DAME SARAH DICKENSON CORSE AND EUSÈBE TONGAS..... } PLAINTIFFS; 1892 Mar. 21.

AND

HER MAJESTY THE QUEEN.....DEFENDANT.

Goods stolen while in bond in Customs Warehouse—Claim for value thereof against Crown—Crown not a bailee—Personal remedy against officer through whose act or negligence the loss happens.

The plaintiffs sought to recover from the Crown the sum of $465.74, and interest, for the duty paid value of a quantity of glaziers' diamonds alleged to have been stolen from a box, in which they had been shipped at London, while such box was at the examining warehouse at the port of Montreal.

On the 21st February, 1890, it appeared that the box mentioned was in bond at a warehouse for packages used by the Grand Trunk Railway Company, at Point St. Charles, and on that day the plaintiffs made an entry of the goods at the Custom-house, and paid the duty thereon ($107.10). On Monday, the 24th, the Customs officer in charge of the warehouse at Point St. Charles delivered the box to the foreman of the Custom-house carters, who in turn delivered it to one of his carters, who took it, with other parcels, and delivered it to a checker at the Customs examining warehouse. The box was then put on a lift and sent up to the third floor of the building where it remained one or two days. It was then brought down to the second floor and examined, when it was found that the diamonds had been stolen—the theft having been committed by removing the bottom of the box. Although the evidence tending to show that the theft was committed while the box was at the Customs examining warehouse at Montreal was not conclusive, the court drew that inference for the purposes of the case.

Held—That, admitting the diamonds were stolen while in the examining warehouse, the Crown is not liable therefor.

2. In such a case the Crown is not a bailee. The temporary control and custody of goods imported into Canada, which the law gives to the officers of the Customs to the end that such goods may be examined and appraised, is given for the purpose of the better securing the collection of the public revenue. Without such a power the State would be exposed to frauds against which it

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would be impossible to protect itself. For the loss of any goods while so in the custody of the Customs officers the law affords no remedy, except such as the injured person may have against the officers through whose personal act or negligence the loss happens.

Statement of Facts.

THIS was a claim against the Crown for the recovery of the duty paid value of a quantity of glaziers' diamonds which were alleged to have been stolen while in the custody of the Customs authorities at the port of Montreal (1).

The matter came before the court on a reference by the Minister of Customs under *The Customs Act* (R. S. C. c. 32, sections 182 and 183, as amended by 51 Vic. c. 14, s. 34).

The facts of the case appear in the reasons for judgment.

December 9th, 1891.

Hogg, Q. C., for the defendant: I submit that the facts do not show that the diamonds were stolen while in the possession of the Crown. The goods were entered in the usual way and the duty paid as usual. The Crown, therefore, is neither liable in respect of indemnifying the importer for the value of the goods nor in respect of refunding the duty. Admitting, for the sake of argument, that the goods were stolen while in the possession of the Customs authorities, the Crown would not be liable. An action in trover or conversion would lie in such a case against the person through whose act or fault the loss arose, but not

(1) By sec. 15 of *The Exchequer Court Act* (50-51 Vic. c. 16) it is enacted as follows:—The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be the subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown.

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against the Crown. (Cites *Cotton* v. *Lane* (1); *Whitfield* v. *Le Despencer* (2); *Rowning* v. *Goodchild*) (3). In such a case as this the Customs department is assimilated to the Post Office. If the Postmaster-General cannot be held responsible for the loss or theft of a letter containing money (*Whitfield* v. *LeDespencer*, *ut supra*), the Minister of Customs, representing the Crown in this case, cannot be held liable here. Both the Customs and the Post Office departments collect revenues of the Crown, and the two are in an analogous position. (Cites *Lord Canterbury* v. *The Queen* (4); *The Queen* v. *MacFarlane*) (5). Sec. 15 of *The Exchequer Court Act* (6) does not alter the law in anyway from that existing in England to-day, and the cases there show that the Crown is not responsible for the torts of its servants. (Cites *Clode on Petition of Right*) (7).

Curran, Q.C., for the plaintiffs: There is no doubt that the Crown is liable in such a case as this,—not only to return the duty paid but also to make good the value of the goods stolen while in its possession. There is no analogy between the Customs and the Post Office departments with respect to the reason for non-liability of the Crown for the safe-keeping of goods, because in the case of the Post Office a man is not obliged to use it, he may send his letters by a servant, while in the other case he is bound to put his goods in the custody of the Customs authorities by law. He has no option.

BURBIDGE, J., now (March 21st, 1892) delivered judgment.

(1) 1 Ld. Raym. 647.
(2) 2 Cowp. 754.
(3) 2 Wm. Black. 906.
(4) 12 L. J. Ch. 281.
(5) 7 Can. S. C. R. 216.
(6) 50-51 Vic. c. 16.
(7) Pages 88 and 89.

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Reasons for Judgment.

The plaintiffs seek to recover from the Crown the sum of $465.74 and interest, for the value, including the duty paid, of a quantity of glaziers' diamonds alleged to have been stolen at the examining warehouse in the port of Montreal from the box in which they had been shipped at London.

On Friday, the 21st day of February, 1890, the box mentioned was, it appears, in bond at a warehouse for packages at Point St. Charles, Montreal, used by the Grand Trunk Railway Company. On that day the plaintiffs made an entry of the goods at the Custom-house, and paid the duty thereon ($107.10). On Monday, the 24th, Owen Smith, the Customs officer in charge of the warehouse at Point St. Charles, delivered the box to Daniel O'Neil, the foreman of the Custom-house carters, who in his turn delivered it to John Mooney, one of the carters, who took it with other parcels and delivered it to Owen Ahern, a checker at the Customs examining warehouse. The box was then put on a lift and sent up to the third floor of the building where it remained one or two days. It was then brought down to the second floor and examined, when it was found that the diamonds had been stolen.

The bottom of the box, by removing which the theft had been effected, had not been skilfully replaced, and one of the nails used to fasten it on had come out at the side of the box. This nail was not, it appears, noticed by any of the persons who saw or handled the box until after it had been opened and the loss discovered.

O'Neil, Mooney and Ahearn think that they would have noticed the nail if it had been exposed when the box passed through their hands. Smith was not at all sure that he would have done so, because he handles many boxes and it was the carter's business to object if the box was not in good order, though if he had

noticed the nail the fact would, he thinks, have struck him. On the other hand, Labelle who opened the box in the examining warehouse, and those who were with him, do not appear to have observed that anything was wrong with it until after the box had been opened and found to be empty.

On this state of facts I am asked by the plaintiffs to find that the theft was committed while the box was at the examining warehouse, and although the evidence is not to my mind conclusive one way or the other, I shall accede to the plaintiff's contention and for the purposes of the case draw that inference from the facts proved.

For the loss of the goods under these circumstances the plaintiffs argue that the defendant is liable. With that view I cannot agree.

Even if it were possible under the authorities to hold that the Crown was, in the ordinary acceptation of the word, a bailee of the goods in question, and bound in keeping them to that degree of diligence which the law exacts, for example, of such special or quasi-bailees as captors or revenue officers, the plaintiffs would, I think, fail (1). There is no evidence of want of diligence in keeping the goods, or, if it is to be inferred that they were stolen by a servant of the Crown, of negligence in selecting or retaining the dishonest servant. But the question is not to be determined by the law of bailments. The officer of the Crown who has the custody of goods sent to a Customs warehouse for examination may be, and no doubt is, in a sense, a bailee of such goods, but the Crown is not (2). For any wrong committed by an officer of the Crown the injured person

(1) Story on Bailments, ss. 38, 39, 444-450, 613-618; *Finucane* v. *Small*, 1 Esp. N.P.C. 315.

(2) *Moore* v. *State of Maryland*, 47 Md. 467; 28 Am. R. 483.

(3) *Whitfield* v. *LeDespencer*, 2 Cowp. 765; *Rowning* v. *Goodchild*, 2 Wm. Bl. 906; Story on Agency s. 319.

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has his remedy against such officer (3), but the Crown is not liable therefor except in cases in which the legislature has expressly, or by necessary implication, imposed the liability, and given the remedy (4).

Moreover, the officer answers for his own acts and omissions only and not for those of his subordinates (5).

In answer to the suggestion that the Postmaster-General is a carrier of letters and liable for the loss of bank-notes stolen therefrom by a sorter in the Post Office, Lord Mansfield, in giving judgment in *Whitfield* v. *LeDespencer* (6), says that:

> The Post Office is a branch of revenue, and a branch of police, created by Act of Parliament. As a branch of revenue, there are great receipts; but there is likewise a great surplus of benefit and advantage to the public, arising from the fund. As a branch of police, it puts the whole correspondence of the Kingdom (for the exceptions are very trifling) under Government, and entrusts the management and direction of it to the Crown, and officers appointed by the Crown. There is no analogy, therefore, between the case of the Postmaster and a common carrier. .....As to an action on the case lying against the party really offending, there can be no doubt of it; for whoever does an act by which another person receives an injury is liable in an action for the injury sustained. If the man who receives a penny to carry the letters to the Post Office, loses any of them, he is answerable; so is the sorter in the business of his department. So is the Postmaster for any fault of his own.....But he is like all other public officers, such as the Lords Commissioners of the Treasury, the Commissioners of the Customs and Excise, the Auditors of the Exchequer, &c., who were never thought liable for any negligence or misconduct of the inferior officers in their several departments.

(4) See authorities cited in the *The City of Quebec* v. *The Queen*, 2 Ex. C.R. 257, and in *Burroughs* v. *The Queen*, 2 Ex. C.R. 298. For United States authorities, see *The United States* v. *Kirkpatrick*, 9 Wheaton 720; *Nichols* v. *The United States*, 7 Wallace 122; *Gibbons v. The United States*, 8 Wallace 269; *Schmalz* v. *The United States*, 4 C. of C.R. 142; *Moore* v. *The State of Maryland*, 47 Md. 467; 28 Am. R. 483; and *Langford* v. *The United States*, 101 U. S. R. 341.

(5) Story on Agency, s. 319; *Cotton* v. *Lane*, 1 Ld. Rayd. 646; *Whitfield* v. *LeDespencer*, 2 Cowp. 754; *Dunlop* v. *Munroe*, 7 Cranch 242; *Wiggins* v. *Hathaway*, 6 Barb. 632; *Brissac* v. *Lawrence*, 2 Blatch. 121, 124.

(6) 2 Cowp. 764-65-66.

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The principle of the immunity of the State from liability for wrongs committed by its officers is well illustrated in the opinions of the Supreme Court of the United States in a number of cases to which reference has already been made.

Mr. Justice Story, in delivering the opinion of the court in the case of *The United States* v. *Kirkpatrick* (1), says that:

> The general principle, is that laches is not imputable to the Government ; and this maxim is founded, not in the notion of extraordinary prerogative but upon a great public policy. The Government can transact its business only through its agents, and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses if the doctrine of laches can be applied to its transactions.

This case was approved and followed in *Dox* v. *The Postmaster-General* (2). In *Nichols* v. *The United States* Mr. Justice Davis, who delivered the opinion of the court, states the rule and the reason therefor, as follows (3) :—

> The immunity of the United States from suit is one of the main elements to be considered in determining the merits of this controversy. Every Government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, applies to every sovereign power, and but for the protection which it affords the Government would be unable to perform the various duties for which it was created. It would be impossible for it to collect revenue for its support, without infinite embarrassments and delays, if it was subject to civil process the same as a private person.

In the opinion of the court delivered by Mr. Justice Miller in *The United States* v. *Gibbons* (4), we find the following :—

> No Government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers and

(1) 9 Wheaton 735.
(2) 1 Peters, 318.
(3) 7 Wall. 126.
(4) 8 Wall. 274-75.

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agents. In the language of Judge Story [Story on Agency, s. 319] "it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties and losses, which would be subversive of the public interests."

The general principle which we have already stated as applicable to all Governments forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties.

The same judge, delivering the opinion of the court in a later case, in which a question as to the jurisdiction of the Court of Claims was involved (1), said :—

While Congress might be willing to subject the Government to the judicial enforcement of valid contracts, which could only be valid as against the United States when made by some officer of the Government acting under lawful authority, with power vested in him to make such contracts, or to do acts which imply them, the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of some one. For such acts, however high the position of the officer or agent of the Government who did or commanded them, Congress did not intend to subject the Government to the results of a suit in that court. This policy is founded in wisdom, and is clearly expressed in the Act defining the jurisdiction of the court, and it would ill-become us to fritter away the distinction between actions *ex delicto* and actions *ex contractu* which is well understood in our system of jurisprudence, and thereby subject the Government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives.

It is, therefore, always to be borne in mind that for the wrong of the public officer there is no remedy against the State unless the legislature thereof has created the liability and given an appropriate remedy. Of such instances of "liberality of legislation" (to use a term found in the opinion of Mr. Justice Davis that has been cited) the statutes of Canada and other British colonies afford a considerable number of instances (2); and in 17 Dalloz Rép. Jur. (3) will

(1) *Langford* v. *The United States*, 101 U.S.R. 345.

(2) *The City of Quebec* v. *The Queen*, 2 Ex. C. R. 252.

(3) C. 10, s. 1, Art. 5, p. 704.

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be found a case where the owner of property stolen from a box in the custody of the Customs officers recovered from the Administration the value thereof under the provisions of the French Customs law of 1791. But there is no suggestion that there is in the case under consideration any statute to aid the plaintiffs. Mr. Curran, for them, pointed out that the case differed from the storage of goods in a bonded warehouse, in which case the importer may exercise his option to leave the goods in the warehouse or not, but that in such a case as the present he has no option but must submit to having his goods taken to the examining warehouse to be examined by the officers of the Customs. That is, no doubt, true, and it might be an element to take into consideration if the case depended upon the law applicable to bailees. But we have seen that in such a case the Crown is not a bailee. The temporary control and custody of goods imported into Canada, which the law gives to the officers of the Customs to the end that such goods may be examined and appraised, is given for the purpose of the better securing the collection of the public revenues. Without such a power the State would be exposed to frauds against which it would be impossible to protect itself. For the loss of any goods while so in the custody of the Customs officers the law affords no remedy, except such as the injured person may have against the officer through whose personal negligence or act the loss happens.

There is another aspect of the case to which it is necessary briefly to refer. If the finding of the court had been, as the counsel for the Crown contended it might have been, that the diamonds were stolen before the 21st February, 1890, it is evident that there was at the time nothing in respect of which any duties were payable and the plaintiffs would, I think, have been

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entitled to a return of the duties paid by them. The plaintiffs' case supported, perhaps, as we have seen by the weight of evidence was, however, that the theft was committed while the goods were in the examining warehouse. In that view of the facts of the case, and it is the view in which it is to be disposed of, the duties were rightly paid. There will be judgment for the defendant, and the costs will as usual follow the event.

Judgment for defendant with costs.

Solicitors for plaintiffs : *Curran & Grenier.*

Solicitors for defendant : *O'Connor, Hogg & Balderson.*