The Application of International Law in the English Courts[1])

The question of the application of international law in English courts may be studied from two points of view: that of the international lawyer and that of the English lawyer. In this article, it is proposed to look at international law as it is regarded by the English courts themselves: it is a view from underneath rather than from above, as it were. It is therefore a study of practice, to the exclution of philosophical and historical considerations except in so far as they are necessary to an exposition of the practice followed[2]). It is in this perspective that Sir Arnold McNair, as he then was, said some years ago:

> "... this topic affords a first-class illustration of our insular and unphilosophical habits of legal thought. We have never attempted to rationalise the relations between international and English law ... but ... this attitude does not prevent us from discharging our international obligations in the matter"[3]).

The relations between international and English law have never therefore been formally rationalised, but if such an attempt were made, it might take the form of stating a general rule, subject to three exceptions, corresponding to the three powers of the state – legislative, executive and judicial.

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[1]) This article was written at the »Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht« at Heidelberg during the author's stay at that Institute.

Statement of Plan:

A. *The General Rule*
B. *The Exceptions*
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    1. Treaties:
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[2]) The historical development and the philosophical background of international law in England has been well described, from the international lawyer's point of view, by Eberhard Menzel, Die Englische Lehre vom Wesen der Völkerrechtsnorm, 1942 (Abhandlungen aus dem Staats- und Verwaltungsrecht sowie Kolonial- und Völkerrecht, H. 65).

[3]) The Method whereby International Law is made to Prevail in Municipal Courts on an Issue of International Law, Transactions of the Grotius Society, vol. 30 (1945), p. 11 f.

A. The General Rule

The general rule may be shortly stated, using the words of Blackstone:

> "... the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be part of the law of the land" [4].

This is the classic phrase and recurs again and again. Blackstone had himself, as counsel, heard Lord Mansfield so express the principle [5], as Lord Mansfield had heard it from Lord Talbot when he was counsel [6], and this view was handed down over the generations [7]. Similarly, the much cited Act of Anne – the Diplomatic Privileges Act, 1708 – was repeatedly said merely to be "declaratory of the common law, and of the law of nations" [8].

International law is, however, often wanting or imprecise, and in such a case the English courts will naturally supply what is missing as best they can. Lord Langdale, M. R., [9] explained this as follows:

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[4] Blackstone's Commentaries on the Laws of England (11th ed. 1791) 4th Book, p. 67.

[5] In *Triquet* v. *Bath* (1764) 3 Burrow 1478; 97 E. R. 936.

[6] *Buvot* v. *Barbuit, Barbuit's case in Chancery* (1737) Cas. temp. Talbot 281; 25 E. R. 777.

[7] *V. Heathfield* v. *Chilton* (1767) 4 Burrow 2015; 98 E. R. 50, per Lord Mansfield; *Novello* v. *Toogood* (1823) 1 B. & C. 361, 107 E.R. 204, per Abbott, C.J.; *De Wutz* v. *Hendricks* (1824) 2 Bing. 314; 130 E. R. 326 per Best, C.J.; *Charles, Duke of Brunswick* v. *The King of Hanover* (1844) 6 Beav. 1; 49 E. R. 724, per Lord Langdale, M. R.; *Emperor of Austria* v. *Day and Kossuth* (1861) 2 Giff. 628; 66 E. R. 263, per Sir John Stuart, V.-C.; *West Rand Central Gold Mining Co.* v. *The King* [1905] 2 K. B. 391, per Lord Alverstone, at p. 406 f.; *In Re Suarez* [1918] 1 Ch. 176, per Swinfen-Eady, L. J., at p. 192; *Commercial and Estates Co. of Egypt* v. *The King* [1925] 1 K. B. 271, per Bankes, L. J., at p. 283; *Engelke* v. *Musmann* [1928] A. C. 433, per Lord Phillimore, at p. 449.

[8] Per Lord Ellenborough, C. J. in *Viveash* v. *Becker* (1814) 3 M. & S. 284; 105 E. R. 619; v. also: *Buvot* v. *Barbuit,* (1737) *op. cit.* per Lord Chancellor Talbot; *Triquet* v. *Bath* (1764) 3 Burr. 1478; 97 E. R. 936, per Lord Mansfield; *Lockwood* v. *Dr. Coysgarne* (1765) 3 Burr. 1676; 97 E. R. 1041, per Lord Mansfield; *Heathfield* v. *Chilton* (1767) *op. cit.* per Lord Mansfield; *Hopkins* v. *De Robeck* (1789) 3 T. R. 79; 100 E. R. 465, per Buller, J.; *Novello* v. *Toogood* (1823) 1 B. & C. 554; 107 E. R. 204, per Abbott, C. J.; *Service* v. *Castaneda* (1845) 2 Coll. 56; 63 E. R. 635, per Knight-Bruce, V.-C.; *In Re Piracy Jure Gentium* [1934] A. C. 586 (P. C.) per Viscount Sankey, L. C.; *The Cristina* [1938] 1 A.E.R. 719, per Lord Maugham, at p. 737 f.

[9] In *Charles, Duke of Brunswick* v. *The King of Hanover* (1844) 6 Beavan 1; 49 E.R. 724. More recently, in *Molvan* v. *Attorney-General for Palestine* [1948] A.C. 351, the Privy Council denied that the bringing of a vessel within territorial waters under the compulsion of the British Navy was a breach of international law, on the ground that no

"The law of nations includes all regulations which have been adopted by the common consent of nations, in cases where such common consent is evidenced by usage or custom. In cases where no usage or custom can be found, we are compelled, amidst doubts and difficulties of every kind, to decide in particular cases, according to such light as may be afforded to us by natural reason, or the dictates of that which is thought to be the policy of the law".

It is thus, for instance, that the courts have for more than two centuries had to determine the exact extent of the acknowledged principle of diplomatic privilege. In earlier times it was necessary to decide whether consuls and such like persons came within the privilege [10]), what persons came within the definition of servants of public ministers so as to be entitled to immunity [11]), and similar questions [12]). In more recent times, the advent of socialism and new economic practices has threatened to burst the seams of the principle of sovereign immunity, by expanding it overmuch. As Lord Wright said in *The Cristina* [13]):

"Times, however, have changed, and the general principle must override the particular instance, and must be adapted to the new conditions",

but what exactly the new principle is has not yet been fixed by international agreement. And pending the achievement of such international uniformity, the national courts may exacerbate the divergences [14]).

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general agreement as to the absolute and unqualified freedom of the sea had been established. Moreover the ship did not sail under the flag of any state.

10) *Buvot* v. *Barbuit* (1737) Cas. temp. Talbot 281; 25 E.R. 777: King of Prussia's agent of commerce held not to be entitled to freedom from arrest; *Viveash* v. *Becker* (1814) 3 M. & S. 284; 105 E.R. 619: Consul of Duke of Sleswick Holstein held not to be entitled to privilege of immunity of arrest.

11) *Darling* v. *Atkins* (1769) 3 Wils., K.B. 33; 95 E.R. 917: held that the office of purser on board an English ship was incompatible with the office of English secretary to the envoy of the Elector of Bavaria, and thus that he was liable to arrest for non-payment of a debt.

12) *Service* v. *Castaneda* (1845) 2 Coll. 56; 63 E.R. 635: the agent of the Queen of Spain's government for the discharge of certain claims upon that government held to be protected from judicial proceedings; *Novello* v. *Toogood* (1823) 1 B. & C. 554; 107 E.R. 204: held that the goods of the plaintiff – first chorister in the chapel of the ambassador from the crown of Portugal as well engaged in outside musical and theatrical activities – could be distrained for non-payment of local rates, even though he himself could not be arrested; *Charles Duke of Brunswick* v. *The King of Hanover* (1844) 6 Beav. 1; 49 E.R. 724: held that the King of Hanover was exempt from liability to suit in his character of sovereign prince, but not in his character of subject to Queen of England; *Magdalena Steam Navigation Co.* v. *Martin* (1859) 2 Ellis and Ellis, 94; 121 E.R. 36: held that the plaintiff, Envoy Extraordinary and Minister Plenipotentiary of Republics of Guatemala and New Granada respectively did not forfeit his privileges as public minister simply because he had invested in shares in an English company.

13) [1938] 1 A.E.R. 719, at p. 734.

14) In *The Cristina* itself, it was common ground that the Spanish ship was *publicis usibus destinata*, but their Lordships did nevertheless discuss *obiter* whether a trading

This general principle of English law is manifested also in two subsidiary principles.

Firstly, there is a presumption that a statute does not violate international law. In the words of Maxwell on the Interpretation of Statutes [15]):

> "... every statute is to be so interpreted and applied, as far as language admits, as not to be inconsistent with the comity of nations, or with the established rules of international law. If, therefore, it designs to effectuate any such object, it must express its intention with irresistable clearness to induce a court to believe that it entertained it, for if any other construction is possible, it would be adopted to avoid imputing such an intention to the legislature. All general terms must be narrowed in construction to avoid it. But if the statute is unambiguous, its provisions must be followed, even if they are contrary to international law" [16]).

Secondly, international law is not proved like foreign law or any other fact: the courts take judicial notice of it [17]). This means that while points of foreign law must be proved by expert witnesses (or referred to the courts of the appropriate countries) just as ordinary facts must be proved by witnesses, points of international law are argued by counsel like points of common law; writers and usage will be cited, and a concordance sought. And the reason is obviously to be found in old adage that international law is part of the common law; this the judges are presumed to know, though counsel may refresh their memory.

Such then is the principle which Judge Moore referred to as "the ma-

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vessel could enjoy immunity. While Lord Wright was of the opinion that all vessels used by a government for public purposes, including trading, should be entitled to immunity (p. 733–735), Lords Thankerton (p. 724), Macmillan (p. 726) and Maugham (p. 740–743) held the opposite view. The question had already been raised in *The Parlement Belge* (1879) 4 P.D. 129; (1880) 5 P.D. 197; and in *The Porto Alexandre* [1920] P. 30, the Court of Appeal considered themselves obliged by the authority of *The Parlement Belge* to hold that the Portuguese government-owned ship enjoyed immunity, even though it was employed in ordinary trading voyages earning freight for the government. The court was similarly divided – and this time not merely in its *obiter dicta* – in the recent case of *Baccus S.R.L.* v. *Servicio Nacional del Trigo* [1956] 3 W.L.R. 948; the majority there decided that immunity attached to a state department, even though it possessed independent legal personality. And earlier, in *Krajina* v. *Tass Agency* [1949] 2 A.E.R. 274 the court had decided that the Russian Tass Agency in England enjoyed immunity as a department of a foreign state.

15) 10th. ed. 1953, p. 148 f., and cf. cases there cited.

16) Cf. for example, *R.* v. *Keyn* (1876) L.R. 2 Ex. D. 63, per Sir Robert Phillimore and Kelly, C.B., *Colquhoun* v. *Brooks* [1889] 21 Q.B.D. 52, per Lord Esher at p. 57 f.; *Theophile* v. *Solicitor-General* [1950] 1 A.E.R. 405, per Lord Porter, at p. 407 f.

17) "Judicial notice is the cognisance taken by the Court itself of certain matters which are so notorious or well established, that evidence of their existence is deemed unnecessary", Phipson on Evidence (9th ed. 1952) p. 4.

jestic stream of the common law, united with International Law" [18]). It has however not gone completely unchallenged. Firstly, it has been attacked on historical grounds. Adair[19]) maintained, as summed up by Hersch Lauterpacht[20])

> "that diplomatic representatives did not in the seventeenth century enjoy exemption from civil and certainly not from criminal liability before courts, that such immunity as was undoubtedly enjoyed was one protected not by courts but by the royal prerogative; and that there is no evidence that in the seventeenth and in the first half of the eighteenth century International Law was regarded as part of the law of England".

The answer to this charge was given by H. Lauterpacht himself:

> "A perusal of the judgements given by Lord Mansfield and others who adopted his terminology shows that what prompted them was not any desire to copy precedents of the past, but the conviction that it was fitting and proper that the courts of this country should give effect to a universally binding law. Prior to Blackstone and Lord Mansfield the jurisprudential question of the relation of International Law to the law of England was not a matter which was present to the minds of judges and writers" [21]).

The doctrine of incorporation has also been criticised as analytically unsound. Thus, for instance, Oppenheim, having said that the two systems of law differed fundamentally in respect of their sources, their subjects and their substance, concluded that,

> "if the law of Nations and Municipal law differ as demonstrated, the Law of Nations can neither as a body nor in parts be *per se* part of Municipal Law" [22]).

Picciotto[23]) firstly notes two propositions, firstly

> "that to the lawyers of the eighteenth and the early part of the nineteenth century the common Law was still the expression of the rules of 'right reason' or 'natural justice',

and, secondly,

> "that until some sixty years ago the naturalistic conception of International Law was not clearly separated from the positivistic ... In other words, the conception of the law as it is was not clearly separated from the conception of law as it ought to be ... The combined effect of these two propositions is that since

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[18]) In *The Lotus Case*, P.C.I.J. Series A, No. 10, at p. 75.

[19]) In The Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries, 1929, p. 238–243.

[20]) Is International Law Part of the Law of England? in Transactions of the Grotius Society, vol. 25 (1939), p. 67.

[21]) *Ibid.* p. 67 f.

[22]) International Law, vol. 1 (2nd ed. 1912), § 21.

[23]) The Relation of International Law to the Law of England and of the United States of America, 1915.

> International Law rests upon rules of morality, and since the Common Law is the embodiment of such rules, International Law must be part of Common Law" [24]).

He then examines the cases, noting the change of philosophy and formulation over two centuries, and concludes that

> "the true view would seem to be that so far from International Law being in any sense whatever a part of the Common Law of England, it is merely a source of law, and that this fundamental confusion between cause and effect has vitiated the whole controversy" [25]).

Further, Halsbury's Laws of England [26]) states the rule as follows:

> "The rules of international law are not part of the law of England, except insofar as they have been received into English law by legislation, judicial decision or established usage".

The traditional doctrine of earlier centuries has therefore been made the subject of controversy, the true nature of which cannot be understood if its two aspects are not seen: ideological and terminological. In its ideological aspect, the controversy is as to the limits and powers of the state in international society; this dispute expresses itself in, and may be confused with, the terminological question whether international law is adopted (or incorporated) or transformed, or, in other words, whether it is a part or a source of the municipal law.

When it is, however, realised that, in whatever way the doctrine was explained, the courts continued to look to, discover and apply international law, the controversy loses much of its point [27]). It did nevertheless provoke a change of formulation of the doctrine, which probably betrays a greater

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[24]) *Ibid.* p. 75 f.

[25]) *Ibid.* p. 105 f.

[26]) 3rd ed. 1954, vol. 7, p. 264, under the title Constitutional Law, contributed by F. H. Lawson, H. J. Davies and C. J. Slade, Barristers-at-law.

[27]) It was thus that L. Jaffe, dealing particularly with the American side of the Anglo-American tradition wrote, in respect of the controversy whether international law has force in the national courts as such: "The argument is not very pertinent here, since the important thing is that the courts do apply rules of international law and do settle controversies which may have repercussions on our relations with other countries". Judicial Aspects of Foreign Relations, 1933, p. 39 f. Similarly, Wynn-Parry, J., in his contribution to Halsbury's Laws of England, *sub. tit.* Conflict of Laws (3rd ed. vol. 7), after having indicated that there are two different approaches to the question whether and to what extent the rules of international law are part of the municipal law of England, concludes: "but since, when it is ascertained on any judicial issue what the relevant settled and generally accepted rule of public international law is, the courts will in fact adopt and treat the rule as incorporated in the municipal law, so far as it is not inconsistent with prior legislation or decisions, there seems little, if any, practical distinction between the two views expressed" (p. 5).

chariness to receive international law. The *locus classicus* of the doctrine in its modern dress is the judgement of Lord Alverstone, C. J., in *West Rand Central Gold Mining Co.* v. *The King* [28]), where he said:

> "It is quite true that whatever has received the common consent of civilised nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognised and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilised State would repudiate it. The mere opinions of jurists, however learned or eminent, that it ought to be so recognised, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually grown to be part of international law by their frequent practical recognition in dealings between various nations" [29]).

This change of formulation and identity of practice is further exemplified in the cases of *Commercial and Estates Co. of Egypt* v. *Board of Trade* [30]), *The Cristina* [31]), and *Chung Chi Cheung* v. *The King* [32]). In the first case, the right of angary in international law was recognised, and in the third case the Privy Council examined and applied international law relating to offences (in this case, wounding and murder) on board a Chinese ship within the British territorial waters of Hong-Kong, holding that while immunity extended to internal disputes between the crews it had in this case been waived by the Chinese Government [33]).

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[28]) [1905] 2 K.B. 391.

[29]) At p. 406 f.

[30]) [1925] 1 K.B. 271, at p. 283 per Bankes, L. J., and at page 293 per Atkin, L. J.

[31]) [1938] A.C. 485; [1938] 1 A.E.R. 719, at p. 725 per Lord Macmillan.

[32]) [1939] A.C. 160; [1938] 4 A.E.R. 786, at p. 790 per Lord Atkin.

[33]) Since it concerned the question of legislation possibly contrary to a rule of international law, note should be taken of the case of *Re Helbert Wagg & Co. Ltd.* [1956] 1 A.E.R. 129. The question here was whether the German moratorium law of 1933 would be recognised in relation to a contract governed by German law between an English company, the claimant, and a German company. The learned judge, Upjohn, J., discussed what were the exceptions to the general principle according to which foreign courts will recognise the territorial validity of legislation, and whether the German moratorium law in question fell within one of the exceptions or not. It was in his exposition of these exceptions (fiscal or penal laws, laws discriminating against English nationals in time of war, laws designed to confiscate the property of particular individuals or classes of individuals) that Upjohn, J., discussed the earlier case of *The Rose Mary* [1953] 1 W.L.R. 246, where

The position has been well summed up by Dickinson in the following words:

> "It is the modern Anglo-American doctrine that the national rule on a question of international concern shall be derived, in the absence of a controlling statute, executive decision, or judicial precedent, from relevant principles of international law to which the nation has given its express of implied consent. The rule thus derived is none the less a rule of national law because it is derived from an international source. Nor does the reference to the nation's implied or express consent state one of the doctrine's essential elements. It merely acknowledges the prevailing positivist theory which founds international law upon consent. When the positivist theory has been supplanted by another theory, the reference to consent may disappear. As it is actually applied therefore the Anglo-American doctrine of incorporation is fundamentally sound" [34]).

Campbell, J., sitting in the Supreme Court of Aden, held that certain laws of the State of Persia, which he found to be passed to nationalise the plaintiff's company without compensation, were confiscatory and ineffectual to pass title. Campbell, J., had there come to the conclusion that the cases in England and other countries justified the formulation of a more general principle, namely (i) that all legislation that expropriates without compensation is contrary to international law; and (ii) that such law is incorporated in the domestic law of Aden and accordingly such legislation will not be recognised as valid in the courts of Aden. In so far as the rule as to the incorporation of international law into the domestic law is the same in England as in Aden, it is noteworthy that Upjohn, J., examined the English cases, and without challenging the decision in *The Rose Mary* on the actual facts of that case, came to the conclusion that: "In my judgment the true limits of the principle that the courts of this country will afford recognition to legislation of foreign states in so far as it affects title to movables in that State at the time of the legislation or contracts governed by the law of that State rests *(sic)* in considerations of international law or in the scarcely less difficult considerations of public policy as understood in these courts, ultimately I believe the latter is the governing consideration. But whatever be the true view, the authorities I have reviewed do show that these courts have not recognised any principle that confiscation without adequate compensation is *per se* a ground for refusing recognition to foreign legislation". And he cited the analogy of foreign exchange control legislation which is recognised by the English courts – provided it is genuinely intended to protect the economy in times of national stress – even though it has the effect of confiscating in some degree private rights of property. These remarks would, however, seem to be *obiter*, for Upjohn, J., in fact decided that the moratorium law was genuine "foreign exchange control legislation which must be recognised by this country as effective to modify contractual obligations where the proper law is German". V. F. A. Mann, International Delinquencies before Municipal Courts, Law Quarterly Review, vol. 70 (1954), p. 181, where the author discusses the question "what decision a judge should arrive at when he finds that the foreign law which he is called upon to apply involves an international delinquency bearing upon the issue of the case" (p. 183). The learned author submits that where the conflict rule of the forum refers the court to a foreign law, the court is obliged not to apply the latter if and in so far as it expresses or results from an international delinquency.

[34]) From a paper published privately for use in the Summer Semester for International Law Teachers, University of Michigan, June 27th – July 28th, 1932; substantially the same paper can be found, in French, in Recueil des Cours, Académie de Droit International, T. 40 (1932 II), p. 309–395, under the title: L'interprétation et l'application du droit international dans les pays anglo-américains.

B. The Exceptions

This statement of the general principle, with its brief indication of the exceptions thereto, may well serve to make the transition to the fuller treatment of these exceptions. For the real worth of a principle is only that of its greatest exception. And these exceptions, may be grouped under three heads, according as they concern the legislative, executive and judicial functions: I. The Sovereignty of Parliament; II. Acts of State; III. National Interpretation.

I. The Sovereignty of Parliament

Since, in the words of Blackstone, "the power and jurisdiction of Parliament ... is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds" [35]), or, in the words of Dicey, "Parliament ... has under the English constitution, the right to make or unmake any law whatever; and, further, ... that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament" [36]), the courts will not apply international law that conflicts with statute, leaving it to the executive and—or legislature to draw the necessary consequences [37]). This principle must however be understood in the light of the other principle already mentioned, that in the interpretation of a statute there is a presumption that it does not violate international law. The play of these two principles may be seen in the cases of *Cail and Others* v. *Papayanni, The Amalia* [38]) and *Mortensen* v. *Peters* [39]). In the former case, the question was whether the British defendants could avail themselves of the limited liability against the Belgian plaintiffs granted under the Merchant Shipping Amendment Act, 1862, in respect of a collision of two ships in the Mediterranean Sea. Lushington, Judge of the Admiralty Court, said:

"The objection is this, that to exempt a British ship in such circumstances from full liability, the Act of Parliament is legislating against the foreigner with

35) Bl. Comm. 11th ed. Book 1, chap. 2, p. 160.

36) Law of the Constitution (9th ed.), p. 39–41.

37) Cf. Sir Arnold McNair, in Transactions of Grotius Society, vol. 30 (1945), p. 12 f., where he cites the Alabama case, and the subsequent passing of a "new and stronger Foreign Enlistment Act in 1870", in support of the statement that "we admit that, if by any reason of the deficiency in our legal institutions our courts fail to give effect to a rule of international law binding upon us, it is the duty of the executive part of our Government to make good that deficiency by making reparation to the injured state. We admit also that we cannot plead as an excuse for a breach of an international obligation any defect in our own legal system". He also cites *Mortensen* v. *Peters*, mentioned below.

38) (1863) 1 Moo. N.S. 471; 15 E.R. 778.

39) (1906) 8 Sess. Cas. 93.

> respect to an act done on the high seas out of British jurisdiction; ... Now, I have always recognised the full force of this objection, that the British Parliament has no proper authority to legislate for foreigners out of its jurisdiction. ... No statute ought, therefore, to be held to apply to foreigners with respect to transactions out of British jurisdiction, unless the words of the statute are perfectly clear; but I never said that if it pleased the British Parliament to make such law as to foreigners out of the jurisdiction, that courts of justice must not execute them; indeed I said the exact contrary ...".

In the event, he held that since the right of limited liability was given to British and foreign shipowners alike, so that there was "perfect reciprocity" and no injustice, the act had "operation on the high seas, and applies to both British and foreign vessels". The Privy Council, on appeal, upheld this view.

The case of *Mortensen* v. *Peters* is much better known, and has been much controverted, for it seemed to be a serious attack upon the supremacy of international law. It was there decided that a Danish subject, a master of a vessel registered in a foreign country, could be convicted under the Herring Fishing Act, 1889, for having used a particular forbidden method of fishing more than three miles from the shore, though alleged to be within the *fauces terrae*. If this case is to be properly understood, however, it must be realised that none of the judges admitted that the jurisdiction claimed went "clearly beyond limits established by the common consent of nations, that is to say by international law" [40]). Indeed Lord Kyllachy, for instance, said that

> "the stretch of water known as the Moray Firth, and defined by the bye-law, is undoubtedly geographically *intra fauces terrae;* and there are many examples of states asserting exclusive jurisdiction within such areas, and of such assertion being acquiesced in by other nations".

The exception arising from the principle of parliamentary omnipotence is therefore wide in formulation but narrow in fact. As Lord Chancellor Sankey said, in connexion with the power of the Imperial Parliament over the independent dominions after the Statute of Westminster, 1931: "But that is theory and has no relation to realities" [41]), and it is realities, not formulas which count [42]).

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[40]) Per Lord Kyllachy.

[41]) In *British Coal Corporation* v. *The King* [1935] A.C. 500, at p. 520.

[42]) Dicey, in his chapter on the Nature of Parliamentary Sovereignty (Law of the Constitution, 9th ed., p. 39–85) discusses the "actual limits on the sovereign power of Parliament", external and internal, and he quotes Leslie Stephen's "Science of Ethics": "Lawyers are apt to speak as though the legislature were omnipotent, as they do not require to go beyond its decisions. It is, of course, omnipotent in the sense that it can make whatever laws it pleases, inasmuch as a law means any rule which has been made by the

H. Lauterpacht summed up the position as follows:

"Probably there are no cases on record – not excluding, perhaps, the frequently cited case of *Mortensen* v. *Peters* – which a court has interpreted a statute in such a way as to acknowledge clearly that the statute as intended by the legislature was in violation of international law or that it inevitably had that effect independently of the intention of the legislature. The presumption that Parliament did not intend to commit a breach of the law of nations has been a powerful weapon wielded with a determination which on occasions has come near to a denial of the supremacy of Parliament" [43]).

II. Acts of State

The term "act of state", though in common usage, is of imprecise meaning. In attempting to elucidate it, we may begin from the general principle that, in the words of Halsbury's Laws of England [44]),

"by the law of the English constitution the Crown acts as the representative of the nation in the conduct of foreign affairs, and what is done in such matters by the royal authority is the act of the whole nation, and binding, in general, upon the nation without further sanction".

The Crown is therefore responsible for foreign affairs, and an act of state is

"an act of the executive as a matter of policy performed in the course of its relations with another state including its relations with the subjects of that state, unless they are temporarily within the allegiance of the Crown".

This is probably the best short definition of act of state, and though extrajudicial [45]), has been accepted into Halsbury's Laws of England [46]). And for

legislature. But from the scientific point of view, the power of the legislature is of course strictly limited. It is limited, so to speak, both from within and from without; from within, because the legislature is the product of a certain social condition; and from without, because the power of imposing laws is dependent upon the instinct of subordination, which is itself limited. If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it".

[43]) Transactions of Grotius Society, vol. 25 (1939), *op. cit.*, at p. 58 f., citing Lord Stowell in *The Le Louis* 2 Dods, 210, 251, 254; Sir William Grant in *The Amedie* (1810) 1 Acton 240, 250; Lord Campbell in *Lopez* v. *Burslem* (1843) 4 Moore 300, 305. Similarly, Brierly wrote that "it is believed that there is no case in British reports in which a court has felt bound by a statute to override a rule which is regarded as a rule of international law". Law of Nations, 5th ed. 1953, at p. 86.

[44]) 3rd ed. vol. 7, p. 263, under the title Constitutional Law, citing 1 Bl. Comm. (14th ed.) 252.

[45]) It was given by E. C. S. Wade, Act of State in English Law; Its Relations with International Law, in The British Year Book of International Law, vol.15 (1934), at p. 103.

[46]) Vol. 7, p. 279. A footnote on the same page, however, indicates the imprecision and uncertainty of the phrase: "The term 'act of state' has been used to denote an executive or

practical purposes, we may accept W a d e s' definition and discuss it under three heads: 1. Treaties; 2. Other acts of state; 3. Declarations of the Crown which have sometimes also been referred to as acts of state. It is true that a treaty is also an act of state, but by reason of its special importance and problems, may be discussed separately.

The exact relationship of these three aspects of the foreign relations of the Crown to each other has not been made the subject of a coherent and comprehensive theory. Such a theory might regard the Crown as responsible for the conduct of foreign relations, and the declarations of the Crown as the clarification and evidence of such conduct. In fact, the indistinctness of the notion of act of state, and the history of these declarations, which reveals that conclusive reliance on such declarations is of recent growth, belies such a synthesis. It is therefore necessary to treat these three aspects of the problem in a way as piecemeal as was the course of their development.

1. Treaties

Two basic principles obtain. Firstly,

> "according to municipal law, the treaty-making power is vested in the Crown" [47]).

Secondly,

> "where taxation is imposed or a grant from the public funds rendered necessary, or where the existing law is affected, or where the private rights of the subject are interfered with by a treaty concluded in time of peace, it is apprehended that the previous or subsequent consent of Parliament is in all cases

administrative exercise of sovereign power by an independent state or potentate, or by its or his duly authorised agents or officers. It has been said not to be a term of art, but to be used in different senses by different authorities. Taken in its largest sense, it might perhaps include legislative and judicial acts, such as an Act of Parliament or a judgment of the superior courts. The term act of state is applicable to any act done by the state in the execution of its sovereign power"; see *Potter* v. *Broken Hill Proprietary Co. Ltd.* (1906) 3 C.L.R. 479, at p. 491 per G r i f f i t h, C. J. See also the Evidence Act, 1851, S. 7 ("Proclamations, treaties, and other acts of state", held to include a Belgien patent; see *Re Bett's Patent* [1862] 1 Moo. P.C.C.N.S. 49); S t e p h e n's History of the Criminal Law, vol. 2, p. 61, 65; *Rustomjee* v. *R.* (1876) 1 Q.B.D. 487, at p. 493, per B l a c k b u r n, J. (affirmed 2 Q.B.D. 69, C.A.); *Forester* v. *Secretary of State for India in Council* (1872) L.R. Ind. App. Supp. 10, P.C. The term 'act of state' is sometimes used to cover the power of a Secretary of State to plead privilege in answer to an action for libel, and the power of the Crown through a Secretary of State to dismiss or compulsorily to retire a naval or military officer without any legal redress. However, no legal consequences flow from its use in any of these connexions, and it is now only employed in the sense given in the text".

47) H a l s b u r y's Laws of England (3rd ed.) vol. 7, p. 287. B l a c k s t o n e had already written: "It is also the king's prerogative to make treaties, leagues and alliances with foreign states and princes ... Whatever contracts therefore he engages in, no other power in the kingdom can legally delay, resist or annul" (Bl. Comm. 11th ed. Book 1, chap. 7, p. 257).

required to render the treaty binding upon the subject and enforceable by the officers of the Crown" [48]).

Sir Arnold McNair summed up the matter succinctly as follows:

"Our treaty-making power lies in the Crown, that is in the Executive. But our law-making power resides in the Legislature, that is, in the 'Crown in Parliament', King Lords and Commons" [49]).

The combination of these two principles leave many uncertainties, which we may discuss under certain headings.

a) Independent Validity, or Otherwise of Treaties

It is clear, to begin with, that certain treaties require the sanction of Parliament. That a treaty imposing an immediate or conditional financial obligation, or involving a change in the law applied in English courts of law or interfering with the private rights of subjects, requires the sanction of Parliament is clear from the judgement of Sir Robert Phillimore in *The Parlement Belge* [50]). It was there claimed that the ship belonging to the King of the Belgians was immune from suit in England not only on the ground that it was a public vessel but also on the ground that this immunity had been conferred by a treaty between the monarchs of England and Belgium, not sanctioned by Parliament, and in regard to the latter argument, it was said that

"this is a use of the treaty-making prerogative of the Crown which I believe to be without precedent, and in principle contrary to the laws of the constitution ... The law of this country has indeed incorporated those portions of international law which give immunity and privileges to foreign ships of war and foreign ambassadors; but I do not think it has therefore given the Crown authority to clothe with this immunity foreign vessels, which are really not vessels of war, or foreign persons who are not really ambassadors. ... the remedy, in my opinion, is not to be found in depriving the British subject without his consent, direct or implied, of his right of action against a wrong-doer, but by the agency of diplomacy, and proper measures of compensation and arrangement, between the governments of Great Britain and Belgium" [51]).

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[48]) Halsbury *ibid.*, p. 288.

[49]) Transactions of Grotius Society, vol. 30 (1945), *op. cit.* at p. 18 f.

[50]) (1879) L.R. 4 P.D. 129, at p. 149–155.

[51]) At p. 154 f. The question was also raised, but not resolved, in *Walker* v. *Baird* [1892] A.C. 491, whether "interference with private rights can be authorised otherwise than by the legislature". In *Re Californian Fig Syrup Company's Trade Mark* (1889) 40 Ch. D. 620, Stirling, J., took it for granted that the International Convention for the Protection of Industrial Property, 1883, could not directly confer a right without legislation, even though Her Majesty was bound by the convention. Similarly, in *The Republic of Italy* v. *Hambros Bank, Ltd.* [1950] 1 A.E.R. p. 430, Vaisey, J., dismissed the

The reversal of this decision by the Court of Appeal did not touch this point, and turned upon the finding that the ship was not predominantly a trading ship.

It is thus, for example, that the Geneva Convention of 1906, was incorporated into English law by the Geneva Convention Act, 1911.

It is this principle also which lies at the root of the law relating to extradition; under the common law, all fugitive criminals who have committed crimes abroad and escaped to Britain may obtain their release by means of the writ of *habeas corpus*, unless an appropriate extradition treaty has received proper legislative sanction.

Similarly, all the treaties of peace which concluded the first world war received legislative sanction. The Treaty of Peace Act, 1919 (as to Germany), the Treaty of Peace (Austria and Bulgaria) Act, 1920, the Treaty of Peace (Hungary) Act, 1921, the Treaty of Peace (Turkey) Act, 1924, were all described as Acts "to carry into effect" the relevant treaty. After the second world war, the treaties of peace with Italy and other countries affected private rights of British subjects, and therefore the Treaties of Peace (Italy, Roumania, Bulgaria, Hungary and Finland) Act, 1947 was passed. The Japanese Treaty of Peace Act, 1951, is in similar terms.

Insofar as treaties of cession are concerned, the position is somewhat doubtful. Whilst in strict law, it would seem possible for the Crown to cede territory without parliamentary consent [52]), constitutional convention in fact seems to require parliamentary approval. The application of this convention was illustrated in the Anglo-German Agreement Act, 1890, ceding Heligoland to Germany; in the Anglo-French Convention Act, 1904, where the treaty involving the cession of territory to France was made subject to the approval of the respective Parliaments [53]).

Treaties regulating belligerent action are in a special position. It must be remembered that the Crown declares and wages war in virtue of the prerog-

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plaintiff's claim against the Custodian of Enemy Property under a Financial Agreement between the United Kingdom and Italy on the ground that the Agreement "is not cognisable or justiciable in this court".

52) In *Damodhar Gordhan* v. *Deoram Kanji* [1876] 1 App. Cas. 332, in which the question was whether certain territory was British or not, the Privy Council said, in respect of the statement of the High Court of Bombay, that it was beyond the power of the British Crown, without the concurrence of the Imperial Parliament, to make any cession of territory within the jurisdiction of the British Courts in India, in time of peace, to a foreign power, that their Lordships "entertain such grave doubts (to say no more) of the soundness of the general and abstract doctrine laid down by the High Court of Bombay, as to be unable to advise her Majesty to rest her decision on that ground" (p. 383 f.).

53) V. Anson, Law and Custom of the Constitution, 4th ed., vol. 2, Part II, p. 137–142.

ative, and may therefore waive its rights. Thus the Crown has by many treaties undertaken to regulate its conduct as belligerent, and it is clear that insofar as the treaty effects a mitigation of belligerent rights, it will be enforced, at least by British Prize Courts, irrespective of statutory sanction. It was thus that the Declaration of Paris, 1856, was applied by the Prize Court, even though it had never received parliamentary approval [54]). Similarly, the Hague Conventions, 1907, were applied [55]). The exact scope of the principle is not clear, and the explanation may lie in the special nature of Prize Jurisdiction [56]). Nor can a firm conclusion be drawn from the common law case of *Porter* v. *Freudenberg* [57]). The question was whether an enemy alien could be sued for a debt and whether he could enter appearance and defend the action. Incidentally, the court discussed the right of an enemy alien to sue in the King's Courts in wartime, under the common law and under Art. 23 (b) of Chapt. 1 of S. 2 of the Annex of the Hague Regulations entitled "Regulations respecting Laws and Customs of War". The argument and judgement went on the assumption that the Hague Regulations bound the court, and nobody objected that the Hague Regulations had not been approved by Parliament.

Difficulties arising from Parliamentary failure to approve a treaty are, however, rather theoretical in character, since, the principle of ministerial responsibility and party discipline ensure parliamentary sanction of treaties entered into in virtue of the prerogative, and in cases of doubt, as Halsbury's Laws of England puts it, "it is usual either to obtain statutory authority beforehand or to stipulate in the treaty that the consent of the legislature shall be obtained" [58]).

b) Interpretation of Treaties

It is clear, first of all, that the English courts will interpret treaties; in the words of Russel, J.:

> "I apprehend it is the right of the litigant to assert before the courts of this country, and the duty of those courts to adjudicate upon, claims founded upon a consideration of the municipal law of this country, and not the less so because the law involved has been derived from, and has been enacted for the purpose

54) *V. The Hakan* [1918] A.C. 148, p. 150; *The Dirigo* [1919] P. 204, p. 218 f.; per Sir Samuel Evans in *The Marie Glaeser* [1914] P. 218, p. 233.

55) *The Chile* [1914] P. 212; *The Ophelia* [1916] 2 A.C. 206; *The Blonde* [1922] 1 A.C. 313.

56) *V. The Zamora* [1916] 2 A.C. 77. Lord Parker of Waddington here said that a Prize Court would "act on" orders in council "in every case in which they amount to a mitigation of the Crown rights in favour of the enemy or neutral, as the case may be".

57) [1915] 1 K.B. 857, p. 874–880.

58) Vol. 7, p. 287.

of giving effect to, certain provisions of a document of an international character" [59]). And the cardinal rule of interpretation is that the "treaties are to be construed according to the intention of the contracting parties" [60]).

The question then arises whether it is permissible to investigate the *travaux préparatoires* in order to elicit this intention. The general rule is that

"it is not permissible, however, in discussing the meaning of an obscure statement, to refer to the 'parliamentary history' of a statute, in the sense of the debates which took place in Parliament when the statute was under consideration" [61]).

Craies also states that

"as to reports of commissioners it is now settled that these matters are inadmissible as aids to construction when the intention of a statute is in question" [62]).

In *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents* [63]), however, Lord Halsbury had referred to the report of a commission on the Patents Office for the purpose of construing the Patents Act, 1888. It is true that Lord Wright [64]) explained that this was permissible for the purpose of finding out the "surrounding circumstances with reference to which the words were used", but whatever the justification, it opens up considerable possibilities to the courts, if they are willing to use them. In any case, there exist certain cases in which extraneous, preliminary transactions were considered. Thus in Webster's case [65]), where the question depended on the interpretation of the treaty of 1814 between France and England, providing for compensation for losses of property unduly confiscated, the King's Advocate defended the award of the commissioners for the liquidation of claims of British subjects on France, citing the letters of

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[59]) *Stoeck* v. *Public Trustee* [1921] 2 Ch. 67, at p. 71. The question was whether the plaintiff was a German national within the meaning of the Treaty of Peace Order 1919 or the Treaty of Peace, and therefore whether certain property was subject to a charge imposed by the Order. Cf. also *Walker* v. *Baird* [1892] A.C. 491, p. 497.

[60]) *Daniel* v. *Commissioners for claims on France, The case of the English Roman Catholic Colleges in France* (1825) 2 Knapp 23; 12 E.R. 387, per Lord Gifford. It was held that it was not "within the spirit of the treaties" that the French government should pay compensation for the sequestration of the English Catholic Colleges in France.

[61]) Craies on Statute Law, 5th ed. 1952, p. 121 f., citing Willes, J., in *Millar* v. *Taylor* (1769) 4 Burr. 2303, 2332; *R.* v. *Hertford College* (1878) 3 Q.B.D. 693, 707; *Attorney General* v. *Sillem* (1863) 2 H. & C. 431, p. 521 per Pollock, C.B.; *Herron* v. *Rathmines etc. Commissioners* [1892] A.C. 498, 502.

[62]) At p. 122, quoting Lord Wright in *Assam Railways and Trading Co.* v. *Inland Revenue Commissioners* [1935] A.C. 445, p. 458.

[63]) [1898] A.C. 571.

[64]) In the Assam Railways case *(supra)*.

[65]) *Webster's Representatives* v. *Commissioners for Claims on France* (1834) 2 Knapp 386, 12 E.R. 532.

Lord Castlereagh to the commissioners in support of his interpretation, and reading one of them in court. In *Porter* v. *Freudenberg* [66]), the court discussed the intention of the proposer of Art. 23 (b) of the Hague Regulations respecting laws and customs of war, and referred to the view of the Foreign Office, though Lord Reading was careful to say that the court's duty was to interpret the text itself. Indeed, it seems to be the rule that the courts will not accept an official interpretation as binding [67]); they are competent to interpret treaties, and they will do so themselves.

It is not therefore quite clear whether the English courts may, in general, have even limited recourse to preparatory discussions, and whether a more liberal policy might be followed in regard to treaties [68]).

The next question which arises is whether it is permissible to refer to a treaty which has been given effect to by an Act of Parliament. The general rule seems to be that where the statute is clear on its face, it is not permissible to resort to the treaty. This was laid down in the case of *Ellerman Lines* v. *Murray* [69]), where two seamen made a claim for wages after the premature termination of their services by wreck of the ship. They claimed under S. 1 of the Merchant Shipping (International Labour Conventions) Act, 1925, and it is to be noted that not only did the preamble of the Act state that it was passed to give effect to the convention concerning unemployment indemnity to seamen in the case of loss or foundering of their ship adopted by the International Labour Convention, Geneva, in 1920, but the convention itself was contained in a schedule to the Act. The apparent extremity of this decision is however mitigated when it is remembered that there was absolutely no ambiguity in the wording of the Act itself; had there been such doubt, it would, in accordance with the ordinary rules of construction, have been

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[66]) [1915] 1 K.B. 857, p. 876, 879.

[67]) Cf. Lord Reading, p. 879.

[68]) It is interesting to note that in 1945, Sir Arnold McNair suggested: "it is in no way inconsistent with the rigid action that we adopt to a British Statute that our Courts should adopt a more generous attitude to a treaty. The essence of a treaty is that we have consented to it – that is its real basis. To what have we consented? Surely we have consented to a treaty which is to be construed in accordance with the principles of international law, and if it could be shown that it is the regular practice of International Tribunals to permit an examination of the *travaux préparatoires*, why should not a British Court feel justified in doing a similar thing? That would afford a solid basis for asking a British Court to treat an international treaty in a manner quite different from that in which they treat a statute"; Transactions of Grotius Society, vol. 30 (1945), p. 48. It may also be noted that the Prize Court adopts a less restrictive attitude. Thus, for instance, in *The Jeanne* [1917] P. 8, p. 12, Sir Samuel Evans, P., referred to the deliberations of the representatives of the various powers at the conference of London to support his decision that freigth was not payable in respect of contraband.

[69]) [1931] A.C. 126.

permissible to regard the context of the statute itself, including the preamble and schedule [70]). Moreover, it would seem that where the Act expressly mentions a treaty so as to be really incomplete without it, the treaty may be referred to. It was thus that the Extradition Act, 1870, which provided that the Act could by an Order in Council be applied to any foreign state with which an arrangement were made, was held to incorporate the treaty with Switzerland; and thus, since the treaty excluded the delivery up of British subjects to the Swiss government, whereas the Act did not, the effect of the incorporation of the treaty in the Act was to obtain the release of the British subject detained for the purpose of extradition to Switzerland [71]). And Cockburn, C. J., explained his decision as follows:

> "the Order in Council must be co-extensive with, and limited by, the treaty, for otherwise our municipal legislation might be at variance with the terms which two countries arranged between themselves – a proposition absurd upon the face of it".

c) Individual Rights under Treaties

The next question that arises is whether individuals may derive rights from a treaty. Various attempts have been made in England to base claims upon treaties concluded between the Crown and foreign powers, and the rule which emerges is that

> "when the Crown is negotiating with another sovereign a treaty, it is inconsistent with its sovereign position that it should be acting as agent for the nationals of the sovereign state, unless indeed the Crown chooses expressly to declare that it is acting as agent. There is nothing, so far as I know, to prevent the Crown acting as agent or trustee if it chooses deliberately to do so".

These words were spoken by Lord Atkin in a case in which the civilian claimants who had suffered loss or damage by German aggression during the war claimed compensation out of the moneys paid or payable as reparations under the Treaty of Versailles [72]).

In English law, it is therefore not possible to claim under a treaty either

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[70]) *V.* especially the judgment of Lord Macmillan. It may also be noted, as was pointed out by Lord Blanesburgh, that the international language of the convention was not transferred simpliciter to the body of the Act, but was translated into the phraseology of the Merchant Shipping Acts. In *Hogg* v. *Toye and Co.* [1935] Ch. 497, which concerned the infringement of copyright, Maugham, L. J., referred to the fact that the section in question was intended to give effect to Art. 11 of the Berne Convention, 1886, substantially reproduced in Art. 15 of the Berlin Convention, 1908, and said that "such conventions can be referred to for the purpose of construing the Act".

[71]) *R.* v. *Wilson* (1877) 3 Q.B.D. 42.

[72]) *Civilian War Claimants* v. *The King* [1932] A.C. 14; in *Baron de Bode's case* (1845–1851) 8 Q.B. 208; 13 Q.B.D. 364; 3 H.L.C.; (115 E.R. 854) the last of the series of peti-

directly, unless the treaty has been incorporated in an Act of Parliament, or indirectly, as principal or beneficiary, unless the Crown has expressly made itself agent or trustee.

2. *Other Acts of State*

From the definition of act of state already given, two conclusions emerge. Firstly, that acts of state have certain limits; and, secondly, that within these limits, they vary greatly in character.

As to the limits contained in the definition, it must be noted that an act of state can only be committed abroad by a servant of the Crown against a subject of a foreign state or his property. This was established in the case of *Buron* v. *Denmon* [73]) where it was held that no action could be maintained against a British naval commander for having freed the slaves and set fire to the barracoons of the plaintiff, a Spanish subject, on the African coast, since his action had been ratified by the Crown. The defence of act of state cannot therefore be pleaded either against a British subject [74]) or against an alien (other than an enemy alien) resident on British territory [75]), or perhaps in general against anyone (other than an enemy alien) within British territory [76]). The acts of the Crown towards "protected persons" are however

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tions made under a number of agreements subsequent to the Napoleonic wars was rejected on the ground the surplus money had "not been received to the suppliant's use". In *Rustomjee* v. *Queen* (1875) 1 Q.B.D. 487, a claim upon 3,000,000 dollars paid under a treaty by the Emperor of China to the Queen of England on account of debts due to British subjects from certain chinese merchants was rejected. And in *Administrator of German Property* v. *Knoop* [1933] 1 Ch. 439, Maugham, J., held that the German Government was not agent or trustee for certain German nationals under the London Agreement, so as to release them from charges imposed by the Treaty of Peace Order.

[73]) (1848) 2 Ex. 167; 154 E.R. 450.

[74]) *Walker* v. *Baird* [1892] A.C. 491 (P.C.). The defendant, a naval officer, took possession of the plaintiff's lobster factory in order to give effect to an agreement on lobster fishing between England and France. Both parties were British subjects, Newfoundland was then British territory, and the action of the defendant was confirmed by the Crown. Lord Herschell said that "the suggestion that they [the defendant's acts] can be justified as acts of state, or that the court was not competent to inquire into a matter involving the construction of treaties and other acts of state, is wholly untenable" (p. 497).

[75]) *Johnstone* v. *Pedlar* [1921] 2 A.C. 262. The defence of act of state was here held not to be available to the police in respect of the seizure and detention of the money of the plaintiff, an American citizen, who had been interned for his part in the Irish rebellion in 1916, even though the action of the police had been subsequently ratified by the Crown. It is to be noted that subsequent ratification is equivalent to prior authorisation.

[76]) In *Commercial and Estates Co. of Egypt* v. *The Board of Trade* [1925] 1 K.B. 271, which concerned the legal justification and principle of compensation for the requisition in a neutral port of a cargo belonging to neutrals during the first world war, both Atkin and Scrutton, L. JJ., had very grave doubts whether act of state could be a defence "within the realm", but these remarks were *obiter*, and apparently not fully considered.

acts of state, in respect of which no action may be brought [77]). The reason is that protectorates are not within Her Majesty's dominions, even though the Crown may exercise jurisdiction in them as if they had been acquired by conquest or cession [78]).

This last precision provides the key to the doctrine of act of state, as it was explained by Lord Phillimore [79]):

> "From the moment of his entry into the country the alien owes allegiance to the King till he departs from it, and allegiance, subject to a possible qualification which I shall mention [80]), draws with it protection, just as protection draws allegiance".

This correlation between allegiance and protection, in the negative sense of exclusion of the defence of act of state, would seem to be the true basis for the doctrine [81]).

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77) *V. The King* v. *Crewe, ex p. Sekgome* [1910] 2 K.B. 576, p. 606, 609, 628, where a writ of *habeas corpus* was refused to the chief of a native tribe in Bechuanaland. Glanville Williams, in his article *(infra)* in the Cambridge Law Journal, vol. 10, (1948), p. 54, at p. 66, notes that this case "turned not on the defence of act of state but on the Foreign Jurisdiction Act, 1890, ... but if the defence ever arose, it seems very likely that the defence would be sustained".

78) The Foreign Jurisdiction Acts, 1890–1913, define the extent of the Crown's jurisdiction, and provide for the legislation for colonial protectorates by Order in Council.

79) In *Johnstone* v. *Pedlar (supra,* n. 75), p. 297.

80) The qualification mentioned was the possibility that the Crown might be entitled to withdraw its protection where an alien flagrantly violates his local allegiance to the Crown. This point was not finally decided.

81) Thus a British subject owes a duty of allegiance, and reciprocally cannot have the defence of act of state pleaded against him, wherever he is; an alien resident within the dominions of the court owes a duty of local allegiance, and so comes within the law of treason (*De Jager* v. *Attorney General of Natal* [1907] A.C. 326) and reciprocally cannot have the defence of act of state pleaded against him *(Johnstone* v. *Pedlar).* It is true that it has not yet been decided that protected persons do not owe allegiance, and that the *dicta* in *Commercial and Estates Co. of Egypt* v. *The Board of Trade (supra)* do not conform to this theory, but there is nothing positive against the theory, except the implications of the very difficult case of *Joyce* v. *D.P.P.* [1946] A.C. 347. It is in his very penetrating criticism of this case that Glanville Williams shows that the *alternative rationale* of the defence of act of state, namely that it is an application of the doctrine of separation of Powers, so that the correlation is between unavailability of the defence of act of state and possibility of diplomatic redress, does not square with the cases. For, on the one hand, an alien resident in England still has the diplomatic protection of his own country, and on the other, a British protected person has no foreign country to protect him. In the same article Williams distinguishes between positive protection: active exertion on behalf of an individual against fellow – citizens or foreigners – and negative protection: absence of illegal interference with the individual by the sovereign himself and his officers. He also makes it clear that the ancient correlation between allegiance and protection means a correlation between the duty of allegiance and the duty of protection. It is in making the fact or possibility of protection (through the possession of a British passport) equivalent to the duty of protection that the House of Lords were able to convict Joyce, in a case which has considerably unsettled the law relating to allegiance and protection, and to acts of state.

Within these limits, however, "acts of state are not all of one kind: their nature and consequences may differ in an infinite variety of ways" [82]). Examples of acts of state are declarations of war [83]), annexation of independent foreign states by conquest or cession [84]), and acts of violence [85]). They were described by Fletcher-Moulton, L. J., in the following words:

> "An act of state is essentially an exercise of sovereign power, and hence cannot be challenged, controlled or interfered with by municipal courts. Its sanction is not that of law, but that of sovereign power, and whatever it be, municipal courts must accept it, as it is, without question ... The true view of an act of state appears to me to be that it is a catastrophic change, constituting a new departure. Municipal law has nothing to do with the act of change by which this new departure is effected. Its duty is simply to accept the new departure ..." [86]).

At the same time, precisely because the act of state produces changes, the courts may be faced with their results.

> "But it may, and often must, be part of their duty to take cognisance of it. For instance, if an act is relied upon as being an act of state, and as thus affording an answer to claims made by a subject, the courts must decide whether it was in truth an act of state, and what was its nature and extent [87]). An example of this is to be found in the case of *Forester* v. *Secretary of State for India in*

V. The Correlation of Allegiance and Protection, in The Cambridge Law Journal, Vol. 10 (1948–1950), p. 54, following an article of H. Lauterpacht, Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens, *ibidem* Vol. 9 (1947), p. 330.

82) Per Fletcher-Moulton, L. J., in *Salaman* v. *Secretary of State for India* [1906] 1 K.B. 613, p. 639.

83) *Esposito* v. *Bowden* (1857) 7 E. & B. 763; 119 E.R. 1430. Willes, J., said: "The force of a declaration of war is equal to that of an Act of Parliament prohibiting intercourse with the enemy except by the Queen's licence. As an Act of State done by virtue of the prerogative, exclusively belonging to the Crown, such a declaration carries with it all the force of law"; at p. 781.

84) *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (1859) 13 Moo. P.C. 22; 15 E.R. 9; *Ex-rajah of Coorg* v. *The East India Co.* (1860) 29 Beav. 300; 54 E.R. 642; *Doss* v. *Secretary of State for India* (1875) L.R. 19 Eq. 509; *Cook* v. *Sprigg* [1899] A.C. 572.

85) *Buron* v. *Denman (supra); Ex-rajah of Coorg* v. *The East India Co.* (1860) 29. Beav. 300; 54 E.R. 642, where the East India Co. in the exercise of its sovereign and political power, conquered and annexed the plaintiff's territory and seized his property, including two promissory notes.

86) *Salaman v. Secretary of State for India* [1906] 1 K.B. 613, p. 639 f.

87) Thus, in *Musgrave* v. *Pulido* (1879) App. Cas. 102, it was held that the governor of the colony was not a viceroy, but that his "authority is derived from his commission, and limited to the powers expressly or impliedly entrusted to him", and "that it must necessarily be within the province of Municipal Courts to determine the true character of the acts done by the Governor, though it may be that, when it is established that the particular act in question is really an act of state policy done under the authority of the Crown, the defence is complete, and the courts can take no further cognisance of it".

Council [88]). But in such a case the court must confine itself to ascertaining what the act of state in fact was, and not what in its own opinion it ought to have been. In like manner municipal courts may have to consider the results of acts of state i. e. their effects on rights of individuals, and even of the government itself".

It is in this connexion that may be appropriately studied the matter of state succession in the English courts, for the question whether rights of succession are available against the Crown would seem to be better considered as the result of one particular, though important, sort of act of state, namely annexation, rather than as an act of state in itself. In this light, it becomes easier to solve what otherwise seems confusing, if not contradictory.

For while, on the one hand, it has been said that

"a mere change of sovereignty is not to be presumed as meant to disturb the rights of private owners; and the general terms of a cession are *prima facie* to be construed accordingly" [89]),

it has, on the other, been also stated that

"it is a well-established principle of law that the transactions of independent states are governed by laws other than those which municipal courts administer. It is no answer to say that by ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and the legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that, according to the well understood rules of international law, a change of sovereign by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation" [90]).

In support of the former view, there may be cited a number of *dicta*. There is first the general statement of Lord Mansfield in the venerable case of *Campbell* v. *Hall* [91]) that

[88]) (1872) L.R. Ind.Ap. Supp., vol. 10.

[89]) Per Lord Haldane, in *Amodu Tijani* v. *Secretary, Southern Nigeria* [1921] 2 A.C. 399 (P.C.). The appellant claimed compensation for loss of his land on acquisition for public purposes, and the question was as to the real character of the native title to land, which was part of the territory ceded to the British Crown in 1861 for the purpose of facilitating the abolition of the slave trade. Lord Haldane said: "No doubt there was a cession to the British Crown, along with the sovereignty, of the radical or ultimate title to the land, in the new colony, but this cession seems to have been made on the footing that the rights of property of the inhabitants were to be fully respected. This principle is a usual one under British policy and law when such occupations take place. The general words of the cession are construed as having related primarily to sovereign rights only" (p. 407).

[90]) *Cook* v. *Sprigg* [1899] A.C. 572, p. 578. It was here held that the appellants as grantees of railway, mineral, trading etc. concessions made by the paramount chief of Pondoland, South Africa, could not after the annexation of Pondoland by Her Majesty, enforce against the Crown the privileges and rights concerned.

[91]) (1774) Lofft. 655; 98 E.R. 848, 895.

"articles of capitulation upon which the conquest is surrendered, and treaties of peace by which it is ceded, are sacred and inviolable, according to their true intent".

In *Salaman* v. *Secretary of State in Council of India* [92]), which concerned the claim to the arrears of pension and an account of the private property of the ruler of the Punjab brought by his representatives after the cession of the Punjab and the confiscation of the property of the state by the East India Company, it was held that all that was done by the company was done as an act of state, though Fletcher-Moulton, L. J., on an application to amend the statement of claim, was of the

"opinion that the documents and facts of the case did afford some ground for thinking that the East India Company, in assuring the management of the infant Maharajah's private (as distinguished from his state) property, had not done so as an act of state in such a sense as would exclude the jurisdiction of the municipal courts to entertain the plaintiff's claims".

In *Attorney-General of Southern Rhodesia* v. *Holt* [93]) which concerned the rights in certain land originally granted to the respondents' predecessors in title by native chiefs or the King of Lagos before the cession of Lagos to the Queen of England by a treaty in absolute terms, Lord Shaw said:

"Their Lordship do not refer to the treaty further than to say that in their opinion property was not excluded from the grant; and they think also that this is subject to the condition that all rights of property existing in the inhabitants under the grant or otherwise from King Docemo and his predecessors were to be respected".

On the other side of the line, there may be cited first of all the case of *The Secretary of State in Council of India* v. *Kamachee Boye Sahaba* [94]), where the senior widow of the late Rajah of Tanjore made a claim to the private and particular estate and effects of the Rajah subsequent to the seizure of the Raj by the East India Company for failure of a male heir; Lord Kingsdown decided upon an examination of the facts that the act was

"a seizure by arbitrary power on behalf of the Crown of Great Britain, of the dominions and property of a neighbouring state, an act not affecting to justify itself on grounds of municipal law" und not "in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Rajah of Tanjore, in trust for those who, by law, might be entitled to it on the death of the last possessor".

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92) [1906] 1 K.B. 613; cf. especially the note p. 647.
93) [1915] A.C. 599 (P.C.); per Lord Shaw, p. 609.
94) (1859) 7 Moore Ind. App. 476; 19 E.R. 388.

Moreover, since "the court cannot enquire into the act at all because it is an act of state", it could not distinguish between the public and private property of the sovereign.

> "The result, in their Lordship's opinion is, that the property now claimed by the respondent has been seized by the British government, acting as a sovereign power, through its delegate, the East India Company; and that the act so done, with its consequences, is an act of state over which the Supreme Court of Madras has no jurisdiction. Of the propriety or justice of that act, neither the Court below nor the judicial committee have the means of forming, or the right of expressing, if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as as whole, to those whose interests are affected. These are considerations into which their Lordship's cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no municipal court of justice can afford a remedy".

Similarly, in *Doss* v. *Secretary of State for India in Council* [95]), where certain bankers represented by the plaintiffs sued the Secretary of State for India, as successor of the East India Company, claiming to be entitled to a charge upon the revenue of the territory of Oudh in respect of money lent to the King of Oudh before its annexation, Sir R. Malins, V.-C., came to the conclusion that the

> "annexation of the territories of Oudh in 1856 was a sovereign act of the government of India, that is, the East India Company, on the part of Her Majesty, and as trustees for her. On these grounds, therefore, I am of opinion that this being an act of state, it is not liable to any review by a court of equity or a court of law".

And in the important case of *West Rand Central Gold Mining Co.* v. *The King* [96]), the suppliants claimed that the English Crown, as a result of the conquest and annexation of the territories of the former South African Republic, was now liable to return the gold, or its value, seized by the Republic. Lord Alverstone said that the alleged principle that by international law, where one civilised state after conquest annexes another civilised state, the conquering state, in the absence of stipulations to the contrary, takes over and becomes bound by all the contractual obligations of the conquered state, except liabilities incurred for the purpose of or in the cause of the particular war [97]), was unsound in principle, not supported by the writings of international text-writers, and in any case inconsistent with the law recognised

95) (1875) L.R. 19 Eq. 509; per Malins, V.-C., p. 535.

96) [1905] 2 K.B. 391.

97) This was the proposition submitted by Lord Cecil, counsel for the suppliants, which was supported by citation from Hall, Wheaton, Halleck, Calvo, Heffter, Huber.

in English courts. Further, as to the submission of the suppliants "that the English courts have recognised and adopted the principle of international law enunciated above", Lord Alverstone said that

> "there is a series of authorities from the year 1793 down to the present time holding that matters which fall properly to be determined by the Crown by treaty or as an act of state are not subject to the jurisdiction of the municipal courts and that rights supposed to be acquired thereunder cannot be enforced by such courts" [98]).

These citations leave it quite clear that the *dicta* of the judges are contradictory. If a path is to be struck through this tangle of opinions, therefore, some must necessarily be cut away; but since this part of the law has not, to the writer's knowledge, been yet reduced to order, such an undertaking can only be tentative. The difficulty is to know which *dicta* to sacrifice for the benefit of others. It would however seem that there are two propositions which are firmly enough established to serve as premisses for a logical argument. On the one hand, act of state cannot be pleaded as a justification for unlawful and arbitrary acts of the executive against British subjects or persons resident within British dominions [99]). On the other hand, it is in the nature of things themselves that acts of state, especially annexations, will have effects which the courts may have to face. From these premisses, the following conclusions may be drawn. Firstly, where the act of state consists of annexation, no subsequent executive act can be pleaded against the inhabitants of the annexed territory as act of state, since they are now British subjects, nor against persons resident there, since they are within the allegiance of the Crown, and therefore all *dicta* which envisage the possibility of such subsequent acts of state against the new British subjects or residents must be rejected as incompatible with established precedents [100]). It follows, secondly, therefore that if rights are denied subsequently to the annexation, at least in the courts, it is because that was already implied in the original act of state, i. e. the annexation. It is a case, to vary a theme, of *non habet quod non datur.*

The final conclusion is that the question of succession is a matter of interpretation of the government's intention at the time of the original act of annexation, which depends on the circumstances and particular form of annexation [101]). Such a principle, while requiring the sacrifice of a number

98) P. 408 f.

99) *V. Buron* v. *Denman, Walker* v. *Baird, Johnstone* v. *Pedlar (supra).*

100) An example of this mention of acts of state, independent of and subsequent to, the initial act of annexation, is to be found in the judgment of Fletcher-Moulton, L. J., in *Salaman's case,* p. 644.

101) This explanation would provide a solution to the paradox recently expressed by

of *obiter dicta*, would yet permit the reconciliation of all the decisions themselves for it is sufficiently sinewy to hold together the manifold cases which can arise. Moreover, it contains within itself a possibility of development which would enable the older cases, often dealing with primitive territories, to be extended to modern circumstances.

Support for this view is to be found in the words of Fletcher-Moulton, L. J., in Salaman's case. After having said that the statement "that the claims arise out of an act of state and are not cognisable by municipal courts . . . goes too far", he went on to say that

> "acts of state are not all of one kind ... its intention and effect may be to modify and create rights as between the government and individuals, who are, or who are about to become, subjects of the government. In such cases, the rights accruing therefrom may have to be adjudicated upon by municipal courts. Let me take a simple example. Let us suppose that a government by an act of state annexes a neighbouring country, and formally takes over all the property and liabilities of the former ruler, and that a part of such property consists of debts due to him. The government is not compelled to collect such debts *vi et armis*, it may avail itself of the assistance of its courts of law for the purpose, in the same way as though the debts had accrued to it otherwise than by act of state. But in deciding on such a claim the courts must loyally accept the act of state as effective. Evidence that the debt was due to the former ruler would thereby become evidence of its being due to the existing government; and I see no reason why in such a case a claim of a converse character might not equally be entertained by municipal courts, and a subject recover from the existing government by the processes of law applicable to such a case any debts due from the former ruler".

The learned Lord Justice however went on to voice a warning.

> "But ... it must not be supposed that the principles of interpretation applicable to an act of state are the same as those which apply to other acts. For instance, if an act of state be expressed in a document purporting to confer benefits on an individual, it by no means necessarily follows that there is any intention to create a contract, or that the document should be construed by the same canons of interpretation as would be adopted in the case of a contract between two individuals. Government in the exercise of its sovereign power may well desire to reserve to itself discretionary powers quite inconsistent with contractual obli-

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F. Mann. In reviewing O'Connell's "The Law of State Succession", he discusses the question of the "inhabitants' right which survive" after a change of sovereignty independently of any treaty, and points to "the extraordinary state of affairs" that while the mere change of sovereignty may not affect acquired rights, they "apparently become exposed to the risk of being lost even years after the change as a result of purely administrative action and regardless of the inhabitants' new status as British subjects". *V.* The Law Quarterly Review, vol. 72 (1956), p. 590 f.

gations. There is no presumption in the case of an act of state that this is not the case, and if the language of the document and the circumstances of the case point to such a conclusion, the court is bound to accept it, however vague and indefinite it may make the effect of the act of state" [102]).

This reading of the cases provides a possible explanation of the apparent contradiction between *Cook* v. *Sprigg* and *Sprigg* v. *Sigcau* [103]). Both cases arose out of the annexation of Pondoland to Cape Colony; in the former case, the appellants sought to enforce concessions granted by the former ruler of Pondoland, the paramount chief, against the annexing British Crown; they failed on the ground that the annexation was an act of state, and any obligations arising therefrom could not be enforced in the municipal courts; in the latter case, Sigcau sought his release from arrest by the governor of Cape Colony under a special proclamation; he succeeded, because the court held that the arrest was an excess of powers granted to the governor and an invasion of the individual rights and liberties of a British subject. Sir William Harrison M o o r e , in the words of W a d e who adopted this criticism [104]),

"inquires why the right of property in Cook's case was not equally with the right of personal security in Sigcau's case under the protection of the courts".

If the interpretation of the cases suggested above is correct, then the apparent contradiction can be resolved by distinguishing the two cases: in Cook's case the alleged right arose b e f o r e the annexation, which was the act of state in question, and the annexation was not intended to involve the succession of the corresponding liability, whilst in Sigcau's case, the right – to release from arrest by an alleged act of state – arose a f t e r the annexation which brought him within British protection. Act of state is no defence against British subjects; but before the annexation in *Cook* v. *Sprigg*, the plaintiffs were not British subjects, and afterwards they had no legal right and there was therefore no denial of right [105]).

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[102]) At p. 640 f.

[103]) [1897] A.C. 38.

[104]) Act of State in English Law, in The British Year Book of International Law, Vol. 15 (1934), p. 98, at p. 109.

[105]) A distinction substantially identical with the one suggested above was already made by W e s t l a k e in 1906 (Is International Law Part of the Law of England?, The Law Quarterly Review, vol. 22, 1906, p. 14–26; Collected Papers, 1914, p. 498–518). He distinguished between the rule of constitutional law, that the validity of an act of state cannot be impugned by English Courts, and the rule of international law, that certain obligations are binding on a successor state. "It is one thing to question the validity of an act of state, and another thing to admit its validity and draw its consequences. An annexation is an act of state, and if it be unattended by any further manifestation of the will of the Crown it will remain open, barring such constitutional rule as has been asserted, to consider whether and within what limits, the Crown is made by force of it the successor to

3. Declarations of the Crown

As already noted above, the term "act of state" is not precise, and has been used in different senses, even to include the declarations which the Crown makes before the court to make clear its position on certain matters of foreign policy. Whatever be the right classification or terminology, it is a clearly established practice that the Crown does issue such certificates, which, since they concern the reception of international law in England, must here be examined.

And in this connexion, three questions require elucidation and precision, insofar as the incomplete and somewhat contradictory materials provided by the cases so allow. The three questions are as follows:

a) The domain of Crown declarations – what events or things the Crown may certify.

b) The verification by the courts of Crown declarations – whether the courts can go behind the declaration.

c) The subject-matter of the declaration – whether the Crown certifies fact or law.

The discussion of these three questions may, however, be prefaced by the remark that it is indeed strictly the Crown, and not the government or the Foreign Office or any other government department, which makes the declaration, since it is the prerogative of the Crown to conduct foreign affairs [106]). Nevertheless, it must be admitted that in fact it is the government which constitutionally conducts foreign affairs, and it is a practice of long standing, otherwise uncriticised by the courts, to express the declaration as emanating from the Foreign Office or other appropriate government department.

This said, we can begin with the first question.

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the obligations as well as the rights of the displaced government. Such consideration will not call the annexation in question". Having made this sound distinction, however, Westlake felt himself compelled by an examination of the cases (especially *Secretary of State* v. *Kamachee Boye Sahaba* and the *West Rand Gold Mining Co. case*) to say that "the law of England must be admitted, in the present state of the authorities, to deny the right of the judges, even on a petition of right, to draw out against the Crown the consequences of an act of state". It is, however, very respectfully submitted that these cases can and should be shorn of some of their *dicta* and thus be reconciled with the other existing authorities cited above. In this way would the sound distinction and argument of Westlake be restored to that purity of which he accepted the alloying only because, as an English lawyer, he felt himself bound by the cases: if counter-authority can be adduced – as it can – then the necessity for making the concession to the authorities disappears.

[106]) This was pointed out by Slesser, L. J., in *The Arantzazu Mendi* [1938] 4 A.E.R. 267, at p. 270.

a) The Domain of Crown Declarations

Acts or events in respect of which the Crown makes declarations include the following [107]): the question whether a foreign state or government has been recognised by this country either *de facto* or *de iure* [108]); the question generally whether certain territory is under the sovereignty of one sovereign state or another, and, in particular, whether recognition has been granted to the conquest by another state or to other changes in territorial title [109]); the sovereign status of a foreign state or its monarch [110]); the commencement and termination of a state of war against another country [111]); the question whether a state of war exists with a foreign country or between foreign countries [112]); the question whether a person is entitled to diplomatic status [113]); further, under S. 4, Foreign Jurisdiction Act, 1890, a Secretary of

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107) The list is largely taken from Oppenheim's International Law (7th ed.), vol. 1, p. 684.

108) *Taylor* v. *Barclay* (1828) 2 Sim. 213; 57 E.R. 769 (non-recognition of Federal Republic of Central America); *The Gagara* [1919] P. 95 (Provisional recognition of Estonian National Council as *de facto* independent body); *The Annette* [1919] P. 105 (non-recognition of Provisional Government of Northern Russia as government of sovereign independent state); *Luther* v. *Sagor* [1921] 1 K.B. 456; [1921] 3 K.B. 532 (recognition of Soviet Government as *de facto* government of Russia).

109) *Foster* v. *Globe Venture Company* [1900] 1 Ch.D. 811 (question whether certain tribes of Suss, Morocco, were independent and whether certain land was the territory of the tribes or of the Sultan of Morocco, in accordance with the terms of a company prospectus); *The Fagernes* [1927] P. 311 (declaration by Attorney-General that place of collision of two ships in Bristol Channel was not within territorial sovereignty of His Majesty); *Bank of Ethiopia* v. *National Bank of Egypt and Liguori* [1937] 3 A.E.R. 8 (declaration by Crown that Italian government was recognised as *de facto* government of part of Ethiopia within its control, at a time when the Emperor was still recognised *de iure*).

110) *The Charkieh* (1873) L.R. 4 A. & E. 59; 28 L.T. 513 (declaration that Khedive of Egypt was not sovereign prince of Egypt); *Mighell* v. *Sultan of Johore* [1894] 1 Q.B. 149 (letter from Colonial Secretary that the defendant was sovereign of independent state in Malaya); *Duff Development Co.* v. *Kelantan Government* [1924] A.C. 797 (letter from Colonial Secretary attesting that Kelantan was independent state in Malay Peninsula).

111) *Janson* v. *Driefontein Consolidated Mines Ltd.* [1902] A.C. 484 (question as to validity of an insurance of treasure against capture during transit on account of capture just before war with Great Britain).

112) *Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham S.S. Co.* [1939] 1 A.E.R. 820 (rejection of indeterminate letter from Foreign Office as to state of war between China and Japan in a case involving the interpretation of a charterparty); *R.* v. *Bottrill, ex parte* Kuechenmeister [1946] 2 A.E.R. 434 (statement by Foreign Office that state of war with Germany subsisted, so that *habeas corpus* was not available to German internee).

113) *Re Suarez, Suarez* v. *Suarez* [1918] 1 Ch. 176 (letter from Foreign Office communicating termination of appointment as Minister by Bolivian Government); *Engelke* v. *Musmann* [1928] A.C. 433 (statement by Attorney-General that defendant had been received by the British Government as Consular Secretary of German Embassy).

State is competent to decide finally on any question as to the existence or extent of any jurisdiction of Her Majesty in a foreign country [114]).

It is not however every matter of international interest that in the subject of Crown declaration [115]). Sometimes, the opinion of the Crown is not solicited [116]), and sometimes the Crown does not wish to commit itself too specifically [117]). But there is no comprehensive and coherent theory as to the questions which do and which do not require Crown certification. The truth of the matter is that the practice of reference to the Crown developed piecemeal and sporadically, and not in virtue of a general guiding principle. Yet the fact that there are cases on either side of the line suggests firstly, that, the courts are under no absolute duty to consult the Crown, and secondly, that there is some implicit, inarticulated principle. The key to the matter would seem to be the idea expressed, for instance, by Lord A t k i n [118]), that

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114) For an example of the submission of a question under S. 4 v. *North Charterland Exploration Co. Ltd.* v. *The King* [1931] 1 Ch. 169.

115) In *Duff Development Co.* v. *Kelantan Government* [1924], A.C. 797, Lord S u m n e r said: "I do not think it has yet been held or ought to be held that the Crown must be deemed to know all the geographical boundaries of all foreign states at all times, and this so that its statement on the subject would be conclusive", p. 827. In *Luigi Monta of Genoa* v. *Cechofracht Co. Ltd.* [1956] 2 A.E.R. 769, it was held that the Foreign Office's statement that it had ceased to recognise the Nationalist Government of China as being either *de facto* or *de iure* government of Republic of China was not conclusive in interpreting the word "government" in a charterparty, *v.* also the Bantham S.S. case *(supra).*

116) In *The Lomonosoff* [1921] P. 97, the plaintiffs claimed compensation for services rendered to defendant's steamship in that they had saved the ship (and incidentally themselves) from the Bolshevist rising in Murmansk. It was *inter alia* held that the Bolsheviks were "not acting with the authority of a politically organised society which at the time was recognised by this country. There is nothing therefore in the comity of nations which compels this court to treat the rescue as a rescue from lawfull authority". The court did not refer to the Crown. In *Murray* v. *Parkes* [1942] 1 A.E.R. 558, the Court decided the question whether Eire had seceded from the British Commonwealth, so that the appellant would not be subject to military service, upon consideration of the relevant legislation, and did not refer to the Crown.

117) Thus in the third letter from the Foreign Office in *Luther* v. *Sagor* [1921] 1 K.B. 456, p. 461, at first instance, the Foreign Office "for certain limited purposes" regarded the representative of Russian commercial delegation as exempt from process of courts and assented to the claim that that which he represented in England is a state government of Russia, "but that beyond these propositions the Foreign Office has not gone". In the Bantham SS. Co. case *(supra)* the executive stated that "the current situation in China is indeterminate and anomalous and His Majesty's government are not at present prepared to say that in their view a state of war exists".

118) In *The Arantzazu Mendi* [1939] 1 A.E.R. 719, p. 722. For other expressions of the same idea, v. *Jones* v. *Garcia del Rio* (1823) T. & R. 297; 37 E.R. 1113; Lord E l d o n said "What right have I, as the King's judge, to interfere upon the subject of a contract with a country which he does not recognise?"; in *Taylor* v. *Barclay* (1828) 2 Sim. 213; 57 E.R. 769, Sir L a n c e l o t S h a d w e l l, V.-C., said: "It appears to me that sound policy requires that the courts of the King should act in unison with the government of the King". In *Foster* v. *Globe Venture Syndicate* [1900] 1 Ch. 811, F a r w e l l, J., on the question

"our state cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another".

In other words, the real reason of the rule seems ultimately to be one of expedience [119]). Questions of international import lie on the boundaries of international politics and law, and acceptance of Crown declarations is an acknowledgement of the limitations of the courts' power in a balanced constitution of divided powers. It is in this spirit that Sir Stafford Cripps *arguendo* said

"that it was undesirable that the courts should come to a decision which might embarrass the executive with regard to matters of state in which this country is or might be concerned" [120]).

Such a doctrine, however, if pushed too far, is the very antithesis of the acknowledged necessity of an independent judiciary in a free country, and the whole tradition of the common law and the principles defended by Coke against the Crown prerogative in the seventeenth century, found expression in the response of Sir Wilfred Greene, M. R.:

"I do not myself find the fear of the embarrassment of the executive a very attractive basis upon which to build a rule of English law".

Perhaps the conflict is insoluble in terms of logical, clear-cut formulas, and the best that can be done is to promote a clear consciousness of the issues at stake, so as to achieve in this way a just and workable balance be-

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whether a tract of land was within the territory of certain tribes or of the Sultan, said: "Sound policy appears to me to require that I should act in unison with the government on such an point as that" (p. 814). In *The Gagara* [1919] P. 95, where a claim was made to a ship in possession of the Estonian National Council which had been recognised by the Crown as *de facto* independent body, Bankes, L. J., said that if the courts did exercise jurisdiction in the face of "these deliberate statements of the Law Officers of the Crown", "there would be a divergence of action as between the courts of this country and the statements that have been made by the government of the country as to the attitude which this country was prepared to take" (p. 104). And in *The Fagernes* [1927] P. 311, which concerned the question of the extent of His Majesty's territorial jurisdiction over the sea, Atkin, L. J., said that "a conflict is not to be contemplated between the courts and the Executive on such a matter, where foreign interests may be concerned, and where responsibility for protection and administration is of paramount importance to the government of the country" (p. 324), and Lawrence, L. J., explained that the Attorney-General had been invited to attend "as it is highly expedient, if not essential, that in a matter of this kind, the courts of the King should act in unison with the government of the King" (p. 329 f.).

[119]) Lord Sumner, in *Duff Development Corporation* v. *The Kelantan Government* [1924] A.C. 797, at p. 826, commented on the expression of the principle in *Taylor* v. *Barclay:* "This seems to be rather a maxim of policy than a rule of law".

[120]) *Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham S.S. C. Ltd.* [1939] 1 A.E.R. 819, at p. 822.

tween the executive's obligations to decide national policy and the court's duty to maintain their independence *vis-à-vis* the executive [121]).

b) The Power of Verification by Courts of Crown Declarations

The second question requiring elucidation in connexion with Crown declarations is that of their verification by the courts: can the courts go behind the declaration?

The question is one of some nicety, and not entirely free from doubt, and it is perhaps best to proceed by stages.

And to begin with, it may be stated that the practice of relying exclusively on certificates of the Crown is one of recent origin. There are two streams of authority, the one concerned with sovereign immunity, the other with the recognition of states, which flow from the eighteenth century, but it was not until the twentieth century that they merged and formed the modern rule.

As regards diplomatic immunity, it would appear to have been the practice, at least at the beginning of the nineteenth century, for the Secretary of State to keep a list of public ministers and for the sheriff to keep a list of their retinue [122]). It emerges clearly from the cases that, on the one hand, the court would decide the question of law whether a particular category of person come within the protection of diplomatic immunity, independently of the opinion of the Secretary of State's office [123]), and on the other hand

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121) A remark of L. Jaffe, though written with an eye rather to the American practice, may be usefully quoted: "The conceptions 'political question' and 'act of state' are preeminently dynamic formulas. It is quite futile to attempt to fill them in by analysis from the constitution conceived as a fixed or static organisation. It obscures their real nature. These conceptions are shorthand statements of the relations between the executive and the judiciary, the resultant of the conflicting claims of competence. History is our witness that these relations have changed as a consequence of an intricate and continuous readjustment of many factors. This was so prior to the adoption of the constitution, and that instrument could not, was not intended to still these restless forces", in Judicial Aspects of Foreign Relations, 1933, p. 19.

122) It may be borne in mind that according to the rules of procedure of those days, proceedings for debt were begun by arrest of the debtor, and that discharge from the custody of the sheriff could be obtained either by proving diplomatic status or by giving bail or a bail-bond. That is why many of the earlier cases arise upon an application for discharge from custody or for cancellation of a bail-bond, *v.* Lord Phillimore, in *Engelke* v. *Musmann* [1928] A.C. 433, p. 452.

123) Thus in *Darling* v. *Atkins* (1769) 3 Wilson, K.B. 33; 95 E.R. 917, it was held that the defendant was not entitled to privilege from arrest since he was not only the English secretary of the envoy of the Elector of Bavaria, but also a purser on board an English man of war, "for no man can serve two masters". The court came to this decision even though the envoy had sworn that the defendant was registered as his secretary in the proper offices. Similarly, in *Viveash* v. *Becker* (1814) 3 Maule & Selwyn, 284; 105 E.R. 619, the

that it would itself decide the question of fact whether a person had the status he claimed upon the balance of evidence. A typical statement is that of Lord Mansfield in *Triquet* v. *Bath*, that "the affidavits on the part of the defendant have out-sworn those on the part of the plaintiffs" [124]). At the same time, where the defendant's own claim to diplomatic protection was not challenged, the court would accept it in the absence of any ground for doubting it [125]). Until late into the nineteenth century, therefore, claims to diplomatic protection were treated as matters of fact, and supported and denied by affidavits, letters from the ambassador in question and oral testimony [126]). There is, however, some evidence to suggest that the Attorney-General occasionally intervened on behalf of members of the diplomatic staff of foreign countries at the request of the Crown; it is to be presumed that the Crown acted at the request of the foreign embassy concerned, and did so where it was itself satisfied of the genuineness of the claim [127]). But even the appearance of the Attorney-General did not prevent the court from deciding the question of fact for itself [128]).

Such was the state of affairs for a long time, and therefore it is with some surprise that one sees that at the end of the nineteenth century it appears to

court decided that the defendant as a mere consul could not enjoy the diplomatic freedom from arrest, independently of the statement of the Secretary of State's office to the plaintiff that the defendant had not been registered as a public minister because he was only a consul.

124) (1764) 3 Burr., 1478; 97 E.R. 936. Other cases are: *Crosse* v. *Talbot* (1725) 8 Mod. 288; 88 E.R. 205; *Wigmore* v. *Alvarez* (1730) Fitz-Gibbon 200; 94 E.R. 719; *Seacombe* v. *Bowlney* (1743) 1 Wils., K.B. 20; 95 E.R. 469; *Fontainier* v. *Heyl* (1765) 3 Burr. 1731; 97 E.R. 1070; *Lockwood* v. *Dr. Coysgarne* (1765) 3 Burr. 1676; 97 E.R. 1041.

125) *Hopkins* v. *De Robeck* (1789) 3 Term Rep. 79; 100 E.R. 465; *Service v. de Castaneda* (1845) 2 Coll. 56; 63 E.R. 635; *Parkinson* v. *Potter* (1885) 16 Q.B.D. 152.

126) In *Parkinson* v. *Potter*, decided so late as 1885 the evidence consisted of the statement of the clerk from the Portuguese Consulate that he had seen the defendant at the Embassy, that he was there two or three times a week, and that he was there spoken of as an attaché. This evidence was not challenged, and was accepted by the appeal court.

127) This would seem to be the inference from the statement of Lord Mansfield in *Heathfield* v. *Chilton* (1767) 4 Burr. 2015; 98 E.R. 50: "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 entitled to the character of public minister". This might also explain the reference to the appearance of the Attorney-General in *Malachi Carolino's case* (1744) 1 Wils., K.B. 78; 95 E.R. 502, and in *The Magdalena Steam Navigation Co.* v. *Martin* (1859) 2 E. & E. 94; 121 E.R. 36. This was also the procedure adopted in *The Parlement Belge* (1879) 4 P.D. 129; (1880) 5 P.D. 197.

128) Thus in *Fontainier* v. *Heyl* (1765) 3 Burr. 1731; 97 E.R. 1070, where "Mr. Jones shewed cause against the rule which had been obtained by Mr. Attorney-General, for the plaintiff to shew cause why an execution should not be set aside, and restoration etc. made to the defendant, upon the fact of his being under regular protection as the servant of a foreign minister", the court accepted Jones' evidence that the defendant was a trader and that "the being valet to Count Haslang was mere sham and pretence", and discharged the order against the plaintiff.

be common practice to refer to a department of state in order to ascertain diplomatic status [129]). And in the leading case of *Engelke* v. *Musmann* [130]) it was held decisively that the court was bound to accept the declaration of the Crown as to the status of diplomatic person. The only certain authority for this decision was an isolated case in 1915 [131]) and the principle of the decision in *Duff Development Co.* v. *Kelantan Government* [132]). This case concerned the question of sovereignty and recognition, and it was thus that the two streams of authority merged. This merger made the modern rule at once definitive and general, but it is interesting to see whether the second line of authority had any firmer antecedents than the first.

The problem arose at the beginning of the nineteenth century when the courts were faced with the various revolutions in the old world and in the new. Lord Eldon was chancellor at the time, and he was always reluctant to allow the claims of the new republics on the double ground that he ought to act in harmony with the government of the King and that he had no judicial knowledge of the existence of the new republics [133]). Two explanation of the attitude of Lord Eldon have been offered. It has been said, firstly, that he

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129) This is the implication from the case of *Macartny* v. *Garbutt* [1890] 24 Q. B. D. 368, and certainly it is the inference drawn from the case by the court in *Engelke* v. *Musmann* [1928] A.C. 433, per Lord Buckmaster, p. 445 f.; per Lord Warrington, p. 457. Sir Robert Phillimore had also consulted the Foreign Office in *The Charkieh* (1873) L.R. 4 A. & E. 59, but without feeling obliged to do so; in fact he engaged upon an elaborate investigation of his own.

130) [1928] A.C. 433.

131) In *Re Suarez, Suarez* v. *Suarez* [1915] 1 Ch. 176, where it was held that a letter from the Foreign Office stating that a Minister's name had been removed from the diplomatic list was sufficient evidence that he had ceased to hold diplomatic office at the date of the letter.

132) [1924] A.C. 797.

133) In *City of Berne* v. *Bank of England* (1804) 9 Ves. Jun. 347; 32 E.R. 636, an application of the revolutionary government of Berne to prevent the Bank of England from transferring funds purchased by the former government of Berne was opposed on the ground that the existing government could not be noticed by the court, since it had not been acknowledged by the British government. Lord Eldon refused the application "observing, that he was much struck with the objection". In *Dolder* v. *Bank of England* (1805) 10. Ves. Jun. 352; 32 E.R. 881, the revolutionary government of Switzerland made an application to have paid into court the dividends from funds purchased before the revolution. Lord Eldon's judgment is not fully or clearly reported, but it is at any rate apparent that he distinguished between what he knew judicially and what he really knew, and he required further proof that the applicants were entitled to the money. The case of *Dolder* v. *Lord Huntingfield* (1805) 11 Ves. Jun. 283; 32 E.R. 1097, is very confusingly reported. In *Jones* v. *Garcia del Rio* (1823) T. & R. 297; 37 E.R. 1113, the plaintiffs applied to have an account taken of the monies which they had advanced under a loan made to two men who represented themselves as envoys from Peruvian government. Lord Eldon decided the question on a technical point, but after having said that England had

"was largely influenced by the desire to do nothing in his court contradictory of the government's policy in matters of recognition; for it must be remembered that he was a member of the government" [134]).

Alternatively, it has been suggested that

"what he was about was to do all in his power as a judge to check the movement towards recognition, by discouraging investors in the South American loans by denying them remedies on the ground of non-recognition" [135]).

Whatever the reason, the practical result was twofold. Firstly, the utterances of Lord Eldon acquired the authority which the principle of precedent, then already firm, if not absolute, gave them, and so outlasted his own tenure of office. Secondly, the parties alleging the recognition of new governments were compelled to resort to the Foreign Office. It was thus that Sir Lancelot Shadwell, V.-C., in the leading case of *Taylor* v. *Barclay* [136]) communicated with the Foreign Office, and, having learned that it had not recognised the Federal Republic of Central America as an independent government, decided that the proceedings for a loan could not be dealt with by the courts.

The practice of applying to and relying upon the Foreign Office in such matters seems therefore to have been established at the beginning of the nineteenth century, but we do not hear anything more until the end of the same century. Then, in *Mighell* v. *Sultan of Johore* [137]), Lord Esher stated quite categorically, without citing any precedent, that

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not acknowledged the government of Peru, continued: "I want to know whether, supposing Peru to be so far absolved from the government of Spain that it never can be attached to it again, the King's courts will interfere at all while the Peruvian government is not acknowledged by the government of this country. What right have I, as the King's judge, to interfere upon the subject of a contract with a country which he does not recognise?".

134) Bushe-Fox, The Court of Chancery and Recognition, 1804–31, in The British Year Book of International Law, vol. 12 (1931), p. 63, 74. Jaffe, *op. cit.*, also remarked, *à propos* the judgment of Lord Eldon in *Jones* v. *Garcia del Rio:* "This is the accent of a judge who is also an advisor to the King, and his servant" (p. 127), and a little later says: "These men [Lord Eldon and Shadwell, V.-C.] seemed to think that any suggestion in a pleading or in a judicial proceeding that an unrecognised state did in fact exist was *ipso facto* a kind of recognition, thus placing the court in a conflict with the executive" (p. 129).

135) A. Lyons, The Conclusiveness of the Foreign Office Certificate, in The British Year Book of International Law, vol. 23 (1946), p. 240, 249. Mr. Lyons also reminds us that Lord Eldon was not only a chancery judge but an active politician, and that as such opposed Canning's declared policy of calling "the New World into existence to redress the balance of the old" (King's Message, 12. 12. 1826).

136) (1828) 2 Sim. 213; 57 E.R. 769; v. also *Thompson* v. *Powles* (1828) 2 Sim. 194; 57 E.R. 761.

137) [1894] 1 Q.B.D. 149. The case was one of breach of promise of marriage against the Sultan of Johore, and the question was whether this territory in the Malay Peninsula was an independent state.

"when once there is an authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the courts of this country is decisive" [138]).

This decision was relied upon in later cases [139]) and yet it was challenged in the leading case of *Duff Development Corporation* v. *The Government of Kelantan* [140]). The case went to the House of Lords on the question, *inter alia*, whether the government of Kelantan was an independent sovereign state and whether a letter from the Secretary of State for the Colonies stating that Kelantan was an independent state was conclusive or not. It was held that it had "for some time" [141]) been the practice of the courts to apply to the government in cases of doubt and that it was

"the duty of the court to accept the statement of the Secretary of State thus clearly and positively made as conclusive upon the point" [142]).

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138) P. 158. Kay, L. J., having said that he could not "conceive a more satisfactory mode of obtaining information on the subject than such a letter", reopened the question of its conclusiveness by referring to the treaty between Great Britain and the Sultan and thus raising the problem of a contradiction between the treaty and the Foreign Office letter.

139) *Foster* v. *Globe Venture Syndicate* [1900] 1 Ch. 811; *The Annette* [1919] P. 105; *The Gagara* [1919] P. 95.

140) [1924] A.C. 797.

141) Viscount Cave, p. 805; "it has long been settled", Viscount Finlay, p. 813.

142) Viscount Cave, p. 808 f.; Viscount Finlay, p. 813; Lord Dunedin, p. 820; Lord Sumner, p. 824; Lord Carson, p. 830 f. This case was, however, subjected to much criticism. Cf. Morgan, in his introduction to "Public Authorities and Legal Liability", by G. E. Robinson, 1925, p. LXXXII–LXXXIV; L. Jaffe submitted the case to very critical comment. In order fully to understand the criticism, it should be noted, that under the treaty, the government of Kelantan had no political relations with any foreign power except through His Majesty the King of England, and he was obliged in all matters of administration to follow the advice of an adviser appointed by His Majesty. Jaffe wrote that in the Duff case, "there was even more reason than in *The Charkieh* for adopting Sir Robert Phillimore's technique [of investigating the claim to sovereignty independently]. What, after all, in terms of administration of justice, is the question before a court when a claim of sovereign immunity is made? It is whether the controversy should be settled by a court or through diplomatic channels. Initially at least, it is a problem of the proper distribution of function. If the court allows the claim of immunity, it normally makes the assumption that the disappointed plaintiff can press his interests through the foreign office. But it is just the contention of the plaintiff in the Duff case that there are no independent diplomatic relations between Great Britain and Kelantan; and the treaty, which, mind you, not the Foreign Office but the Secretary of State for the Colonies transmitted to the court showed quite conclusively that this contention was true. It was the British administration itself which had thwarted satisfaction of this claim, and which, driven from ditch to ditch, had finally stepped out and said, 'We're not the enemy, you know. It's the Sultan of Kelantan. You can't fight him, and at this donned a mask of oriental countenance; the comedy was complete. Nothing left for the plaintiff but to appeal to His Majesty's grace, a not very favourable prospect under the circumstances" (p. 210 f.).

Since the two cases of *Duff Development Corporation* v. *The Government of Kelantan* and *Engelke* v. *Musmann,* therefore, it is settled beyond doubt that the certificate of the Crown is conclusive [143]).

This having been established, the next stage in the enquiry is to ascertain whether such certificates are not only c o n clusive but e x clusive, that is to say whether such is the only method of proving an international fact. In this respect, two views have been indicated, at least implicitly. According to the one, reference to the Crown is the only method of settling the disputed question [144]). According to the other view, reference to the Crown is not absolutely necessary. This attitude is often associated with the rule of "judicial notice". Judicial notice is "the cognisance taken by the court itself of certain matters which are so notorious or clearly established that evidence of their existence is deemed unnecessary" [145]). The enunciation of the rule relating to Crown declarations in virtue of this principle would seem to have as its corollary the principle that reference to the Crown is but one method of ascertaining the position, if the best. Such a view derives support not only from the above-mentioned cases in which reference to the Crown was not made, but also from certain *dicta* of the judges [146]).

The conclusion in the present state of the authorities would seem to be, therefore, that while the courts are not absolutely bound to consult the Crown, it is general practice to do so.

We have now completed two stages in our investigation of the court's power to verify Crown declarations. There remains but one more question in this connexion, that of the insufficiency of the Crown declaration. This may arise for two reasons; the Crown itself may decline to give an answer [147]). Much more frequent and likely, however, are not direct denials but vaguely or cautiously expressed certificates. This may due either to the

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143) Insofar as diplomatic immunity is concerned, the modern practice is to verify claims either by gaining a certificate from the Foreign Office or by producing the published Foreign Office list. The list transmitted by foreign embassies is examined by the Foreign Office, and recognition of diplomatic status is withfeld if it is in doubt. The procedure was explained by the Attorney-General in *Engelke* v. *Musmann* [1928] A.C. 433, at p. 435 f.

144) *V.* Scrutton, L. J., in *Luther* v. *Sagor* [1921] 3 K.B. 532, p. 556; Lord Atkin in *The Arantzazu Mendi* [1939] 1 A.E.R. 719, p. 721; McNair, J., in *Sayce* v. *Ameer Ruler Sadiq Mohammad Abbasi Bahawalpur State* [1952] 1 A.E.R. 326, at p. 330.

145) Phipson on Evidence (9th ed. 1952) p. 4.

146) Kay, L. J., in *Mighell* v. *Sultan of Johore* [1894] 1 Q.B.D. 149, p. 161; Lord Sumner in *Duff Development Corporation* v. *The King* [1924] A.C. 797, at p. 823 f. The point was recognised to be still open by Viscount Simon in *Sultan of Johore* v. *Abubakar, Tunku Aris Bendahara and Others* [1952] 1 A.E.R. 1261, p. 1266 f.

147) The possibility was mentioned by Lord Sumner in the Duff case, p. 825, and an example is afforded by the case of *Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham S. S. Co., Ltd.* [1939] 1 A.E.R., p. 819.

unwillingness of the Crown to commit itself in "changing and difficult times" [148]) or to the intrinsic complexity of the situation, especially when it is unprecedented. In such cases, the rule is that it is for the court "to collect the true meaning of the communication for itself" [149]). In other words, the court recovers some of the discretion which the rule of conclusiveness *ex facie* denies it, if it is prepared to exercise it. This is exemplified by a large number of cases, many of which followed upon the various revolutions and territorial realignments that have characterised this century [150]).

148) Lord Sumner in the Duff case, p. 825.

149) [1924] A.C. 797, at p. 824, per Lord Sumner.

150) In *Statham* v. *Statham and His Highness the Gaekwar of Baroda* [1912] P. 92, which was a petition for divorce, Bargrave Deane, J., referred to a certificate from the India Office in an earlier case, in which it had been said that "the Gaekwar of Baroda has been recognised by the Government of India as a ruling chief governing his own territories under the suzerainty of His Majesty... But, though his Highness es thus not independent, he exercises as ruler of his state various attributes of sovereignty, including internal sovereignty ... subject however to the suzerainty of His Majesty the King of England". The learned judge discussed the meaning of suzerainty in the light of the writings of Grotius, de Vattel and Pufendorf, and concluded that the Gaekwar ranked among the "sovereigns who acknowledge no other law than the law of nations". The Russian revolution had to be dealt with in *The Gagara* [1919] P. 95, *The Annette* [1919] P. 105, and *Luther* v. *Sagor* [1921] I K.B. 456; 3 K.B. 532. In the first case, the Attorney-General informed the court that His Majesty's government "had for the time being, and with all necessary reservations as to the future, recognised the Esthonian National Council as a *de facto* independent body, and accordingly had received a certain gentleman as the informal diplomatic representative of that Provisional Government". The court decided that they should not therefore permit the arrest of a vessel in possession of Esthonian government. In the second case, the Foreign Office wrote that the provisional government of Northern Russia had not been formally recognised by His Majesty's government, but that His Majesty's government were at present cooperating with the provisional government in its opposition against the Russian Soviet government. It was held that this meant that the British government did not recognise the provisional government as a sovereign power. In *Luther* v. *Sagor*, there was a succession of communications from the Foreign Office to the parties in the case. At first instance the Foreign Office wrote that for certain limited purposes His Majesty's government had assented to the claim of the representative of the Russian Commercial Delegation to represent a State government of Russia and that for the same limited purposes had assented to the claim that that which the Russian agent represented was a State government of Russia, but that beyond that it would not go. It added that it had never officially recognised the Soviet government in any way. Upon this, Roche, J., held that he could not recognise the Soviet government as the government of a sovereign state or power, competent to deprive the plaintiff of his property by decree. After this decision, the Foreign Office again wrote a letter, in which it was stated that "His Majesty's government recognise the Soviet government as the *de facto* government of Russia". Thereupon, the Court of Appeal held that the decree of confiscation of the plaintiff's property was valid. – The case of *The Arantzazu Mendi* [1939] 1 A.E.R. 719 arose at the time of the Spanish civil war. The ship had been successively requisitioned by the Republican and Nationalist governments, and had been arrested in London in pursuance of a writ *in rem* for the possession of the ship issued by the owners. The Foreign Office wrote a letter stating that His Majesty's government recognised the government of the Spanish republic as the only *de jure* government of Spain or any part of it, that it "recognises the

The position is summed up by Oppenheim as follows:

"When, as occasionally happens, the statement of the Foreign Office lacks in clarity on account of the novelty or complexity of the facts which it is requested to certify, the court is presumed to have the power – and the duty – to interpret the certificate in accordance with the principles of international law applicable to the situation" [151]).

c) The Subject-matter of Crown Declarations – fact or law

We have already seen above that the intervention of the executive in matters relating to international law is a threat to the independence of the judiciary if it is not restricted within reasonable bounds. One restriction which suggests itself would be to limit the declarations of the Crown to matters of fact. Nor is the highest authority in this sense wanting. For Coke, in his Prohibitions del Roy [152]), expressed himself thus in his opposition to James I:

"... it was answered by me, in the presence and with the clear consent of all the Judges of England, and Barons of the Exchequer, that the King in his own person cannot adjudge any case, either criminal, as treason, felony etc., or betwixt party and party, concerning his inheritance, chattels or goods, etc., but this ought to be determined and adjudged according to the law and custom of England; and always judgments are given, *ideo consideratum est per curiam,* so that the court gives the judgment ... A controversy of land betwixt parties was heard by the King, and sentence given, which was repealed for this, that it did not belong to the common law: then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the judges: to which it was answered by me, that true it was that god had endowed His Majesty with excellent science, and great endowment of nature; but His Majesty was not learned in the law of his realm of England, and cases which concern the life, or the inheritance, or goods or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of

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nationalist government as a government which at present exercises *de facto* administrative control over the larger portion of Spain", and that it recognised that "the nationalist government now exercises effective administrative control over all the Basque provinces of Spain". It was thereupon held that the Nationalist government was sovereign and could not be impleaded; v. similarly, *Banco de Bilbao* v. *Rey* [1938] 2 A.E.R. 253. On the occasion of the annexation of Abyssinia, the English courts had to decide the cases of *Bank of Ethiopia* v. *National Bank of Egypt and Liguori* [1937] 3 A.E.R. 8; and *Haile Selassie* v. *Cable and Wireless Ltd* [1938] 3 A.E.R. 384 (C. A.), 677 (Ch. D.), where the British government recognised the Emperor of Ethiopia as *de iure* sovereign but the Italian government as *de facto* sovereign.

151) International Law, (7th ed.) vol. 1, p. 685, n. 5; v. also British Year Book of International Law, vol. 20 (1939), p. 125, at p. 128.

152) (1607) 12 Co. Rep. 63–65, quoted *arguendo* in *Duff Development Corporation* v. *Kelantan Government* [1924] A.C. 797, at p. 800.

law, which law is an act which requires long study and experience, before that a man can attain to the cognisance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and in peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege*".

It must however be admitted that the theoretical simplicity of this distinction between fact and law is not realised in fact.

According to certain statements of high authority "the answer of the King, through the appropriate department, settles the matter whether it depends on fact or law" [153]). If this is so, there is no reason why meticulous attention should be given to the direction of Lord Phillimore that

"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 recognised by His Majesty as a Sovereign' " [154]).

This would also explain the fact that while in most cases the Crown has contented itself with stating in its communication to the court or parties that it recognised the particular state or government as sovereign or did not so recognise it [155]), in other cases it stated that the particular state or government was sovereign [156]).

A more serious, if less perceptible, restriction upon the courts' power is the courts' own reluctance to construe the Crown statements independently in the light of the principles of international law, even when the expressions used are not in common usage in international law [157]). Lord Sumner

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153) Per Viscount Finlay in *Duff Development Corporation* v. *Kelantan Government* [1924] A.C. 797, at p. 815. To the same effect are statements of Tucker and Atkin, L. JJ., in *R. v. Bottrill, ex parte Kuechenmeister* [1946] 2 A.E.R. 434, at p. 437 and 438, which concerned the question whether Great Britain was still in a state of war with Germany, and therefore whether a person detained could be released by means of *habeas corpus*.

154) In *Engelke* v. *Musmann* [1928] A.C. 433, at p. 455.

155) *V. The Gagara* [1919] P. 95; *The Annette* [1919] 105; *Luther* v. *Sagor* [1921] 1 K.B. 456 [1921] 3 K.B. 532; *Haile Selassie* v. *Cable and Wireless Ltd* [1938] 3 A.E.R. 384, 677; *Banco de Bilbao* v. *Rey* [1938] 2 A.E.R. 253; *The Arantzazu Mendi* [1939] 1 A.E.R. 719; *Sultan of Johore* v. *Abubakar, and Others* [1952] 1 A.E.R. 1261; *Civil Air Transport Inc.* v. *Central Air Transport Corp.* [1952] 2 A.E.R. 733.

156) *Mighell* v. *Sultan of Johore* [1894] 1 Q.B. 149; *Duff Development Corporation* v. *Kelantan Government* [1924] A.C. 797; *Sayce* v. *Ameer Ruler Sadiq Mohammad Abbasi Bahawalpur State* [1952] 1 A.E.R. 326.

157) *E. g.* exercise of "effective administrative control" in *The Arantzazu Mendi* [1939] 1 A.E.R. 719. *V.* H. Lauterpacht, Recognition of Insurgents, Modern Law Review, vol. 3 (1939/40), p. 1, where *The Arantzazu Mendi* is discussed in this light, and in certain respects criticised.

seemed to envisage precisely such an interpretation by the courts when he said that

> "There may be occasions, when for reasons of state full, unconditional or permanent recognition has not been accorded by the Crown, and the answer to the question put has to be temporary if not temporising, or even when some vaguer expression has to be used. In such cases not only has the court to collect the true meaning of the communication for itself, but also to consider whether the statements as to sovereignty made in the communication and the expressions 'sovereign' and 'independent' sovereign used in the legal rule mean the same thing" [158]). In fact, as has been well stated, "the courts have shown a tendency to be almost hypnotised by the presence or absence of the words 'recognition', 'sovereign' and so forth ..." [159]).

And indeed the attitude of the courts was well expressed by Lord Atkin, no friend of uncontrolled executive discretion [160]), when he said:

> "Our state cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our sovereign has to decide whom he will recognise as a fellow-sovereign in the family of states, and the relations of the foreign state with ours in the matter of state immunity must flow from that decision alone" [161]).

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158) *Duff Development Corporation* v. *Kelantan Government* [1924] A.C. 797, at p. 824 f.

159) F. A. Mann, Judiciary and Executive in Foreign Affairs, Transactions of Grotius Society, vol. 29 (1944), p. 143, at p. 155 f.

160) As was shown in his vigorous dissenting judgment in the war-time case of detention by the Home Secretary, *Liversidge v. Anderson* [1942] A.C. 206.

161) *The Arantzazu Mendi*, p. 722 (v. n. 150). Perhaps the best example of the courts' reluctance independently to interpret Crown declarations is afforded by the case of *Duff Development Corporation* v. *Kelantan Government* [1924] A.C. 797, where Viscount Cave expressed himself in a similar spirit to that of Lord Atkin: "No doubt the engagements entered into by a State may be of such a character as to limit and qualify and even to destroy the attributes of sovereignty and independence: Wheaton, 5th ed., p. 50; Halleck, 4th ed., p. 73; and the precise point at which sovereignty disappears and dependence begins may sometimes be difficult to determine. But where such a question arises it is desirable that it should be determined, not by the courts, which must decide on legal principles only, but by the government of the country, which is entitled to have regard to the circumstances of the case ..." (at p. 808). In the light of these statements, the suggestion of F. A. Mann, which immediately follows the words quoted above, represents an international lawyer's ideal rather than present English law; it runs as follows "... and since the practice of the courts is less flexible or capable of alteration than that of the Executive, it may be well to consider whether statements by the Executive should not be so formed as to describe a situation rather than to state results. This may enable and compel the court in proper cases to deduce for itself whether the facts described amount to 'recognition', 'sovereignty' etc., within the meaning not of diplomatic usage, but of international law".

III. National Interpretation of International Law

Before bringing to a close this study of the reception and application of international law in English courts, attention must be drawn to something which if it is not exactly an exception to the general rule that international law is part of the law of England, is a restriction of its practical scope. By this is meant not so much what B r i e r l y expressed in the following words

> "... a national court can only apply its own version of what the rule of international law is, and ... however objectively it may try to approach a question which raises an issue of international law, its views will inevitably be influenced by national factors" [162]).

It is meant rather that while the original reception of any particular rule of international law will be from the usual sources of international law, it would seem that its subsequent development will be according to the rules and spirit of English law, and in particular in accordance with the doctrine of precedent [163]). The practical demerit of the English rule that international law is part of the law of England is that if a rule of international law is accepted in an embryonic form, its subsequent growth will not be according to the rules of international life but of the life of the common law. This is a question not so much of rule as of attitude, and yet it may have serious results in practice. And in fact the general impression which emerges from a study of the English cases involving points of international law is that the English judges are somewhat shy of examining and applying that mass of often very uncertain materials which constitute international law. Two examples may be given:

Firstly, it is necessary only to refer back to the cases on recognition discussed above to recall the mutual reluctance of Crown and courts which often exists to decide the vital question of sovereignty, which is one essentially of international law.

Secondly, there may be mentioned the cases on state succession, whether resulting from treaty or otherwise. This is a matter of great complexity, demanding careful distinctions and much learning [164]), and yet, or perhaps precisely on that account, the English courts have in recent times contented themselves with following English *dicta* and precedents. Already in the case

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162) The Law of Nations, 5th ed., p. 88.

163) *V.* for example *Chung Chi Cheung* v. *R.* [1938] 4 A.E.R. per Lord A t k i n, at p. 790: "The courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue, they seek to ascertain the relevant rule, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals".

164) *V.* The Law of State Succession (1956), by D. P. O' C o n n e l.

of *West Rand Central Gold Mining Co.* v. *Rex* [165]), Lord Alverstone, C. J., said, firstly, that the alleged proposition that "by international law, the sovereign of a conquering state is liable for the obligations of the conquered state" must be accepted or rejected *in toto* since distinctions according to different obligations could not be made, apparently on the ground the municipal tribunals could not make such distinctions [166]); secondly, that such an absolute rule was not supported by the text book writers on international law [167]); and thirdly, and decisively, that any such views were "inconsistent with the law as recognised for many years in the English courts" [168]). And in two recent cases [169]), the court limited itself to quoting the old case of *Cook* v. *Sprigg* [170]) and its successors, without enquiring whether international law had developed in between.

The meaning of what is here being said may become plainer if the spirit of the Common Law Courts is contrasted with that of the Prize Court. It cannot be denied that the English Prize Court applies international law [171]) and the fact that the Prize Court applies exclusively international law and that the ordinary English courts apply common law as well as international law should not in principle make any difference to the international law in fact applied. Nevertheless, a difference of spirit does exist, as was expressed by Sir Arnold McNair in the following words:

> "The British doctrine is that while a British Prize Court is a municipal and not an international court, it administers international law and does so, it would appear, more directly than other British courts and not on the ground that it is part of the law of England", and a little further on: "It is worth saying that the main reason for the difference of attitude of our Prize Courts and our Common Law Courts is that our Prize Courts have been staffed in the past by men who were civilians. The Prize Court ... was the Admiralty Court sitting in prize, and therefore the foundations of prize law were laid by men who were trained in the law maritime and also in international law, and that is why we

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165) [1905] 2 K.B. 391.

166) P. 402 f.

167) P. 403–406.

168) P. 406.

169) *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board* [1941] 2 A.E.R. 93 (P. C.); *Secretary of State v. Sardar Rustam Khan and Others* [1941] 2 A.E.R. 606 (P. C.).

170) [1899] A.C. 572.

171) Except that they will also apply an English Act of Parliament which cannot be interpreted consistently with international law, and also Orders in Council (not made in virtue of a statute) which "amount to a mitigation of Crown rights in favour of the enemy or neutral, as the case may be" per Lord Parker of Waddington, *The Zamora* [1916] 2 A.C. 77, at p. 97. For the origins and development of English prize law and jurisdiction, *v.* R. G. Marsden, Prize Law in Journal of Society of Comparative Legislation, vol. 15 (1915), p. 90.

find them more ready to enforce and apply directly international law because they feel it is their own. It is not extraordinary ... that the common law judge just looks with a certain degree of apprehension upon international law. He is not so familiar with it" [172]).

This brings us to the end of our review of the practice of the English courts on questions of international law. Their experience has been long and varied, and they have developed their principles in the typical English fashion, pragmatically, empirically. The length and unbrokenness of this tradition is at once the strength and weakness of the English law on questions of international concern. Its strength because, as Maitland well said of the English law as a whole, it has "something of the character of an experimental science" [173]); its weakness, because it has tended perhaps to be imprisoned in its past. The English practice may therefore not in all respects fulfil the wishes of an international lawyer, who is interested in national courts only insofar as they decide international questions; and this after all is not their main function. But if a true perspective is to be achieved, it must be remembered that the courts are not the only organs of the Crown, and that what is denied by the courts may be accorded, or at least rectified, by the executive or by the Crown in Parliament. Three examples of this threefold competence of the Crown may be given.

Firstly, subsequently to the case of *The Secretary of State in Council of India* v. *Kamachee Boye Sahaba* [174]), where, it will be remembered, the court decided that the eldest widow of the late Rajah of Tanjore could not enforce any claim to the private property of the Rajah after the seizure of Tanjore by the East India Company, on the ground that the seizure was an act of state, the president of the East India Company drew up a minute which recorded the Company's decision. It was there said that

"while, on the one hand, the government is left by this decision, free to take whatever course it considers best; on the other, a serious responsibility has been cast upon it. The government is declared to be the sole arbiter, unrestrained by the ordinary obligations of municipal law; and it is, therefore, peculiarly incumbent upon us to show that we are prepared to act in the spirit of those principles of equity and liberality which are the foundation of all law".

Thereupon followed the proposals for the maintenance of the Rajah's relations, including heritable pensions for the senior widow and fifteen junior

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172) The Method Whereby International Law is Made to Prevail in Municipal Courts on an Issue of International Law, in Transactions of Grotius Society, vol. 30 (1945), p. 11, at p. 18 and 47.

173) Collected Papers, III, 376.

174) (1859) 7 Moore Ind. App. 476; 19 E.R. 388.

widows, and the six natural sons and eleven natural daughters [175]). The decision of the court therefore meant not that the debt did not exist, but that it could not be enforced in an English court of law.

Secondly, the doubts as to the rule of international law relating to the territorial extent of sovereignty [176]) were resolved for the future by the Territorial Waters Jurisdiction Act, 1878.

Thirdly, following the much quoted case of *Mortensen* v. *Peters* [177]), the Crown for diplomatic reasons remitted the remaining portion of the sentences on the Danish, Swedish and Norwegian subjects concerned; while the decision was expressly said by the government spokesman in the House of Lords not to be wrong – indeed the court could hardly act otherwise, for it acted on the view that Parliament must be presumed to have satisfied itself of its power to pass the Act in question – the decision was in fact inconsistent with prior English practice, where the word "subject" was used in accordance with the principles of international and constitutional law i. e. any person subject to the jurisdiction of the legislature passing such laws [178]). And in 1909 the Trawling in Prohibited Areas Prevention Act redefined the "prohibited areas".

Other examples could be cited, and therefore our conclusion is that while England admits the supremacy of International Law, it is not exclusively the courts which put this principle into effect.

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175) This is noted at the end of the report of the case itself.

176) As revealed in the case of *R.* v. *Keyn* [1876] 2 Ex. D. 63.

177) (1906) 8 Sess. Cas. 93, *supra.*

178) *V.* per Lord Fitzmaurice, Under-Secretary of State for Foreign Affairs, Parliamentary Debates, 4th Series, vol. 169, p. 979.