Present: Lascelles C.J. and Wood Renton J.

1913.

ABARAN APPU *v.* BANDA.

327—D. C. Kandy, 21,461.

Civil Procedure Code, s. 461—Action against arachchi for malicious prosecution—No notice of action given—Public officer—"Act purporting to be done by him in his official capacity."

A public officer who does an act maliciously in the pretended exercise of his authority cannot be said to be "purporting to act" as a public officer, and is therefore not entitled to notice of action.

Where the defendant, an arachchi, maliciously and in order to satisfy a private grudge, brought a false charge against the plaintiff,—

Held, that plaintiff was entitled to sue the defendant for damages without notice of action in terms of section 461 of the Civil Procedure Code.

THE facts appear from the judgment.

H. A. Jayewardene, for the defendant, appellant.—The plaintiff should have give notice of action to defendant before he brought this action. Civil Procedure Code, section 461. "Purporting" in section 461 means "pretending." It does not matter whether the defendant acted actually in his official capacity. If he pretended to act in his official capacity, he cannot be sued without notice. The word "purporting" has a wider meaning than "in pursuance of"; it means "in the ostensible exercise of."

The plaintiff ought to have averred in the plaint, and proved, circumstances which would excuse notice. It is not open to the plaintiff to say that he has given due notice, and then say, if notice was found not to have been given, that notice was not necessary. It is clear from the plaint that the plaintiff himself regarded the act of the defendant as an act in his capacity of a public servant. It is not open to him now to say that defendant did not purport to act as a public officer.

Allan Drieberg, for the plaintiff, appellant.—The words "purporting to act" has the same meaning as "acting in pursuance of." The test whether notice is required or not is whether the defendant honestly intended to enforce the law. *Appusingo Appu v. Don Aron*,[1] *Hermann v. Seneschal*,[2] *Roberts v. Crilean*.[3] The real charge against the defendant is that he fabricated evidence against the plaintiff; such an act cannot be said to fall within the meaning of section 461.

H. A. Jayewardene, in reply.

Cur. adv. vult.

[1] (1906) 9 *N. L. R.* 138.

[2] (1862) 32 *L. J. C. P.* 43.

[3] 33 *L. J. Exch.* 65.

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January 20, 1913. LASCELLES C.J.—

This is an appeal against a judgment of the District Court of Kandy awarding the plaintiff damages for malicious prosecution by the defendant. The plaintiff's case is that the defendant, who is the arachchi of Yatawara, maliciously and in order to satisfy a private grudge, brought a false charge of stealing a calf against the defendant.

On the evidence I find it impossible to doubt that the charge, though preferred in the name of the korala, was in fact made by the defendant, and that it was made by him maliciously and falsely . . . . . .

His Lordship discussed the evidence and proceeded:—

There are several other circumstances which are mentioned in the judgment of the learned District Judge which go to show that the charge was a false one maliciously brought by the defendant. I am quite satisfied that the charge was false to the knowledge of the defendant. The question whether the plaintiff is debarred from bringing this action by the fact that he has not served notice on the defendant in accordance with section 461 of the Civil Procedure Code is fully discussed in the judgment of my brother Wood Renton, which I have had the advantage of reading.

I have come to the conclusion that the learned District Judge was right in following the judgment in *Appusingo Appu v. Don Aron*,[1] the effect of which is that a public officer who does an act maliciously in the pretended exercise of his authority cannot be said to be " purporting to act " as a public officer, and is therefore not entitled to notice of action.

I have referred to the Indian decisions under the corresponding section (424) of the old Indian Code as to the construction of the words " an act purporting to be done by him in his official capacity," but without finding any decisive guide. The decisions are conflicting (*vide Shahunshah Begum v. Fergusson* [2] and *Jogendra Nath Roy Bahadur v. Price* [3]).

I think that the point must be decided by the light of local legislation. As regards two important classes of public officers, namely, officers of the regular police and officers of the Customs, special provision is made for their protection when acting in the course of their duties. An officer of the regular police when sued " for any act done by him in such capacity " may, under section 78 of the Police Ordinance, 1875, plead that the act was done under a warrant, and under section 122 of Ordinance No. 17 of 1869 no summons can be served on any officer of Customs "for anything done in the exercise of his office " until fifteen days after notice in writing has been delivered to him. It is clear on the authority of *Perera v. Hansard*,[4]

[1] *(1906) 9 N. L. R. 138.*
[2] *I. L. R. 7 Cal. 499.*
[3] *I. L. R. 21 Cal. 586.*
[4] *(1886) 8 S. C. C. 1.*

and of a well-known line of English cases, of which I will only cite one of the latest, namely, *Pearson v. Dublin Corporation* [1] (decided under the Police Authorities Protection Act, 1893), that the protection given by sections expressed in these or in similar terms does not extend to acts maliciously done by the public officer under cloak of his authority. Then the question arises whether section 461 of the Civil Procedure Code, which superseded section 122 of the Customs Ordinance (*Le Mesurier v. Murray* [2]), enlarged the protection already given by section 122 to officers of the Customs and extended it to malicious acts. I find it impossible to believe that by using the somewhat ambiguous expression, " purporting to be done in his official capacity," the Legislature intended to introduce such a change. I do not think that any such distinction can be drawn between this expression and expressions such as " anything done by the officer in the exercise of his office."

In both cases the protection is intended to be given where the defendant has acted in good faith and with an honest intention of putting the law into force.

I, therefore, hold that the plaintiff's action is not barred by his failure to give the notice prescribed by section 461 of the Civil Procedure Code. For these reasons I would dismiss the appeal with costs.

WOOD RENTON J.—

The evidence in this case is such as would have made it impossible for us in any event to hold that the strong finding of the learned District Judge in favour of the respondent on the facts was wrong. But speaking for myself, I desire to go further and to say that, in my opinion, the decision of the learned District Judge on the merits was right.

The only question that remains to be considered is whether the respondent must fail because he did not give the defendant-appellant notice of the action in terms of section 461 of the Civil Procedure Code. Two facts are clear and admitted. The appellant did not receive notice of the action, and he is a " public officer " within the meaning of the section just referred to. The learned District Judge has, however, held on the evidence that the appellant, in the charge which he brought against the respondent, was acting maliciously throughout, and in fact that the whole case was to his knowledge a fabrication. In that state of the facts the learned District Judge says that the appellant, in the prosecution of the charge in question, was not " purporting " to act as a " public officer " within the meaning of section 461 of the Civil Procedure Code, and was, therefore, not entitled to notice of action. In support of that view he relies on a decision of my own in the case of *Appusingo*

[1] *(1907) A. C. 351.*

[2] *(1898) 3 N. L. R. 113.*

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Appu v. Don Aron,[1] to the effect that a public officer who does an illegal act *mala fide* in the pretended exercise of statutory powers cannot be said to be " purporting " to act as such, and is therefore not entitled to notice of action. There is, so far as I am aware, no express decision on the meaning of the term " purporting " in enactments of this character. In *Appusingo Appu v. Don Aron* [1] I construed it in the sense in which the terms " in pursuance of " were interpreted in England in the case of *Hermann v. Seneschal.*[2] I am still of opinion that the interpretation which I put on the word " purporting " in the case just mentioned is correct. Section 78 of Ordinance No. 16 of 1865, which provides for notice of action being given to members of the regular police in respect of " anything done or intended to be done " by them under the provisions of that Ordinance, was construed in the same sense by this Court in *Perera v. Hansard*,[3] and the decision in that case was fortified by a reference to a long series of English authorities in which the same principle was laid down. *Perera v. Hansard* [3] was decided prior to the enactment of the present Civil Procedure Code, and the appellant's counsel contended that section 461 of that Code must be deemed to have repealed section 78 of Ordinance No. 16 of 1865 by implication. In the case of *Le Mesurier v. Murray*,[4] it was held by Lawrie A.C.J. that the provisions of section 122 of the Customs Ordinance, 1869, (No. 17 of 1869), as to notice of intended action against a Customs officer, were superseded by those of section 461 of the Civil Procedure Code. It is clear law that an enactment in one statute should not be held to have been repealed by implication by an enactment in another, unless the two sets of provisions cannot reasonably be construed so as to stand together. It is quite possible to interpret the term " purporting " in section 461 in a sense consistent with the provisions of section 78 of Ordinance No. 16 of 1865, and I cannot bring myself to think that if the Legislature had intended to set aside the law embodied in the former enactment by the provisions of section 461 of the Civil Procedure Code it would not have used unambiguous language for that purpose. It was argued that the question of the good faith of a public officer could not form an element to be taken account of in considering whether or not he had a right to notice of action because the question was incapable of being determined before the action had been tried. No difficulty of this kind, however, has arisen in England in consequence of the construction put by the Courts there on such expressions as " in pursuance of " or " anything done or intended to be done " under the provisions of a statute, and I see no reason to anticipate that any such difficulty will arise under our procedure in this Colony.

I would dismiss the appeal with costs.

Affirmed.

[1] *(1906) 9 N. L. R. 138.*
[2] *(1862) 32 L. J. C. P. 43.*
[3] *(1886) 8 S. C. C. 1.*
[4] *(1898) 3 N. L. R. 118.*