Estoppel and Crown Privilege in English Administrative Law

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Perhaps the most anachronistic doctrine in Anglo-American public law is that of sovereign immunity. Under it, the State is placed in a privileged position of immunity from the principles of law which are binding upon the ordinary citizen, unless it expressly consents to be bound by such principles. In Anglo-American law the infallibility attributed to the King in the days when he was personally sovereign has been more recently recognized in the State, which the Crown now merely personifies. Thus, even today, and even in the American democracy, the basic principle of public law is that the King can do no wrong.¹

That the doctrine of sovereign immunity is inconsistent with the rule of law has long been recognized. "Whether this immunity is an absolute survival of the monarchical privilege, or is a manifestation merely of power, or rests on abstract logical grounds, ... it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State," Justice Frankfurter has asserted.² Sovereign immunity has tended to dualize Anglo-American public law by treating cases against the State as wholly distinct from those governed by the ordinary law, to be dealt with on wholly different principles. Legal concepts have not been applicable, without the State's express consent, to cases governed by the sovereign immunity doctrine. The result has been a system of public law dualist in essence. Different rules apply to cases in which the State is a party, different consequences flow from acts of the State, and cases in which the responsibility of the State is at issue are removed from the cognizance of the courts. In such a system the State has, in effect, been placed upon a higher plane than the individual, with complete immunity given to its acts qua State acts.

Criticism of the sovereign immunity doctrine has, until now, been focused almost entirely upon its effects on the law of public tort and contract liability. It has, not unnaturally, been assumed that with the enactment of statutes like the Crown Proceedings Act,

¹ Davis, Administrative Law 797 (1951).
1947, in Britain, and the Federal Tort Claims Act of 1946 in the United States, under which most of the sovereign's immunity to suit has been waived, the lacuna in the rule of law caused by the sovereign immunity doctrine has been completely filled. What is not generally realized, however, is that the doctrine of sovereign immunity is a pervasive one, whose effects in Anglo-American public law have not been limited to the field of public tort and contract liability. Outside that field, the law has remained unaltered by laws like the Crown Proceedings Act, whose operation does not affect the privileged position which the State still enjoys, as compared to the private individual, in many aspects of our public law.

Most important in this respect in its practical effects on the dealings of the citizen with the administration is the privileged position of the State as far as the doctrine of estoppel and the compulsory production of evidence are concerned. Here are two aspects of sovereign immunity that continue to hamper the private individual engaged in administrative-law litigation and to impede the courts in their endeavor to administer equal justice as between State and citizen. The privileged position of the State with regard to the representations of its agents and the production of evidence indicates that the lacuna in the rule of law caused by the sovereign immunity doctrine still needs some filling. As far as estoppel and Crown privilege are concerned, the King can still do no wrong.

**Estoppel**

The importance of estoppel in the field of administrative law arises from the significant role that the advisory function has come to play in present-day administration. Unlike the legislature, which is normally empowered solely to enact laws, the modern administration is vested not merely with powers of delegated legislation, but also with the power to interpret the law that it has made as well as the statutes under which it operates. Such interpretations constitute a large part of the work of administration on both sides of the Atlantic.

Administrative interpretations of the law are made known not only through agency exercises of powers of delegated legislation and adjudicatory authority. The administration may also render

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3 So characterized in Report of the Committee on Ministers’ Powers 112, Cmd. 4060 (1932).
what amounts to an advisory ruling or opinion for a particular individual. "Increasingly there is a tendency to ask the man from the Ministry what the position is. Does this work need a license? Does that want planning permission? Ought I to pay contributions at this rate, or that?" Administrative advice enables those subject to governmental authority to learn how the agency concerned will interpret the law in cases involving them. "The value to the public of this means of guidance in advance of action is apparent," and the practice of issuing advice has become widespread in present-day administration.

Is administrative advice reliable? As a practical matter, the private individual who seeks and receives official advice will comply with such advice, unless, that is, he is willing to assume the burden and expense of challenging the advice in the courts. The administrative agency concerned will, of course, also respect its own advice in the vast majority of cases. Situations can and do arise, however, where, because of changes in personnel or policy, the administration repudiates its own advisory rulings and refuses to be bound by them. In such cases, are the private citizens protected because of their reliance upon the administrative advice? Is the administration estopped from denying the correctness of the prior advice which it itself has given?

The United States Supreme Court has answered these questions with a categorical negative in the well-known case of Federal Crop Insurance Corporation v. Merrill. The defendant was a government-owned corporation created to insure producers of wheat against crop losses due to unavoidable causes, including drought. It promulgated a regulation, published in the Federal Register, specifying the conditions upon which it would insure wheat crops, including a provision making "spring wheat which has been reseeded on winter wheat acreage" ineligible for insurance. Without actual knowledge of this provision, plaintiff, who was a wheat grower, applied to defendant corporation's local agent for insurance on his crop, informing the local agent that most of it was spring wheat being reseeded on winter wheat acreage. The agent advised plaintiff that the entire crop was insurable and, acting on his recommendation, the corporation accepted plaintiff's appli-
cation for insurance. Two months later, plaintiff's crop was destroyed by drought, but the corporation refused to pay the loss, when it learned that the destroyed acreage had been reseeded. In plaintiff's suit to recover on the crop insurance policy, the corporation contended that it was not in any way bound by the representation of its local agent that plaintiff's crop was insurable. The Supreme Court agreed with this contention, asserting that, even though a private insurance company would be bound on similar facts, the same was not true of a government corporation engaged in the insurance field. "It is too late in the day," said Justice Frankfurter, "to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures." The government corporation in a case like this is treated as an agency of the United States and is vested with the sovereign's immunity to a doctrine like estoppel. The plaintiff was bound by the provision in defendant's regulations even though he had no actual knowledge of its existence and even though he, not unnaturally, relied on the advice of defendant's own agent that his crop was insurable. "Men must turn square corners when they deal with the Government." 

In a celebrated dissent, Justice Jackson rejected the notion that a government agency like the defendant in this case should occupy a position more privileged than that of a private insurance company in an analogous case. If a private company would be estopped on similar facts from denying the representations of its agents, he said, there is no reason why the same should not be true of a government corporation. "It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street."

The problem of estoppel just discussed, which produced such a sharp conflict of opinion in the highest American Court, has arisen as well in English cases, and the English judges also have not been united in their approach to its solution. Lord Justice Denning, with characteristic forthrightness, has strongly urged the view that an administrative agency is bound by the doctrine of

7 Id. at 383.
8 Id. at 385, quoting Rock Island A. & L.R. Co. v. United States, 254 U.S. 141 at 143, 41 S.Ct. 55 (1920).
9 Id. at 387-388.
estoppel upon the same basis as is a private individual. In *Robertson v. Minister of Pensions*, the appellant, a serving army officer, wrote to the War Office regarding a disability of his and received a reply, dated April 8, 1941, stating: "Your disability has been accepted as attributable to military service." Relying on that assurance he forbore to obtain an independent medical opinion on his own behalf. The Minister of Pensions later decided that the appellant's disability was not attributable to war service, and the pensions appeal tribunal affirmed that decision. The appellant appealed, contending that the War Office letter of April 8, 1941, estopped the Minister of Pensions from denying that the appellant's disability was attributable to war service. Denning, J. (as he then was) declared, "If this was a question between subjects, a person who gave such an assurance as that contained in the War Office letter would be held bound by it unless he could show that it was made under the influence of a mistake or induced by a misrepresentation or the like. No such defence is made here." The War Office letter, his Lordship went on, was, on the face of it, an authoritative decision intended to be binding and intended to be acted on. And the appellant did, on the faith of the letter, forbear from getting a medical opinion. "That is sufficient to make the letter binding. The case falls within the principle that if a man gives a promise or assurance which he intends to be binding on him, and to be acted on by the person to whom it is given, then, once it is acted upon, he is bound by it."

Having come thus far, the learned judge then had to decide whether the administration was immune from the doctrine of estoppel that would bind the ordinary citizen upon analogous facts. Denning, J., explicitly rejected the notion that there was any such administrative immunity. "The Crown cannot escape," said he, "by saying that estoppels do not bind the Crown, for that doctrine has long been exploded." It is interesting to note that the reasoning of Denning, J., in his *Robertson* judgment is diametrically opposed to that of the American Supreme Court in the already-discussed *Merrill* case. The American Court rejected the view that the wheat farmer could rely on the administrative assurance which he had received. It was up to the farmer to determine whether that assurance was authorized by the applicable statutes

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10 [1949] 1 K.B. 227 at 228.
11 Id. at 230.
12 Id. at 231.
13 Ibid.
and regulations. In the *Robertson* case, his Lordship treated the assurance which the appellant had received from the War Office in a wholly different manner. "Can it be seriously suggested," he asked, "that, having got that assurance, he was not entitled to rely on it? In my opinion if a government department in its dealings with a subject takes it upon itself to assume authority upon a matter with which he is concerned, he is entitled to rely upon it having the authority which it assumes. He does not know, and cannot be expected to know, the limits of its authority." 14

The view thus expressed by Denning, J., in *Robertson v. Minister of Pensions* was reiterated by him after his elevation to the Court of Appeal in *Falmouth Boat Construction Co. v. Howell*. 15 The plaintiffs there were ship repairers who had, at defendant's order, done alterations and repairs at Falmouth to a naval vessel, bought by defendants for conversion into a passenger-carrying ship. The work done by plaintiffs was done after inspection by, and with the oral permission of, the licensing officer for the Admiralty at Falmouth. The officer in question was the licensing officer for the Admiralty under the Restriction of Repairs of Ships Order, 1940, and was expressly authorized by the Admiralty to sign licenses on their behalf. Under the 1940 order referred to, the Admiralty, acting under regulation 55 of the Defence (General) Regulations, 1939, required that no person whose business was the repair or alteration of ships was to carry out in the United Kingdom any repairs or alterations to ships otherwise than at the order of any government department "except under the authority of a licence granted," by the Admiralty. The plaintiffs, it should be noted, did eventually receive a written license, but the work at issue had been done before that time. The case under discussion arose out of an action by the plaintiffs to recover for the alteration and repairs done to defendant's ship. Defendant pleaded that, since the work had been done without a written license, it was illegal under the 1940 order, and that what was done in contravention of the law could not be made the subject-matter of an action.

Bucknill and Singleton, L.J.J., were of the opinion that the word "license" in the 1940 order was not to be construed as limited to a formal, written license, but as including oral permission to carry out alterations and repairs to ships; consequently, the work which

14 Id. at 232.
had been done by plaintiffs was not in contravention of the law. Denning, L.J., in his judgment, went further and assumed that defendant was right in his contention that the order restricting the repairs of ships postulated a license in writing. But this did not mean that the plaintiffs had violated the law.

"They acted on what they were told by the licensing officer. They did not know what orders had actually been made by the Admiralty, or what variations had been made in them. They had no means of knowing the orders, or at any rate they had no sure means, because the Admiralty were not bound to publish them. They could only rely on what they were told by the licensing officer. Can it be seriously suggested, that, having relied on him, they have been guilty of an offence? In my judgment, there is a principle of law which protects them from such an injustice. It is a principle of particular importance in these days when the officers of government departments are given much authority by orders and circulars which are not available to the public. The principle is this: whenever government officers, in their dealings with a subject, take on themselves to assume authority in a matter with which he is concerned, the subject is entitled to rely on their having the authority which they assume. He does not know and cannot be expected to know the limits of their authority, and he ought not to suffer if they exceed it." 16

This was, of course, an exact restatement by Lord Justice Denning of his view articulated in the Robertson case—that a private individual should be protected if he relies upon the advice or assurance given him by an administrative officer or agency. The administration, in such a case, should be bound exactly as an ordinary citizen is bound when someone acts upon a promise or assurance made by him. In Lord Justice Denning's approach, there is no room for treating the administration any differently from a private individual as far as estoppels against it are concerned.

The House of Lords has, however, indicated that it disagrees with Lord Justice Denning's view on the point under discussion. In the Falmouth Boat Construction Co. case, the highest British tribunal did, it is true, affirm the decision of the Court of Appeal. 17 But it did so upon the ground that the license in writing which plaintiffs had ultimately obtained covered work already done under the oral sanction of the proper authority as well as work to be

16 Id. at 25-26.
done in the future. Since, under this holding, the written license had a retrospective effect, it followed that all of the work done by plaintiffs had been formally licensed and was hence manifestly in accordance with law. There were, it should be noted, only two opinions delivered by the House of Lords in this case, which were concurred in by the rest of that tribunal, and both of the learned lords who expressed their views went out of their way to state their specific disagreement with the theory upon which Lord Justice Denning had rested his judgment in the Court of Appeal. Lord Simonds referred to the basic principle, already quoted, which Lord Justice Denning had articulated in Robertson's case and reiterated in his Falmouth Boat Construction Co. judgment, namely, that under which a citizen is entitled to rely on government officials having the authority which they assert when, in their dealings with the citizen, they take on themselves to assume authority in a matter with which he is concerned. Lord Simonds flatly declared, "My Lords, I know of no such principle in our law nor was any authority for it cited. . . . The question is whether the character of an act done in face of a statutory prohibition is affected by the fact that it has been induced by a misleading assumption of authority. In my opinion the answer is clearly No. Such an answer may make more difficult the task of the citizen who is anxious to walk in the narrow way, but that does not justify a different answer being given."

Substantially the same opinion was expressed by Lord Normand, who likewise rejected Lord Justice Denning's view that the Crown was barred by the representations made by the licensing officer and acted on by plaintiffs. As his Lordship puts it, "it is certain that neither a minister nor any subordinate officer of the Crown can by any conduct or representation bar the Crown from enforcing a statutory prohibition or entitle the subject to maintain that there has been no breach of it." Substantially the same opinion was expressed by Lord Normand, who likewise rejected Lord Justice Denning's view that the Crown was barred by the representations made by the licensing officer and acted on by plaintiffs. As his Lordship puts it, "it is certain that neither a minister nor any subordinate officer of the Crown can by any conduct or representation bar the Crown from enforcing a statutory prohibition or entitle the subject to maintain that there has been no breach of it."

The opinions delivered in the House of Lords in the Falmouth Boat Construction Co. case indicate that the view of the highest British tribunal on the question of whether the administration should be estopped from denying the correctness of representations made by its agents to private individuals who rely upon such representations is substantially similar to that articulated by the United States Supreme Court in the already-discussed case of the American wheat farmer. On neither side of the Atlantic does the

18 Id. at 845.
19 Id. at 849.
citizen appear to be protected by his reliance upon administrative advice or assurances. Undoubtedly, as the American Court conceded in the Merrill case, this may make for hardship in particular cases. But, to paraphrase Lord Simonds, the fact that the accepted rule may make more difficult the task of the citizen is not felt to justify either court in adopting a different rule.

What is it that has led both the English and American courts to reject in the field of administrative law a doctrine like estoppel that accords so fully with our sense of justice in private-law cases? Both courts feel that there is a fundamental difference, in this respect, between the administration and a private principal acting through an agent. When an ordinary citizen clothes his agent with apparent authority, he is estopped from denying that the agent was actually authorized, where his conduct has led another to change his position. In such a case, the only interests at stake are those of the parties concerned and it would be unjust for the third party to be left without a remedy against the principal whose conduct had led him to act to his detriment. The same is not true when the principal in the case happens to be an administrative agency. As the United States Supreme Court has expressed it, "Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." Unlikethe case involving only an ordinary principal and agent, there is more than mere private interests at stake when the administration acts through its agents. In such cases, the entire community has a vital concern in ensuring that administrative agents do not act beyond the bounds of the actual authority delegated to them by law. If such agents can bind the administration by their acts, even though such acts are not clearly within the scope of their authority, there is danger that they will assume powers not actually delegated to them, knowing that their governmental principal will not be able to disavow even such acts. The doctrine of estoppel could thus be used to give de facto validity to ultra vires administrative acts. This, at any rate, appears to be the fear that has induced the courts on both sides of the Atlantic to refuse to bind the administration by the advice or assurances given by its agents.

That the fear referred to has, in fact, been a strong inducement in the minds of the judges is shown by the language of Lord

Greene, M.R., in a judgment rejecting the contention that the Minister of Agriculture and Fisheries was estopped from denying that a tenancy had been created with regard to certain land which he had taken possession of. Defendant's counsel, said Lord Greene in the judgment referred to, "suggested, first of all, that even assuming, as he conceded, that the regulations gave no power to the Minister to create a tenancy, nevertheless the Minister was estopped from denying that the document in question did create a tenancy and, accordingly the relationship must be regarded as one of landlord and tenant. There is, I think, a very short answer to that. Accepting the view which Mr. Bailleu . . . accepts, that the Minister had no power under the regulations to grant a tenancy, it is perfectly manifest to my mind that he could not by estoppel give himself such power. The power given to an authority under a statute is limited to the four corners of the power given. It would entirely destroy the whole doctrine of ultra vires if it was possible for the donee of a statutory power to extend his power by creating an estoppel." 21 It may well be that, on similar facts, a private individual would have been estopped. But the Minister is a statutory body and can only perform the acts which he is empowered to perform. 22 An estoppel cannot be worked against him lest he be tempted to create estoppels to extend his own authority.

As Professor Mitchell has aptly expressed it, the above reasoning, which results in the denial of any remedy, has the beauty of logic and the ugliness of injustice. 23 Yet, even if it is sufficient to justify the courts in refusing to apply the doctrine of estoppel in cases where the administrative agent has gone beyond his statutory authority, one wonders whether that consideration applies as well to the House of Lords and American Supreme Court decisions which have been discussed. In both the Falmouth Boat Construction Co. and Merrill cases, it was not a statute, but an administrative regulation, which was violated by the action of the administrative agents. In such a situation the perils adverted to by Lord Greene above do not appear to exist. Where it is the administrative agency's own regulation, rather than a statute, that limits the agent's authority, there is no danger that the working of an estoppel will enable the administration to extend its own statutory au-

22 Id. at 153, per Cassels, J.
authority. It is true that, in the normal case, an administrative organ should be bound by its own rules and regulations, whose terms should be adhered to in every case to which they are applicable. That principle should, however, give way in order to prevent injustice to one whom an administrative official has led to rely upon advice or assurance to his detriment. In such a case, there is no real public interest to justify refusing to estop the administration from denying the correctness of the advice or assurance given.

It is interesting to note that, in the United States, notwithstanding the case-law illustrated by the already-discussed Merrill decision, Congress decided that the federal government ought to be estopped by the acts of some of its agents and that at least some misled citizens ought to be protected in these cases. An Act of 1947 provides that employers are not to be held liable for failure to pay the wages required by certain labor laws, if the failure was based upon good faith reliance upon rulings of designated Labor Department officials. In addition, some American agencies themselves have provided by regulation for similar inroads upon the “no estoppel against government” doctrine. Thus, the agencies established to administer price controls in the United States both during and after the last war provided in their regulations for non-liability where a violation of the law was based upon good faith reliance upon advice given by agency officials.

American administrative lawyers have gone even further and asked “whether all this experience does not justify more inclusive legislation to protect people who rely on official advice. For if immunity is feasible in such eruptive fields as labor law and price control, why not also in most other regulatory fields?” A recent official study has taken cognizance of this sentiment and recommended the enactment by Congress of the following statutory provision:

“... No sanction shall be imposed by any agency for any act done or omitted in good faith by any person in conformity with, or in reliance upon, any rule, or any advisory letter, opinion, or other written statement of the agency addressed in writing to such person and obtained by him without fraud or material misrepresentation, notwithstanding the fact that, after such act or omission has taken place, such rule, or such letter, opinion, or other written statement is modified,


25 Id. at 376.
amended, rescinded, revoked, or held invalid by the agency for any reason.”

It is not suggested that a statutory provision like that just quoted is necessarily one which should be enacted verbatim into the British statute-book. At the same time, it can hardly be denied that the law laid down in the speeches delivered in the House of Lords in the Falmouth Boat Construction Co. case does make matters most difficult for the private citizen who may be misled by administrative advice or assurances. It is true that the quantitative aspect of the problem under discussion should not be overemphasized. Only rarely will the administration fail to respect its own rulings, and businessmen and others constantly make decisions based on administrative advice that is adhered to by all concerned. Yet, as a leading American proponent of a statute protecting those who rely on administrative advice well puts it, “occasionally people have been hurt by retroactive action, and it can safely be assumed that numerous planned transactions rest inchoate, for the sole reasons that the parties are afraid to rely on statements which are not legally binding. The proposed statute would provide something other than a graveyard for these plans, something more than sympathy for people who will in the future be misled. Further, when there is honest dispute on such facts as ‘conformity,’ ‘good faith’ and ‘reliance,’ why should the Government’s lawyers be allowed to circumvent a holding on the merits of these issues by retreating to the ‘no estoppel against government’ doctrine?” There is certainly much to be said for the view that, while, as the American Court stated in an already-quoted passage, men must turn square corners when they deal with the government, the government should be held to a like standard of rectangular rectitude when dealing with its citizens. In its role as counselor, the administration, like the ordinary citizen, ought to be required to stand by its word, honorably.

28 Note 8 supra.
Crown Privilege

The privileged position of the State in Britain with regard to the compulsory production of evidence is usually referred to as the rule of "Crown privilege." Its place in modern British law was conclusively confirmed in the celebrated decision of the House of Lords in *Duncan v. Cammell, Laird & Co.* That case arose out of the sinking with great loss of life of the submarine *Thetis,* which sank just before the last war while engaged in a trial dive. The *Thetis* had been built by respondents under contract with the Admiralty. A large number of actions were brought against respondents by the personal representatives of the deceased, claiming damages for negligence. Respondents objected to producing a number of documents which came into their custody in their capacity of contractors to the Admiralty. The documents in question included (either in original or as a copy) the contract for the hull and machinery of the *Thetis,* letters written before the disaster relating to the vessel's trim, reports as to the condition of the *Thetis* when raised, a large number of plans and specifications relating to various parts of the vessel, and a notebook of a foreman painter employed by the respondents. As Viscount Simon pithily expressed it, some five years after the judgment of the House of Lords was delivered, "what was desired there by the plaintiffs was to have produced to them then and there the blue prints which would have shown exactly how the submarine *Thetis* was constructed."  

The respondents had been directed by the Treasury Solicitor not to produce the documents and to object to production thereof on the ground of Crown privilege. An affidavit of the First Lord of the Admiralty was submitted in which he stated: "All the said documents were considered by me with the assistance of my technical advisers and I formed the opinion that it would be injurious to the public interest that any of the said documents should be disclosed to any person." The appellants took out a summons, calling on the respondents to give inspection of the documents, but the House of Lords, affirming the decisions below, held that inspection should not be ordered. The governing principle of the case, as stated in the speech of Viscount Simon, L.C., was "that a court of law ought to uphold an objection, taken by a public department when called on to produce documents in a suit be-

32 146 Lords Deb., 5th ser., cols. 927-928.
tween private citizens, that, on grounds of public policy, the documents should not be produced." 33

Dean Roscoe Pound, in a contemporary analysis of *Duncan v. Cammell, Laird & Co.*, declared that the result reached seems sound. 34 The blue prints which showed how a naval submarine was constructed were certainly not matters to be laid open to public inspection, above all in time of war. This was especially true of the case of the *Thetis*, as a speech of Viscount Simon delivered in 1947 has informed us. "I do not think," said he, "I am disclosing any secret nowadays when I say that if those blue prints had been produced it would have appeared that submarines of the type of the *Thetis* were not only armed so that they could fire forwards under the water but that there were also further tubes which could fire from behind. That was a secret and we were at war with the Germans. I have not the slightest doubt that the First Lord of the Admiralty was justified when after considering this particular circumstance, he came to the conclusion that he should say, 'I am sorry, but I must claim privilege for these particular blue prints.'" 35

The bare holding of their lordships that inspection of the *Thetis* documents should not be compelled is, on these facts, one which few people would dispute. What is more debatable is whether Viscount Simon did not go too far in his *Duncan v. Cammell, Laird & Co.* opinion in enunciating a rule of complete judicial abnegation in cases where Crown privilege is claimed. In the *Duncan* case itself, it should be noted, the House of Lords upheld the claim of Crown privilege, although the documents at issue had not been inspected by any court. Their lordships repudiated the holdings in several earlier cases under which the judge might properly probe the objection by himself examining the documents. 36 Particularly significant in this respect was the express refusal to follow the decision of the Judicial Committee of the Privy Council in *Robinson v. State of South Australia*, 37 where it was held expressly that a court should look at the documents in order to see whether their production would really be prejudicial to the public welfare. "I cannot agree with this view," declared Lord Simon of this *Robinson* holding. 38 On the contrary, said

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34 56 HARV. L. REV. 806 at 813 (1943).
35 146 Lords Deb., 5th ser., cols. 927-928.
his lordship, a court is not competent to go behind the claim of
Crown privilege made by the head of a government department.
Thus, the affidavit of the First Lord of the Admiralty that it was
contrary to the public interest for the *Thetis* documents to be open
to inspection by appellants was conclusive and there were no cir-
cumstances in which the judge could himself look at the documents
before ruling as to their production. Viscount Simon quotes
with approval the strong language of Pollock, C. B., in an earlier
case:

"We are of opinion that, if the production of a state paper
would be injurious to the public service, the general public
interest must be considered paramount to the individual in-
terest of a suitor in a court of justice; and the question then
arises, how is this to be determined? It is manifest it must be
determined either by the presiding judge, or by the respon-
sible servant of the Crown in whose custody the paper is. The
judge would be unable to determine it without ascertaining
what the document was, and why the publication of it would
be injurious to the public service—an inquiry which cannot
take place in private, and which taking place in public may
do all the mischief which it is proposed to guard against. It
appears to us, therefore, that the question, whether the pro-
duction of the documents would be injurious to the public
service, must be determined, not by the judge but by the head
of the department having the custody of the paper. . . ."39

It is true that Lord Simon also articulates the principles which, in
his opinion, ought to govern Ministers in deciding whether to claim
Crown privilege in particular cases.40 But this rather platitu-
dinous statement41 of his lordship is, in the words of one com-
mentator, "not binding as a matter of law."42 Certainly the state-
ment by Viscount Simon of these principles hardly changes the
legal effect of his judgment, which is to leave the whole matter of
Crown privilege for the administration to determine.

At the time *Duncan v. Cammell, Laird & Co.* was decided, the
issue of Crown privilege could arise only in cases litigated between
private individuals. As Lord Simon stated, in his 1942 judgment,
"When the Crown (which for this purpose must be taken to in-
clude a government department, or a minister of the Crown in his

39 Id. at 639, quoting Beatson v. Skene, 5 H. & N. 838 at 853.
40 Id. at 633-634.
41 So characterized in Street, "State Secrets—A Comparative Study," 14 Mod. L. Rev.
121 at 123 (1951).
42 WILLIAMS, CROWN PROCEEDINGS 130 (1948).
official capacity) is a party to a suit, it cannot be required to give discovery of documents at all." Prior to 1947, the absence of a right of discovery against the Crown was a natural corollary of the Crown's absolute immunity from suit. Under the Crown Proceedings Act, 1947, however, as is well known, most of the Crown's immunity from suit has been done away with. And the 1947 statute provides expressly that "in any civil proceedings . . . to which the Crown is a party, the Crown may be required by the court to make discovery of documents and produce documents for inspection. . . ." But this provision is hardly intended to eliminate the rule of *Duncan v. Cammell, Laird & Co.* On the contrary, the law of Crown privilege is expressly preserved as it had been declared in the House of Lords decision, for section 28 (2) of the Crown Proceedings Act specifically states that any rule made under it "shall be such as to secure that the existence of a document will not be disclosed if, in the opinion of a Minister of the Crown, it would be injurious to the public interest to disclose the existence thereof."

That Crown privilege can, in particular cases, all but destroy the right of action against the State which the Crown Proceedings Act gives the private citizen has been recognized by English commentators themselves. As Professor Wade aptly expresses it, "Section 28 of the Crown Proceedings Act, far from enlargeering the liability of the Crown, offers it a protection which may very well deny justice to the subject." The public (in the words of an oft-cited statement by Lord Hardwicke) has a right to every man's evidence. And the private litigant, under modern discovery practice, should have an equal right to evidence in the possession of the other side which may be of use to him in the presentation of his case. Lord Simon himself stated, in his *Duncan v. Cammell, Laird & Co.* opinion, that the question of Crown privilege was one "of high constitutional importance, for it involves a claim by the executive to restrict the material which might otherwise be available for the tribunal which is trying the case. This material one party, at least, to the litigation may desire in his own interest to make available, and without it, in some cases, equal justice may be

44 10 & 11 Geo. 6, c. 44, §28 (1) (a).
46 Cited in 8 WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE, 3d ed., 64 (1940).
That such prejudice to the administration of justice is not a matter of mere academic theory is well known to practitioners on both sides of the Atlantic. "Most practitioners," declared an eminent Q. C., "have had experience where they have felt that the withholding of documents by the Crown has hindered the effective presentation of their case." Even if this statement is somewhat exaggerated, it does indicate that the problem for the litigant against the Crown is a very real one.

The effect of Crown privilege upon the right of action given by the Crown Proceedings Act is well shown by *Ellis v. Home Office.* It arose out of an action brought under the 1947 statute by a prisoner on remand on account of injuries sustained by him in Winchester Prison as the result of an attack upon him by one Hammill, a fellow prisoner, who was then under observation as a possible mental defective. Ellis, who suffered permanent injury, alleged that this was due to the negligence of those responsible for the management of the prison, claiming that they ought to have kept better supervision over a prisoner who they knew, or ought to have known, was likely to commit acts of violence. Whether or not Ellis would ultimately have succeeded in his action, of course nobody knows. But his case hinged largely on the prison doctor's reports upon Hammill and on certain statements made by eye-witnesses at the time of the assault. All of this material was withheld by the Home Secretary, acting on a claim of privilege under section 28 of the Crown Proceedings Act. The whole issue, Professor Wade points out, turned upon the question of whether the prison doctor had reason to believe that Hammill was a person likely to become insanely violent. But the doctor's opinion could not be tested on cross-examination by reference even to the routine hospital reports on the man, because of the Home Secretary's refusal to produce the reports. Ellis' dilemma in this respect was well stated by Devlin, J., before whom the action was tried. "The plaintiff is in the unfortunate position that he has been quite unable to test that evidence in any way at all. The facts relating to Hammill's behaviour in prison are known only to the prison authorities. Documents, of course, are brought into existence in

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relation to that; the hospital officers prepare a daily report in which, of course, it would be their business to note down anything with regard to Hammill which was significant, because he was put in the C.2 wing in order that he might be kept under observation. Those reports, if they were examined, might or might not show something which would lead a medical man to suppose that Hammill's conduct ought to have given rise to a suspicion of violence. Those reports are not before the court because the defendants—who are, of course, also the Crown—have claimed Crown privilege for them. . . .”

In view of the holding in *Duncan v. Cammell, Laird & Co.*, few would disagree with Devlin, J.'s, assertion that the Home Secretary's claim of privilege could not sensibly be challenged. At the same time, it is clear from the judgments that were delivered by the Court of Appeal in the *Ellis* case that the members of the appellate tribunal fully echoed the expression of Devlin, J., of his "uneasy feeling that justice may not have been done because the material before [him] was not complete, and something more than an uneasy feeling that, whether justice has been done or not, it certainly will not appear to have been done." Certainly, as Singleton, L. J., said "That is a serious thing for a judge to have to say as to the administration of justice in his court."

One who reads the leading judgment delivered by Lord Justice Singleton in the *Ellis* case cannot help feeling that his Lordship was far from convinced that the documents at issue were of such nature that they came within the reason behind the rule of Crown privilege. "I cannot help feeling," he declares, "that if this question had been considered in all its implications, both in regard to police documents and in regard to hospital reports, it might well have been found that the disclosure of most of them could not have been fraught with any danger to the public interest, while it would have been desirable that they should be disclosed to the advisers of this injured plaintiff for reasons of fairness and in the interests of justice." As a matter of law, however, the entire Court of Appeal had to recognize, despite the anxiety which all of the judges expressed, that they were bound by the decision in *Duncan v. Cammell, Laird & Co.* "In the result a decision of the House of Lords

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53 Id. at 137.
54 Ibid.
55 Ibid.
56 Id. at 144.
given in time of war when defense considerations were paramount may have operated to deny justice to an unhappy prisoner on remand who, whatever the merits of the charge against him, could not lawfully have been assaulted in prison even by a mental defective."

For the present writer to assert the unsoundness of the English law on Crown privilege is for him to follow in the footsteps of almost everyone who has written upon the subject. What is particularly striking to the outside observer is the rigidity of the rule laid down in Duncan v. Cammell, Laird & Co. The House of Lords enunciated a wholesale rule of Crown privilege: in every case, under its decision, the certification by a department head that a particular document or class of documents should not be disclosed is a conclusive bar to discovery of the document or documents in question. What the House of Lords appeared to neglect, however, is the fact that a wholesale rule is peculiarly inappropriate in this field. It is important to recognize that the nature of the document whose disclosure is sought may not be the same in all cases. There is a basic distinction between documents containing so-called "state secrets" and those containing only what has been termed "official information." In addition, we shall see, the claim of Crown privilege can be made in at least five different types of cases, not all of which should necessarily be treated alike.

"State Secrets"

Under Duncan v. Cammell, Laird & Co., all documents for which a claim of Crown privilege is made are dealt with similarly. What was overlooked by the House of Lords there, however, is that there is a fundamental distinction between cases involving what the Model Code of Evidence drafted by the American Law Institute calls "state secrets" and those involving other official information. According to the Model Code, "'secret of state' means information not open or theretofore officially disclosed to the public concerning the military or naval organization or plans of the United States, or a State or Territory, or concerning international relations." The distinction between such state secrets and other official in-

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68 Rule 227. Rule 33 of the Uniform Rules of Evidence promulgated in 1953 by the National Conference of Commissioners on Uniform State Laws broadens this definition to include information "Involving the public security."
formation can be seen clearly by comparing the documents at issue in *Duncan v. Cammell, Laird & Co.* itself with those involved in *Robinson v. State of South Australia*, the Privy Council decision already mentioned, which the House of Lords expressly refused to follow in *Duncan*. In the *Duncan* case, as has been emphasized, it was secret naval plans whose disclosure was sought. However much one might wish to secure a fair trial to private litigants, the blueprints of the *Thetis* were documents whose disclosure should not be compelled. In the *Robinson* case, on the other hand, what was desired was disclosure of reports and correspondence relating to wheat in a public warehouse. These were primarily commercial documents and, though the officials concerned may have genuinely felt that their disclosure was contrary to the public interest, it is certainly true that the danger or detriment to which the State would have been exposed by the production of such documents was far less obvious than it was in the case of the *Thetis* blueprints. Indeed, as will be pointed out, the absolute rule of *Duncan v. Cammell, Laird & Co.* appears out of place in cases involving only such official information as that at issue in the *Robinson* case.

Where "state secrets" of the type of the *Thetis* blueprints are the subjects of attempted discovery proceedings, few will deny that the House of Lords was correct in holding in *Duncan* that they should be privileged. But this does not necessarily mean that one must agree with Viscount Simon's decision that the administrative assertion of privilege must be conclusive. On the contrary, a strong case can be made to support the view that, even where it is claimed that "state secrets" are involved, the courts should go behind the Ministerial declaration to see whether, in fact, Crown privilege has been rightfully asserted.

The view that it is only the executive that is competent to decide whether the disclosure of a particular document is contrary to the public interest has, it is true, been forcefully stated, both by Lord Simon himself and other eminent jurists. To an outside observer, however, some of the reasons given to support such view appear specious ones. Thus, during the third reading of the Crown Proceedings Bill, both Viscount Simon and the Lord Chan-

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59 Note 37 supra.
61 See, e.g., the speeches in support of §28 (2) of the Crown Proceedings Act by Lords Jowitt and Simon and the present Lord Chancellor. 146 Lords Deb., 5th ser., cols. 923-929; 439 H.C. Deb., 5th ser., cols. 1692-1695.
cellor emphasized that "if the Crown is a party to the litigation the Court could scarcely take a decision on the question of whether a particular document ought to be produced without contravening the elementary principle of justice that a Judge should have no dealings with one litigant on the matter in hand save in the presence of and in the equal knowledge of the other." Had this reason been advanced from a less eminent source, it might well be characterized as unworthy of serious consideration. The party who is not permitted to see the evidence will hardly object to an ex parte decision where the alternative is to deny him any court review of the claim of Crown privilege. The judicial solicitude to save the party from ex parte action leaves him only with a conclusive administrative determination adverse to his interest from which there can be no appeal, ex parte or otherwise.

Little more worthy of weight is the claim usually advanced, in the words of Pollock, C. B., that the "public interest must be considered paramount to the individual interest of a suitor in a court of justice." An American jurist can hardly do better than quote the comment of his distinguished compatriot, John Henry Wigmore, in answer to this claim. "As if the public interest were not involved in the administration of justice! As if the denial of justice to a single suitor were not as much a public injury as is the disclosure of any official record! When justice is at stake, the appeal to the necessities of the public interest on the other side is of no superior weight. 'Necessity,' as Joshua Evans said, 'is always a suspicious argument, and never wanting to the worst of causes.' " To say that the public interest must prevail is really to beg the question. No one will deny that general principle or even, as has been conceded, that, when a genuine "secret of state" is involved, the public interest is against any disclosure. Yet to say thus much does not answer the question of whether the judge or the administrator is to decide where the public interest lies in a particular case. The principle asserted by Pollock, C. B., is thus irrelevant to the determination of whether an administrative claim of Crown privilege must be treated as conclusive.

Much more substantial as a reason for the holding of executive conclusiveness is the inexpertness of the courts in dealing with

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64 8 Wigmore, Evidence, 3d ed., 790 (1940).
such matters. The judge, it is said, cannot possibly inform himself of all the relevant factors which may or may not contribute to the view that a particular document contains a "state secret." 65 "... I cannot conceive," Viscount Simon has stated, with regard to the question of Crown privilege, "how a Judge could have the material to decide it. He would need to go, in effect, and sit in the Minister's chair, in his Department. He would need to call for other documents to understand the relation of this one to others. He would need to learn the methods of the Department, and that would be perfectly impracticable." 66

It cannot be denied that, for a wholly adequate determination of the question of Crown privilege, the judge should have the knowledge of the administrator—knowledge which because of its technical or confidential character the judge may not, as a practical matter, be able to obtain. 67 This is especially true today, when so many matters may relate to public security, particularly in the fields of atomic energy and scientific research. Thus, an employee injured by radiation burns in an atomic power plant may sue the State for alleged negligence. In view of the scientific complexity of the field of atomic energy and the classified nature of most of the information relating to it, it needs no extended discussion to show that a judge called upon to determine whether certain documents whose discovery plaintiff desires relate to the production of fissionable material would have far from an easy time. 68

All of this may be conceded. But it does not follow that an administrative claim that a "state secret" is involved must be subject to no judicial scrutiny whatsoever. Even a judge who is not a technical expert in the field concerned should be able to determine whether there is a reasonable basis for the administrative claim and, where a "state secret" is at issue, the courts should not demand more. Nor, in the case of "state secrets," will it even be necessary in most cases for the disclosure of the secret itself to be forced. The judge need only be told enough to show him that there is a reasonable basis for the claim of privilege, which, in the majority of instances, should be possible without examination of the document at issue itself.

65 146 Lords Deb., 5th ser., col. 924, per Lord Jowitt.
66 Id., cols. 928-929.
68 Cf. ibid.
The view just expressed finds strong support in the decision of the United States Supreme Court in *United States v. Reynolds*, the leading American case on the subject. It arose out of the crash of a military aircraft on a flight to test secret electronic equipment, in which certain civilian observers aboard were killed. Their widows sued the United States under the Federal Tort Claims Act. The plaintiffs moved for discovery of the Air Force's official accident investigation report, but the Secretary of the Air Force filed a claim of privilege objecting to production of the document. The Supreme Court appears clearly to have adopted the view that the determination of privilege, even where "state secrets" are involved, is a judicial function. At the same time, where such secrets are present, the courts should, if at all possible, not force any disclosure, even to the trial judge. "The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect." This necessitates, says the Court, what it terms a "formula of compromise." "Judicial control," said Chief Justice Vinson, "over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." 

In the case under discussion, the Court felt that, from all the circumstances of the case, there was, at the least, a reasonable basis for upholding the claim that a "state secret" was involved, without the need for personal examination of the document at issue. As Chief Justice Vinson stated, "On the record before the trial court it appeared that this accident occurred to a military plane which had gone aloft to test secret electronic equipment. Certainly there was a reasonable danger that the accident investigation report

69 345 U.S. 1, 73 S.Ct. 528 (1953).
70 Id. at 8.
71 Id. at 9.
72 Id. at 9-10.
would contain references to the secret electronic equipment which was the primary concern of the mission.”

Under the American view, it is for the judge to determine whether a privilege on the ground that a “state secret” is involved is validly claimed. According to the Reynolds case, the judge’s inquiry extends only to seeing whether there is a reasonable basis for the assertion of privilege. If he can satisfy himself that there is such reasonable basis from the circumstances of the case, without examining the document at issue, then such examination should not be had. In Reynolds itself, we have seen, the Court felt that such was the case. On the other hand, if examination of the document itself is necessary before the judge can decide whether a “state secret” is really involved, he can and must make such examination. Nor, as the lower court ably stated in the Reynolds case, “is there any danger to the public interest in submitting the question of privilege to the decision of the courts. The judges of the United States are public officers whose responsibility under the Constitution is just as great as that of the heads of the executive departments. When Government documents are submitted to them in camera under a claim of privilege the judges may be depended upon to protect with the greatest of care the public interest in preventing the disclosure of matters which may fairly be characterized as privileged. And if, as the Government asserts is sometimes the case, a knowledge of background facts is necessary to enable one properly to pass on the claim of privilege those facts also may be presented to the judge in camera.”

The view asserted above, which finds support in the decisions of the American courts, is not inconsistent with the overriding need to protect “state secrets” from public disclosure. It insists only upon the desirability of judicial review of at least the reasonableness of the claim of privilege, which, as already emphasized, can, in most cases, be made even without examination of the document concerned. If there is a reasonable danger that disclosure will divulge military matters or things of that type, then, of course, there must be an absolute prohibition on disclosure which applies in all types of cases. It is recognized that such absolute bar can lead to unfairness to particular litigants. A plaintiff who is unfortunate enough to have his case based upon a secret-service con-

73 Id. at 10.
74 Reynolds v. United States, (3d Cir. 1951) 192 F. (2d) 987 at 997-998.
tract,\textsuperscript{75} the design of an armor-piercing shell,\textsuperscript{76} or the design of a naval range-keeper,\textsuperscript{77} can hardly get a fair day in court if the matters at issue are wholly privileged. Where “state secrets” are so clearly involved, however, the interest of the litigant must give way to the public interest against any disclosure. The most that the litigant can ask for is that the judge determine that there is a real basis for the claim that a “state secret” is involved before he bars discovery.

“Official Information”

\textit{Duncan v. Cammell, Laird \& Co.}, as already emphasized, involved “state secrets” of a type which, all will agree, ought clearly to be protected from public disclosure. But the opinion of Viscount Simon in that case was by no means limited to documents involving such secrets. Its language applies instead to all official information for which a claim of Crown privilege is made. According to the American Model Code of Evidence, which appears to have been the first clearly to make the distinction between “state secrets” and what it terms “official information,”\textsuperscript{78} the latter “means information not open or theretofore officially disclosed to the public relating to internal affairs of this State or of the United States acquired by a public official of this State or the United States in the course of his duty, or transmitted from one such official to another in the course of duty.”\textsuperscript{79}

Disclosure of official information other than “state secrets” would appear to have no adverse effect upon public security. What is involved in such information are not military or naval secrets, of the type of the \textit{Thetis} blueprints or the report on secret electronic equipment at issue in the \textit{Reynolds} case, but other governmental communications which, for one reason or another, may not have been made public. Whatever the reasons for their non-disclosure may have been, they relate to what is conceived to be the proper internal functioning of government and not to securing the public

\textsuperscript{75} See Totten v. United States, 92 U.S. 105 (1875).
\textsuperscript{78} The distinction was, however, anticipated in WIGMORE, EVIDENCE, 3d ed., \$2378 (1940).
\textsuperscript{79} Rule 228. A similar definition is contained in Rule 34 of the Uniform Rules of Evidence, referred to in note 58 supra.
safety or defense of the realm. This is shown clearly by a case like the already-discussed decision of the Court of Appeal in Ellis v. Home Office. The medical and police reports whose disclosure was sought in that case can, by no stretch of the imagination, be said to involve "state secrets," in the sense in which we have used that term. What was really involved in Ellis was the dossier of a prisoner, which the Home Office wished kept confidential; but this is a long way from the case where, in Viscount Simon's phrase, "disclosure would be injurious to national defence, or to good diplomatic relations." As has been underlined, however, Duncan v. Cammell, Laird & Co. makes no distinction between "state secrets" like the Thetis blueprints and official information like that at issue in the Ellis case. The Court of Appeal in Ellis consequently felt bound, under the wholesale rule of privilege laid down by the House of Lords, to deny disclosure. Indeed, as Singleton, L. J., aptly pointed out, the Ellis case shows clearly how wide an interpretation may be put on the words of Lord Simon in Duncan v. Cammell, Laird & Co.

Where other than "state secrets" are involved, whether or not disclosure should be compelled should depend upon the type of case in which the issue arises. It is not generally recognized in British discussions of the subject that the question of Crown privilege for official information can arise in at least five different kinds of cases, not all of which should necessarily be treated alike. The cases referred to are (1) criminal proceedings; (2) civil proceedings with the Crown as party plaintiff; (3) civil proceedings with the Crown as party defendant; (4) proceedings in which the Crown is not a party; and (5) proceedings in which disclosure of the records of public authorities other than the Crown is sought.

Criminal Proceedings. The proper approach to be followed where claims of governmental privilege are invoked to prevent disclosure of official information in criminal proceedings is that articulated by Judge Learned Hand in United States v. Andolschek. In that case, defendants were tax inspectors of a federal
agency who were tried criminally for a conspiracy which included their taking of bribes. They sought discovery and the introduction in evidence of certain reports which they had made to their superiors in their official capacity. According to Judge Hand, the government could not claim privilege for these official reports in such a criminal proceeding. “While we must accept it as lawful,” states his opinion, “for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully.”

Under Judge Hand’s approach, when the government undertakes a criminal prosecution, it waives any privilege it might otherwise have against disclosure of official information which may be relevant to the criminal action. In a criminal proceeding, there is both the traditional interest of our law in safeguarding the rights of the accused and the fact that the prosecuting government itself determines the classification of restricted material. The government cannot have it both ways. If it wishes to keep the particular documents secret, it cannot go ahead with the prosecution. If it is more interested in seeing that the accused does not escape the sanction of the criminal law, it must not deny him access to relevant material under its control. In the criminal field, Chief Justice Vinson has said, “the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.” In a criminal case any public policy militating against public disclosure of official information must give way to the interest of the accused in

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86 Id. at 506.
88 United States v. Reynolds, 345 U.S. 1 at 12, 73 S.Ct. 528 (1953).
having the information for use in making a defense.\textsuperscript{89} It is true that the prosecution must be protected against harassing demands for irrelevant official information. But this can be done easily enough by allowing the judge to order the information to be produced for his inspection \textit{in camera} so that he may determine whether it is really relevant to the criminal proceeding.\textsuperscript{90}

At first glance what has just been said appears utterly inconsistent with \textit{Duncan v. Cammell, Laird & Co.}. It should, however, be noted that Viscount Simon there took pains to declare expressly that “The judgment of the House in the present case is limited to civil actions and the practice, as applied in criminal trials where an individual's life or liberty may be at stake, is not necessarily the same.”\textsuperscript{91} Even under the House of Lords decision in \textit{Duncan}, it can thus be argued that the rule of absolute Crown privilege need not necessarily apply to criminal proceedings. In such proceedings, on the contrary, it is submitted that the doctrine of waiver enunciated by Judge Learned Hand is one which comports more fully with the basic interest of the criminal law in safeguarding the rights of the accused.

\textbf{Civil Proceedings With Crown as Plaintiff.} The dictum of Lord Simon just quoted is clearly limited to criminal trials. There is consequently no legal justification for distinguishing between different types of civil proceedings, so far as the applicability of the rule of \textit{Duncan v. Cammell, Laird & Co.} is concerned. At the same time, however, it can be argued that many of the considerations which apply to criminal cases apply as well to proceedings instituted by the Crown as party plaintiff. In such cases, too, it can be said, if the government chooses to commence an action, it should stand in the position of the private litigant and be held to waive any privilege against disclosure of official information which it might possess if it were not a party to the litigation.\textsuperscript{92} Although this argument is wholly inconsistent with the present law in Britain, it is receiving increasing support from courts in the United States. As one American judge expressed it, it is but a short step, and a necessary one, from the rule in criminal cases discussed above to the rule that where the government is the complainant in a civil

\textsuperscript{90} Id. at 734.
\textsuperscript{91} [1942] A.C. 624 at 633-634.
\textsuperscript{92} Compare note, 29 N.Y. Univ. L. Rev. 194 at 204 (1954).
suit it should likewise be required to make its own choice—either to make disclosure or to drop the suit.\textsuperscript{93}

\textit{Civil Proceedings With Crown as Defendant.} There is little doubt that the use of the Crown privilege doctrine in cases brought under the Crown Proceedings Act, 1947, has given rise to most of the recent criticism of that doctrine in Britain. Speaking of Crown privilege in \textit{Ellis v. Home Office}, Devlin, J., declared, "It is a rule, of course, which is particularly unfortunate when the person who is responsible for deciding whether they should be disclosed or not happens also to be the defendant in the action in which he is being sued. It means that every litigant against a government department—and such litigation is becoming more and more frequent as the sphere of government activities is extended—is denied, as a matter of course, the elementary right of checking the evidence of government witnesses against the contemporary documents."\textsuperscript{94} In a case like \textit{Ellis v. Home Office}, indeed, we have seen, the doctrine of Crown privilege all but defeats the right to sue the State which is given by the Crown Proceedings Act.

A number of American decisions apply the theory already discussed of waiver of privilege by the government to cases brought under the American equivalent of the Crown Proceedings Act. Their reasoning is that the State, by consenting to be sued, has waived its privilege against disclosure of official information, just as it does when it institutes a criminal proceeding. It should be borne in mind that the Federal Tort Claims Act and other American statutes authorizing suits against the State contain no limitations such as that in section 28 (2) of the Crown Proceedings Act, which, as has been pointed out, expressly preserves the Crown privilege rule. That being the case, American judges have been able to read into the State's consent to suit a consent to waive its privilege against disclosure of official information. "The consent, being general, amounts to an endorsement of the libel\textsuperscript{95} with the sovereign's command 'Soit droit fait al partie'. (Let right be done

\textsuperscript{93} Bank Line, Ltd. v. United States, (D.C. N.Y. 1948) 76 F. Supp. 801 at 803. A striking case applying this principle is United States v. Cotton Valley Oil Operators Committee, (D.C. La. 1949) 9 F.R.D. 719, aff'd per curiam by equally divided Court, 339 U.S. 940, 70 S.Ct. 793 (1950), where an antitrust action by the government was dismissed because of its failure to submit documents whose disclosure was sought by discovery proceedings.

\textsuperscript{94} [1953] 2 Q.B. 135 at 138.

\textsuperscript{95} This was an admiralty suit, hence the use of this term.
to the party). But right cannot be done if the government is allowed to suppress the facts in its possession."96

Crown Not a Party. The problems that may arise where a claim of Crown privilege is made in proceedings in which the Crown is not a party were brought into sharp focus by the recent case of Broome v. Broome.97 It arose out of a petition by a wife for divorce on the ground of cruelty. The husband denied that he had been guilty of cruelty and claimed that the wife had been guilty of adultery. The husband was a regular soldier and, as the case developed, it was important to determine the circumstances in which the wife was received by the husband on her arrival in Hong Kong, where he was stationed. At the time, there had been in Hong Kong a representative of the Soldiers', Sailors' and Airmen's Families Association (SSAFA), one Mrs. Allsop. Differences had arisen between the husband and wife, and her good offices were invoked. She had made written reports of the case to her head office. The wife caused two subpoenas to be issued. The first was a subpoena ad testificandum directed to Mrs. Allsop. The second was a subpoena duces tecum served upon the Secretary of State for War, requiring him to bring letters, copies of letters, memoranda and records made by SSAFA concerning the wife and husband. The second subpoena was directed to the Secretary of State for War because all the relevant SSAFA documents had come into the possession of the War Office. Application was made on behalf of the Crown to have both subpoenas set aside, and counsel for the Crown produced a certificate by the Secretary of State for War. The Secretary's certificate stated: "I have read the correspondence and notes covered by the subpoena issued to me . . . and I have considered the evidence which Mrs. Gwenneth Mary Allsop could give, as set out in a statement taken from her and submitted to the Treasury Solicitor . . . and I am of opinion that it is not in the public interest that the documents should be produced or the evidence of Mrs. Allsop given orally."

As far as the documents in question were concerned, the court was, of course, bound by Duncan v. Gammell, Laird & Co. According to Sachs, J., the rule of that case applies to any document in

96 Bank Line, Ltd. v. United States, (D.C. N.Y. 1948) 76 F. Supp. 801 at 804. There is a short statement to the contrary in United States v. Reynolds, 345 U.S. 1 at 12, 73 S.Ct. 528 (1953). As already pointed out, however, that case involved military secrets and is not relevant to a case not involving such "state secrets." See note, 29 N.Y. Univ. L. Rev. 194 at 205 (1954).
the physical possession of the Crown—and that irrespective of
where the document originates or in whose custody it reposes. 98
As the documents were in the possession of an agent of the Crown,
Crown privilege consequently attached to them even though they
had emanated from SSAFA, an independent body. The claim of
privilege made in the Broome case was not, however, limited to the
documents whose disclosure was sought. The Crown also sought
to have the subpoena addressed to Mrs. Allsop set aside, on the
ground that it was not in the public interest that her evidence be
given. In his argument, counsel for the Crown made what has
been termed the remarkable claim 99 "that a Minister of the Crown
could give a certificate that the giving of evidence by any specified
witness (whether or not a servant or agent of the Crown) as to any
set of facts or class of facts would be contrary to the public interest,
and that once that certificate was given those facts could not be given
in evidence in court by the witness." 100 The sole authority asserted
for this all-embracing "privilege by unexaminable certificate" (as
Sachs, J., aptly described it 101) was the dictum of Viscount Simon in
the Duncan case: "The present opinion is concerned only with the
production of documents, but it seems to me that the same prin­
ciple must also apply to the exclusion of oral evidence which, if
given, would jeopardize the interests of the community." 102

English writers have assumed that the dictum of Lord Simon
was intended to apply as broadly as the rule laid down in Duncan
itself, i.e., to all oral evidence where a claim of Crown privilege is
made. One wonders whether his lordship necessarily meant to
go so far. It is true that, in a case like Duncan v. Cammell, Laird &
Co., where military secrets were involved, the privilege must ex­
tend to oral evidence which might lead to any disclosure of the
secrets. And it is also true that, insofar as Crown privilege for
documents containing official information other than "state
secrets" is recognized, the privilege must logically apply equally
to oral testimony concerning the contents of such documents. 103
But it does not necessarily follow from this that the rule of con­
clusive Crown privilege must apply to oral testimony not con­
nected with documents for which privilege may be claimed. The

98 Id. at 404.
100 [1955] 2 W.L.R. 401 at 405.
101 Ibid.
103 Moss v. Chesham U.D.C., Jan. 16, 1945, unreported, quoted in Simon, "Evidence
implications of the Crown's far-reaching claim in the Broome case were acutely noted by Sachs, J.: "Should it be an issue in a civil action, for instance, whether A stole money or goods from B, Mr. Winn submitted it would be competent for a Minister of the Crown to certify that it was contrary to the public interest for a witness who saw the theft to give evidence to that effect. According to Mr. Winn the sole test as to whether the privilege attached was the opinion of a Minister that for the witness to give that piece of evidence was contrary to the public interest—an opinion into which he submitted the court could make no inquiry." 104 The Crown could, in other words, prevent any and every witness from giving any evidence simply by certifying that his testimony should be excluded.

It is interesting to note the justification stated by the Crown for its attempt to use its asserted privilege in Broome v. Broome. The reason for seeking to exclude the evidence of Mrs. Allsop was stated to be the desire of the Crown to ensure that those works of SSAFA concerned with maintaining good relations between a serving husband and wife, and in particular its attempts at reconciliation, should be given the same sort of protection from disclosure in court as the efforts of probation officers and others specifically concerned with matrimonial reconciliation. 105 It may well be that the protection desired by the Crown should be given to evidence of the type involved. But the question of whether such evidence should be privileged in a court of law should surely be one for the courts themselves, in the absence of statutory provisions on the matter. In the Broome case itself, Sachs, J., did not really have to decide whether Crown privilege in such a case extended, as the Crown contended, to "a general power wholly to suppress evidence from every source of facts merely upon the unexaminable opinion of a Minister as to what that Minister regarded as the public interest." 106 This was true because the learned judge held that the claim to Crown privilege failed on an issue of procedure, since, according to Sachs, J., even assuming that the Minister concerned could claim privilege in regard to any particular oral evidence, it would be wrong for the Minister to interpose a blanket claim of privilege which would prevent the witness from giving any evidence whatsoever of any sort. 107

ment, "any certificate in a 'blanket form' which stopped a witness going into the witness-box seems contrary in principle to those portions of the decided cases which enjoin Ministers before giving a certificate as regards documents to examine each in turn in the light of the issues arising in the case." 108

Though his holding that the claim of Crown privilege failed on the procedural point rendered it unnecessary for Sachs, J., to decide whether the privilege as claimed by the Crown existed, the learned judge did state in his judgment that he had not been persuaded of the existence of the privilege in the terms in which it was submitted to him. Indeed, he intimated that, even if the Crown might be held to have the privilege to prevent oral testimony, it should "be circumscribed by reference to certain specific heads of public interest, such as the safety of the realm, international relations, or the prevention and detection of crime." 109

This, it should be noted, is to distinguish between "state secrets" and other official information (much as the present writer has done in the discussion above), limiting the privilege to cases where "state secrets" may be involved. In the Broome case itself, it is important to bear in mind, nothing of the kind referred to by Sachs, J., was involved. The testimony of Mrs. Allsop, which the Crown sought to prevent, was directly relevant to the question of the husband's alleged cruelty. She was able to testify as to the way in which the husband actually received the wife when she arrived in Hong Kong and it seems, in fact, that her evidence helped convince the court that the charge of cruelty was not made out. Looking at the report of the case, it is indeed difficult to see why the Crown ever tried to prevent her testimony. As Sachs, J., put it, "On all those points her evidence was of assistance to the court; on none of them was there any apparent cause for any intervention in the name of Crown privilege." 110 Even counsel for the Crown appeared to concede that nothing had happened which really called for intervention by the Crown, even if the privilege existed. 111 Yet, if the extreme claim of the Crown had been accepted, the testimony, so directly relevant to the doing of justice in the case, could never have been heard by the court.

The rejection in Broome v. Broome of the extreme claim of the Crown (at least in the way it was there made) conclusively to ex-

109 Id. at 408.
110 Id. at 408-409.
111 Id. at 409.
clude any and all oral testimony by the simple assertion of Crown privilege does not, it should be emphasized, in any way affect the right of the Crown to bar disclosure of documentary evidence (or oral testimony concerning documents for which privilege may be claimed) in proceedings in which the Crown is not a party. That such right exists in suits between private individuals, as in suits under the Crown Proceedings Act, is, indeed, clear when one recalls that *Duncan v. Cammell, Laird & Co.* itself was an action between private parties. Under the *Duncan* decision, as already pointed out, there is no distinction between "state secrets" and other official information: the conclusive claim of privilege can be made by the Crown regardless of what kind of information is involved in the case. In *Broome v. Broome*, the documents whose disclosure was barred by the Ministerial certificate could not, by any stretch of the imagination, be deemed to relate to "state secrets." They involved rather undisclosed information which the administration sought to keep in obscurity for reasons of policy not related to the security of the State.

There appears to be some justification for allowing the State to bar the disclosure of official information in suits to which the State is not a party, even if one agrees with the view expressed in the American cases already referred to, under which the State waives whatever privilege it might otherwise have by appearing as a party. When the State is itself a party, there is a real danger that the doctrine of Crown privilege will be used to advance the government's position as litigant. As was aptly pointed out, during the debate on the Crown Proceedings Bill, the "public interest" for which Crown privilege may be claimed may well be deemed to include the winning of the government's suit in court. A "... Minister, acting conscientiously, might say, 'My duty, first and foremost, is to the public interest. I think it is better in the public interest that we should win, and, therefore, I shall not disclose documents which might cause us to lose the case. I would not be doing my duty if I did so.'" 112 It is true, as the attorney-general declared, that the doctrine of Crown privilege should not be so used to defeat the cause of justice. 113 When the Crown is a party, however, and has a direct stake in the outcome of the case, there is always the chance of arbitrary suppression. Although the claim of privilege is made in the name of the Minister, he acts upon the recommendation of his subordinates directly concerned with the case, whose

112 439 H.C. Deb., 5th ser., col. 1727.
113 Ibid.
only concern, all too often, may be the winning of that case at all costs. In considering the public interest in these cases, one should, as Morris, L. J., has said, bear in mind that it is "one element of the public interest that regard should be had to the due administration of justice in such manner that it should always be done, and should be seen to be done." When Crown privilege bars the disclosure of evidence in a case where the Crown itself is a litigant, this desideratum is certainly not fully met.

Where on the other hand, the suit is between private individuals alone and the State has no direct interest in the outcome, there is much less danger of Crown privilege being used for the arbitrary suppression of evidence. And this is why many American cases permit the State to claim privilege for official information in cases in which the State is not a party. It should, however, be emphasized that, even under them, the rule on this side of the Atlantic does not begin to approach the doctrine of "privilege by unexaminable certificate" enunciated by the House of Lords in Duncan v. Cammell, Laird & Co. The court in the United States may still examine the evidence for which privilege is claimed to determine whether the claim of privilege is a valid one. And, where only official information not involving "state secrets" is at issue, it would seem that the American courts would not follow the approach of United States v. Reynolds, already discussed, under which the judge looks only to see whether there is a reasonable danger that compulsion of the evidence will expose matters which should not be divulged. That approach is valid only where "state secrets" are involved. In the case of other official information, the judge should determine himself whether there is, in fact, a public interest in barring disclosure. Only then should the claim of privilege be upheld, even in cases in which the State does not have the direct interest of a litigant.

Public Authorities Other Than Crown. According to Scott, L. J., in Blackpool Corporation v. Locker, nothing analogous to Crown privilege has yet been conceded by the courts to any local government officer. Indeed, it is generally assumed by English writers that public authorities other than the Crown do not enjoy any privilege to bar the disclosure of documents or other evidence. It is to be noted that the distinction made in Britain between de-

115 The leading case is Boske v. Comingore, 177 U.S. 459, 20 S.Ct. 701 (1900).
partments of the central government and other public authorities tends to be followed as well on this side of the Atlantic. The American courts too look with disfavor upon assertions by administrative agencies other than those of the federal government of a privilege against disclosure of official information.\(^{117}\)

The fact that local authorities and other governmental organs which have thus been denied any right of Crown privilege have been able to function effectively despite the denial indicates that advocates of a wholesale rule of privilege overstate their case when they assert that such wholesale privilege is a *sine qua non* to the effective functioning of the central government. If that assertion has substance, is it not also applicable to public authorities other than the Crown?\(^{118}\)

**Conclusion**

The aspect of the law of Crown privilege that is most repugnant to an outside observer is, without any doubt, its complete elimination of judicial control. Under *Duncan v. Cammell, Laird & Co.*, as we have repeatedly emphasized, the courts cannot go behind a ministerial claim of privilege. As Lord Jowitt has expressed it, "the final decision as to whether a document should or should not be produced must be left, in the words of Lord Parker in a famous case, the *Zamora*, to those who are responsible for the national security, who must be the sole judges of what the national security requires."\(^{119}\)

The difficulty with this view is that it assumes that the administrative answer to the question of public interest will necessarily coincide with the true interest of the public in all cases. One wonders, however, whether it is realistic to expect the administration always to weigh wisely and impartially the total public interest against its own convenience. One must consider the matter in the framework of administrative realities. The diffusion of power in government departments often lodges actual responsibility in the fourth or fifth tier of the administrative hierarchy. A subordinate immediately concerned with a case may not bring to it the complete objectivity of a Lord Chancellor. To make the head of the department the ultimate arbiter of disclosure is, under these circumstances, no real guaranty that the determination will be based

\(^{117}\) See note, 29 N.Y. Univ. L. Rev. 194 at 209 (1954).

\(^{118}\) Compare Street, "State Secrets—A Comparative Study," 14 Mod. L. Rev. 121 at 130 (1951).

upon sound principles of public interest. The Minister will inevitably take cognizance of the public interest as it is seen from his own departmental angle, including its administrative convenience. "Under the normal administrative routine the question will come to him with recommendations from cautious subordinates against disclosure and in the press of business the chief is likely to approve the recommendation about such a seemingly minor matter without much independent consideration."

To ensure that departmental convenience is not equated to public interest, there should be independent scrutiny of the claim of privilege. Such scrutiny can be best made by the judge before whom the claim of privilege is asserted. A Canadian judge aptly stated almost a century ago, with regard to the question of who should have the final word in cases of the type under discussion, "are you to compare the discretion, the unbiassed mind, the position of the judge who is alike independent of the Crown and of the people, who is free from party spirit, who knows or should know no one, to the biassed mind, naturally, necessarily, biassed mind of a politician, not independent as the judge is but dependent upon a party, who knows or must know the contending parties, and may have the most cogent reasons for supporting one party, in preference to another; who has to bear, and does bear the external pressure which the judge is or should be inaccessible to; whose interest it may be, under the flimsy pretense, under the transparent veil of pretended public interest, to screen some petty minion in office? The comparison cannot hold for a moment. In the case of the judge, you have sacred guarantees; in that of a politician, you have none. External pressure will curb down the politician, whilst you will behold the judge more erect than ever, calmly and firmly resisting and baffling its baneful influence. Clearly then, manifestly, should it be left to the judge on the Bench, in his discretion, to determine the question. . . ."

In the United States, as has been shown, there may be judicial inquiry into governmental claims of privilege, regardless of the kind of information whose disclosure the administration seeks to bar. Even if the rule of conclusive privilege of *Duncan v. Cammell,*

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Laird & Co. is sound when limited to "state secrets" such as the Thetis blueprints (and the present writer is far from conceding even that), that does not justify the application of that rule in cases involving other official information. Where such information is concerned, there can be no adverse effect by disclosure upon public safety or the defense of the realm. It is consequently difficult to see what harm could be done to the public interest by allowing the judges to examine such information to see whether disclosure should be precluded. Where "state secrets" are not involved, the document at issue, more likely than not, is known to a number of people at many levels in the administrative hierarchy. Shall every subordinate in the department have access to the information, and not the presiding officer of justice? In such a case, points out an M.P., a great many people know that the document whose disclosure is sought exists. "The Treasury Solicitor knows that it exists. So does his typist who copies it, his office boy who takes it to counsel, and counsel who is briefed by the Treasury Solicitor. He knows what is in it; otherwise, how can the privilege be claimed? Is it suggested that a judge of the high court is less to be trusted with the knowledge of this secret than all those people?"

One can, indeed, go further and ask why there should be any privilege for evidence which does not involve any "state secrets." If such evidence is directly relevant to a judicial inquiry, why should the administrative desire to keep it in obscurity be permitted to defeat the ends of justice? If the public safety or defense of the realm will not be affected, why should departmental convenience weigh more heavily than the proper resolution of cases by the courts? It will, however, be said that, even though official information may not contain "state secrets," its disclosure may not be in the public interest. Thus, it is claimed that administration might be seriously hampered if departmental files were liable to be made public in litigation. This is asserted to be particularly true of reports and intra-departmental communications where, in the words of Lord Simon, "the candour and completeness of such communications might be prejudiced if they were ever liable to be disclosed in subsequent litigation. . . ."

124 Id. at 799.
125 439 H.C. Deb., 5th ser., col. 1725.
to reports from civil servants," the present Lord Chancellor has stated, "and the basis is that if you are to make all confidential reports by civil servants disclosable, then the result will be that the State will not have the advantage of as clear, honest and forthright reports from its civil servants, as it would if they were protected." 127

It is submitted, with all respect to the eminent authorities just cited, that their view is based upon a priori reasoning which may or may not be consistent with the facts of administrative life. "Is it proved that employees make reports less honestly if they think that there is the slightest possibility of someone other than their employers seeing them at some future time?" 128 If the views of Lords Simon and Kilmuir in this respect are sound, why should they not apply with equal force to the reports of local authorities and private reports for which there is no privilege? If the reason asserted were valid, it should, as Mr. Silverman well states, "apply not only to the State but . . . to the London County Council, a good many public authorities all over the country, and, indeed, insurance companies and many other bodies which send out officers to make investigations. These people are not entitled to claim this privilege on the ground that they would get less honest reports. Why should the State do so?" 129 It has never been shown that public authorities other than the Crown and private bodies, which do not possess any privilege in these matters, have really been impaired by such lack. In truth, it seems most unlikely that a conscientious civil servant would actually be affected by the remote possibility that what he writes in a report may ultimately see the light of day in the courtroom. Even if he is somewhat restrained, it does not necessarily follow that that is an unmitigated evil. It is hard to see how the work of a department is impaired if its officials purge their correspondence and reports of the intemperate type of comment that is all too often found to abound in departmental files.

The administrative reluctance to make full disclosure to the public is, without a doubt, one of the critical problems of present-day public law. The time has not yet come in the Anglo-American

127 439 H.C. Deb., 5th ser., col. 1692.
129 439 H.C. Deb., 5th ser., col. 1726.
world when deliberate official misuse of the privilege of secrecy is rife. But the vast extension of administrative authority presents an ever larger scope for the claim of privilege. "Indeed it requires no great flight of imagination to realize that if the Government's contentions in these cases were affirmed the privilege against disclosure might gradually be enlarged by executive determinations until, as is the case in some nations today, it embraced the whole range of governmental activities." 130 The possibilities of abuse are plainly latent in the privilege. There is needed only the willingness to exercise them. 131

130 Reynolds v. United States, (3d Cir. 1951) 192 F. (2d) 987 at 995.
131 8 WIGMORE, EVIDENCE, 3d ed., 791 (1940).