

BOVILL,
C.J.
&
SMITH, J
1890.
July 19.

[BOVILL, C.J. AND SMITH, J.]

THE CHIEF COLLECTOR OF
CUSTOMS

Plaintiff,

v.

ALI HUSSEIN

Defendant.

PRACTICE—PENALTY—CIVIL ACTION—CRIMINAL PROCEEDING—
JURISDICTION OF DISTRICT COURT—CUSTOMS AND EXCISE
REGULATIONS ORDINANCE, 1879, SECTION 46.

Section 46 of the Customs and Excise Regulations Ordinance, 1879, provides that all duties, penalties and forfeitures imposed by this Ordinance or any law relating to Customs or Excise, and the liability to forfeiture of any goods seized under the authority thereof, may be sued for, prosecuted or recovered by action or information in the name of the Chief Collector of Customs, etc.

HELD (affirming the decision of the Court below): That the proceedings to be taken to recover penalties and forfeitures under this section must be criminal proceedings.

APPEAL from the District Court of Famagusta.

The action was brought to recover penalties under Section 12 of the Customs and Excise Ordinance of 1879 for not rendering an account of goods exported and for a declaration that the goods were forfeited under Section 22 of the Customs and Excise Regulations Ordinance, 1879.

The judgment of the District Court was to the following effect:

The plaintiff's claim, as appearing in the writ of summons, is as follows:—

Penalties and forfeiture of goods for infringement of Customs Ordinances, I. of 1879, Clause 12, and XXIV. of 1879, Clause 22. This is, to say the least, a most bald statement of claim, but no objection has been taken, and it is, therefore, to be presumed that the defendant has in no way been prejudiced by it.

The defendant, on the case being called, raised two preliminary objections: (i.) that this Court has no jurisdiction, the recovery of penalties under the Customs Ordinance being a criminal not a civil proceeding, and (ii.) that the writ was bad because the return was less than 15 days from the date of the writ.

By Section 46 of Customs and Excise Regulations Ordinance, 1879, "all duties penalties and forfeitures may be sued for, prosecuted and recovered by action or information before any Court of competent jurisdiction." "Court of competent jurisdiction" is defined by Section 3 of Ordinance III. of 1879, amended by Ordinance X. of 1880, to

mean, in the case of an Ottoman subject charged with any offence under such Ordinance, the competent Nizam Court." By the Cyprus Courts of Justice Order, Section 21, all jurisdiction, civil and criminal, of Nizam Courts was transferred to the Courts created by that Order. There is no doubt that the District Court is the Court of competent jurisdiction: but by the Order in Council the District Court has two jurisdictions, the one civil and the other criminal; the civil proceedings being commenced by writ, and the criminal by information. The point now to be decided is: are the proceedings under Section 46 of Customs Ordinance criminal proceedings, or can the penalties be recovered by civil proceedings; in other words, has the District Court jurisdiction under Section 29 of the Order in Council to try this matter, or under Section 49?

BOVILL,
C.J.
&
SMITH, J.
CHIEF
COLLECTOR
OF CUSTOMS,
H.
ALI
HUSSEIN.

By the Order in Council it would certainly appear that the recovery of a fine or penalty is by criminal proceedings. It is so expressly stated in Section 49, and Section 92 allows the Supreme Court to make an order for the trial of a person civilly, when the principal object of a charge is to recover a money penalty only—the District Civil Court would not have jurisdiction without such order.

I think also there can be no doubt that the proceedings for the recovery of a penalty under the Turkish Law are criminal and not civil. The recovery of penalties is dealt with by Article 37 of the Penal Code, which states that a person unable to pay a fine shall be imprisoned for a period of 24 hours to 3 months. The penalty asked for here, being under Ordinance I. of 1879, would, before the passing of Ordinance III. of 1879, have presumably been recoverable under Section 37 of the Criminal Code.

The local Ordinances for the enforcement of fines and penalties (Ordinance IV. of 1879, repealed by Ordinance III. of 1883), do not alter the criminal nature of the proceedings. In Ordinance III. of 1883 the words "prosecutor" and "accused" are used.

In the case of *Reg. v. Paget*, L.R. 8 Q.B.D. 151, a proceeding under the Railway Clauses Consolidation Act, which imposes a penalty upon persons travelling without having previously paid the fare, the Court stated: "The question is, whether the case now under consideration is one for which the defendant is liable by law, upon summary conviction for the same, to be imprisoned, fined or otherwise punished, or whether it is one in which the justices have authority by law to make an order for the payment of money . . . it seems to me that the forfeiture claimed here is not a sum of money claimed to be due and recoverable on complaint to a Court of summary jurisdiction. It is true that the forfeiture presumably is a forfeiture to the

BOVILL,
C.J.
&
SMITH, J.
CHIEF
COLLECTOR
OF CUSTOMS
v.
ALI
HUSSEIN.

Great Western Railway Co., but that does not bring the case within the class of civil remedy—it still remains criminal. *Hearne v. Garton*. A fine or penalty is matter of criminal not civil procedure. *Mellor v. Denham*. At the time of hearing no sum of money was due to anybody until the Magistrate convicted and adjudged the amount, which might range from one farthing to 40s. The Great Western Railway did not claim any sum due to them. Their claim was that the Magistrate should convict, and, if convicting, should adjudge such amount as in his good judgment he should assess it.” Where a penalty is recovered by civil action it is recovered as a statute debt. *Roscoe, Nisa Prius*, 1884, p. 666. In the present case there is no debt, no sum of money due to any one, until the Court has fixed the amount, which, under Section 12 of Ordinance 1 of 1879, might range from one farthing to £20.

I have no doubt, therefore, that these proceedings are criminal proceedings and that the Court of competent jurisdiction is a Court having criminal jurisdiction, that is to say, the Court given jurisdiction under Section 49 of the Order in Council.

It remains therefore to be considered if the use of the words “action or information” can be said to give this Court jurisdiction. I think not. The word “action” may apply to civil or criminal proceedings—there may be a civil action or a criminal action. In Comyn’s Digest “Action D.” and Bacon’s Abridgment, “Actions in General,” the word is defined as extending to and including criminal proceedings. It is true “action” is defined in the Cyprus Courts of Justice Order, 1882, as “including all proceedings of a civil nature,” but this cannot in any way affect the meaning of the word in Customs Ordinance, 1879.

Fines and penalties, being criminal matters, the words “action” and “information,” which apply both to civil and criminal proceedings, cannot make this Court a “Court of competent jurisdiction.”

It is more than probable that the legislature intended “sued for by action” to apply to “duties,” which are in the nature of a debt.

It appears to me that what is asked for is the punishment of the defendant for a breach of the Customs Law, and the only Court to try such a matter is a Court having criminal jurisdiction. There can be no question of a debt, the amount being unliquidated, and it is only as an action of debt that the proceedings could be civil.

In England it is true that the Crown has the right to sue in any Court (*Magdalen College Case, II., Co. Rep. 75 a.*) but that rule of law cannot apply here.

It may possibly be said, it is immaterial whether this Court is called a civil or a criminal one, it being the same; but I think it is material—in civil matters the defendant may be compelled to give evidence, not in criminal matters, etc.

The other objection also appears to be well founded under Rule 9 of Order II. Rules of Court, 1886, and this Court has no power of amendment. The only amendments the Court can make are set out in Rule 12. However, if it were not for the other objection, I presume the Court could order a new writ to be served, altering the return day on such terms as the Court might think fit. It is not necessary to decide this question, as on the first objection the Court hold they have no jurisdiction and this action must be struck off with costs to defendant.

The plaintiff appealed.

Collyer, Q.A., for the appellant: The proceedings have been taken under Section 46 of the Customs and Excise Regulations Ordinance, 1879, which provides "that all duties, penalties and forfeitures recovered under or imposed by this Ordinance or any law relating to Customs and Excise, and the liability to forfeiture of any goods seized under the authority thereof, may be sued for, prosecuted or recovered by action or information in the name of the Chief Collector of Customs and Excise, etc. By virtue of this section an option is given to the Chief Collector of Customs to pursue the remedies given to him either civilly or criminally. The point taken by the Court below, that as the penalty awarded may be anything from one farthing to £20, there is no debt that may be civilly sued for, is no doubt a strong one, but that does not touch the question of the forfeiture of the goods. This forfeiture may be sued for. He cited *Reg. v. Paget*, 8 *Q.B.D.* 151, and *Mellor v. Denham*, 5 *Q.B.D.* 467.

Diran Augustin for the respondent.

Judgment: This is a claim for penalties and forfeiture of goods under the Customs and Excise Acts, 1879. The plaintiff's claim was dismissed by the District Court on the ground that he ought to have taken criminal and not civil proceedings. The question turns upon the meaning of Section 46 of the Customs and Excise Regulations Ordinance, 1879. It is contended that under the Section the plaintiff has an option to take either civil or criminal proceedings as he chooses. In our opinion the intention

BOVILL,
C.J.
&
SMITH, J.
CHIEF
COLLECTOR
OF CUSTOMS
v.
ALI
HUSSEIN.

1890.
Oct. 3.

BOVILL, of this clause is not to confer any option, but to point out
 C.J. the person at whose instance proceedings are to be taken,
 & SMITH. J. but he must take the appropriate proceedings.

CHIEF
 COLLECTOR
 OF CUSTOMS
 v.
 ALI
 HUSSEIN.

The clause in question is taken from the English Act (The Customs Laws Consolidation Act, 1876), and the similar clause in the English Act is followed by other clauses regulating the proceedings to be taken which are wanting in the Ordinance. We do not think that the plaintiff would be justified in taking criminal proceedings for enforcing say the payment of excise duties. There is authority for holding that the infliction of penalties and forfeitures are criminal matters (*Reg. v. Paget, ubi. sup.*), and we therefore think that the decision of the District Court was right. If the Ordinance intended to give the Chief Collector of Customs an option as to the form of the proceedings he might take, we think clearer words would have been used.

Appeal dismissed with costs.

BOVILL,
 C.J.
 &
 SMITH, J.
 1890.
 Dec. 11.

[BOVILL, C.J. AND SMITH, J.]

HADJI HAFIZ MUSTAPHA MEHMET *Plaintiff,*

v.

NICOLA YANNI TZINGO *Defendant.*

SALE OF SPECIFIC GOODS—IMPLIED WARRANTY, FREEDOM FROM DEFECTS—MEJELLE, ARTICLES 336, 337, 338, 342 AND 343.

On a sale of goods there is an implied warranty that the goods sold are free from all defects unless the vendor declare that he will not so warrant them, or unless the seller states that he will accept them with all defects.

The plaintiff purchased from the defendant two mares, nothing being said by either party at the time of the sale as to their state or condition. On the day of the sale, and after taking delivery of the mares, the plaintiff discovered that one of them was broken-winded.

HELD (reversing the decision of the Court below): That the plaintiff was entitled to rescind the sale.

APPEAL from the District Court of Nicosia.

The action was brought to recover the sum of £4, paid by the plaintiff to defendant as part payment of the price of two mares, and which plaintiff sought to recover back, on the ground that he had a right to rescind the contract of sale as one of the mares was broken-winded.