procedure to be adopted by the plaintiff in order to maintain his claim, it is a matter in which we should give special leave to appeal when the amount involved is less than £30. On the whole, having regard to the principle followed by this Court in *Dalgarno* v. *Hannah* (1) we have come to the conclusion that it would not be a proper thing for us to decide such a difficult matter in a case where so small an amount is involved as in this case. We think, therefore, that the proper order is to rescind the special leave.

Special leave rescinded. Appellant to pay the costs of the appeal.

Solicitors, for the appellant, *Logan & Carlton* by *Sly & Russell.*

Solicitors, for the respondent, *Baker & Mackenzie* by *Mackenzie & Mackenzie.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

BAUME . . . . . APPELLANT;
PLAINTIFF,

AND

THE COMMONWEALTH . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

SYDNEY, *Aug.* 14, 15, 16, 17, 20, 27.

Griffith C.J., Barton and O'Connor JJ.

Action against Commonwealth—Liability for tortious acts of servants—Independent officer—Collector of Customs—Ministerial duty—Nominal and small damages—Customs Act (*No.* 6 *of* 1901), *secs.* 30, 214, 215—*Judiciary Act* (*No.* 6 *of* 1903), *secs.* 56, 64.

(1) 1 C.L.R., 1.

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Practice—Verdict of jury in Court exercising federal jurisdiction—New trial motion—Jurisdiction of High Court—Power of Court to reduce damages—Amendment at trial—Judiciary Act (*No.* 6 *of* 1903), *secs.* 2, 39.

Secs. 56 and 64 of the *Judiciary Act* 1903 give a subject the same rights of action against the Commonwealth as he would have against a subject in matters of tort as well as contract. The Commonwealth is therefore responsible in an action for the tortious acts of its servants in every case in which the gist of the cause of action is an infringement of a legal right, if the act complained of is not justified by law, and the person doing it is not exercising an independent discretion imposed upon him by Statute, but is performing a merely ministerial duty.

The Collector of Customs, pending the passing of entries, took and detained certain imported goods liable to *ad valorem* duty for the purpose of ascertaining their true value for duty, and upon the passing of the entries delivered the goods to the importer.

Held, that, in refusing to pass entries until the ascertainment of the true value for duty, the Collector was performing a quasi-judicial duty prescribed by the Statute to be performed by him personally, in the performance of which he was required to exercise independent judgment on a preliminary question of fact, and that an action would not lie against the Commonwealth for a wrongful refusal to pass entries owing to a mistake of facts or even *mala fides* on the part of the Collector.

Tobin v. *The Queen*, 16 C.B.N.S., 310, and *Enever* v. *The King*, 3 C.L.R., 969, followed. *Barry* v. *Arnaud*, 10 A. & E., 646, and *Barrow* v. *Arnaud*, 8 Q.B., 595, distinguished.

But, *held*, that the neglect or refusal by the Customs Department to furnish the importer with copies of books and documents impounded or retained under secs. 214 and 215 of the *Customs Act* 1901 was a breach of an absolute duty cast by the latter section on the department, for which an action would lie against the Commonwealth ; and

That, though the impounding and retaining of the books and documents in the first instance were justified by the Act, the unreasonable detention of them after the expiration of the period necessarily occupied in the ascertainment of the value of the goods was unlawful, and rendered the Commonwealth liable to an action for conversion ; but

That, in either case, the damages recoverable were limited to the pecuniary loss actually suffered by the plaintiff by reason of the wrongful acts.

Semble, that on a motion for a new trial on the ground of misdirection the High Court will follow the practice of the Supreme Court and refuse to grant a new trial if the misdirection involves only a trifling amount.

If, on a motion for a new trial on the ground that the damages are excessive, it appears that the damages are excessive, but that the plaintiff is entitled to

something more than nominal damages, the Court has no jurisdiction to reduce the damages and enter a verdict for the lesser amount except by consent of the parties.

Distinction between nominal and small damages considered.

It is a matter for the discretion of the Judge at the trial to refuse or to allow an amendment of the plaintiff's claim by the filing of fresh particulars, and, if the Judge refuses it, the Court of Appeal will not interfere with his discretion if the defendant might by any possibility have been prejudiced by the amendment.

The High Court has jurisdiction to entertain a motion for a new trial after the verdict of a jury in the Supreme Court of a State exercising federal jurisdiction under sec. 39 of the *Judiciary Act* 1903.

NEW TRIAL MOTION.

The appellant brought an action against the Commonwealth in the Supreme Court of New South Wales in its federal jurisdiction, for wrongful acts alleged by him to have been committed by the officers of the Customs Department in respect of certain shipments of goods liable to *ad valorem* duty under the Customs Tariff, and certain books of account and documents, which had reference to the goods in question and to the plaintiff's business generally.

The declaration contained seven counts which were in substance as follows:—(1) Trespass to certain parcels of merchandise of the plaintiff whereby the plaintiff suffered loss and damage and incurred expense in endeavouring to obtain delivery and possession thereof and was injured in his business and otherwise; (2) conversion of the said goods whereby the plaintiff suffered the loss and damage stated in the first count; (3) wrongful refusal by the Customs to pass entries of the goods or to permit them to be removed from the control of the Customs by the plaintiff notwithstanding that the plaintiff made proper entries of the goods and paid the proper duties, whereby the plaintiff suffered loss and damage; (4) similar count to the third, except that tender of duties was alleged, instead of payment; (5) wrongful refusal by the Collector to furnish to the plaintiff certified copies of books and documents seized and impounded by the Customs under sec. 214 of the *Customs Act* 1901 whereby the plaintiff suffered loss and damage in his business; (6) trespass to books and documents

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whereby the plaintiff suffered the loss and damage stated in the fifth count; and (7) detention of books and documents of the plaintiff. The plaintiff claimed under the seventh count a return of the books and documents with £5,000 damages for their detention, and under the residue of the declaration £15,000.

The defendant pleaded, (1) as to the first, second, third, fourth, fifth and sixth counts, not guilty; (2) as to the seventh count, the general issue; (3) as to the third count, traverse of the allegations of making entries and payment of duty; (4) as to the fourth count, traverse of the allegations of making entries in compliance with the Act, of delivery of entries to the Collector, of tender of duties, of readiness and willingness to pay duties, and of notice thereof to the Collector; (5) traverse of allegations in the fifth count that entries had been duly made and delivered, and that duties had been paid; (6) that the causes of action arose before the passing of the *Judiciary Act* 1903; (7) as to the first and second counts, justification under sec. 30 of the *Customs Act* 1901; (8) as to the sixth and seventh counts, justification under secs. 214 and 215 of the *Customs Act* 1901; and (9) that the alleged grievances were done under the authority of the Minister administering the Customs under the *Customs Act* 1901, and in the exercise of his discretion and in pursuance of the powers vested in him by that Act and in the course of his administration of the Act and not otherwise.

Upon these pleas the plaintiff joined issue, and as to the seventh, eighth and ninth pleas new assigned for excess. There was also a demurrer to the sixth plea, and joinder in demurrer. Judgment on the demurrer was ordered to be entered for the plaintiff by the Supreme Court.

The action was tried before *Darley* C.J., and a jury. By direction of the learned Chief Justice the jury returned a verdict for the defendant on the first, second, third, and fourth counts, and on the other three counts they found a general verdict for the plaintiff for £750.

The plaintiff now moved for a new trial on the following grounds:—(1) That a verdict for the defendant was wrongly directed on the first three counts; (2) that His Honor was in error in holding that no action was maintainable under the first

and second counts except in respect of goods for which entries had actually been made; (3), (4), and (5) improper rejection of evidence of statements made by the Collector that the goods would not be delivered up whatever the plaintiff might do; (6) improper rejection of evidence of refusal by the Customs to deliver up goods mentioned in a certain letter from the plaintiff to the defendant; (7) improper refusal by His Honor to allow plaintiff to give evidence under the particulars in the letter; (8) erroneous ruling by His Honor that particulars were necessary under the third and fourth counts; and (9) improper refusal by His Honor to allow amendment of the particulars furnished by the plaintiff; (10) and (11) improper refusal by His Honor to direct the jury to find a verdict for the plaintiff on the sixth and seventh counts and to direct them that there was no justification proved for the seizure of the books and documents; and (12) that the damages were insufficient.

The defendant filed notice of cross appeal, to have the verdict set aside and a new trial granted, and also of its intention to contend that the verdict returned for the plaintiff on the fifth, sixth and seventh counts should be set aside and a verdict entered for the defendant, or a new trial granted upon the grounds, (1) that the verdict was against evidence; (2) and (3) that His Honor should have directed the jury that on the evidence the defendant was not liable in the action, and that the defendant was not responsible even if the books and documents were unreasonably detained; (4) that a verdict should have been directed for the defendant on the fifth, sixth and seventh counts; (5) erroneous direction that the jury in assessing damages might consider any unreasonable delay in returning the books and documents of which copies had already been furnished to the plaintiff; (6) that the jury should have been directed that on the evidence the plaintiff was only entitled to nominal damages; and (7) that the damages were excessive.

The facts sufficiently appear in the judgments.

Shand K.C. (with him *Garland*), for the respondent, submitted, by way of preliminary objection, that the High Court had no jurisidiction to entertain an application for a new trial

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after the verdict of a jury in a Court exercising federal jurisdiction, and referred to *Musgrove* v. *McDonald* (1). Sec. 20 of the *Judiciary Act* 1903 does not confer such a power. It presupposes the power, but it cannot give what the Constitution has not given: sec. 73 of the Constitution. The proper course was to appeal to the Full Court and from that to the High Court.

[GRIFFITH C.J. referred to *Wilcox* v. *Donohoe* (2).]

This is not a judgment of the Supreme Court within the meaning of sec. 39 of the *Judiciary Act* 1903.

Knox K.C., for the appellants, referred to sec. 51, sub-sec. xxxix., of the Constitution.

The judgment of the Court was delivered by

GRIFFITH C.J. We do not think that the decision in *Musgrove* v. *McDonald* (1) covers the present case. That turned entirely on the Constitution. The *Judiciary Act* 1903 defines the word "appeal," as used in that Act, as including "an application for a new trial and any proceeding to review or call in question the proceedings decision or jurisdiction of any Court or Judge." Section 39 is the section under which the Supreme Court in this case exercised jurisdiction. In passing that section Parliament assumed to act under sec. 77 of the Constitution, which authorized Parliament to make laws investing any Court of a State with federal jurisdiction, and defining the extent to which the jurisdiction of any federal Court shall be exclusive of that which belongs to or is vested in any Courts of the States. By sec. 39 the legislature conferred upon State Courts power to exercise this particular branch of federal jurisdiction, subject to certain conditions. One of those conditions is, for the purpose of the present case, (reading the word appeal in the sense of the definition), that the decision "shall be final and conclusive except so far as an application for a new trial may be brought to the High Court:" Sec. 39 (2) (*a*). In the same Act we find careful provisions for the making of such appeals and for the Constitution of the High Court before which they come. By the *High Court Procedure Act* 1903, which was passed at the same time, careful provision

(1) 3 C.L.R., 132.

(2) 3 C.L.R., 83.

is made for regulating the procedure in such applications. Under these circumstances we are of opinion that the High Court has power to make an order directing a new trial, after a verdict of a jury in the Supreme Court exercising this delegated federal jurisdiction under sec. 39 of the *Judiciary Act* 1903.

Knox K.C. and *J. L. Campbell* (with them *E. M. Mitchell*), for the appellant. The Commonwealth is liable for the wrongful acts of its servants in administering the *Customs Act*. The maxim *respondeat superior* applies in the same degree as between subject and subject. The principle that the King can do no wrong no longer applies to State or Commonwealth governments. Secs. 56 and 64 of the *Judiciary Act* 1903, which replace the temporary provisions of the *Claims against the Commonwealth Act* 1902, are similar in effect to the words of the New South Wales Statute which, in *Farnell* v. *Bowman* (1), were held to take away the prerogative immunity from the Crown. That having gone, the Commonwealth is in the same position as any other public body as regards liability for the wrongful acts of its servants. [They referred to *Tobin* v. *The Queen* (2); *Delacauw* v. *Fosbery* (3); *Whitfield* v. *Lord Le De Spencer* (4); *River Wear Commissioners* v. *Adamson* (5); *Ruling Cases*, vol. I., p. 308; *Quick and Groom, Judicial Power of the Commonwealth*, p. 119; *Gibson* v. *Young* (6); *Davidson* v. *Walker* (7).]

The Commonwealth is only a great corporation. There is no distinction between the liability of bodies whose objects are public and that of bodies which carry on business for profit: *Mersey Docks and Harbour Board* v. *Gibbs* (8). The possibility of such a tort is clearly contemplated by the *Judiciary Act* 1903. The liability of the Customs for the acts of its officers is recognized by sec. 34 of the *Customs Act* 1901. The wrongs complained of in this case were committed by the officers of the Commonwealth in performing a duty cast upon the Customs Department: See sec. 4 of the *Customs Act*. They are not acts of a specific officer designated by Statute to perform a specific duty,

(1) 12 App. Cas., 643.
(2) 16 C.B.N.S., 310, at p. 324.
(3) 13 N.S.W. W.N., 49.
(4) Cowp., 754, at p. 765.
(5) 2 App. Cas., 743.
(6) 21 N.S.W.L.R., 7; 9 App. Cas., 418, at p. 433.
(7) (1901) 1 S.R. (N.S.W.), 196.
(8) L.R. 1 H.L., 93.

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as in *Enever* v. *The King* (1). The Commonwealth is bound to detain goods so far as is necessary for the purposes of revenue, but is not entitled to exceed those limits. The plaintiff was entitled to get his goods on tendering the proper duty. And the Customs officers were bound to demand a particular amount of duty in order to give the plaintiff an opportunity of tendering it. Having offered to do all that was necessary under the Act, he was entitled to the goods, and the Commonwealth is liable for damage caused by their detention after that time. The Commonwealth may not be liable for an honest mistake on the part of its officers, but it must be liable for excess on their part if damage is caused: *Tracy* v. *Swartwout* (2). If there is a *bonâ fide* dispute as to the amount of duty there is a provision in sec. 167 by which the importer may get his goods, but the plaintiff was denied all information as to what was complained of. The passing of an entry is not a condition precedent to the right to get possession of the goods. *Darley* C.J. ruled that it was, and rejected evidence of conversations with the Collector which would have proved that the detention was oppressive and wrongful, and that the plaintiff was ready to do all that was necessary. The onus was on the defendant to justify the detention under the circumstances, yet no evidence of justification was given. There is clear authority for the liability of the officers in *Barry* v. *Arnaud* (3) and *Barrow* v. *Arnaud* (4). The officer is bound to do everything necessary to enable persons affected by the Act to exercise their rights: *Pickering* v. *James* (5).

[BARTON J. referred to *In re Thornbury Division of Gloucester Election Petition*; *Ackers* v. *Howard* (6), as approving that case.]

The officer here is merely the instrument of the Commonwealth, performing a ministerial duty. At any stage the Minister could intervene. There is not a mere nonfeasance. The neglect to carry out the duties imposed by the Act is a wrongful act: *Queen* v. *Williams* (7).

(1) 3 C.L.R., 969.
(2) 10 Peters, 80 (12 Curtis, 26).
(3) 10 A. & E., 646.
(4) 8 Q.B., 595.
(5) L.R. 8 C.P., 489.
(6) 16 Q.B.D., 739.
(7) 9 App. Cas., 418.

[GRIFFITH C.J. referred to *Brennan* v. *Guardians of Limerick Union* (1).]

The principal is liable even if the servant acts capriciously: *Bayley* v. *Manchester Sheffield and Lincolnshire Railway Co.* (2); *Dyer* v. *Munday* (3). The goods having been wrongfully withheld from the plaintiff, the subsequent delivery of them will not exonerate the defendant from an action for trespass: *Hiort* v. *London and North-Western Railway Co.* (4). If the form of the action is incorrect an amendment should be allowed. Assuming that there is a cause of action under the third and fourth counts, an amendment of the particulars should have been allowed, and evidence admitted in support of the claim as amended: *Lysaght Bros. & Co. Ltd.* v. *Falk* (5); the defendant was not prejudiced by the new particulars, as it had sufficient notice of them before the action; and evidence of conversations with the Collector should have been admitted. The plaintiff is therefore entitled to a new trial.

Shand K.C. and *Garland*, for the respondent. Evidence of the refusal by the Collector to deliver up the goods, was inadmissible without an amendment of the particulars filed. The amendment was rightly refused, as the defendant was prejudiced by the delay, and the amended particulars tendered were incorrect. The Judge's discretion will not be interfered with: *Chitty's Archbold's Practice*, 12th ed., pp. 1,452, 1,460, 1,455.

[GRIFFITH C.J.—The form of the action should be conversion: *Keyworth* v. *Hill* (6); *Fouldes* v. *Willoughby* (7).]

If there was any wrongful act the officer is liable, not the Commonwealth. Secs. 56 and 64 of the *Judiciary Act* 1903 being in derogation of the prerogative, should not be extended to include all classes of torts unless it is absolutely clear that they were intended to do so. But there was no evidence of a conversion. The plaintiff was not entitled to immediate possession of the goods. They were subject to the control of the Customs until entries were passed: secs. 30, 33, 37, 39, 154 and 167 of the

(1) 2 L.R., Ir., 42.
(2) L.R. 7 C.P., 415.
(3) (1895) 1 Q.B., 742.
(4) 4 Ex. D., 188.
(5) 2 C.L.R., 421.
(6) 3 B. & Ald., 685.
(7) 8 M. & W., 540.

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Customs Act 1901. Tendering the entry conferred no right to possession. The goods were delivered up as soon as duty was paid, and until then the Collector was bound to detain them. Unreasonableness in the performance of the duty does not give a right of action against the defendant. Even if it did, there was no evidence of unreasonable detention. Evidence of conversations with the Collector was properly rejected. It was tendered to show a waiver of the passing of entries. But that is a condition precedent imposed by the Statute; it could not be within the scope of the Collector's authority to waive it. This is not a case of apparent authority like *Citizens' Life Assurance Co.* v. *Brown* (1). Every person must be presumed to know the statutory authority of Customs officers, and the Commonwealth cannot be bound by any acts which are not authorized by the Statute. Even if there were a cause of action in respect of the detention of goods the damages would be trifling, and a new trial would not be granted under the practice of the Supreme Court.

As to the claims for seizing and detaining the books, there was evidence that goods of the plaintiff had been detained within the meaning of sec. 214, and the Court could not direct a verdict for the plaintiff. If the books were improperly seized or detained the Collector was acting beyond the scope of his authority, and, though he might be liable himself, the defendants was not liable. Sec. 34 does not carry the liability of the Commonwealth beyond that limit. Secs. 221-225 refer only to proceedings against officers.

[GRIFFITH C.J. referred to *Evans* v. *Liverpool Corporation* (2).]

Even if the evidence of conversations had been admitted, it would not have made any case against the Commonwealth. The Collector must have a discretion, by necessary implication from the words of the Act, to detain the goods until he has satisfied himself as to the proper value for duty. In *Barry* v. *Arnaud* (3) and *Barrow* v. *Arnaud* (4), the officers had no discretion, as the question involved was a question of law. The Act would be unworkable if the reasonableness of the detention were always a matter for a jury: See secs. 160, 229. Even if it was the duty of

(1) (1904) A.C., 423.
(2) 74 L.J.K.B., 742.
(3) 10 A. & E., 646.
(4) 8 Q.B., 595.

the Collector to hand over the goods, his failure to do so was a wrong on his part, but the Commonwealth is not responsible for it. The duty is imposed upon the Collector himself. He is not subject to any person's control, but is invested with absolute discretion. [They referred to *Tobin* v. *The Queen* (1).] Moreover he was right in detaining the goods. The proper value for duty had not been stated, as required by sec. 154, and the genuine invoice was not produced. The invoice stated the value for duty as the price paid by the plaintiff for the goods in London. That was not the fair market value in London. [They referred to *Goldring* v. *Lockyer* (2); *Orchard* v. *Simpson* (3).] The goods were therefore liable to forfeiture under sec. 229.

Even if the detention of the books was wrongful, the Collector is the officer designated by the Statute to seize and detain them, and the Commonwealth is not liable if he performs the duty in an improper manner: *Enever* v. *The King* (4). So also it is his personal duty to supply copies of books and documents, and he alone can be sued for a failure to carry it out. [They referred to *Poulton* v. *London and South Western Railway Co.* (5); *Bolingbroke* (*Lord*) v. *Swindon New Town Local Board* (6).]

[GRIFFITH C.J.—I am disposed to think that the duty to supply copies is imposed on the Customs Department, not on the Collector.]

In any case the damages were excessive. There was no evidence of actual loss, and the damages should have been nominal. The verdict for the plaintiff on the sixth and seventh counts should be set aside and a verdict entered for the defendant, and on the fifth count the damages should be reduced to a nominal amount. The defendant does not ask for a new trial.

Knox K.C. in reply. *Evans* v. *Liverpool Corporation* (7) is distinguishable. In that case it was clear that the authorities could not interfere with the individual officer in the performance of his duty. They appointed a competent officer and there their responsibility ended.

(1) 16 C.B.N.S., 310.
(2) (1904) 4 S.R. (N.S.W.), 276.
(3) 2 C.B.N.S., 299.
(4) 3 C.L.R., 969.
(5) L.R. 2 Q.B., 534.
(6) L.R. 9 C.P., 575.
(7) 74 L.J.K.B., 742.

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As to the 1st and 2nd counts, a mere denial of right to the possession of goods amounts to conversion: *Baldwin* v. *Cole* (1).

This Court has no power to reduce damages except by consent, if the plaintiff is entitled to more than nominal damages: *Watt* v. *Watt* (2). Here they were not nominal. The amount was purely a question for the jury, and there was evidence from which they might have inferred a serious damage to the plaintiff's business. It was impossible to prove the actual loss in money, from the nature of the case, but that does not make the case one for nominal damages; "*The Mediana*" v. "*The Comet*"; "*The Mediana*" (3). As the defendant does not press for a new trial the verdict for £750 cannot be disturbed, if the defendant is liable for anything more than nominal damages.

Cur. adv. vult.

GRIFFITH C.J. This was a motion by the plaintiff to set aside a verdict after trial before the Chief Justice for New South Wales and a jury, in an action brought in the Supreme Court in its federal jurisdiction, in which the plaintiff obtained a verdict on part of his claim for £750, and on another part of his claim there was a verdict for the defendant. The defendant also gave notice that it desired to have the verdict set aside, so far as it was for the plaintiff, on different grounds.

The plaintiff's action was in respect of alleged wrongs committed in respect of certain goods, and in respect of certain books of account and documents. The declaration contains seven counts, the first four of which were in respect of the goods, and the other three in respect of the books and documents. The goods in question were imported into the Commonwealth by the plaintiff and were liable to *ad valorem* duty on importation. [His Honor then stated the effect of the several counts of the declaration, and continued:] The defendant, besides traversing all the material allegations in the declaration, pleaded that the documents and books had been taken and impounded by the officers of the Customs after goods of the plaintiff had been

(1) 6 Mod. Rep., Case 303.
(2) (1905) A.C., 115.
(3) (1900) A.C., 113.

seized by the Customs in the exercise of the powers conferred by the *Customs Act* 1901. The plaintiff to this plea new assigned. At the trial judgment was given for the defendant on the first four counts, apparently by direction of the learned Judge. On the other three counts the plaintiff had a general verdict for £750.

The facts of the case may be briefly stated. The plaintiff is a dealer in watches and jewellery, and an importer of these goods from England, through an agent who carries on business in Sydney and elsewhere in the Commonwealth. The goods, it is said, came originally from Switzerland through England. They were imported sometimes by parcels post, sometimes in the ordinary way as cargo. About November 1902 the Customs authorities in Melbourne detained some of the plaintiff's goods, and shortly afterwards the Customs officers went to the plaintiff's agent in Sydney, and, assuming to act under the authority of the *Customs Act* 1901, sec. 214, demanded to see the plaintiff's books and documents. That section, so far as it is necessary to quote it, is as follows:—"Whenever any goods have been seized or detained, the owner shall immediately upon being required so to do by the Collector produce and hand over to him all books and documents relating to the goods so . . . seized or detained . . . and of all other goods imported by him at any time within the period of five years immediately preceding such request seizure or detention." The books were handed over to the Customs authorities, and kept in their possession for a considerable time. A good deal of correspondence seems to have passed between the Customs Department and the plaintiff, with the result that entries were not passed for the goods the subject of the action until the following July; and in substance the action is for damages for depriving the plaintiff of the goods for that period, that is, so far as the goods are concerned. With respect to the books the action is for keeping them longer than was necessary, and for not supplying the plaintiff with copies of them as was the duty of the Customs under sec. 215 of the *Customs Act* 1901. That section provides:—"The collector may impound or retain any document presented in connexion with any entry or required to be produced under this Act, but the person otherwise entitled to such document shall in lieu thereof be entitled to a copy certified

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as correct by the collector and such certified copy shall be received in all Courts as evidence and of equal validity with the original."

The defendant contends that the Commonwealth is not responsible for any of the acts complained of, that is, the delay in passing entries and the consequent delay to the plaintiff in getting possession of the goods, or for the failure to furnish the copies of the books, or for retaining the books. The plaintiff contends that the defendant is responsible for all of them.

Now, as to the general contention of the defendant that the Commonwealth is not responsible for the tortious acts of its servants, in my opinion, secs. 56 and 64 of the *Judiciary Act* 1903 cannot be distinguished from the section of the New South Wales Statute that was under consideration by the Judicial Committee of the Privy Council in *Farnell* v. *Bowman* (1).

[His Honor read secs. 56 and 64 of the *Judiciary Act* 1903 and continued]: I cannot distinguish between the section of the New South Wales Statute and the provisions of these two sections, so far as regards a case in which the relations between the Commonwealth and its officers is such that according to the ordinary principles of law the maxim *respondeat superior* would apply. But it does not follow that the Commonwealth would be responsible in an action for every wrongful act done by its servants. That this is so is sufficiently shown by the case of *Tobin* v. *The Queen* (2), and by the case of *Enever* v. *The King* (3), in this Court decided in February last. But I think that these sections of the *Judiciary Act* 1903 apply to every case in which the gist of the cause of action is an infringement of the right of property, if the act complained of is not justified by law, and the person doing it is exercising a merely ministerial duty and is not charged by the Statute with an independent discretion. But, in my opinion, when the duty prescribed by the Statute is to be performed by a designated person, and in the performance of that duty he is required to exercise independent judgment on a preliminary question of fact, the maxim *respondeat superior* does not apply so as to make the superior liable if the officer comes to a mistaken conclusion. Whether the officer himself would be

(1) 12 App. Cas., 643.
(2) 16 C.B. N.S., 310.
(3) 3 C.L.R., 969.

liable if he acted *malâ fide* is quite immaterial. In that case it is clear that the employers would not be liable, even in the ordinary case of master and servant, as was pointed out by *Willes* J. in *Bayley* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (1). In such a case, where the servant is charged with the duty of exercising his independent discretion, the wrongfulness or unlawfulness of the act depends upon the conclusions of fact actually drawn. The duty is not merely ministerial, it is quasi-judicial. If it were merely ministerial other considerations would apply, as will be shown when I come to deal with that part of the case. In *The Queen* v. *Commissioners of Income Tax* (2), which has already been referred to by this Bench in dealing with another case, Lord *Esher* M.R. made some observations which, if not precisely in point, serve as an illustration of the point to which I am referring. He said (3):— "When an inferior Court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shewn to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none." In the same way if an officer of the Government is required to investigate facts and arrive at a conclusion and act according to

(1) L.R. 7 C.P., 415; L.R. 8 C.P., 148.

(2) 21 Q.B.D., 313.

(3) 21 Q.B.D., 313, at p. 319.

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that conclusion on the facts, then the lawfulness or unlawfulness of the act depends upon the conclusion he arrives at. If he honestly though mistakenly arrives at a certain conclusion, the act is not unlawful. There is no authority for saying that the maxim *respondeat superior* applies in such a case. There are numerous analogous cases, of which *Enever* v. *The King* (1) is one, and the latest illustration is *Evans* v. *Liverpool Corporation* (2). These being the principles applicable to the determination of this case, I proceed to apply them to the facts.

I will refer now to the sections of the *Customs Act* 1901 under which it is alleged on the one hand that the detention was unlawful, and on the other that it was not unlawful, or that, even if it was unlawful, the defendant is not responsible for it. [His Honor then read secs. 30, 32, 33, 35, 36, 37, 38, 39, and continued:] There is, therefore, no authority for the taking of the goods out of the control of the Customs except by passing an entry. It is said that a Minister of the Government might have allowed the goods to go. It is possible that he might. If he had, he would not have been acting in accordance with the law, although it may be that no consequences would have followed from the want of legal warrant for his act. In the case of *ad valorem* duty special provisions are made. [His Honor then read sections 154, 158, and 167, and continued:] I refer to these sections to show the nature of the duty imposed on the collector, in order to ascertain the true value of goods liable to *ad valorem* duty. It is a personal duty cast upon him, and, if he in the exercise of the discretion cast upon him decides that the sum tendered as duty is insufficient, or that the value of the goods as stated in the invoice is not the correct value, he is not only authorized, but is bound to detain the goods until the true value is ascertained in the manner prescribed by law. Detention of the goods for that purpose is not wrongful, but rightful, and cannot give rise to any cause of action. In the present case there was, we are told, a *bonâ fide* dispute as to the proper value that ought to be put on the goods in question. It seems to have been a *bonâ fide* dispute, and I am disposed to think that, so far from the Collector being wrong, he was probably right. That, however, is quite immaterial for the purpose of the present decision.

(1) 3 C.L.R., 969. (2) (1906) 1 K.B., 160.

I will proceed now to deal with the several counts. The first count has gone, because the taking and keeping of the goods was lawful; it was required by the Act, not forbidden. The second count was for conversion. That is the proper form of action for the wrongful temporary detention of goods, as was pointed out in the case of *Keyworth* v. *Hill* (1). But, for the reasons I have shown, there was no improper detention of these goods until the entry was passed, and the goods were delivered as soon as it was passed. There was, therefore, no evidence of conversion, and that count fails, and judgment upon it was rightly entered for the defendant.

In connection with the contention that evidence was wrongly rejected of conversations between the officers of the Customs and the plaintiff's agent, it was said that the evidence was intended to prove that these officers intimated that they would not pass entries whatever the plaintiff might do. If any officers of the Customs declared their intention not to do their duty I cannot see how that can make their employers responsible for such a failure. It may be evidence of *mala fides* on the part of the officers. If so it would be irrelevant. That evidence was therefore, in my opinion, rightly rejected.

The third and fourth counts were based upon the doctrine laid down in *Barry* v. *Arnaud* (2), and *Barrow* v. *Arnaud* (3). Those were actions against a Customs officer for wrongfully refusing to pass entries of goods which the defendant claimed to be liable to a duty at a specific rate, and it was held that the actions lay. The question was not as to the value of the goods, but whether they were liable to one specific rate or another. That was a pure question of law. No question of fact was involved. Moreover the actions were brought against the officer. Whether an action would lie against an officer under the circumstances of the present case it is not necessary to consider. For the reasons I have stated it would not lie against the employer, if the officer had an independent duty to ascertain the value of the goods. These counts were framed on the assumption that the defendant was responsible for a mistake on the part of the

(1) 3 B. & A., 685.

(2) 10 A. & E., 646.

(3) 8 Q.B., 595.

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officer. These two cases, therefore, have no application to the present case, and, if they had, they do not show that an action would lie against the defendant here. If the action lay at all it would be for conversion, and the special counts might be treated in that case as informal counts for conversion.

There were some other points made with respect to these counts. The goods in question in these counts comprised four small lots of goods which arrived by parcels post in March and May 1903, of the total value of about £70. They were not delivered till 6th July when the entries were passed. The plaintiff by agreement with the defendant gave particulars of his claim. He might have been ordered to do so, but he did so without an order and the matter should be treated as if the particulars had been given under order of the Court. They were given under the first five counts of the declaration. Subsequently the plaintiff delivered another document which may be considered as an amendment of these particulars. In that the day of the wrongful acts complained of in the 1st, 2nd, 3rd and 4th counts was alleged to be 6th July. Evidence was tendered that the passing of the entries in respect of these goods which had been detained was not on 6th July but in March and May 1903. Objection was taken by the defendant that this was not a fair intimation of the dates of the wrongful acts complained of, and the learned Chief Justice thought the argument a sound one, and declined to allow an amendment. It was objected that he was bound to allow an amendment, but it appears to me to have been a matter entirely in his discretion. Bearing in mind that the evidence sought to be given related to transactions in March and May, the defendant may very well have been prejudiced by having been previously told that evidence would be required of matters that took place in July, and having prepared its evidence accordingly. The matter was entirely in the discretion of the learned Judge, and I see no reason for dissenting from the conclusion at which he arrived. But even if the evidence had been admitted with respect to these four lots of goods, the only damages the plaintiff could have recovered for their temporary detention would have been the actual pecuniary loss he had sustained by reason of the delay. Considering that the goods

were only worth £70, and were detained for a very few weeks, the maximum damage would have been less than £20, and it is not the practice of the Supreme Court to grant a new trial for a mistake relating to a trifling sum of that kind. Damages could not have been recovered exceeding the actual pecuniary loss, and it is very doubtful whether they could have been more than the amount specified in sec. 167, which lays down a rule as to damages in cases of this kind. Whether that is an exclusive rule or not may be a matter for consideration at some future time.

It appears, therefore, that as regards the first four counts of the declaration the plaintiff has no cause of action. His motion for a new trial was on the same grounds as the other points with respect to the rejection of evidence, that is, that he would have been able, if allowed, to show something in aggravation of damages. The result is that the plaintiff's motion fails on all points, and the defendant is entitled if it pleases to ask simply that the motion be dismissed. It has, however, asked for certain relief on its side, the most important being that the damages on the other counts should be reduced to nominal damages.

Now, the fifth count, for not giving copies of documents to the plaintiff, discloses a breach of an absolute duty cast by the Statute upon the Customs Department. That appears to me to be a purely ministerial duty. When books are taken in this way the owner is entitled to have copies given to him, and if the Customs authorities do not furnish copies, there is a breach of the law resulting in a man being deprived of his property, and for such a breach an action will lie, and I think the Commonwealth is liable for it in an action of tort. The question what damages are to be recovered is a different matter.

The sixth count, for seizure of books, fails because there is ample evidence that, before the books were demanded by the Customs officers in Sydney, goods of the plaintiff had been detained in Melbourne. It is not necessary to refer to the evidence on that point in detail. The learned Judge very properly declined to direct the jury otherwise. That count therefore fails; but the new assignment was treated at the trial as meaning that the defendant not only seized the books but detained them for

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an unreasonable time. The seventh count will not lie for return of the goods, all the goods having been returned. The complaint would more properly form the subject of a count for trover, but that is a matter of form to which this Court is not in the habit of giving serious attention. As to the detention of the goods, if they were lawfully taken, the detention does not become unlawful until the time during which they might lawfully be detained has expired, and the person entitled to possession of them has demanded them. There was a demand for the books in March, but there was no further application to return them until July, when the matter was settled. It may, however, be taken that the demand in March was continuous, and that damages may be given for unreasonable detention of them after the time when the plaintiff became entitled to them. But no point was made as to that. Assuming, however, that the plaintiff is entitled to damages for detention of the books after the time when the Customs had done with them, for which I think an action would lie against the Commonwealth, it was contended for the Commonwealth that these damages would be nominal only. I think not. The distinction between nominal and real damages was pointed out very clearly by Lord *Halsbury* L.C. in the "*The Mediana*" v. "*The Comet*": "*The Mediana*" (4) cited by Mr. Knox. He said:—"I wish, with reference to what has been suggested at the bar, to remark upon the difference between damages and nominal damages. 'Nominal damages' is a technical phrase which means that you have negatived anything like real damages, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term 'nominal damages' does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that

(4) (1900) A.C., 113, at p. 116.

because they are small they are necessarily nominal damages." Then he referred to various cases one of which was the taking away of a chair for which the damages would be small. So here I think the plaintiff is entitled to damages, not nominal. I think that there can be no doubt that if the maximum amount of damages recoverable were one shilling, that is, nominal, then this Court would have jurisdiction under its practice to reduce the verdict to that amount. But unless the amount is limited to what is called nominal damages, the Court has no jurisdiction to reduce them except by the consent of the parties. That was pointed out in *Watt* v. *Watt* (5). But the action being for a mere interference with a proprietary right there can be no vindictive damages. There is no element of wounded feelings or annoyance or anything of that kind. The only damages recoverable therefore are the pecuniary loss actually sustained by the plaintiff by reason of the wrongful acts of the defendant. They are two: first, the detention of the books for some period, not very long, after 6th July; and, second, the delay in giving the plaintiff copies of the documents. There is no evidence whatever that he sustained any pecuniary loss in respect of either matter. The case seems to have gone to the jury as a case of general oppressive action on the part of the Customs for which the jury should give what damages they thought the defendant ought to pay. There was no evidence of any specific loss. It does not appear that the plaintiff sustained damages to the extent of one farthing. It is obvious, therefore, that the amount of damages awarded is excessive. The plaintiff was only entitled to be compensated for the actual pecuniary loss that he could prove that he sustained. I do not mean that that must be assessed in pounds shillings and pence, but there must be some proportion between the damages awarded and the possible injury sustained by the loss of these documents, most of which related to old transactions very likely long since closed and done with.

It follows, in my opinion, that the defendant is entitled, if it desires it, to a re-assessment of damages on the fifth and sixth counts. Otherwise the motion will be dismissed, and in either case the plaintiff should pay the costs.

(5) (1905) A.C., 115.

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BARTON J. As I agree with His Honor the Chief Justice in the conclusions at which he has arrived, and the reasons which he has stated in his judgment, I content myself with concurring.

O'CONNOR J. The plaintiff's claim in this case naturally divides itself into two parts, first, that the Commonwealth by its officers has wrongfully interfered with his right to the possession of his goods, namely, his merchandise, books, invoices and other papers; secondly, that the Commonwealth by its officers has wrongfully failed to carry out the obligations to the plaintiff as an importer of goods which the *Customs Act* has imposed upon it. In regard to the plaintiff's claim as to his merchandise, the learned Chief Justice at the trial ruled that he could not recover, and on those counts a verdict was returned by His Honor's direction for the defendant. In that ruling I entirely concur. With regard to the claims relating to the books and invoices the plaintiff recovered a verdict. The reasons which lead me to the conclusion at which I have arrived on that point I shall state later on. In the first place I will state why in my opinion the plaintiff's claim in regard to his merchandise cannot be sustained.

In the consideration of this question the *Customs Act* 1901 is really the basis of the claim and of the defence. The whole case, therefore, depends upon what are the rights of the Commonwealth and what are the rights of the plaintiff under that Act. But before dealing with the Act it is necessary to consider the contention of the defendant that it is not liable in respect of any of these claims because the Commonwealth is entitled to avail itself of the old rule that an action of tort cannot be brought against the Crown. In face of the provisions of secs. 56 and 64 of the *Judiciary Act* 1903 it is impossible to support that contention. Long before the passing of the *Constitution Act* the several States of Australia had brought the law with regard to claims against the Government more into conformity with modern notions of fairness and common sense than those which prevailed in the days when the maxim was strictly upheld; and in all the States, in some form or other, it was possible to bring an action of tort against the Crown. Before the passing of the *Constitution Act* there had been an authoritative decision of the

Privy Council in *Farnell* v. *Bowman* (1), as to the meaning of the Act in New South Wales which had brought about this change in the law. It was held in that case that the Act gave a subject the same rights against the Crown as he would have against a subject, with regard to all matters of tort and contract. That Act was in much the same language as sec. 54 of the *Judiciary Act* 1903, and it was held that a right of action for tort against the Crown was there given. The Constitution of the Commonwealth, sec. 48, gave power to Parliament to make laws regulating proceedings by subjects against the Commonwealth and against the State, and that power was at first exercised by the Commonwealth in passing a temporary Act in 1902, called the *Claims against the Commonwealth Act* 1902. In that Act, sec. 2 sub-sec. 3, the rights of the public in such an action were described by the same phrase as that used in sec. 64 of the *Judiciary Act* 1903. It was enacted that the rights of parties in actions against the Commonwealth should be as nearly as possible the same as in actions between individuals, following the words used in the New South Wales Act, which had been under consideration in *Farnell* v. *Bowman* (1). The Act of 1902 was a temporary Act, and was repealed by the *Judiciary Act* 1903, which now contains the law on the subject. The temporary Act of 1902 gave a right merely to petition the Crown in the form of a petition of right and it was in the power of the Government to appoint a nominal defendant, but if the Government refused to do so the subject had no remedy. But the *Judiciary Act* 1903, as if to emphasize the equality of subject and Crown in litigation, gave the right directly to the subject to sue the Commonwealth or the State, and declared that when the action was brought, the rights of the person suing were to be the same as in an action against an individual. The law with regard to claims against the Commonwealth now stands in that position. The Commonwealth acts, as all Governments must act, by its servants, and whenever the relation of the Commonwealth to its servants is such that in a similar case an individual would be liable for the acts of his servant, the Commonwealth is liable for the acts of its servants. This applies to cases of

(1) 12 App. Cas., 643.

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contract, cases of wrongful interference with property, and cases of neglect to perform a statutory duty. But in all these cases the plaintiff must show, against the Commonwealth just as against an individual, that some wrong has been committed by the Commonwealth through its servants, for which the Commonwealth is responsible, or that some duty has been imposed upon the Commonwealth, either directly or through its servants, for a breach of which the Commonwealth is liable.

Before dealing with the application of this principle to the several claims under consideration I shall refer to the sections of the *Customs Act* 1901 from which the defence on the part of the Commonwealth is to be gathered, and upon which also rest the causes of action for breach of duty upon which the plaintiff relies.

There is a group of sections in the *Customs Act* 1901, extending from sec. 30 to sec. 48, under the general heading of "Customs Control Examination Entries and Securities generally." Sec. 30 declares that "Goods shall be subject to the control of the Customs as follows:—(*a*) As to all goods imported—from the time of importation until delivery for home consumption." I need not quote the rest of the section. There can be no delivery for home consumption until the entry is passed, and passing the entry can be effected only by the signing of the entry by the collector. The goods are therefore under Customs control from the time of importation until the collector signs the entry; and not only is there a right in the Customs officers or the collector to keep possession of the goods, if they think fit, during that period, but there is a statutory prohibition against anyone interfering with the goods unless by the authority and in accordance with the Act. That is expressly provided by sec. 33. Therefore until the entry has been signed by the collector it is clear that the importer has no right to the possession of the goods. In this case as soon as the entry was signed by the collector the goods were delivered up, and therefore it seems to me that the answer of the Commonwealth that it is protected in respect of claims as to interference with the merchandise is completely justified by those provisions of the *Customs Act* 1901. But the plaintiff put his claim on another ground. Assuming that he could not get possession of the goods until the entry was

signed, he contends that the collector was guilty of a breach of duty in not signing the entry. An examination of the sections relating to the duties of the collector will demonstrate that no such cause of action can be maintained. The principle underlying the whole of these sections relating to dealing with goods under Customs control is that the Customs shall keep control of the goods until duty is paid. In regard to duties which are specific in amount, and as to which the only questions of fact that are likely to arise are as to weight, quantity, or number, there is generally very little difficulty. But where duty is chargeable according to value altogether different considerations arise. The duty cannot be determined without the determination of the value, and the first question that must arise, in considering the rights of the importer and the rights of the collector is who is to determine for the time being, for the purpose of freeing the goods from Customs control, what the duty is. That responsibility is imposed upon the collector, and necessarily so. The collector, for the purpose of carrying out that duty, has a number of powers under different sections of the Act, to which I need not now refer in detail, for the purpose of ascertaining value in order that the proper amount may be demanded and paid before the goods are released from Customs control. In a case like the present the question of value is to be determined on the principle embodied in sec. 154. The value shall be taken to be the fair market value of the goods in the principal markets of the country whence they were exported, and in order to ascertain what is the fair market value of the goods in the principal markets of the country whence they were exported, it may be necessary, as it may have been necessary in this case, for the collector to make inquiries. He is not bound to take the statement of the importer as to the value of the goods. He is entitled to make inquiry for himself. In this case it would be necessary to make inquiries in London as to the market value of goods of this kind, and to inquire into all the circumstances under which the goods were imported from Switzerland to London and sold there, and the value which under the circumstances they would have in the London market. While that inquiry was going on, the collector was justified in delaying delivery of the goods until he had

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satisfied himself as to their value. One of the complaints of the plaintiff is that the collector would not inform him what the duty was, and he says that, if he had been informed, he would have paid it. He contends that the collector was bound to inform him of the amount of duty claimed. I can see no such duty imposed by the Act upon the collector. He is not called upon to make a guess as to value, but to ascertain the value. If it is impossible to ascertain that without making inquiries which involve delay, it is unfortunate for the importer, but if it is the collector's duty to make those inquiries, there is no remedy. Looking, therefore, at the whole of these sections regulating the duty of the collector in dealing with imported goods, it is plain that the collector is appointed by the Act to adjudicate for the time being on the question of value. It is left to his judgment and discretion to decide, and so long as he uses his position in the inquiry honestly there can be no claim even against him for detaining the goods pending inquiry, nor is he under any obligation to come to any particular conclusion as to value, or to pass the entry on presentation or tender of any particular duty by the importer. That being so, if this action had been against the collector, it seems to me impossible that the plaintiff could succeed in his allegation of a breach of duty. I may say, in regard to that part of the case, I agree with my learned brother the Chief Justice, that the cases that have been referred to—*Barry* v. *Arnaud* (1), and *Barrow* v. *Arnaud* (2)—do not apply. Both those were cases in which the liability of the goods to duty was a pure question of law. Even if the question to be determined by the collector here were a pure question of law, I very much doubt whether those decisions would apply to a case under the *Customs Act* 1901, but it is not necessary to decide that question. Certainly where the duty of determining the value is cast upon the collector as in the present case, they can have no application. But assuming that the collector would personally be liable, there still remains the question whether the Commonwealth is liable for the acts of the collector. As I stated in the earlier part of my judgment, with regard to the liability of the Commonwealth in a suit or action by a subject, the liability of

(1) 10 A. & E., 646. (2) 8 Q.B., 595.

the Commonwealth for the acts of its servants depends altogether upon the relation of the Commonwealth to its servants in regard to the particular matter in question. No doubt there are many cases in which the Commonwealth is liable for all the acts of its servants when acting within the scope of their authority. But where Parliament has regulated the administration of a Department, and has imposed duties upon the Commonwealth and special duties upon its officers, quite different considerations arise. If the Statute imposes a duty upon the Commonwealth, the Commonwealth is liable for the breach of that duty by its servants. But it does not follow that because the Statute imposes a duty upon the servants of the Commonwealth the Commonwealth is liable for the breach of the servant's duty. The obligation may be placed upon the servant in such a way that a duty on the Commonwealth may be necessarily implied. But the form of the Statute and the words of the legislature must be considered in every case. In this case the duty of passing of the entry, and the control of the goods while the amount of duty is being considered, are placed upon a designated officer, the collector, who is invested not only with the carrying out of certain administrative duties in regard to the goods, but also with the responsibility of deciding according to his own discretion as to the amount of duty chargeable, and as to how they are to be disposed of in the meantime. As that duty is imposed upon the collector and not upon the Commonwealth, it appears to me that the collector is the officer designated to discharge that duty, and, his duties being so particularly specified, the case comes within the principle of *Tobin* v. *The Queen* (1) and *Enever* v. *The King* (2), which were referred to by my learned brother the Chief Justice. Where the officer of the Government has imposed upon him a particular duty, the responsibility to discharge which, according to his discretion, rests upon him, the Commonwealth is not liable for his failure to discharge it, or for his failure to come to a correct conclusion where a matter of judgment is involved. That being so, it appears to me that there can be no claim in this case against the Commonwealth for the breach of duty alleged in regard to the passing of entries

(1) 16 C.B.N.S., 310. (2) 3 C.L.R., 969.

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by the collector, and, therefore, that the plaintiff's claim in regard to his merchandise is altogether without any foundation.

As to the claims with regard to the books, both parties at the trial apparently agreed to treat the claim as one for the detention of the books and invoices for an unreasonable time, although the claim in the declaration was not in that form. It must now be taken that that was substantially the claim. The rights of the importer and the rights of the Commonwealth with respect to these particular invoices depend entirely upon the construction of secs. 214 and 215. It is undoubted that, when the demand was made for these books, goods had been detained, and therefore the position had arisen in which sec. 214 justifies the collector in retaining possession of the books and invoices dealing with the same class of goods for a period of five years before. Therefore, in the original taking and dealing with these books, the Commonwealth were justified under sec 214. But it is said that the Commonwealth became liable for detaining the books unreasonably beyond the period allowed by secs. 214 and 215. Sec. 215 gives power to the collector to impound or retain documents presented in connection with any entry and required to be produced under the Act. It was contended by counsel for the Commonwealth that that section entitled the collector to keep possession of the documents as long as he liked without any question. I do not think that is the proper construction of the section. The words are "impound or retain." I think the collector is only entitled to retain the documents as long as is necessary for the purpose of dealing with the goods in relation to which the documents were originally impounded, and if he retains them for an unreasonable time beyond that period the Commonwealth is liable. There are various purposes for which the books and invoices might be detained. In some cases it may be reasonable, where there are other questions arising with regard to the books and invoices, to detain them after the goods have been dealt with. But in other cases it might be quite unreasonable to detain them. There must be this implied limitation on the power of the collector to detain documents that he has only a right to do so for as long a time as is reasonable under the circumstances.

Having regard to the rights given to the importer to have his goods freed from Customs control under the Act, it appears to me that there is in this case evidence of detention for an unreasonable time. That cause of action, like any other where the claim is for a breach of a statutory obligation, can only be maintained where actual damage has occurred by reason of the breach of duty. There is evidence from which it may be inferred that some actual damage has occurred in this case; the action, therefore, is maintainable. The amount of damage is another matter. In the same way I think the plaintiff was entitled under sec. 215 to have certified copies of the documents which the defendant retained. It appears that he was not able to get certified copies of some of them. There also the question of damages must be considered. I entirely agree with the rule as to the damages which has been laid down by my learned brother the Chief Justice. The damages to be recovered are the damages incurred, which follow directly and naturally from the wrong complained of. There can be nothing in the nature of vindictive damages or punishment for the breach of duty.

Looking through the evidence in this case I find it almost impossible to discover any evidence of material damage arising from these causes of action, either for the detention of books and documents or for the failure to give certified copies. The verdict, therefore, of £750 for these causes of action, which were the only causes of action before the jury, is one which cannot be supported if the respondent wishes to have it set aside on the ground that the damages are excessive. I therefore concur in the judgment of my learned brother the Chief Justice, that, with regard to the first four counts of the declaration the ruling of the learned Chief Justice of the Court below was right, and the verdict ought to be entered for the defendant; and with regard to the causes of action for which the plaintiff has recovered damages, that if the Commonwealth presses its claim for a new trial, a new trial must be had for the re-assessment of those damages. The new trial, of course, must be limited to the question of damages.

Bavin, for the Commonwealth, informed the Court that the respondent did not desire a new trial for assessment of damages.

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GRIFFITH C.J. In that case the appellant's motion will be dismissed with costs.

Motion dismissed with costs.

Solicitor, for the plaintiff, *Mark Mitchell.*

Solicitors, for the Commonwealth, *Macnamara & Smith* for the *Crown Solicitor for the Commonwealth.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

PRISCILLA TRAINER . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 20, 21.

Griffith C.J., Barton and O'Connor JJ.

Criminal Law—Receiving stolen property—Goods the property of person unknown—Evidence—Recent possession—False statement by person in possession.

The prisoner was found by the police in possession of certain sheep, and, on being questioned, gave an untrue account of the way in which they came into her possession. She was charged with stealing and with receiving sheep the property of some person or persons unknown. Except her own statement there was no evidence as to the ownership of the sheep, or as to their having been stolen. She was convicted of receiving.

Held, that there was not sufficient evidence to support the conviction.

On an indictment for larceny or receiving no presumption adverse to the accused may be drawn from the fact that the goods alleged to have been stolen or feloniously received were found in his possession unless there is evidence of