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IS THE DUCHY OF CORNWALL ENTITLED TO CROWN IMMUNITY?

*John Kirkhope*¹

Abstract:

Over the last few years an increasing number of people have questioned the advantageous tax position enjoyed by the Duchy of Cornwall and Prince Charles as Duke of Cornwall. There has, for example, been a report by the House of Commons Committee of Public Accounts specifically devoted to the topic.² The issue as far as this writer is concerned is that there has been insufficient understanding that the tax position of the Duchy and Duke of Cornwall flow from the fact that they are said to benefit from 'Crown Immunity'. If they are not entitled to Crown Immunity then they cannot claim the tax exemptions which they presently enjoy. This article seeks to challenge the assumption that the Duke and Duchy are entitled to Crown Immunity. It will be argued that a prerogative right was extended to the Duchy of Cornwall by Executive action without the approval of or discussion in Parliament. The article will then go on to make some observations about the basis of taxation of the Duchy and Duke.

Keywords: Duchy of Cornwall, crown immunity, tax exemption

Introduction:

Crown Immunity: A Brief Background

The Office of Parliamentary Counsel has recently published, following a Freedom of Information request from the writer, a pamphlet entitled 'Crown Application' which explains their understanding of the application of Crown Immunity to which the reader is referred.³

The topic of Crown Immunity is complex. In 1235 Bracton in his *Laws and Customs of England* wrote *Quod Rex non debet esse sub homine' sed sub Ded et Leg.*⁴ As early as 1561 in *William v Berkley*⁵ it was settled in England that the Crown was bound by any statute that applied to it. It was also said in the same case: 'When the King gives His consent He does not mean to prejudice Himself'. An early formulation of the principle in English Law dates from 1604: '*Roy n'est lie per ascun statute, si il ne soit expressment nosme*'⁶

Chitty described it as:

...the King is not bound by any Acts of Parliament as do not particularly and expressly mention him. The King is impliedly bound by statutes passed for public

¹ Dr John Kirkhope is a Notary, Chartered Insurer and independent scholar who recently completed His Phd entitled 'The Duchy of Cornwall – A Feudal Remnant? An Examination of the Origin, Evolution and Present Status of the Duchy of Cornwall' (Plymouth University, 2013).

² House of Commons Committee of Public Accounts, 'The Duchy of Cornwall', November 2013 HC 475.

³ Office of the Parliamentary Counsel, *Crown Application*, November 2012.

⁴ That the King should not be under man, but under God and the law. Bracton, *Laws and Customs of England* (1235).

⁵ *William v Berkley* (1561) 1 Plow. 223; 75 ER 339 KB

⁶ *The King's Case* (1604) 7 Co Rep 32a 'the King is not bound by any statute unless he is expressly named in it.'

good; the relief of the poor; the general advancement of learning, religion and justice; or to prevent fraud, injury or wrong.⁷

Diplock LJ stated that: ‘...the modern rule of construction of statutes is that the Crown...is not bound by a statute which imposes obligation or restraints on persons or in respect of property unless the statute says so expressly or by necessary implication.’⁸

In Halsbury’s Laws it is expressed as follows:

The Crown is not bound by statute unless the contrary is expressly stated, or unless there is a necessary implication to be drawn from the provisions of the Act that the Crown was intended to be bound, or there can somehow be gathered from the terms of the relevant Act an intention to that effect...⁹

The basis of Crown Immunity is the maxim: ‘The King/Queen can do no wrong’. There are three possible understandings of the adage. Whatever the King/Queen does it cannot be wrong. The principle of ‘absolute perfection’ which provides that, in law, the Sovereign is regarded as being incapable of thinking wrong or meaning to do an improper act. Next the Sovereign has no legal power to do wrong. Finally, as Maitland explained: ‘...against the King, the law has no coercive power’.¹⁰

Crown Immunity and the Duchy of Cornwall: Initial Observations

While there are those who may debate the basis of the principle of Crown Immunity and its contemporary relevance, there is no doubt that it exists. A similar immunity is said to extend to the Duchy of Cornwall and it is this which will now be explored. This is not a theoretical question. Because of Crown Immunity the Duchy does not pay Capital Gains Tax, and, in respect of Duchy income, Prince Charles, it is claimed, is not liable to income tax although he does make a voluntary payment equivalent to the amount that would be otherwise payable. As a further example there is a group on the Isles of Scilly called the Garrison Leasehold Group who are campaigning because the Leasehold Reform Act 1967, the Leasehold Reform, Housing and Urban Development Act 1993 and the Commonhold and Leasehold Reform Act 2002¹¹ do not apply to tenancies of the Duchy of Cornwall. Despite the fact they were not bound by the legislation, the Duchy agreed to enfranchisement of leases with certain exemptions one of which applied to the Isles of Scilly. The Duchy was concerned properties would be owned by ‘off islanders’, become second homes, to the

⁷ Chitty, J., *A Treatise on the Law of the Prerogatives of the Crown* (1820) p.382.

⁸ *BBC v Johns* (1965) Ch. 32 at 78-79.

⁹ *Halsbury’s Laws of England*, vol.8(2) Constitutional Law and Human Rights para.384.

¹⁰ Tomkins, A., ‘Crown Privileges’ in Sunkin, M., and Payne, S., *The Nature of the Crown* (Oxford University Press, 1999) p.176.

¹¹ HC, 3 April 2001, col.176W.

detriment of the islands¹². The concern may be legitimate but the fact still remains a property right available to all other lessees is not available to Duchy tenants because of the application of Crown Immunity. On the face of it this would appear to be inconsistent with Article 1 of The First Protocol of the European Convention on Human Rights.

1 Crown Immunity, the Duchy of Cornwall: Some History

There is no mention of Crown Immunity applying to the Duchy of Cornwall in the sixteenth century book by Sir William Staunford *The Pleas of the Crown*¹³ or Sir Matthew Hale's *The Prerogatives of the Crown*¹⁴ published in the seventeenth century or specifically in Chitty's *Treatise on the Law of the Prerogatives of the Crown* issued in 1822. Although the latter did say: 'So a grant from the King to the Prince (of Wales) does not make alienation from the Crown, for the land continues parcel of the Crown.'¹⁵ Chitty is an influential work and in this regard in 2009 in a Government Paper it was explained:

The difficulty is that there are many prerogative powers for which there is no recent judicial authority and sometimes no judicial authority at all. In such circumstances, the Government, Parliament and the wider public are left relying on statements of previous Government practice and legal textbooks, the most comprehensive of which is now nearly 200 years old.¹⁶

The fact that Chitty makes no substantial reference to Crown Immunity applying to the Duchy of Cornwall is highly significant.

Land Tax Acts 1798

In the late 1790's various Acts were passed in connection with the Land Tax¹⁷. The Land Tax Perpetuation Act 1798¹⁸ contains specific provisions permitting the Duchy to dispose of property which they could not otherwise do because the Charter founding the Duchy provided its property would be inalienable¹⁹. There was no question that the Duchy of Cornwall was not subject to the Acts and was not liable for the tax imposed.

House of Lords 1817

In 1817 a long running case of *Sir John St Aubyn and others v The Attorney General of the Prince of Wales and Another* was referred to the House of Lords. Lord Redesdale observed

¹² Letter Farrer & Co, solicitor to Duchy of Cornwall, dated 5 April 2001.

¹³ Staunford, Sir William, *The Pleas of the Crown* (1560).

¹⁴ Hale, Sir Matthew *The Prerogatives of the King* (1976 Written 1640–1676).

¹⁵ Chitty, J., *Prerogatives of the Crown* (1820) p.405. He shows as authority for the proposition *Comyns Digest Roy G* which in turn cites *Palmer Reports*.

¹⁶ Ministry of Justice, *The Governance of Britain: Review of the Executive Royal Prerogative Powers: Final Report* October 2009 para.29.

¹⁷ A tax imposed to finance the Napoleonic Wars.

¹⁸ Land Tax Perpetuation Act 1798, 38 George III c.60.

¹⁹ For more see Haslam, G., 'Modernisation' in *The Duchy of Cornwall* (ed. Crispin Gill, 1987) p.49.

according, to the Extracts from the Shorthand Writers Notes, that: ‘..it will be difficult to find that the Prince of Wales as Duke of Cornwall stands in any other relation than that of a Subject considering him merely as Duke of Cornwall.’²⁰

Queen’s Remembrancer’s Fees 1855

The issue which arose in 1855 with regard to the payment of the Queen’s Remembrancer²¹ fees is worth considering in some detail.²² The fees amounted to £12 8s 4d (about £600 in today’s money) and were in connection with a suit between the Duchy and the Bristol Water Works Company.²³ The liability to the fees arose under the Exchequer Court Act 1842.

The opinion of the Attorney General to the Duchy was obtained. He said:

...it will be proper to resist the payments of these fees...communication should be made to the Lords of the Treasury that they instruct the Queens Remembrancer to abstain from demanding them.

The Surveyor to the Duchy wrote to the Treasury, enclosing a copy of the Attorney General to HRH Prince of Wales opinion, which said the view of Prince Albert had been sought who gave as his judgment the fees should not be paid. The letter then continues:

It will probably occur to the Lords Commissioners that in proceedings of this nature which affect the landed property of the Duchy the Attorney General of His Royal Highness *represents the Interest of the Crown as well as the interests of the Prince.*(emphasis added)

The Queen’s Remembrancer in his response stated:

..it has been thought necessary to demand these fees..in consequence of the Prince of Wales being a party to the suit as a *subject suing for his own benefit and not in any way to be considered as suing on the part of the Crown or the Public.*’ (emphasis added)

He continues:

...it would seem he (the Prince of Wales) stands in the same predicament as any other suitor not the Crown or a Public Department of Revenue...the Duke of Cornwall may come within the exemptions contained within the Act...the exemption being only intended to apply to the payment of fees of such Public Departments as would only pay them out of public monies. – This could not be held to be the case in regard to fees payable by the Duchy of Cornwall as *private party in a cause; and I have therefore been of opinion that these fees were properly demanded.* (emphasis added)

²⁰ TNA TS27/818, Treasure Trove; Duchy claim mining rights (1907–1932).

²¹ The Queen’s Remembrancer is an ancient judicial post, the oldest judicial appointment in continuous existence, first created in 1154, continued to sit in the Court of Exchequer until the Court was abolished in 1882. The purpose of the role was to keep records of taxes paid and unpaid.

²² TNA TS25/829, Duchy of Cornwall Payment of Fees claimed by the Queen’s Remembrancer from the Duchy of Cornwall.

²³ *The Attorney General of the Prince of Wales v The Bristol Waterworks Company* (1855) 156 ER 699; 10 Ex. 884.

The only possible argument by which I can conceive a claim to exemption to be supported would be founded upon a contingent claim of the Crown to the Revenues of the Duchy of Cornwall in the event of the death of the Prince of Wales; but I should submit that even supposing the exemption to be maintainable on the occurrence of that contingency (which might be doubtful) that possibility could not affect the position of the actual Duke of Cornwall *suing as a subject and liable to the conditions affecting subjects in this court.* (emphasis added)

The Attorney General to HRH Prince of Wales responded to the Queen's Remembrancer first by suggesting he was mistaken that the suit against the Bristol Water Works Company was for the benefit of the Prince of Wales 'solely and personally' whereas in fact they:

...were to the benefit of the Lands of the Duchy and thereby to the inheritance of the Crown. The possessions of the Duchy were inseparable from the Crown save for the purpose of supporting the dignity of the Prince of Wales for which purpose they were vested in His Royal Highness as it were temporarily and the claim of the Crown to the Revenues of the Duchy is not merely contingent on the event of the death of the Prince of Wales but the interest of the Crown in those revenues is permanent subject to the contingent claim of His Royal Highness.

As happened so often the matter was submitted to the Government's Attorney and Solicitor General who gave their opinion:

It therefore appears to us incorrect to say that the interest of the Crown in the Revenues is permanent subject to the contingent claim of H R H whenever a Prince of Wales exists. *It appears to us that it is the interest of the Crown that is contingent on the failure of a Prince of Wales.* At all events H R H has a present and immediate interest in the Revenues of the Duchy. He does not sue in the name or on behalf of the Crown but in his own account. The fruits of the suit will enure to his immediate benefit. True it is that the Crown even where there is a Prince has an indirect interest (independently of its Reversionary Interest in the maintenance of the Revenue of the Duchy as forming a provision for the Prince)... *We are of the opinion therefore that H R H stands in the same position as any other subject or suitor in this Court of Exchequer and is liable to pay the fees in question.* (emphasis added)

In other words the Exchequer Court Act 1842 did apply to the Duchy and Crown Immunity did not apply.

Right to Wreck 1860s

The Duchy in the nineteenth century sought to re-establish its right to wreck which brought it into dispute with the Board of Trade and holders of various manorial rights. The Duchy claimed the Merchant Shipping Act 1854 did apply to Cornwall and the Board of Trade's investigation into wrecks within the County was illegal. The matter was referred to the Law

Officers who determined the Act did apply to the Duchy thus they did not enjoy the right to Crown Immunity²⁴.

Right to Royal Mines 1860s

The Duchy claimed that it had *prima facie* the right to the Royal Mines of gold and silver in Cornwall. Thus the *Onus probandi*²⁵ rested with the Crown. It was for the Crown to rebut the argument rather than for the Duchy to prove its case²⁶. The Duchy went on to say on 11 February 1860:

The mature decision of Sir John Patteson (who had presided in an earlier dispute) should be treated as setting at rest questions of this nature between the Sovereign and the Duke of Cornwall and that the superior title of the latter to all territorial rights whether prerogative or otherwise within the precincts of his Duchy should not now be questioned.

The papers were forwarded to the Government Law Officers with a statement from the Officers of Land Revenue which said, amongst other things:

It is conceived that the decision of Sir John Patteson has no bearing upon the question – the right of the Crown to Royal Mines is not a Territorial but a Sovereign or Prerogative right and a grant of all the King's Territory in a particular county would not without express words pass the Sovereign's right to Royal Mines.

The Government Law Officers went on to say '...it is submitted that the burden of proving title to them clearly rests upon the Duchy.' The Opinion, dated 29 May 1860, was as follows:

We are not satisfied that the facts and matters relied on in support of the claim are in anywise sufficient to countervail the general principle of law *that Royal Mines are a Prerogative Right of so high a character as not to pass by any royal grant except by express words of which we find none* (emphasis added) in the Charters by which the Duchy of Cornwall was created and its possessions granted.

It is however not seemly or proper that a question of this kind between Her Majesty and the Prince should be subject of legal proceedings (emphasis added) and in the course of our Conference with the Prince's Attorney General it appeared to us and which view as we understood met with his full concurrence that the question should be considered by some former Judge of the Highest position and eminence.' (emphasis added).

The issue seems to have rested until 1879 when the question was again raised of submitting the matter to arbitration²⁷. In 1880 it was suggested Lord Penzance act as arbitrator²⁸. In a letter to Lord Penzance it was stated:

²⁴ TNA BT243/262, The Duchy of Cornwall: Legislation relating to right of wrecks of the sea (1856-1985). For full discussion see Pearce, C., *Cornish Wrecking 1700- 1860* (The Boydell Press, 2010) p.182.

²⁵ The onus of proof

²⁶ TNA TS27/818, Treasure Trove – mining rights claim by Duchy of Cornwall (1907-1932).

²⁷ TNA T1/16350, Duchy of Cornwall: arbitration on Crown's right to royal gold and silver mines in Cornwall. (1879)

²⁸ TNA T1/12673, Duchy of Cornwall – question of title to Royal Mines to be settled by arbitration (1880)

It is considered both by the Queen's Government and by the Prince of Wales in Council to be highly desirable *to have this question set at rest without adverse litigation* (emphasis added) between Her Majesty and His Royal Highness and it is considered that the best mode of proceeding will be to follow, as nearly as circumstances will admit the course adopted some years since when similar questions between the Crown and the Duchy as to undersea Mines were referred to the late Sir John Patteson.

The dispute would appear to have been placed in abeyance until 1882/3 when the question was once more discussed. The Office of Woods wrote that it was undesirable the resolution to the question should be postponed but the Duchy did not feel able to sanction the expenditure of a large sum of money to secure a 'right so small as has been received from Royal Mines.'²⁹ In a letter dated 26 June 1883 the Duchy, which was clearly not keen for the matter to go to arbitration, said:

The confident hope is entertained that upon the facts and considerations now brought forward many of which are probably new to the Officers of the Crown, the Lords Commissioners of the Treasury acting on their advice will feel no hesitation in admitting the proposition contended for on the part of the Duchy and thereby give effect to the *great constitutional settlement* (emphasis added) effected by King Edward the Third and His Parliament...

The Crown however persisted in its view that the Duchy claims were not sufficient to: '...countervail the principle of law that Royal Mines are a prerogative right of so high a character as not to pass by any royal grant except by express words which are not to be found in the Duchy Charters.' The matter was left and remains outstanding. The fact is that while the right to Royal Mines, the Government Law Officers claimed, could not pass by implication we will see later the prerogative of Crown Immunity did apparently so pass.³⁰

The Welby Papers 1897

Notes on the Civil List were prepared for the Treasury in 1897 they record 'exemption from taxation is part of the Royal prerogative.'³¹ They go on to say:

The taxation paid in respect of the Duchies of Lancaster and Cornwall is shown in the annual accounts of these Duchies, and consists of property tax (for which certain sums are allowed annually to the tenants of the Duchies) land tax and 'other taxes'.

There is no reference, which might be expected, in what is a comprehensive review, to Crown Immunity applying to the Duchy of Cornwall and thus by implication it was also exempt.

²⁹ TNA T1/14831, Duchy of Cornwall title to gold and silver mines (1883)

³⁰ Commercial quantities of gold have recently been discovered in Cornwall with result that the Crown Estate and the Duke of Cornwall have agreed to share the proceeds. See Owen, G., 'The Queen and Charles agree to share spoils of new Cornish gold bonanza' *MailOnline* 15 September 2013.

³¹ TNA T38/837, Civil List Notes 'The Welby Papers' (1897)

The Treasury View 1899

In 1899 Sir Edward Walter Hamilton who became Joint Permanent Secretary to the Treasury wrote a letter concerning property rating of members of the Royal family in which he said:

...it is a well known maxim that the Crown is not bound by any Act of Parliament except by express enactment, *there is no such maxim applicable to the Heir Apparent, or any other member of the Royal Family. I doubt, therefore whether the Executive Government could exempt expressly the Prince from any part of the Income Tax now paid by him without the authority of Parliament.*³² (emphasis added)

In fact as we shall discover Crown Immunity was extended to the Duchy of Cornwall by Executive action without authority of Parliament.

2 Duchy of Cornwall Land Tax and Valuation 1913

This is a matter of great importance.³³ From 1849 the Duchy had paid income tax to which all landlords were liable. In 1913 the Inland Revenue approached the Duchy about submitting valuations and paying a new landlord's tax on income from mineral royalties under the Finance (1909-1910) Act 1910.³⁴ The Government Law Officers were asked to advise. The instructions issued by them are a masterful summary by the Solicitor acting for the Board of the Inland Revenue:³⁵

...the duty to give particulars...is resisted by the Duchy upon the broad ground that the Prince of Wales possesses the same prerogatives as the King³⁶, and that inasmuch as the King is not bound by the provisions of a statute unless expressly named, the Prince of Wales either absolutely, or at all events so far as the lands of the Duchy of Cornwall are concerned, is not bound by the provisions of Part I of the Finance Act 1910.

Note that it is the Inland Revenue who are claiming that Crown Immunity does not apply to the Duchy and it should comply with its, the Inland Revenue's, request. The instructions then explain that the particular prerogative with which it is concerned, Crown Immunity, was unlike any other differing in 'substance' from other prerogative rights such as the right to royal fish and foreshore. The instructions point out that under the Bill of Rights 1688 the Sovereign could not prevent application of an Act of Parliament by exercise of his prerogative power. The precise wording of the Bill of Rights is: 'That the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without consent of Parliament is illegal.'

³² TNA T168/71, Papers relating to taxation and property rating of members of the Royal Family (1899-1904)

³³ The papers are reproduced in the author's thesis see Appendix pearl.plymouth.ac.uk/pearl_jspui/.../2013kirkhope10286390phd.pdf.

³⁴ TNA LO3/467, Duchy of Cornwall - Land Tax and Valuation (1913)

³⁵ Hall, P., *Royal Fortune* (1992) p.54.

³⁶ At this time the King was George VI and the Prince of Wales was the future Edward VIII, Duke of Windsor.

The Solicitor to the Board of the Inland Revenue maintained the Prince of Wales is a subject of the Crown albeit the 'first of His Majesty's subjects' and the estate is a 'private estate'. In those circumstances the King could not choose to suspend an Act of Parliament as it applied to that 'private estate'. The papers then say:

Search has been made for any authority directly laying down the proposition that the Duke of Cornwall qua his rights over Duchy lands, or that the Prince of Wales as such, is not bound by statute unless expressly named. No such authority has been found and (the Duchy) when pressed on the point was not able to point to any authority.

The Duchy argued that the: 'prerogative rights of the Duchy are identical with those of the Crown' and 'That in fact Duchy lands are Crown lands and the same principles apply.' The Board of the Inland Revenue acknowledged, for reasons set out in the Instructions, that the Duchy was: 'entitled to press the argument...to the fullest extent, but it is submitted that even when so pressed that argument does not go very far.'

Reference is made in the papers to various cases including *The Attorney General to HRH the Prince of Wales v St. Aubyn*³⁷ and *Rowe v Brenton*³⁸. In particular the description of the Duchy given by Lord Tenterden in that latter case in which he refers to the '...very peculiar nature of the Duchy' and the 'Crown's peculiar interest in (the Duchy) at all times.' No mention is made of the disagreements which arose with regard to the Merchant Shipping Act 1854, Queen's Remembrancer's Fees and Royal Mines which would have supported the Inland Revenue's position. Presumably the Revenue was unaware of these earlier disputes.

The Board of the Inland Revenue specifically stated:

It may be mentioned that the Crown Private Estate Acts do not appear to apply to lands of the Duchy of Cornwall those lands being expressly exempted, or excluded under general provisions which prevent those Acts from applying to lands which are possessed by the Sovereign through inheritance from his predecessors.

The most difficult issue of all is then addressed: the position when either there is no Duke of Cornwall or he is a minor. The solicitor to the Board of the Inland Revenue then said:

...it may be argued that, having regard to the interest which the Sovereign has at all times in the Duchy...the prerogative of the Crown whatever may be the case when the Duke is of age, applies to the Duchy lands and, the Crown not being named in the Finance Act 1910 Mineral Rights Duty is not payable...the practical result may be that no returns can be enforced and no duty can be recovered until after the Duke of Cornwall attains his majority.

³⁷ *Attorney General to HRH., Prince of Wales, Duke of Cornwall v Sir John St. Aubyn and others* (1811) Wight 167.

³⁸ *Rowe v Brenton* (1828) 8 B & C 737; 3 Man & Ry KB 133; 108 E.R. 1217; Concanen's Rep 1.

The instructions to counsel prepared by the Board of the Inland Revenue demonstrated a great deal of research. They identify there is no basis in statute or case law for the Duchy enjoying Crown Immunity. The recognised authorities on the Prerogatives of the Crown make no mention of such a privilege. The difficulty created by the fact the Duchy oscillates between a Duke and the Crown is also considered. The reply received from the Law Officers does not tackle any of these issues. It simply asserts that:

We are of the opinion that the same principles which render the provisions of any Act of Parliament inapplicable to the Crown unless the Crown is expressly named, apply also to the Prince of Wales in his capacity as Duke of Cornwall. This result arises from the peculiar title of the Prince of Wales to the Duchy of Cornwall. In other respects the Prince of Wales as being the first subject of the Crown is like other subjects bound by Statutory enactments.

The Law Officers opinion, which ignores the issues raised by the Inland Revenue and the authorities they represent, stretch the definition of the Crown in an unexpected way. *This opinion is the basis upon which the Duchy continues to claim Crown Immunity and, amongst other things, its privileged tax position.* They then went on to say:

We would strongly deprecate the bringing to an issue of questions such as those here set out. It is obvious that if such a matter were litigated the Duchy of Cornwall might find *that even though they succeeded their success in the Courts did not conclude the matter* (emphasis added).

In 1921 the Law Officers were again consulted.³⁹ The Prince of Wales had continued to pay tax 'as an act of grace'. The Law Officers responded that their opinion was unchanged. The Prince of Wales agreed to pay £20,000 (approx £657,000 in 2012) per annum as a voluntary contribution in lieu of tax. From 1921 until 1982 although the Duchy continued to present its accounts to Parliament as it was obliged to do, it did not publish them. The accounts which were presented to Parliament show the voluntary contribution under the heading 'taxes and parish rates'⁴⁰ which is clearly misleading.

In 1971–1972 a Select Committee on the Civil List stated:

The income from the Duchy of Cornwall is exempt from all taxes. The exemption is based on an opinion given by the Law Officers of the Crown in 1913 and again in 1921. The tax exemption apparently arose from 'the peculiar title of the Prince of Wales to the Duchy of Cornwall'. *The judgement was very short and a little inscrutable. It did not say what was peculiar or special.* Nevertheless, the Inland Revenue accepted it without question. There has been no further explanation or elucidation.⁴¹ (emphasis added)

³⁹ TNA IR40/16549, The Duchy of Cornwall Taxation (1921).

⁴⁰ Hall, *Royal Fortune*, p 57.

⁴¹ House of Commons *Report from the Select Committee on the Civil List 1971 -1972* HC29 para.48.

Mr. Strudwick, Assistant Secretary Board of the Inland Revenue, when he appeared before the Committee said in reference to the 1913 Opinion:

Their answer, I am afraid, which is all I have, does not really take us much further, because they simply said (*that Crown Immunity applies*)... also to the Prince of Wales in his capacity as Duke of Cornwall....That is all they said.⁴²

It is extraordinary that an institution which describes itself as a 'private estate' and is similarly described by Government should enjoy Crown Immunity and, therefore, such a privileged tax status based on a 'short and inscrutable' opinion which has never been challenged or revisited.

'Crown Application'

It is noteworthy that the pamphlet issued by the Office of Parliamentary Counsel, to which reference has already been made, makes no reference at all to the Duchy of Cornwall and states at section 3.8: 'There is no question of personal immunity from legislation for any member of the Royal Family other than the Sovereign.'

3 The Duchy of Cornwall and Taxation

The taxation of the Duchy of Cornwall cannot be considered in isolation from that of the Crown. The starting point is the Crown Private Estates Act 1800 which allowed the monarch to own property as a private person. It provided the Crown's private estates would:

be subject and liable to all such taxes, rates, duties, assessments...as the same would have been subject and liable to, if the same had been property of any subject of this realm.⁴³

The provision was broadly repeated in the Crown Private Estates Act 1862⁴⁴. The Crown is liable to Stamp Duty⁴⁵. The interpretation given to the provisions of the Crown Private Estate Acts by the Inland Revenue is that the Monarch is liable to tax on an estate, because it is said the Acts provides: '...the private estates shall be subject' and the Acts only apply to taxes which are charged on land. Thus profits from farming, which is a trade and not an estate, are not liable to tax⁴⁶. Many commentators are critical of this argument and consider it to be very generous⁴⁷. However, be that as it may, the situation is: 'The Sovereign is not legally obliged to pay income tax, capital gains tax or inheritance tax because the relevant enactments do not apply to the Crown.'⁴⁸ The relevant enactments do not apply to the Crown

⁴² Ibid, p 348

⁴³ Crown Private Estates Act 1800 s.6.

⁴⁴ Crown Private Estates Act 1862 ss.8 and 9.

⁴⁵ Stamp Act 1891 s.119.

⁴⁶ House of Commons, *Report from the Select Committee on the Civil List 1971-72* HC.29 p.43.

⁴⁷ See for example Bartlett, R.T., 'Taxation and the Royal Family - I', *British Tax Review* (1983)p.99 and 'Taxation and the Royal Family - II', *British Tax Review* (1983) p.138.

⁴⁸ House of Commons, *Report of the Royal Trustees, 1993* HC.464 p.3.

because the Crown enjoys Crown Immunity, that is to say, the Crown is not generally bound by statute. This is significant because in 1913, as already observed the Government Law Officers stated:

WE ARE OF OPINION THAT the same principles which render the provisions of an Act of Parliament inapplicable to the Crown unless the Crown is expressly named, apply also to the Prince of Wales in his capacity as Duke of Cornwall.⁴⁹

The 1913 opinion was confirmed in 1921 when the Law Officers were asked once more.⁵⁰

Background⁵¹

The background to the 1913 opinion is as follows. From 1842, when income tax was reintroduced, Queen Victoria agreed to pay the tax. Something she regretted bitterly in later life. Her son Edward VII also paid income tax about which he complained persistently during the course of his reign. As has already been demonstrated from the example of the Land Tax Acts there was no question in the eighteenth century that the Duchy of Cornwall should not pay tax. From at least 1849 the Duchy of Cornwall also paid the income tax to which landlords were liable and other taxes.⁵² In 1910 when George V succeeded his father he decided to take advantage of his Crown Immunity and stopped paying income tax. Thus after 68 years the Sovereign ceased to meet an obligation imposed on other citizens. Interestingly this assertion of Crown Immunity by the Sovereign in 1910 did not extend to the Duchy of Cornwall.

The 1913 opinion was that the Duchy were no longer liable. Despite that, the Duchy continued to pay until 1921 when the burden was removed and a £20,000 voluntary contribution was made to the Exchequer.⁵³ The treatment of the Duke of Cornwall for income tax purposes does not correspond with the view of the Treasury in 1897 or 1899. Exemption was granted without the authority of Parliament which in 1899 was considered necessary.⁵⁴ In 1969, after negotiations with the Prince of Wales, it was agreed he should surrender 50% of the net revenues of the Duchy. The memo to the Prime Minister stated: 'The Household have reluctantly accepted this solution.'⁵⁵

⁴⁹ TNA LO3/467, Duchy of Cornwall Land Tax and Valuation (1913).

⁵⁰ TNA IR40/16549, Law Officers Opinion Duchy of Cornwall (1921).

⁵¹ Readers are referred to Hall, P., *Royal Fortune, Tax, Money and the Monarchy* (1992) which explores the relationship between the monarchy and their attitude to tax.

⁵² TNA T38/837, Civil List Notes (1897).

⁵³ Tomkins, 'Crown Privileges', p.182.

⁵⁴ TNA T168/71, Papers relating to taxation and property rating of members of the Royal Family (1899-1904).

⁵⁵ TNA PREM13/2906, Royal Family Proposal for dealing with revenues of Duchy of Cornwall (1969).

The present basis upon which the Duchy is taxed is set out in the 'Memorandum of Understanding on Royal Taxation' issued in March 2013.⁵⁶ This confirmed the Duke of Cornwall enjoys the same Crown exemption applicable to the Monarch. From 6 April 1993 the Prince of Wales *voluntarily* began paying income tax on that part of the Duchy income which is used for personal expenditure. Mr Ross (now Sir Walter Ross) Secretary of the Duchy explained '(The Prince of Wales) pays tax on a voluntary basis in exactly the same way as any other taxpayer'.⁵⁷ It was also agreed he would pay the market rent for the use of Highgrove. Since the Duke of Cornwall is entitled to the income from the Duchy this does appear to be removing money from one pocket and placing it another. The Duchy is not liable to capital gains tax because: 'The Prince of Wales is not entitled to its capital or capital gains'. The Queen or the Prince of Wales may, at any time, give notice of withdrawal from the arrangements. Whether that is politically feasible is another matter. The Prince of Wales is fully taxable in all other respects. It is only in regard to the Duchy that special privileges are enjoyed.

Assuming, for the purposes of argument that the Duchy is entitled to Crown Immunity does that lead to the conclusion that it should not be liable to tax. There are a number of arguments which suggest it does not. The reasoning is that imposing tax on the estate would reduce its value upon reversion to the Crown. The imposition of tax on the income arising from the Duchy would not affect the reversion to the Crown since that would not have any impact on the capital value of the Duchy.

There is a logic that the imposition of capital taxes would impact on the reversion to the Crown. However, the Crown has a 'beneficial interest' in the Duchy which must be distinguished from the estate itself which is a distinct entity. Looked at that way it could well be argued that the effect which the taxation of capital of the Duchy estate has upon its value is irrelevant.⁵⁸ The Law Officers in 1913 went on to say: 'Taxation is not and cannot be exacted from land; it is exacted from subjects who are taxpayers.'

Another way of expressing the proposition is 'there can be no liability to tax without a taxpayer'.⁵⁹ Although the Duchy is likened to a trust there is no reference to 'feoffees to uses (trustees)' in the Charter or in any of the Duchy Management Acts. The Officers of the Prince's Council perform duties similar to trustees but they are not trustees. Therefore, the reasoning would appear to be since there are no trustees and no one who can be assessed

⁵⁶ HM Government, *Memorandum of Understanding on Royal Taxation* 2013.

⁵⁷ House of Commons, Committee of Public Accounts, 7 February 2005.

⁵⁸ See Bartlett, 'Taxation and the Royal Family – I', p 99 and 'Taxation and the Royal Family – II', p.138.

⁵⁹ *Ibid.*

for tax. Revenue law does not recognise the Duchy because it is not a natural person, a company or a trust although it has similarities with bodies the law does understand. If the comparison offered by the Duchy itself that it is like a trust under the Settled Land Act 1925 then that would suggest any assessment would be raised on the person who is entitled to the income.

Income tax is now paid, voluntarily, in the assessable income arising from the Duchy but capital gains tax is not paid. Between 2001 and 2008 the Duchy made £43 million in capital gains on which tax was not paid⁶⁰. They claim, quite properly, that if they were liable to capital gains tax they would also be entitled to claim the reliefs and allowances available to other taxpayers. The fact remains the Duchy enjoys a considerable benefit not available to others^{61/62}.

It is difficult to escape the conclusion that advice was sought from the Law Officers because the taxpayer concerned was the Prince of Wales and because all parties wished to avoid appeal proceedings. In any other case, in view of the doubts the Revenue must have had and continue to have, they would have raised assessments so the issue could, if the taxpayer chose, be determined through the normal appeal procedures particularly since the doubts raised about the Law Officers opinion and the interpretation given it has substance.

4 Concluding Comments

While the Solicitor to the Board of the Inland Revenue in 1913 acknowledged there are complicating issues his proposition is as follows. The prerogative of Crown Immunity is a special right differing from other prerogative rights which can and have been granted by the Crown. The granting of such a prerogative would require specific words. There are no documents by which the Crown granted such a prerogative. Furthermore even if such a document existed it would be ineffective because of the Bill of Rights 1688 which prevents the Crown by prerogative suspending the application of laws to the Prince of Wales. Because the Duchy oscillates between the Crown and Duchy the Law Officers concluded the Duchy did enjoy this special prerogative. It must be assumed the 'peculiar title' to which the

⁶⁰ *Daily Telegraph*, 16 August 2008, 'Prince Charles makes £43 million profit from property deals'.

⁶¹ HM Revenue and Customs were asked who provided the opinion with regard to the taxation of the sovereign and when. They were also asked if the opinion in respect of the Duchy of Cornwall had been reviewed if so by whom and when. They refused to answer. The ICO upheld the decision of HM Revenue and Customs see ICO FS50444734 Appendix J in author's thesis.

⁶² The taxation of the Duchy is coming in for increasing public scrutiny see, for example, Wilcock, D., and Mann, Petra, 'Prince Charles in tax dispute – Duchy denies "tax avoidance scam"' *Western Morning News*, 17 December 2012.

Law Officers referred arises from the fact the Duchy 'reverts' to Crown when there is no Duke. Certainly the Great Charter of 17 March 1337 says if there is no Duke:

'..the same Duchy with the Castles Boroughs Towns and all other things abovesaid *shall* revert to us to be retained in the hands of the Kingdom of England until there appear such Son...' (emphasis added)

Mr Iain Wright, MP, Under Secretary of State in the Department of Communities, and Local Government explained it as follows:

...even though it is managed as a private estate, the Duchy of Cornwall can only be held by the eldest son of the reigning monarch, and if there is no son, then it *reverts* to the Crown. I believe this is self-explanatory where the link to the Crown is concerned.⁶³ (emphasis added)

Erskine May in its explanation of the need to obtain consent in respect of Bills before Parliament explains the need for consent because of the 'reversion' of the Duchy when there is no Duke. The principle would appear to be that anything which affects the Duchy, particularly to its detriment, for example, the imposition of tax, has a consequence for the Sovereign because the Crown enjoys the right of reversion.

There are difficulties with the basis of the 1913 Law Officers Opinion, in so far as it can be discerned. The Solicitor to the Board of the Inland Revenue and the Law Officers would appear to have been unaware of the comments in the House of Lords and the disputes which arose in the nineteenth century which have been described above. The Duchy claimed Mines Royal; the Crown Estate has resisted the claim because it is a prerogative right which is so 'high a character' and could only be passed, the Law Officers argued, by express words. Unquestionably the right to Mines Royal, while a significant prerogative right, is a lesser right to that of Crown Immunity yet in the case of Mines Royal it did not pass while Crown Immunity does.

Next there is the question of the 'reversion' to the Crown. It is important to emphasise that the Duchy does not 'escheat' to the Crown. It is not absorbed in the Crown it remains distinct. Sir George Harrison in 1837 wrote that the King was 'duty bound to maintain the Duchies and transmit them to his successors'. He suggested the Sovereign, when there was no Duke or the Duke was a minor was invested with the character of a trustee and 'The Sovereign trustee could in fact if not in theory could do wrong if he bargained away the

⁶³ Letter Iain Wright MP Under Secretary of State Dept. of Communities and Local Government to Andrew George MP 16 June 2009.

Duchy of Cornwall'.⁶⁴ The Duchy itself refers to the 'trust' provisions of the founding Charters⁶⁵. The Attorney General to HRH the Prince of Wales likened the Duchy to a trust created under the Settled Land Act 1925.⁶⁶

If we pursue the analogy of the Duchy being like a trust the trustee of the trust is either the Sovereign or the Duke of Cornwall. The beneficial interests are the life tenant, the Duke of Cornwall, with the Sovereign having a contingent interest. When the Sovereign is trustee when there is no Duke or the Duke is a minor then, as Harrison implied, he or she holds the Duchy as legal owner but not as absolute owner. That is to say he or she holds the property in accordance with the founding documents for the benefit of the beneficiaries from time to time. Whether it is the Sovereign or the Duke who is entitled to the income from the Duchy, they at all times have an 'interest' in the estate and not in the estate itself which is a separate entity. To import the rights and privileges which a person enjoys personally, even the Sovereign, or by virtue of his or her position to his or her role as trustee is a dubious proposition. This logic would suggest since the Sovereign has the right to Mines Royal when the Sovereign is trustee then the Duchy would also enjoy Mines Royal which the Law Officers says it does not.

As a further demonstration of the restricted nature of the Monarch's interest in the land held by the Duchy it continues to be held in fee. In *The Attorney General v The Mayor and Commonalty of the Borough of Plymouth* (1754) Chief Baron Parker said

It is clear, that the Crown does *not take an absolute fee, but only a qualified fee* till the birth of the King's eldest son he takes a fee; but it is only a qualified fee till he comes to the Crown, or till his own death...⁶⁷ (emphasis added)

When there is no Duke of Cornwall the Crown holds the lands of the Duchy of Cornwall in qualified fee from itself.

Even when there is no Duke or the Duke is a minor the right to *Bona Vacantia* continues to be dealt with separately by the Treasury Solicitor on behalf of the Crown and the solicitors to the Duchy of Cornwall on behalf of the Duchy. The Crown and the Duchy were and are distinct. A telling observation was made by the Clerk to the Crown in 1889 during the discussions about the production of a Royal Warrant for the Lord Warden of the Stannaries to be able to summon a militia was that the warrant could not suggest the Crown confirmed

⁶⁴ Harrison, Sir George, *Memoir respecting the Hereditary Revenues of the Crown and the Revenues of the Duchies of Cornwall and Lancaster* (1837) p.36.

⁶⁵ Duchy of Cornwall Annual Accounts 31 March 2012.

⁶⁶ *Michael Bruton v Information Commissioner, The Duchy of Cornwall and The Attorney General to HRH the Prince of Wales* (2011) (EA/2010/0182) p.17.

⁶⁷ *Attorney General v The Mayor and Commonalty of Plymouth and others* (1754) Wight 134 p.1214.

the appointment of the Lord Warden that would be a 'proceeding which would be *'ultra vires'* (beyond the powers of) and 'an encroachment on the jurisdiction of the Duke of Cornwall'⁶⁸.

Halsbury's Laws of England summarises the situation:

Because the monarch is a separate person from....the Duke of Cornwall there can be a valid lease or conveyance between them...When the Duchy of Cornwall is vested in the Crown rights formerly enjoyed over one estate for the benefit of the other will not merge.⁶⁹

There is only one reported case which directly addresses the question of Crown Immunity and the Duchy of Cornwall. That is *Hobbs v Weeks* (1950)⁷⁰. This was a County Court case, therefore, not a precedent, in which Judge Wethered at Wells County Court held:

That when the lands of the Duchy of Cornwall are vested in the Crown (as they have been since the accession of Edward VIII) the Rent Restriction Acts do not apply to premises comprised in them.

This decision would suggest that when not in the Crown the Rent Restriction Acts would then have applied.

Conclusion

There is no specific grant by the Sovereign of Crown Immunity to the Duchy of Cornwall anymore than there is an Act of Parliament extending Crown Immunity to the Duchy. The right is not mentioned by Staunford, Hale and there is a qualified reference, only, in Chitty all of whom are regarded as authorities in these matters. The evidence suggests that in the eighteenth and nineteenth centuries, as demonstrated by the Land Tax Acts, Merchant Shipping Act 1854 and the Exchequer Court Act 1842, it was not assumed the Duchy enjoyed Crown Immunity. The opinion of the Law Officers in 1913 is inconsistent with the opinions offered with regard to Mines Royal and others and is based on a fundamental misunderstanding of the relationship of the Duchy to the Crown.

By virtue of the Duchy's right to Crown Immunity a 'private estate' enjoys substantial privileges without there being any clear basis upon which those privileges are founded. There is an opinion which is not consistent with the previous opinions offered by the same Department or past practice and which does not address the very detailed issues raised by the person who sought the opinion.

⁶⁸ TNA C197/18, Commission for the management of the Duchy of Cornwall (1827-1889).

⁶⁹ *R v Inhabitants of Hermitage* (1692) Carth. 239; 90 ER 743. *Halsbury's Laws of England* vol.12(1) section 213 Relations between aspects of the Crown.

⁷⁰ *Hobbs v Weeks* (1950) 100 LJ 178 p.178.