Present: Lascelles C.J. and Pereira J. 1914

MUTTUPILLA *v.* BOWES.

122—C. R. Colombo, 36,745.

Action against the Principal Collector of Customs—Notice of action—Civil Procedure Code, s. 461 — Customs Ordinance, No. 17 of 1869, s. 122.

Section 461 of the Civil Procedure Code, which enacts, *inter alia* that no action should be instituted against a public officer in respect of an act purporting to be done by him in his official capacity until the expiration of one month next after notice in writing has been delivered to him, must be deemed to have repealed by implication the provision of section 122 of Ordinance No. 17 of 1869, which specially provided for fifteen days' notice of action in the case of officers of the Customs. The maxim *generalia specialibus non derogant* applies only where the particular statute relied upon is a statute in favour of a particular class of persons or the property of a particular class.

But, *per* PEREIRA J., section 461 of the Civil Procedure Code does not lay down any matter of substantive law, but provides for a link in the chain of the procedure necessary for the recovery of the claims referred to in it. Section 4 of the Civil Procedure Code, therefore, conserves the provision of section 122 of Ordinance No. 17 of 1869, there being no express repeal or modification of it anywhere.

[1] *(1889) 4 N. L. R. 121.*

[2] *(1882) 8 P. D. 89.*

1914.

Muttupilla v. Bowes

Per PEREIRA J.—Where in an action against a defendant (described in the caption of the plaint as the Principal Collector of Customs) for the return of certain goods detained by him in his capacity of Collector, there was no averment in the plaint that he acted *mala fide* in detaining the goods or outside the scope of his authority,—

Held, that the claim should have been made against the Attorney-General, and not the defendant in his official capacity.

LASCELLES C.J.—The provisions of section 461, which require one month's notice to be given of all actions against the Crown or against public officers, has superseded the special provisions of section 122 of the Customs Ordinance.

APPEAL from a judgment of the Commissioner of Requests, Colombo (T. W. Roberts, Esq.).

The case was reserved for argument before a Bench of two Judges by Pereira J.

The facts appear from the judgment of Lascelles C.J.

Samarawickreme (with him *Canekeratne*), for the plaintiff, appellant.—The plaintiff has given fifteen days' notice of action, as required by the Customs Ordinance (No. 17 of 1869, section 122). The Commissioner was wrong in dismissing the plaintiff's action on the ground that one month's notice, as required by section 461 of the Civil Procedure Code, was not given. The Civil Procedure Code did not repeal the provisions of the Customs Ordinance as to notice. The special provision as to notice of actions against Customs officers is not touched by the Civil Procedure Code, which makes provisions as to actions against public officers generally. *Generalia specialibus non derogant.* Counsel cited *Kalu Menika v. Kerala*,[1] *Jalaldeen v. The Municipal Council of Colombo*,[2] *Barker v. Edger*,[3] *Maxwell on the Interpretation of Statutes, 6th ed., p. 285.*

The proviso to section 4 of the Civil Procedure Code shows that section 461 of the Civil Procedure Code does not affect the provisions of section 122 of the Customs Ordinance.

van Langenberg, K.C., S.-G. (with him *V. M. Fernando, C.C.*), for the plaintiff, respondent.—The maxim *generalia specialibus non derogant* applies to cases where the earlier statute confers a privilege on a particular class of persons. See *Garnett v. Bradley*.[4] In the present case the Customs Ordinance does not confer any privilege on any particular class. If section 122 confers a privilege on Customs officers, the provisions of section 461 of the Civil Procedure Code extend the privilege, and do not restrict it. Therefore, the maxim relied upon by appellant does not apply.

The provisions of section 461 of the Civil Procedure Code and section 122 of the Customs Ordinance are inconsistent. The Civil Procedure Code being the later Ordinance repeals by implication

[1] *6 N. L. R. 101.*
[2] *(1909) 12 N. L. R. 129.*
[3] *(1898) A. C. 754.*
[4] *(1877-78) 3 A. C. 944.*

the provision as to notice of action in section 122 of the Customs Ordinance. See *Le Mesurier v. Murray*,[1] *Abaran Appu v. Banda*.[2]

Section 461 enacts substantive law. One month's notice of action is a condition precedent to the institution of an action against a public officer. Section 4 of the Civil Procedure Code does not conserve the provision of section 122 of the Customs Ordinance, as the requirement as to notice is not a question of procedure.

Section 122 of the Customs Ordinance does not make any provision for notice before institution of action. It only provides that no summons shall be sued out until fifteen days after notice. But there is nothing to prevent the action being instituted within even twenty-four hours of the accrual of the cause of action. Section 124 gives the Customs officer one month's time after notice to make amends. The provision of section 461 of the Civil Procedure Code is an entirely new provision, and must be observed.

The action is not maintainable, as it should have been brought against the Attorney-General, and not against the Principal Collector of Customs.

Counsel also cited *13 L. J. M. C. 110* and *(1879) 48 L. J. Q. B. 186*.

Samarawickreme, in reply.

Cur. adv. vult.

June 10, 1914. LASCELLES C.J.—

This case was reserved for the opinion of a Bench of two Judges on a point of law raised at the trial. In the Court of Requests the plaintiff's action was dismissed on the ground that he had not given the one month's notice required by section 461 of the Civil Procedure Code in cases where a public officer is sued for an act purporting to be done in his official capacity.

The plaintiff contends that he has complied with the requirements of section 122 of the Customs Ordinance (No. 17 of 1869) by giving fifteen days' notice of action before issuing summons.

The question thus is whether the general provisions of section 461, which require one month's notice to be given of all actions against the Crown or against public officers, has superseded the special provisions of section 122 of the Customs Ordinance as regards notice of action against Customs officers.

In 1898, in *Le Mesurier v. Murray*,[1] Lawrie A.C.J. held that the provisions of section 122 of the Customs Ordinance as to notice of intended action against a Customs officer were superseded by those of section 461 of the Civil Procedure Code.

This decision has, as far as I am aware, never been questioned; and quite recently it has been referred to in this Court as an authoritative statement of the law on the subject (*Abaran Appu v. Banda* [2]).

[1] *(1898) 3 N. L. R. 113.*

[2] *(1913) 16 N. L. R. 49.*

1914.

LASCELLES C.J.

Mutupilla v. Bowes

It is now contended, on the strength of the principle embodied in the maxim *generalia specialibus non derogant*, that the general provisions of the Civil Procedure Code do not touch the special provisions enacted by the Customs Ordinance with regard to the particular case of actions against Customs officers.

The conditions on which the subject is allowed by law to sue the Crown or public officers for acts done in their official capacity are highly important to the public. When we find that a section of the Civil Procedure Code has been judicially interpreted to lay down a simple and uniform rule applicable to all cases, and that this ruling has passed unquestioned for fifteen or sixteen years, I for my part would decline to interfere with the ruling, unless I was satisfied beyond all possible doubt that it was erroneous.

This is very far from the case. The learned Solicitor-General has referred us to the English case of *Garnett v. Bradley*,[1] the facts of which present a close analogy to those of the present case. The Statute 21, Jac. I., c. 16 enacted that, where, in an action for slander, the plaintiff recovered damages less than 40*s*., he should have no more costs than damages. The question was whether this enactment was superseded by the general provisions of the Judicature Act that costs should be in the discretion of the Judge, or in trials before a jury, should follow the event. The House of Lords decided that the provisions of the statute of James I. were superseded by the Judicature Act, and much of the reasoning in the judgments is in point in this case.

It is clear, in the first place, that, so far as actions against officers of the Customs are concerned, the provisions of the Customs Ordinance and the Civil Procedure Code are inconsistent. The general rule in such cases is that the later enactment repeals the earlier. This is specially the case where the later enactment, as is the case with section 461, is couched in negative terms. As was pointed out by Lord Blackburn in *Garnett v. Bradley*,[1] most of the cases where the maxim *generalia specialibus non derogant* is applicable are cases where the earlier statute was in favour of a particular class of persons or the property of a particular class of persons. In these cases it was considered unfair that an enactment couched in general terms should abrogate the particular privilege.

But this is not the present case. Even if it be supposed that section 122 of the Customs Ordinance conferred something in the shape of privilege or immunity on Customs officers, this privilege or immunity is not taken away or abridged by section 461 of the Civil Procedure Code. On the contrary, it is extended.

In my opinion the decision in *Garnett v. Bradley* [1] is a sufficient authority to support the ruling of Lawrie A.C.J. on this point.

With regard to the proviso to section 4 of the Civil Procedure Code, I need only say there is no question here of modifying any

[1] *(1877–78) 3 A. C. 944.*

special rule of procedure prescribed by an earlier Ordinance. The question here is not one of procedure. It is with regard to the conditions subject to which a certain class of actions is allowed to be instituted, with regard to a requirement which must be satisfied before the course of procedure begins to run. I do not consider it necessary to consider whether the action is maintainable in its present form.

For the above reasons I would dismiss the appeal with costs.

PEREIRA J.—

The first question to be considered in this case is whether section 461 of the Civil Procedure Code can be said to have repealed by implication the provision of section 122 of Ordinance No. 17 of 1869 as to the period of notice mentioned in it. Section 122 of Ordinance No. 17 of 1869 enacts that no summons shall be sued out against any officer of the Customs for anything done in the exercise of his office until fifteen days after notice in writing shall have been delivered to him, and section 461 of the Civil Procedure Code provides, *inter alia*, that no action shall be instituted against a public officer in respect of an act purporting to be done by him in his official capacity until the expiration of one month next after notice. It have been argued that the maxim *generalia specialibus non derogant* applies, and cases both English and local bearing on the subject have been cited. Among the latter are the cases of *Kalu Menika v. Kerala* [1] and *Jalaldeen v. The Municipal Council of Colombo*.[2] In *Kalu Menika v. Kerala* [1] it was held that the provision of section 19 of the Partition Ordinance, No. 10 of 1863, allowing in effect an appeal from an interlocutory decree for partition under section 4 of the Ordinance, was not tacitly repealed, as regards partition actions under the Ordinance in Courts of Requests, by the provision of section 81 of the (later) Courts Ordinance; which granted an appeal from only final decrees of Courts of Requests ; and in *Jalaldeen v. The Municipal Council of Colombo* [2] it was held that the provision of section 14 of Ordinance No. 7 of 1887, which gave jurisdiction to Courts of Requests to entertain actions for the reduction of the assessment rates levied by the Municipal Council, provided the rate did not exceed Rs. 100, was not implicitly repealed by section 4 of Ordinance No. 12 of 1895, which gave Courts of Requests jurisdiction to entertain all actions in which the debt, damage, or demand did not exceed Rs. 300. Among the English cases cited is that of *Barker v. Edgar*. [3] In that case Lord Hobhouse in the course of his judgment observed as follows: "The general maxim is *generalia specialibus non derogant*. When the Legislature has given its attention to a separate subject, and made provision for it, the

[1] *6 N. L. R. 101.*

[2] *(1909) 12 N. L. R. 129.*

[3] *(1898) A. C. 754.*

1914.

PEREIRA J.

Muttupilla v. Bowes

presumption is that a subsequent general enactment is not intended to interfere with the special provision, unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms." The case of *Garnett v. Bradley*,[1] cited by the Solicitor-General, however, throws a peculiar light upon this and other similar cases. There Lord Blackburn in his judgment cited a number of cases similar to *Barker v. Edger*,[2] and observed: "In all these cases the particular statute relied upon was a statute in favour of a particular class of persons or the property of a particular class of persons ..... When that is the case, where the particular enactment is particular in the sense that it protects the rights, the property, or the privileges of particular persons or a class of persons, the reason for the rule which has been acted upon is exceedingly plain and strong." And then he proceeded to point out that the so-called particular Act in question in that case, namely, Statute 21, Jac. I., c. 16, which provided that where a party had obtained a verdict and recovered damages less than 40*s*. in an action of slander he should have no more costs than damages, did not give a privilege to a particular class, but that it enured to the benefit of all His Majesty's subjects. The same observation appears to me to apply to the Legislative provision in the Customs Ordinance with which we are concerned in this case. In passing, I should like to observe that Mr. Solicitor cited to us only portions of the judgment of Lord Blackburn, and relied, *inter alia*, on that part of it where his Lordship pointed out that the two acts that he was dealing with were inconsistent with each other, and therefore the latter repealed the former. I was somewhat embarrassed in the course of the argument, because I could not bring myself to agree with the proposition in its application to section 122 of the Customs Ordinance. On a careful perusal of Lord Blackburn's judgment, however, I see that his Lordship's *dictum* had special reference to section 33 of the later of the two Acts he was considering, which expressly provided that that Act repealed all statutes "inconsistent with it." The *dictum*, therefore, has no application to the point at issue in the present case; but, as a result of the *dictum* first mentioned above, the appellant's counsel's contention that the maxim *generalia specialibus non derogant* applies to this case, in my opinion, fails.

It was also argued by the appellant's counsel that by virtue of the proviso to section 4 of the Civil Procedure Code, section 122 of the Customs Ordinance must be deemed to be unaffected by section 461 of the Code. The proviso lays down that (to cite material portions only) nothing in the Code shall be held in any way to affect or modify any special rules of procedure which, under or by virtue of the provisions of any Ordinance now in force, may have from time to time been laid down or prescribed to be followed

[1] *(1877–78) 3 A. C. 944.*

[2] *(1898) A. C. 754.*

by any Civil Court in this Colony in the conduct of any action, matter, or thing of which any such Court can lawfully take cognizance, except in so far as any such provisions are by the Code "expressly repealed or modified." There has certainly been no express repeal or modification by the Code of section 122 of the Customs Ordinance, but it has been argued that the provision of section 461 of the Civil Procedure Code is not a matter of procedure but of substantive law. I am aware that this Court has held that the Civil Procedure Code enacts in some of its sections substantive law, but I cannot see my way to accede to the proposition that the provision of section 461 is substantive law. The giving of a certain notice to a prospective defendant is a step in the direction of enforcing the claim against him. It has nothing to do with the accrual of the claim itself. In *Poyser v. Minors*,[1] Lush L.J. observed: "'Practice,' in its larger sense, like 'Procedure,' which is used in the Judicature Acts, denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the Court is to administer the machinery, as distinguished from its product." When a certain notice is prescribed by law to entitle a person to invite the aid of a Court to enforce a claim, it is, I think, a link in the chain of the procedure necessary to enforce the claim. While section 461 of the Code lays down a general rule, the provision of section 122 of the Customs Ordinance should, in my opinion, be looked upon as an exception, which (and not the general rule) is applicable to the present case. In this view I think that the appellant's counsel's argument must prevail, and I would allow the appeal, but that I think that the Commissioner's decision on the second issue framed in the case is erroneous, and the defendant is entitled to succeed on that issue. It is said that the action is one for tort against the defendant in, so to say, his personal capacity, but it is, I think, clear that the defendant has been sued in his official capacity as on a mere breach of contract. In the caption of the plaint he is described as the Principal Collector of Customs, and there is no averment that in detaining the plaintiff's goods he acts *mala fide* or outside the scope of his authority, and the remedy sought is the delivery to the plaintiff of certain goods that he detains in his capacity of Principal Collector of Customs. The decision in the case of *Raleigh v. Goschan*[2], is in point. In the circumstances mentioned in the plaint, the proper party to be sued was the Attorney-General. In my opinion, on the facts placed before the Court, the plaintiff is not entitled to maintain this action against the defendant personally, and on that account I agree that the appeal be dismissed with costs.

Appeal dismissed.

[1] *7 Q. B. D. 329, 333.*

[2] *(1898) 1 Ch. 173.*