1944 *Present:* **Moseley S.P.J. and Wijeyewardene J.**

SANGARAPILLAI, Appellant, *and* PRASAD, COLLECTOR OF CUSTOMS, Respondent.

254—D. C. Jaffna, 315.

Customs Ordinance (Cap. 185) section 146—Seizure of goods by Customs Officer—Release by Collector of Customs on security—Notice of claim by owner—Proper authority to be sued—Liability of Collector.

Where an action is instituted under section 146 of the Customs Ordinance for declaration of title to goods, which were seized by a Customs officer and which were released by the Collector of Customs on security furnished by the owner, who had given notice of claim under the section,—

Held, that the Attorney-General was the proper party to be sued in the action.

Semble, the statutory remedy provided by the section is the only remedy available to a subject whose goods have been seized as forefeited under the Ordinance.

A Head of Department is not liable for the tort of a subordinate, unless the act complained of was substantially the act of the Head himself.

THE plaintiff instituted this action under section 146 of the Customs Ordinance against M. Prasad, Collector of Customs, Northern Province, in respect of certain goods seized under the provisions of the Customs Ordinance. The defendant pleaded, *inter alia*, that the action was not maintainable against him and the learned District Judge upheld the plea and entered decree dismissing the plaintiff's action with costs. Plaintiff appealed.

H. V. Perera, K.C. (with him *J. E. M. Obeyesekere* and *T. Somasunderam*), for the plaintiff, appellant.—This is an action for the recovery of certain goods belonging to the plaintiff which were originally seized by one Mr. Tisseverasinghe on behalf of the defendant and which are now being wrongfully detained by the defendant. The defendant is the Collector of Customs, Northern Province, and Mr. Tisseverasinghe is an Assistant Collector. The trial Judge has dismissed the whole case on two preliminary issues of law holding—(1) that we have sued a person

acting in his official capacity and, therefore, we should have sued the Crown, and (2) that the defendant, as the Head of a Department, is not liable for any tortious act of a subordinate. He has misunderstood the legal position. The important point is that we want our goods back, and the only person whom we should sue is the person who is actually in possession of them. The defendant is being sued not in his official capacity, but for a tort committed by him in detaining the goods. This is an action, not for damages, but for the restoration of goods. We have reserved our claim for damages as against Mr. Tisseverasinghe for a later action.

The defendant's position is not different from that of any other wrong-doer. The Head of an executive Department can be sued provided he has participated in or ratified and adopted the act complained of *Raleigh v. Goschen*[1] and *Rogers v. Rajendro Dutt et al*[2] are in point. *Singer Sewing Machine Co. v. Bowes*[3], *Muttupillai v. Bowes*[4], *Sanford v. Warring*[5] and *Bainbridge v. The Postmaster-General*[6] to which the trial Judge refers have been misapplied in this case.

[WIJEYEWARDENE J.—Is not this action one for mere declaration of title as against the Crown, the proper party to be sued being the Attorney-General? See *Le Mesurier v. Attorney-General*[7] and the argument and judgment in *The Colombo Electric Tramways Co. v. The Attorney-General*[8].]

Even if it be regarded as such and not as an action for the recovery of goods the defendant can be sued. No special remedy such as by way of petition of right is available in Ceylon against the Crown. The present action is, therefore, maintainable. The whole case depends on a proper interpretation of *Raleigh v. Goschen* (*supra*). The civil irresponsibility of the Crown for tortious acts would be unjust if its agents were not personally responsible for them; in such cases the Government is morally bound to indemnify its agent—*Rogers v. Rajendro Dutt et al* (*supra*).

R. R. Crosette-Thambiah, Acting Solicitor-General (with him *T. S. Fernando, C.C.*), for defendant, respondent.—Section 146 of the Customs Ordinance (Cap. 185) provides the clue for the determination of this case. It is not in dispute that the seizure was made by the Assistant Collector of Customs. The scheme of the Customs Ordinance is in this wise: forfeiture by operation of law simultaneously with the act of unlawful importation, followed by manual seizure, followed by " condemnation " of the goods (a term well known in Prize Law) *i.e.*, the goods become the property of the Crown unless the claimant gives the requisite notice and furnishes the requisite security. Thereafter—if the requisite notice and security are given—section 146 operates to give the claimant a statutory right of action and also prescribes the form of the action. This is sometimes known as a statutory contract or a parliamentary contract. It is probably this that Walter Pereira J. had in mind when he described this type of action as one " *as* on a breach of contract "—*Muttupillai v. Bowes* (*ubi sup.*). Counsel cited sections 104, 105, 106, 132, 123, 146, and 154 of the Customs Ordinance. Once the plaintiff moved under, and

[1] *L. R. (1898) 1 Ch. 73.*
[2] *(1860) 13 Moore's Rep. 209.*
[3] *(1917) 4 C. W. R. 78.*
[4] *(1914) 17 N. L. R. 453.*
[5] *(1896) 2 N. L. R. 361.*
[6] *L. R. (1906) 1 K. B. 178.*
[7] *(1901) 5 N. L. R. 65.*
[8] *(1913) 16 N. L. R. 161.*

invoked the aid of, section 146, it was obligatory on the defendant to act as he did. Malice is not alleged in the plaint and, in fact, was expressly disclaimed. In the circumstances, this plaint does not disclose a cause of action against this defendant. If the security demanded by the defendant was excessive, the plaintiff was not without legal remedy.

Raleigh v. Goschen (ubi sup.) is authority for the proposition that the head of a Government Department is not liable for the independent tortious act of his subordinate. The *bona fide* performance of a statutory duty cannot constitute a legal wrong. The defendant having done no more than what the law requires of him, it cannot be said that he adopted, or ratified the act of the Assistant Collector. Further, in a claim for the recovery of goods in the possession of the Crown the remedy in England is by way of petition of right. It has been held that where in England the remedy is by way of petition of right, the corresponding remedy in Ceylon is by way of a suit against the Attorney-General—*Buckland v. The King; The Colombo Electric Tramways Co. v. The Attorney-General; Saibo v. The Attorney-General.* The present plaint discloses no cause of action against the present defendant.

J. E. M. Obeyesekere in reply.—The seizure in this case was made under section 132 of the Customs Ordinance. That section speaks of goods " liable to forfeiture ". The provisions of section 146 are, therefore, not applicable in the present case.

Even if we may have sued the Attorney-General on the basis of a *quasi*-contract we have chosen the alternative remedy of an action in tort the cause of action being the unlawful detention of property. The action has been prematurely dismissed; the remaining issues should have been tried.

Cur. adv. vult.

July 26, 1944. WIJEYEWARDENE J.—

The plaintiff instituted this action against " M. Prasad, Collector of Customs, Northern Province, " in respect of certain goods seized under the provisions of the Customs Ordinance. The defendant pleaded, *inter alia*, that the action was not maintainable against him on the facts set out in the plaint, and the District Judge held in his favour on that plea and entered decree dismissing the plantiff's action with costs. The plaintiff has appealed against that decree.

The plaintiff sets out in paragraph 2 of the plain that " the defendant is the Collector of Customs for the Northern Province ", and then proceeds to make certain material allegations which may be summarised as follows:—

Para 3—That Mr. E. B. Tisseverasinghe acting " for and on behalf of the defendant wrongfully and or without any legal justification " seized 62 bundles of beedies and a motor lorry in which the beedies were taken.

Para 4—That customs duty had been duly paid.

Para 5—That the plaintiff gave a written notice " under section 146 of the Customs Ordinance " of his intention to institute an action in respect of the seized goods and offered to give security as required by that section.

Para 6—That the lorry was released on the plaintiff entering into a bond for a sum of Rs. 5,000.

Para 7—That the defendant offered to release the beedies on receipt of the following security:—

(*a*) security in respect of beedies—Rs. 7,000;

(*b*) security in respect of penalties which may be imposed under section 127 of the Customs Ordinance—Rs. 21,000;

(*c*) security in respect of costs of action—Rs. 2,000.

Para 8—" The plaintiff pointed out that the item of security referred to at (*b*) of the preceding paragraph cannot be demanded as a condition precedent to the release of the beedies under section 146 of the Customs Ordinance. The defendant has however unlawfully refused to release the said 62 bundles of beedies unless the said item of security is also furnished. "

The reliefs asked for in the plaint are—

(i) that the beedies and lorry be declared not liable to seizure and that they are his property;

(ii) that the defendant be ordered to return unconditionally the beedies and " in the event of failure to do so that he be condemned to pay their value, namely, Rs. 7,000 ";

(iii) that the defendant be ordered to release the security given in respect of the lorry.

Clearly the plaintiff cannot obtain the relief (iii) in this action. The bond executed by him is in favour of His Majesty under section 105 of the Customs Ordinance, and the proper party to be sued in respect of that relief is the Attorney-General. (Civil Procedure Code 456.)

It is necessary to consider in greater detail the facts on which the plaintiff asks for reliefs (i) and (ii).

Even if Mr. Tisseverasinghe, who was an Assistant Collector of Customs, Northern Province, committed a tort in seizing the beedies and lorry, the defendant is not liable, merely because he happened to be the Collector of Customs, Northern Province. No Head of a Department is liable for the tort of a subordinate unless the act complained of was substantially the act of the Head himself—*Raleigh v. Goschen*[1]. No cause of action has, therefore, accrued to the plaintiff as against the defendant on the facts alleged in paragraph 3 of the plaint. Paragraph 4 of the plaint states that the duty has been paid, and, of course, the burden of proving that fact is on the plaintiff (section 144 of the Customs Ordinance). Paragraphs 5 and 6 refer to steps taken by him under section 146 of the Ordinance. Those paragraphs 4, 5 and 6 do not set out facts constituting a cause of action against the defendant. We then come to paragraphs 7 and 8 which show what the cause of action is. The cause of action is the defendant's refusal to release the beedies on receipt of security (*a*) and (*c*) mentioned in paragraph 7 and his insisting on the defendant giving security (*b*) in addition. It may be noted here that no damages are claimed against the defendant for the alleged wrongful detention and the only claim is for a declaration of title to the goods, and an order for the recovery of the goods or their value.

[1] *L. R. (1898) 1 Ch. 73.*

It is convenient at this stage to deal with an argument of Mr. Obeyesekera in reply to the Acting Solicitor-General. He argued that section 146 which refers to goods seized as " forfeited " did not apply to the seizure in question, as the seizure was made under section 132 which refers to goods " liable to forfeiture ". It is not necessary to consider the nature of the distinction sought to be drawn by Mr. Obeyesekere between the two classes of goods, as his argument is based on the erroneous assumption that there is some section in the Ordinance which states that goods for which Customs Duty is not paid are " liable to forfeiture ". There is no such section in the Ordinance. There is, in fact, no section which states that goods shall be seized, if no Customs Duty is paid. The Ordinance sets out in a number of sections (*see* sections 29, 35, 36, 39, 40, 49, 66, 67, 69, 95) various matters which have to be done from the time that the ship carrying the goods arrives within a league of the port until the final delivery of the goods to the importer. The Ordinance further provides that the goods shall be forfeited for non-observance of any of these conditions. Then section 106 provides that " if any goods, packages, or parcels shall be landed, taken, or passed out of any ship, or out of any warehouse, not having been duly entered, the same shall be forfeited " while section 123 provides that the " means of conveyance . . . . made use of in any way in the . . . . removal of any goods liable to forfeiture under this Ordinance shall be forfeited ". A non-payment of Customs Duty must necessarily be preceded or accompanied by the non-observance of some of these conditions. It is by declaring that the goods shall be forfeited for non-observance of the conditions laid down in the sections mentioned by me that the Ordinance declares in effect, that the goods as well as the conveyance in which they are removed shall be forfeited, if there has been a failure to pay Customs Duty. Such goods and conveyance will be " seized as forfeited ", and section 146 would, therefore, be applicable to such a seizure. Moreover the plaintiff's position has been always that the seizure was governed by section 146 as shown by paragraphs 5 and 6 of the plaint, the bond given for the release of the lorry, and paragraph 5 (*e*) of the petition of appeal which pleads that " the steps contemplated by section 146 of the Customs Ordinance having been duly taken, the property has not been forfeited to the Crown ".

I shall now proceed to examine the position of the parties under section 146. Under that section the beedies were " to be deemed and taken to be condemned " and dealt with accordingly, unless the plaintiff gave written notice that he would enter a claim to the goods, and that he was prepared " to give security to prosecute such claim ". The section then required the Customs Officer to whom such notice was given to release the goods on receiving such security as " he shall consider sufficient ". It will thus be seen that it was the action taken by the plaintiff in giving notice and in expressing his willingness to give security that created the situation which rendered it necessary for the defendant to exercise his powers under section 146 and fix the amount of the security. That was a power which the Legislature made it obligatory for him to exercise. Could it then be said that in exercising that power he had given a cause of action to the plaintiff against himself? It is not

the case of the plaintiff that the defendant acted *mala fide*. The Ordinance has vested the defendant with absolute discretion as to the amount of security to be demanded. If the defendant has proved himself incapable of exercising in a reasonable manner the unqualified discretion given to him by the Legislature, that does not give the plaintiff a right to bring this action against the defendant, whatever relief he may get in some other way.

The claim contemplated by section 146 in respect of goods released on security is clearly a claim for declaration of title to goods and the discharge of the relative bond.

It was open to the plaintiff to give the necessary security and prosecute his claim under section 146. He gave the security for the lorry but not for the beedies. He would not, therefore, be able to prosecute his claim in respect of the beedies in the manner contemplated by section 146. Is he then entitled to obtain relief by adopting some other legal procedure? The general principle appears to be against such a view. Where a special statutory procedure is provided for recovering property from the Crown the subject's remedy in England by petition of right is taken away (*Laws of England (Hailsham) Vol. 9, para 1177*).

In England the remedy has to be sought by a petition of right, where the subject wants to obtain restitution of goods in the possession of the Crown. In *Feather v. the Queen*, Cockburn C.J. said:—" the only cases in which the petition of right is open to the subject are, where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or where the claim arises out of a contract. " (*See* also the judgment of McCardie J. in *Buckland v. the King* [2]).

Our Courts have been enabled to give relief to an aggrieved subject by the practice of the Crown waiving the right not to be sued for declaration of title and restitution of property in cases where the remedy by petition of right was open to such a person in England. It was held in *Sanford v. Waring*[3] that land in the possession of the Government could not be recovered in a suit against the servant of the Crown who is in temporary occupation of it as tenant and that the only way by which a subject could recover his land which he alleges to be in the wrongful possession of the Government was by an action against the Attorney-General. (See also *Le Mesurier v. The Attorney-General*[4] and *The Colombo Electric Tramways Co. v. The Attorney-General*[5].)

The argument against the maintainability of the present action against the defendant may be expressed in a slightly different way as in the judgment of Atkin L. J. in *Mackenzie-Kennedy v. Air Council*[6]:—

" It was held that the Lords Commissioners of the Admiralty could not be sued in tort, though they were named individually, where

[1] *122 English Rep. 1191 at 1204.*
[2] *(1933) 148 Times Rep. 557 at page 561.*
[3] *(1896) 2 N. L. R. 361.*
[4] *1901) 5 N. L. R. 65.*
[5] *(1913) 16 N. L. R. 161.*
[6] *(1927) 2 K. B. 517.*

they were described collectively by their official title in a case (*Raleigh v. Goschen*) where Romer J. came to the conclusion that they were sued in their official capacity. I think that perhaps it might be more accurate to distinguish between a suit against a person in his individual capacity and in a representative capacity, for I cannot see that if you are in fact suing an individual on his personal liability it makes any difference whether you describe him as an official or not. If, however, you sue him as representing some interest or assets other than his own which you seek to bind by the action, it becomes very relevant how you describe him, for it may be found that as a representative he is not liable at all. And this is clearly true of a representative of the Crown who as such cannot be sued in tort. It is, of course, equally clear that individual servants of the Crown who themselves commit torts cannot escape liability by pleading the commands expressed or implied of the Crown. But sued as individuals they expose their own assets alone to liability in the event of judgment against them."

In the present case the beedies have become the property of the Crown, and they are in charge of the defendant merely as the agent of the Crown, as the Crown must necessarily exercise its right of possession through an agent. Thus, the defendant is sued in connection with goods vested in the Crown and the discharge of a bond executed in favour of the Crown. He is, therefore, sued " as representing some interest or assets other than his own ". He is moreover described by reference to his office as Collector of Customs. Viewed in that light, the action is not maintainable against the defendant. It may be added that Mr. H. V. Perera argued that this action had to be brought against the defendant and not against the Attorney-General as the relief demanded was based on the tortious act of wrongful detention of goods pleaded in paragraph 7 of the plaint. That argument appears to ignore the fact that the defendant who, as shown above, is sued as a representative of the Crown and not in his individual capacity can plead the same immunity as the Crown itself.

For the reasons stated above, I think that the present action must fail. The Attorney-General is the proper person to be sued either in an action under section 146 for declaration of title to goods released on security or in an action falling outside section 146—if such an action is available—for declaration of title and restitution of goods condemned under that section.

I would, therefore, dismiss the appeal with costs.

MOSELEY S.P.J.—I agree.

Appeal dismissed.

15——J. N. A 93349 (11/49)