THE CANADIAN BAR REVIEW

VOL. VI. TORONTO, MAY, 1928. No. 5

SUITS BY AND AGAINST THE CROWN.

"Contrary to the common belief, there is so far as we know, no civilized country in which the right of the ordinary citizen to judicial protection against Government is more limited, or more embarrassed by obscurities, paradoxes and pitfalls than is the case in England."[1] This statement will not be considered in the least too strong by any one familiar with English procedure. In the present writer's student days the "obscurities, paradoxes and pitfalls" were bad enough. Today they are a hundred-fold worse, as the Reports only too well illustrate, with governmental activities growing on every hand, and "departments", "boards", "councils" and such like seeking for their activities, with ever widening ambit, the all-embracing protection of the prerogative. So grave has the situation become—and it is potentially graver with rising demands, and the not improbable satisfaction of them in no distant future, for a much wider extension of public ownership than at present exists in England—that students of the law have at last turned their minds to grapple with conditions whose reform is long since overdue and against which for many years the most sober and learned bench in the world have not been slow in uttering emphatic and at times scathing protests.[2] The "Crown" has become a shelter for all kinds of inequitable dealings, which, save for the prerogative, would soon receive short shrift in the courts.

We cannot, of course, say how long the present rule of law will hold that the "Crown" is not liable in tort and that in suits

[1] Sir M. S. Amos, in *Journal of Comparative Legislation*, February, 1928, vol. x, part i, p. 131.

[2] For ready examples of these protests see Professor J. H. Morgan's brilliant essay "Remedies against the Crown," in G. E. Robinson, *Public Authorities and Legal Liability* (London, 1925). Mr. Morgan's essay, I am glad to say, will soon be issued separately in extended form.

covering contracts and property rights procedure is by Petition of Right. Traditions hang heavy in English procedure; but, at any rate, the beginnings of reform are in the air. With the extending growth of "Crown" activities in Canada it is important that these beginnings should receive attention, and that we should, in addition, understand something of procedure elsewhere in the Empire, where, as in Canada, many works and developments must almost of necessity be carried out by the State, which in other countries, owing to conditions which need not detain us, are or would be undertaken by private enterprise. As had been well said: "It must be borne in mind that the Local Governments in the colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works, for the construction of which it is necessary to employ many inferior officers and workmen. If, therefore, the maxim that 'the King can do no wrong' were applied to colonial Governments . . . it would work much greater hardship than it does in England."[3]

In 1921, Lord Birkenhead, as Lord Chancellor, appointed a strong committee[4] "to consider the position of the Crown as litigant and to propose such amendments of the law as [might be considered] advisable and feasible, having due regard to the exceptional position of the Crown and to prepare a Bill embodying and giving effect to such changes" as might reasonably be recommended. The full terms of reference included the following:—

(a) That the procedure by Information and Petition of Right should be abolished and the procedure in cases in which the Crown was a litigant should be assimilated, as far as possible, to the procedure regulating the conduct of cases between subjects, including such matters as discovery, the receiving and paying of costs by the Crown, and the like.

[3] Sir Barnes Peacock in *Farnell* v. *Bowman*, [1887] 12 A.C. 643.

[4] Owing to the importance of the reference it is well to note the personnel of this Committee: The Chief Justice (Lord Hewart); the Master of the Rolls (Lord Hanworth); Justices Rowlatt, Hill, Branson; the Attorney-General (Sir Douglas Hogg); the Solicitor-General (Sir Thomas Inskip); Sir T. W. Chitty; Mr. H. M. Giveen; Sir W. Graham-Harrison; Mr. R. M. Greenwood; Mr. M. L. Gwyer; Sir Patrick Hastings; Sir John Mellor; Mr. D. Pollock; Mr. J. Rye; Sir C. Shuster; Sir L. Scott; Mr. J. H. Shaw; Mr. G. T. Simonds; Sir H. Slesser; and (part time) Sir W. Trower, Sir George Barstow, the Hon. Clive Lawrence.

(b) That the Crown, with certain reservations, should be placed in the same position as a subject as regards the power and liability to sue and be sued in the County Courts.

(c) That the Crown should become liable to be sued in tort.

In 1924, Lord Haldane, as Lord Chancellor, modified somewhat the original terms of reference before the necessarily long inquiries could be arranged and concluded; and, on the assumption that the changes suggested were desirable and feasible, he requested the preparation of a Bill on the lines outlined. We may perhaps regret the modification, as apparently we have been deprived of all details, and possibly of an invaluable contribution to the history of law treating in full the whole subject domestically and comparatively. Be that as it may, the Committee, after consultation with most of the Government Departments, prepared a Bill which was presented to the Lord Chancellor (the late Lord Cave) on March 28, 1927 and which may be shortly summarized:—

(i) Part I, under the title *Crown Proceedings in High Court and County Courts,* abolishes the prerogatives of the Crown to grant Petition of Right as a matter of grace to subjects seeking the enforcement of contractual claims or property rights against the Crown, and substitutes action in the courts of the type used by ordinary litigants, to be brought against the Attorney-General or the Crown official involved.

(ii) Part II, under the title *Substantive Rights,* adds a liability of the Crown for the tortious acts of its servants, which result in damages to subjects, to be enforced in like manner as contractual and property claims.

(iii) Part III, under the title *Supplemental and Miscellaneous,* deals *inter alia* with judgments which are (a) merely declaratory of the rights of the subject and the Crown, or (b) result in the awarding of a certificate entitling the successful subject as litigant to the amount of damages specified therein to be paid from Treasury funds set apart for that purpose, or from any funds of the Government Department concerned which are available for the satisfaction of its liabilities, the choice to be at the option of the litigant; with proceedings in rem, which are prohibited; with costs, the Crown being made liable in like manner as a private litigant; with Petition of Right, English Information and Latin Information which are in substance abolished; with Discovery.

The issues raised by the matter of Discovery doubtless proved the most difficult, and we may select the problem at this point for some consideration; especially in the light of what will be said later in connexion with other parts of the Empire. We may here note in passing and without further reference (as French procedure is comparatively well known to common law lawyers) that in France there is no difficulty. There procedure by and against the State is more or less equitably provided for, and there is no problem over Discovery, as there is no right of Discovery among private litigants. More interesting as being arrangements in a great modern industrial state, and less well known, is the situation in Germany. There the position of State is assimilated to that of a legal person, under the conception of the "Fisc" (or Exchequer). The "Fisc" is "one", is "unitary", and every Government Department is an "aspect" or "legally personified emanation" of this unity; and so on, in each of the States which constitute the Republic. A litigant, with cause of action against the Republic or a State, sues the "Fisc" in its proper "emanation", and the case proceeds like that between ordinary suitors, subject to no claims by the "emanation" concerned to extra-ordinary preferences, privileges, "prerogatives"—"obscurities, paradoxes and pitfalls"—such as fence Crown proceedings in England, where the rule is "that the Crown is entitled to full discovery and . . . the subject as against the Crown is not,"[5] where the shadow of the mighty rock of prerogative guards the "Crown" alone at the expense of the poor private litigant in the dry-parched land of traditions.

When then the Crown Proceedings Committee came to this aspect of their reference they were face to face with an issue hoary with age. Discovery was a favoured child of equity, nursed like a royal prince by many generations of all-watchful Chancellors. However, as a result of their deliberations certain advances were made, and the following procedure laid down in their Bill:—

(a) Nothing in the Bill shall operate to impose on any officer of the Crown obligations to make discovery of documents, information or secrets on oath; but rules of Court may oblige the Crown's officer or officers to deliver to the other party a list in prescribed form of such documents "not being documents the existence of which it would be contrary to the public interest to disclose, relating to the matters in question as are or have been in the possession, custody or power of the Crown."

[5] *Attorney-General* v. *Newcastle-on-Tyne Corporation*, [1897] 2 Q.B. 384.

(b) The Crown must list in a separate schedule such documents whose disclosure is claimed to be privileged as against public policy.

(c) Nothing in the Bill shall operate to impose on the Crown any obligations to produce in any Crown proceedings, either to the court or to any party to the proceedings, any document the production of which would be injurious to the public interest.

(d) Rules of court may provide that the court may require the production of a certificate signed by a Secretary of State or other Minister of the Crown that "every relevant document the existence of which can be disclosed without injury to the public interest is set forth in the list;" or, where privilege is claimed, a like certificate stating that the claim is set up in the public interest; either class of certificate "shall be final and conclusive."

(e) Similar or analogous provisions in the Bill deal with Interrogatories.[6]

It will be noted (i) that the old claim on behalf of the Crown to refuse discovery on prerogative grounds is to disappear; (ii) the Crown will have a claim to privilege such as may be made at present in suits to which the Crown is not a party; (iii) the certificate of the Minister is "final and conclusive" in any claim to privilege. In this last connexion and in the light of what follows, it is interesting to note that the Committee makes no deviation from the well-known rule (except to provide for a "certificate") that a statement by a minister claiming privilege, in the public interest, in refusing to disclose a document or documents is final and conclusive.[7]

To those of us brought up in English legal traditions and rules of procedure the proposals of the Committee are not so much revolutionary as highly courageous and informed by sound practical common-sense. It is, of course, impossible to decide when action, if any, will be taken, and, as far as my information goes, I believe that progress will be piecemeal. On the other hand, it is important to note: (i) that the proposals come from a Committee remarkable for legal learning and reputation; (ii) that they have received general approval from Government Departments; and (iii) that they are not as entirely revolutionary as they appear to be when we

[6] For the Committee's reference and its Bill see *Crown Proceedings Committee Report* (Cmd. 2842, April, 1927).

[7] See Pollock, C.B., in *Beatson* v. *Skene*, H. & Colt, 853; Lord Esher, M.R., in *Hughes* v. *Vargas*, (1893) 9 T.L.R. 551.

turn, as we shall now do, to consider Crown procedure in other parts of the Empire.

In reviewing Crown procedure in Australia it is unnecessary to examine in detail the judicial powers as laid down in the *Commonwealth of Australia Constitution Act*, 1900,[8] and as discussed in well known text-books, such as those by Moore, Quick, or Kerr. It is sufficient introduction for our purpose merely to recall that that Act, doubtless in some degree with existing and continued precedents in view in the various Australian colonies through which inroads had already been made into the traditions of Crown procedure,[9] laid it down that the legislature of Australia "may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power."[10] Under that authority Australia has passed a *Judiciary Act*[11] of undoubted constitutional validity, of which Part IX is entitled *Suits by and against the Commonwealth and the States.*

The important sections are:—

> 56. Any person making any claim against the Commonwealth whether in contract or in tort may in respect of the claim bring a suit against the Commonwealth in the High Court or in the Supreme Court of the State in which the claim arose.
>
> 57. Any State making a claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth in the High Court.
>
> 58. Any person making any claim against a State, whether in contract or in tort, in respect of a matter in which the High Court has original jurisdiction or can have original jurisdiction conferred on it, may in respect of the claim bring a suit against the State in the Supreme Court of the State or (if the High Court has original jurisdiction in the matter) in the High Court.
>
> 59. Any State making a claim against another State may in respect of the claim bring a suit against that State in the High Court.

[8] 63 and 64 Vic. c. 12, s. 8 (chapter III, ss. 71-80).

[9] See for example, *Claims Against the Colonial Government Act (N.S.W., 1876)*; *Claims Against Government Act* (Queensland, 1866); *Crown Suits Act* (Western Australia, 1898, amended No. 14 1919); *Crown Redress Act* (Tasmania 1891). In Victoria and South Australia, however, under respectively the *Crown Remedies and Liability Act*, (1890), and *Claims Against Government Act* (1853), no remedy existed against the Crown in tort; in contract procedure by Petition of Right was followed.

[10] 63 and 64 Vic. c. 12, s. 8 (chapter III, s. 78). This section passed through a varied history from 1891 until it received its present form at the Melbourne Convention in 1898, as a legislative proposal expressly necessary to deal with the prerogative. (*Melbourne Convention Debates*, pp. 1653-1679. R. E. O'Connor (N.S.W.) proposed the clause as it now stands and first saw the necessity in this connexion of substantial legislation).

[11] *The Judiciary Act*, (No. 6 of 1903).

64. In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

An examination of these sections, as applied and interpreted by the courts, reveals important departures from tradition: (i) the old procedure by Petition of Right gives place to an ordinary right of action; (ii) procedure in tort is possible, and the Crown is liable for the tortious acts of its servants in every case in which the relationship between the Government and its officers is such as will allow, according to ordinary legal rules, the application of the doctrine of *respondeat superior;* (iii) rules of Discovery and of Interrogation are no longer guarded for the "Crown," under the shadow of the prerogative.

In this last connexion a word must be said. The Courts have forced the Crown to answer questions.[12] In relation to Discovery we have already noted that the Crown Proceedings Committee have retained a part, and that most important, of the old rule. In Australia this has disappeared. The Crown is not indeed deprived of a right to claim privilege; but it cannot in the person of a Minister claim privilege as a prerogative in answer to a demand for discovery, nor can it claim privilege merely by a plea of public interest. Judicial decision has laid it down that, while that protection remains for exercise which must belong to a Government in carrying out its necessary duties, the decision in relation to the claim does not lie with the Minister. His "certificate" (Crown Proceedings Bill), his "statement" (rule of law, *supra*) is no longer considered "final and conclusive." Where a Minister claims privilege in the public interest the High Court has ruled that the court itself and not the Minister will decide; and before such a claim is settled the court, as of right and of duty, will find out not merely the exact nature of the matter for which privilege is claimed, but will examine also the "public interest", the "prejudice" or otherwise, under which the claim is made.[13] It will "ascertain what is the nature of the alleged state secret, and whether facts discoverable on inspection of the thing can, in any intelligible sense, prejudice the public welfare."[14] The Crown in relation to Discovery

[12] See, *inter alia, Commonwealth of Australia* v. *Miller,* 10 C.L.R. 742; *The King* v. *Associated Northern Collieries,* 11 C.L.R. 138.

[13] *Marconi's Wireless Telegraph Co., Ltd.* v. *The Commonwealth* (No. 2), 16 C.L.R. 178 (Isaacs, J., dissenting).

[14] D. Kerr, *The Law of the Australian Constitution,* p. 300 (Sydney, 1925).

and to Interrogation is "as nearly as possible" placed in the same position as private suitors. The very nature, however, of organized government sets limits on complete assimilation. Those limits in Australia will not be defined and laid down by a Minister (himself the "Crown" in some suit) but by the Courts. In other words, the Courts and not the Executive will interpret the phrase "as nearly as possible" of the *Judiciary Act.*

On the other hand, we may note that the judicial interpretation of the *Judiciary Act* extends to the Executive reasonable protection, and does not indiscriminately make the Crown responsible for every act of its servants. For example, if a legal right is infringed by the tortious act or acts of a servant of the Crown, the Crown is responsible if the act or acts complained of has no justification in law and the person doing it or them is not exercising an independent discretion imposed by statute, but is merely carrying out a ministerial duty.[15] Nor will the courts, where a servant of the Crown is carrying out a duty imposed on him by statute law or common law, impute to the Crown the control which belongs to the ordinary relations of master and servant unless they are clearly proved to the satisfaction of the courts to exist.[16] In other words, Crown procedure in Australia is carried on with definite purposes (i) to facilitate justice, reason, equity and commonsense; (ii) to recognize that the modern state is no longer a *feudal* monarchy; (iii) to take the weapon of the prerogative from the "Crown," as it ceases to be the protection of the subject when wielded by a "Minister" himself the ephemeral creature of the State; and (iv) to guard at the same time the reasonable function of the Executive Government. The courts have uniformly prevented any judicial trespass on the ambit and scope of powers proper to executive discretion and action, as they have equally protected the judiciary against claims by the Executive in deciding the generality of legal procedure as entrusted to Australia by the *Constitution Act* and subsequently laid down in Australian statute law.

In conclusion, as our interest is specially in Crown procedure in the Empire we may note without comment the rule in other Dominions. In the Union of South Africa the procedure by Petition of

[15] *Baume* v. *The Commonwealth* (1906) 4 C.L.R. 97. Cf. Quick, *The Legislative Powers of the Commonwealth and States of Australia.* p. 740. (Melbourne, 1919).

[16] *Enever* v. *The King,* (1905) 3 C.L.R. 969, *Strachan* v. *The Commonwealth,* (1906) 4 C.L.R. 455. Australian courts in this connexion follow closely English decisions.

Right does not exist. Authority is given by statute law to all citizens of South Africa to institute proceedings against the Crown as though the Crown were a private person, whether the claim arise out of a contract lawfully made on behalf of the Crown, or out of torts committed by a servant of the Crown acting within the capacity and scope of his official authority as servant.[17] In the Dominion of New Zealand, up to 1910, the liability of the Crown was limited to causes of action arising out of (a) breaches of contract (b) wrongs independent of contract done or suffered in connexion with a public work.[18] In 1910 this liability was changed and the Crown is now liable in respect of (a) breaches of contract (b) any cause of action in respect of which a Petition of Right would lie at common law (c) wrongs independent of contract for which an action for damages would lie if the defendant were a subject of his Majesty. The Crown, as heretofore, is protected against the malicious or wilful wrong-doing of its servants and against speculative and exorbitant demands for damages. Otherwise the Crown is now in a position similar to that of any other employer in respect of the negligence of its servants.[19] In the Irish Free State some changes have been made. The State Departments have been expressly and *nominatim* created by statute; the Minister of each is a corporation sole with power to sue, and, subject to the fiat of the Attorney-General, with liability to be sued in his style and name.[20]

The truth is that the law of Crown procedure throughout the Empire is yielding to changing conditions. It must respond to that "experience" in which Mr. Justice Holmes found the vitality of our law, at the expense of logic, and we may add of traditions. Those of us who as students spent weary days amid the mazes of English property law—with inextricable complications in conveyancing, with copyhold, with dower and courtesy, with borough English and gavelkind, with strange differences over real and personal property, with curious schemes of intestate succession, with the Statute of Uses, Maitland's "marvellous monument of legislative futility"—have reason to congratulate the students, teachers and practitioners of today on the not far distant hope of a comparative making-straight of their paths. Although fifty years went to these reforms, we yet

[17] Act No. 1 of 1910. Cf. M. Nathan, *The South African Commonwealth*, p. 165 (Johannesburg, 1919).
[18] *Crown Suits Act*, 1908, s. 35.
[19] *Crown Suits Amendment Act*, 1910, No. 54.
[20] *Ministers and Secretaries Act*, 1924, No. 16.

hope we shall live to see students, teachers and practitioners lifted out of the "miry clay" of the "obscurities, paradoxes and pitfalls" of Crown Procedure, their feet set up the rock of simplicity, and the new song of reasonable certainty in their mouths. "The garland of prerogatives", to use a famous phrase, has in modern times become too dangerous and inequitable; or (if "privilege" is claimed against me "in the public interest") is too sacred an adornment to be debased in the "person" of ever growing "departments" omnicompetently posing as the "Crown," which spread out over the land from a central bureaucratic iniquity. What "public ownership" in England would bring, without reform. we shudder to contemplate. Reform will benefit all those who sacrifice to mechanism and uncertainty time which might well be given to the science of jurisprudence, and all citizens, when suitors, who in truth constitute the modern State, of which the "Crown" is merely the convenient titular embodiment.

University of Toronto. W. P. M. KENNEDY.