

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Honourable James Squire Farnell v. William Bowman, from the Supreme Court of New South Wales ; delivered 23rd July 1887.*

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Present :

LORD HOBHOUSE.

SIR BARNES PEACOCK.

SIR RICHARD BAGGALLAY.

SIR RICHARD COUCH.

This is an appeal from a judgement or order of the Supreme Court of New South Wales in an action by the Respondent, as Plaintiff, against the Honourable James Squire Farnell, the present Appellant, who was then Secretary for Lands of the Colony, and had been duly appointed under the Act 39 Vict., No. 38, of the Legislature of New South Wales to be sued as the nominal Defendant on behalf of the Government of the Colony.

The declaration contained two counts. The former charged that the Government by their servant broke and entered the lands of the Plaintiff situate in the Colony, and lit fires thereon, and thereby burned down and destroyed the grass, trees, and fences of the Plaintiff on the said lands. The second alleged that the Government by their servants so negligently and wrongfully lighted and maintained certain fires on the Plaintiff's said lands in the first count mentioned, and upon lands adjoining thereto, and conducted themselves so negligently

and wrongfully in and about the care of the said fires, and the taking of precautions against the spreading of the same, that by reason thereof the said fires spread over the lands of the Plaintiff, and burned down and destroyed large quantities of grass and fencing thereon. The count also charged special damage.

The Defendant pleaded Not guilty, and also demurred upon the ground that the declaration was bad in substance, and stated as grounds for demurrer, first, that the Government were not liable to be sued in an action of tort; and two other grounds which, if tenable, have not been relied on in this appeal.

The main question to be determined is whether, under the provisions of the Act 39 Vict., No. 38, of the Colonial Legislature, the Government of the Colony is liable to be sued in an action of tort.

The majority of the Judges held that such an action would lie, the learned Chief Justice dissenting. The demurrer was therefore overruled, and it was ordered that judgement be entered for the Plaintiff on the Defendant's demurrer. From that order the present appeal has been preferred.

Their Lordships are of opinion that the order is right, and ought to be affirmed.

At the time of the passing of the 39 Vict., No. 38, two Acts of the Colonial Legislature were in force, viz., the 20 Vict., No. 15, and the 24 Vict., No. 27. The former of those two Acts was intituled "An Act to give relief to persons having claims against the Government of New South Wales;" the other, "An Act for the amendment of the law as to claims against the Crown." The latter Act recited that it was expedient to adopt the law of England relating to petitions of right, and to adapt the same as nearly as might be to the circumstances of the Colony, and the Act was passed in conformity with the

recital. By the seventh section it was provided that nothing in the Act should give to the subject any remedy against the Crown in any case in which he would not have a remedy before the passing of the Act.

That Act was repealed by the 39 Vict., No. 38, and has never been renewed, probably because it was considered that the repealing Act afforded a better and more expeditious remedy for every case in which a petition of right would lie.

The 20th Vict., No. 15, was also repealed by the 39 Vict., No. 38, but as the latter Act contained provisions *in pari materia*, though giving more extensive remedies to persons having claims against the Colonial Government, it will be well to refer to the provisions of the repealed Act. The preamble was in the words following:—

“Whereas disputes and differences have arisen, and may hereafter arise, between the subjects of Her Majesty the Queen and Her Majesty’s Local Government in the Colony of New South Wales, the subject matter of which disputes and differences has arisen, or may arise, within the Colony; and whereas the ordinary remedy by petition of right is of limited operation, and is insufficient to meet all such cases, and is attended with great expense, inconvenience, and delay. Be it therefore enacted,” &c.

It was then enacted, amongst other things, that—

“In all cases of dispute or difference touching any claim between any subject of Her Majesty and the Colonial Government of the Colony of New South Wales which may have arisen, or may hereafter arise, within the said Colony, it shall and may be lawful for any person or persons having such disputes or differences to present a petition to the Governor of the said Colony, setting forth the particulars of the claim of such petitioner, which petition shall, within fourteen days from the presentation thereof, be referred by the Governor to his Executive Council; and if the said Governor shall, with the advice of his Executive Council, think fit, the said petition shall be referred to the Supreme Court of the said Colony for trial by a jury, or otherwise as such Court shall, after such reference, direct.”

The Act then provided safeguards for cases affecting the Royal prerogative, for the appointment of some person to be a nominal Defendant

to the petition, and for answering the claim out of the Consolidated Revenue of the Colony.

Act 39 Vict., No. 38, contains no preamble or recital, but it extends the provisions of the 20 Vict., No. 15, in favour of the subject.

It is intituled "An Act to enforce claims against the Colonial Government, and to give costs in Crown suits," and after repealing by Section 1 the 20 Vict., No. 15, and the 24 Vict., No. 27, it enacts by Sections 2, 3, 4, 5, 6, and 7 as follows:—

"2. Any person having or deeming himself to have any just claim or demand whatever against the Government of this Colony may set forth the same in a petition to the Governor praying him to appoint a nominal Defendant in the matter of such petition, and the Governor, with the advice of the Executive Council, may, by notification in the 'Gazette,' appoint any person resident in the Colony to be nominal Defendant accordingly. Provided that if within one month after presentation of such petition no such notification be made the Colonial Treasurer for the time being shall be the nominal Defendant.

"3. The petitioner may sue such nominal Defendant at law or in equity in any competent Court, and every such case shall be commenced in the same way and the proceedings and rights of parties therein shall as nearly as possible be the same, and judgement and costs shall follow, or may be awarded on either side, as in an ordinary case between subject and subject.

"4. The nominal Defendant in any case under this Act shall not be individually liable in person or property by reason of his being such Defendant.

"5. In any action or suit under this act all necessary judgements, decrees, and orders may be given and made, and shall include every species of relief, whether by way of specific performance or restitution of rights for recovery of lands or chattels, or payment of money or damages.

"6. In any action or suit by the Crown or Attorney General on behalf of the Crown costs shall follow or may be awarded as in an ordinary case between subject and subject.

"7. The Colonial Treasurer shall pay all damages and costs adjudged against any such nominal Defendant, or costs awarded against the Crown or Attorney General under this Act, out of any moneys in his hands then legally applicable thereto, and forming part of or belonging to the Consolidated Revenue of this Colony, or thereafter voted by Parliament for that purpose, and in the event of such payment not being paid within 60 days after demand execution may be had for the amount, and the same be levied upon any property vested in the Govern-

ment of this Colony, but not upon any property real or personal vested in it on behalf of the Imperial Government, or to which such last-mentioned Government has any claim, or is in anywise entitled."

Thus, unless the plain words are to be restricted for any good reason, a complete remedy is given to any person having or deeming himself to have any just claim or demand whatever against the Government. These words are amply sufficient to include a claim for damages for a tort committed by the local Government by their servants. Under the present Act, if the Governor with the advice of his Executive Council does not within a certain specified time appoint a nominal Defendant, the Colonial Treasurer for the time being is, by the enactment of the Legislature, to be the nominal Defendant, and in an action against the nominal Defendant the rights of the parties are to be the same as in an ordinary case between subject and subject, and in the event of the damages and costs, if any, adjudged against the nominal Defendant not being satisfied within a certain period, the 7th section enacts that execution may be had for the amount in the manner therein provided.

It must be borne in mind that the local Governments in the Colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works for the construction of which it is necessary to employ many inferior officers and workmen. If, therefore, the maxim that "the king can do no wrong" were applied to Colonial Governments in the way now contended for by the Appellants, it would work much greater hardship than it does in England.

It appears from the recital in Act 20 Vict., No. 15, that one of the reasons which induced

the Legislature to pass that Act was that the ordinary remedy by petition of right was of limited operation, and insufficient to meet all cases of disputes and differences which had arisen or might arise between the subjects of Her Majesty the Queen and Her Majesty's *local Government* in the Colony. It could not, therefore, have been intended to limit the operation of the Act to cases in which the subject had a remedy by petition of right. The very object of the Act was to give a remedy in cases to which a petition of right did not extend. Why, then, should it be supposed that the Legislature intended to exclude cases of tort? Justice requires that the subject should have relief against the Colonial Governments for torts as well as in cases of breach of contract or the detention of property wrongfully seized into the hands of the Crown. And when it is found that the Act uses words sufficient to embrace new remedies, it is hard to see why full effect should be denied to them.

Their Lordships further observe that, in the Act of 24 Vict, which was directed to amend the procedure on petitions of right, there was a proviso that it should not give to the subject any new remedy. But in the Act of 20 Vict., where one of the motives of the Act was that the existing remedy is limited and insufficient, there was no such proviso. So also in the Act of 39 Vict., which repeals that of the 24th, there is no repetition of the repealed proviso. The makers of these laws seem to have kept well before their eyes the two distinct processes, that of opening a larger range of remedies to the subject, and that of amending procedure without any enlargement of remedy. Their Lordships therefore cannot see why in construing the Act now under consideration, a Court of law should go out of its way to strain the words, and to give them a meaning other than their ordinary literal

meaning. If they did so, they would be introducing a certain amount of repugnancy into the Act itself: for the fifth section gives to the subject a right to have specific performance of contracts, which is not a kind of relief available against the Crown. The third section expressly says that, in every case, not the proceedings only but the rights, shall be the same, and that judgement shall follow as in an ordinary case between subject and subject. Those enactments are not consistent with holding as the learned Chief Justice expresses it, that the words "any just claim or demand whatever" can mean no more than such claims or demands as the law then recognized, and that they cannot include a claim for damages *ex delicto*.

Their Lordships wish to remark that in the course of the judgement in which the learned Chief Justice dissented from his colleagues, he expressed some broad views relating to the Prerogative of the Crown, which have not been discussed at the bar on this appeal, and in which their Lordships must not be understood as concurring.

Reference was also made by the learned Judges below to some observations which were made in the Ceylon case of *Appu v. the Queen's Advocate*, 9, Law Reports, Appeal Cases, 571, as if they were intended to lay down a universal principle that actions *ex delicto* cannot be brought against the Crown. But their Lordships were speaking solely with reference to the law of Ceylon, as to which every one was agreed that there existed no practice of suing the Crown on torts, whereas there did exist a practice of suing on contracts. It was argued that certain words in an Ordinance were to be excluded from application to any kind of suit by a subject against the Crown, because they were capable of application to actions on torts, which did not exist. It was in answering that argument that their

Lordships' observations were made, and it has no bearing whatever on the present controversy. Their Lordships will humbly advise Her Majesty to affirm the judgement of the Supreme Court. The Appellant must pay the costs of the appeal.

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