

Present : Bertram C.J. and Porter J.

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SAIBO v. THE ATTORNEY-GENERAL.

136—D. C. Colombo, 4,968.

Customs Ordinance, 1869, ss. 104 and 31—Rice removed from bonded warehouse to ship—Boatmen stealing some rice—Evasion of payment of Customs duties—Fine—Illegal threat of detention of boats till fine was paid—Payment under protest—Right to recover money paid even though it was due—Condictio indebiti—Condictio ob iniustam causam—Money had and received—English law same as the Civil law.

Some lighters belonging to the plaintiff were engaged in transporting imported rice from a bonded warehouse to certain ships in the harbour. A small quantity of rice was collected by the crew for unlawful disposal, and incidentally with a view to evading the payment of Customs duties. Fines were imposed by the Principal Collector on the tindals for offences committed, and the plaintiff was notified to recover and remit the fines. The Principal Collector further threatened to detain the lighters pending payment. The plaintiff paid the money under protest to prevent a detention of the boats, and sued the Attorney-General for the refund of the money.

Held, (1) The tindals had committed an offence under section 104 of the Customs Ordinance, 1869, and the fines were legally imposed and due from the tindals.

(2) The Principal Collector had no right to detain the lighters. The detention could not be justified under section 31, which relates to boats unloading goods from a ship.

(3) Plaintiff could recover the money paid, although it was due to the Crown, as it was paid by plaintiff owing to the illegal threat of detention of the lighters.

“ If a public officer, whether in good faith or bad faith, seeks to enforce a claim against any person by the unlawful detention either of his person or of his goods, money paid under this pressure may be recovered back.”

THE plaintiff in this action sued the Attorney-General for the return of a sum of money paid by him under protest to the Customs Department to avoid the detention of his lighters by the Customs authorities. These lighters were engaged in transporting imported rice from a bonded warehouse to some vessels in the harbour for shipment to the Maldives. Several hundred pounds of rice, which were stolen by the crew, were found in the boats. The Principal Collector of Customs imposed a fine on the tindals of the boats for attempting to defraud the revenue by not paying the Customs duties. He requested the plaintiff to recover and remit the fines, and notified him that the lighters had been detained

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pending payment. The plaintiff endeavoured to obtain a remission of the fine, and pending this correspondence the order for detention was not enforced. The fines were not remitted ; and the plaintiff paid the fines under protest, apprehending that if he did not pay the lighters would be detained. The District Judge dismissed plaintiff's action for the refund of the money. He appealed,

Hayley, for the plaintiff, appellant.

Akbar, Acting S.-G. (with him *Fernando, C.C.*), for the defendant, respondent.

November 26, 1923. BERTRAM C.J.—

This was an action in which the plaintiff claimed from the respondents the return of certain sums paid to the Customs Department under protest. These sums consisted of four fines inflicted on four tindals in the service of the plaintiff for certain alleged offences committed against the Customs Ordinance, No. 17 of 1869. These sums were paid to avoid the detention of his lighters by the Customs authorities in pursuance of an order already made but not yet put into force. The facts are as follows : The lighters had been engaged in transporting imported rice from the bonded warehouse, in which it had been temporarily lodged, to certain ships in the harbour for shipment to the Maldives. On a visit of inspection being paid to these lighters several hundred pounds of rice were found on board. It was contended on behalf of the plaintiff that the rice so found merely consisted of the sweepings of rice which naturally falls into the lighter during the process of transshipment, and of which no account is ordinarily taken. Looking at the quantity of the rice found, its quality and condition, and the places in which it had been stored, the learned Judge disallowed this explanation, and came to the conclusion that this rice was the result of petty pilferings, and that the crews of the lighters had collected it with a view to its unlawful disposal, and incidentally with a view to evading the payment of Customs duties to which it would be liable. Mr. Hayley's criticisms of this finding of fact were not without force, but there is ample evidence to justify the conclusions of the learned Judge, and there is no sufficient reason for interfering with them. The amount of duty which might have been recovered is no doubt extremely small, but the fine inflicted is a light one, and was no doubt intended chiefly as a warning.

These being the facts, it now becomes necessary to consider the law. What offence had the tindals committed ? The learned Judge finds, and I think rightly finds, that they had committed an offence against section 104 of the Customs Ordinance, in that they had "dealt with goods liable to duties of Customs with intent to defraud the revenue." The tindals were consequently

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liable to have the amount of the penalty recovered from them as a forfeiture by an action under the section.

The Principal Collector of Customs purported to enforce this forfeiture by an order for the detention of the vessels, and in so doing he claimed to act under sections 82 and 101 of the Customs Ordinance. Those sections prove on examination to have no application to the case. The learned Judge, however, held that the detention might be justified under a particular provision of section 31. The provision is in the following terms :—

“ If any goods be found in a boat without a boatnote, as above provided for the boat containing such goods may be detained and such boat and such goods shall be liable to forfeiture.” With very great respect, I am not able to take the view of this provision which the learned District Judge has taken, and in my opinion it has nothing to do with the case. The provision is not a general provision relating to all boats found in the harbour. It must be read as part of the section in which it occurs. That section relates to boats unloading goods from a ship. Not only is the provision particularized by its context, it is also particularized by the words “ as above provided for.” The Solicitor-General seeks to read these words as though they were equivalent to “ as above described,” but the two expressions are not synonymous. If the section were drafted, in the modern manner, in a series of sub-sections, and if this part of the section were in a separate sub-section and read “ If any goods be found in a boat without a boatnote, as provided for in sub-section (1) hereof,” there could be no possible doubt of the construction. In any case it is absurd to suppose that any boat found under any circumstances in the harbour with goods on board is liable to forfeiture, unless it can produce a boatnote signed by the officer of some ship. In my opinion the section in no way justifies the threatened detention of the lighters.

On the infliction of the fine, the Principal Collector of Customs addressed a notice to the plaintiff dated February 15, 1922, informing him of the offence committed by his tindals and of the penalty imposed. It requested him to recover and remit the amount as early as possible, and notified him that his lighters had been detained pending payment. The lighters were not in fact detained. The plaintiff entered into a correspondence with the Principal Collector of Customs and attempted to justify his tindals or to obtain remission of the fine, but without success. Pending this correspondence, the order for detention was not enforced. The plaintiff finding his efforts fruitless, and apprehending that if he did not pay the money his lighters would be detained, paid the money under protest and brought this action for its recovery, claiming in his plaint that his tindals had committed no offence, and that his boats were not liable to detention.

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Under the law as above explained the legal position appears to be that the money was in fact due from the tindals, but that the Principal Collector of Customs was not entitled to order the detention of the lighters in order to enforce the payment. What then are the plaintiff's rights under the circumstances? The Solicitor-General contended that inasmuch as the money was actually due, it could not be recovered from the Government as money had and received to the plaintiff's use, and that if the plaintiff had any complaint about the unlawful seizure of his lighters, he must seek his remedy in an action *in tort* against the officer personally responsible, such an action, under our local decisions, not lying against the Government. This contention of the Solicitor-General has on the face of it a certain ingenuity and plausibility, but fortunately for the interests of the subject it is erroneous. It is not the law that an officer of Government may enforce a lawful claim by unlawful pressure, and that the Government may thereupon retain the money so enforced.

Under the Roman-Dutch law the present action is not strictly speaking a *condictio indebiti* as was assumed in the course of the argument. The action known as *condictio indebiti* will be found explained in *Voet 12, 6*. It is an action for the recovery of money which was not due, but which was voluntarily paid under mistake. The action would more strictly come within the *condictio* described in the previous chapter, the *condictio ob iniustam causam*. One of the illustrations of the action given in paragraph 4 is, "*cum repetitur id, quod ex stipulatione per vim extorta solutum est,*" that is to say, the recovery of a payment made in pursuance of a promise extorted by force. In English law the action is known as the action for money had and received. The classical exposition of the principles of this action is to be found in the judgment of Lord Mansfield in *Moses v. Macferlan*.¹

"This kind of equitable action to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex æquo et bono*, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play: because in all these cases the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got

¹ (1760) 2 Burr. 1005; 97 E. R. 676.

through imposition (express or implied) or extortion ; or oppression ; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.

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“ In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.”

It has been shown by William David Evans in an interesting appendix to his translation of *Pothier's Law of Obligation* (edition of 1806, vol. II., p. 378) that for every material phrase of this passage Lord Mansfield had the authority of an express provision of the Civil law, so that the English law on the subject may be treated as identical with the law of this Colony.

In English law it has been long settled by a series of cases that if a public officer, whether in good faith or bad faith, seeks to enforce an unlawful claim against any person by the detention either of his person or of his goods, money paid under this pressure may be recovered back. One of the best statements of this principle will be found in the judgment of Lord Abinger B. in *Atlee v. Backhouse*.¹ How, then, does the English law stand on the question of the enforcement by unlawful pressure of a lawful claim ?

In *Sowell v. Champion*² execution was issued against the goods of the plaintiff in pursuance of a lawful debt, but in a place to which the process did not run. The judgment-debtor who paid the bill in order to recover the goods brought an action in trespass, and it was held that he was entitled to recover in damages the whole value of the goods, and not merely the amount of damage which he had sustained by their being taken in a wrong place. Lord Denman C.J. said : “ Parties are not to extort even what is justly due by the improper execution of a warrant. It might lead to the most fatal consequences if we were to hold otherwise. The person who takes upon him to exact money by an authority which he does not possess is bound to repay what he has so levied.” Patterson J. said : “ I am of the same opinion. As to the amount of damages, the reduction would not perhaps be mischievous in the present case ; but I am afraid of the principle that would be established if we held, where money has been levied by an illegal course of proceeding, the damage to be taken into consideration is only the amount of injury actually sustained. All kinds of irregularities would follow if such a doctrine were admitted.”

See also *Clark v. Woods*.³ A writ of execution was issued for the recovery of poor rates, but by a mistake a sum of six shillings for costs was unlawfully included. The Justices issued a warrant commanding the constable to arrest the plaintiff until payment of

¹ (1838) 3 M. & W. 650 ; 150 E. R. ² (1838) 6 A. & E. 407 ; 112 E. R. 156.
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³ (1848) 2 Ex. 395 ; 154 E. R. 545.

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the sum. The amount was paid under protest, and it was held that in an action in trespass the plaintiff was entitled to recover, not merely the six shillings costs, but the whole sum exacted. Platt B. observed that the law is perfectly clear that where a person has a sum of money extracted from his pocket by unlawful means he is entitled to recover the whole of such amount back again.

In *Pitt v. Coomes*¹ a judgment-debtor was taken in execution on a judgment, but the arrest was irregular because it was made while he was returning from Court. He paid the amount of the judgment into Court, and in a subsequent application he was held entitled to recover the whole sum, notwithstanding that it was legally due. Lord Denman C.J. said: "The arrest, we think, was illegal. The consequence is that the money was improperly extorted. In saying so, I do not mean to say that the proceeding was corrupt, but the money, having been the price paid to recover liberty when improperly taken away, must be restored."

It might be argued on behalf of the Solicitor-General, that in the two cases first cited the action was an action *in tort* and would not lie against the Government, whereas the present action is an action under an implied contract. There is, however, nothing in this. The measure of the plaintiff's right is the same, whether it is determined in contract or *in tort*. What he may recover as damages in one action he may recover on the implied contract in the other.

If the Solicitor-General were right, then, even in an action *in tort* against the Principal Collector of Customs (there being no circumstances to justify the infliction of exemplary damages), the damages recoverable in such a case as the present would be merely nominal. Perhaps the best answer to the contention is, in the words of Lord Mansfield: "It (that is, the action) lies for money which *ex aequo et bono* the defendant ought to refund." This is the principle both of the Roman and the English law.

I may further note that even if the Solicitor-General's contention were right, the answer which Mr. Hayley made to it in the present case would of itself be sufficient. The fines, indeed, were due, but they were not due from the plaintiff, but only from his tindals. I am not satisfied that he would ever have thought of discharging the liability of his tindals, but for the threat of detention against his own vessels. In his action he challenged both the fine and the detention. He did not expressly say "even though the fine is due from the tindals you cannot recover it by detaining my boats," but it would not be *ex aequo et bono* that under such circumstances a man should be tied down to the terms of his protest. It is not, however, necessary to consider this point. For the reasons I have given, I am of opinion that the appeal must be allowed with costs.

PORTER J.—I agree.

Appeal allowed.

¹ (1837) 2 A. & E. 459; 111 E. R. 178.