[HIGH COURT OF AUSTRALIA.]

WILLEY . . . . . APPELLANT;
PLAINTIFF,

AND

SYNAN . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM STARKE J.

Practice—Costs—Security—Plaintiff ordinarily resident out of the jurisdiction—Plaintiff substantially in position of defendant—Action commenced in response to statutory notice to avoid forfeiture—Security not ordered—High Court Rules, Order XXVIII., r. 9—Customs Act 1901-1934 (*No.* 6 *of* 1901—*No.* 7 *of* 1934), *secs.* 207, 229 (*e*).

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MELBOURNE, *Nov.* 20; *Dec.* 12.

Latham C.J., Rich, Dixon and McTiernan JJ.

The plaintiff, who was a member of the crew of a ship travelling from New Zealand to Australia, alleged that he found on board the ship English silver coins totalling in value £351. On arrival of the vessel officials of the Customs Department took possession of the coins. The plaintiff made a claim for the coins under sec. 207 of the *Customs Act* 1901-1934. The Collector of Customs thereupon gave notice to the plaintiff requiring him to commence an action for the recovery of the coins, and stating that in default of bringing such action the coins would be condemned without further proceedings. The plaintiff, who was not ordinarily resident within the Commonwealth, thereupon commenced an action against the Collector of Customs for the recovery of the coins. The Collector of Customs applied for security for costs pursuant to Order XXVIII., rule 9, of the *High Court Rules*.

Held that, by reason of the defendant's notice requiring him to commence proceedings and the statutory forfeiture which would have resulted from his failure to do so, the plaintiff was, in substance, in the position of a defendant, and security for costs should not be ordered.

Decision of *Starke* J. reversed.

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APPEAL from *Starke* J.

The plaintiff, Samuel Charles Willey, was a member of the crew of the s.s. *Piako*, which on 21st August 1933 was travelling from New Zealand to Melbourne. The plaintiff alleged that on that day he found on board English silver coins totalling in value £351 5s. On the arrival of the vessel at Melbourne officials of the Customs Department took possession of the coins. The plaintiff made a claim for the coins and the Collector of Customs of the State of Victoria, exercising the right conferred by sec. 207 of the *Customs Act* 1901-1934, sent to the plaintiff a notice in the following terms :—" Whereas by notice in writing dated the 20th September, 1933, you have by your agent, Abram Landa, solicitor of 148 Phillip Street, Sydney, New South Wales claimed the sum of three hundred and fifty-one pounds five shillings seized as goods forfeited to His Majesty pursuant to sec. 229 (*e*) of the *Customs Act* 1901-1930 Take notice that pursuant to sec. 207 of the said Act I hereby require you to enter an action against me for the recovery of the said goods and further take notice that if you shall not within four months after the date hereof enter such action the said goods shall be deemed to be condemned without any further proceedings. Dated this ninth day of November, 1933." On 16th November 1933 the plaintiff commenced an action in the High Court against Maurice Bernard Synan, Collector of Customs of the State of Victoria, claiming the return to him of the coins and damages for unlawful detention. It appeared that at the time of the commencement of the action and thereafter the plaintiff was not ordinarily resident within the Commonwealth. It also appeared that claims to the coins were also made by the Government of New Zealand and by the owners of the s.s. *Piako*.

The defendant issued a summons for an order that the plaintiff give security for the defendant's costs of the action on the ground that the plaintiff was ordinarily resident beyond the Commonwealth. In opposing the summons the plaintiff contended that, even if he were ordinarily resident beyond the jurisdiction, he was really a party attacked, not a party attacking, and that, therefore, he was substantially in the position of a defendant and should not be ordered to give security for costs. The summons was heard by *Starke* J.,

who ordered that unless the plaintiff returned to Australia and brought the action to trial within four months from the date of his order the plaintiff should give security for costs in the sum of £150, and that in the meantime further proceedings in the action be stayed, with liberty to the plaintiff to apply to *Starke* J. immediately upon his arrival in Australia.

From that decision the plaintiff now appealed to the Full Court.

Fraser, for the appellant. In this action one must look at the substance and not merely at the form of the action. By his notice to the plaintiff the Collector of Customs compelled the plaintiff to bring this action in order to protect his property. Here the plaintiff is not the attacker but the person attacked, and the ordinary rule is that the person attacked, who normally is the defendant, will not be ordered to give security for costs (*Maatschappij voor Fondsenbezit* v. *Shell Transport and Trading Co.* (1)). By virtue of the special provisions of the *Customs Act* the plaintiff is forced into the necessity of taking this action, and it was not just to order security for costs to be given, having regard to the special circumstances of this case. The procedure here is somewhat similar to that on interpleader (*Tomlinson* v. *Land and Finance Corporation* (2)). The plaintiff is not in the ordinary position of a plaintiff and the order should in the circumstances not have been made.

Herring, for the respondent. The order made by *Starke* J. was too considerate to the plaintiff, who had had various opportunities of informing the Court of what he intended to do. There was ample jurisdiction under Order XXVIII., rules 9 and 17, of the *High Court Rules* to make the order, as the plaintiff was beyond the jurisdiction. The plaintiff is really in the position of a plaintiff and not in the position of a defendant. This money was taken from him, not by the defendant, but by the master of the ship. The Court could now order that unless security is lodged within a specified time the action should be dismissed. Even in a case like *Maatschappij voor Fondsenbezit* v. *Shell Transport and Trading Co.* (1) the Court

(1) (1923) 2 K.B. 166.

(2) (1884) 14 Q.B.D. 539.

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has a discretion, and this was a proper exercise of the Court's discretion. This Court should deal with this matter once and for all. It is open to this Court to make whatever order is proper now. Either such an order should now be made or the plaintiff should be given one last change to bring the action to trial. The plaintiff is a plaintiff in a real sense and has to come here and prove his right. This is really a contest between two parties as to who is to get this money.

Cur. adv. vult.

Dec. 12.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from an order made by *Starke* J. on 22nd May 1935 ordering that unless the plaintiff returned to Australia and brought this action to trial within four months from the date of the order the plaintiff should give security for costs in the sum of £150. In the meantime all further proceedings in the action were stayed, with liberty to the plaintiff to apply to *Starke* J. immediately upon his arrival in Australia.

Order XXVIII., rule 17, of the *High Court Rules* assumes that there is a general power to order security for costs to be given in any case in which it is just that such security should be given. This rule is not included in the English Rules of Court, but it is unnecessary to consider the rule in this case because the application for security for costs was made under Order XXVIII., rule 9, on the ground that the plaintiff is ordinarily resident beyond the Commonwealth. Upon this appeal it was not disputed by the appellant that there was evidence upon which the learned Judge might properly find that the plaintiff was ordinarily resident beyond the Commonwealth. The point taken upon the appeal was that the plaintiff is not really a plaintiff but is, in substance, in the position of a defendant who is compelled to protect his property against legal proceedings which are really instituted and brought about by the defendant in the litigation.

The plaintiff was a member of the crew of the s.s. *Piako*, which on 21st August 1933 was travelling from New Zealand to Australia. The plaintiff alleges that on that day he found on board English silver coins totalling in value £351 5s. On the arrival of the vessel

officials of the Customs Department took possession of the coins. The plaintiff made a claim for the coins (see sec. 207 of the *Customs Act* 1901-1934) and the defendant, exercising the right conferred on him by that section, sent to the plaintiff the following notice:— "Whereas by notice in writing dated the 20th September, 1933, you have by your agent, Abram Landa, solicitor of 148 Phillip Street, Sydney, New South Wales claimed the sum of three hundred and fifty-one pounds five shillings seized as goods forfeited to His Majesty pursuant to section 229 (*e*) of the *Customs Act* 1901-1930 Take notice that pursuant to section 207 of the said Act I hereby require you to enter an action against me for the recovery of the said goods and further take notice that if you shall not within four months after the date hereof enter such action the said goods shall be deemed to be condemned without any further proceedings. Dated this ninth day of November, 1933. M. B. Synan, Collector of Customs, Victoria."

Sec. 229 (*e*) of the *Customs Act* 1901-1930 provides that the following goods (*inter alia*) shall be forfeited to His Majesty:— "All goods found on any ship or aircraft after arrival in any port or aerodrome and not being specified or referred to in the inward manifest and not being baggage belonging to the crew or passengers and not being satisfactorily accounted for."

On 16th November 1933 the plaintiff issued the writ in this action claiming the return to him of the coins and damages for unlawful detention. It is stated in correspondence that claims to the coins have also been made by the Government of New Zealand and by the owners of the s.s. *Piako*.

The plaintiff contends that, even if he is ordinarily resident beyond the jurisdiction, he is really a party attacked, not a party attacking, and that therefore he is substantially in the position of a defendant and should not be ordered to give security for costs. It was held in *Maatschappij voor Fondsenbezit* v. *Shell Transport and Trading Co.* (1) that the Court when considering an application for security for costs should be guided by the substance and not by the form of the matter. The Court "orders security for costs against the foreign attacker, not against the foreigner defending himself or his property

(1) (1923) 2 K.B. 166.

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from attack" (1). Thus, in interpleader proceedings, a party who is a defendant in the issue, but who is substantially in the position of a plaintiff initiating an action and is a foreigner residing abroad, may properly be ordered to give security for costs, though as a general rule a defendant cannot be ordered to give such security (*Tomlinson* v. *Land and Finance Corporation* (2)). But if for mere convenience a litigant who resides abroad is made plaintiff in an interpleader issue, but he does not substantially occupy the position of the plaintiff commencing an action, he will not be ordered to give security for costs (*Belmonte* v. *Aynard* (3)).

The precise position of a finder of goods on a ship as affected by secs. 207 and 229 (*e*) of the *Customs Act* will require consideration at the trial, and it would not be desirable (nor indeed is it relevant) to examine the question at this stage.

In this case the Collector really initiated legal process by giving a notice under sec. 207 which would result in the exclusion of any right of the plaintiff unless the plaintiff himself took legal proceedings. If the Collector had not acted under sec. 207, it would not have been necessary for the plaintiff, in order to prevent the extinction of his right, to take any proceedings. If, no notice having been given, he took proceedings in conversion or detinue, he would be in the same position as any plaintiff who comes into the jurisdiction to complain of an act which he alleges to be wrongful. But, as the Collector has given him a notice under sec. 207, he is, in effect, forced into legal proceedings, not merely to enforce his claim, but to prevent his claim from being extinguished. He is therefore really in the position of a defendant. The references made by my brother *Dixon* to the nature of informations *in rem* provide a close analogy to the position in this case. The still older procedure by *monstrans de droit* and traverse of office supplies further illustrations (*Chitty* on *The Prerogatives of the Crown* (1820), pp. 352, 355). The case is similar to that of the defendant in replevin who "must give security for costs, for his case cannot be distinguished from the plaintiffs in other actions" (*Wilkinson* on *Replevin* (1825), p. 45).

Thus, in my opinion, the plaintiff should succeed upon this appeal.

(1) (1923) 2 K.B., at p. 177.
(2) (1884) 14 Q.B.D. 539.
(3) (1879) 4 C.P.D. 221.

RICH J. I have had the opportunity of reading the judgment of my brother *Dixon* and agree with it.

DIXON J. This is an appeal from an order requiring the plaintiff to give security for the costs of the action.

The defendant in the action is sued as Collector of Customs. The plaintiff is a seaman who, in August 1933, was a member of the crew of the s.s. *Piako*, bound from Dunedin to Melbourne. He alleges that, while the ship was in mid-ocean, he found on board English silver coins amounting to £351 5s. There was an embargo on the export from New Zealand of English silver currency, which in Australia had more than its face value. On the arrival of the ship the Customs took possession of the coins. The plaintiff's statement of claim does not allege that the Customs took the money directly out of his possession, and counsel for the defendant stated that in fact it was surrendered to the Customs by the master of the ship.

The plaintiff made a demand upon the Comptroller-General for payment of the money to him as the finder, and threatened litigation. Thereupon the defendant, as Collector of Customs, served upon the plaintiff a notice under his hand which, after reciting that the plaintiff had by notice in writing claimed the sum of £351 5s. seized as goods forfeited to His Majesty pursuant to sec. 229 (*e*) of the *Customs Act* 1901-1930, notified him that, pursuant to sec. 207, the defendant required him to enter an action against the defendant for the recovery of the goods, and that, if he did not do so within four months, the goods would be deemed condemned without any further proceedings.

Sec. 229 (*e*) includes among the goods which shall be forfeited to the Crown goods found on a ship after arrival in any port, not being specified or referred to in the inward manifest and not being baggage belonging to the crew or passengers and not being satisfactorily accounted for. The word "goods" is defined by sec. 4 as including all kinds of movable personal property. Subject to any contention that may be advanced on the hearing of the action to the effect that par. *e* does not apply to money (cf. *McKenna* v. *Dent* (1)), or

(1) (1912) V.L.R. 150 33 A.L.T. 202.

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that the money was not "found on any ship . . . after arrival," the Crown's claim to forfeit the silver appears to depend upon the question whether it fell under the description, "baggage," and upon its being satisfactorily accounted for. It is evident that, upon the last issue as well as upon the question, if it arises, whether the plaintiff has a title to possession, his story will require some examination.

Sec. 207, under which the defendant as Collector gave notice to the plaintiff, is one of a number of provisions dealing with the seizure and forfeiture of goods. Under sec. 205, the officer seizing the goods is to notify the "owner" unless he be present at the seizure. If he does so, the goods shall be deemed to be condemned unless the owner makes a claim within one month of the notice. Sec. 206 enables the Collector to deliver goods seized to the owner on his giving security. Under sec. 207, if a claim to goods seized is served on the Collector by the owner, the Collector is empowered to retain possession of the goods without taking any proceedings for their condemnation and, by notice under his hand, to require the claimant to enter an action against him for the recovery of the goods. If the claimant does not, within four months after the date of such notice, enter such action, the goods shall be deemed to be condemned without any further proceedings.

In acting under this provision, the defendant assumed that the plaintiff was owner of the silver coins. The expression "owner" is defined in sec. 4 as including any person being or holding himself out to be the owner, importer, exporter, consignee, agent, or person possessed of, or beneficially interested in, or having any control of, or power of disposition over, the goods. Widely expressed as this definition is, it contains no words which aptly describe the possessory title of a finder of lost goods. But, no doubt, the word "owner" in sec. 207 includes, not only the person entitled to the property in goods against all the world, but also a person entitled to the possession, use and enjoyment of goods except as against the true owner. Whether the plaintiff is such a person is open to question even upon the assumption that he found the coins and that they had been lost or abandoned by their true owner. It is not a matter which directly arises upon the present appeal. But a ship at sea is not

the same as an open shop such as that in which the bank notes were dropped and found in *Bridges* v. *Hawkesworth* (1). It does not necessarily follow from that decision that lost articles in a ship are not within the protection of the shipowner so that he is entitled to them, as against the person who discovers them, even when that person is not his servant or agent. Further, the fact that the finder is the servant or agent of the shipowner may give the latter the better right to possession of the articles found (cf. *Salmond, Jurisprudence*, 8th ed. (1930), sec. 99, particularly at p. 307). On the other hand, once the plaintiff did, whether by finding or otherwise, obtain a title to the possession of the silver, except as against the true owner, that title would not be affected by the master's assuming custody and control and surrendering it to the Customs, if that occurred.

The plaintiff, having received notice under sec. 207, commenced the present action claiming the return of the silver coins. At the time of the institution of the proceedings he was a member of the ship's crew, but, some seven or eight months later, he was paid off in London, where he has apparently since resided. The address for service given in the writ was the plaintiff's former place of residence in Australia, but he had ceased to board there on going to sea about eighteen months before. Within a reasonable time of the writ, the defendant applied for security for costs on the ground that the plaintiff resided out of the jurisdiction. The application stood over at the instance of the defendant's solicitor, who displayed no eagerness to bring the action to a speedy trial. At length, the application was brought on before *Starke* J., who made an order that, unless the plaintiff returned to Australia and brought the action to trial within four months from the date of the order, he should give security for costs. The condition expressed in this order favours the plaintiff. It relieves him of the obligation to give security if he returns to the jurisdiction for the trial and does so without procrastination. If the case is a proper one for ordering the plaintiff to give security for costs, he cannot complain that, instead of making an absolute order, the learned Judge gave him the choice of returning to attend the trial.

(1) (1851) 21 L.J. Q.B. 75.

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The question upon which the appeal depends is whether it is a proper case for an order for security for costs. His Honor does not appear to have acted upon the ground that the plaintiff gave in the writ an address which was not his, nor is that the ground stated in the defendant's summons. The decision in *Chellew* v. *Brown* (1) seems to show that security for costs should not be ordered because a seaman, who has no fixed residence ashore, gives in his writ some address which is not really his abode, unless there is reason to think that he desired to mislead. The order was in fact made upon the ground that the plaintiff resided out of the jurisdiction. In answer to that ground the plaintiff now says that he began the action in compliance with the defendant's notice in order to avoid a forfeiture, and, therefore, is not truly the actor in the proceedings.

The principle is that a party to judicial proceedings, who resides beyond the jurisdiction, should not be required to give security for costs unless, however the parties are arranged upon the record, he is the person invoking or resorting to the jurisdiction for the purpose of establishing rights or obtaining relief. If he does avail himself of the remedies the jurisdiction provides in order to obtain affirmative relief or redress, he may be ordered to give security, although he becomes a defendant in the action. Thus, on the one hand, a defendant in an action at law who filed a bill in equity to restrain the proceedings at law, was not required by the Court of Chancery to give security for the costs of the suit although he resided out of the jurisdiction (*Watteeu* v. *Billam* (2)). And, on the other hand, a distraining landlord who became a defendant in an action of replevin in respect of the goods distrained was ordered to give security on the ground that he resided out of the jurisdiction (*Selby* v. *Cruchley* (3)). The principle was considered in *Maatschappij voor Fondsenbezit* v. *Shell Transport and Trading Co.* (4), where a number of illustrative cases are collected in the judgment of *Scrutton* L.J. He said: "The position, I think, extends to every case where the person against whom security is

(1) (1923) 2 K.B. 844.
(2) (1849) 3 De G. & Sm. 516; 64 E.R. 586.
(3) (1820) 1 Brod. & B. 505; 129 E.R. 817.
(4) (1923) 2 K.B. 166.

sought is really defending himself against attack, even if he be nominally a plaintiff, but really defending himself against defendants' previous action against him" (1).

The application of the principle to the present case is difficult because the one party, the plaintiff, has propounded a claim to money which, he says, he found before it came to the hands of the defendant, and the other party, the defendant as Collector, has propounded a claim to the same money on the ground that after the time when the plaintiff says he found it, it became forfeit to the Crown.

The solution of the difficulty, in my opinion, lies in a consideration of the effect produced by the provisions of the *Customs Act*. The right of forfeiture relied upon by the Crown is altogether independent of the validity of the plaintiff's claim. Even if he did find the silver, so as to obtain a right to its possession, the forfeiture over-reaches his claim. But to over-reach it steps must be taken on behalf of the Crown to secure a condemnation of the goods, or the statutory equivalent of a condemnation. It was open to the Customs to retain the money without seeking to forfeit it and, if the plaintiff carried out his threat to sue for it, to rely upon any weakness in the title he set up to the possession of the money. But, in that case, the Crown would be exposed to the risk of the plaintiff's recovering the money if he established a prior possessory title. The Customs did not take this risk but proceeded under sec. 207 to obtain the equivalent of a condemnation. This step involved the assumption that the plaintiff was "owner" of the coins. It may be granted that the assumption was made only for the purpose of obtaining a forfeiture and that, if the forfeiture proves not to have been effected, the Customs are not precluded from denying his ownership. Nevertheless for that purpose his prima facie title is assumed. The purpose of assuming it is to defeat it. But that purpose can only be accomplished by calling upon him to enter the present action. If he does not, the goods assumed to be his are condemned.

It appears to me that the Collector is the actor. The notice is a step taken by him directed at obtaining a condemnation. It is

(1) (1923) 2 K.B., at p. 177.

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a statutory substitute for judicial proceedings by the Crown against the goods. Its effect is to cast the onus of taking proceedings upon the owner or supposed owner. In the absence of such a provision, it would be incumbent upon the Attorney-General, or upon the party making the seizure, to file in a Court of record an information *in rem*. When such informations were in use, the proceedings included two proclamations. Claims were entered after the second of these, which was preceded by a commission of appraisement. In default of a claim the goods were condemned (*Manning, The Practice of the Court of Exchequer*, 2nd ed. (1827), p. 143). "Before proceedings or seizures were placed under the control of the commissioners of the respective boards of customs and excise, the seizing officer was bound in the next term, or sooner, at the discretion of the Court, to return the cause of seizure, and take out a writ of appraisement, otherwise the proprietor was entitled to move for a writ of delivery, upon which a writ of appraisement and delivery went of course, and upon that writ the proprietor had the goods delivered to him, giving security in double the sum to answer the appraised value" (*ibid.*, pp. 143, 144). (See *Blackstone's Commentaries*, 21st ed. (1844), vol. III., pp. 261, 262, and compare his judgment in *Scott* v. *Shearman* (1); *Attorney-General* v. *Lade* (2); *Johnson* v. *Sowers* (3).)

The provisions of the *Customs Act*, in effect, enable the officers of the Crown to take the preliminary steps by simple notices out of Court so that it is the claimant who must issue process. But when he does issue a writ he does so to protect his supposed ownership. In substance he is not the attacker, actor or person seeking redress.

For these reasons I think he is not liable to give security for the costs of the action. I do not think we should be influenced by the consideration that in all probability the plaintiff would have brought an action even if the Collector had not proceeded under sec. 207. In fact he did so proceed and thus made it necessary for the plaintiff to sue or allow the forfeiture to take place.

I think the appeal should be allowed.

(1) (1775) 2 Wm. Bl. 977, at p. 980; 96 E.R. 575, at p. 577.
(2) (1745) Park. 57, at pp. 61, 62; 145 E.R. 712, at p. 714.
(3) (1718) Bunb. 30; 145 E.R. 584.

McTIERNAN J. I agree that this appeal should be allowed.

The action in which the appellant has been ordered to give security for costs was entered by him in response to a notice served on him by the defendant pursuant to sec. 207 of the *Customs Act* 1901-1930. The action therefore was truly instituted by way of defence to a claim by the Collector of Customs for the condemnation of the appellant's goods.

Certain silver coins claimed by the appellant to be his goods, which form the subject matter of the action, had been seized by the Collector of Customs, who initiated proceedings for their condemnation by giving the notice provided for by sec. 207.

The rule that a plaintiff who is out of the jurisdiction should give security for costs should not be applied to the plaintiff in this action for the reasons stated by *Scrutton* L.J. in *Maatschappij voor Fondsenbezit* v. *Shell Transport and Trading Co.* (1). See, too, *Vincent* v. *Hunter* (2), where Sir *James Wigram* V.C. said: "It is perfectly just, when a plaintiff has brought a defendant into Court, by instituting proceedings against him, and a cross-suit is the necessary or proper form of defence, that the defendant should be treated as a defendant throughout, and not be required to give security for the costs of the cross-bill, which, in truth, is merely defensive"; and compare *Belmonte* v. *Aynard* (3), per *Denman* J.

Appeal allowed with costs. Order appealed from set aside.

Solicitors for the appellant, *Abram Landa & Co.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

H. D. W.

(1) (1923) 2 K.B., at pp. 176, 177.
(2) (1846) 5 Hare 320, at p. 321; 67 E.R. 935.
(3) (1879) 4 C.P.D., at p. 223.