THE CROWN PROCEEDINGS ACT, 1947

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The Crown Proceedings Act, 1947, of the Parliament of the United Kingdom, came into force on January 1st, 1948. Because it has made revolutionary changes in the position of the Crown as a litigant in the courts of the United Kingdom, students of the evolution of British constitutional doctrines may be interested in a statement of what these changes are and how they came about.

The Act, as its title implies, changes the procedure relating to civil proceedings by and against the Crown. It also fundamentally modifies the rights and liabilities of the Crown vis-à-vis the subject, so far as the law of the United Kingdom is concerned. These alterations will be explained later; meanwhile it may be helpful to summarise the position of the Crown as a litigant before the Act was passed and the reasons underlying the changes which the Act has made.[1] As early as the 13th century the rule had become established that the King could not be compelled to answer in his own court; but this, as Pollock and Maitland remarked in their History of English Law, was equally true of every petty lord or every petty manor. In the 16th century, however, the procedure of Petition of Right was established and became statutory under the Petition of Right Act of 1860. The classes of claims which could be made the subject of a Petition of Right have never been satisfactorily defined, but probably the best definition is that contained in the case of *Feather* v. *The Queen*, as follows:

> The only cases in which a Petition of Right is open to the subject are where the land or goods or money of a subject have found their way into the possession of the Crown and the purpose of the Petition is to obtain restitution, or if restitution cannot be given, compensation in money, or where a claim arises out of contract, as for goods supplied to the Crown or to the public service. It is in such cases only that instances of Petition of Right having been entertained are to be found in our books.[2]

It will be observed that whatever else may be the subject of a Petition of Right, a claim in tort cannot be. This exclusion was no doubt based upon the ancient constitutional maxim that

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[1] Students of English legal history will not need to be reminded of Sir William Holdsworth's two articles on The History of Remedies against the Crown in (1922), 38 L.Q.R. 141, 280.

[2] (1865), 6 B. & S. at p. 257.

the King can do no wrong, as well as on the principle that the doctrine of *respondeat superior* did not apply to the Crown. There was one statutory exception to the principle that the Crown could not be sued in tort. By section 26 of the Ministry of Transport Act, 1919, the Minister was made responsible for the acts and defaults of his officers, servants and agents. Furthermore, in recent years it had been the practice to provide by statute that certain Ministers of the Crown may sue and be sued (*e.g.*, section 6 of the Ministry of Pensions Act, 1916, and section 10 of the Air Force (Constitution) Act, 1917), but these provisions were held to be procedural only and not to impose any new liability on the Crown. In theory, therefore, there was considerable difficulty in the way of a subject pursuing any remedy against the Crown. In practice, however, these difficulties were to a great extent removed by various means adopted by the Crown whereby claims against it could be adjudicated in the courts. Before a Petition of Right could be launched it was necessary to obtain His Majesty's fiat through the Attorney General. But "everybody knows", said Lord Justice Bowen in *In re Nathan*, "that the fiat is granted as a matter, I will not say of right, but as a matter of invariable grace by the Crown whenever there is a shadow of claim — nay, more, it is the constitutional duty of the Attorney General not to advise a refusal of the fiat unless the claim is frivolous."[3] Indeed, even where the Attorney General had grave doubt, it was not unusual for him to recommend the fiat and allow the question of whether the Petition lay to be dealt with by the court on proceedings for demurrer. Again, with regard to torts, the Crown always gave facilities for a claimant to pursue a personal action against the Crown's servant and, if the act complained of was done by that servant in the course of his official duties, the Crown invariably stood behind the defendant servant and paid any damages awarded. This practice covered the majority of cases of tort, but there were still some few cases in which either the defendant could not be identified or for some other reason a personal action did not lie. In these cases various attempts were made from time to time to allow the claims to be adjudicated upon, but there were legal objections to some of the means adopted as was expressed recently by the House of Lords in the case of *Adams* v. *Naylor*.[4] While these devices removed to a great extent any substantial grievance, the fact remained that the subject was (except when suing the Minister of Transport) dependent for

[3] (1884), 12 Q.B.D. at p. 479.
[4] [1946] A.C. 543.

his remedy upon the grace of the Crown and had no legal right enforceable against the Crown without the Crown's consent. Another cause of complaint related to the methods by which the Crown enforced its remedies against the subject. Although the Administration of Justice (Miscellaneous Provisions) Act, 1933, authorised the Crown to recover debts by proceedings instituted by writ of summons, the procedure normally adopted by the Crown in proceedings against the subject was by way of English or Latin information or by the prerogative writs of *capias ad respondendum*, writs of *subpoena ad respondendum* and the like. It was said with some justification that these forms of proceedings were archaic and in some ways oppressive to the subject. Moreover, many practitioners were unfamiliar with the practice and rules of court pertaining to proceedings of this nature. These difficulties probably did not assume any great importance until the early part of the present century. During and after the first world war, however, the State became involved in a great number of trading activities and these activities have increased during and since the second world war. It was perhaps not surprising therefore that lawyers and business men urged that the principles, which had perhaps been unobjectionable in an age when there was little distinction between the King in his personal capacity and the Crown as the Head of the State, should be abandoned and that the State should be placed in the same position as the subject in the courts of law. There was never any suggestion that any change should be made so far as concerned the King in his personal capacity and it was, and by the Act of 1947 still is, recognized that it would be inconsistent with the Royal dignity that the King himself in respect of his own acts should be impleaded in His own Courts.

The first steps to remedy the matter were taken in 1921 by the then Lord Chancellor, Lord Birkenhead, who appointed a strong Committee of lawyers and others to consider the position of the Crown as litigant and to propose such amendments of the law as, with due regard to the exceptional position of the Crown, might seem advisable and feasible. The Committee moved slowly and in 1924 the then Lord Chancellor (Lord Haldane) directed it to assume that amendment was both desirable and feasible and to proceed with the drafting of a Bill. The Bill was produced in 1927. It was not found possible at that time to give legislative effect to the Committee's Report and it was not until 1947 that a Bill, which differed in many respects from the Bill of 1927, was introduced into Parliament by the Lord Chancellor, Lord Jowitt.

That Bill passed through all its stages during the summer and became the Crown Proceedings Act, 1947.

The Act is divided into six parts. Part I makes important changes in the substantive law and is therefore perhaps the most important. The first section enables a person who before the Act had to pursue his remedy by Petition of Right or by proceedings against a particular Minister under one or other of the provisions before referred to, to take proceedings against the Crown as of right and without the fiat of His Majesty.

Section 2, probably the most important section in the Act, imposes upon the Crown for the first time liability in respect of tort. On this point it is essential to appreciate that, although it is possible and indeed proper in a very large part of the field covered by the activities of the Crown to draw an analogy between those activities and those of private enterprise, there are certain necessary functions of Government where no analogy exists. For instance, no private person has a duty to maintain Armed Forces or to undertake the many activities which must be undertaken by the Crown in discharging its duty to defend the Realm. Furthermore, the servant of a private person is appointed by the mere will of his employer and his duties are directed by his employer, whereas in the case of a Crown servant the appointment may be made by an officer of the State and his duties may be controlled by statute. The legal consequences which follow from these facts were clearly stated in the judgment of Chief Justice Erle in the case of *Tobin* v. *The Queen*.[5] It was consequently impossible for the Act to deal with the question of tort by the summary and attractive method of merely enacting that the Crown should be liable to be sued in tort. Section 2 therefore sets out three classes of wrongs which it is thought will completely cover, possibly with some overlapping, all that is required. The classes are:

(a) torts committed by servants or agents;

(b) breaches of the duties which a private employer owes to his servants or agents at common law by reason of being their employer; and

(c) breaches of the duties attaching at common law to the ownership, occupation, possession or control of property.

The section goes on to provide that, where the Crown is bound by a statutory duty which is also binding upon persons other than the Crown, the Crown shall be liable in tort for

[5] (1864), 16 C.B. N.S. 309.

breaches of that statutory duty to the same extent as it would be so subject if it were a private person. This provision, at first sight, seems somewhat complicated, but its purpose is to ensure, firstly, that the Crown shall only be liable for breaches of statutory duties which bind the Crown and, secondly, that the Crown shall not be liable for breaches of statutory duties which bind the Crown but do not at the same time bind private persons. The reason for this latter limitation is that there are many Acts of Parliament which impose general duties upon particular Ministers, *e.g.*, it is the duty of the Minister of Education to promote the education of the people of England and Wales. Clearly, if the Minister fails to perform this duty, he should be answerable in Parliament and not elsewhere.

As has been previously stated, many duties are imposed by statute upon officers of the Crown, and the rule of law is that when a duty to be performed is imposed by law and not by the will of the party employing the servant, the employer is not liable for the wrong done by the servant in carrying out that duty.[6] Subsection (3) of section 2 deprives the Crown of any defence based on this principle.

Subsection (4) gives the Crown the benefit of any statutory provision which negatives or limits the liability of any Government Department or officer of the Crown in respect of any tort. Examples of these provisions will be found in section 23(4) of the Post Office Act, 1908, section 29 of the Inland Revenue (Regulations) Act, 1890, and section 267 of the Customs (Consolidation) Act, 1876. It is obviously reasonable that, where Parliament has deliberately decided that servants of the Crown are entitled to certain protection in carrying out their duties, the Crown should enjoy the same protection in the case of proceedings in respect of the acts of those servants.

Subsection (5) exempts the Crown from liability in respect of anything done or omitted to be done by any person discharging or purporting to discharge any responsibility of a judicial nature vested in him or any responsibilities in connection with the execution of judicial process. Clearly, the Crown ought not to interfere in the manner in which judicial functions are exercised; for, to the extent to which the Crown interferes, the functions cease to be judicial. Equally the Crown ought not to interfere with any servant who is charged with the execution of judicial process; any such interference would, in effect, be an interference by the Executive in the course of justice. If the Crown, therefore,

[6] See *Stanbury* v. *Exeter Corporation*, [1905] 2 K.B. 838.

cannot interfere with the acts of a servant of the Crown in these cases, it seems wrong that the Crown should be liable for those acts; the basis of a master's vicarious liability is the power of the master to control and direct the servant.

Section 3 imposes a liability on the Crown in respect of the infringement by any servant of the Crown of any patent, registered trademark or copyright or design committed with the authority of the Crown. This provision, however, does not affect the right which the Crown has under section 29 of the Patents and Designs Act, 1907, to use patents for the service of the Crown upon payment of compensation.

Section 4 gives to the Crown a right of indemnity against those of its servants who involve the Crown in liability in tort and applies to the Crown the law relating to contribution between joint tortfeasors. It also applies to the Crown the provisions of the Law Reform (Contributory Negligence) Act, 1945, which abolishes the defence of contributory negligence.

Sections 5, 6 and 7 deal with shipping matters. Stated quite shortly, they place the Crown in the same position as a private shipowner with regard to liability for collisions at sea, and make the necessary consequential amendments in the existing Merchant Shipping Acts to give the Crown the benefit of limitation of liability. Similar provisions are also made with regard to the liability of the Crown in its capacity as the owner of any dock or canal or as a harbour or conservancy authority.

Section 8 imposes for the first time liability on the Crown to pay salvage in respect of services rendered to ships and other property of the Crown. Hitherto, as a matter of law, the Crown was under no such liability although as an act of grace the Crown invariably paid salvage remuneration to salvors of its property. This section also gives the Crown the right to claim salvage in all circumstances. By the Merchant Shipping (Salvage) Act, 1940, the Crown was entitled to claim salvage within certain limits; since the Crown is now to be liable to pay salvage in the same way as a private person, those limits have been abolished and the Crown is now entitled to claim salvage upon the same basis as any other salvor.

Section 9 protects the Crown and any servant of the Crown from any liability in respect of the carriage of ordinary mails and the transmission of telegrams and telephone messages. The postal service is one of those cases in which there is no analogy between the Crown and private individuals. In the case of *Whitfield* v. *Le Despenser*,[7] Lord Mansfield stated that:

[7] (1778), Cowper 764.

> The comparison between the Postmaster and a carrier or the master of a ship seems to hold in no particular whatever. The Postmaster has no hire, enters into no contract, carries on no merchandise or commerce. The Post Office is a branch of revenue and a branch of police created by statute and there is no analogy between the Postmaster and a common carrier.

It will be appreciated that the Post Office is bound to carry letters and parcels and transmit telegrams and telephone messages. It cannot protect itself by conditions as can a private carrier because there is no contractual relationship between the Post Office and the person whose letters it carries or whose telegrams or telephone messages it transmits. Unless, therefore, some provision exempting the Crown from liability existed, a multitude of claims might well be made in respect of loss of mails or delay in their carriage or in the transmission of messages. Moreover, no satisfactory method of assessing the resultant damage could be readily found. It would be quite impossible for the Post Office to check the damages in respect of a letter which was delayed. It might, for instance, be alleged to contain information with regard to the trend of markets which, if received in due time, would have enabled the receiver to make a large profit or avoid loss. A little imagination will indicate the enormous difficulties in dealing with claims of this kind. No doubt for this and other reasons the statute exempts the Post Office from any liability. On the other hand, the Post Office are by subsection (2) placed under legal liability within the limits covered by the registration fee for loss or damage to registered inland postal packages. The section, however, contains certain essential safeguards, the most important of which is that protecting the Post Office against a multiplicity of actions. The section limits the relief available to the sender or addressee of the packet unless the court gives leave to some other person to make a claim when satisfied that the sender and the addressee are unable or unwilling to make the claim.

Section 10 relates to claims by one member of the Armed Forces of the Crown against another. The maintenance of Armed Forces is another example which defies analogy with private enterprise. In the training and maintenance of the Armed Forces the Crown and its officers have to undertake duties which, if done by a private individual, would not only be unlawful but might also be criminal, *e.g.*, the use of live ammunition in training the army and the deliberate flying in close formation necessary for training the Air Force. The section therefore exempts from liability both the Crown and any member of the Armed Forces

in respect of death or personal injuries suffered by another member of the Armed Forces

> (a) when he is on duty and is either killed or injured by the act of another member of the forces while on duty; or
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> (b) when, although not actually on duty, he is killed or injured by the act of a fellow member of the forces on duty if the event causing the death or injury happens on military premises, or on a ship, aircraft or vehicle used for military purposes.

It also exempts the Crown and any member of the forces from liability if a member of the Armed Forces is killed or injured in consequence of the nature and condition of any land, premises, ship, aircraft or vehicle or of any equipment or supplies used for the purposes of those forces.

It is to be observed that the exemption relates only to death or personal injuries; it does not bar a claim either against the Crown or an officer of the Crown in respect of other torts such as false imprisonment and malicious prosecution. It is important also to appreciate that soldiers or their representatives are deprived of their remedy at common law in those cases only if the Minister of Pensions certifies that the death or personal injury is, or will be, treated as attributable to service for the purpose of entitlement to a pension award under the instruments relating to pensions for the Armed Forces.

Section 11 contains a saving for the proper exercise of the prerogative and statutory powers and, in particular, for anything done under the prerogative or statute in respect of the defence of the Realm or the training or maintenance of the Armed Forces of the Crown.

We now pass to Part II of the Act which deals with jurisdiction and procedure. It provides that all the ancient methods of process by which proceedings were brought by or against the Crown shall be abolished and that in future all civil proceedings by and against the Crown in the High Court shall be instituted and proceeded with in accordance with rules of court and not otherwise. Rules of court have been made assimilating so far as practicable the procedure in Crown proceedings to the procedure in civil proceedings between subjects. Provision is made to permit proceedings to be brought against the Crown in county courts, the Crown already having the right to sue in the county court by the Administration of Justice (Miscellaneous Provisions) Act, 1933. Certain specified Government Departments are

designated in a list to be published by the Treasury under section 17 of the Act as departments which can sue or be sued; in the case of any Department not so designated the proceedings will be brought by or against the Attorney General. The Act also contains a number of detailed provisions about the place of trial; generally speaking, all trials of Crown proceedings in the High Court must take place in London unless the Crown otherwise consents. Section 21 contains an important provision to the effect that no injunction or order for specific performance can be obtained against the Crown, but in lieu thereof the court may make an order declaratory of the rights of the parties. No doubt the principle underlying this provision is that in times of national emergency the Crown may be compelled to take, at the shortest possible notice and with the certainty that its operations will not be interrupted by the courts, measures which may be thought to infringe the rights or alleged rights of the subject. In such a case the appropriate course is for the Government of the day to ask Parliament to validate what it has done and no doubt Parliament will in those cases decide how far the acts of the Crown were justified in the circumstances. If Parliament approves of what has been done and ratifies it by retrospective legislation, it will also no doubt provide compensation for the persons aggrieved. The freedom of the Executive to meet a crisis by action of this kind would be fettered if it were open to the subject to obtain an interim injunction restraining the Crown from doing what it thought necessary in the public interest.

Part III of the Act deals with judgments and executions. Section 25 arranges for the issue to any person entitled to a sum of money on a judgment against the Crown of a certificate of the amount due, and imposes an obligation on the appropriate Government Department to pay the sum certified to be due. No form of execution or attachment can be issued against the Crown or its property. So far as execution by the Crown is concerned, section 26 limits the powers of execution formerly possessed by the Crown and provides that an order in favour of the Crown may be enforced in the same manner as an order made in an action between subjects and not otherwise. The result is that the Crown can no longer imprison for non-payment of a debt except (by virtue of subsection (2) of section 26) in the case of two classes of Crown debts, *viz.*, sums payable in respect of death duties and purchase tax. This exception operates by applying sections 4 and 5 of the Debtors Act, 1869, whereby persons who are in the position of trustees are, in effect, subject to imprisonment in default of payment of trust moneys. In the

case of death duties, the taxpayer has, or has had, in his hands the estate out of which the duty ought to have been paid; in the case of purchase tax he has sold the goods and received the tax from the purchaser. In this respect, his position is analogous to that of the trustee. This explains the extension of the Debtors Act to these two cases.

Section 27 prevents money payable by the Crown to another person being attached except by the means set out in the section. In effect a judgment creditor of a person who is a creditor of the Crown may obtain from the court in proper cases an order which will restrain the creditor of the Crown from receiving the money and will direct payment of that money to the applicant or to a receiver on his behalf. The section, however, denies this remedy in the case of wages or salary payable to officers of the Crown, moneys which by statute cannot be assigned or charged or taken in execution, and moneys payable by the Crown to any person on account of a deposit in the Post Office Savings Bank.

Part IV deals with a number of miscellaneous and supplementary matters, the most important of which is the discovery of documents in the possession of the Crown. Before the Act came into force, the Crown could not be compelled by an order of the court either to give discovery or to answer interrogatories. The question, therefore, how far Crown documents ought to be protected from discovery in legal proceedings to which the Crown was a party never arose upon an order for discovery, but the question has on more than one occasion arisen where an officer of the Crown has been subpoenaed to produce documents in proceedings between subjects. The Crown always maintained the view that it was not bound to produce documents if the appropriate Minister was of opinion that their production would prejudice the public interest. Much controversy has ranged about this question for many years, but in the recent case of *Duncan* v. *Cammell, Laird & Co. Ltd.* the House of Lords delivered an authoritative opinion upon the limits within which the Crown may validly claim that documents should not be produced and upon the proper procedure to be followed in making such claim.[8] The short effect of the judgment is that the Crown may refuse to produce documents if the Minister is of opinion that their production would prejudice the public interest. A certificate by the Minister to this effect is final upon the matter, and the court is not entitled itself to look at the documents covered by the certificate. The House of Lords also lays it down that objection

[8] [1942] A.C. 624.

to production of a document may be taken either because of its contents or because, irrespective of its contents, it belongs to a class (*e.g.*, minutes passing between Government officials or advice given to a Minister) which the public interest requires to be protected from production on the ground that candour and completeness of communication might be prejudiced if they were liable ever to be disclosed in subsequent litigation. Section 26 accordingly provides that, subject to these principles of law, the Crown may be ordered to give discovery and to answer interrogatories. There is also an important provision in subsection (2) of section 28 that Rules of Court shall ensure that the *existence* of a document shall not be disclosed where, in the opinion of a Minister of the Crown, such disclosure would be injurious to the public interest.

Other provisions of Part IV to which attention should be drawn are those in section 29, excluding Crown ships, aircraft or other property from proceedings *in rem* or from arrest, detention or sale, and those in section 30 which applies to the Crown (with certain exceptions) the limitation of time within which actions may be brought in respect of collisions at sea or salvage services under the Maritime Conventions Act, 1911. The section also provides that the Crown, in any proceedings other than those covered by the Maritime Conventions Act, can avail itself of the one year's limitation of time within which proceedings may be brought against a public authority. Section 35 may also be of interest in so far as it directs that Rules of Court shall be made providing that no set-off or counterclaim is available against the Crown in proceedings for the recovery of duties, taxes or penalties and that, without the leave of the court, there shall be no set-off or counterclaim by or against any Government Department which does not relate to that Department. The only other provision of Part IV to which particular attention need be drawn is that in section 40 excluding from the operation of the Act any proceedings by or against the Crown arising otherwise than in respect of His Majesty's Government in the United Kingdom. This means that the Act in no way affects the liability of any Dominion or Colonial Government and if any such Government wishes to take proceedings in the United Kingdom, those proceedings will be taken in accordance with the law and practice as it stood before the passing of the Act.

Part V applies the Act to Scotland. The Crown in Scotland has not enjoyed the same privileges with regard to civil proceedings as in England. The practice of suing the Crown, as represented

by Officers of State, had in Scotland received statutory recognition by an Act of the Scottish Parliament in 1600. As time went on, the Lord Advocate was increasingly recognized as the representative of the Crown in litigation, a process which was completed by the Crown Suits (Scotland) Act, 1857, under which proceedings by and against Government Departments in Scotland can be taken by or against the Lord Advocate. As it was thus unnecessary to apply the Act in all its aspects to Scotland, Part V applies only those provisions which, having regard to the existing state of the law in Scotland, are necessary to bring the position of the Crown as a litigant in Scotland into line with the position of the Crown as a litigant under the Act in England.

As for Northern Ireland, the Act can be applied there by order in council under Part VI both in relation to the rights and liabilities of the Crown in the right of its Government of the United Kingdom and in right of its Government in Northern Ireland. The necessity for this is that in Northern Ireland some executive functions are still the responsibility of the United Kingdom Government while others are the responsibility of the Government of Northern Ireland.

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The foregoing account of what seem to be the more important provisions of the Act naturally cannot pretend to be exhaustive. Anyone really interested in these constitutional matters will wish to study the Act itself. It is perhaps too much to hope that the Act has satisfactorily disposed of all the difficulties which have arisen in relation to the Crown as a litigant; but this at least can be said that it makes a very real attempt to remove the grievances which have hitherto existed.

La belle éloquence jaillit plus aisément d'un esprit cultivé; c'est la somme de ses acquisitions qui fait l'homme disert et le distingue du bavard impénitent. L'un s'élève et l'autre rampe. (Me Maurice Garcon, Essai sur l'éloquence judiciairea. Paris, 1941)