JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL No. 70/69

BEFORE: The Hon Mr. Justice Eccleston, Presiding
The Hon Mr. Justice Fox J. A.
The Hon Mr. Justice Edun J.A. (ag.)

THE ATTORNEY GENERAL - PLAINTIFF-APPELLANT

vs.

DESNOES & GEDDES LTD - DEFENDANT-RESPONDENT

Mr. B. Scott for the Appellant

Mr. J. Leo-Rhynie for the Respondent

Heard:- 23rd, 24th April; 11th June, 1970

FOX, J.A.

On 22nd July, 1967, a collision occurred on the Marcus Garvey Drive between a Public Works Land Rover and a Pick Up owned by the Defendant Company and driven by its servant. On 21st August, 1968, the Plaintiff filed an action of damages for negligence in the Resident Magistrate's Court, Kingston, claiming £92. 1. 4 for the cost of repairs to the Land Rover. On 31st December, 1968 the Defendant Company filed a counter-claim in negligence for £230.13.0 for total loss of the Pick Up. In the defences to the Claim and Counter-claim which were stated at the commencement of the trial, the question of negligence was put in issue. In addition, the Plaintiff advanced a defence to the counter-claim under the Public Authorities Protection Law, Cap. 316, which limits the period within which the Plaintiff could have been sued to one year after the accident.

The Plaintiff's case was that the Land Rover was being driven in a westerly direction on the southern driveway of the Marcus Garvey Drive - a dual driveway. The driver said he intended to turn to his right, and by way of a gap in the traffic island which separates the two driveways, to cross over on to the northern driveway, and eventually to drive into the public works department premises to the north of the driveway. In carrying out this intention, the driver said he gave appropriate signals, and inclined

the vehicle towards the gap in the traffic island. The Pick Up came from behind and crashed into the right rear of the Land Rover. In addition to the driver of the Land Rover, a driver of a taxicab which was immediately behind the Land Rover, and a public works department clerk who was a passenger in the Land Rover, gave evidence in support of the Plaintiff's case. The Defendant's case was that the Land Rover was driven from land to the south of the Marcus Garvey Drive, on to the Southern driveway, and directly across the path of the Pick Up just as that vehicle which was proceeding in a westerly direction was about to pass a truck which was parked on the left or south side of the same southern driveway. In this situation there was nothing which the driver of the Pick Up could have done to avoid a collision.

In deciding which of these two diametrical versions of the accident he would accept, the learned Magistrate allowed himself to be guided by inconsistencies and improbabilities in the evidence of the three witnesses for the Plaintiff, and by his favourable assessment of the reliability of the driver and sideman of the Pick Up, both of whom gave evidence for the Defendant. He found that the accident was caused entirely by the negligence of the driver of the Land Rover and gave judgment for the Defendant on the claim.

With respect to the statutory defence to the Counter-claim, the learned Magistrate took the view that "it would clearly be most inequitable to allow a Public Authority to deprive a Defendant of his right to Counter-claim by merely delaying the filing of his action for the Statutory period:" and that "to hold otherwise ..... would be to bestow on Public Authorities a most unfair advantage which could work hardship and injustice on a Defendant through no fault of his own". The Court was "in duty bound to see that such consequences do not result". The learned Magistrate also thought that a counter-claim was not an "action, prosecution or other proceeding ..... commenced against" the Plaintiff within the meaning of the provisions of section 2 (1) of the Public Authorities Protection Law. On this ground of law also, he held that the defence failed. Accordingly, he entered judgment for the Defendant for the full amount of the counter-claim.

Against this decision, the Plaintiff has appealed. The first

ground of appeal challenged the findings of fact. Counsel argued that these were against the weight of the evidence. We have followed Counsel in the detailed and careful examination which he made of the printed testimony of the witnesses, and we are satisfied that the learned magistrate has not misdirected himself as to the facts or their significance, and that his reasons for concluding as he did are beyond question. Counsel contended further that the driver of the Pick Up was guilty of contributory negligence because he should have seen the Land Rover when it was on the land to the south of the driveway, and should have exercised greater care in guarding against the probability of it coming on to the southern driveway in front of the Pick Up. On the evidence which the learned Magistrate accepted, the Land Rover came so suddenly and directly into the path of the Pick Up, that a collision was unavoidable. There was no effective safeguard which the driver of the Pick Up could have taken against this unexpected manoeuvre, and it was impossible for the learned Magistrate to find, in the factual situation which he accepted, that the accident was caused by any fault in the driver of the Pick Up. This contention also fails.

It is not difficult to understand the disfavour with which the learned Magistrate viewed the special defence to the Counter-claim. But however unworthy the Plaintiff's conduct may be thought to be in waiting until the statutory period within which he could be sued had expired before commencing proceedings, this is not the sort of morally wrong behaviour which will excite the intervention of equity. The Plaintiff did not deliberately mislead the Defendant. His conduct is altogether untainted by anything resembling fraud. He has merely acted in such a way as to take the very best advantage of an existing statute which limits the period for the bringing of actions against him by the general public. Indeed, by allowing his right of action to be barred by the lapse of time, the Defendant failed to exhibit that reasonable diligence which equity requires of those who would invoke her aid. If he has been subjected to a rude awakening, the Defendant has only his own improvidence to blame. The Magistrate's belief that equitable principles were capable of rescuing the Defendant's suit from defeat was therefore erroneous. Equally unfounded is his view that a "counter-claim claim is not caught in the prohibitory web of the Public Authorities Protection Law". A counter claim is of "the same effect as

a plaint in a cross action". (Cap.179 s.191). For all purposes except execution it is an independent action. Stumore v Campbell & Co. [1891-1894] All E.R. (Reprint) 785; Amon v Bobbett 22 Q.B.D. 543. It is therefore clear that an independent action was commenced when the counter-claim was filed.

Now, the Public Works Department is admittedly within the scope and ambit of the Public Authorities Protection Law. Consequently, the statutory defence was capable of providing a complete answer to the counter-claim. As to whether it did, depended upon the character of the act of the driver of the Land Rover on the occasion; that is whether the driving was "done in pursuance, or execution, or intended execution, of any Law, or of any public duty or authority". (Public Authorities Protection Law, Cap 316, s.2(1)). For as Lord Buckmaster explained in Bradford Corporation v Myers [1916] 1 A.C. 242, the Law was not intended to cover every act which a public authority might have the power to perform. In that case, the Bradford Corporation were authorized by an Act of Parliament to carry on the undertaking of a gas company, and were bound to supply gas to the inhabitants of the district. They were also empowered to sell coke produced in the manufacture of gas. They contracted to sell and to deliver a ton of coke to the Plaintiff. By the negligence of their agent, the coke was shot through the Plaintiff's shop window. More than six months afterwards, the Plaintiff commenced an action in negligence against the Corporation. The defence was a plea in bar under the Public Authorities Protection Act, 1893. The judgments in the House of Lords make it clear that although a contract for the sale and delivery of coke was intra vires the authority of the Corporation, the actual sale and delivery was not done in direct pursuance of the provisions of the Statute, or in the direct execution of the duty or authority imposed or given by the Statute. "The act complained of was negligence in breaking the respondent's window, and that arose in the execution of a private obligation which the appellants owed by contract to the respondent, for the breach of which no one but the respondent was entitled to complain". (Lord Buckmaster L.C. at p.246 ibid.) The House held that an action for such negligence was not within the definite class of action contemplated by the Public Authorities Protection Law, 1893, and that as a consequence the plea in bar was of no avail. This case is im-

portant in that it shows that there are some causes of action within, and others without the Law, and that it is difficult to draw the line between these two categories.

At the trial of the instant case, counsel for the Plaintiff took the view that it was not for the Plaintiff to prove that the Land Rover was being driven in pursuance of any Law or in the execution of any public duty or authority, but that it was for the Defendant to prove the contrary. The trial judge disagreed with this proposition on the ground that it required the Defendant to prove something peculiarly within the knowledge of the Plaintiff. The real objection to the proposition, however, is that it ignores that particular principle of the law of evidence which requires a party to prove the facts which he asserts. Here, it is the Plaintiff who has pleaded a special defence under the statute and it would seem to be unarguable that the facts which establish that defence must be shown by him. Nevertheless, in the submissions before us, the proposition was repeated and expanded. Counsel for the appellant submitted that by filing suit, the Plaintiff had instituted "civil proceedings by the crown," and that by counterclaiming the Defendant had initiated "civil proceedings against the Crown". Both parties had acted in accordance with the provisions of The Crown Proceedings Law, 68 of 1958 Section 14 (1), (2). Counsel's contention was that the Plaintiff had given the clearest possible indication that he was acting on behalf of the Crown, and in the discharge of his duties as a Minister of the Government. By counterclaiming against him, the Defendant accepted the position. If the Defendant was now asserting that the Plaintiff was not acting in a public capacity, the burden was upon the Defendant to show this.

It has not been easy to follow the logic on the relevance of this reasoning. The counter claim is indeed an action "commenced against" the Plaintiff, but it is not an action in relation to any 'act done' by him. It is an action arising out of an 'act done' by the driver of a Public Works Department vehicle. The crucial question therefore is as to the character of the act of this driver, and not as to the character of the act of the Plaintiff when he filed suit. The Attorney General is entitled, and indeed is under a duty, to sue any person whose negligence has caused damage to a vehicle of the Public Works Department. The success of such an action

would in no way depend upon whether the driver was acting as a servant or agent of the Department, or upon the character of the act of his driving on the occasion. Consequently, to show that the driver was on a frolic of his own or that the Department's vehicle was being used entirely for a private purpose, would afford no defence to the claim of the Attorney General. If the negligence alleged was established, he would be entitled to a judgment. If, however, in such an action the Defendant should file a counterclaim, the question whether the driver was acting as a servant or agent of the Department would become of critical importance and if the Defendant was unable to establish this, his counterclaim would fail. But the counter claim would not fail merely because the Defendant was unable to show the character of the act of the driver of the Department's vehicle, because the Crown is "subject to all those liabilities in tort to which, if it were a person of full age and capacity, it would be subject

(a) in respect of torts committed by its servants or agents."

(The Crown Proceedings Law, 68 of 1958, Section 3 (1)(a))

These provisions make it obvious that the Defendant's success on the counter claim is not dependent upon his ability to prove the character of the act of the driver of the Department's vehicle. Proof of this fact is required only if the Attorney General as Plaintiff seeks to rely upon the Public Authorities Protection Law as an answer to the counter-claim. The burden of proving those conditions which confer the protection in s.2(1) of the law, would then fall upon him. To apply the language of Viscount Maugham in Griffiths v. Smith [1941] A.C. 170 at 185, to the instant case, it was necessary for the Attorney General to establish that the driving of the Land Rover on the occasion "was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on the (Public Works Department) not being a mere incidental power such as a power to carry on a trade."

There was no sufficient evidence before the learned Magistrate from which he could have determined the precise circumstances in which the Land Rover was being driven, or the purpose of its journey. Counsel for the Appellant suggested that the evidence of the driver of the Pick Up that the Land Rover came "from over land being dumped on the left, between Marcus Garvey Drive and the sea," and that after the accident the "Public Works

Department started dropping marl on ramp crossing the island, as they were widening the road there," together with the evidence of the sideman of the Pick Up that "Work was going on, at the Air-Strip and Public Works Department trucks going in westerly direction and wishing to turn into that site would proceed to regular opening in island ..... - that appeared to be what Jeep meant to do." - raised up an inescapable inference that the Land Rover was being driven in the exercise of an authority or power for the benefit of the public. We cannot agree that evidence of such a skimpy and plainly equivocal nature is capable of determining what is, on the authority of the cases, an admittedly difficult question. By means of stringent provisions not only as to time, but as to costs as well, (s.2(1) (6) saddles the unsuccessful Plaintiff with "costs to be taxed as between solicitor and client") - The Public Authorities Protection Law has cut down the ordinary right of the citizen to his remedy. The law must therefore be strictly construed and strictly proved. Such strict proof is absent in this case, and the statutory defence must therefore fail.

During the reply of counsel for the Appellant, to the submissions of counsel for the Respondent, counsel for the Appellant applied to amend his grounds of appeal by adding a fifth ground as follows,-

> "The Resident Magistrate was wrong in law in hearing the evidence to the Counter Claim of the Defendant-Respondent as there had been no compliance with the provisions of Rule 7 (1) of the Resident Magistrate's Court (Crown Proceedings) Rules, 1959.
> (Proclamations, Rules and Regulations - Gazette Supplement, 10th July, 1959 - p.474)"

This Rule provides that,-

> "Where civil proceedings are brought by the Crown the defendant shall not be entitled without the leave of the judge (to be obtained on an application of which not less than seven clear days' notice has been given to the Crown) to avail himself of any set-off or counterclaim."

Counsel submitted that the effect of this failure to comply with the provision of the Rule was to deprive the Resident Magistrate's Court of jurisdiction to try the counter-claim. Counsel cited the case of Pajotte v Babb (1959) 1 W.I.R. p.29, and contended that this court had no alternative

but to allow the application to amend, and do what the trial judge should have done, namely to order that the counter claim be struck out. In Pajotte v Babb a Petty Civil Court in Trinidad, which had been specifically deprived of jurisdiction by a statute to grant any equitable relief or remedy, gave a judgment to this effect. In the court of appeal the judgment was set aside, and the action struck out. This is not the position here. No statute has relieved the Resident Magistrate's Court of jurisdiction to try the Counter Claim. All that the rule does is to lay down the procedure which must be followed before the jurisdiction is exercised. At the trial, the Plaintiff could have objected to the hearing of the counter claim, but he did not do this. Instead he admitted the jurisdiction of the Court to try the counter claim, and not only is he estopped from raising the point, but also it is not open to him to do so for the first time on appeal -

Ramberran v. Mohammed [1964] 1 W.I.R. 142

The application to amend was therefore refused.

In the result this appeal is dismissed. The judgments in favour of the Defendant-Respondent on the Claim and on the Counter Claim are affirmed. The Defendant-Respondent is to have the Costs of this appeal fixed at Fifty dollars.