LE MESURIER *v.* ATTORNEY-GENERAL.

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D. C., Kandy, 12,998.

Action rei vindicatio *against the Crown—Claim for damages for wrongful possession—Amendment of pleading.*

According to the law of Ceylon, an action *rei vindicatio* may be brought against the Crown, but not an action in tort.

Where the plaintiff claimed not only the land but also damages and mesne profits arising from alleged wrongful possession on the part of the Crown, the plaintiff was allowed to strike out his claim for damages and mesne profits and proceed with his action for the recovery of the land only.

THIS was an action against the Crown to recover two undivided third shares of a large portion of land situate partly in the District of Uva and partly in the Central Province, known as Kumanekele, containing in extent 2,656 acres of forest. The cause of action set out in the 14th paragraph of the plaint was as follows:—

"About the beginning of the year 1890 the Crown, through its agents and servants, wrongfully and unlawfully took possession of the said Kumanekele and constructed a line of railway thereon from the point G to the point H shown in the plan marked B, and the Crown has since been in the wrongful and forcible possession of the said Kumanekele, and has used and maintained the said line of railway for its own use and benefit to the loss and damage of plaintiff of Rs. 20,000."

He alleged that this land was a portion of a tract of country (situate in Udabadana at one time in the District of Uva) granted by the last King of Kandy by a *sannas* to his first predecessor-in-title. The Crown denied that the land lay within the boundaries described in the *sannas*.

The plaintiff prayed for a declaration of title, for a decree that the Crown should give up possession of the land to him, and for "Rs. 20,000 as and for past damages and mesne profits, and further damages and mesne profits at the rate of Rs. 40 per diem from the date of the institution of the action, &c."

Issues of law and of fact having been framed, the issues of law only were argued, viz.: (1) whether this action is maintainable against the Crown; (2) whether the allegation that the Crown, through its servants and agents, wrongfully took possession of the Kumanekele disclosed a cause of action against the Crown; (3) whether the *sannas* pleaded in the plaint created an estate in tail; (4) whether it was competent to Edward James Dehigama and

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Dingiri Amma to transfer the land to A. M. Galloway, W. Ronald, and W. Henry; (5) whether the plaint was bad for uncertainty of boundaries of the land and for deficiencies of the plan filed with the plaint; and (6) whether the plaintiff could maintain this action since he was never put in possession, and his vendors never had possession.

The District Judge (J. H. de Saram) decided the third and the fifth issue in the negative, and the fourth in the affirmative. As to the sixth and first issues he held as follows:—

"The question now is whether the plaintiff, as a purchaser, had right to institute this action, his vendors not having themselves had possession and not having put him in possession. However desirable it may be that the question here raised by Mr. Attorney should be settled by authoritative decision, I am bound to follow the judgments of the Supreme Court on the subject. In *Darandegedara Appuhami v. Pahalagedara Apuhami* (*3 S. C. C. 61*), it was decided by the Full Court on the 3rd February, 1880, that the execution and delivery of a conveyance of land, the property of the vendor, if in conformity with the Ordinance No. 7 of 1840, transferred the title to the land to the purchaser although no corporeal delivery or actual possession of the land had followed, and that by virtue merely of the title so created the purchaser might maintain an action for a declaration of title against a third party in possession without title or under a weaker title. This decision was, on the 3rd July, 1883, followed in *Punchihami v. Arnolis* (*5 S. C. C. 160*), and has ever since then been followed by our Courts. The other point, that a vendor should have had possession at the time of the execution of the transfer by him, does not appear ever to have been decided. The point was argued in *Darandegedara Appuhami v. Pahalagedara Appuhami*, but was not decided, because no objection was taken to the libel in the answer, on the ground that the plaintiff's vendor was not seized and possessed of the land at the time of the sale.

"Cayley, C.J., and Berwick, J., after very elaborate and exhaustive examination of the authorities bearing on the point, expressed the opinion that a purchaser can maintain an action for a declaration of title, although, at the time of sale to him, his vendor had not possession of the land sold, provided he had a title thereto. Cayley, C.J., said 'that when a person signs in the manner 'required by the Ordinance No. 7 of 1840 and delivers for good 'consideration a conveyance of all his interest in land, such a 'conveyance will pass the *dominium*, if the seller has it, although 'such *dominium* may not have been accompanied by physical 'possession; in the same way' the Dutch *transport* effected a

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'transfer of all the right which the transferor had in the subject-'matter of the conveyance, whatever might have been the nature 'of such right.' Berwick, J., said, according to Roman Law, 'both 'movables and immovables equally pass by either fictitious, or 'symbolical, or actual delivery, and I only follow what has been 'the invariably recognized law of the country during the whole of 'a lengthened experience at the Bar and on the Bench, until 'questioned very recently indeed, in considering that the delivery 'of a deed of transfer of land executed before and attested by a 'public notary in accordance with the provisions of Ordinance No. '7 of 1840, is a constructive delivery of the land itself; the notarial 'execution and attestation and the registration of the duplicate or 'protocol (formerly in Court and now with the Registrar of Lands) 'with delivery of the deed, taking the place of the old Dutch 'symbolical delivery before the judge and the registration of the 'proceeding among the acts of Court, with the same result as in 'Holland, the principles being the same, namely, contract of sale 'plus symbolical delivery equal to *dominium*, with the consequent 'right to sue in ejectment.' These *dicta* have been followed by our Courts for nearly twenty years, and have, as far as I know, never been overruled. I feel bound to follow them, now that the point has been raised. I answer the sixth issue in the affirmative.

"I have now to consider the principal issue—whether the plaintiff can maintain this action, and whether the allegation that the Crown, through its servants and agents, wrongfully took possession of the Kumanekele discloses a cause of action against the Crown? This is admittedly an action *ex delicto*. The Crown is charged with unlawful entry and possession, through its agents and servants, of plaintiff's land. Mr. Attorney relied, among others, on two judgments in support of the contention that the action is not maintainable. One was *Muttu Aiyar v. The Attorney-General*, which was instituted in the District Court of Kurunegala in June 1887. That action is on all fours with the present one. It was there held by Burnside, C.J., and Dias, J., that an action *ex delicto* does not lie against the Crown for the tortuous acts of its servants in taking possession of land claimed by a subject. I may here remark that this case was decided after the case of *Jayawardene v. The Queen's Advocate* (*4 S. C. C. 77*) was decided, and in which Cayley, C.J., said, 'the practice 'adopted in Ceylon 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 money due *ex contractu* had prevailed for a long series of years and had been 'recognized by the Supreme Court in hundreds of decisions."

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Another case relied on by Mr. Attorney was *Siman Appu v. The Queen's Advocate* (*9 Appeal Cases, 571*), in which the Judicial Committee of the Privy Council recognized that no action *ex delicto* would lie against the Crown.

"The only authority cited by Mr. Rudra in support of his contention that the Crown is liable to be sued in tort was the *dictum* of Bonser, C.J., in *Sanford v. Waring*, but His Lordship there expressly left the question open. The case of *Le Mesurier v. The Attorney-General* (*3 N. L. R. 227*) cited by Mr. Rudra certainly did not go to the length he contended for. The case of *Farnell v. Bowman* (*12 Appeal Cases, 643*) and of *Wemyss v. The Attorney-General* (of the Straits Settlements) (*13 Appeal Cases, 197*) are cases in which it was decided that the Crown could be sued in tort, in the one case under the New South Wales Act 39 Vict. c. 38, and in the other case under the Crown Suits Ordinance of 1876. There is no similar enactment in force in Ceylon.

"I am of opinion that this action cannot be maintained. I answer the first and second issues in the negative, and dismiss this action with costs."

The plaintiff appealed.

Rudra (with *H. Jayawardena and Browne*), for appellant.

—The District Judge is in error in supposing that this is a case *ex delicto*. It is really an action *rei vindicatio*. [LAWRIE J.,—But you claim damages as well as the land itself]. Yes, but the reason of the damages is not set out in full in the plaint. Plaintiff averred only this, "as and for past damages and mesne profits," which he may or may not succeed in proving. As regards the claim to the land, there is no reported case deciding that an action *rei vindicatio* does not lie against the Crown. Several cases relating to actions in tort are to be found, but the present suit relates mainly to title. The Roman-Dutch Law, which is the Common Law of the Island, recognizes the right of the subject to sue the king. *Voet ad Pand, 1, 4, section 6* (*Buchanan's Trans., page 66*). The Supreme Court has also recognized it. *Fernando's Case* (*4 S. C. C. 77*), and *Sanford v. Waring* (*2 N. L. R. 361*), *Mathes v. Barton* (*3 Lorenz. 270*), *Le Mesurier v. Layard* (*3 N. L. R. 227*), *Newman v. Queen's Advocate* (*6 S. C. C.* 29).

Layard, A.-G., with *Bawa*, for respondent.—It is submitted that the property being situated in the Kandyan Province, the law applicable to this case is the English Law or Kandyan Law and not the Roman-Dutch Law; and that even if the Roman-Dutch Law does apply, such an action will not lie under that Law. On the conquest of the Kandyan territory by the British

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in 1815, a Proclamation dated the 2nd March, 1815, was issued declaring the Kandyan Provinces vested in the Sovereign of the British Empire, and at the same time securing to the inhabitants of the Kandyan Provinces their civil rights and immunities according to the laws, institutions and customs in force amongst them; but no reference is made to the Roman-Dutch Law, nor to the extension of the law of the Maritime Provinces of Ceylon to the Kandyan Provinces. It is true that, in arguing the case *Siman Appu v. The Queen's Advocate* (in *9 L. R. A. C. 571*), it was admitted by the counsel for the Crown that the Roman-Dutch Law was the law of Kandy, and the Privy Council states that "the "Kingdom of Kandy was not conquered till 1818, after which the "law of the maritime parts was extended to the interior." But there does not appear to be any authority for that proposition. Subsequent legislation seems to point out that it is erroneous. For in 1852 the Legislature, by section 5 of the Ordinance No. 5 of 1852, enacted that where there was no Kandyan Law or custom having the force of law applicable to the decision of any matter or question arising for adjudication within the Kandyan Provinces, for the decision of which other provision was not therein specially made, the Court should in any such case have recourse to the law as to the like question or matter in force in the Maritime Provinces, which was thereby declared to be the law for the determination of such matter or question. It is clear therefore that up till 1852 the Roman-Dutch Law had not been introduced into the Kandyan Provinces, and consequently up till 1852 the prerogative of the Sovereign that an action could not be brought against him must have been in force. If the law as administered by the Kandyan kings governed the question of prerogative rights, it is obvious from the history of those kings that they would not have tolerated proceedings of any sort against them by their subjects. They were absolute monarchs with the power of life and death and legislation (*Niti Nigandawa, p. 7, & c.*). On the other hand, if Kandyan Law is silent on the point, there is nothing to divest the British Sovereign of his prerogative of immunity from actions. The question then remains as to whether section 5 of Ordinance No. 5 of 1852 did in any way divest the British Sovereign of any of his royal prerogatives. Section 5 seems only to deal with questions arising between subject and subject, where there is no Kandyan Law or custom having the force of law applicable to the matter.

The prerogative rights of the Crown cannot be restricted by an Ordinance without express words. *Attorney-General v. Constable, 4 L. R. Ex. Div. 172*, and *the Postmaster-General* in *re*

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Benham, 10 L. R. Ch. Div. 595. In the Privy Council, in the case *Thebergo v. Landry* (*L. R. 2 A. C. 102*), it was held that in any case in which the prerogative of the Crown has existed, precise words must be shown to take away that prerogative. It has been laid down by the Supreme Court of Ceylon that the Crown is not bound by any general enactment which will deprive the Crown of its prerogative, unless the enactment affects the Crown either by express terms or by necessary implication. *Horsfall v. Queen's Advocate, 5 S. C. C. 101.* There is nothing in the Ordinance No. 5 of 1852 which divests the Sovereign of his prerogative either by express terms or by necessary implication.

Assuming that the Roman-Dutch Law is in force in the Kandyan Provinces, the question is whether under the Roman-Dutch Law an action *rei vindicatio* would lie against the Crown. The question of the right of the subject to sue the Sovereign has been frequently discussed in our local Courts, and it has always been held that the Crown could not be sued *ex delicto. Hendrick v. Queen's Advocate, 4 S. C. C. 76;* and *Newman v. Queen's Advocate, 6 S. C. C. 29,* and other cases. And the Privy Council in *Siman Appu v. The Queen's Advocate* recognizes that there was a distinction in Ceylon between actions in contract and actions in tort, for whilst in the former the Crown could be sued in Ceylon, it could not be in the latter. They pointed out in their judgment in the case *Farnell v. Bowman, 12 L. R. A. C. 643,* that every one was agreed that there existed no practice of suing the Crown in tort in Ceylon, whereas there did exist a practice of suing on contracts in Ceylon.

In this case the plaintiff alleges that the Crown by its officers has wrongfully taken possession of land which belongs to him, and that the Crown has adopted the wrongful acts of its officers. The basis of the action is therefore a wrongful act, and consequently the cause of action appears to be founded on a tort. No action therefore lies against the Crown.

Assuming, however, that the action is one not based on tort, the question is whether an action *rei vindicatio* will lie against the Crown in this Colony. The action *rei vindicatio* is dealt with in *Voet, lib. 6, tit 1,* and in it there is no reference to any such action being maintainable against the Crown, as against the *fiscus,* or imperial treasury. In fact *lib. 6, tit 1, num. 23,* seems to point to no such action lying, because it states that even those persons who have bought the property of a third party from the *fiscus* or from the palace of the Emperor or Empress are secure from such actions, though, by the Constitution of Zeno, an action against the *fiscus* was allowed as a matter of indulgence (not of right),

if brought within four years, to recover the price of the property sold. In the same way, Voet (*lib. XVIII., tit 4, num. 8*) in treating of the sale of an *hereditas* says that the purchaser from the *fiscus* is safe, and cannot be evicted from the premises purchased. The only remedy is by an action against the *fiscus* to recover the amount of money paid to the *fiscus* by the purchaser. This remedy also appears to be an indulgence, and under the Constitution of Zeno had to be brought within four years. If the action *rei vindicatio* will not lie against the purchaser from the Crown or *fiscus*, much more so would it not lie against the Crown as *fiscus*.

In *Sanford v. Waring, 2 N. L. R. 361*, the Chief Justice refers to a passage from *Hollandsche Consultatien* (*bk. IV., p. 123*), where the Fiscal of North Holland on being sued excepted to the plaintiff's right to sue, and the Court accordingly overruled the plea and called on the defendant to answer. It does not appear what the nature of the action brought against the Fiscal on that occasion was. Admittedly, certain actions lay against the *fiscus*, and it does not at all follow that the passage referred to covers an action *ex delicto* or one *rei vindicatio*. In fact, the passages cited earlier seems to disclose that no action *rei vindicatio* would lie against the *fiscus*.

The reasoning of the Privy Council in the case of *Siman Appu v. The Queen's Advocate* appears to be based on the fact that an extensive practice of suing the Crown in contract had existed in Ceylon, and was recognized by the Legislature in enacting the 117th section of the Ordinance No. 11 of 1868. The language of that section, the Privy Council held, did not confer a new right or establish a new kind of suit, but only regulated rights and proceedings already known and existing. The question narrows itself to the issue as to whether there has been a recognized practice in Ceylon of suing the Crown in actions *rei vindicatio*. Chief Justice Cayley in *Fernando's case*, reported in *4 S. C. C. p. 77*. said that the practice of suing the Crown in real actions for the recovery of specific property had prevailed in Ceylon for a long series of years, and had been recognized by the Supreme Court in hundreds of decisions. The question at issue in that case referred to the right to sue the Crown for the recovery of moneys due *ex contractu*, and accordingly the words dealing with actions *rei vindicatio* were *obiter dicta*. It is submitted that no decisions of the Supreme Court have ever recognized the right of the subject to sue the Crown in real actions for the recovery of specific property, and no such actions have been brought. On the contrary, it has been held so far back as 1884 that where the

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plaintiff sued the Queen's Advocate for damages arising out of trespass to land and prayed for a declaration of title as against the Crown, that no such action would lie. *Appuhami v. Queen's Advocate, 6 S. C. C. p. 72*, and again in December, 1887, when an action was brought against the Crown to have certain land declared the property of the plaintiff, the Supreme Court consisting of Chief Justice Burnside and Sir Harry Dias affirmed the decision of the lower Court, and held that the action, being not one *ex contractu* but based on an unlawful entry by the Crown's servants, would not lie. *Muttu Aiyar v. Attorney-General*, D. C., Kurunegala, 21,762 (unreported). [BONSER, C.J.—Here, we have two actions in one plaint: one a *rei vindicatio* and the other for damages.] There was no such contention in the Court below. An action *rei vindicatio* is based on a wrong done, and the present plaint alleges wrongful possession on the part of the Crown.

Rudra waived the claim for damages and expressed his willingness to confine his claim to a declaration of title merely and to amend his plaint accordingly.

BONSER, C.J.—

In this action the plaintiff alleges that the Crown by its officers has wrongfully taken possession of land which belongs to him; that the Crown has adopted the acts of its officers, and is in possession of the land, and refuses to give it up to him. He claims a declaration of title as to the land and also claims the fruit thereof, and makes a further claim for damages for the wrongful act of dispossession.

He sues the Attorney-General as representing the Crown in this Island. The defendant took the objection that no action of this kind will lie against the Crown or against him as representing the Crown. Well, if that be so, it is a very alarming state of things, and not very creditable to the Government of this Island. For the purposes of the argument, the allegations in the plaint must be taken to be true, and we are in effect asked to believe that the Crown can dispossess any citizen in this Island of his property, and that there is no remedy open to him. I for my part, am not inclined to believe that the plaintiff is in such a state as is attempted to make out. I will not repeat the reasons which led me to think that things are not so bad as suggested. They will be found set out at length in the judgment I delivered in the case of *Sanford v. Waring* (*2 N. L. R. 361*).

However, the plaintiff by his counsel has waived all claim to any damages arising from any alleged tort on the part of the Crown and

its officers, and has stated in open Court that he is willing to confine his claim to a mere declaration of title and to the fruits of the land while in the possession of the Crown, so that it is unnecessary for us to determine the question whether the law in this Island is that no action can be brought against the Crown for a tort.

The judge of the Court below dismissed the plaintiff's action on the ground that he had no claim whatever against the Crown, following a judgment of this Court delivered in 1887, in the case of *Muttu Aiyar v. The Attorney-General*, which was tried in the District Court of Kurunegala and came up in appeal before the late Chief Justice Burnside and Mr. Justice Dias. Mr. Justice Dias delivered the judgment of this Court, which was acquiesced in by the Chief Justice. That case has never been reported, and I think it would have been desirable if it had been left in the obscurity which it has so long enjoyed. The grounds given by Mr. Justice Dias are not, I may say with all respect for that eminent judge, such as are consistent with the reasoning of the Privy Council in the case shortly before decided, in 1884, with regard to actions against the Crown in the matter of contracts. I refer to the case of *Siman Appu v. The Queen's Advocate*. It is quite clear to my mind that the learned judge had not before him when he wrote his judgment the *ratio decidendi* of the Privy Council in that case.

But as regards the question of an action by a subject to recover possession of land in the possession of the Crown, it seems to me that the reasoning of the Privy Council in the case of Siman Appu distinctly applies and governs this case, and I prefer to adopt the view of the late Chief Justice Cayley, who, having been himself Queen's Advocate, stated that " 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 " that 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." It was said in argument that there is no foundation for that statement of Chief Justice Cayley, but he had at the time, sitting at his side, Justices Clarence and Dias, who concurred with him, and Chief Justice Cayley by using " we " spoke in their names as well as in his own; and I cannot bring myself to believe that so learned and eminent a judge as Sir Richard Cayley would have committed himself to a statement of facts, peculiarly within his knowledge, if it was not strictly true.

The proper order to make in this case is that the case be remitted to the District Court to make the necessary amendments in the pleadings arising out of the undertaking made in open

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Court by plaintiff's counsel, withdrawing all claims in respect of tort and confining his claim to a simple one of title.

In conclusion, I would add that, if the law as to the rights of a subject to sue the Crown in actions of tort is doubtful—and I must admit that it is, since my brother Lawrie is strongly of opinion that the Crown is not liable to be sued in such actions—then it is high time that the Government should take steps to bring the legislation of this Island into line with the legislation of other Colonies, such as New Zealand and the Straits Settlements, and in this connection I would quote the words of the judgments of the Privy Council in the case of *Farnell v. Bowman* (*12 Appeal Cases, 649*), where the Board said: "Justice requires "that the subjects should have relief against the Colonial Governments for torts as well as in cases of breaches of contract or the "detention of property wrongfully seized into the hands of the "Crown", and I venture to say with all respect that I entirely concur in that expression of opinion.

LAWRIE, J.—

To me it seems settled law that the Crown is not liable to be sued by a subject in actions *ex delicto*. In so far as this is an action claiming substantial damages for an alleged wrongful and unlawful act by the Crown through its agents and servants and for wrongful and forcible possession by the Crown, it cannot, in my opinion, be maintained. Plaintiff's counsel was willing that his plaint should be amended. I propose to order the deletion of the words alleging *delict*, "wrongfully and unlawfully" in the second line and "the wrongful and forcible" in the sixth line, and "to the loss and damage of plaintiff of Rs. 20,000" at the end of the paragraph, and the third prayer. The action will then correspond to a petition of rights addressed to the king, a temporate statement, praying the Court for declaration of an asserted title to land, of which the Crown is in possession. I do not call that an action *rei vindicatio*. I am not sure that a subject has the right to sue the Crown, as he could a fellow-subject in an action *rei vindicatio*. I call the action one for declaration of title, which (I take it) is not the same as an action *rei vindicatio*. It is said that there have been hundreds of cases in our Courts for declaration of title, in which the Crown was made defendant; it is said that there has been only one (D. C., Kurunegala, 21,762). I am not very concerned whether there have been many or any or none. There is no law denying the right of a subject in Ceylon to bring an action for declaration of title against the Crown. I think it is recognized in the

Ordinance No. 12 of 1840. I think the analogy of the petition of rights in England supports it. I think that judgments of the Privy Council show it is just that such an action should be allowed.

These amendments having been made, I would set aside the decree dismissing the action, and I would remit the case to the District Judge to proceed according to law. No costs of this appeal.