bind, *so far as they purport so to do*, both the Crown in the right of the various States and subjects. It is wrong to say that the *Engineers'* case denied the application of the rule, here considered, in favour of the States, for in the *Engineers'* case the legislation in question expressly purported to bind the States; and therefore that case, so far as here relevant, only decided that Commonwealth legislation could bind State instrumentalities. *Gulson's* case[1] goes further and requires that, in order to bind the Crown in the right of States (and, for that matter, the Crown in the right of the Commonwealth) Federal legislation must purport so to do in express words or by implication.

It is unfortunate that the majority of the court, in their pre-occupation with *R. v. Sutton*,[3] did not analyse the true nature of the rules of construction here considered. No indication is given of the requirements as to the nature of legislation in which the requisite implication may be found, and this must, for the present, remain a difficult problem.

DAVID R. DOOLEY.

NOTE.—Regulation 6 of the National Security (Landlord and Tenant) Regulations (Statutory Rules 1945 No. 97) which provided that the regulations shall bind the Crown in the right of States has now been repealed (Statutory Rules 1945 No. 155).

THE EDITORS.

STATUTORY NEGLIGENCE—CONTRIBUTORY NEGLIGENCE AS A DEFENCE.

Authority of House of Lords Decisions in Australia.

Piro v. W. Foster & Co. Ltd.[1]

This recent case finally decides two interesting points of law, on one of which the English and Australian Courts have differed, and on the other of which there has been no clear authority. The first question is whether contributory negligence is a defence to a claim based on statutory negligence; the second whether Australian courts must follow decisions of the House of Lords in preference to those of the High Court.

In this case an infant, who was employed at a dangerous machine used for pressing sheepskins, injured his hand when he put it into the machine to remove a skin. At the trial it was held that the defendant company had been guilty of a breach of statutory duty to fence or safeguard the machine; but that, as the plaintiff had been guilty of contributory negligence (having taken an obvious risk after adequate warning) his action based upon this breach of duty should fail. The plaintiff appealed to the High Court.

The High Court had decided in an earlier case—*Bourke v. Butterfield and Lewis Ltd.*[2]—that contributory negligence was not a defence in an action of this kind—that is, in an action to recover damages for personal

1. [1943] A.L.R. 405.
2. (1926) 38 C.L.R. 354.

injury caused by a breach of an absolute statutory duty imposed for the benefit of a class of persons of which the plaintiff is a member. The Court thought that only wilful misconduct on the part of the plaintiff would provide an answer to a claim of this nature. The American Restatement of the Law of Torts adopted substantially the same view. The House of Lords, however, in two more recent decisions—*Caswell v. Powell Duffryn Associated Collieries Ltd.*[3] and *Lewis v. Denye*[4]—held that contributory negligence was a defence to such a claim. In both cases *Bourke v. Butterfield*[2] was considered and disapproved. At the trial the learned judge followed those decisions of the Lords in preference to the decision of the High Court. Thus two questions were raised for the High Court to decide :

(1) What was the position in Australia when a decision of the High Court conflicted with a decision of the House of Lords ?

(2) Was contributory negligence a defence in an action of this kind ?

On the first point the Court unanimously decided that as a general rule the High Court and other Courts in Australia should follow a decision of the House of Lords in preference to a decision of the High Court. Therefore the Court considered itself bound by the Lords decision in *Caswell v. Powell Duffryn and Associated Collieries Ltd.*[3] and *Lewis v. Denye*[4] and overruled its own earlier decision.

The Appeal however was allowed, a majority of the Court considering that there was insufficient evidence to establish contributory negligence on the part of the plaintiff. As the evidence in favour of contributory negligence appeared to be quite substantial, it would seem that in cases of this kind there is a tendency on the part of the courts to require very strong evidence to establish such a defence. Thus the basis of *Bourke v. Butterfield and Lewis*[2]—that the Factories Acts are intended to protect workers against their own negligence—is still given some recognition. What amounts to sufficient negligence for the purposes of this defence will presumably be settled only after we have struggled through another wilderness of single instances.

JOHN R. CAMPTON.

3. [1940] A.C. 152.
4. [1940] A.C. 921.