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NOTE AND COMMENT.

* * * In the case of *Rowland* v. *The Air Council* (1923) 39 T. L. R. 228, Russell, J., in the Chancery Division of the High Court of Justice in England, deals with the question whether the defendants were liable upon a contract originally entered into by the Secretary of State for War. The facts disclosed that in July, 1915, the Secretary of State for War made a contract with one Edwards whereby the War Office would be supplied by Edwards with an aeroplane designed by an engineer named Kennedy, according to specifications. Kennedy's design in question included a novel feature in aeroplane construction, *i.e.* a tail-gun pit with accommodation for guns and gunners. It also had engines mounted on the wings. In July, 1916, the Director-General of Military Aeronautics transferred the benefit of the contract to Kennedy, who agreed to carry out the work with such variations as might be ordered from time to time. The plaintiff alleged that it was an implied term of the contract that the specifications and designs for Kennedy's aeroplanes were not to be disclosed to rival designers of aeroplanes, and were to be used only by the Directorate of Military Aeronautics, the Admiralty, and the Air Board. In the autumn of 1917 the Air Board lent their designing and technical staff to Messrs. Handley Page, Limited, and, as the plaintiff alleged, disclosed to that firm Kennedy's confidential reports, and the designs and draw-

ings of his aeroplane, the result of the disclosures being that the Handley Page V. 1500 machine was fitted with Kennedy's invention of the tail-gun pit, and on March 15th, 1918, Frederick Handley Page, the chairman of the company, applied for a patent for it (Patent No. 139,230). On March 16th, 1918, Kennedy applied for a patent for his invention, which was accepted subject to a reference to the Handley Page patent. Kennedy's patent was No. 166,184 of 1918. In 1917 and 1918 the plaintiff alleged that large orders were given by the Government to Handley Page, Limited, for aeroplanes fitted with Kennedy's tail-gun pit, orders which, but for the disclosure of his designs to that firm, must have been given to Kennedy. The plaintiff asked for a declaration that Kennedy's patent was valid, and he claimed as damages £156,506, the profit made by Handley Page, Limited, on the manufacture of the aeroplanes, and £171,000, royalties on the invention. The defence of the Air Council, which, the plaintiff contended, had taken over the rights and liabilities of the Directorate of Military Aeronautics, of the Admiralty Air Department, and of the Air Board, was that if a contract was contained in certain letters of July 5th and 6th, 1916, the letters were written and received by servants and agents of the Crown who could not be sued, and that the Air Council, being the servants and agents of the Crown, could not be sued in respect of any contract made on behalf of the Crown. The Air Council also averred that the contract relied on was made with servants of the Crown other than themselves, and therefore they were not liable, and that in February, 1920, they paid Kennedy the sum of £31,000 in full satisfaction of his alleged rights under the contract.

It should be stated that the Air Force (Constitution) Act, 1917, sec. 10 (1) enacts:—"The Air Council may sue and be sued, and for all purposes be described by that name."

The case came on for hearing on points of law

before trial. In delivering judgment Russell, J. observed that it was not disputed by the plaintiff that but for the provisions of the Air Force (Constitution) Act, 1917, by which the defendants were established, no action for damages for breach of contract would lie—recognizing the long-established principle that no action is maintainable against a servant of the Crown upon a contract made by him on behalf of the Crown. He found that the intention of sec. 10 (1) of that Act was to authorize the use of a name, and not to confer new rights in derogation from the Crown's prerogative. Under the Act in question, however, the Air Council was not an incorporated body, but consisted of individuals. The Air Council, being established to administer matters relating to the Air Force and the defence of the realm by air, was in the fullest sense the Crown. In the result it was decided that so far as the action claimed relief for breach of contract, and for the alleged infringement of Kennedy's patent, it was not maintainable, and that the plaintiff could not by action against a Government Department obtain a declaratory judgment that the patent was a valid patent.

It is also worth while noting that counsel for plaintiff contended that, having regard to the decision in *Graham* v. *His Majesty's Commissioners of Public Works* (1901), 2 K. B. 781 (where it was held that an action would lie against the defendant Commissioners because they were a body incorporated by statute without any provision exempting them from direct liability for their acts and contracts), the defendants in this case ought to be held liable on the assumption that Parliament in enacting the Air Force legislation in question had in contemplation the argument urged in the earlier case that such actions would not lie without the statute expressly providing that the defendants could sue and be sued, the learned trial Judge drily observed that such a contention "attributed to the Legislature an unexpected interest in the oratory of advocates."

A point related to that in controversy here was in issue between the parties in the Canadian case of *Johnston* v. *The King* (1910), 13 Ex. C. R. 155. That was a case of petition of right where the suppliant sought to enforce a claim against the Crown, in right of the Dominion of Canada, upon a contract for personal services entered into with the Commissioners of the National Transcontinental Railway. It was held by Cassels, J., that inasmuch as the Commissioners were, by 3 Edw. VII., ch. 71, *created a body corporate having capacity to sue and be sued* on their contracts, any action arising out of the contract should be brought against the Commissioners and that the same could not be maintained against the Crown by petition of right. This judgment was affirmed by the Supreme Court of Canada (1911) 44 S. C. R. 448.

We may be permitted to remark here that, hedged about with the prerogative as the Crown still is in judicial proceedings, the head of the wearer of it need not lie so uneasy as King Henry the Fourth's night-gown soliloquy would tell the world. Walter Bagehot's view of the vitality of the prerogative is doubtless as true of the second decade of the twentieth century as it was of the period—some fifty years ago—when it was expressed:—" 'The divinity which doth hedge a king' may have less sanctity than it had, but it still has much sanctity." And yet Maitland's counsel in such matters must not be forgotten:

> "There is one term against which I wish to warn you, and that term is 'the Crown.' You will certainly read that the Crown does this and the Crown does that. As a matter of fact we know that the Crown does nothing but lie in the Tower of London to be gazed at by sight-seers. . . . If you are told that the Crown has this power or that power, do not be content until you know who legally has the power—is it the King; is it one of his secretaries? Is this power a prerogative power or is it the outcome of statute?"

* * * In the *City of Regina* v. *McVey* (1922), 23 O. W. N. 32, O'Brian, Co.C.J., sitting in the First Division Court of the County of Carleton, decided that where a resident of the City of Regina, Saskatchewan, after he had been assessed for income tax in that city, removed to the City of Ottawa, Ontario, and took up his residence there, he was not liable to an action in the Ontario Courts for the recovery of the tax. The case of *Sydney* v. *Bull* (1909) 1 K. B. 7, was relied on as sustaining this view. In that case, by an Act of the Legislature of New South Wales, the Municipal Council of the City of Sydney was authorized to carry out improvements in a certain street within that city, and liability was imposed upon the owners of property situate within the improvement area to contribute towards the cost of the improvements. For the purpose of enforcing payment of contributions the Council was empowered to distrain the goods of the owners liable to contribute, and, in addition to the remedy by distress, to recover by action the amounts due and payable. Being unable to recover by means of distress the amount of contribution due from an owner of property within the improvement area, the Council brought an action in an English Court against the person liable for the tax in New South Wales, but who was resident in England. The trial Judge (Grantham, J.) held that the action was not maintainable because (1) the liability being imposed by the foreign State solely for its own domestic purposes, the action enforcing it was analogous to an action to recover a penalty or tax; and (2) the action was one relating to real property situate abroad.

The underlying principle of such cases is one of private international law. The Courts will not lend their assistance to foreign States for the purpose of enforcing claims for the collection of revenue and cognate matters. (See *Huntington* v. *Attrill* (1893), A. C. 150, at p. 196 *et seq.*) In Dicey's "Conflict of Laws," 3rd ed., p. 230, it is said:—

"The Court has no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal or revenue law of a foreign country." Reference is there made to *Attorney-General for Canada* v. *Schulze* (1901), 9 Sc. L. J. 4 and *Sydney* v. *Bull* (*supra*).

Halsbury's "Laws of England," vol. 6, p. 284, touches the doctrine so guardedly as to make it obscure.

It is unfortunate for the taxing power in any field to be thwarted in the collection of its revenues by easy sanctuary being afforded to delinquent debtors, such as results from a removal from one province to another in Canada. But it is difficult to suggest any remedy in the premises that would not be met by constitutional objections of an obstinate kind. Possibly if the matter should become acute, some workable inter-provincial convention may be arrived at which will meet the situation adequately.

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* * * A scathing indictment of the Jury system of the United States is presented by Mr. J. C. McWhorter in the *American Law Review* (vol. LVII., No. 1). After speaking of the very general opinion entertained by the American people of the inadequate enforcement of the criminal laws of the country, an opinion supported by investigations made by Bar associations and civic organizations, he declares that "the great obstructing incubus upon the administration of American law, both civil and criminal, is the jury system." According to Mr. McWhorter's view meticulously technical procedure and the inefficiency of juries in the United States have reversed the relative positions of the criminal and the people so that the former enjoys the protection of the law that essentially belongs to the latter; in other words, the criminal secures more or less immunity from punishment under a defective system of administering justice. It is the jury system that encourages gallery-play by lawyers to whom legal ethics is a byword. It is the jury system

that crowds the trial dockets with unmeritorious civil cases, and makes possible that class of lawyers locally known in the United States as "Ambulance Chasers." It is the jury system that inspires the criminal with contempt of the law, and encourages him in the hope of escape from the penalty befitting his crime. All this and more is included in the spirited attack by Mr. McWhorter.

We in Canada shall await with interest what may be said in defence of the American jury; and in the interim it would not be amiss for us to enquire if all is well with our own system. We harbour the impression that in our times, here as well as in England, the lawyer of wide forensic experience regards Blackstone's lyrical eulogy of trial by jury as mere "tosh." At no time in its history, we think, could trial by jury be sung as "the palladium of British liberty, the glory of the English law, and the most transcendent privilege that any subject can enjoy or wish for." On the contrary we think, and in this thought we are glad to be in agreement with our American cousins, that it is the judges on the bench and not juries in the box that give to our Courts of Justice their strength and wisdom in maintaining the peace and security of social life.

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* * * Sir Paul Vinogradoff, Corpus Professor of Jurisprudence at Oxford, has been nominated as Carpentier lecturer at Columbia University for 1923-4. Sir Paul is one of the outstanding figures in the learned world to-day, and it is to be hoped that he will visit Canada during his stay on this side of the water. It affords a great opportunity for the Canadian Bar to hear an address by him. He has been in America before; in 1897 he conducted a series of lectures in Harvard and other universities in the United States. The REVIEW rejoices in the fact that Sir Paul has written a special article for its pages, bearing the full impression of his literary hall-mark. As soon as space permits we shall give our readers the benefit of its publication.

* * * Sir William Mackenzie, K.C., President of the Industrial Court, gave a most instructive lecture on "Industrial Arbitration" recently in London. He discussed the view still so prevalent that arbitration in industrial disputes is an adventure upon perilous social seas; and claimed that what had been done in settling ordinary disputes arising between business men, could be done with cases of disagreement between employer and workmen if people would take a sensible view of the matter. The lecturer observed that

> "To allow the hundreds of disputes which daily occupied the ordinary courts of this country to be settled by a trial of strength between the parties would send us straight back to the Dark Ages—it would end in confusion . . . Yet methods which would be looked upon as barbarous for the purpose of settling business differences in general were too often accepted as a matter of course, and even of economic necessity, when a business difference of a particular kind occurred—that is, a difference between an employer and his work-people."

The lecturer referred to the course of history to show that compulsory arbitration in industrial matters was impracticable. On the other hand he submitted that an Industrial Court, permanent in its structure and orderly in its procedure, was a feasible means of attaining the consummation so devoutly wished by all right-minded people. He thought that the Industrial Court in England, by laying the foundation of a body of industrial common law, had already given promise of its ability to compose disputes that naturally grow in complexity so long as there is no regular forum for their hearing and determination.