

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Palmer
v. Hutchinson from the Supreme Court of the
Colony of Natal; delivered 15th July 1881.*

Present :

SIR BARNES PEACOCK.

SIR MONTAGUE SMITH.

SIR ROBERT P. COLLIER.

SIR RICHARD COUCH.

SIR ARTHUR HOBHOUSE.

This is an appeal from a judgment of the Supreme Court of Natal, in a suit in which the Appellant was the Defendant. The suit was brought against him in his capacity, as described in the writ, as Her Majesty's Deputy Commissary General for the Colony of Natal, and, as such, representing Her Majesty's Commissariat Department. In the declaration he is described as Deputy Commissary General in his capacity as Acting Commissary General.

The suit was brought, as alleged in the writ, to recover,—

First, the sum of seven hundred and forty-three pounds eighteen shillings and tenpence halfpenny sterling, for the price or hire of certain waggons and oxen, and for carriage of certain goods.

Second, the sum of one thousand pounds sterling, as and for damages, and as being the value of fifty trek oxen killed or dead owing to the over-driving and illegal acts of Defendant or his employés.

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Third, the sum of four hundred and fifty-six pounds sterling as hire for certain six waggons and oxen, or as damages for their illegal seizure and impressment by Defendant or his employés; and,

Fourth, the sum of two hundred and fifty pounds sterling as general damages.

All upon grounds to be fully set forth in the declaration.

The grounds of the claim were more fully stated in the declaration, in which it was alleged that the first item of 743*l.* 18*s.* 10½*d.* was due for the hire of certain waggons under a tender made by the Plaintiff, and accepted by the Defendant in his capacity as Acting Commissary General, for seven waggons for the purpose of conveying Government stores, goods, packages of military stores, and other supplies from Pietermaritzburg to Dundee or Doornberg, and for the conveyance of certain extra or surplus goods, servants, and invalids as passengers in the said waggons. The other items were claimed as damages alleged to have been sustained by the Plaintiff in consequence of certain illegal and tortious acts committed by the Defendant and his employés, and for compensation alleged to be due under a promise made by Major-General Marshall, commanding the Cavalry brigade, and the senior officer in the vicinity. The Plaintiff admitted by his declaration that the Defendant had tendered the sum of 1,053*l.* 18*s.* 10*d.*, in lieu of all claims, the sum of 743*l.* 18*s.* 10*d.* being for the freight, and 310*l.* for the rest of the Plaintiff's claim.

The Defendant, without answering the Plaintiff's declaration or entering into the merits of the case, excepted to the jurisdiction of the Court on the ground that the action was not cognizable by the Court, as being an action against Her

Majesty's Commissariat Department for acts alleged to be done by officers in Her Majesty's service in performance of their duties in that service, and also upon the ground that the acts complained of were acts for which the Court could afford no remedy; and he also excepted to the declaration on the grounds that the Defendant, in the capacity in which he was sued, was an officer in Her Majesty's service acting under the instructions and directions of the Commander of the Forces in South Africa, and, through him, subject to the instructions and directions of the Secretary of State for War, and that the negligence and acts complained of and the claims made under the alleged contract were acts and claims for which no legal remedy existed against Her Majesty's Commissariat Department, even if proceedings had been adopted in England by way of petition of right in due legal form instituted in the Supreme Court of Judicature in England, until the Secretary of State for War, as representing the said Department of Her Majesty's Government, had had an opportunity of inquiring into and determining the merits of said claims and alleged wrongs complained of, and the relief, if any, which should be afforded, and of submitting the petition and his recommendations thereon to Her Majesty the Queen for Her Majesty's gracious consideration, and in order that Her Majesty, if she should think fit, might grant Her fiat that right be done.

The Defendant also excepted to so much of the declaration as claimed damages for negligence, detention, or otherwise, on the ground that such claims were bad in law and substance. On the following grounds, viz. :—

“1. That they are preferred against a Department of Her Majesty's Imperial service for
 “alleged tortious acts of officers acting in the

“ discharge of their duty, and when employed in
 “ the service of that Department ;

“ 2. That even if a claim for damages as insti-
 “ tuted in the action were preferred in England on
 “ a petition of right, and submitted for the deci-
 “ sion of the Supreme Court of Judicature in
 “ England, such claim would be disallowed.”

The Court overruled the exceptions to the jurisdiction of the Court (Record, p. 11, s. 3), and also those to the declaration, so far as it related to the form of suing and to the claims in respect of contract, whether made by the Commissariat Department or arising impliedly by reason of Major-General Marshall's orders or request ; but they allowed the exceptions to the declaration so far as related to the damages in respect of *delicta* or tortious acts of any of the officers of the Queen's Government.

In delivering his judgment, the learned Chief Justice said :—

“ Her Majesty is not sued by name or title in this action, nor is she so sued in substance, any more than if the action were against the colonial revenue. A public officer under Her Majesty (as public officers generally are) is sued in his official capacity on a contract in that capacity ; and it appears to me that by the law or practice of this forum, he may be so sued in ordinary course. It may be quite another matter whether he is liable on an implied contract, by reason of Major-General Marshall's order or request ; but possibly, evidence may show that he is. As far, therefore, as by the exceptions it is objected that there is no jurisdiction in this Court to entertain the action, or that the declaration avers no regularly instituted cause of action, they must, I think, be overruled.

“ But just as I am of opinion that the practice of our Court is to be applied to maintain this action, as far as relates to the form of suing, and to the suits being in respect of contract, so I also think, in accordance with the previous decisions by this Court (*Muirhead & Co. v. Ayliff*, 23rd November 1875, acted on in an Estcourt bridge case in 1879), that the revenue (be it Natal or English) is not liable for the alleged *delicta*, or, in English law phrase, the tortious acts of officers of the Queen's Government, I can draw no distinction between one Queen's Government and another in that respect (*Rogers v. Rajendro Dutt*, 13 Moo., P. C., 209).”

It is unnecessary to determine whether the Court would have had jurisdiction if a petition of right had been presented, and the Crown had ordered that right should be done. The suit was not a petition of right, and there was no order of Her Majesty that right should be done.

If the action had been against the Crown, either by name or title, or in substance, it is clear that the Court would have had no jurisdiction to entertain it.

The jurisdiction conferred upon the Court by the Ordinance of Natal, dated 10th July 1857, was merely "over all Her Majesty's subjects, "and all other persons whomsoever residing and "being within the Colony."

The action is against a subject in his official character as Deputy Commissary General. And it is further stated in the declaration (para. 2, page 5) that "the Defendant in his aforesaid "capacity is the representative or head of the "Commissariat Department in the Colony, and "as such represents Her Majesty's Imperial "Government in the Colony so far as the Com- "missariat and Transport Departments of the "Imperial Government are concerned."

It is clear that the exceptions to the declaration ought to have been allowed upon the ground that the facts stated did not constitute a cause of action against the Defendant. It has never been contended by any one that the Defendant was personally liable upon the contract. If it had been, that contention must have failed.

The Supreme Court held that he was liable in his official character. It treated the action as a proceeding against the Imperial revenue by making a public officer a Defendant in his official capacity, and expressed an opinion that a decree in such a suit might be executed against some portion at least of the revenue or property of the Imperial Government.

The Chief Justice said,—

It is a common practice with us in South African Courts that actions for obtaining from the revenue money for or in respect of contracts are instituted against the proper public officer (generally the Colonial Secretary) in his official capacity, and judgment against him in that capacity is both sought and at times given. And in principle it seems to me that it has to be the same, as to our mode of procedure, whether the revenue sought by the action to be charged be colonial or English. The colonies are as much part of the Queen's dominions as England is, and for us to hold, as is contended for on the part of the Defendant, that to sue here the English revenue is to sue the Sovereign, but to sue the colonial revenue is not, would be, I apprehend, to introduce a distinction practically and theoretically constitutionally unsound. I may mention here that our practice of proceeding against the revenue by making a public officer a Defendant in his official capacity was, *quoad* the Cape Colony, recognized apparently by the Privy Council, as far back as the year 1838, in the case of *Van Rooyen v. Reit* (2 Moo., P.C. 177), where the Civil Commissioner of Uitenhage (in the Cape Colony) was sued by private individuals, in respect of a pecuniary default of his predecessor in office, in respect of moneys received by him from them. . . .”

In a subsequent part of his judgment, he said :—

“There is no occasion here to discuss the question as to how any judgment in this action can be put in execution, but I am disposed to think that the general rule is that a judgment obtained against a Government officer in his official capacity may, by our practice, be executed against any Government property found within this Court's jurisdiction, and not allocated by law to some distinct special purpose. We held, I think, several years ago, that certain property of the Durban municipality could not be taken in execution, by reason of its being thus otherwise allocated. There might, too, I presume, be cases in which the public officer sued did not sufficiently represent *in toto* the Government for a judgment against him to bind all Government property, even though not specially allocated.”

The case of *Rooyen v. Reit*, 2 Moore, P.C. 177, cited by the Chief Justice, is no authority in support of the Plaintiff's right to sue the Deputy Commissary General. In that case it was held that the Government officer who was sued was not liable, and the only right to sue the District Secretary and Treasurer which was recognized by the Judicial Committee was a right to sue him

personally for money which by arrangement between him and Swan, of whom the Plaintiffs were the legal representatives, he had received on Swan's account.

In the case under appeal it was said by the Chief Justice, that the Crown is, "as to some " branches of revenue, represented by public " officers, and that then no petition of right " seems to be requisite," and he referred to the case of the Attorney General's proceeding by information, and to the case of *Dyke v. Elliot*, 8 Moore, P.C.C., New Series 428, in which the Crown sued in the Admiralty Court in the name of the Procurator General, for the condemnation of a vessel for an offence against the Foreign Enlistment Act.

The Crown, by virtue of its prerogative, has a right to sue by information in the name of the Attorney General, and also has a right to sue in the Admiralty Court in the name of the Procurator General, but in the present case the Chief Justice treats the Plaintiff as attempting to sue the Imperial revenue by making a public officer a Defendant in his official capacity. But this right of the Crown affords no support for the proposition that the Government revenue may be reached by a suit against a public officer in his official capacity.

The case of *Kirke v. The Queen*, 14 Law Reports, Eq. 558, which is cited by the Chief Justice, is no authority for that proposition. That was a suit by the Attorney General against a contractor with the Secretary of State for War, praying for an injunction to restrain him from continuing upon land vested in the Secretary of State after notice to quit given under the powers of the contract. It seems to have been intimated that in such a suit the Secretary of State for War should be a party.

That is, a party as Complainant, not as a Defendant.

Their Lordships are clearly of opinion that the Deputy Commissary-General cannot be sued either personally or in his official capacity upon a contract entered into by him on behalf of the Commissariat Department. He is not a corporation, and he has no property or assets in his official capacity which could be seized or attached in execution of a decree against him in that capacity, and it is clear that no portion of the Government revenue, whether allocated to a special purpose or not, could be seized in execution under it.

The law upon the subject has been clearly laid down in several cases.

In the case of *Macheath v. Haldemund*, 1, Term Reports, 180, which was an action against the Governor of Quebec for military stores and supplies provided under his orders for the garrison of a fort, Lord Mansfield said, "The only question before the Court is, whether the Defendant be liable or not in this action. If he be, the Plaintiff must recover. If not, no consideration as to the Plaintiff's remedy against any other person can induce the Court to make him so. There is no colour to say that he is liable in his character of Commander-in-Chief. In a late case which was tried before me, where one Savage brought an action against Lord North, as First Lord of the Treasury, in order that he might be reimbursed the expenses which he had incurred in raising a regiment for the service of Government, I held that the action did not lie.

"So in another case of *Lutterloh* against *Halsey*, which was an action brought against the Defendant, who was a Commissary, for the supply of forage for the army, and by whom

“ the Plaintiff had been employed in that service,
 “ the Commissary was held not liable.

“ In the present case it was notorious that the
 “ Defendant did not *personally* contract. The
 “ Plaintiff knew, at the time that he furnished
 “ the stores, that they were for the use of
 “ Government; and he afterwards made Govern-
 “ ment debtor in his bills.”

In the case of *Gidley v. Lord Palmerston*,
 3 Brod. and Bingham's Reports, 275, it was held
 that an action would not lie against the Secretary
 at War, for moneys which he, as a public officer,
 had received, and which he was authorized to pay
 over to the Plaintiff's testator, on account of his
 retiring allowance.

In that case Chief Justice Dallas, in delivering
 the judgment of the Court, said, “ It is not
 “ pretended that the Defendant is to be charged
 “ in respect of any express undertaking or agree-
 “ ment between him and the testator, or in re-
 “ spect of any other character than his public
 “ and official character of Secretary at War. It
 “ is in that character and in that only that his
 “ duty is alleged to arise, being therefore a duty
 “ as between him and the Crown only, and not
 “ resulting from any relation to or employment
 “ by the Plaintiff, or under any undertaking in
 “ any way to be personally responsible to him.
 “ The money received is granted by the Crown,
 “ subject only to the disposition or control of
 “ the Defendant as the agent or officer of the
 “ Crown, and responsible to the Crown for the
 “ due execution of the trust or duty so com-
 “ mitted. There is therefore no duty from which
 “ the law can imply a promise to pay to the
 “ testator during his life, or to his executor after
 “ his death, nor can money be said to have been
 “ had and received to the use of the testator,
 “ which money belonged to the Crown, being

“ received as the money of the Crown, and the
“ party receiving it being responsible only to the
“ Crown in his public character. On this view
“ of the case it appears to us that this action
“ cannot be maintained.”

Any funds which may be issued by Government to the Commissariat Department for the service of the State stand upon the same footing as that above described with reference to the money received by the Secretary at War.

With reference to the remark of the Chief Justice that the case could be disposed of by having regard to the practice of the Court, the forum of the *locus contractus* and of the action (Record, p. 9). Their Lordships think it right to say that no practice of the Court can confer upon it any power or jurisdiction beyond that which is given to it by the charter or law by which it is constituted.

For the above reasons their Lordships are of opinion that the exceptions to the whole declaration ought to have been allowed, and judgment given for the Defendant, with costs, and they will humbly advise Her Majesty to allow the appeal, to reverse the judgment of the Supreme Court, and to order judgment to be entered for the Defendant, with costs. The Respondent must pay the costs of this Appeal.
