As the law now stands, therefore, two interesting questions are left at large. On the one hand, will the English Courts adopt, in a commercial case where the Crown is a party defendant, the wider view of their powers indicated by Lord Blanesburgh in *Robinson v. South Australia* ? On the other hand, will the Australian Courts, in a case in which the Crown is not a party litigant, follow the Court of Appeal in distinguishing *Robinson's* case and in adopting the narrower view of their powers indicated by MacKinnon L.J. in *Duncan v. Cammell Laird* ?

The attitude taken by the English Courts in this particular matter is in line with their general refusal to review on the merits the exercise of an administrative discretion. On the other hand, their attitude does represent the abdication of an authority expressly given by the Rules. And, as it has been pointed out in Australia, there can be little danger to the Crown's interest in adopting the course proposed by Lord Blanesburgh, and submitting to an independent Judiciary the grounds on which privilege is claimed. Such a course would go far towards satisfying the disappointed litigant that the claim of privilege was not being put forward arbitrarily.[10]

—B. H. ROWAN.

10. (1934) *Law Institute Journal* (Vic.), p. 21.

THE CROWN AND STATUTES.[1]

A.G. v. Hancock; [2] *Re Hutley's Legal Charge.*[3]

The question of the application of statutes to the Crown has always been both fluid and uncertain, and recent cases, although they throw a great deal of light on the problem, are far from removing all the obscurities.

The crux of the matter is to be found in Craies on *Statute Law*[4] where he quotes the following passage from Bacon's *Abridgment*: "When a statute is general and thereby any prerogative right title or interest is divested or taken from the King, in such case the King shall not be bound, unless the statute is made in express terms to extend to him." Craies says that this does not mean that the King may not in certain cases be deprived by statutes, which do not name him, "of such inferior rights as belong indifferently to the King or the subject such as the title to an advowson or to a landed estate." What it means, he says, is that the King cannot in any case whatever be stripped by a statute which does not specially name him "of any part of his ancient prerogative or of those rights which are incommunicable and are appropriated to him as essential to his regal capacity." Craies quotes many cases in support of this proposition, amongst them being *Willion v. Berkley* (1560)[5] and the *Magdalen College* case (1616).[6]

1. The writer acknowledges the assistance he has derived in preparing this note from discussion with the Honours Class in Constitutional Law I.
2. [1940] 1 K.B. 427; 1 All E.R. 32.
3. [1941] 2 All E.R. 141.
4. 4th ed., p. 362.
5. Plowden's *Commentaries*, p. 240.
6. 11 Co. Rep. 68b.

In *Ryan v. Sydney Harbour Trust Commissioners*[7] Griffith C.J. took as the basis of his judgment the proposition laid down in Craies, and subsequent Australian cases have followed this decison, among them being *R. v. Hay.*[8] In the former case the Employers' Liability Act and in the latter case the Statute of Frauds were held binding on an instrumentality of the Crown, though the Crown was not named therein. These decisions were clearly consistent with principle, as formulated by Craies. The statutes concerned affected the Crown in exactly the same way as subjects. They did not deprive the Crown of any specific right which it possessed in contradistinction to its subjects. Indeed on a strict analysis it may be said that they did not deprive anybody of a " right " at all. The Employers' Liability Act merely imposed a liability unknown to the common law, or cancelled a common law immunity. The Statute of Frauds did the opposite : it freed the contractor from a common law liability. It was scarcely necessary therefore to draw the distinction between the Crown's distinctive or " incommunicable " rights and those rights which it possesses in common with its subjects. Nevertheless this distinction has commonly been regarded as part of the law in Australia.

The interest of the two recent English decisions, which are the subject of this note, on the applicability to the Crown of some of the war emergency legislation is that they do not appear even to draw this distinction, still less to rest upon it.

In *A. G. v. Hancock* we find the Crown endeavouring to enforce a judgment for a Crown debt (income tax) without the leave of the appropriate Court. The Courts (Emergency Powers) Act, 1939, by s. 1 (i), provides (*inter alia*) :—

> " A person shall not be entitled, except with the leave of the appropriate Court, to proceed to execution on, or otherwise to the enforcement of, any judgment or order of any Court (whether given or made before or after the commencement of this Act) for the payment or recovery of a sum of money."

Wrottesley J. said :

> " I think I am bound to say that this Act of 1939 is an Act which, if applied to the Crown, would clearly divest it of, or diminish in some way, the Crown's property, interest, prerogative or rights, and it is not necessary for this purpose, I think, for me to say which of that category I think is affected. I think that very likely all of them would be. For that reason . . . I am bound to say that the Crown here is not affected by the Courts (Emergency Powers) Act, 1939."

The learned Judge however made no mention of the passage in Craies dealing with the special or " incommunicable " rights of the Crown.

Here we can see what looks like a clear difference between the English and the Australian decisions. In the view of Wrottesley J. the right of the Crown apparently does not have to be " incommunicable " in order to escape a Statute in which the Crown is not expressly named.

7. (1911) 13 C.L.R. 358.
8. [1924] V.L.R. 97.

It is nevertheless possible to make the decision in *Hancock's* case agree with the Australian principle. For, as we have seen, Wrottesley J. did expressly say that a " prerogative " was probably involved, though he did not say explicitly what prerogative it was. This does suggest some special and distinctive Crown right. In this connection, mention should be made of the provisions of the Income Tax Act which give the Crown an express right to " recover " taxes by action in the High Court. " Recover " might well be held to include the execution of any judgment. In this view, the Courts (Emergency Powers) Act, 1939 would operate to divest the Crown of a special and distinctive, because an express statutory, right.

But the fact that Wrottesley J. does not quote the relevant passage from Craies seems to indicate that he was expressing the wider principle. This view of his decision is strengthened by the subsequent case of *Re Hutley's Legal Charge*. Morton J. there expressly applies the decision in *A.G. v. Hancock* to a right which, without any possibility of doubt, was held by the Crown and the subject indifferently. It was a right to take possession of mortgaged land. Yet it was held that the Possession of Mortgaged Land (Emergency Provisions) Act, 1939 did not bind the Crown.

It is interesting to notice that the decision in the *Magdalen College* case, which is one of the authorities on which Craies relies for the proposition that has become the basis of the Australian principle, can be reconciled with both *Ryan's* and *Hutley's* cases. In the *Magdalen College* case, the question was whether or not a statute of 13 Elizabeth, forbidding the Masters and Fellows of Colleges to alienate land otherwise than for a term of years, operated to make void a conveyance in fee to the Crown. The Court was unanimous that it did, though the Crown was not named therein. Among a number of reasons, the Court laid down the principles upon which the passage quoted above from Bacon's *Abridgment* was founded. But the Court emphasised that the particular conveyance then in question was made *subsequently to the Act.* It could not therefore be said that the statute deprived the Crown of any right or interest under the conveyance. *Ryan's* case—and *R. v. Hay* too—are of course quite consistent with this decision. As has been shown, no specific right or interest of the Crown was there involved. But for that matter the decision in *Hutley's* case falls also into line. For there the Crown already had the mortgage before the Act came into force and therefore the Act, if it bound the Crown, would divest a right which did exist when the Act was passed.

Despite the fact that all the cases can be reconciled on that ground, it is submitted firstly that the English and Australian Courts, though both relying on the same passage in Bacon's *Abridgment* as a foundation for their propositions, have adopted different interpretations of that passage; secondly that, in view of the recent decision in *Re Hutley's Legal Charge*, it seems unlikely that the English Courts will move in the direction indicated by the Australian cases. Indeed, the passage in Craies on which the Australian cases are founded, and also the earlier cases cited by Craies, seem at the moment to have ceased to be good law in England. It may be hoped that the matter will be further clarified in the appellate jurisdictions in the United Kingdom.

—C. VICKERS-WILLIS.