außerhalb der Bucht der Küstenlinie zu folgen habe, und ein Richter will eine territoriale Zone von 3 Meilen und eine Aufsichtszone von weiteren 3 Meilen aufstellen, die zu bemessen seien von einer Linie, die am engsten Teil des Eingangs über die Bucht gezogen werde.

Der Attorney-General erklärt, daß nach seiner eigenen Meinung keine Gebietshoheit bestehe, wenn das Gewässer mehr als 12 Meilen breit ist, es sei denn, daß nachgewiesen werde, daß der Küstenstaat zweifellos feste Herrschaft darüber ausgeübt habe.

Zum Vergleich mit obigen Ausführungen sei noch der Vorschlag der Kodifikationskommission des Völkerbunds zur Regelung der Frage angeführt [5]):

»Pour les baies qui sont environnées de terres d'un seul Etat, la mer territoriale suit les sinuosités de la côte, sauf qu'elle est mesurée à partir d'une ligne droit tirée en travers de la baie, dans la partie la plus rapprochée de l'ouverture vers la mer, où l'écart entre les deux côtes de la baie est de dix milles marins de largeur, à moins qu'un usage continu et séculaire n'ait consacré une largeur plus grande. Les eaux de ces baies sont à assimiler à des eaux intérieures.

»Pour les baies qui sont environnées de terres de deux ou plusieurs Etats, la mer territoriale suit les sinuosités de la côte.«

Marg. Wolff.

* * *

b) House of Lords.

Engelke v. Musmann. July 3, 1928. (T. L. R. Aug. 3, 1928 p. 731)[1]).

Diplomatische Immunität — Bindung des Gerichts durch die Aussage der Exekutive

1. Die Aussage des Attorney General für die Krone (Foreign Office) über den Status einer zum Personal einer ausländischen Vertretung gehörigen Person bindet das Gericht.

2. Alle Personen, die vom Foreign Office als zum Botschaftsstab- oder -haushalt gehörend anerkannt sind, sind vor den englischen Gerichten immun.

3. Völkerrecht bildet einen Teil des englischen Common Law.

4. Der Empfangsstaat darf ein Mitglied des Botschaftshaushalts oder -stabs ablehnen.

5. Der diplomatische Vertreter eines Staats kann nur auf Befehl seines Staatsoberhaupts auf seine Immunität verzichten.

Der Kläger (der Berufungsinstanz) ist Konsularsekretär und wurde vom (jetzigen) Beklagten in der Vorinstanz auf Zahlung seiner Miete verklagt. In der Vorinstanz (Ct. App. 23. June 1927, [I K. B. 1928, p. 90]) ist die Immunität des damaligen Beklagten verneint worden, obgleich der Attorney-General als Vertreter der Krone (Foreign Office)

5) Völkerbundsdrucksachen C. 196, M. 70, 1927 V. S. 72.

1) Abgedruckt mit Erlaubnis der 'Times' Publishing Co.

ausgesagt hatte, daß der Konsularsekretär zum diplomatischen Personal gehöre (er war in der Botschaft u. a. zum Dechiffrieren verwendet worden). Das House of Lords hebt im vorliegenden Fall das Urteil des Court of Appeal mit folgender Begründung auf:

"Lord Buckmaster. — My Lords, the privilege affording ambassadors and other accredited representatives of foreign countries immunity from all writs and processes is an ancient doctrine of the common law declared in terms by the Diplomatic Privileges Act, 1708 (7 Anne, c. 12).

No question is raised on this appeal affecting the existence or the extent of this protection. The sole point for determination is the method by which the status of any person who claims the benefit of this privilege is to be determined. For the appellant it is contended that the statement of the Attorney-General on the instructions of the Foreign Office is for this purpose conclusive, while the respondent asserts that any such dispute should be determined in the ordinary way according to the usual rules of evidence. The present appeal arises out of the following circumstances: On July 28, 1926, the respondent issued a writ in the King's Bench Division of the High Court claiming against the defendant rent alleged to be due under a lease dated August 18, 1924, and damages for breach of covenant. A conditional appearance was entered by the defendant and a summons was issued by him asking that the writ might be set aside on the ground that he had been a consular secretary on the staff of the German Embassy, London, since November 25, 1920, and had been notified as such to the British Foreign Office and that his name appeared in the Diplomatic List issued by the British Foreign Office. It is unnecessary to follow the varying fate of this application before the Master and the Judge for, pursuant to leave, another summons was issued by the appellant on October 26, 1926, asking the same relief as before. On this application, as on the former, the appellant filed an affidavit; prolonged and fruitless proceedings in Chambers ensued until, finally, on March 4, 1927 — eight months after the issue of the writ — Mr. Justice Shearman made an order that the appellant should attend for cross-examination on his affidavit, at the same time granting leave to appeal against his order. The appellant availed himself of this permission and appealed to the Court of Appeal, who, on June 23, 1927, confirmed the order of Mr. Justice Shearman, the Master of the Rolls dissenting, and from their judgment this appeal has been brought. In form, therefore, this appeal is against an order for cross-examination, but in substance the dispute is far more important.

On the first day of the hearing of the appeal the Attorney-General informed the Court on their invitation that the defendant 'has been appointed as a member of the staff of the German Ambassador under the style of consular secretary and has been received in that capacity by the British Government. His name has been submitted to the Foreign Office by the Ambassador in the usual way, and his position as a member of the Embassy is, and has been since December, 1920, recognized

without reservation or condition of any sort. He has been engaged, during the last 12 months, at any rate, as a member of the staff of the commercial division of the Embassy. As such he has been obliged to take part from time to time in the general work of the Embassy staff, and particularly as regards the ciphering and deciphering of telegrams, that is, telegrams between the German Ambassador and his Government. He is responsible in all that he does to the German Ambassador.' He further added that he had himself communicated with the Foreign Office, had ascertained and accepted and was able to say that he was satisfied that the information was correct as to the defendant's position at all relevant dates. If this statement as to status be accepted, no question arises upon the construction of the statute; the defendant would then be entitled to the benefit of the privilege that he invokes. Lord Justice Scrutton, with whom Lord Justice Sargant agreed, felt himself unable to accept this statement as binding; to do so would, in his opinion, be contrary to principle and unsupported by authority. I find myself unable to agree with this conclusion.

So far as the question of principle is concerned, the case decided in this House of Duff Development Company v. Government of Kelantan (40 The Times L. R., 566; [1924] A. C., 797) is a clear authority that the method of proving status either of sovereigns, or of the ambassadors who are their representatives, is by the very method that is challenged in the present case. The statute, however, draws no distinction between the ambassador and what, in the language of the Act of Parliament, is described as the 'domestic or domestic servant of any such ambassador,' and it seems difficult to understand, when the principle is admitted in regard to the one, that it should not apply in relation to the other; for the privilege is the same in each case. With regard to the sovereignty of a particular State and whether or not a particular person is a sovereign ruler, the case referred to makes the general principle plain. As Lord Finlay said, at page 813: —

'It has long been settled on any question of the status of any foreign power, the proper course is that the Court should apply to His Majesty's Government, and that in any such matter it is bound to act on the information given to them through the proper department. Such information is not in the nature of evidence; it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognizance.'

Lord Dunedin expressed the same opinion in these words, at page 820: —

'It seems to me that once you trace the doctrine for[2]) the freedom of a foreign sovereign from interference by the Courts of other nations to comity, you necessarily concede that the home sovereign has in him the only power and right of recognition.'

Now the acceptance and recognition of persons who form the staff

[2]) richtig wohl 'of'.

of an ambassador are matters which, having regard to the practice in the conduct of foreign affairs, are equally based on the comity of nations and necessarily also within the cognizance of the Crown acting through the Foreign Office. They are in a position to know what are the duties performed and the persons who perform them, and it is plain that, though they trust the list put forward if it appears from their knowledge to be a list which might reasonably be accepted, yet the list itself is scrutinized, inquiries are made and, if necessary, persons are removed for sufficient reasons. That some such practice is contemplated under the Act itself is plain from the section which provides that no person shall be proceeded against for the arrest of a servant of the ambassador unless his name shall have been registered in the office of one of the principal Secretaries of State and transmitted to the Sheriffs of London and Middlesex, who are to hang the list up in some public place. This, of course, is a negative provision and does not show that the list should be accepted as evidence; but it does contemplate the preparation of a list of persons for whom immunity is claimed and its publication in the manner therein provided. The list is not conclusive, nor is it the list itself on which reliance is to be placed, but on the statement of the Crown, speaking through the Attorney-General, that a particular person at the critical moment is qualified to be upon the list. When this statement has been made it is difficult to see how it can be questioned without the introduction of proceedings which in the person of the ambassador himself, and equally of his wife and family and staff, it would obviously be undesirable to institute.

But apart from the question of principle, it appears to me that there is valuable information to be found in the authorities. In the case of Crosse v. Talbot (8 Mod. Rep. 288) a question arose whether a particular person was on the staff of the Duke of Holstein's Resident here, and a certificate was produced that he was the *valet de chambre* of such Resident at certain wages. The Court, however, held that he appeared to be a mere nominal servant and that he consequently was not within the privilege, but the certificate of the Resident as to what his status actually was does not appear to have been challenged. In cases like Seacomb v. Bowlney (1 Wilson, 20), and Triquet v. Bath (3 Burr., 1478), the dispute was, in fact, tried upon affidavit and the only questions determined were whether these affidavits showed that the status was adequate to secure the protection. The latter case is interesting because it explains the origin of the passing of the statute of Anne. In Heathfield v. Chilton (4 Burr., 2015), the dispute was as to whether the person in whose service the defendant, who had been arrested was, was himself within the privilege. Lord Mansfield there said: 'The application is not by the Attorney-General... That indeed would have shown that the Crown thought this person entitled to the character of a public minister. It now remains uncertain what his proper character is.' Lord Mansfield also added that the registration of a particular person's name in the Secretary of State's office was not a

condition precedent to his right of protection. In the case of Fisher v. Begrez (1 Cr. and M., 117), the question was whether a chorister was within the protection, and it was there held that the certificate itself was not a sufficient authority that the defendant was, as a chorister, a domestic servant, and therefore privileged.

Beyond this, the earlier cases throw little light upon the question, and this is possibly due to the fact that in all those cases, the defendant being the subject of arrest, application was immediately made on affidavit for his release; and that the matter could be tried by affidavit, if no intervention took place and if the defendant so liked, is not in dispute. The later cases are more instructive.

In Macartney v. Garbutt (6 The Times L. R., 214; 24 Q. B. D., 368) a question arose whether a British subject accredited to Great Britain by a foreign government as a member of its Embassy was liable to distress on the furniture of his house for rent. Such distress had been levied and had been paid out by the plaintiff, who brought an action to recover back the sum. In the course of his judgment, Mr. Justice Mathew said that the plaintiff was an English subject, had been appointed by the Chinese Government English secretary to the Chinese Embassy, and had been received in that capacity by the British Government; his name had been submitted to the Foreign Office in the usual way, and his position as a member of the Embassy recognized without reservation or condition of any sort. He would, therefore, seem to be clearly entitled to the privileges of the *Corps Diplomatique*. The importance of this statement is that the learned Judge bases his judgment upon the reception of the person as Secretary by the British Government, the submission of his name to the Foreign Office and his recognition by them. Now those circumstances could only be proved either by a person speaking on behalf of the Crown, as representing the Foreign Office, or by such person giving evidence and being subject to cross-examination, but, as soon as the matter is based upon the reception and recognition by the Foreign Office, it seems impossible to suggest a reason why such recognition should be good in the case of the Ambassador and bad in the case of his staff.

In the case of the Parlement Belge (5 P. D. 197) there is a very important statement by Lord Justice James. Lord Justice Brett appears to have doubted whether the recognition of an ambassador by the Crown could be accepted if the person in question had not, in fact, been sent as an ambassador, but Lord Justice James states (at p. 199) that that question is outside the authority of any municipal court, and adds: 'I apprehend that we should be bound to act on the representation of the Foreign Office.' And, in re Suarez (34 The Times L. R., 127; [1918] 1 Ch., 176), it was decided in the Court of Appeal that a letter from the Foreign Office under the hand of an Assistant Secretary of State, stating that a Minister's name has been removed from the diplomatic list, is sufficient evidence that he had ceased to hold diplomatic office at the date of the letter.

It is, of course, obvious that the privilege claimed has serious results, as it excludes from their remedies in the Courts the persons with whom members of the ambassador's staff may have incurred obligations, and it is possible that it is open to abuse. It is of the essence of all privilege that it may be abused, but that question has nothing to do with the matter which we are called upon to decide; the merits of the dispute out of which this question has arisen are in no way before us for consideration. The privilege itself depends upon maintaining the obligations of international law and the comity of nations. It would, indeed, be unfortunate if, after recognition had been afforded by His Majesty through the Foreign Office to persons as holding on the ambassadorial staff posts which entitled them to the privilege and after a statement as to their position had been afforded on behalf of the Crown through the Attorney-General, it was to be disregarded by the judiciary; for, in such circumstances, the ensuing contest could not possibly enure to the public good.

Viscount Dunedin. — My Lords, I entirely concur with what has been said by the noble and learned lord on the Woolsack as to the unfortunate way in which this case was begun. Had the question remained merely as to whether the cross-examination was permissible upon an affidavit in which the appellant set forth his own status, I should have been of opinion with the Court below. But, in truth, the whole case was altered *funditus* when the Attorney-General intervened.

The respondent tried to convince us that, if this case was decided in favour of the appellant, it was opening the door to the granting of diplomatic privilege to the Consular Service. It is nothing of the sort. Mr. Engelke will enjoy diplomatic privilege not because he is styled Consular Secretary, but because he, as an accredited member of the Ambassador's household, has privilege as such and does not forfeit it because he does some consular work. In the case of Duff Development Co. v. Kelantan Government (40 The Times L. R., 566; [1924] A. C. 797), in this House it was pointed out that the acknowledgment of diplomatic privilege entitling to immunity from being sued in the tribunals of this country rests on comity, and that the Statute of Anne does no more than confirm the Common Law and annex certain penalties to those who transgress it. Mr. Engelke is, in the words of the statute 'a domestic of the Ambassador'. In the Oxford Dictionary 'domestic' as a substantive is defined as 'a member of the household, one who dwells in the house, an inmate'; and there is a quotation of 1656, 'from that time he had his accesses to His Majesty's person as a domestique without ceremony'. To prove that he is so rests on the fact that it has been brought to the notice of the Court through the Attorney-General, as the mouthpiece of the Foreign Office, that Mr. Engelke was presented to the Foreign Office as belonging to the personal staff of the Ambassador in the list supplied by him to the Foreign Office and accepted as such by the Foreign Office. In such a case the comment which I made in Duff's case (supra), and which I think was quoted by the Master of the Rolls, seems

to me directly in point. The Attorney-General, in his very careful statement, shows that the acceptance of the list is no matter of necessity, but that it is subjected to careful scrutiny. This seems to me to obviate the possibility of abuse, or of such an extension of privilege as the inclusion of the whole consular service. The judgment of the Court of Appeal should be reversed and a declaration made that the appellant is entitled to diplomatic privilege.

Lord Phillimore. — My Lords, The plaintiff in this case brought an action claiming certain relief against the defendant in respect of the lease of a house. The defendant, who claims diplomatic privilege as one of the staff of the German Embassy, entered a conditional appearance and took out a summons for an order that the writ be set aside. In support of this summons he filed an affidavit by his solicitor, speaking partly to the deponent's own knowledge, but mainly upon information and belief. This affidavit was rejected, perhaps unfortunately, by Mr. Justice Talbot as being insufficient even to raise the point. Thereupon, the defendant filed his own affidavit, and then a further affidavit on his own behalf, and the plaintiff being minded to contest the accuracy of the statements contained in these affidavits applied to cross-examine the defendant upon them. The defendant, upon the instructions of the Ambassador declined to submit himself to cross-examination and after the matter had been to and fro in a not very edifying series of applications to Master and Judge it came before the Court of Appeal.

Before that Court the Attorney-General appeared, instructed by the Foreign Office, to give certain information as to the status of the defendant, and after he had given that information, the Court nevertheless, by a majority, affirmed the decision of the Judge at Chambers directing that the defendant should attend for the purpose of cross-examination. It is from this order of the Court of Appeal that the appeal has now been brought to your Lordship's House.

The description which the defendant gave of himself and which has been given of him by the Foreign Office is, that he is a consular secretary on the staff of the German Ambassador, and the argument for the plaintiff rested on the expression 'consular' with a suggestion that an attempt was being made to get diplomatic privileges for a person who was not truly diplomatic but only in the consular service. For reasons which will appear in the course of this opinion, it is not necessary to go very deeply into this point, but I may observe, that the positions of diplomat and consular *employé* are not mutually exclusive, and that indeed it has been in the past not uncommon to clothe a consul or consul-general with certain diplomatic functions and thereby to give him a diplomatic status. But the question before your Lordships turns on other matters.

If this case now turned upon the question whether the defendant should be cross-examined upon his affidavit or not, it may be that the result would be unfavourable to him. Where an application is made

to stop a suit *in limine* and the application rests upon a disputed matter of fact, it would be right that the evidence should be scrutinized. On the other hand, where an applicant is claiming that he is privileged from litigation it seems a strange result if he is forced to litigate in order to obtain his exemption from litigation.

But as the defendant is now content to rely solely upon the certificate of the Foreign Office delivered to the Court by the Attorney-General, it is unnecessary to consider the question of cross-examination.

The objection taken on behalf of the plaintiff to the reception of this certificate and the criticism of its weight seem to me to rest upon misapprehensions as to the nature of diplomatic privilege.

By international law, which is part of the common law of this country, an Ambassador, by which term I intend to include diplomatic agents of all sorts — the stately Ambassador, in the restricted sense of the word, the special envoy, the resident Minister, and the Chargé d'Affaires — is sent by the one country and received by the other upon the terms that he has among his other diplomatic privileges immunity from legal process in the Courts of the country which receives him. The reasons for this immunity are well expressed in Magdalena Steam Navigation Co. v. Martin (2 El. & El., 94).

This immunity, being accorded to him in order that he may transact his Sovereign's business, is a privilege which he cannot waive unless under direction from his Sovereign.

The Ambassador further requires, in order that he may effectually do his Sovereign's business, that there should be a like immunity for his personal family, that is to say, his wife and his children, if living with him, his diplomatic family, as it is sometimes called, that is to say, his counsellors, secretaries and clerks, whom I take to be intended by the word 'domestic' in the Statute of Anne, and his ordinary servants, described in the statute as 'domestic servants,' with a possible reservation in the case of domestic servants who are nationals of the receiving country. The privilege of all these persons is a derived privilege, created for the benefit of the Ambassador, and may be waived by him, but should, unless waived, be taken by them for the Ambassador's benefit.

But just as the receiving State may intimate that a proposed Ambassador will not be agreeable to it, and will be refused, so if the Ambassador tenders a person as a domestic or domestic servant, the receiving State may refuse to accept and recognize the man as such, and when the person tendered is a subject of the receiving country, conditions may be made. In old days, a resident Minister or Chargé d'Affaires was not infrequently a subject of the receiving country, distinguished from an envoy who, as the derivation of the word shows, would be sent from the one country to the other. I take it that in living memory our business at the Court of the ruler of Afghanistan was conducted on this footing. But generally now, the Ambassador is a subject of the sending and not of the receiving country, and is therefore said to be extra-territorial.

But his domestic servants, or some of them, will almost certainly be subjects of the receiving country, and in certain cases some members of the staff may be drawn from the receiving country. The case of Macartney v. Garbutt (6 The Times L. R., 214; 24 Q. B. D., 368) affords such an instance. Sir Halliday Macartney was appointed English secretary to the Chinese Legation and, as the case narrates, his appointment was communicated to and accepted by the Foreign Office without conditions, though, as he was a British subject, it might have been made subject to the condition that no privilege was claimed for him. The Siamese Legation has had, to my knowledge, similar English secretaries, but whether they were accepted by the Foreign Office conditionally or unconditionally I know not.

When we come to the ordinary domestic servant, it may well be that, if he be a British subject, the Foreign Office may intimate that they cannot accept him so as to give him privilege. But according to English law (which may in respect of the domestic servant who is a national go somewhat beyond general international law), when once the man is tendered as a domestic or as a domestic servant, and the tender is accepted, the status is created and the privilege attaches.

When therefore the certificate from the Foreign Office was delivered by the Attorney-General, it was not, as suggested on behalf of the plaintiff, a piece of hearsay evidence, a mere narrative of what the Ambassador had told the Foreign Office. It was a statement of what the Secretary of State, on behalf of His Majesty, had done, not what he was doing *ad hoc*, or what he was believing and repeating, but what the Foreign Office had done. The certificate is no attempt on the part of the Executive to interfere with the Judiciary of the country. The status which gives the privilege has been already created by the Crown in virtue of its prerogative in order to administer its relations with a foreign country in accordance with international law.

For the plaintiff, reliance was not unnaturally placed upon a number of cases, principally in the 18 th century, where privilege was asserted by an application to discharge the defendant, supported by an affidavit of the facts, whether made by or on behalf of the defendant; and it was submitted that this was the only way in which the status (except in the case of the actual Ambassador) could be proved, with a further submission that the proper consequence would be that the deponent might be cross-examined. It would seem that the privilege might be claimed and proved in this manner, but there were reasons for this procedure which no longer exist, and there are objections to it in principle which seem to me to make it a less desirable course.

In these 18th century cases, the defendant seems always to have been a British subject. I should gather that in most of them he was not on the Sheriff's list, and I would insist upon this, not because of the direct importance of the list, but because he would have been on the list if he had been made known to the Foreign Office, and accepted as one of the Ambassador's retinue, and it follows, therefore, that he

never had been tendered and accepted, and was reduced to proving his privilege in fact by showing his service.

My next observation would be that, according to the procedure of those days, process was initiated by arrest of the person, and that a defendant had perforce to submit so far to the jurisdiction as to procure his release by giving bail. Further, I would observe that counsel have told your Lordships that the result of their researches is that cross-examination upon affidavit was an unknown form of procedure till introduced by the Chancery Procedure Act of 1852, so that the affidavit of the 18th century was merely a solemn mode of making a claim. It was indeed the only way, as far as I know the old procedure, because I conceive that a suggestion on the roll would not be applicable, and that the only form of process would be by a rule *nisi* supported by affidavit.

Such defendants, not having been made known to the Secretary of State, could not well expect to have the benefit of the procedure suggested by Lord Mansfield in Heathfield v. Chilton (4 Burr., 2015). I quote his words: 'I find this is not an application by the Attorney-General, by the direction and at the expense of the Crown. That, indeed, would have shown that the Crown thought this person intituled to the character of a public minister.'

The case of Fisher v. Begrez (1 Cr. and M., 117) is perhaps the most favourable to the plaintiff. There the claim of privilege was disallowed, and there are expressions in the report to the effect that the certificate from the Secretary of State was not conclusive; but what is referred to is not a real certificate, but the Sheriff's list, and the reason given is that a man may well have been put on the list as being at the time in the suite of an Ambassador, and yet be no longer in that capacity. There was not, as in this case, a certificate *de praesenti*. It may be further noticed that the claim for privilege was made in respect of a writ of *fi. fa.*, so that the case must have proceeded to judgment without any such claim having been made, and it seems to have been an afterthought.

The case of the Russian Ambassador, which led to the Statute 7 Anne, c. 12, is related by Lord Mansfield in the case of Triquet v. Bath (3 Burr., 1478), and is given more at length in Blackstone's commentaries, 2nd ed., Vol. 2. p. 255, repeated by Stephen. Blackstone got his account from Boyer's Annals, to which I have referred. Lord Mansfield, following, I think, the train of thought which he expressed later in Heathfield v. Chilton (supra), seems rather to complain that in that case there was no direct intervention by the Attorney-General. He observes as follows: 'If proper application had been immediately made for his discharge from the arrest, the matter might and doubtless would have been set right. Instead of that, bail was put in, before any complaint was made.' I do not, however, know what the unfortunate Ambassador could have done. His carriage was stopped, he was dragged out of it with violence and taken to a sponging house, where he had to remain till two distinguished persons put in bail for him. He then

went straight to the Queen to complain, and the whole diplomatic corps joined in protesting, whereupon the delinquents were summoned before the Privy Council, of which it is stated that the Lord Chief Justice Holt was sworn a member, apparently in order that he might sit. One of the persons complained of was discharged, but the rest were committed to prison, and the Attorney-General was directed to file an information against them, on which they were convicted, judgment being reserved, in order to consider the international law; but the Czar having been mollified by the passing of the Act of Parliament, and the presentation of an elaborately engrossed copy, desired that they should not be punished, and they were accordingly released.

It does not appear that any steps were taken to vacate the bail bond or dismiss the suit. Probably, any such step was deemed unnecessary. There was intervention by the Crown, but after a different fashion.

I have already observed that in my judgment there are objections in principle against driving a defendant to the course adopted in the 18th century cases. The object to be attained is immunity from the vexation of litigation with its impediments to the discharge of the functions of the domestic or domestic servant, as illustrated in the case of Magdalena Steam Navigation Company v. Martin (supra). Absolute freedom is difficult to procure. Litigation, as Lord Justice Mellish observed in Ex parte Edwards (L. R., 9 Ch. 138), usually begins *ex parte*, and a defendant served with a writ must enter an appearance, even if it be only a conditional appearance, or he will have judgment against him, and he must follow up appearance by a summons to set aside the writ. All this is unfortunate, and is intended to be provided against in our country by the Statute of Anne and the Sheriff's list. But the only compensation, if it be compensation, is to give the defendant his costs. If possible, there should be no further interference with him, but if he is put to file an affidavit it is a further step in *de facto* submission. If he has to attend for cross-examination, it is a further submission and not unlikely to interfere with the discharge of his other duties. Where the man's chief has not taken the precaution of tendering the man and procuring his acceptance, the man may still have to prove his status *aliunde*. But where the man has been tendered and accepted, the joint act creates a status, which can only be removed by showing that his duties have ceased or that he has engaged in trade.

My Lords, if I am not mistaken, when a question arises in the Law Courts as to whether a ruler is a Sovereign and a proper Secretary of State is consulted, the right answer is not 'A. B. is a Sovereign,' but 'A. B. is recognized by his Majesty as a Sovereign.' So, I think, the exact inquiry in this case is not whether the defendant is a member of the ambassadorial staff but whether he has been accepted and recognized by the Crown as such a member, and it appears to me that he has so been.

Therefore, my Lords, I think that this appeal should be allowed.

Lord Warrington of Clyffe. — My Lords, the appellant is defendant in an action brought against him by the respondent Musmann for the recovery of rents and damages for breach of covenants contained in a lease dated August 18, 1924, made between the respondent of the one part and the appellant of the other part of certain premises at Hampstead.

The appellant having entered a conditional appearance applied to have the writ and all subsequent proceedings set aside on the ground that he is a consular secretary on the staff of the German Embassy and, therefore, entitled to immunity from civil proceedings.

In support of this application he filed affidavits stating the nature of his employment and making the claim to immunity.

On March 4, 1927, Mr. Justice Shearmann, on an appeal from a decision of Master Moseley, given in Chambers on February 15, 1927, ordered the appellant to attend for cross-examination, but gave leave to appeal.

The appeal came before the Court of Appeal on April 12 and May 30 and 31, 1927. The Attorney-General attended and at the request of the Court informed them that the appellant had been appointed a member of the staff of the German Embassy, under the style of consular secretary, and had been received in that capacity by the British Government, that his name had been submitted to the Foreign Office by the German Ambassador in the usual way, and that his position as a member of the Embassy was and had been since December, 1920, recognized without reservation or condition of any sort. He gave the court certain further information as to the particulars of the appellant's employment which it is not necessary to state in detail, and stated that he gave the information both on the instructions of the Foreign Office and on his own responsibility as Attorney-General.

On June 23, 1927, the Court of Appeal by a majority (Lords Justices Scrutton and Sargant — the Master of the Rolls dissenting) made an order affirming the order of Mr. Justice Shearman. This is an appeal from that order.

On November 25, 1927, the Attorney-General lodged a petition to this House praying leave to intervene in this appeal and to lodge a case and to be heard thereon. The prayer of this petition was granted by the Appeal Committee, reserving to the respondent Musmann the right to take on the hearing of the appeal such preliminary objection to the Attorney-General being heard as he might be advised.

The Attorney-General accordingly lodged a case and appeared before your Lordships, but the respondent objecting to his being heard, and the Attorney-General stating that the printed case contained all that he desired to say, he did not address any argument to your Lordships.

The real question, therefore, and it is an important one, is whether in such a case information given by the Attorney-General in the circumstances stated above as to the diplomatic status of a person claim-

ing immunity from civil process is conclusive as to the fact of such status. If it is, then cross-examination on an affidavit with the object of displacing the effect of the information would be irrelevant and useless and ought to be refused.

It must be borne in mind that all that is directly in issue is the fact of the appellant's status. Whether, that fact being established, a defendant is entitled to the immunity that he claims is a further question, which might have to be determined by the Court. In the present case, however, it does not appear that there is in issue any question of law or fact other than that of status.

It is now well settled that in certain matters connected with our relations with Foreign States it is for the Court to take judicial notice of the facts relating thereto, and further that in all matters of which the Court takes judicial cognizance the Court may have recourse to any proper source of information, and there is no question that in such a case as the present the source of information actually applied to was the proper source.

The information so obtained is not in the nature of evidence; it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognizance, and the Court is bound to act on such a statement (See the opinion of Lord Finlay in Duff Development Co. v. Kelantan Government (40 The Times L. R., 566; [1924] A. C., 797, at p. 813).

It is admitted that amongst the matters of which the Court is bound to take judicial cognizance are the status of an Ambassador himself and even that of a mere chargé d'affaires. In the case of Macartney v. Garbutt (6 The Times L. R., 214; 24 Q. B. D., 368) it would seem, though it is not quite clear, that the Court acted on information obtained from a Government Department, in that case the Home Secretary, as to the status of the English Secretary of the Chinese Embassy. But when once it is established, and I think it is, that the Court takes judicial cognizance of the status of any member of a Foreign Embassy, it is impossible on any principle to draw a distinction between one class of member and another and to say that the rule applies to the first and not to the second.

The Attorney-General states explicitly in paragraph 26 of his case that it is a necessary part of his Majesty's prerogative in his conduct of foreign affairs and his relations with foreign States and their representatives to accord or refuse recognition to any person as a member of a foreign ambassador's staff exercising diplomatic functions. The fact of recognition is of course peculiarly within the knowledge of the department according it, and a statement by or on behalf of the department that it has been accorded to any person must, in my opinion, come within the principles above referred to and be conclusive as to the status of that person.

It may be added that the Attorney-General states in his printed case that, for the purpose of obtaining recognition of the members of an

ambassador's staff exercising diplomatic functions, a list of such members is furnished from time to time to the Secretary of State by every ambassador. The list is not accepted as of course on behalf of his Majesty, and after investigation it not infrequently happens that recognition is withheld from a person whose name appears upon the furnished list, either because his diplomatic status is in doubt, or because the number of persons for whom status is claimed appears to the Secretary of State to be excessive.

I have not thought it necessary to discuss the many cases which were cited in this House. It is enough to say that some of them support and no one of them is opposed to the view that I have above expressed.

I have also thought it unnecessary to say anything about the statute of Anne. It is well settled that the questions that we have been discussing do not depend on the statute but are principles of common law, having their origin in the idea of the comity of nations.

For the reasons above expressed I am of opinion that this appeal should succeed and the orders of the Court of Appeal and Mr. Justice Shearman should be discharged, and a declaration made as proposed from the Woolsack. The appellant does not ask for costs and the order will therefore be without costs here or below.

Lord Blanesburgh concurred in the judgment of Lord Buckmaster [3]).

* * *

c) High Court of South West Africa

Königlich Preußisch-Brandenburgisches Hausfideikommiß v. His Honour the Administrator of South West Africa and the Registrar of Deeds. [1]) Sept. 7, 1928.

Versailler Vertrag, Artikel 256, 257.

1. *Der Ausdruck "Royal personages" (personnes royales) in Art. 256 des Versailler Vertrages hat die gleiche Bedeutung wie der Ausdruck "other German sovereigns" (anciens souverains allemands) in Art. 56 des Versailler Vertrages. Der Umfang des nach Art. 257 den Mandatarmächten zufallenden Vermögens ist in derselben Weise bestimmt. Unter "private property of the former German Emperor and other Royal personages" ist nicht zu verstehen das Privatvermögen der Mitglieder des Königlich Preußischen Hauses soweit sie nicht selbst unter die "other German sovereigns" gehören.*

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3) Vgl. u. a. zu diesem Urteil die Debatte im House of Commons vom 1. August 1928 (Hansard Parl. Deb. H. o. C. 1928, Vol. 220, p. 2146), die kurze Note im Solic. Jour. (4. Aug. 1928, S. 525), das unten S. 204 wiedergegebne Urteil des Oberlandesgerichts Darmstadt und die Zusammenstellung der Judikatur im Harvard Law Rev. (February, 1929 p. 582).

1) Nach amtlicher Mitteilung.