INTERNATIONAL WOODS LIMITED

v.

THE ATTORNEY-GENERAL OF THE COLONY OF FIJI

[COURT OF APPEAL, 1964 (Hammett P., Adams J.A., Marsack J.A.), 31st January-4th February, 27th February]

Civil Jurisdiction

Customs—duty allegedly wrongly levied—proceedings for refund—properly brought against Attorney-General—Customs Ordinance (Cap. 166) ss.65, 67, 145, 155, 157, 158—Crown Proceedings Ordinance (Cap. 14) ss.2, 12(2), 16, 18(2) (3), 32(2)—Customs Regulation Ordinance 1881, ss.4, 95, 101—Customs Regulation Ordinance 1881-1895 (see Ordinance No. 1 of 1895) ss.52, 53, 54—Customs Regulation Amendment Ordinance 1922—Law Revision Ordinance 1945, s.15(a)—Customs (Amendment) Ordinance 1947—Petitions of Right Act 1860 (23 & 24 Vict., c.34) (Imperial)—Crown Suits Act 1908 (New Zealand)—Crown Proceedings Act 1947 (10 & 11 Geo. 6, c.44) (Imperial)—Customs Consolidation Act 1876 (39 & 40 Vict., c.36) (Imperial).

Customs—Comptroller—action against officer of Crown as such—Attorney-General defendant—Crown Proceedings Ordinance (Cap. 14) ss.12(2), 18(2) (3), 32 (2).

Attorney-General—properly joined as defendant in proceedings where Petition of Right formerly lay—or where proceedings lay against officer of Crown as such.

Interpretation—implied repeal—Customs Ordinance (Cap. 166)—Crown Proceedings Ordinance (Cap. 14).

An action for a refund of duty alleged to have been wrongly levied under the Customs Ordinance may properly be brought against the Attorney-General as defendant. Prior to the passing of the Crown Proceedings Ordinance such a claim could have been brought by Petition of Right and it follows that from the combined effect of sections 2 and 12 (2) of the Crown Proceedings Ordinance, proceedings may now be brought against the Attorney-General. Furthermore the Comptroller of Customs is an "officer" of the Crown within the definition in section 32 (2) of the Customs Ordinance, and proceedings which might, prior to the Crown Proceedings Ordinance, have been brought against the Comptroller as such officer, fall within the description of "civil proceedings against the Crown" in section 18 (2) of the last mentioned Ordinance, which, under section 12 (2) thereof, are to be instituted against the Attorney-General.

Cases referred to: *Carron Co. Ltd.* (unreported—see Robertson's Civil Proceedings against the Crown, 1908, p.343): *Dickson v. R.* (1865) 11 H.L.C. 175; 11 E.R. 1298: *In re Nathan* (1884) 12 Q.B.D. 461: *Baron de Bode v. R.* (1851) 3 H.L.C. 449; 10 E.R. 176: *Holborn Viaduct Land Co. Ltd. v. R.* (1887) 52 J.P. 341.

Appeal from an order of the Supreme Court striking out an action.

R. A. Kearsley for the appellant company.

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B. A. Palmer for the respondent.

Judgment of the Court: [27th February, 1964]—

In this action there is no statement of claim, and the general endorsement on the writ merely claims a sum of £649.15.0. as "customs duties wrongly levied in respect of a 'Hyster' Lift Truck." The proceedings subsequent to the writ throw no further light on the nature of the claim or on the questions of fact or law which may arise. Upon service of the writ, the Attorney-General issued a summons to have it set aside on the ground that the plaintiff had not complied with section 145 of the Customs Ordinance (Cap. 166), or "for any other good cause." In the argument in the Court below, this resolved itself into the contentions that, whereas the Attorney-General had been named as defendant, the Comptroller of Customs was the officer who ought to have been named and served; and that, there being a limitation of time for commencing proceedings and this having expired, no amendment could be made substituting the one officer of the Crown for the other. The latter submission was not contested in argument, and the learned Judge, having decided the former in favour of the Attorney-General, adjourned the case in the hope that the Attorney-General might see his way to waive the objection to the substitution of the Comptroller. Eventually, as no waiver was forthcoming, an order was made striking out the action, with costs against the plaintiff.

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We are happy to state that, at the hearing in this Court, learned counsel for the Attorney-General was able to assure us that, whether the appeal were proceeded with or not, the Attorney-General would now permit an order to be made substituting the Comptroller as defendant. This means that, whatever the result of the appeal may be, the case will now go back to the Supreme Court, and the plaintiff will be able to obtain a decision on the merits of its claims. We need hardly say that the Attorney-General's decision meets with our fullest approval and appreciation, and that it has been a relief to the Court to know that, whatever its decision on the technical point might be, the plaintiff would in the end have such relief, if any, as justice might require. The course followed by the Attorney-General accords with the high standard of probity which characterises the Crown as a litigant, and it has enabled the Court to approach a rather difficult problem unembarrassed by any feeling that a decision one way or the other was desirable in order to avoid a possible injustice.

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The technical question remains to be decided, and is not an easy one. We may say at the outset that we do not consider that anything turns on section 145 of the Customs Ordinance, which reads as follows:—

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> "145. Every suit or proceeding for the recovery of any duty or other charge leviable under this Ordinance or for the enforcement of any penalty or for the forfeiture of any goods, vessel or boat or any other article or for the satisfying of any bond or

security under this Ordinance shall be entered in the name of the Comptroller of Customs and may be instituted by a collector of customs."

In our opinion, that section is limited to proceedings by or on behalf of the Crown. In this we do not imagine that we differ from the learned Judge, though it follows that the Attorney-General's summons was misconceived in its reliance on that particular section. The real question is the one to which the learned Judge addressed himself, namely, whether there is, in sections 157 and 158, an implication that claims for refund of duty must be brought against the Comptroller, and whether this implication prevents section 12 (2) of the Crown Proceedings Ordinance (Cap. 14) from applying. The subsection is as follows :—

"12. (2) Civil proceedings against the Crown shall be instituted against the Attorney-General."

Sections 157 and 158 of the Customs Ordinance are as follows :—

"157. No action or suit for the refund of any duties alleged to have been wrongly levied under any law relating to customs shall be commenced in the Supreme Court before the person bringing the same has first appealed to and obtained the ruling or decision of the Commissioners as provided under section 67 hereof, and then only within two months from the date of such ruling or decision, and if in case of such action or suit it is determined that the duty so paid was not the proper duty but that a less duty was payable, the difference between the payment and the duty found to be due or the whole payment as the case may require shall be returned to such importer and shall be accepted by such importer in satisfaction of all claims in respect of the importation of such goods and the duty payable thereon and of all or any damages and expenses incident thereto except costs of suit as next hereinafter provided.

158. In any action against the Comptroller of Customs or any officer of customs the party to such action or suit in whose favour a verdict is given shall, if the verdict entitles him to costs, be entitled only to his costs of suit as between party and party against the other party to such action or suit, such costs to be taxed in the usual way; and if such verdict is given against the plaintiff in such action or suit, the costs so taxed as aforesaid shall be recoverable and recovered against the plaintiff in the same manner as costs in an ordinary action or suit in such court are recoverable by law; but if such verdict is given against the Comptroller of Customs or any officer of customs as defendant in such suit, the costs so taxed as aforesaid shall be paid out of the general revenue by the Accountant-General as costs in any other Crown suit are payable."

It is perhaps desirable to refer briefly to the history of sections 145, 157 and 158. The present section 145 appeared as section 95 in the Customs Regulation Ordinance 1881, but the concluding words then read, ". . . shall be entered in the name of the Receiver-General

and shall be decided in a summary way." Like the present section 145, section 95 was incapable of being read as applying to claims against the Crown. There was then no Comptroller of Customs and it was the Receiver-General who was charged with "the general administration of this Ordinance." (Section 4) The words "in a summary manner" probably meant decision by a Magistrate; and section 101 provided that, on all appeals to the Supreme Court, the Attorney-General should be the respondent. Express provision for such appeals was made by section 52 of Ordinance No. 1 of 1895. The present sections 157 and 158 did not appear in the Ordinance of 1881, and were respectively added by sections 53 and 54 of Ordinance No. 1 of 1895, though section 54 mentioned the Receiver-General, there being still no Comptroller of Customs. There was thus, from 1881 to 1895, no express provision whatever as to actions or suits for refund of duty, and nothing from which it could be inferred that such proceedings must necessarily be brought against the Receiver-General. The substitution throughout of a Comptroller of Customs in place of the Receiver-General was effected by the Customs Regulation Amendment Ordinance of 1922 (No. 13). From 1895 to 1922, the only reference to be found in the Ordinances to proceedings against the Receiver-General, and, since 1922, the only reference to proceedings against the Comptroller of Customs, has been the one contained in the opening words of what is now section 158—a mere provision as to costs, and one which, unlike section 157, makes no reference to refund of duties. The reference in section 95 of 1881 to decision "in a summary manner"—whatever it may have meant—seems to have been regarded as deleted by section 15 (a) of the Law Revision Ordinance of 1945 (No. 2)— *sed quaere*, as the particular phrase is not mentioned; and, by section 2 of the Customs (Amendment) Ordinance of 1947 (No. 4), section 145 was brought into its present form by the addition of the words, "and may be instituted by a collector of customs."

We have already expressed our view as to the scope of section 145, and need only add that, in our opinion, nothing contained in sections 157 and 158 can be regarded as affecting its construction.

We were assured by counsel on both sides that the conditions precedent imposed by section 157 have been met in this case, and that, provided the action has been properly constituted, there is nothing in section 157 to prevent it from proceeding. The section says nothing on the question who should be named as defendant, and there is nothing to prevent its application to an action brought against the Attorney-General. The present action falls within its scope as being an action for refund of duties, and the whole of its provisions can be applied to this action. In other words, there is no conflict between section 157 and the provision contained in the Crown Proceedings Ordinance, and no question arises of any implied repeal of anything contained in section 157. The two provisions are fully capable of standing together.

We think too that, assuming that proceedings for refund of duty might, prior to the enactment of the Crown Proceedings Ordinance, have been brought by petition of right, the words "action or suit" are

wide enough to include a petition (1 *Halsbury's Laws of England,* 3rd Ed., p. 5; and compare the use of the title "Crown Suits" under which the Petitions of Right Act 1860 appeared in 5 *Halsbury's Statutes of England,* 1st Ed., and the fact that in New Zealand petitions of right were, until recently, governed by a statute entitled the Crown Suits Act 1908). As will appear below, we think that such procedure was in fact open, and it would seem to follow that, even before the Crown Proceedings Ordinance, section 157 was already applicable to proceedings (that is to say, proceedings by petition of right) which were not brought against the Comptroller of Customs but directly against the Crown, and that to apply it now to proceedings instituted under that Ordinance involves no change in the law.

Section 158 deals, as we have said, solely with questions of costs, and is expressed to be applicable "in any action against the Comptroller of Customs or any officer of customs." The scope of the section is thus much wider than in the case of section 157. It would, of course, apply to an action against the Comptroller for refund of duties, if such an action were maintainable. But it includes much more besides, and is by no means limited to actions for refund. It would apply, for instance to actions such as are contemplated by section 155, against officers of customs for trespasses or other wrongs committed in purported execution of duty—actions which are, at least in theory, the personal concern of the officers, and which are in no true legal sense directed against the Crown. Thus the section may still have a wide operation even if it has now become inapplicable to an action for refund. It was common ground, in the argument before us, that, prior to the Crown Proceedings Ordinance, an action for refund could be brought against the Comptroller, with the result that section 158 would have applied to the proceedings and would have governed the taxation and recovery of costs. But, while reserving our opinion as to the former permissibility of such an action, we are by no means satisfied that an action against the Comptroller was the only form of procedure that was open for securing a refund. In *Robertson's Civil Proceedings By and Against the Crown* (1908), p. 343, the learned author cites an unreported case of *Carron Co. Ltd.* (1902), in which a claim for refund of customs duty was brought by petition of right; and, at pp. 343-5, he refers to the use of the same procedure in respect of death duties, excise duty and stamp duty. (See also 9 *Halsbury's Laws of England,* 2nd Ed., p. 689). In *Dickson v. R.* (1865) 11 H.L.C. 175, 11 E.R. 1298, a petition of right for refund of excise duty was dealt with in the House of Lords without comment on the procedure, though the petition failed on the merits. The claim for the same sum of 16/6½d. had originally been litigated in the Courts of Exchequer and Exchequer Chamber in Ireland in an action brought against an officer of excise in which the plaintiff eventually obtained a judgment; but, the money not being forthcoming and having in the meantime been paid over to the Treasury, he took advantage of the then recent passing of the Petitions of Right Act 1860 in order to enforce the claim. These facts appear in 11 H.L.C., pp. 176-7, and one may perhaps feel a shadow of regret that, after these renewed proceedings had passed through the Irish Court of Queen's Bench, the English Court of Exchequer Chamber and the House of Lords, so staunch a litigant was left without his

16/6½d. in the end. Bearing in mind that the Petitions of Right Act 1860 did not introduce such petitions, and created no new rights, but merely regulated and improved the procedure (see *per* Smith J. in *In re Nathan* (1884) 12 Q.B.D. 461, 468), the case of *Dickson v. R.* (supra) appears to illustrate clearly the proposition that there may be alternative remedies by action against an officer or by petition of right, provided always, of course, that the relevant statute does not preclude one or other of those alternatives.

In *In re Nathan* (1884) 12 Q.B.D. 461, where the claim was for refund of probate duty, and the statute provided for such refund to be made by the Commissioners if the claim were proved to their satisfaction, the Court of Appeal (Brett M. R. and Bowen L.J.) refused a writ of mandamus on the ground that the proper remedy was by petition of right, though this remedy would be available only if, on the true construction of the statute, the Commissioners were not "the ultimate and sole judges" (*per* Brett M.R., p. 472, and *per* Bowen L.J., p. 477). At p. 478, Bowen L.J. said:—

> "To my mind there is a clear remedy in a petition of right if the applicant is entitled to any remedy at all. The money is in the hands of the Crown, and there is an old constitutional way by which subjects of the Crown in this country are enabled to obtain back out of the hands of the Crown, either land, money or goods, upon which the Crown has laid its hands, and that is by the proceeding known as a petition of right. If that is the true view, then the petition of right would be the proper remedy in this case."

The "ambit of the petition of right" is stated in general terms as follows in *Robertson's Civil Proceedings By and Against the Crown* [1908], p. 331:—

> "Petition of right is the process by which recovery is made from the Crown of property of any kind, including money, to which the suppliant is legally or equitably entitled, except in cases where this process is ousted by some statutory method of recovery."

In our opinion the procedure was one that was universally available, within the defined limits, save only where a statutory remedy was given, and it appeared, on the proper construction of the statute, that the remedy so given was intended to be exclusive (*Baron de Bode v. R.* (1851) 3 H.L.C. 449, 469: 10 E.R. 176, 184; and, as to income tax, *Holborn Viaduct Land Co. Ltd. v. R.* (1887) 52 J.P. 341).

We see no reason for thinking that a petition of right would not have lain in the present case before the enactment of the Crown Proceedings Ordinance, there being no express provision in the Customs Ordinance requiring proceedings to be in some other form, and nothing from which, so far as we can see, such a requirement can fairly be implied. A mere implication that proceedings *may* lie against the Comptroller is not enough. Section 157 is not incompatible with the idea that a petition of right would lie; and if, as suggested above and as we think, the words "action or suit" will comprehend a petition, there was no difficulty at all in applying the section to such a

petition, and there is certainly none now in applying it to proceedings by action against the Attorney-General in pursuance of the Crown Proceedings Ordinance.

Of course, if, as was suggested might be the case in *In re Nathan* (above), it can be shown that the Ordinance makes a decision of the Comptroller or any other person final on any question affecting a claim for refund of duty, it would still be so whatever the form of the proceedings might be; and, while a petition might fail on this ground, it would fail on the merits and not as a matter of procedure. *In re Nathan* (above), the question was treated as one for decision on the hearing of the petition. We are not aware that any such question is likely to arise in the present case, and we mention the point only for the purpose of showing that, even if one does arise, it is irrelevant for present purposes. There are indeed, in sections 65 and 67, provisions which, if they stood alone, might be construed as having conclusive effect as to the amount of duty payable; but the assessment of a collector under section 65 is clearly subject to review by the Board of Commissioners acting under section 67, and the facts that, by the express terms of section 157, an action or suit for refund can only be brought after there has been a decision under section 67, and that the determination of the Supreme Court as to the amount of the duty is made effective for the purpose of securing a refund, seem to make it clear that, just as the apparently conclusive effect of section 65 is subject to the appeal to the Commissioners under section 67, so the apparently conclusive effect of section 67 is in its turn subject to the decision of the Court under section 157. We have, however, heard no argument on this or any similar question, and accordingly content ourselves with leaving all such questions open for decision at the hearing of the action.

We think therefore that it was possible, even before the Crown Proceedings Ordinance, to launch a claim for refund of customs duty in a form—to wit, a petition of right—to which section 158 would presumably have no application; and, if it is now permissible to sue the Attorney-General, and if it follows that section 158 cannot then be relied upon, there is no material alteration in the law.

For these reasons we think that section 158 cannot be regarded as decisive. There is no ground for any suggestion that it has been repealed in whole or in part by the Crown Proceedings Ordinance, and the utmost that can be said is that, if claims for refund can now be made by action against the Attorney-General, the section will not apply to such proceedings any more than it would have done to earlier proceedings by petition of right. There are provisions as to costs in section 16 of the Crown Proceedings Ordinance, and the intention may well have been that those provisions should apply in proceedings properly brought under that Ordinance, and should apply in lieu of any other provisions such as those contained in section 158. We see no reason for holding that the Crown Proceedings Ordinance should not apply here merely because the result may be that costs will no longer necessarily be dealt with as provided in section 158; and, as indicated above, it seems that the same result would have followed, even before the enactment of that Ordinance, if the proceedings had been by petition of right.

If we are correct in our view that a petition of right would have lain before the Crown Proceedings Ordinance, it is clear, from the combined effect of sections 2 and 12 (2) of the Ordinance, that proceedings may now be brought against the Attorney-General.

What we have just said is sufficient to dispose of this case. But there is another line of reasoning not raised in the argument before us, from which we think the same result must follow. It turns on the use of the words "civil proceedings against the Crown" in section 12 (2) of the Crown Proceedings Ordinance. The definition of "civil proceedings' 'in section 32 (2) is unhelpful, but section 18 (2) — which appears in the same Part of the Ordinance as section 12 — is relevant, and contains the following words, some of which we put in italics : —

> "(2) Subject to the provisions of this section, any reference in this Part of this Ordinance to *civil proceedings against the Crown shall be construed as a reference to the following proceedings only* : —
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> (a) . . .
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> (b) Proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Ordinance had not been passed, might have been enforced or vindicated or obtained by an action against the Attorney-General, or any Government department, or *any officer of the Crown as such;* and
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> (c) . . .

Notwithstanding the use of the word "only", this seems to make it perfectly clear that, in any case where, before the Ordinance, relief could have been obtained by action against "any officer *of the Crown as such,*" a claim for such relief is now to be regarded as a "civil proceeding against the Crown," and must, in accordance with section 12 (2), be brought against the Attorney-General. Section 32 (2) defines the word "officer" as including any servant of Her Majesty— even the Governor. There can be no doubt that the Comptroller of Customs is an "officer" of the Crown, within this definition, and that, if a claim for refund of duty lay against him, it lay against him "as such". The policy of the Ordinance seems clearly to be that actions against officers of the Crown as such are to be replaced by actions against the Attorney-General—a general statutory transfer of the liability to be sued in an action. There is no definition of the word "action", but we understand the term as excluding special statutory procedures, such as, for instance, appeals against assessments of income tax, where the proper view is that the statutory remedy is the only one available, and that an ordinary action will not lie. It may possibly be—though we doubt it—that, in addition to the exceptions specifically made by subsection (3) of section 18, there are some statutes providing for actions against officers of the Crown to which this statutory transfer cannot be applied. But, in our opinion, the mere fact that a statute designates an officer as the person to be sued by action is not sufficient to prevent the liability to be sued from

being transferred to the Attorney-General, one of the very purposes of the Ordinance being to effect such transfers. The Customs Ordinance, however, does not even go so far as that, and any implication that can be read into it cannot be said to be strong enough to prevail against the subsequent enactment. We are in any event, disposed to construe section 12 (2) as a general provision intended to override other statutory provisions in order to introduce a desirable uniformity of procedure and as not being one to which the maxim *generalia specialibus non derogant* can readily be applied. The contrary view might reduce sections 12 (2) and 18 to a trap for unsuspecting litigants—a most undesirable result. It is, however, unnecessary for us to indulge in generalities which might carry us into fields remote from the Customs Ordinance and it is enough for us to say that, while not ourselves perceiving any conflict between the two Ordinances, we consider that, if any such conflict exists, the Crown Proceedings Ordinance must in this case prevail over the other, even if this involves an implied repeal of somthing which can be found by implication in the Customs Ordinance.

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The fact that section 18 (3) specifically excepts the Public Trustee and the Registrar of Titles appears to support the view that the Ordinance was intended to override generally any other enactments permitting actions to be brought against officers of the Crown. Otherwise those exceptions would have been unnecessary. Had there been in the Customs Ordinance an express provision for action against the Comptroller, we think, as at present advised, that there would have been an implied repeal. But we need not go so far as that in the present case.

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We do not think it relevant that the corresponding English enactment—the Crown Proceedings Act 1947—expressly repealed certain provisions of the Customs Consolidation Act 1876.

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We think it desirable to add that nothing we have said is to be taken as indicating that, had it been incumbent upon us to consider the point, we would necessarily have been of opinion that it was beyond the power of the Court to amend the writ by substituting the Comptroller of Customs as the nominal defendant in lieu of the Attorney-General. It may well be that this case is distinguishable from certain authorities that were cited to the learned Judge, on the ground that the real defendant here is Her Majesty the Queen, and that such an amendment is accordingly no more than the substitution of one of her servants or agents for another servant or agent, and may therefore properly be made even after a period of limitation has expired. But no decision is necessary, and we merely reserve our opinion on this point.

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We should perhaps also add that, while some inferences may possibly be drawn from it, our judgment does not directly touch the question whether section 145, dealing with proceedings for the collection of duty and the like, is in any way affected by the Crown Proceedings Ordinance. That question must be left for decision when it arises.

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The appeal is allowed, and the order of the Supreme Court striking out the action and for payment of costs is set aside; and the respondent is ordered to pay the appellant's costs of the appeal, and in
A the Court below, taxed on the higher scale.

Appeal allowed.