property, although originally a sort of blackmail levied on the village communities, and Government arranged to pay, in lieu of it, certain allowances to the male issue of the Girasias.

The Judgment deals with every view of the case.

(*a*) It treats the collection as recognized property.

(*b*) It treats it not as property, but as a precarious payment.

Referring to the Burdwan case (23 Suth. W. R., 378) their Lordships distinguished it on the ground that the decision rests on an obligation to pay rent for certain *Mouzahs*. Here, even if the jaghire is absolute property, the grant of money is throughout an allowance. The Government found a list of persons who were to receive payments. Their right was admitted by Government. The Act provides that any one claiming such payments must take a certain course of procedure in the form prescribed by the **[344]** Act and none other. Here there is no certificate under the Act. The plaintiff should have got a certificate from the proper officer.

As to the argument that this is a suit for money had and received, I cannot declare that unless I have power to declare and determine plaintiff's right to the money received.

I have no jurisdiction.

I must dismiss the suit with costs. If I have power to do so, I will reserve to the plaintiff the right to bring another suit for the same matter if and after he shall obtain a certificate under the Act.

Solicitors for the Plaintiff: *Branson* and *Branson*.

Solicitor for the Defendant: *Carr*.

NOTES.

[This case was followed in (1894) 18 Mad., 187, where it was held unnecessary that Government should be a party, for the bar to operate.

See also 13 Mad., 75; (1906) 29 Bom., 480=7 Bom. L. R., 497.

This case does not apply where the person entitled to a portion relinquished it in lieu of a maintenance not made payable out of the pension, and the suit was brought to recover such maintenance:—(1882) 4 Mad., 341.]

[4 Mad. 344.]

ORIGINAL CIVIL.

The 9th December, 1879.

PRESENT:

MR. JUSTICE INNES.

Hari Bhanji and another.....Plaintiffs

and

The Secretary of State for India in Council.....Defendant.*

Jurisdiction of Courts to entertain suit against the Secretary of State for India for alleged illegal levy of import duties by a Collector—Salt Act of 1877—Import duty increased—Salt in transit, effect of notification under Tariff Act, 1875, exempting salt from paying more than the difference between excise and import duty leviable.

In 1877 H shipped salt from Bombay to Malabar ports having conformed to the provisions of the Bombay Salt Act, 1873, and paid Rs. 1-13-0 per maund, the full duty then leviable

* Civil Suit No. 482 of 1879 on the Original Side of the High Court.

under the Indian Tariff Act 1875. By a notification under Clause B, Section 6, of the Indian Tariff Act, the Governor-General in Council had exempted salt which had paid the excise duty at Bombay from liability to pay more than the difference between what was so paid and the import duty leviable under the Tariff Act. While the salt was in transit, the Salt Act of 1877, which raised the import duty to Rs. 2-8-0 a maund, came into force. The Collector of Malabar levied 11 annas a maund on the salt imported, in the belief that he was so authorized by law, and his action was ratified by Government.

Held that, assuming the Collector's act to be illegal, a suit to recover the amount so levied would lie against the Secretary of State for India in Council.

[345] *Held*, also, that the payment at Bombay was not a payment of import duty by anticipation, and that the plaintiffs were not excused by the notification of the Governor-General from paying the amount levied by the Collector.

Nobin Chunder Dey v. *The Secretary of State for India* (I. L. R., 1 Cal., 11) dissented from.

THE facts and arguments in this case appear from the Judgment of the Court (INNES, J.).

Mr. *Spring Branson* for the Plaintiffs.

The Advocate-General (Hon. P. *O'Sullivan*) and Mr. *Tarrant* for the Defendant.

Judgment:—This suit is for the recovery of Rs. 4,456-5-0 alleged to have been illegally levied from plaintiffs by the Collector of Malabar and paid to the Custom-house officials of that district on the 5th, 7th, and 11th March 1878, in respect of duty upon salt imported in January 1878 at the ports of Cannanore and Tellicherry.

The plaintiffs say that in the latter part of 1877 they shipped the salt from ports in the Presidency of Bombay, and that in the removal and shipping of the salt they conformed to the Bombay Salt Act of 1873, paying the full duty, 1 rupee 13 annas per maund, leviable thereon under the Indian Tariff Act of 1875; that on the 27th day of December 1877, while the salt was in the course of transit from the Presidency of Bombay to the ports of Cannanore and Calicut, the Salt Act of 1877 was passed by the Governor-General in Council, which altered the duty leviable under the Tariff Act of 1875 to Rs. 2-8-0 in place of Rs. 1-13-0 a maund; and that the Act came into force on the following day (28th December).

Plaintiffs contend that the levy of the additional duty was illegal, as the full duty leviable had been already paid at Bombay; and claim restitution of the sum overpaid with interest at 9 per cent. per annum.

The substance of the defendant's written statement is that the Tariff Act of 1875 provides that there shall be levied and collected in every port to which the said Act applies the duties specified in Schedules A and B thereto annexed, and that the duty on salt leviable according to No. 49 of Schedule A was by Act No XVIII of 1877, which came into force on the 27th December 1877 **[346]** increased, as stated by plaintiff, and that as the Act was already in force when the salt was imported into the Madras Presidency, it was liable to the additional duty leviable under the Act.

An objection was taken also as to the want of such notice as plaintiffs were bound to give to entitle them to sue the Secretary of State.

The issues settled were—

I. Whether the notice of action given to the Chief Secretary to the Madras Government is sufficient within the meaning of Section 424 * of Act X of 1877.

II. Whether the levy of 11 annas per maund in the plaint mentioned was contrary to the provisions of Act XVIII of 1877 or otherwise illegal.

III. Whether the plaintiffs are entitled to interest upon the sums due to them, if any.

The following additional issue was afterwards framed—

IV. Whether the Court has jurisdiction over the subject matter of this.

The question as to due notice (first issue) was abandoned.

First I will consider the issue as to the jurisdiction.

It is admitted that the Secretary of State would be liable in a case in which the East India Company would have been liable—as to this *see* Section 65 of 21 and 22 Vic., Cap. 106—and this, no doubt, is so. But it is contended that the East India Company would not have been liable to be sued in such a case as that before the Court, but only in cases in which a petition of right would lie to the Crown, and in certain other cases in which they had entered into contractual engagements of a quasi private character.

The sovereign is not personally answerable for offences against the law for reasons which are sufficiently obvious. Also in his public capacity he cannot be responsible for wrongs, because he is under the control of his responsible ministers. But the maxim 'the king can do no wrong' has a more extended meaning than that he is not responsible for wrongs, *viz.*, that the prerogative of the sovereign extends not to the doing of any wrong, and that where wrong is done by the sovereign, unconscious and unvoluntary wrong—for no other can be conceived—the subject is always **[347]** entitled to redress. For, as was expressed by Lord *Denman* in the *Baron de Bode's* case, (8 Q. B. 274), in which one of the contentions was that a particular class of claims for redress could not be entertained against the sovereign, "There is an unconquerable repugnance to the suggestion that the door ought to be closed against all redress or remedy," for any wrong whatever.

The extent of the subject's means of redress as between him and the sovereign has, however, often been a matter of question. At one time it was supposed that a remedy lay only for restitution of lands. *See* the case [referred to in *Tobin* v. *The Queen*] (16 C. B. N. S., 310; s.c. 33, L. J. C. P., 199, 205), in the Year-book of 34 H. 8, in which the Justices indignantly repudiated the notion entertained by the bar that a petition of right would only lie in a plea of land, and they certainly gave their opinion, but it does not appear to have been decided, that a petition of right will lie for chattels personal, seized to the king's use by the violence of one of his officers, and also that money paid to the king under lawful warrant, but against equity and conscience, might be recovered back by petition of right.

* [Sec. 424:—No suit shall be instituted againstt he said Secretary of State in Council or against a public officer until the expiration of two months next after notice in writing has been in the case of the Secretary of State in Council delivered to, or left at the office of, a Secretary to the Local Government or to the Collector of the District, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action and the name and place of abode of the intending plaintiff; and the plaint must contain a statement that such notice has been so delivered or left.]

Notice previous to suing Secretary of State in Council or public officer.

The case of *Tobin* v. *The Queen* shows that the opinion of the Judges before whom it came was that a petition of right will lie for the restitution by the Crown of real property and of chattels and for the discontinuance by the Crown of wrong of any description, but not for unliquidated damages for a wrong. It may be difficult to understand why, if a petition of right would lie for the trial of the question whether there had been a wrong and the Judges could by their judgment procure the discontinuance of wrong, they could not also proceed to try and determine what the damages were which would afford a proper compensation for the wrong and procure the payment of the amount out of the public purse. The view that such a petition would not lie appears to be founded upon the circumstances that no such case has been found in the reports and the inference therefrom that, if any such petition was ever preferred, the *fiat* was never issued upon it, because there was no precedent for such a petition. This would be in accordance with the view of Lord Coke, as quoted by Lord Chief Justice HOLT in the *Banker's case* (14 How. State Trials) that the legitima-**[348]**tion of any case may be doubted that has no case of kin to it, a view which would seem to substitute precedent for principle.

The present claim, however, is either a claim for restitution of the sum wrongfully seized and held, or for damages for the wrongful taking—damages which are liquidated and measured by the amount taken—and it is, therefore, in its nature apparently a claim for which a petition of right would lie as between the subject and the sovereign. But the question as to whether in the United Kingdom a petition of right or in India an action would lie is not wholly dependent upon the nature of the relief prayed. It has respect also to the relation of the person against whom the proceeding is instituted to the person who actually committed the act for which redress is prayed.

As to the Crown, or in India the Secretary of State, the question must always be—Is the person who committed the tortious act in such a position relatively to the Crown that the Crown, or in India the Secretary of State, can be made responsible through him?

To determine this with reference to the present case, we have to consider the law of agency in torts. The liability of the principal for the wrongful act of the agent depends upon whether the principal by his conduct, active or passive, has been the cause of the wrong and consequent damage, or has adopted the act of the agent and has profited by the wrongful gain, because then the agent is regarded as a mere instrument which the principal employed for the accomplishment of the wrong, and the principal is responsible.

Cases that come within this principle are—

I. Where the act is done under the express authority of the principal.

II. When, though not authorized by the principal, the act is done in the course of the performance of acts which lie within the scope of the authority given to the agent by the principal.

As to this I may quote the judgment of Mr. Justice WILLES in *Barwick* v. *English Joint Stock Bank* (L. R., 2 Ex., 259) where *Ewbank* v. *Nutting* (7 C. B., 797); *Goff* v. *Great Northern Railway Company* (3 E. & E., 672: s.c. 30 L. J. Q. B., 148); *Huzzey* v. **[349]** *Field* (2 C. M. & R., 432) are quoted, and Mr. Justice WILLES goes on to say: "In all these cases it may be said, as it was said here, that the master has not authorized the particular act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of act and must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in."

III. When the act is not within the scope of the authority given, but is done intentionally and in the mistaken idea that it is within the scope of the authority given and it is adopted by the principal who takes the benefit of it, this is illustrated in the case of *Buron* v. *Denman* (2 Exch., 167).

IV. When the act done is not within the scope of the authority given, and is done intentionally and without any mistake as to its being within the scope of the authority given, but the benefit of it is adopted by the principal, this is illustrated by the case of *Udell* v. *Atherton* [7 H. and N., 172; S.C. 30 L.J. (Ex.,) 337], and, as said by Mr. Justice WILLES in *Barwick* v. *English Joint Stock Bank*, this case is to be distinguished from cases in which the person employed, as in *Barwick* v. *English Joint Stock Bank*, is a general agent. In both these cases there was deceit on the part of the agent causing damage, but in *Udell* v. *Atherton* there was only a limited authority for a particular purpose, and the deceitful representation was outside the scope of that authority, and the principal would not have been liable if he had not adopted the act.

But the employer is not answerable—

I. When the act done by the agent is not an act within the scope of his authority, though done in the mistaken belief that it is so, unless the employer adopts it and makes it his act—*Money* v. *Leach* (3 Burr., 1992. [See Tobin *v.* Queen (*supra*), p. 203]. This was the case in which a warrant was issued for the author of the *North Briton*, and the plaintiff, another person, was wrongfully arrested by the defendant, who was held liable.

[350] II. Nor is the employer answerable when he is in such a position that practically he has no control over the person employed, and thus cannot be said to have caused the act complained of. This rule, to which, however, there is an exception that will presently be noticed, applies in the case of all agents who, though they may be appointed and are removeable by their employers, have their duties regulated by law, as the inferior officers employed under the Postmaster-General, Lords Commissioners of the Treasury, Commissioners of Customs, and Excise Auditors of Exchequer, a pilot employed under the captain of a ship, &c. It also applies where a person is sued in respect of the acts of the servants employed under some one with whom he has contracted. The person sued is not responsible for the wrongful acts of the contractor's servants, because they are not employed by his will and are not under his directions. *See* the Judgment in the case of *Tobin* v. *The Queen*.

III. Where the wrongful act done is done on behalf of the Crown or sovereign power, and is ratified and becomes by ratification an act of State, the sovereign power is not responsible to any Municipal Court, and the agent also is excused because he is simply the instrument of an irresponsible power—*The Secretary of State in Council of India* v. *Kamachee Boyee Sahaba* (7 M. I. A., 539).

Assuming, for the sake of the argument, that the act complained of in the present case was a wrongful act, yet it is not contended that the officer who levied the duty did not act in the belief, however mistaken, that he was acting according to the authority he had by law, and the act has been adopted by the Government which has taken the benefit of it. The case, therefore, would seem to come within the rule of *Buron* v. *Denman* and the implied rule of *Money* v. *Leach*, unless it comes within the rule of the irresponsibility of an employer who practically has no control over the person employed, and consequently cannot

be said to have caused the act complained of, as in the case of wrongful acts of inferior officers in public offices already referred to.

But it is evident from *Buron* v. *Denman* that from the cases of exemption from responsibility arising out of such a relation must be excepted the case in which the superior employer has adopted the wrongful act and taken the benefit of it as in the present case. **[351]** In the case of *Tobin* v. *The Queen* it may be observed the wrongful act was not adopted by the Crown. There was no benefit indeed nor advantage to adopt, as the ship and property were entirely destroyed and the claim was for unliquidated damages.

I think also the rule in India as to the responsibility of Government to its own tribunals for the acts of its servants is different from that in England. It is apparent from the preamble to the Bengal Regulation III of 1793, as is noticed in the Fifth Report of the Select Committee of the House of Commons appointed to inquire into the affairs of the East India Company in 1812 (*see* page 38, Higginbotham's edition, 1876), that the Government, of which Lord Cornwallis was then the head, had at that early period determined to submit to be sued for injury done to the meanest of its subjects by the authorized acts of its officers or by any act of its own in the framing of rules whereby injury was caused to the rights of individuals.

The words of the preamble to the Regulation are very remarkable:—

"The Government have resolved that the authority of the laws and regulations lodged in the Courts of Justice shall extend not only to all suits between native individuals, but that the officers of Government employed in the collection of the revenue, the provision of the Company's investment, and all other financial or commercial concerns of the public shall be amenable to the Courts for acts done in their official capacity in opposition to the regulations, and that Government itself, in superintending the various branches of the resources of the State, may be precluded from injuring private property, they have determined to submit the claims and interest of the public in such matters to be decided by the Courts of Justice, in the same manner as the rights of individuals."

It may be said that, according to the well-known rule, the preamble cannot be construed as a part of the enactment, and that what the law was does not therefore appear from it. But it is admissible as a historical record to show the policy deliberately laid down at that period, and although the Regulation III of 1793 applied only to Bengal, it cannot be doubted that it was the intention of the Head of the Government to apply the principle generally throughout the territories of the East India Company.

[352] Madras Regulation II of 1802 is founded upon this Bengal Regulation. It is general in submitting all civil suits to the jurisdiction of the Courts (except certain specified claims) and Collectors of Customs, among other public officers, are declared answerable to the Zilla Courts for acts done in their official capacity in opposition to any established regulations.

It is not express as to the submission of Government to be sued in its own Courts.

Regulation I of 1823 provided an improved mode of procedure for enabling public officers in proper cases to defend suits brought against them in their official capacity at the public expense.

By Regulation IX of 1803, Section 55, the Collector of Customs of Madras and the officers under him were made amenable to the Zilla Court of Chingleput for acts done in their official capacity "contrary to, or not warranted by, this Regulation."

Act IV of 1844, Section 63, recognized the existing amenability of all Customs Officers throughout the Presidency and continued it.

This Act was repealed by Act VI of 1863, and although there is no express declaration, as in the former Act, of the liability of Custom-house Officers for wrongful official acts, a right of action for anything done in pursuance of this Act is recognized in Section 214, which provides that no such action shall be brought without a month's previous notice. Section 7 of Regulation II of 1802 remained in force up to the date of the repealing Act X of 1861, and the amenability of officers of Customs to the Zila Courts undoubtedly survived under the provisions of that section up to the date of the enactment of Act X of 1861; but the reason for the enactment of Act X of 1861 was, as stated in the preamble, the existence of a Code of Civil Procedure, Act VIII of 1859, and it will be seen by turning to that Act and its successor, Act X of 1877, that all suits of a civil nature are within the jurisdiction of the Courts with certain specified exceptions, and unless the jurisdiction previously existing over such suit had been expressly taken away, it must be held, I think, that the amenability of these officers to the Courts existing at the date of the passing of Act VIII of 1859 was recognized and continued by that Act and by Act X of 1877, and that Act X of 1861, in repealing Section 7 of Regulation II of 1802, did not affect their amenability (*see* as to **[353]** this the decision of Sir Mordaunt Wells in *Rundle* v. *Secretary of State in Council*,) (1 Hyde's Rep., 37. Cowell's Dig., p. 215). Section 6 of Act VI of 1863 merely provides for an award by the chief Customs authority in respect to any matter not specially provided for by any law for the time being in force whether relating to levy of duty or otherwise, and does not apply to cases in which it is possible to determine, as in the present case, whether the duty is properly leviable by looking at the enactments, and therefore does not by implication exclude the jurisdiction of the Courts in such cases.

Sections, 218 to 220 apply only to awards of confiscations and forfeitures and duties increased by way of penalty, and the awards that may be made in pursuance of these sections are equally incapable of excluding the jurisdiction of the Court in cases such as the present.

Act VIII of 1878 followed and repealed Act VI of 1863, but I do not understand the words "decision or order" passed by a Custom-house Officer in Section 188 of Act VIII of 1878 to refer to executive orders levying duty. In his capacity of levying duty he is simply the executive officer to carry out the Act. The words refer, I think, to judicial orders and adjudications under Sections 182 and 183. But whether they be so restricted or not, I do not think Sections 188 to 192, even by implication, exclude the jurisdictton of the Courts for wrongs done by Custom-house Officer, and Section 198 recognizes that there may be suits against them. It appears to me, therefore, that though Section 7 of Regulation II of 1802 is repealed and there is no provision of the law rendering Custom-house Officers in express terms amenable to the law for acts done in their official capacity, they are nevertheless liable under the principles which have become rooted in the law by the earlier legislation whereby the Supreme Government submitted to have questions as to rights in dispute between its officers of revenue and its subjects determined in its own Courts, and which principles have continued in operation and have not been affected by the repealing Act of 1861.

In this view an action would lie against the Custom-house Officer for levying duty wrongfully or in excess of what was properly chargeable; and if the Government, as it has done in the **[354]** present case, makes the alleged wrongful act its own act and takes the benefit of it, the act becomes the

act of the Government; and in accordance with the principles promulgated under Lord Cornwallis' government, and not since departed from, the Government is liable to be sued in its Courts for damages for the wrongful act. Nor does it make any difference that the claim is made to the Original Side of the Court, the jurisdiction of which was defined and determined originally by English law and the Charters and Letters Patent. For the Government of the East India Company extended over the local limits of the Supreme Court's jurisdiction, and the submission of all claims against the Government for trial by the Court was part of a great general policy, and the jurisdiction so conceded over all suits against Government was clearly not intended to be confined, if it could be confined, to the Company's Courts. Furthermore, the Charter itself gave complete jurisdiction over wrongful acts of the Government and its officers, not being acts of State, except in matters immediately relating to the collection of the revenue. *See* the case of *Venkata Runga Pillai* v. *East India Company* (1 Strange's Madras Cases 152, and, as was decided by this Court in the appeal of the *Collector of Customs* v. *Chitambaram* (I. L. R., 1 Mad., 115), even that exemption ceased on the erection of the High Court.

This liability of Government in the case of a ratification of a wrongful act of its officer was recognized by the Privy Council in *Collector of Masulipatam* v. *Cavali Venkata Narayanappa* (8 M. I. A., 529), in which it was said the acts of a Government officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or if he exceed that authority, when the Government in fact or in law directly or by implication ratifies the excess. But assuming that the liability of the Secretary of State by the Act of the Legislature already quoted, 21 and 22 Vic., Cap. 106, Section 65, is placed on the same footing with that of the East India Company, is no greater after all than that of the Crown, this is surely a class of case in which if wrong were shown to have been done a petition of right would lie. For what is asked for is simple restitution of an ascertained **[355]** sum of money wrongfully taken. The prayer for interest which is in the nature of unascertained damages is a mere incident which cannot alter substantially the nature of the claim or remove it from the jurisdiction of the Court—*see* the cases collected in the note to *Smith* v. *Upton* (6 Man. & G., 251).

Sir John Puley's case (T. 7, H. vi, fol. 44, pl. 22.) is in point as regards the prayer for restitution of the sum wrongly levied and held, and the *Abbot of Faversham's* case, [Ryley's Pl. Parl., 256 (4 Ed., III)]. which was one for rent of land seized by the king, is in point as to the interest, *i.e.*, as to what accrues out of property wrongfully seized and withheld; and as Lord Denman said in the Baronde Bode's case (p. 274) in the passage, part of which I have before quoted, "There is nothing to secure the Crown against committing the same species of wrong, unconscious and involuntary wrong, in respect of money, which founds the subject's right to sue out his petition when committed in respect to lands and specific chattels, and there is an unconquerable repugnance to the suggestion that the door ought to be closed against all redress or remedy for such wrong." In *Rogers* v. *Rajendro Dutt* (8 M. I. A., 103) there are expressions used which have been urged here as manifesting the irresponsibility of the Government. In that case no doubt it was sought by defendant to shift the responsibility of his wrongful act upon the Government which had ratified it. The Privy Council decided that there was no actionable wrong, but in the course of their decision said that the liability of the wrong-doer could not be affected by the fact that the Government had ratified the wrong. And they go on to say the civil irresponsibility

of the supreme power for tortious acts could not be maintained with any show of justice, if its agents were not personally responsible for them, though in such cases the Government is assuredly bound to indemnify its agent. But the question of the responsibility of the sovereign power was not then before the Privy Council, and that case can at the most be taken as an authority for the position that whether or not the ratifier is also liable the wrong-doer himself is always liable, and perhaps also for the position that the East India Company or the Secretary of State would not be liable to be sued for recovery of **[356]** unliquidated damages for a wrong. As to this it may be instructive to glance at the *P. and O. Steam Navigation Company* v. *Secretary of State* (Bourke's Rep., pt. vii, 166.) where it was said "a distinction was taken in argument between a liability under a contract and a liability arising out of a wrongful act, but we are of opinion that the words 'liabilities incurred' in Stat. 3 and 4 Wm. IV, Cap. 85, Sec. 9, and the same words in Stat. 21 and 22 Vic., Cap. 106, Secs. 42 and 65 are not necessarily limited to liabilities arising out of contract, for, if so, there was no necessity to use the word 'incurred' at all. Actions of ejectment in which mesne profits were recoverable were maintained against the East India Company in consequence of acts done by their officers. Express provision also was made by Stat. 53 Geo. III, Cap. 155, Section 128, and by Stat. 55 Geo. III, Cap. 84 and 89, with reference to certain actions which must have been actions of trespass."

A judgment of the Calcuttu High Court has been referred to in the case of *Nobin Chunder Dey* v. *The Secretary of State for India*, (I. L. R., 1 Cal., 11) as in favour of the position contended for by the Advocate-General that the plaintiff has no right of suit against the Secretary of State. That certainly is a very strong case. At a Government auction-sale of licenses for five shops for the sale of gunja and sidhi, plaintiff was the highest bidder, and his bids were accepted and recorded; he also performed his part of the contract by paying the deposit for the licenses amounting to Rs. 968. The conditions of sale were stated to be "The Collector does not bind himself to accept the highest bid. The settlement with the accepted auction-purchaser will be contingent on the approval by the Police authorities of the proposed locality of the shop and the character of the applicant for license." Afterwards the plaintiff was refused a license, possibily owing to some objection arising out of his character or out of the situation of his shop; but the Collector retained the money, and the Government did not repudiate the retention but ratified it. Here, upon the allegation of the plaintiff, there was a clear wrongful retention of an ascertained sum of money, and upon the precedents of some of the cases I have referred to, including the opinions expressed by the Judges in the case in the Year-book of 34 H., viii, and that of Lord Denman in the **[357]** Born de Bode's case, besides numerous cases which I have not expressly referred to, I should have thought that there could be no doubt that a petition of right would lie in such a case. I confess, with the greatest respect for the opinions of the learned Chief Justice SIR RICHARD GARTH and the other learned Judges who dealt with the case both in original and appeal, that I am unable to regard that case as rightly decided and I could not follow it

My opinion is, for the reasons already stated, that the action will lie.

The next question is whether any wrong has been done, and what sum, if any, the plaintiffs are entitled to recover.

Why is it contended that the excess levied at the Madras ports over what was levied in Bombay was wrongly levied? Plaintiffs' answer is, we were bound only to pay what was leviable as duty when we paid it in Bombay; and as what we paid in Bombay covered all that was then leviable as duty, we are not liable to pay the excess.

Clause B, Section 6, of Act XVI of 1875 enables the Governor-General from time to time, by notification in the *Gazette of India*, to exempt any goods imported or exported into or from any specified port or places therein from the whole or any part of the duties of customs to which they are liable under this Act, or any other law for the time being in force, and to cancel any such exemption.

In pursuance of this power the Governor-General by notification has exempted salt which has paid excise duty in Bombay from paying more than the difference between what is so paid and the duty leviable. In the case of the plaintiffs, when did the liability to pay duty attach? Did it attach at the date of payment of what was paid at Bombay or at the dates of import at the Madras ports? To determine this it is desirable to inquire what it was that was paid at Bombay, was it a payment of import duty in anticipation? Distinctly not. It was excise duty, and the only engagement of the Government of India was that on the salt which had paid such excise duty being brought to the port of import, only the difference would be charged between such excise duty and the import duty leviable.

[358] No import duty had been paid; but in consideration of the levy of the excise duty, the Government excused so much of the import duty as was covered by the excise duty.

It seems to me that plaintiffs were still liable to the contingency of the tariff rates being raised between the interval of their paying the excise duty in Bombay and the levy of the import duty at the port of import.

That contingency actually happened, and plaintiffs were liable to pay the extra duty. The plaintiffs' suit therefore must be dismissed, but as they succeeded on the issue as to the jurisdiction, each party will bear his own costs.

Solicitors for the Plaintiff, *Tasker* and *Wilson*.

The Government Solicitor (*Barclay*) for the Defendant.

NOTES.

[There was an appeal from this case which is reported in (1882) 5 Mad. 273. The judgment in this case on the point of jurisdiction was affirmed.

For Notes *see* the notes to 5 Mad. 273, in the '**Law Reports' Reprints.**]

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[359] APPELLATE CIVIL

The 9th February, 1880 and 8th December, 1881.

PRESENT:

MR. JUSTICE INNES AND MR. JUSTICE MUTTUSAMI AYYAR.

Hinde and Co.....(Plaintiffs), Appellants

and

Ponnath Brayan and others..... (Defendants), Respondents.*

Res judicata—*Foreign judgment—Civil Procedure Code, Section 14 (b), (c)—"International"—"Natural Justice."*

An *ex parte* judgment of a French Court against a native of British India not residing in French territory upon a cause of action which arose in British India, imposes no duty on the defendant to pay the amount decreed so as to bar a suit in British India.

* Second Appeal No. 143 of 1879 against the decree of J. W. Reid, District Judge of North Malabar, reversing the decree of E. K. Krishnen, District Munsif of Tellicherry, dated 26th August, 1878.