SANFORD *v.* WARING.

1896.

June 16, 18, and 23, and October 15.

D. C., Kandy, 6,436.

Recovery of land—Action rei vindicatio *against servant of Crown in temporary occupation—Recovery of land in wrongful possession of the local Government—Action against Attorney-General—Action for tort against the Crown.*

Per BONSER, C.J.—Land in the possession of the Crown cannot be recovered in a suit against the servant of the Crown who is in temporary occupation of it as such servant; the only way by which a subject can recover his land which he alleges to be in wrongful possession of the local Government of this Island is by an action brought against the Queen's Attorney-General of the Island.

The proposition taken for granted in *Siman Appu v. The Queen's Advocate* (*9 Ap. Cases, 571*), that an action for tort would not lie against the Crown as represented by the local Government of this Island on the ground that the law with respect to the immunity of the Crown from being sued in such actions extends to this Island, queried by BONSER, C.J.

THE facts of the case appear in the judgment of BONSER, C.J.

Dornhorst and *Wendt*, for appellant.

Ramanathan, Acting A.-G., and *Loos*, for respondent.

15th October, 1896. BONSER, C.J.—

This is an action brought to establish the plaintiffs' title to an undivided one-third share of a large tract of forest, some 5,000 acres in extent, of which the Crown is in possession, and to recover the same. The defendant is sued in his official capacity as Chief Resident Engineer of the Haputale Railway Extension.

The plaintiffs allege that they are entitled to this land under a *sannas* made by the last King of Kandy in favour of their predecessor in title. The defendant disputes their title on various grounds, and more particularly on the ground that this forest was not included in the grant made by the *sannas*.

We heard a long argument on this point, the result of which was to leave on my mind the impression that the plaintiffs have made out their case in this respect. But there is a fatal objection to the plaintiffs' action which renders it unnecessary to enter upon this question.

It was admitted by Mr. Dornhorst, who argued the case on behalf of the plaintiffs, that this is an action *rei vindicatio*, and that its object was to recover land which, if occupied by the defendant, was occupied by him, not in his private capacity, but in his

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capacity of a servant of the Crown. The Government of Ceylon has constructed and works this railway extension, and part of the land sought to be recovered is occupied by the railway line and works.

Can land in the possession of the Crown be recovered in a suit against the servant of the Crown who is in temporary occupation of it as such servant? In my opinion it cannot.

I put the case during the argument of an action *rei vindicatio* being brought against the bailiff or servant as such of a person alleged to be in possession of the property sought to be vindicated, and asked Mr. Dornhorst if he could produce any precedent or authority for such an action; but, as I expected, none was forthcoming. From Voet's statement of the law (*Com. ad Pand., VI. 1–22*) it seems clear that property can only be effectually recovered by the owner in an action against the wrongful possessor, *i.e.*, the person who occupies the property, either himself or by his agent, with the *animus domini*. If the action be brought against a *nudus detentor* he is entitled to be dismissed from the action as soon as he discloses the name of the person on whose behalf he detained the property. In the present case it appeared on the face of the plaint that Mr. Waring was *nudus detentor*, holding on behalf of the Crown, and the action ought therefore to have been at once dismissed.

In my opinion, the only way by which a subject can recover his land, which he alleges to be in the wrongful possession of the local Government of this Island, is by an action brought against the Queen's Attorney-General for the Island.

It was said that there are decisions of this Court which have laid down that such an action will not lie against the Attorney-General, but when these cases are examined it will be found that all that was decided is that an action for *tort* cannot be maintained against the Attorney-General in respect of the wrongful act of a Government servant.

The question of suits against the Crown in this Island was considered by the Privy Council in the case of *Siman Appu v. The Queen's Advocate* (*9 Ap. Cases, 571*), where it was held that an action for breach of contract would lie against the Crown. That decision was based on the ground that a long-continued course of practice of the Courts to allow such actions had been recognized by the local Legislature.

Their Lordships said: "The 117th section of Ordinance No. 2 "of 1868 runs as follows:—

> All suits instituted in the name of the Queen's Advocate on behalf of the Crown for the recovery of any debt, damage, or demand, or to obtain possession of any property, provided the amount or value in dispute exceeds

£10, may be instituted and prosecuted, at the discretion of the Queen's Advocate, in the District Court held at the principal town of the Province in which the defendant resides, or in which the cause of action shall have arisen wholly as to any part, or in which such property is situated; and all suits instituted by any private party against the Queen's Advocate wherein the amount or value in dispute exceeds £10 shall, unless the Queen's Advocate consents to forego such right, be instituted and prosecuted in the District Court held at the principal town of the Province in which the act, matter, or thing in respect of which any such suit shall be brought shall have been done or performed, or in which the property in dispute is situated, and the said District Court shall have cognizance of and power to hear and determine such suits as if the cause of action had arisen within the district.

"It appears to their Lordships that the latter part of that section "would be deprived of its meaning, unless it is held that, in the "view of the Legislature, suits might be instituted by private "persons against the Queen's Advocate for the recovery (amongst "other things) of debts and damages. It is said that to give that "meaning to the Ordinance would prove too much, for it would "include actions for damages *ex delicto*, which, as every one admits, "cannot be brought against the Crown. But it does not follow "that because the words are wide enough to include actions *ex* "*delicto* they must do so. They are not words adapted to confer a "new right or to establish a new kind of suit. They are only "regulative of rights and proceedings already known, and they "must be construed according to the state of things to which they "clearly refer. They can therefore receive a full and sufficient "meaning without extending them to actions *ex delicto*, but they "cannot receive a full and sufficient meaning—indeed, it is difficult "to assign them any substantial operation at all—unless they "embrace actions *ex contractu*."

Now, every word of that reasoning applies equally to actions to recover land. The words "or to obtain possession of any pro-"perty" cannot be given any meaning unless they apply to actions *rei vindicatio*. CAYLEY, C.J., who had himself been Queen's Advocate, said in Fernando's case decided in 1881 (*4 S. C. C. 77*): "The practice adopted here of suing the Crown in the name of the Queen's "Advocate, *both in real actions for the recovery of specific property*, "and in actions for the recovery of moneys due *ex contractu*, has "prevailed here for a long series of years, and has been recognized by "this Court in hundreds of decisions; indeed has not, so far as we "can ascertain, ever been called in question until now."

But their Lordships, although they decided the case on the ground above mentioned, intimated that had it been proved that the right of a subject to sue the sovereign by his officer existed in

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Holland under the Roman-Dutch Law, they would have held that the right now existed in this Island. At page 585 of the report this passage occurs :—

> There certainly seems no more antecedent reasons why the Counts of Holland should be exempted from suit through their officers than existed for the exemption of the King of Scotland. And though it is very likely that whilst great potentates, like the Dukes of Burgundy and the Kings of Spain, were Counts of Holland, it would not be very safe to sue them, yet when the United Provinces became independent, suitors might find themselves more favourably placed.

" But whatever speculations may be made upon these points, " their Lordships cannot advise Her Majesty that such was the " Roman-Dutch Law, unless it is shown to them that it was so. " And neither the researches of counsel nor their own have enabled " their Lordships to attain any certainty on the subject."

That some such remedy against the Fisc or Imperial Treasury existed under the Roman Law is plain from the language of Voet : " *Non tamen hanc patiuntur actionem* (*i.e., rei vindicatio*) *qui* " *rem alienam a fisco emerunt, aut a Principis vel Augustæ domo :* " *eo quod hi statim securi sunt ; sola adversus fiscum actione intra* " *quadriennum indulta iis, qui pro rei alienatæ dominio putaverint* " *aliquam sibi competere petitionem* " (*Com. ad Pand., VI. 1–23*). So also, treating of the sale of an *heraditas*, he says that the purchaser is safe " *Cum ementes a fisco statin securi sint et fiscum ipsum ven-* " *dentem convenire debeat, quis-quis judicio contendere cupit, ad se* " *venditam pertinere hereditatem* " (*18, 4, 8*).

The same passages show that in Voet's opinion that was the law of Holland in his day, and this right to sue the Fisc is recognized in *Hollandsche Consultatien* (*bk. IV. 128*).

There is a curious case mentioned by Kotze, C.J., of the Transvaal, in the notes to his translation of *Van Leeuwen's Commentaries* (*p. 11*), from which it appears that the Sovereign States of Holland submitted themselves to the jurisdition of their own Court, and on the 28th July, 1501, were ordered, as defendants, to pay unto Philip of Spain, the plaintiff, compensation for damages which had been caused to his house in Rotterdam.

Again, I find a case in the *Hollandsche Consultatien* (*bk. IV. 123*) where the Fiscal of North Holland, on being sued, excepted to the plaintiff's right to sue on the following grounds : " *Quasi* " *Fiscus qui principem representat, in jus vocari non possit sine* " *venia, de jure autem vasallus dominum subditus principem in jusvocare absque venia non potest, argumento sumpto a liberto* " *ad Patronum.*" The plaintiff replied that the plea ought to be " rejected : " *Quia inquit hoc non solere in Principe observari* [for

" actions were brought every day against the Procurer-General and " Fiscal] *qui fiscus sunt principem que representatit non petita venia,*" and the Court accordingly overruled the plea and ordered the defendant to answer. It does not appear that these authorities were cited to the Privy Council in the case of *Siman Appu v. The Queen's Advocate.* They would seem to show that the Government of the United Provinces might be sued through its officers.

That the Attorney-General in this Colony is the proper officer to be sued is clear. Until quite recent times he was styled Advocate Fiscal. Although the style was changed first to Queen's Advocate and then to Attorney-General, no substantial change was made in the duties of the office, and now section 456 of the Civil Procedure Code expressly enacts that " all actions by or against the Crown " shall be instituted by or against (as the case may be) the Attorney-" General."

It seems to have been taken for granted in *Siman Appu v. The Queen's Advocate* that an action for *tort* would not lie against the Crown as represented by the local Government of this Island, on the ground that the English Law with respect to the immunity of the Crown from being sued in such actions extends to this Island. I am not prepared, as at present advised, to assent to this proposition.

The more recent cases of *Farnell v. Bowman* (*12 Ap. Cases, 643*), and *Wemyss*, Attorney-General of the Straits Settlements (*13 Ap. Cases, 197*), show that at the present day even in Colonies in which the English common law prevails there is a strong tendency to make the local Government liable for the acts, even tortuous, of their servants whenever the local enactments can be reasonably construed to create or recognize such a liability.

I desire to leave this question open for further consideration when it arises for decision.

Then, as to the costs of this action.

The question of the competency of this action was heard and decided against the defendant before the other issues were framed. Had the defendant appealed against that decision, as he might have done, the expense of the subsequent trial would have been saved. The proper order therefore to make will be that the defendant will only have his costs up to and including the trial of the preliminary issue of law. The appeal will be dismissed with costs.

[LAWRIE, J., without committing himself to the opinion that an action in ejectment would, in the circumstances of this case, have

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lain against the Attorney-General as representing the Crown, agreed with his Lordship the Chief Justice that, in the special circumstances of this case, no action in ejectment lay against the defendant. He, however, rested his judgment on the view he took of the facts of the case, and agreed to affirm the judgment of the Court below dismissing the plaintiffs' claim.]