

Singh v. Uma Kunwar (1). In considering the difference between the old and the new law, I have not overlooked the omission of the following words in s. 327 of the old Code, viz., "shall be written on the stamp-paper required for petitions to the Court, where a stamp is required for petitions by any law for the time being in force." These words were concerned with the stamp revenue, and were repealed by the Court Fees Act, VII of 1870, and have no connection with the present subject. The conclusion then at which I arrive is, that the law as settled by the Full Bench case has not been altered by the present Code of Civil Procedure, and that the preliminary objection must prevail. At the same time I am bound to say that this is a conclusion to which I come most reluctantly, because it appears to me that, although it is very desirable to uphold awards when properly made, the matter contained in ss. 520 and 521 is matter upon which it would be just and reasonable to allow either party, when defeated, to resort to an Appellate Court.

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Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Cunningham.

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 & Aug. 1.

Public Officer—Official Trustee—Notice of Suit—Tortious Acts—Civil Procedure Code (Act X of 1877), ss. 2, 424—Official Trustee's Act (XVII of 1864).

The Official Trustee is a 'public officer' within the definition given in s. 2 of the Civil Procedure Code.

The cases in which a public officer is entitled to notice of suit under s. 424 of the Code, are those in which he is sued for damages for some wrong inadvertently committed by him in the discharge of his official duties, and the object of giving notice is, that if a public body or officer entrusted with powers happens to commit an inadvertence, irregularity, or wrong, before any one has

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a right to require payment in respect of that wrong, he shall have an opportunity of setting himself right, making amends, restoring what he has taken, or paying for the damages he has done.

The Official Trustee, therefore, is not entitled to notice of suit, when the question to be decided relates to the rights of the *cestuis que trustent* in respect of the trust-fund, and not to a wrong committed by him.

THE plaintiff in this case claimed to be entitled to a share in a certain trust-fund, of which the defendant, the Official Trustee of Bengal, was trustee. The trust was one created by the Government for the benefit of some of the descendants of Tippoo Sultan, and contained an ultimate trust in case of failure of heirs for the benefit of the Secretary of State for India. No notice of the suit had been given to the defendant, who, in his written statement, pleaded that he was entitled as a 'public officer' to two months' notice of the suit under s. 424 of the Civil Procedure Code.

Mr. *Stokoe* for the plaintiff.—The Official Trustee does not come within the class of public officers intended to be included within the provisions of chap. xxvii of the Civil Procedure Code. He has no connection with Government. He is not subordinate to any person. It is not necessary for him to make a reference to the Government before answering a plaint. [CUNNINGHAM, J.—The object of the provisions in this chapter is to enable the Government to determine whether they will defend a suit against one of their servants, who is being sued for a tortious act which he has committed.] Yes, the provisions are similar to cases contained in various English Statutes. If the Official Trustee is a public officer, he can only come under the last clause of s. 2, the definition section of the Code, as an officer "remunerated by commission for the performance of any public duty." All the officers referred to are those who have the interests of Government under their charge. They are divided into distinct classes—(i) every Judge, (ii) covenanted servants, (iii) commissioned officers, (iv) officers of Courts of justice, (v) jailors, (vi) police officers and health officers. The last clause deals with several classes of public officers doing duties on behalf of Government, and it would be a singular result to

find that the Legislature having enumerated different classes of Government servants as public officers, should, in the last clause, mean to refer to another and totally different class of officers. 'Public duties' are those in which the Government has an interest. It cannot be said that the Government is interested in this case, although the Secretary of State for India is a party. The Official Trustee takes this trust under a private deed. There are two deeds,—in one the Official Trustee is the trustee, in the other private persons, and in both there is an ultimate trust for the Secretary of State. It cannot be said that, in the second deed, the trustees are public officers. No one can compel the Official Trustee to accept a trust. The only duties imposed upon him are those referred to in s. 32 of the Official Trustee's Act, and then the leave of the High Court must first be obtained under the Act: he is not entitled to notice; it is only under s. 424 of the Code that the right can be claimed. There is a material distinction between the definition of 'public officer' in the Civil Procedure Code and the definition in the Penal Code. The same classes are referred to in both Codes, and the definition in the Civil Procedure Code is taken with slight verbal alterations from the Penal Code; but the Penal Code has a further clause which is meant to define municipal officers. The duties they have to perform are of a more public nature than those which the Official Trustee has to perform. But these persons are not 'public officers' within the meaning of the Civil Procedure Code, and it would be anomalous if the Official Trustee, whose duties are of a less public nature, should be held to be a public officer.

The office of Official Trustee was created in order to remedy the inconveniences occasioned by the death, absence, or refusal, or incapacity of trustees to act. He is an 'official' trustee; his duties are not public, but private. He cannot be compelled to accept a trust. Under the previous Official Trustee's Act, XVII of 1843, the Official Trustee could be compelled to take a trust.

The object of giving notice is to enable an officer who has committed a wrongful act to make amends without going into Court, and the suits of which notice must be given are those in respect of tortious or *quasi-tortious* acts: Addison on Torts,

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4th Edn., pp. 726—764; *Umphelby v. McLean* (1), *Davies v. The Mayor of Swansea* (2), *Davis v. Curling* (3), *Fletcher v. Greenwell* (4), *Attorney-General v. Hackney Local Board* (5), *Flower v. Local Board of Low Leyton* (6).

Mr. *Handley* for the defendant, the Official Trustee.—Chapter xxvii of the Code does not say that the suits of which notice must be given are only those in respect of tortious acts. The case of *Selmes v. Judge* (7) shows, that, in order to entitle a public officer to notice, it is not necessary that he should have committed a wrongful act. There the defendant had merely received money. [CUNNINGHAM, J.—The action was to recover money illegally demanded of the plaintiff by the defendant, and paid by him for a highway rate levied by the defendant. He had done an illegal act.] The Official Trustee ought not to be in a worse position than a Collector acting as the agent of the Court of Wards, who, when sued for acts done in that capacity, is entitled to notice: *The Collector of Bijnor v. Munuvar* (8).

Mr. *Lee* for the infant defendants.

Cur. ad. vult.

CUNNINGHAM, J.—As to the question raised by the Official Trustee, I am of opinion that he is not in the present suit entitled to the notice provided by s. 424 of the Civil Procedure Code. He would appear to me to fall within the last words of the definition of ‘public officer’ given in s. 2 of the Act, inasmuch as he is “remunerated by fees or commission for the performance of a public duty,” that duty being imposed upon him by the Official Trustee’s Act, 1864, as holder of an office to which he is appointed by the Chief Justice. The officer appointed under Act XVII of 1864 replaced “the Registrar or such other officer of the Court” as the Court selected as Official Trustee under Act XVII of 1843. The Official Trustee’s scale of remuneration in the case of transferred trusts is fixed by law (s. 11); he is precluded from being a co-trustee, or from investing funds otherwise than in Government securities, or as the

(1) 1 B. & Ald., 42.

(2) 22 L. J., Ex., 297.

(3) 8 Q. B., 286.

(4) 4 Dow., 166.

(5) L. R., 20 Eq., 626.

(6) L. R., 5 Ch. Div., 347.

(7) L. R., 6 Q. B., 724.

(8) I. L. R., 3 All., 20.

Court directs, or from holding a religious trust ; the office is a corporation *sole*, the interests of one trustee vesting forthwith in his successor ; his books are to be inspected by the Chief Justice, who can make rules for the safe custody of trust-funds or the forms of the Official Trustee's accounts and statements and the custody of securities. He submits his accounts annually to the Chief Justice, who has them audited. Lastly, the executor or administrator of an infant or lunatic, to whom a gift or legacy is made, or the trustee of any such gift or legacy, may, with leave of the Court, transfer it to the Official Trustee, who must, thereupon, take charge of it. All these circumstances appear to me to indicate that the Official Trustee is, in the mode of his appointment, the character of his duties, the limitations by which he is restricted, and the control to which he is subject, a public officer ; and accordingly he would, in my opinion, be entitled to the notice provided in s. 424, if it could be shown that suits such as the present are within the purview of chap. xxvii of the Code. But I do not think that they are. The words "in respect of an act purporting to be done by him in his official capacity" must be read in the light of the numerous English decisions which have been passed in cases where public officers, companies, &c., are entitled by Statute to notice ; and it appears from these that the cases in which notice is necessary are invariably cases in which a public officer is sued for damages for some wrong inadvertently committed by him in the discharge of his official duties ; and the object, as described in *Attorney-General v. Hackney Local Board* (1), is, that if a public body or officer entrusted with powers happens to commit an inadvertence, irregularity, or wrong, before any one has a right to require payment in respect of that wrong, he shall have the opportunity of setting himself right, making amends, restoring what he has taken, or paying for the damages he has done, or, as was said by Lord Ellenborough in *Theobald v. Crichmore* (2), to protect persons acting illegally, but in supposed pursuance of the law, when the illegality has arisen from ignorance or inadvertence.

The rule that the notice is confined to suits of this descrip-

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tion was taken for granted in *Davies v. The Mayor of Swansea* (1), where Willes, J., then counsel for the defendant, conceded that, in an action brought for breach of a specific contract, no notice was necessary.

In the case referred to by Mr. Handley—*Selmes v. Judge* (2)—the action was brought in respect of an admittedly illegal act done by the defendants, and the question raised was, whether in doing it they *bonâ fide* intended to act in pursuance of these powers.

Reading chap. xxvii in the light of the rulings of the English Courts, I conclude that the intention was to give to Government, as represented by the Secretary of State, and to the servants of Government in the discharge of their public duties, the same protection as English Statutes confer on many public officers and bodies, *viz.*, that when it is alleged that they have committed an illegality in the discharge of their duties, they shall have time and an opportunity of making amends before the matter is brought into Court. This view is, I think, borne out by the entire chapter, and is strengthened by the provision in s. 426 with reference to Government electing whether it will undertake the defence or not.

The actions here referred to seem to me to differ essentially from those in which the Official Trustee is joined, often formally, often as a friendly party, for the purpose of deciding what his duty as Official Trustee is in some particular, or of arming him with the necessary authority to do some act which he cannot do on his own responsibility. In one sense in this case, the action may be said to be brought for the wrongful refusal to do some act which the plaintiff is entitled to have done; but in another sense, *viz.*, for the disposal of the real issue raised between the parties to this suit, their respective legitimacy, he need not really be a party at all, and in any case it is impossible to regard such a suit as in any sense brought for damages, and I do not, therefore, consider that it falls within the provisions of s. 424.

Attorneys for the plaintiff: Messrs. *Watkins and Watkins*.

Attorney for the Official Trustee: Mr. *Gregory*.

Attorney for the infant defendants: Baboo *N. G. Neogy*.

(1) 22 L. J., Ex., 297.

(2) L. R., 6 Q. B., 726.