TRINIDAD AND TOBAGO:

IN THE COURT OF APPEAL

Civil Appeal
No.69 of 1963

B E T W E E N

SIR SOLOMON HOCHOY, G.C.M.G., O.B.E.. - Defendant/Appellant

A N D

THE NATIONAL UNION OF GOVERNMENT EMPLOYEES (a registered Trade Union) and JOHN HACKSHAW - Plaintiffs/Respondents

A N D

No.70 of 1963

B E T W E E N

SIR SOLOMON HOCHOY, G.C.M.G., O.B.E. - Defendant/Appellant

A N D

THE OILFIELD WORKERS TRADE UNION (a registered Trade Union) and GEORGE WEEKS - Plaintiffs/Respondents

A N D

No.71 of 1963

B E T W E E N

SIR SOLOMON HOCHOY, G.C.M.G., O.B.E. - Defendant/Appellant.

A N D

THE CIVIL SERVICE ASSOCIATION OF TRINIDAD AND TOBAGO (a registered Trade Union) and JAMES MANSWELL - Defendants/Respondents.

CORAM: The Hon. the Chief Justice, Sir Hugh Wooding,
" " Mr. Justice Hyatali, J.A.
" " Mr. Justice Phillips, J.A.

April 24, 1964.

J U D G M E N T

By the argument addressed to this court the learned Solicitor-General sought to maintain (1) that the appellant was sued in his official capacity as Governor-General in respect of an

/official ..

official act; (2) that even if he was sued in his private capacity for an official act, it was incompetent for the respondents so to do, since the appellant is immune from suit in the courts of Trinidad and Tobago; and (3) that the court had no jurisdiction to make the declarations prayed for, as O.26 r.5 of the Rules of the Supreme Court is not binding on the Crown.

On the face of each writ the appellant is described as "Sir Solomon Hochoy G.C.M.G., O.B.E.," simpliciter, but in the indorsement thereon, he is designated in paragraph 1 thereof as "the Defendant Sir Solomon Hochoy (hereinafter referred to as "the Governor-General")," and thereinafter in a simple reference to him in sub-paragraph (c) thereof he is called 'the Governor-General'. It was said in these circumstances that the appellant is sued in his official and not in his private capacity. This contention is in my judgment untenable, as it is perfectly plain from each writ and the indorsement thereon that Sir Solomon Hochoy, the individual, is the defendant against whom the relief claimed is sought and the fact that the indorsement indicates that he was going to be referred to as "the Governor-General" is no warrant for concluding that he is sued in his official capacity. In my view, the finding of the learned judge that the appellant is sued in his personal capacity is right and should not be disturbed.

Even so, the learned Solicitor-General argued that it is incompetent for any citizen to sue the appellant personally for an official act as he is immune from suit in the courts of Trinidad and Tobago. For the validity of this submission, reliance was placed on the opinion of the learned contributors to the title "Commonwealth and Dependencies", in 5 Halsbury's Laws of England (3rd Edn.) p.468 at para. 1033, and the case of Sullivan v Earl Spencer and others (1872) 6 Ir. C.L.R. 173. Before considering them however, it is necessary to consider the constitutional status of Trinidad and Tobago (which I shall hereafter call "the State") and that of its Governor-General.

/In 1962, ...

In 1962, the Parliament of the United Kingdom enacted the Trinidad and Tobago Independence Act (11 Eliz. 2, c.54), and the Queen in Council made the Trinidad and Tobago (Constitution) Order in Council 1962, whereby with effect from August 31, 1962, the State attained the status of an independent Dominion within the British Commonwealth of Nations, and was granted a new constitution under the Act and Order respectively. The provisions in the constitutional instruments relating to the Governor-General, the legislature, the executive authority and the Judicature are contained in ss. 19, 20, 22, 44(1), 56(1) and (2) and 73 of the Order and are in the following terms:-

s. 19: "There shall be a Governor-General and Commander-in-Chief of Trinidad and Tobago, who shall be appointed by Her Majesty and shall hold office during Her Majesty's pleasure and who shall be Her Majesty's representative in Trinidad and Tobago."

s. 20: "A person appointed to the office of Governor-General shall before entering upon the duties of that office, take and subscribe the oath of allegiance and such oath for the due execution of his office as may be prescribed by Parliament."

s. 22: "There shall be a Parliament of Trinidad and Tobago which shall consist of Her Majesty, a Senate and a House of Representatives."

s.44(1): "Subject to the provisions of the Constitution, the power of Parliament to make laws shall be exercised by bills passed by the Senate and the House of Representatives and assented to by the Governor-General on behalf of her Majesty."

s.56(1): "The executive authority of Trinidad and Tobago is vested in Her Majesty."

s.56(2): "Subject to the provisions of the Constitution, the executive authority of Trinidad and Tobago may be exercised on behalf of Her Majesty by the Governor-

/General....

"General, either directly or through officers subordinate to him."

s. 73: "There shall be a Supreme Court of Judicature for Trinidad and Tobago consisting of a High Court of Justice . . . . . and a Court of Appeal with such jurisdiction and powers as are conferred on those Courts respectively by this Constitution or any other law."

These provisions speak for themselves. In substance, they decree that the Queen is Queen of the State, that she is a constituent part of its legislature, that the executive authority is vested in her, that the courts are her courts and that the appellant, as the duly appointed Governor-General holds office during her pleasure, owes allegiance to her, is her representative in the State and is charged with the duty of exercising her executive authority under the constitution. Notwithstanding what seems to me to be the clear purport of these provisions, the Solicitor-General maintained that the appellant as the Queen's representative is immune from suit in the courts of the State. Expressed more graphically, his proposition is that the Governor-General, like the Queen, can do no wrong.

There is a fallacy in this proposition, which proceeds I think, from a misconception of the true meaning and significance of the doctrine that the Queen can do no wrong. Let me endeavour therefore, to put it in its proper perspective. The doctrine in its present form developed from the ancient feudal principle that no lord could be compelled to answer in his own court. In its constant application to the King as head of the kingdom, however, it acquired a special meaning and significance; for not only did the common law in the course of its evolution and development clothe the King's person with inviolability, perfection, sovereignty and pre-eminence, but by many statutes he was declared to be "the supreme head of the realm in matters both spritual and ecclesiastical, inferior to no man, dependent on no man and accountable in his proper person to

/none .....

none save only to God, either within or without the realm." See 1 Blackstone Commentaries (12th Edn.) pp.241 - 2 and 245; and 7 Halsbury's Laws of England (3rd Edn.) p.222 at paras. 468 - 470. From the association of this concept of perfection with the inability of his subjects to compel him to answer in any of his courts the doctrine that the King could do no wrong was born and became securely entrenched thereafter in the British Constitution as the prerogative of perfection. As Professor Holdsworth recorded in his History of the English Law (3rd Edn.) Vol.111 p.466:-

> "In 1457 it was affirmed on one side and denied on the other that the King could be a disseisor; and in 1483 the question whether or no the King could be a disseisor led to a statement in Chancery, which was agreed to by all the judges and serjeants, of the general principle that the King cannot commit a wrong. But as yet this was a very new principle. It was not until the sixteenth century that with the growth of the idea of the dual capacity of the King, it became acclimatized in the law. It was not until the seventeenth century that it was made the basis of the modern doctrine of ministerial responsibility."

In 1864, Erle C.J. in Tobin v The Queen 16 C.B.(N.S.) 311 at p.354 defined the doctrine in these terms:-

> "The maxim that the King can do no wrong is true in the sense that he is not liable to be sued civilly or criminally for a supposed wrong. That which the sovereign does personally, the law presumes will not be wrong: that which the sovereign does by command to his servants cannot be a wrong in the sovereign, because, if the command is unlawful, it is in law no command and the servant is responsible for the unlawful act, the same as if there had been no command."

In the following year, Cockburn, C.J. in Feather v The Queen 6 B & S 258, spoke in the same strain when he said at p.295 that:-

/"the maxim ..

> "the maxim that the King can do no wrong applies to personal as well as to political wrongs; and not only to wrongs done personally by the Sovereign if such a thing can be supposed to be possible, but to injuries done by a subject by the authority of the Sovereign."

He went on to add, at p. 296, this rather important statement:

> "Let it not, however, be supposed that a subject sustaining a legal wrong at the hands of a minister of the Crown is without a remedy. As the Sovereign cannot authorize wrong to be done the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown. The learned counsel for the suppliant rested part of his argument on the ground that there could be no remedy by action against an officer of state for an injury done by the authority of the Crown, but he altogether failed to make good that position."

This brief review of the origin and development of the doctrine makes it plain that the prerogative of perfection, as it came to be known, is a peculiar privilege of the Queen and adheres to her in both her politic and personal capacities. In its proper signification, therefore, it means and implies that she cannot be sued in either capacity for any supposed wrong done or authorised by her. This doctrine remains in full force and effect in the State. Accordingly, the appellant who is no more than an officer, albeit a high official, appointed by the Queen, and who holds the office of Governor-General during her pleasure and owes allegiance to her, can lay no claim to a privilege which is personal and peculiar to her. And as there is nothing in the constitutional instruments or in any other enactment which confers on the appellant the immunity for which the Solicitor-General contended, I must reject the notion that he cannot be sued personally, or that as Governor-General he is, like the Queen, incapable of doing wrong.

The passage under the rubric "Legal liability of

Governors-General and Governors" appearing in 5 Halsbury's Laws of England (3rd Edn.) p.468 para. 1033, may now be examined. It may be conveniently divided into two parts. The first reads as follows:-

> "While the Queen is not subject to the jurisdiction of her courts, the representatives of the Crown are liable to suit in the territory or in the United Kingdom for tortious acts committed in the course of their official functions though not in respect of contracts."

This statement clearly refutes the proposition for which the Solicitor-General contended and strongly supports the submissions made on behalf of the respondents. What he relied on, however, was the sentence immediately following, to wit:

> "In view of the present status of Members of the Commonwealth it is possible, however, that the courts might recognise immunity from suit in respect of claims arising out of official but not private acts."

We were invited to fulfil, what can at best be described as the hope expressed therein that the Governor-General of a Dominion will be declared by its courts to be immune from suit in respect of claims arising out of official acts. This is, no doubt, a desirable goal at which to aim, but unless I am convinced that the courts of the State have the jurisdiction to confer immunity from suit on a Governor-General in respect of such claims, I should not be prepared to deny the citizen his right to sue him in respect of any liability which he thinks he might enforce, especially as the legislature has made no attempt to disturb it but on the contrary is apparently content to preserve it intact. It is sufficient to state I am not so convinced. The statement however, is useful to show, that the learned contributors to the title in question recognise, that the Governor-General of a Dominion enjoys no immunity from suit in respect of claims arising out of official or private acts.

/This is .....

This is in complete accord with what I have been endeavouring to state and so I shall pass on to the case of Sullivan v Earl Spencer and Others (supra).

It is clear that the court in that case decided not that the Lord Lieutenant was immune from suit but that no liability could be incurred by him in respect of the act which was shown by affidavits to bear the character of a political act. Whiteside, C.J., likened the action to one brought against a Judge for acts done in his capacity as a Judge and was careful to say, that no action could be maintained for the act complained of. In none of the judgments delivered, is there any statement to suggest that the Lord Lieutenant could not be sued, or that the court had no jurisdiction over him. This case, therefore, does not assist the argument of the Solicitor-General, and fortified by the opinions of the learned Chief Justice and of Phillips, J. which I have had the advantage of reading and with which I respectfully agree, I am satisfied that the second argument of the appellant must also be rejected.

With respect to the last point advanced, the submission was that O.26 r.5 of the Rules of the Supreme Court was not binding on the Crown, by virtue of s.7 of the Interpretation Act 1962. This rule reproduces substantially, s.22 of the Judicature Act No.12 of 1962 that

> "No action shall be open to objection on the ground that a merely declaratory decree or order is sought",

but adds that

> "the court may make binding declarations or right whether any consequential relief is or could be claimed or not."

It is to be observed that the rule does not confer jurisdiction to make a declaration; it merely declares that no action shall be open to objection because a merely declaratory order is sought. The jurisdiction of the court to make declarations

/is an .....

is an ancient and well-established one and is not derived from the Rules of the Supreme Court. At any rate, if it is competent for the respondents to sue the appellant in his personal capacity then even assuming that the principle contended for is correct, it is wholly irrelevant to the instant case. For these reasons I also, would dismiss the appeal.

As a footnote merely, to this judgment, I would add that the constitutional status of the State is now such that it would be more in keeping with its dignity, if matters of this kind were litigated against the Attorney-General. No prejudice is likely to result from adopting this procedure and I join with the learned Chief Justice in commending it for acceptance.

Isaac E. Hyatali,
Justice of Appeal.