1955 *Present :* Gratiaen, J., and Swan, J.

THE ATTORNEY-GENERAL, Appellant, *and* G. N. RUSSEL, Respondent

S. C. 24 (Inty.)—D. C. Colombo, 32,425M

Delict—Action against public officer—Substitution of Attorney General as party defendant—Effect—Civil Procedure Code, ss. 462, 463.

If in an action in tort against a public officer the Attorney-General is substituted under section 463 of the Civil Procedure Code in the place of the party defendant, the same issues arise as would have arisen in the action against the public officer himself; if the plaintiff's cause of action against the public officer is established the decree is entered against the Attorney-General and will be satisfied in the same way as any other decree awarding relief against the Crown.

APPEAL from an order of the District Court, Colombo.

V. Tennekoon, Crown Counsel, for the petitioner-appellant.

S. J. Kadirgamar, for the plaintiff-respondent.

Cur. adv. vult.

November 11, 1955. GRATIAEN, J.—

This is an appeal by the Attorney-General against an order refusing his application under section 463 of the Civil Procedure Code (as amended by section 5 of the amending Act No. 48 of 1954) to be substituted as a party defendant in an action between private parties.

The plaintiff had sued Mr. R. G. Senanayake of Gregory's Road, Colombo, on 29th June 1954 to recover Rs. 6,600 as damages. The action is founded in tort, the allegation being that, shortly prior to 16th March 1954, Mr. Senanayake had "intentionally or knowingly and without legal justification" induced or procured the Galle Face Land and Building Company Ltd. to commit a breach of its subsisting agreement with the plaintiff for the tenancy of a residential apartment in Galle Face Court. Mr. Senanayake entered an appearance in the action on 16th July 1954 and was directed to file his answer to the plaint on 20th August 1954, on which date he applied for, and obtained, an extension of time until 3rd September 1954. A further indulgence was granted him until 8th October 1954, but on the previous day the Attorney-General made an application under section 463 (as amended) to be substituted as a party defendant on the ground that he (the Attorney-General) had "undertaken the defence of the said R. G. Senanayake". The application was supported by Mr. Senanayake's affidavit to the effect that he had held the office of Minister of Commerce, Trade and Fisheries at all times material to the cause of action set out in the plaint, and had continued to do so until 10th July 1954.

Section 463 of the Civil Procedure Code, in its original form, provided as follows :—

"463. If *the Government* undertake the defence of an action against *a public officer*, the Attorney-General shall apply to the Court, and upon such application the Court shall substitute the name of the Attorney-General as a party defendant in the action."

By virtue of section 5 of the amending Act No. 48 of 1954, which passed into law pending the present action, section 463 now reads :

> " If *the Attorney-General* undertakes the defence of an action against a *Minister, Parliamentary Secretary or public officer,* the Attorney-General shall apply to the Court, and upon such application the Court shall substitute the name of the Attorney-General as a party defendant in the action."

The Attorney-General's application seems to have been viewed by the plaintiff with considerable apprehension. The action having been filed on the basis that Mr. Senanayake had personally committed an actionable wrong, it was feared that his sudden disappearance through "the trap-door", so to speak, of section 463 might leave the plaintiff (if he established his cause of action) without a judgment-debtor. Moreover, so Mr. Kadirgamar explained, doubts were entertained as to whether the substitution of the Attorney-General as defendant might not completely alter the character of the litigation so as to divest the plaintiff of his remedy against the only person who could be held directly liable under the law of this country for the tort complained of. Let me summarise the suggested consequences : the Crown enjoys complete immunity in Ceylon from liability for torts committed by one of its executive officers (be he a Cabinet Minister or only a subordinate servant of the Crown). Was it not therefore open to the Attorney-General, upon his substitution, to plead that no judgment could be entered against him (as legal representative of the Crown) in respect of Mr. Senanayake's personal tort ? In all these circumstances, the plaintiff expressed a strong preference for proceeding against Mr. Senanayake alone.

Having explained these apprehensions to the learned District Judge, Mr. Kadirgamar raised a number of objections to the Attorney-General's application, and relied in particular on the argument that section 463, having been amended only after the action commenced, could not operate retrospectively to deprive the plaintiff of rights which had previously accrued to him. This latter objection was upheld by the learned Judge.

During the argument in appeal, I pointed out that, upon a proper construction of section 463 (in its original as well as its amended form), there was no substantial reason for fearing the consequences which the plaintiff has in contemplation. The section, when invoked, can never operate to the detriment of a plaintiff who establishes that he has suffered injury at the hands of a public officer. It merely empowers the Attorney-General, in cases which seem to him appropriate, to indemnify a plaintiff against (for instance) actionable wrongs committed by public officers or servants. In reaching this conclusion, I am fortified by the statement made to us by learned Crown Counsel that no other interpretation is suggested on behalf of the Attorney-General. It is indeed a matter for regret that this assurance was not also given in the Court below.

The true scope of section 463 must be examined in the background of the Crown's continued (but much deplored) immunity in this country from liability for the torts of its public officers. This immunity is precisely the

same as it was in England until the Crown Proceedings Act of 1947 passed into law. In Ceylon, therefore, what Lord Atkin (then Atkin L. J.) said in *Mackenzie v. Air Council*[1] is still correct :

> " The Crown itself can do no wrong, and the public revenue cannot be made liable without the Crown's consent to remedy wrongs committed by servants of the Crown. "

Only the individual public officer who commits or authorises the commission of a tort is answerable in law to the victim of his wrongful act ; and it is no defence for him to say in such a situation that he had acted in obedience to the orders of the executive government or of anyone else. " Since the King can do no wrong, he can authorise no wrong. "

In England, before the Act of 1947 was passed, government departments frequently resorted to a beneficial device for making the public revenue available for the settlement of claims for tort in situations where a moral obligation was considered to be imposed upon the Crown. The Treasury Solicitor would, on request, nominate a party against whom the plaintiff could institute proceedings. The Crown stood behind the "nominal" defendant in the litigation, and, if the plaintiff succeeded, the Crown made an *ex gratia* payment of the sum awarded as damages. But the Courts eventually refused to recognise this colourable device in *Adams v. Naylor*[2] and *Royster v. Cavey*[3]. Hence the Crown Proceedings Act, 1947.

But in Ceylon, the Code of Civil Procedure expressly provides machinery by which the Crown may do justice in similar situations without resorting to the subterfuges which had been found necessary to achieve that end under the earlier English practice. Section 463 in its original form contemplated a case in which " the Government " undertakes the defence of an action against a public officer. Once that has been done, the Attorney-General " shall " (the word is imperative) apply for substitution as a defendant, and the Court " shall " (the word is once again imperative) allow the application. By this means, effect was given to " the Crown's consent to remedy wrongs " committed by a public officer. In any action that is continued after the Attorney-General's substitution as defendant, the same issues arise as would have arisen in the action against the public officer himself ; if the plaintiff's cause of action against the public officer is established, a decree is entered against the Attorney-General. As any decree against the Attorney-General in his representative capacity is in truth a decree against the Crown, the judgment-debt is paid from public funds, although, procedurally, section 462 prohibits the issue of a writ of execution against the Attorney-General (either as an original or a substituted defendant).

It will thus be seen that the Government's decision to " undertake the defence " connotes a great deal more than a mere decision to provide legal representation for the public officer concerned. It involves the acceptance of responsibility by the Crown for the satisfaction of the decree which might otherwise have been awarded in favour of the plaintiff against the public officer individually.

[1] *(1927) 2 K. B. 517 at 531.* [2] *(1946) A. C. 543.*
[3] *(1947) K. B. 207.*

But was the learned District Judge correct in deciding that the substitution and addition of certain words which now appear in section 463 (as amended after this action commenced) have to some extent altered or enlarged the scope of its machinery ? I do not think so. The section now applies if "the Attorney-General" undertakes the defence in the action against the public officer. This does not mean that the decision is the personal decision of "Mr. So-and-so who happens to be the Attorney General of Ceylon". On the contrary, it is made on behalf of and in the name of the Crown acting through its traditional and constitutional representative in any litigation in which the Crown is interested in our Courts. Before the amendment, the term "Government of Ceylon" was equivalent in this context to "the Crown": *Le Mesurier v. Layard*[1], and the later substitution of the words "Attorney-General" introduces a distinction without a difference.

Let us now consider the effect of the express inclusion of Ministers and Parliamentary Secretaries in the class of persons whose defences may be "undertaken" by the Attorney-General. I am perfectly satisfied that these words were also added out of an abundance of caution and in order to remove doubts as to what was always obvious. Ministers and Parliamentary Secretaries hold office under the Crown. *Podi Singho v. Goonesinghe*[2]. They are "public officers" within the meaning of section 463 in its original form, and the language of the amending Act serves only to emphasise their inclusion.

For these reasons, the amendment of section 463 after the present action commenced does not offend the *prima facie* rule against retrospective legislation; it has in no way enlarged the ambit of the Crown's right of intervention in a special class of private litigation. The Court had therefore no option but to allow the Attorney-General to be substituted for Mr. Senanayake as a party defendant. Indeed, Mr. Kadirgamar made it clear to us that, if the Crown's acknowledgment of the correctness of this interpretation of section 463 has been communicated to the plaintiff in the lower Court, the application would not have been resisted. The true position is now made clear, and I repeat it only to avoid the possibility of any misunderstanding as to the legal affect of the order which I propose. The defence which the Attorney-General has undertaken is in truth the *defence of Mr. Senanayake.* The real issues arising for adjudication will be whether Mr. Senanayake was personally liable in damages upon the cause of action pleaded in the plaint. If those issues be answered in favour of the plaintiff, the decree will be entered against the Attorney-General and will be satisfied in the same way as any other decree awarding relief against the Crown. Upon this understanding, I would allow the appeal, and direct that the Attorney-General be substituted as defendant in the place of the original defendant. In all the circumstances of the case, the costs of this appeal and of the argument in the Court below should be costs in the case.

SWAN, J.—I agree.

Appeal allowed.

[1] *(1898) 3 N. L. R. 227.*

[2] *(1948) 49 N. L. R. 344.*