the States it can have no relevancy. Coming now to the application of the principle of construction to the enactments in question, it would follow that, although that principle may be used to ascertain whether the King, as representing the Commonwealth, is bound by the Customs Act, it cannot be used in the inquiry whether the King, as representing the community of New South Wales, is bound by the Constitution or by the Customs Act. In such a case the obligation of the Crown as representing the community of New South Wales to obey the Constitution and laws, such as the Customs Act passed under its authority, depends upon entirely different considerations"[75]. *Isaacs* J., as he then was, said:—"No doctrine of law, however applicable to the purely unitary form of government, can, if inconsistent with the great, essential and dominant purpose of the Federal Constitution, be allowed to prevail. Any theory, therefore, is inadmissible which would permit the States, merely because allegiance is owed to the same Crown, to claim entire exemption from the general operation of a Federal law, regulating a matter of national concern, and made by virtue of a granted power of such a nature that the exemption would or might either utterly frustrate the legislation or render it practically

ineffective. The regulation of foreign trade and commerce and the imposition of customs duties are necessarily powers of that character"[76]. *Higgins* J. said:—"It seems to me to be also correct to say that the doctrine of construction applies to the Government of the State in State Acts, to the Government of the Commonwealth in Federal Acts. In other words, the Crown to be considered in applying the doctrine to a Customs Act is the Crown of the Commonwealth—the separate juristic person referred to in Municipal Council of Sydney v. The Commonwealth2(1904) [1904] HCA 50; 1 C.L.R. 208, at p. 231.. To my mind, indeed, if ss. 106-109 of the Constitution be rightly considered, most of the difficulties as to the conflict of powers will vanish. The States' laws, and the States' powers to make laws, are all subject to the Constitution; and the Commonwealth laws made under the Constitution override any conflicting State laws made within the States' powers; and, so far as regards customs machinery provided by the Commonwealth Parliament, the State officials must submit to it as if they were private persons. They are not servants of the King so far as regards importation; and the burden lies upon them, as it lies on other subjects of the King, of showing that they are exempted, without express words to that effect, from the obligations created by a Federal Act"[78].

The Regulations now in question do not in express terms bind any Executive Government. It would follow from *R. v. Sutton*[79] that if the provisions contained in the Regulations had been enacted under the defence power as a statute no presumption would arise that Parliament did not intend to bind the Executive Government of any State. The principle established by *R. v. Sutton*[80] is applicable to regulations made by the Executive Government of the Commonwealth as well as to statutes passed by the Commonwealth Parliament. If regulations are based upon a statute made in the exercise of any legislative powers under which the Commonwealth may pass laws binding on the States the construction of the regulations is not governed by a presumption that they are not intended to bind the Executive Government of any State unless it is expressly mentioned or it is a necessary inference that this agency of the Crown is bound. Such regulations, if validly made, would bind the Executive Governments of the States if the language of the regulations in its ordinary natural sense covers them and they are not expressly or by necessary implication excepted.

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

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

In my opinion the doctrine of *R. v. Sutton*[81] regarding the application of Federal law to the Executive Government of a State is not impaired by any other decision and it provides a sound ground for holding that the appellant is bound by reg. 15; nothing that has been decided on the

question whether the Crown is indivisible implies that the Executive Governments of the several States cannot be bound by a Federal law if the Executive Government of the Commonwealth is not bound by it.

Williams J.

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

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

The crucial question that arises on the appeal from the Full Court to this Court is whether these Regulations are binding upon His Majesty as the sovereign head of the State of Western Australia. The appellant relies upon the principle of construction that where the prerogative, rights, or property of the Crown are affected, the Crown is not bound by a statute unless it is named in it or there arises a necessary implication from the purpose and provisions of the statute that it was intended to bind the Crown. Counsel for the Commonwealth submitted that the principle of construction "has been sometimes misunderstood and extended beyond the purpose for which it was laid down," and that the true principle is that "the King cannot in any case whatever be stripped by a statute, which does not specifically name him, of any part of his ancient prerogative, or of those rights which are incommunicable and appropriated to him as essential to his regal capacity" (*Sydney Harbour Trust Commissioners v. Ryan*[82]). But it is clear, I think, that the principle applies to all property vested in the Crown, or in some Minister (as in the present case), or public authority on behalf of the Crown. For instance, in *Gorton Local Board v. Prison Commissioners*[83] the principle was applied where the facts were very similar to the present case because the question arose whether plans for two blocks of houses which were to be built for officers' quarters on part of the land on which a prison was erected had to be approved by the Local Board, and that case was followed in *Cooper v. Hawkins*[84], where the question was whether a locomotive owned by the Crown and driven by a servant of the Crown on Crown service was subject to the *Locomotives Act 1865* Imp.. The principle has been applied to exempt premises owned by the Crown from the operation of the *Rent Restrictions Acts 1920 and 1923* Imp. (*Wirrall Estates Ltd. v. Shaw*[85]). It has also been applied by the Privy Council to the case of debts due to the Crown (*Commissioners of Taxation (N.S.W.) v. Palmer*[86]).

Neither the *National Security Act* nor the *Landlord and Tenant Regulations* name the Crown expressly. If the Act was not intended to bind the Crown, regulations made under the Act could not

do so (*Food Controller v. Cork*[87]; *Re Keep, McPherson Ltd.*[88]). But, in the case of the Act, it follows, I think, from the decision of the House of Lords in *Attorney-General v. De Keyser's Royal Hotel Ltd.*[89], and particularly from the speech of Lord *Atkinson*[90], that the Act, which deals with what is the special trust and duty of the King to provide for, namely the defence and security of the realm, and prescribes the methods by which that purpose is to be effected, discloses a sufficiently clear and unmistakable intention to bind the Crown.

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

It has been contended, however, that, in the case of Commonwealth legislation, the principle of construction only applies to the Crown as sovereign head of the Commonwealth, and that the Crown as sovereign head of a State is in no better position than a private individual. This contention found favour with the Full Court of Western Australia, and is supported by the view, expressed by this Court in *R. v. Sutton*[91], that, in the construction of Commonwealth statutes relating to matters within the exclusive control of the Commonwealth Government, the principle only applies to His Majesty as head of the Commonwealth Government and not to His Majesty as head of a State Government. If this is the true position with respect to Commonwealth Acts passed in the exercise of exclusive powers, it is difficult to see why the position should not be the same in the case of statutes passed in the exercise of concurrent powers, but it is unnecessary to pursue this question further, because I agree with *Jordan* C.J. in *In re E. O. Farley Ltd.*[92], for the reasons there stated, that the decision in *R. v. Sutton*[93] that the *Customs Act* there in question was binding on the Sovereign as head of a State can only be supported by the implication of a necessary intention to be gathered from the purpose and provisions of the Act to that effect. The view expressed in *R. v. Sutton*[94] is, in my opinion, inconsistent with two decisions of the Privy Council one given before and the other after that case was decided. In *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*[95], the Privy Council held that under the *British North America Act 1867*, which confers exclusive powers on both the Dominion and Provincial Governments, the Provincial Government of New Brunswick, being a simple contract creditor of the Maritime Bank of the Dominion of Canada, constituted under a law of the Dominion, in respect of public moneys of the Province deposited in the name of the Receiver-General of the Province, was entitled to payment in full over the other depositors and simple contract creditors of the bank, its claim being for a Crown debt to which the prerogative attached. In that case, therefore, the Privy Council held that the Queen as the sovereign head of the province of New Brunswick had the full prerogative rights of a Sovereign under a law made by the Parliament of the Dominion. In *In re Silver Brothers Ltd.*[96] the *Interpretation Act 1906* passed by the Dominion Parliament, s. 16, enacted that no provision in any Act was to affect the Crown unless it was expressly stated therein that the Crown was to be bound thereby. The Privy Council held that in a bankruptcy in the Province of Quebec, where the assets were insufficient to discharge both a sum due for a tax under a Dominion statute and a sum due for Provincial taxes, the Dominion statute, having regard to s. 16 of the *Interpretation Act*, had to be read as though it provided that the priority enacted should not operate so as to diminish any rights of the Crown in any Province, with the result that the two debts would rank *pari passu* as claimed by the Province. In *Federal Commissioner of Taxation v. Official Liquidator of E. O. Farley Ltd.*[97] this Court applied the decision in *In re Silver Brothers Ltd.*[98] to the winding up of a company in New South Wales, and held that debts due to the Crown as the sovereign head of the Commonwealth and of the State of New South Wales should be paid *pari*

passu.

It has been made quite clear by the judgment of the Privy Council in *Theodore v. Duncan*[99] that "the Crown is one and indivisible throughout the Empire, and it acts in self-governing States on the initiative and advice of its own Ministers in these States," a view to which full effect was given in the discussion on this question that occurs in the joint judgment of *Knox* C.J., *Isaacs* J., *Rich* J. and *Starke* J. in the *Engineers' Case*[100]. This does not mean, of course, that the Commonwealth Parliament, in legislating within its powers, cannot create priorities between the King as sovereign head of the Commonwealth and the King as sovereign head of a State (*South Australia v. The Commonwealth* (*Uniform Tax Case*)[101]), or make the legislation binding or not binding upon the Crown as sovereign head of the Commonwealth or of a State as the case may be, but whenever it is intended that His Majesty shall be bound in respect of his prerogative, rights or property, whether as the sovereign head of the United Kingdom or any part of the British Empire, it is necessary that he shall be expressly named or that a necessary implication to that effect shall appear from the statute. This construction is in accordance with the statements in the joint judgment in the *Engineers' Case*[102] that "it may be that even if s. V. of the Act 63 & 64 Vict. c. 12 had not been enacted, the force of s. 51 of the Constitution itself would have bound the Crown in right of a State so far as any law validly made under it purported to affect the Crown in that right ... These considerations establish that the extent to which the Crown, considered in relation to the Empire or to the Commonwealth or to the States, is bound by any law within the granted authority of the Parliament, depends upon the indication which the law gives of intention to bind the Crown." (The italics are mine.) These statements can only mean that the Crown in right of a State is only bound by Commonwealth legislation when the legislation shows expressly or by implication an intention to that effect. It is clear, therefore, to my mind, that when this Court in the *Engineers' Case*[103] swept away the cobwebs of construction arising from the doctrine of the implied immunity of instrumentalities, it also swept away at the same time the anomalous principle laid down in *R. v. Sutton*[104] that in the case of Commonwealth legislation the Crown in right of a State was bound unless the State could show that the legislation was not intended to bind the State. A case in this Court in which it was held that the King as sovereign head of the United Kingdom was not bound by a Victorian Act is *Broken Hill Associated Smelters Pty. Ltd. v. Collector of Imposts (Vict.)*[105].

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

Appeal allowed with costs. Judgment of magistrate and order of Supreme Court of Western Australia set aside. Order respondent do give possession of the dwelling known as Warders Quarters situate at 9 Holdsworth Street, Fremantle, to the appellant on or before 31st October 1944. Respondent to pay the appellant's costs of the proceedings before the magistrate and of the appeal to the Supreme Court.

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

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

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

[1] [1943] HCA 2; (1943) 67 C.L.R. 1.

[2] (1943) 67 C.L.R., at pp. 17, 18, 20, 21, 23.

[3] [1920] HCA 54; (1920) 28 C.L.R. 129, at p. 153.

[4] (1920) 28 C.L.R., at p. 153.

[5] [1925] HCA 30; (1925) 36 C.L.R. 170.

[6] [1908] HCA 26; (1908) 5 C.L.R. 789.

[7] (1908) 5 C.L.R., at p. 806.

[8] (1908) 5 C.L.R., at pp. 796 (Griffith C.J.), 801 (Barton J.), 814 (Isaacs J.), 817 (Higgins J.).

[9] [1908] HCA 28; (1908) 5 C.L.R. 818.

[10] (1920) 28 C.L.R., at p. 159.

[11] (1939) 40 S.R. (N.S.W.) 240; 56 W.N. 203.

[12] [1920] HCA 54; (1920) 28 C.L.R. 129.

[13] [1908] HCA 26; (1908) 5 C.L.R. 789.

[14] (1920) 28 C.L.R., at p. 152.

[15] [1908] HCA 26; (1908) 5 C.L.R. 789.

[16] (1920) 28 C.L.R., at p. 159.

[17] (1920) 28 C.L.R., at p. 165.

[18] [1920] HCA 54; (1920) 28 C.L.R. 129.

[19] [1908] HCA 26; (1908) 5 C.L.R. 789.

[20] [1920] HCA 54; (1920) 28 C.L.R. 129.

[21] (1908) 5 C.L.R., at p. 797.

[22] (1908) 5 C.L.R., at p. 813.

[23] [1920] HCA 54; (1920) 28 C.L.R. 129.

[24] [1908] HCA 26; (1908) 5 C.L.R. 789.

[25] (1908) 5 C.L.R., at p. 814.

[26] [1920] HCA 54; (1920) 28 C.L.R. 129.

[27] [1920] HCA 54; (1920) 28 C.L.R. 129.

[28] [1908] HCA 26; (1908) 5 C.L.R. 789.

[29] [1920] HCA 54; (1920) 28 C.L.R. 129.

[30] (1925) 36 C.L.R., at p. 218.

[31] [1908] HCA 26; (1908) 5 C.L.R. 789.

[32] (1925) 36 C.L.R., at p. 218.

[33] (1925) 36 C.L.R., at p. 228.

[34] (1932) A.C. 514, at p. 524.

[35] (1920) 28 C.L.R., at p. 152.

[36] (1908) 5 C.L.R., at p. 809.

[37] (1920) 28 C.L.R., at p. 159.

[38] [1922] HCA 62; (1922) 31 C.L.R. 421, at p. 439.

[39] (1884) 28 Ch. D. 643.

[40] (1884) 28 Ch. D., at p. 649.

[41] (1892) A.C. 437.

[42] (1932) A.C. 514.

[43] [1940] HCA 13; (1940) 63 C.L.R. 278.

[44] (1884) 28 Ch. D. 643.

[45] (1923) A.C. 647, at pp. 660, 669.

[46] (1884) 28 Ch. D., at p. 648.

[47] (1878) 9 Ch. D., at pp. 481, 482.

[48] (1807) 16 East. 278, at p. 282 [104 E.R. 1094, at p. 1096].

[49] (1907) A.C. 179.

[50] (1892) A.C. 437.

[51] (1932) A.C. 514.

[52] [1940] HCA 13; (1940) 63 C.L.R. 278.

[53] (1884) 28 Ch. D. 643.

[54] [1908] HCA 26; (1908) 5 C.L.R. 789.

[55] [1911] HCA 64; (1911) 13 C.L.R. 358.

[56] (1920) 28 C.L.R., at p. 164.

[57] (1908) 5 C.L.R., at p. 833.

[58] (1905) A.C. 551.

[59] (1919) A.C. 696, at p. 707.

[60] (1873) L.R. 15 Eq. 355.

[61] [1940] HCA 13; (1940) 63 C.L.R. 278.

[62] (1905) A.C. 551.

[63] (1926) A.C. 715.

[64] [1925] HCA 30; (1925) 36 C.L.R. 170.

[65] [1908] HCA 26; (1908) 5 C.L.R. 789.

[66] (1920) 28 C.L.R., at pp. 152, 153.

[67] [1908] HCA 26; (1908) 5 C.L.R. 789.

[68] (1940) 1 K.B. 427.

[69] (1941) Ch. 369.

[70] [1908] HCA 26; (1908) 5 C.L.R. 789.

[71] (1842) 10 M. & W. 117, at p. 124 [152 E.R. 406, at p. 409].

[72] [1908] HCA 26; (1908) 5 C.L.R. 789.

[73] (1908) 5 C.L.R., at p. 796.

[74] (1908) 5 C.L.R., at pp. 801, 802.

[75] (1908) 5 C.L.R., at pp. 806, 807.

[76] (1908) 5 C.L.R., at pp. 813, 814.

[77] [1904] HCA 50; (1904) 1 C.L.R. 208, at p. 231.

[78] (1908) 5 C.L.R., at pp. 817, 818.

[79] [1908] HCA 26; (1908) 5 C.L.R. 789.

[80] [1908] HCA 26; (1908) 5 C.L.R. 789.

[81] [1908] HCA 26; (1908) 5 C.L.R. 789.

[82] (1911) 13 C.L.R., at p. 365.

[83] (1904) 2 K.B. 165 (note).

[84] (1904) 2 K.B. 164.

[85] (1932) 2 K.B. 247.

[86] (1907) A.C. 179.

[87] (1923) A.C., at pp. 671, 672.

[88] (1931) 48 W.N. (N.S.W.) 180.

[89] [1920] UKHL 1; (1920) A.C. 508.

[90] (1920) A.C., at p. 536.

[91] [1908] HCA 26; (1908) 5 C.L.R. 789.

[92] (1939) 40 S.R. (N.S.W.), at p. 247; 56 W.N., at p. 205.

[93] [1908] HCA 26; (1908) 5 C.L.R. 789.

[94] [1908] HCA 26; (1908) 5 C.L.R. 789.

[95] (1892) A.C. 437.

[96] (1932) A.C. 514.

[97] [1940] HCA 13; (1940) 63 C.L.R. 278.

[98] (1932) A.C. 514.

[99] (1919) A.C., at p. 706.

[100] (1920) 28 C.L.R., at p. 152.

[101] [1942] HCA 14; (1942) 65 C.L.R. 373.

[102] (1920) 28 C.L.R., at pp. 153, 154.

[103] [1920] HCA 54; (1920) 28 C.L.R. 129.

[104] [1908] HCA 26; (1908) 5 C.L.R. 789.

[105] [1918] HCA 29; (1918) 25 C.L.R. 61.

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