Aldworth Ltd. v. Sharp [1899] 1 Ch. 622 Byrne J. agreed that mere possession was ambiguous.

It was not, however, so clearly determined that payment at a new rate would, by itself, not constitute sufficient part performance. However in both those cases the tenants were in possession as well as paying the rent and it is submitted that Sholl J. is correct in his view that increased payment is not enough. He buttresses his opinion by stating that if the increased payment by itself were sufficient "it may be necessary to treat it as an exception to the requirement that an act of part performance must be something which affects the position of the parties in relation to the possession, use or tenure of the land."

In any event, the tenant was in possession in this case, and it was carefully pointed out that the cases were not definite upon the point of increased payment of rental alone and that the opinion expressed in relation to that point was *obiter dicta.*

DARYL DAWSON

CONSTITUTIONAL LAW—SHIELD OF THE CROWN

It was shown by Latham C.J. in his judgment in *Grain Elevators Board v. Shire of Dunmunkle* that in determining whether an incorporated public authority is entitled to "the shield of the crown" a Court should consider five essential factors, incorporation, financial autonomy, independent discretion, the crown right to appoint members of the authority and the extent to which it engages in governmental or non-governmental functions. The emphasis in different cases has been on various of these grounds but in general there has been agreement to the extent that none of these tests alone gives a conclusive answer.

The recent High Court decision of *Commonwealth v. Bogle*[1] is the latest in this line of cases and is of particular interest because of the stress laid upon the fact of incorporation in the leading judgments and the view that once incorporated the tendency is that such a corporation is created to be a separate legal entity subject to the ordinary law.

The Commonwealth Government had established hostels to accommodate immigrants and subsequently formed a company under Victorian law (Commonwealth Hostels Limited) to control them under the direction of the Minister of Labour and National Service. The lease of the Brooklyn Hostel (Victoria) over which this litiga-

[1] [1953] A.L.R. 229.

tion arose was never assigned by the Commonwealth to the company, nor was any property of the Commonwealth transferred to it. A contract was executed under which the Commonwealth lent the necessary funds to the company for the control of the hostels, the company was to arrange accommodation as requested by the Department and comply with ministerial directions as to policy. Provision was made for all accounts to be audited by the Auditor-General, no distribution of profits was to be made and if the Minister ordered that the company was to be wound up any surplus funds were to be paid to him.

After the company took over the hostels it increased the charges with the Minister's approval although they were in excess of those allowed by the State Prices Regulation Act which provided that board and lodging was a "declared service" and orders fixed maximum charges for board and lodging. Bogle was one of a number of migrants who refused to pay the new charge and this action was brought by the Commonwealth and the company for a sum due at the higher rate than that fixed by the order. For the Commonwealth it was contended that the scheme was in execution of the Government's immigration policy under the direct control of the Government and that the Government as such was not bound by the State Prices Regulation Act.

This view was upheld by the minority (McTiernan and Williams JJ.) who held that Commonwealth Hostels Limited was entitled to crown immunity as they considered that the company was expressly created by the Commonwealth as a convenient corporate agent for carrying out a governmental purpose of the Commonwealth.

The leading majority judgment was given by Fullagar J. with the concurrence of Dixon C.J. and Kitto J. who held that the company was the proper plaintiff in the action and was bound by the State Prices Regulation Act which rendered illegal any contract by the migrant to pay the higher amount that was claimed. He stresses the fact of the formation and operation of the company as a separate entity and he argues that the general effect of the contract was to substitute it for the Department of Labour and National Service.

He rejects the contention held by the minority that the company is a mere agent of the crown in the following terms:

> "It is not difficult to conceive purposes which might be served by the substitution of a new corporate entity for the Commonwealth as the person responsible for the conduct of the hostels, but it seems impossible to conceive any rational purpose that could be served by the interposition of a corporate 'manager'

between the Commonwealth and the individual managers and servants who must of necessity be employed."[2]

Webb J. supports Fullagar J. and adds that "One naturally looks for a clear indication of an intention to do such an unusual thing as to employ a company as a mere servant of the Commonwealth, and I can find no such indication."[3]

Taylor J. measures the independence and balances it with such decisions as *Kirkland's*[4] case and concludes that the company had an independent existence and a wide discretion in functions which are not characteristically governmental.

This decision, it is submitted, is well in keeping with the authorities as they now stand and is a welcome reaffirmation by the High Court that where the Government interferes with the life of the general public by means of a public corporation it should be made liable under the general law existing between subject and subject.

An aspect of the case which would undoubtedly have received much more attention if the company had been held to be a crown agent would have been whether it was in fact bound by the State Prices Regulation. Williams and Taylor JJ. both discussed *Gulson's* case[5] and reaffirmed that the crown is one and indivisible. Of particular interest in this respect at least for Victoria, was the doubt expressed by Fullagar J. as to the correctness of the decision of Lowe J. in *Marks v. Forests Commission.*[6] He does not elaborate upon his view[7] and it is interesting to speculate whether he would fall into line with the criticism of the case which has been made so forcibly by Professor Friedmann.[8]

A. C. CASTLES

[2] *Ibid.* 243. [3] *Ibid.* 238.
[4] *Repatriation Commission v. Kirkland* (1923) 32 C.L.R. 1.
[5] *Minister of Works (W.A.) v. Gulson* (1944) 69 C.L.R. 338.
[6] [1936] V.L.R. 344. [7] [1953] A.L.R. 245.
[8] "Legal Status of Incorporated Public Authorities" 22 *A.L.J.* 7.

DIVORCE—COLLUSION AND ONUS OF PROOF

Gabric v. Gabric[1] and *Heffernan v. Heffernan*[2] are two recently reported decisions by the Supreme Court of Victoria involving a question of collusion. The former was a decision of Sholl J. and the latter was decided by the Full Court consisting of Lowe A.C.J. and Martin and Smith JJ. Their importance lies in the comprehensiveness of the definition of collusion laid down, a definition in which

[1] [1953] V.L.R. 282. [2] [1953] V.L.R. 321.