Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeals of Hettihewage Siman Appu v. *the Queen's Advocate* (*Nos.* 83,316 *and* 83,320 *respectively*), *and on the Cross Action in Appeal No.* 83,320, *from the Supreme Court of Ceylon, delivered 7th April* 1884.

Present:

LORD BLACKBURN.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

The facts which give rise to these suits took place in the year 1878. Appu and Francisco Fernando, the two principal Defendants, purchased of the Crown Agents two arrack rents, each of which gave them a monopoly of selling the native liquors, arrack rum and toddy, for the year ending on the 30th June 1879, within a certain district called a rent division. The purchase money was to be paid in twelve instalments, and was secured by mortgage bonds given by the Defendants to the Queen. The third Defendant Juan Fernando is a surety for the others.

In the earlier action numbered 83,316 the Queen's Advocate on behalf of the Crown sued for Rs. 29,783. 34 cents, and in the later action numbered 83,320 for Rs. 30,216. 66 cents, being respectively the balances due on account of the two rents. The Defendants do not deny that the balances sued for are unpaid and would be due if there were nothing to set off against them.

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But they allege that the Crown has broken its engagements to them in connection with the arrack rents, and that they have thereby suffered damage which they are entitled to have ascertained in these actions and to enforce against the Crown in reconvention.

In action 83,316 the District Judge found that the Defendants had suffered damage to the extent of Rs. 4,500, and therefore that the Crown could recover only the amount of rent minus the damage, viz. Rs. 25,283. 34 cents. In action 83,320 he found that the Defendants had suffered damage to the extent of Rs. 70,000, which exceeded the claim of the Crown by Rs. 39,783. 66 cents. He then set the results of the two actions against one another, and made a single decree condemning the Crown to pay the Defendants the sum of Rs. 14,500. 32 cents.

The Crown appealed to the Supreme Court in both actions, and that Court made separate decrees. In action 83,316 they held that the Defendants had not made out any case in reconvention, and they decreed to the Crown the whole sum claimed for it. In action 83,320 they held that the Defendants had proved damages to the extent of Rs. 37,031. 25 cents, which exceeded the claim of the Crown by Rs. 6,814. 91 cents, and for that sum they gave the Defendants a decree.

The Defendants have now appealed to Her Majesty in Council from both decrees of the Supreme Court, seeking in effect to restore the decision of the District Judge. And the Crown has appealed in action 83,320, seeking to have the claims in reconvention entirely disallowed.

The claims made in reconvention in action 83,316 may be stated as follows:—That the profits of arrack taverns were diminished by the action of licensed liquor shops, which are shops for the sale of imported liquors; that the sums offered for arrack rents diminished accordingly;

that Francisco Fernando addressed the Governor to that effect; that the Governor, in answer, stated, on the 15th May 1878, that, "The "Government will aid in the suppression of the "sale of intoxicating liquor of every kind in "districts where the establishment of arrack "taverns is prohibited;" that on the 10th June, when the rent was put up to auction, Mr. Templer, the Government Agent, promised to the bidders present that licenses would not be issued to retail liquor in places where there were no taverns within the arrack districts; that, on the 12th June 1878 Mr. Le Mesurier, the Government Assistant Agent, urged Appu to purchase the rent, and promised him not to issue licenses for liquor shops in certain places; that on the 14th June, when the rent was actually purchased by private contract, Mr. Templer said to Appu, "You will have a good profit, because "licenses to sell other liquors would not be "issued;" and that licenses had been issued in contravention of the four promises so made.

With regard to the Governor's statement of the 15th May, the evidence as to the amounts bid for the rents leaves it at least doubtful whether the Defendants placed any reliance on it. But whether they did or did not, it was no contract. Fernando was not offering anything to the Government, or bound by anything when the Governor had written to him. There was no bargain then in contemplation. The Governor did nothing more than indicate the line of policy which the Government desired to take, just as he did when he told Mr. Templer, as that gentleman states in his cross-examination, that, "if the planters wanted to go in for temperance "they shall have it; that if they would allow no "taverns on their estates, the Government would "not allow liquor shops." Moreover there is not any statement by the Governor that licenses

shall not be issued in any given place; he only says that Government will aid in the suppression of the sale of liquors; and for aught that appears the Government have always been willing to do that so far as circumstances admit.

The next promise relied on was that of the 10th June. It was not alleged in the Defendant's answer, and the Supreme Court disregarded it on that account. But evidence on the point was given on both sides, and it was discussed before the District Judge and decided by him in favour of the Defendants. Their Lordships therefore think it more satisfactory not to exclude the discussion on appeal.

Three witnesses depose that Mr. Templer used the expressions which the Defendants rely on, Appu himself, Pedro Peresa, and Mathes Peresa. But Appu and Mathes do not understand English, and Pedro only understands English a little, though he says that he knew what the Agent said. He adds, "the Agent spoke in English, "and the Kachcheri Mudaliyar interpreted to us." It is clear that if the parties relied on what was then said, they must have relied on the Interpreter.

Mr. Templer does not deny that he said something on the point. He does not recollect it, but says that if he said anything he simply conveyed the Governor's instructions. What those were he stated on cross-examination in the terms above quoted.

We are therefore reduced to the evidence of the Interpreter. He says, "On that occasion the "Government Agent asked me to tell the Renters "that licenses would not be issued to sell foreign "liquors in places where taverns had been "suppressed." But immediately afterwards he adds, "One of the bidders came forward and "asked the Agent whether he would promise "not to issue fresh licenses for the sale of foreign

" liquor, and the Agent said he could make no " such promise."

The probability is that there was some conversation on the point, no doubt an important point to bidders, and that Mr. Templer made some declaration of the intentions of the Government similar to what is stated by him, and in the letter of the 15th May. But it is very difficult to say that any undertaking which any bidder had a right to rely on was given on behalf of the Crown. Be that as it may, it is certain that no bargain was struck on this occasion. Only Rs. 140,000 was bid, and the auction failed. An entirely fresh negotiation with Appu was entered on, which resulted in his offering Rs. 181,300, and in the sale of the 14th June. The talk of the auction room on the 10th cannot be imported into the private contract on the 14th.

The promise which Mr. Le Mesurier is said to have made on the 12th June was in the course of a private conversation between himself and Appu. He flatly denies it. It is in itself an improbable thing to have come from a Sub-agent. Appu's credit is so damaged by his denial of a letter (Exhibit Y) which he undoubtedly wrote, that there is no difficulty in disbelieving him, and their Lordships concur with the Supreme Court in so doing.

The last promise relied on is that of the 14th June. Appu, who was in the room and transacting the business with Mr. Templer, swore to what he said in the terms which have been stated above. Francisco says that he stood at the door, and overheard what was said, but he does not mention any declaration by Mr. Templer on the point in question. According to him Appu said that, " as he knew then the Governor's reply, he " would not mind giving " a larger price. We have then to go to the Interpreter, on whom Appu must rely for what Mr. Templer said, and

he tells us that "no mention whatever was made "about licenses." Mr. Templer also denies any promise.

Even if stronger evidence had been given of the promises relied on by the Defendants, there are two circumstances which would shake it greatly. One is that in the letter, Exhibit Y, which was written by Appu to the Government Agent on the 8th June, he attributes the low prices offered for arrack rents, not to the competition of liquor shops, but to a combination of those who have "a strong hold on the arrack "farms," and who have, he says, formed themselves into a body for the auction of the 10th instant. And he takes credit to himself for acting in the interests of the Government, and against those of the ring, by making higher offers, but begs that his proceedings may be kept quite secret. The other circumstance is that the Defendants never insisted or even asked that this important undertaking should be introduced into the written contract, which was signed on the 14th June, and was supplemented by the mortgage bond of the 28th June.

Their Lordships do not find it necessary to discuss the questions much dwelt on at the bar, whether the case made by the Defendants is a collateral contract, or a representation on which the Defendants entered into the written contract. They think with the Supreme Court that no contract or representation is proved at all in reconvention, and that the appeal in action 83,316 wholly fails.

In action 83,320 precisely the same case was made in reconvention with respect to liquor licenses, and the District Judge awarded Rs. 30,000 as damages. The Supreme Court, thinking the case was not proved, struck out the whole of that sum. They also reduced the sum of Rs. 40,000 awarded by the District Judge as

damages on another part of the case in reconvention which has yet to be stated. But the appeal of the Defendant is confined to the question of the liquor licenses. It therefore wholly fails for want of proof.

Their Lordships now turn to the appeal of the Queen's Advocate, which raises questions both of fact and law, and they will take the facts first.

The 6th article of the conditions of sale, which constitute the written contract between the parties, runs as follows:—"Licenses to sell "arrack rum and toddy by retail at the taverns "enumerated in the list hereto annexed, marked "A, shall be granted on the application of the "Renter to such persons as he may desire." List A is a list of twelve towns, villages, or places numbered consecutively from 1 to 12. The ninth place is entered in the list as "9, Kadyanlina:" a town of some little importance.

There had previously been a tavern licensed for a house in the bazaar of Kadyanlina, whether numbered 9 or not does not appear. The house was built on land belonging to Mr. Elphinstone, a coffee planter, who owned the whole bazaar and a large part of the neighbouring land. He was hostile to taverns, and having got possession of the site forbad the use of it as a tavern. The exact time at which this was done does not appear, but it was some time before the abortive auction of the 10th June.

In his evidence Mr. Templer tells us how the matter stood. He says, "One of the taverns "in the Bulatgama Division was Kadyanlina "tavern. On the 10th June I distinctly told "the Renters who had assembled to bid that there "would be difficulty in getting a site for a tavern "there. That Mr. Elphinstone would not allow "any site in the Kadyanlina bazaar to be used "for the purposes of a tavern. . . . I told

" the Renters that if they could get another " suitable site within that locality I would give " them a license."

On the 29th June a license was issued by Mr. Templer to sell arrack rum and toddy during the month of July " at the tavern No. 9 situate " at Kadyanlina, and at no other place." This license was ineffectual because neither the old site nor any other site could be procured in July. What is important to observe is that the license was issued for something called " Tavern No. 9 " at Kadyanlina," though it was well known to the Government Agents that the very house which was formerly used for the purpose was not then used or available for it.

At this point the case is complicated by attempts on the part of the Defendants to transfer the Kadyanlina tavern to Maskeliya, some 20 miles off. They presented several petitions for this purpose, which were refused. The only bearing which these proceedings have on the question now to be decided is that the Government, which steadily refused to grant any license for Maskeliya, admitted that one should be granted for the neighbourhood of Kadyanlina.

In the month of August the Defendants procured a site in the town of Kadyanlina, which adjoined the site of the old tavern. On the 30th August they applied to the Government Agent to " grant the license No. 9 for the tavern of " Kadyanlina, to establish the same tavern at the " adjoining place where it has been established " in the last year." Similar petitions were presented on the 3rd and the 17th September.

What was done on these petitions appears from the evidence of Mr. Le Mesurier and Mr. Templer. Mr. Templer was under the impression, which has been found by both Courts to be incorrect, that the new site was not in Kadyanlina, but a mile or a mile and a half distant. He evidently thought

that he was not bound to grant any license for a tavern so situated, except under the promise that he made to the Renters on the 10th June, which left him to be the judge what was a suitable site. He reported to the Governor that he never refused to license another site for a tavern in the vicinity of the old tavern at Kadyanlina. But, in point of fact, he did so refuse. He refused a license to the Defendants for the site they had procured, for the sole reason that Mr. Elphinstone objected to it and therefore the site was not suitable.

The question now is whether by that refusal the Crown has broken the written contract. It is said that the answer of the Defendants sets up only a collateral parol contract, which is not proved in fact, and could not be proved in point of law. But it appears to their Lordships that the answer relies on both contracts, and that the Defendants, though unable to make anything of the Maskeliya episode, have a right to rest their case on the written contract.

The 6th article is capable of two constructions; one being that licenses were to be granted for certain houses then used as taverns; and the other being that licenses were to be granted for a tavern in each of the specified towns and places in List A. Neither construction is quite literal, and to determine which is the true one it is necessary to look at the subject matter of the contract. Now, to the knowledge of both parties, there was at the time of the contract no tavern at all at Kadyanlina, and the contract would have no meaning if it were taken to refer to an existing tavern. The parties must be deemed to have contracted on the 14th June with reference to existing facts, and the language of Mr. Templer on the 10th June shows that the salient facts present to their minds were that there was no immediately available site for a tavern, no

reasonable chance of procuring the old site, and a difficulty in procuring another site in Kadyanlina.

So reading the contract, the clear duty of the Crown was to grant a license when a site in Kadyanlina, was procured, unless it could be proved that some substantial objection existed to it. The Crown had not, as Mr. Templer supposed, an arbitrary discretion to say what was a suitable site. Mr. Elphinstone's hostility was not a substantial objection to the performance of a legal obligation to grant a license for a site in Kadyanlina, as indeed Mr. Templer himself must have thought when he did grant the license for the old site.

On these grounds their Lordships concur with both the Courts below in thinking that there has been a breach of contract. It remains to consider the legal objections urged by the Crown against the Defendants' right to recover damages.

The argument on behalf of the Crown may be thus condensed. A claim in reconvention is in substance nothing else than a cross action brought by the Defendant against the Plaintiff; to sustain such a claim the Defendants must show that they can maintain a suit against the Crown; no such right existed under the Roman Dutch law, which is the law of Kandy; even if it did it would have been abrogated by the conquest of the country, being one of those rights which must of necessity be varied by a change of sovereign power; there has been no subsequent establishment of the right; a practice of suing the Crown has arisen, but it is irregular and cannot be upheld unless warranted by law, and no law can be found which confers the right. Even if there were the right of suit, it is argued that it would not warrant such a decree as the Court has made, for though the Court says that a judgement against the Crown does not carry

execution with it, it has in fact given execution to the extent of the debt due to the Crown by setting off the two claims and so wiping out the debt. These arguments were enforced at the bar with great learning and ability.

The maritime provinces of Ceylon were part of the dominions of the United Provinces, and were acquired by conquest by the British Government in 1799. The law in force before the time of the conquest must have been the Roman Dutch law of Holland, probably with some modifications. On the conquest the King of England might have abrogated the old law and have introduced the English law. He did not do so, but continued the old law with modifications, reserving to the King and to the East India Company power to make other alterations. The interior of the island, then the kingdom of Kandy, was not conquered till 1818, after which the law of the maritime parts was extended to the interior.

One of the laws of Ceylon, which differed from the English law, was that of reconvention, and it is not disputed that, as between subject and subject, that law of reconvention is in force. The question now is whether the same law is in force between the Judge Advocate suing for the Crown and a subject.

It may be assumed in favour of the Crown that for the purpose of trying whether the counter claim can be made at all there is no distinction between a claim in reconvention and an original action. And if it cannot be shown that the right to bring such an action existed under the Roman Dutch law, a legal foundation for it, if found at all, must be found in transactions subsequent to the conquest of the country.

The Defendants contend that there was a power given by the Roman Dutch law, to sue

the officer of the Government on behalf of the Government, and that this power has been preserved, the style of the officer alone being changed into the Queen's Advocate. They do not allege that when judgement is given for the subject against the Queen's Advocate execution can be issued against his person or private property, nor even against the property or revenue of the Government; but they say that, though the judgement cannot be thus enforced, the subject has a right to have it ascertained by a Court of Justice that he has a debt which the Government ought to pay, and to have the benefit of the strong moral pressure that there would be on the Government to provide for payment of the debt thus ascertained. Such a suitor would thus be much in the position of a subject in England who on a petition of right has obtained a judgement in his favour, but can only obtain the fruits of his judgement by the grace of the Crown and the assistance of Parliament.

In support of the Plaintiff's argument, it was contended that it was not possible to suppose that any Government, or at least any monarchical Government, would submit to the indignity of being sued even through its officers. That, however, is not an impossible supposition. In the King's Advocate *v.* Lord Dunglas, 15 Court of Sessions Cases, 1 Series, 314, Lord Medwyn enters into a very learned discussion as to the early history of the mode of procedure in Scotland. He states at p. 325 that in very early times the King of Scotland sued in person in civil suits, but that afterwards he sued by his officers of state, and at p. 333, when discussing how the King was to be sued, Lord Medwyn says:—

"His officers are cited instead of the Sovereign, and to defend his interest, on the ground that it was thought improper to call the King personally into Court. The rule however was

not extended to the Regent. Thus the Queen Regent is defender in a reduction of a forfeiture in 1558, John Duke of Albany in 1525, and James Earl of Arran in 1543, along with the Treasurer and Advocate, or (and ?) the donators, the persons having interest."

There certainly seems no more antecedent reason why the Counts of Holland should be exempted from suit through their officers than existed for the exemption of the King of Scotland. And though it is very likely that whilst great potentates, like the Dukes of Burgundy and the Kings of Spain, were Counts of Holland, it would not be very safe to sue them, yet when the United Provinces became independent, suitors might find themselves more favourably placed.

But whatever speculations may be made upon these points, their Lordship cannot advise Her Majesty that such was the Roman Dutch law, unless it is shown to them that it was so. And neither the researches of Counsel nor their own have enabled their Lordships to attain any certainty on the subject.

That a very extensive practice of suing the Crown has sprung up is certain. In his judgement in the case of Fernando, which was decided immediately before the present case came under review, C. J. Cayley says, "The practice has "been recognized in many hundreds of decisions, "and long acquiesced in by the Crown, and, so "far as I am aware, has not till now been called "in question." It was recognized by the judgement of the Court in Fraser's case, decided in the year 1868.

In Mr. Justice Thompson's Institutes of the Laws of Ceylon, after referring to the English Petition of Right, he says that, the Ceylon Government having no Chancellor, a suit against the Government has been permitted, and the Queen's Advocate is the public officer who is sued on behalf of the Crown. He then points out that, except in land cases, this action gives

little more than is given by the Petition of Right, for no execution can issue against the Crown or against the Queen's Advocate.

It is true that in Palmer *v.* Hutchinson 6 App. Cases, page 619, it is stated 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. But in Natal, where that case arose, the jurisdiction of the Court was founded on an Ordinance dated the 10th of July 1857, and extended only over all Her Majesty's subjects and all other persons whomsoever residing "and being within the "Colony." And this case possesses a feature which is not found in Palmer *v.* Hutchinson, viz., that the practice of suing the Crown has been recognized by the Legislature.

The 117th section of Ordnance No. 11 of 1868 runs as follows :—

"All suits instituted in the name of the Queen's Advocate on behalf of the Crown, for the recovery of any debt, damages, or demand, or to obtain possession of any property, provided the amount or value in dispute exceeds ten pounds, may be instituted and prosecuted, at the discretion of the Queen's Advocate, in the District Court held at the principal town of the province in which the Defendant resides, or in which the cause of action shall have arisen wholly or as to any part, or in which such property is situated; and all suits instituted by any private party against the Queen's Advocate wherein the amount or value in dispute exceeds ten pounds shall, unless the Queen's Advocate consents to forego such right, be instituted and prosecuted in the District Court held at the principal town of the province in which the act, matter, or thing in respect of which any such suit shall be brought shall have been done or performed, or in which the property in dispute is situated; and the said District Court shall have cognizance of and power to hear and determine such suits as if the cause of action had arisen within the district."

It appears to their Lordships that the latter part of that section would be deprived of its meaning unless it is held that, in the view of the Legislature, suits might be instituted by private persons against the Queen's Advocate

for the recovery (amongst other things) of debts and damages. It is said that to give that meaning to the Ordinance would prove too much, for it would include actions for damages *ex delicto*, which, as everybody admits, cannot be brought against the Crown. But it does not follow that, because the words are wide enough to include actions *ex delicto*, they must do so. They are not words adapted to confer a new right, or to establish a new kind of suit. They are only regulative of rights and proceedings already known, and they must be construed according to the state of things to which they clearly refer. They can therefore receive a full and sufficient meaning without extending them to actions *ex delicto*, but they cannot receive a full and sufficient meaning, indeed it is difficult to assign them any substantial operation at all, unless they embrace actions *ex contractu*.

It is then certain that prior to 1868 there was such an established practice of suing the Crown that the Legislature took it for granted and regulated it. The same state of things must have existed prior to 1856, for the Ordinance of 1868 is only a re-enactment of an earlier Ordinance of 1856. Earlier Ordinances still have been referred to, but their Lordships do not discuss them, because, though they speak of suits in which the Crown is Defendant, and though it is the opinion of the Supreme Court and is probable that they refer to claims *ex contractu*, it is not clear that they do so.

It would certainly be inconvenient that there should be no means of obtaining the decision of a Court of Justice in Ceylon on claims made by the subject against the Crown. Yet there are none if actions of this kind do not lie, for the Petition of Right does not exist in the Colony. In the present case the consequences would be somewhat

startling. The Crown would be able to sue the subject on one portion of a contract, while itself violating with impunity another portion of the same contract; and the subject must pay for the breach which he has committed, while recovering nothing for the breach by which he has suffered. Whatever may be the exact origin of the practice of suing the Crown, it was doubtless established to avoid such glaring injustice as would result from the entire inability of the subject to establish his claims. And finding that the Legislature recognized and made provision for such suits at least 28 years ago, their Lordships hold that they are now incorporated into the law of the land.

It remains to consider whether the decree does right in setting off the Defendants' claim against that of the Crown, or whether separate judgements should be given for each amount, leaving the sum awarded to the Defendants to be recovered only as a matter of grace on the part of the Crown.

It is true that the course taken by the Courts below does practically give an effective execution against the Crown to the extent of the Crown's claim against the Defendants. But though the Crown is thereby prevented from recovering its debt, it is not exposed to the indignity attendant upon process of execution. Some analogy to this question may be found in the cases which decide that a foreign Sovereign may be sued in the Court of Chancery by way of defence or cross claim, though he cannot be sued unless he himself has first invoked the jurisdiction of the Court. In the case of the Duke of Brunswick *v.* the King of Hanover (6 Bea., 1), the principle of this doctrine was very fully discussed by Lord Langdale. In the course of his judgement he says :—

"The liability of a foreign Sovereign to be sued in a case

where he himself was suing here, was considered to be founded upon the principle that by suing here he had submitted himself to the jurisdiction of the Court in which he sued. The decision is in accordance with the rules of the civil law. The *reconventio* is a species of defence, and '*Qui non cogitur in aliquo 'loco judicium pati, si ipse ibi agat, cogitur excipere actiones 'et ad eundem judicem mitti.*'"

A further analogy may be found in the practice of the Court of Admiralty affecting cases of collision where both parties are to blame. There, though the damage suffered by each is ascertained by a separate process, no monition is issued except for the moiety of the balance awarded to the one who has suffered the greater damage. And that rule is followed though the amount actually payable by one of the parties is materially affected by it, as it would be when the other is insolvent. This principle is illustrated by the case of The Stoomvaart Maatschappy Nederland *v.* The Peninsular and Oriental Steam Navigation Company, 7 App. Ca., 795.

In this case the suit is brought by the Queen's Advocate on a contract made between the Crown and a subject. The parties have contracted on a footing of equality. It would lead to injustice if, when brought into Court by the Crown, the subject should not be able to resist payment of anything but that which, on the balance of the debt or damage recoverable under the contract by each party, is found due to the Crown.

The Crown suffers no more indignity or disadvantage by this species of defence than it would suffer by defences of a more direct kind, which yet would be clearly admissible: as for instance, if a breach of contract sued on by the Crown were excused on the ground that the wrongful action of the Crown itself had led up to that breach.

For these reasons, their Lordships consider that the judgment of the Supreme Court on this point must be upheld.

The result is that each of the three appeals ought to be dismissed with costs, and their Lordships will humbly advise Her Majesty accordingly.