
Enever v R [1906] HCA 3; (1906) 3 CLR 969 (12 March 1906)

HIGH COURT OF AUSTRALIA

Enever Plaintiff, Appellant; and The King Defendant, Respondent.

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On appeal from the Supreme Court of Tasmania.

12 March 1906

Griffith C.J., Barton and O'Connor JJ.

Nicholls (with him Keating and Crisp), for appellant.

Dobbie S.G., for the respondent.

Nicholls in reply.

The following judgments were read:—

March 12

Griffith C.J.

This was an action brought by the appellant against the Crown, as represented by the Executive Government of Tasmania, for damages sustained by him in consequence of his wrongful arrest by a constable of police. The *Tasmanian Crown Redress Act 1891*, (55 Vict. No. 24) provides (sec. 4) that "any person having or deeming himself to have any just claim against Her Majesty in respect of any contract entered into on behalf of Her Majesty by or under the authority of the Government of Tasmania, or in respect of any act or omission, neglect or default of any officer, agent or servant of the Government of Tasmania which would be the ground of an action at law or suit in equity between subject and subject, may file in any Court of competent jurisdiction of Tasmania a supplication setting forth the particulars of such claim, and the Court in which such supplication is filed is hereby empowered to hear and determine such claim in manner hereinafter provided." *Dodds* C.J. and *McIntyre* J. were of opinion that the action did not come within the terms of this section; *Clark* J. was of the contrary opinion.

By the *Police Act 1865*, (29 Vict. No. 10), sec. 197, it is provided that a constable may take into custody without warrant and forthwith take before a justice "any person who within his view commits any of the following offences ... every person who disturbs the public peace." It is not disputed by the

respondent that the arrest complained of was wrongful, the appellant having been the victim and not the aggressor in the disturbance of the peace which took place within the constable's view. The constable was, therefore, personally liable for his wrongful act; but the question is whether under the terms of the *Crown Redress Act* the Government are responsible for it. It is not contended by the appellant that the Statute imposes any liability upon the Government except in cases where the relationship between the officer and the Government is such that, if a like relationship existed between subject and subject, the maxim *respondeat superior* would apply. It is necessary, therefore, to consider the nature of the office of a constable, and what, according to the law of Tasmania, is the nature of the relationship between a constable and the Executive Government by whom he is appointed.

At common law the office of constable or peace officer was regarded as a public office, and the holder of it as being, in some sense, a servant of the Crown. The appointment to the office was made in various ways, and often by election. In later times the mode of appointment came to be regulated for the most part by Statute, and the power of appointment was vested in specified authorities, such as municipal authorities or justices. But it never seems to have been thought that a change in the mode of appointment made any difference in the nature or duties of the office, except so far as might be enacted by the particular Statute. Again, at common law constables had large powers necessarily incident to the discharge of their functions as peace officers or conservators of the peace, amongst which perhaps the most important was the authority to arrest on suspicion of felony. To these powers others of a like nature have from time to time been added by statutory provisions, of which the 179th section of the *Police Act* is an instance. But there is no reason for thinking that the mere statutory addition to the list of their powers altered the essential nature of those powers. It seems also to have been always accepted as settled law that, although a peace officer was himself responsible for unjustifiable acts done by him in the intended exercise of his lawful authority, no responsibility for such acts attached to those by whom he was appointed. In *Stanbury v. Exeter Corporation*[1], Lord *Alverston* C.J., referring to the subject, said:—"This case ... is, I think, very analogous to that of police and other officers, appointed by a corporation, who have statutory duties to perform, where, although they owe a duty to the corporation appointing them, there is no ground for contending that the corporation are responsible for their negligent acts." In the same case *Wills* J. said[2]: "This case is, to my mind, almost exactly analogous to the case of a police officer. In all boroughs the watch committee by Statute has to appoint, control, and remove the police officers, and nobody has ever heard of a corporation being made liable for the negligence of a police officer in the performance of his duties." The learned Judge went on to say:—"I think that the reason why that is so, although it is not stated in any English authorities, is expressed in the passage quoted from Beven on Negligence, 2nd ed., vol. 1, pp. 388-9. If the duties to be performed by the officers appointed are of a public nature and have no particular local characteristics, then they are really a branch of the public administration for purposes of general utility and security which affect the whole Kingdom; and if that be the nature of the duties to be performed, it does not seem unreasonable that the corporation who appoint the officer should not be responsible for acts of negligence or misfeasance on his part." Whether this be the reason for the rule or not, I think that the passage which I have quoted contains an accurate statement of the law, and that the rule was firmly established that the authorities by whom a constable was appointed were not at common law liable for his acts, whether of omission or commission.

A consideration of the general doctrine of the law of agency as applied to the case of a constable leads to the same conclusion. In considering whether a master is liable for the acts of his servant the test is, as stated by *Crompton* J., in *Sadler v. Henlock*[3], quoted with approval by *Bowen* L.J., in *Donovan v. Laing, Wharton, and Down Construction Syndicate*[4], whether the party sought to be made responsible retained the power of controlling the act. Now, the powers of a constable, *quâ* peace officer, whether conferred by common or statute law, are exercised by him by virtue of his office, and cannot be exercised on the responsibility of any person but himself. If he arrests on suspicion of felony, the suspicion must be his suspicion, and must be reasonable to him. If he arrests in a case in

which the arrest may be made on view, the view must be his view, not that of someone else. Moreover, his powers being conferred by law, they are definite and limited, and there can be no suggestion of holding him out as a person possessed of greater authority than the law confers upon him. I am disposed to think that this is a sounder basis for the rule of the immunity of those who appoint constables for their acts than that suggested by *Wills* J. A constable, therefore, when acting as a peace officer, is not exercising a delegated authority, but an original authority, and the general law of agency has no application.

The authority of the master of a ship at sea to maintain order is analogous. He derives his authority from his office, to which he is appointed by the owners of the ship. But the authority which he exercises in this respect is, I conceive, an original and personal, and not a delegated, authority. And I do not know of any instance in which it has been sought to hold the owners responsible for an excess by the master, though there are several reported cases of actions against masters.

It has always been assumed that the common law, so far as it regulated the powers and duties of peace officers for the preservation of the peace and the apprehension of offenders, was introduced into Australia on settlement. On the first settlement, however, the appointment of peace officers, as of all other officers, was of necessity vested in the representative of the Crown. At that time the maxim *respondeat superior* did not apply to the Crown, so that it was not important to consider whether the circumstance that the appointment was made by an authority representing the whole community would make any difference as to the responsibility of the appointor for the acts of the appointee. In may be suggested that, if the reason given by *Wills* J. for the rule of non-liability is the true one, it would no longer apply when once the maxim just referred to was by the *Crown Redress Act* made applicable to the Crown. I have already sufficiently dealt with this suggestion, and will now proceed with the history of the law of Tasmania as to the appointment of constables. Up to 1865 the appointment continued to be made by the Executive Government, but by the Act 29 Vict. No. 9, the appointment and control of constables was vested in municipal authorities where they existed, being however retained, where no such authorities were in existence, by the Government. The law continued in this state until 1898, when the *Police Regulation Act* (62 Vict. No. 48) was passed, by which the appointment and control of constables was vested in an officer called the Commissioner of Police, who was himself appointed by the Executive Government. During the period from 1865 to 1898 there can, I think, be no doubt that the municipal authorities were not liable for the acts of constables appointed by them. But, if the argument for the appellant is sound, the liability of the Government for the acts of the non-municipal police attached as soon as the *Crown Redress Act* became law in 1891. This argument, if accepted, leads to the singular result that the applicability of the maxim *respondeat superior* to the case of constables then depended, not upon the nature of the office or of the relationship between the appointor and the appointee, but upon the personality of the employer, with the still more singular consequence that the maxim applied as against the Crown only, and not as against other authorities exercising a precisely similar power under the same Statute. This would in effect be to construe the Act of 1891 not merely as abrogating a rule conferring a special immunity upon the Crown, but as creating a new kind of liability which had never existed as against any subject exercising similar powers. This is not likely to have been the intention of the legislature. In my opinion, both the Act of 1865 and the Act of 1898 were intended merely to deal with the appointment and disciplinary control of constables, leaving the nature of their powers and duties and the responsibility for their actions to be governed by the common law as modified by the Statutes (if any) dealing with that subject. It was not, indeed, contended for the appellant that he could rest his case upon the later Act.

I am, therefore, of opinion that the case does not fall within the governing words of sec. 4 of the *Crown Redress Act 1891*: "any person having ... any just claim or demand ... in respect of any act ... or default of any officer, agent, or servant of the Government of Tasmania which would be the ground of an action at law ... between subject and subject," since the acts of commission or omission of a constable never were the ground of an action at law as between subject and subject against any person

but the constable himself, or some other person who had personally directed the act complained of. For these reasons I am of opinion that the appellant's case fails.

In addition to the arguments which I have so far dealt with, counsel for the respondent relied upon the authority of the case of *Tobin v. Regina*[5]. That was an action against the Crown for loss sustained by reason of the wrongful seizure of a vessel by the commander of a ship of war employed in the suppression of the slave trade, and it was held (1) That the commander in seizing the vessel was not acting in obedience to a command of Her Majesty, but in the supposed performance of a duty imposed upon him by Act of Parliament; (2) That if he was an agent employed by the Crown, he was not acting within the scope of his authority in seizing a ship not engaged in the slave trade, and for that reason did not make his principal liable for a seizure made without authority from that principal; and (3) That a Petition of Right would not lie to recover unliquidated damages for a tort. The third ground is no longer the law of Tasmania. *Clark* J. thought that, this ground being of itself sufficient to justify the decision, the reasons given by *Erle* C.J. in delivering the judgment of the Court might be regarded as *obiter dicta*. I cannot so regard them. The case was decided more than forty years ago by Judges of great eminence, and even if I had a difficulty in following their reasoning, I should have much hesitation in dissenting from their conclusions. For the purpose of construing the Statutes which have been passed in the Australian colonies for extending the right of redress for wrongful acts committed by officers of Government, I think it is proper to refer to the pronouncements that had been previously made by the English Courts as to questions of agency as between the Crown and its officers, and that it should be held that *primâ facie* it was not intended to create a responsibility in respect of the acts of officers under circumstances which, according to the decisions, did not constitute them agents for the Crown. In my opinion, the Court ought to follow *Tobin's Case*[6], which is not in principle distinguishable from the present.

The railway cases relied on by the appellant are in my opinion inapplicable. In all of them the question was one of evidence whether the fact of actual delegation of authority by the defendants to the persons by whom the wrongful act complained of had been committed was proved. In the present case it was not attempted to be proved that any delegation had been made in point of fact, other than that alleged to arise from the nature of the constable's office. If a constable commits a wrongful act by direction of a superior officer, that officer is no doubt personally responsible. Whether the Government would also be responsible under the *Crown Redress Act* would depend upon other circumstances which do not exist in the present case.

For all these reasons I am of opinion that the judgment of the majority of the Supreme Court was right, and that the appeal should be dismissed.

Barton J.

The *Police Act 1865* (29 Vict. No. 10), sec. 179, authorizes a constable to arrest without warrant and take before a Justice "any person who within his view ... disturbs the public peace." ...

During or immediately after a street disturbance, the appellant was arrested by a constable in the streets of Hobart under this enactment. The charge was dismissed. The appellant brought an action against His Majesty to recover compensation for an alleged assault and false imprisonment of the suppliant by a member of the police force of the State of Tasmania who purported to act in the matter in the discharge of his duty as a constable. The case was tried at Hobart before *Clark* J. on 28th September 1904, and the suppliant had a verdict for £25, including £10 paid into Court, with costs, subject to the decision of the learned Judge on the following question of law:—"Whether the constable in effecting the arrest mentioned in the supplication was or was not acting as an officer, agent or servant of the Government of Tasmania, within the meaning of the Crown Redress Act 1891." The learned Judge referred that question of law to the Full Court by special case, and that is the question to

be determined in this appeal. The Full Court by a majority consisting of the Chief Justice and *McIntyre* J. (*Clark* J. dissenting), held that the constable was not acting as the servant of the Government of Tasmania within the meaning of the *Crown Redress Act*. Sec. 4 of that Act is as follows:—"Any person having or deeming himself to have any just claim against Her Majesty in respect of any contract entered into on behalf of Her Majesty by or under the authority of the Government of Tasmania, or in respect of any act or omission, neglect or default of any officer, agent or servant of the Government of Tasmania, which would be the ground of an action at law or a suit in Equity between subject and subject, may file in any Court of competent jurisdiction of Tasmania a supplication setting forth the particulars of such claim, and the Court in which such supplication is filed is hereby empowered to hear and determine such claim in manner hereinafter provided."

That is the section under which the action is brought, and the application of that section to the present case is the matter to be determined. The point whether the constable was acting as an officer, agent or servant of the Government is not the only question; though the constable might be an officer, agent or servant of the Government, he would still have to be such within the meaning of the *Crown Redress Act 1891* before the liability could attach.

First, then, was the constable acting on the occasion in question as an officer, agent or servant of the Government of Tasmania? That question may be treated baldly in the first instance. That he was in a sense an officer of the Government of Tasmania is not open to dispute. He was an officer appointed under a Statute, one of a series of Statutes providing for and regulating the police force and dealing with their duties as such, while of course they had other duties to perform by reference to various Statutes.

In arresting a person, even mistakenly, on a charge of committing within his view a breach of the peace, the constable was acting in the supposed exercise of an authority given to him by the Act of which I have read a section, viz., the *Police Act 1865*. It is contended on behalf of the appellant that he was in that respect and on that occasion acting as a servant of the Government in such a sense that the maxim *respondeat superior* applies. I have come to the conclusion that that position cannot be sustained. For the maxim to apply, it appears to be plain that the person for whose act it is sought to attach responsibility to the superior, must have been under the control of that superior at the time of the doing of the act. Is a person who is obeying or endeavoring to obey the authority of an Act of Parliament so under the control of the State as to render the State responsible? It appears to me that in order to establish that position it must be shown that the control, if any, under which the person acted was that of the Executive Government of the State. The difficulty of sustaining that position was obvious. Counsel endeavoured to remove it by the argument that the State, that is to say, the Government as a whole, is one and indivisible in relation to what we understand to be its three branches, the Executive, the Legislature and the Judiciary. In other words, counsel for the appellant contended that if what was done, was done under the authority of an Act of Parliament, then it was done under the authority of the State in its legislative capacity, and that the State was equally responsible whether the person whose act was complained of was obeying the State in that or in any other of its three capacities. This contention raised the argument that the State, which is of course recognized as between Government and Government as an indivisible authority in matters of international responsibility, is in the same position as to remedies sought in an action by a subject against it. Of course that argument if adopted gets rid of the difficulty. It is a bold and novel proposition, but before it can be established those who put it forward must remove the first obstacle that confronts them, which is that the proposition has not a shred of authority for its support, and has not been put forward before, so far as we know, in any Court of Justice where the question was the responsibility of the State to the subject. Its establishment would be followed by consequences which may be thought of as merely novel and curious, until it is realized that they would involve the whole fabric of the State in confusion and disaster. I do not feel justified in seriously entertaining such an argument.

The difficulty then still remains in the way of the appellant that he has not any cause of action unless it be in respect of an "act of omission, neglect, or default," the responsibility for which rests with the Executive Government. As I have pointed out, the person must be not only the servant of the superior, but must be under the control of the superior before the latter can be held liable. I am of opinion that that is not the case where a constable is obeying a Statute, because when an act is done under a Statute, an order not to do it is one which has no weight or validity, while the order of the Executive Government to do the duty imposed by the Statute gives no added force to the command of the Statute.

In *Sadler v. Henlock*[7]—to look at the matter as between subject and subject—the question was whether, between the defendant and a person employed by him, who, by his method of doing certain work for the defendant, committed a tortious act, there existed the relation of master and servant, or that of contractor and contractee, and it was held that the former was the real relation, and that the defendant was liable. Had the person employed for the purpose been a contractee "exercising an independent employment" the action would not have lain, because the test was whether the defendant retained the power of controlling the work. On the same principle, that is, because they had parted with the power of controlling the operation in the course of which the injury took place, the defendants in *Donovan v. Laing, Wharton and Down Construction Syndicate*[8], were held not to be liable to the plaintiff in respect of injuries sustained through the negligence of a man who was in the employment of the defendants, but who was, at the time of the injury, under the control of a firm of wharfingers, to whom the defendants had lent his services, during the loading of a ship at their wharf. That the test question is,—Had the defendant the power of controlling the work?—is illustrated with equal clearness in *Rourke v. White Moss Colliery Co.*[9]. In *Murray v. Currie*[10], the defendant employed a stevedore to unload his vessel. The stevedore employed his own labourers, amongst whom was the plaintiff, and also one of the defendant's crew, named Davis, whom he paid, and over whom he had entire control, to assist them in unloading. The plaintiff, while engaged in the work was injured through the negligence of Davis. It was held that the defendant was not responsible. *Bovill* C.J. was of opinion that the rule must be absolute to enter a non-suit. *Willes* J., who was of the same opinion said[11]:—"The stevedores, however, are not the servants of the owner of the ship; but they are persons having a special employment, with entire control over the men employed in the work of loading and unloading. They are altogether independent of the master or owner. In one sense, indeed, they may be said to be agents of the owner; but they are not in any sense his servants. They are not put there in his place to do an act which he intended to do for himself."

I mention these cases as illustrations of the clear principle that, before a person can be held responsible for acts of another who is his servant, the latter must at the time of the act be not only the former's servant but must also be under his immediate control, and that is so whether the matter rests between the Crown and a subject or between subject and subject.

Therefore, on the question whether the appellant was, though in a sense an officer of the Government, an officer so under the control of the Government at the time that the maxim *respondeat superior* would apply, I am of opinion that the appellant utterly fails, not only for the reasons I have given, but also for the reasons the learned Chief Justice has given on that branch of the case. In saying this I speak not only as to the matters which I have been putting forward, but also as to the position of a constable of Tasmania as constituted by the Statutes of that State.

In relation to that question of the position of a constable, which after all comes back, when fully considered, to the same question of control, while there is no direct decision there are one or two cases which throw light on the position. The first is the case of *Baker v. Wick*[12], which was a further consideration before Lord *Alverstone* C.J., after trial on these facts. A Justice's warrant of distress addressed in the statutory form to the overseers and constables was handed by one of the overseers to the assistant overseer, who was empowered by the statutory terms of his appointment to perform all the duties of an overseer. It was held that the overseers were not responsible for the illegal acts of the

assistant overseer. In delivering judgment His Lordship said[13]: "It is sought to hold the two overseers responsible for these illegal acts on the part of Washer and the bailiff Webster. The warrant was addressed to the overseers, and it has been contended on behalf of the plaintiffs that the fact of its being so addressed imposed upon the overseers a duty which they could not get rid of by delegating the execution of it to third persons, and that they were in a position similar to that of a sheriff acting under a fi. fa., who is responsible for any illegality committed by his officers in executing the writ ... But there is this important distinction between the two cases, that the assistant overseer, unlike the sheriff's officer, has an independent statutory authority, and is recognized by the legislature as a person who may perform all the duties of an overseer."

The position described is for present purposes very like that of a constable in Tasmania. As to that case, *McIntyre* J. in his judgment on the appeal to the Full Court in the present case very succinctly put it as follows:—"But in Baker v. Wicks1(1904) 1 K.B., 743. this important distinction is drawn between the cases of a sheriff's officer and an assistant overseer of the poor of a parish, viz., that the assistant overseer, unlike the sheriff's officer, has an independent statutory jurisdiction, and acts done by him are so done by virtue of his own authority derived from the appointment of the vestry." *Mutatis mutandis* that is precisely the position of a constable in this case. The next case is *Stanbury v. The Exeter Corporation*[15]. A passage in the judgment of Lord *Alverstone* C.J. renders it unnecessary to state the facts separately:—"The action was brought against the corporation of Exeter in respect of an act, which for the present purpose must be assumed to have been negligent, of an inspector who detained some sheep upon suspicion of their being infected with sheep-scab. If this had been an ordinary case of delegation by the corporation of duties which they had to perform, or of powers which they were entitled to exercise, then the ordinary rule of master and servant and the doctrine of respondeat superior might apply. This case, however, having regard to the position of the parties and to the Statute and the order made thereunder, is, I think, very analogous to that of police and other officers, appointed by a corporation, who have statutory duties to perform, where, although they owe a duty to the corporation appointing them, there is no ground for contending that the corporation are responsible for their negligent acts." *Wills* J. concurred, and his words have been cited. *Darling* J. said[16]:—"To my mind the question whether the local authority are liable for the inspector's negligence depends upon whether the act done purported to be done by virtue of corporate authority, or by virtue of something imposed as a public obligation to be done, not by the local authority, but by an officer whom they were ordered to appoint." That is just the relation of the constable to the executive authority in this case. He was doing a duty by virtue of something imposed as a public obligation to be done, not by the Government, but by an officer whom the Government had by statutory authority appointed. The judgment continues:—"The particular things which the inspector did here were things which the corporation could not do themselves, and they were not in fact doing them" (any more than was the King doing them in this case)—"They had to carry out the Act, and had to do that by appointing an officer. When that officer was appointed he was guided by instructions given to him, not by the local authority, but by the Board of Agriculture." That is to say he need not have obeyed the order of the local authority. The learned Judge concludes:—"It appears to me, therefore, that these were not acts done by a servant of the corporation or under their authority, but were acts of a public nature done by a public officer appointed by the corporation as directed by the Statute."

That again seems to me to put in a short, sensible, and accurate form the position not only of an inspector in that case but also of a constable in this case.

In order to bring the King within the maxim *respondeat superior*, a number of railway cases were cited, but they have in my opinion no application to this controversy. They turn on a question of authority given to the company for the protection of their own interests, and whether it has been delegated by them. This is shown by *Pollock* C.B. in *Roe v. Birkenhead Co.*[17]. He says:—"It therefore follows that the plaintiff was bound to show that the person by whom he was arrested was not only the servant of the company, but that he then had authority to arrest him" (*i.e.* from the

Company). It is plain that unless the argument as to the indivisible character of the State is to prevail, it cannot for a moment be maintained that in this case the constable had that authority.

It was argued that if cases of this nature afforded no ground of action against the Crown, or "the State," as counsel preferred to call it, there would be little or nothing left to which the Act could apply. The answer to this argument is to be found in the judgment of the Privy Council in *Farnell v. Bowman*[18], where their Lordships say:—"It must be borne in mind that the local governments in the colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works for the construction of which it is necessary to employ many inferior officers and workmen. If, therefore, the maxim that the King can do no wrong were applied to colonial governments in the way now contended for by the appellants, it would work much greater hardships than it does in England." The hardship involved in that maxim has resulted in the passing of Statutes in several of the States of the Commonwealth dispensing with its operation in relation to matters beyond the ordinary scope of Government, as it was up to recent times understood. But it still remains open to grave doubt how far, if at all, it was intended by those Acts to give the subject rights of action which in the result would interfere seriously with the ordinary administrative work of the Government as apart from undertakings of the character referred to by the Judicial Committee in the case last cited. Several cases of that kind in New South Wales were cited in argument, but I do not think it is necessary to refer to them now. I should however like to refer to some remarks of *A. H. Simpson* J. in *Davidson v. Walker*[19]. There the plaintiff was under the impression that there was no reason of public policy which prevented him from bringing against the Crown any action for what, as between subject and subject, would be a tort. He brought an action against the Crown for a nuisance in respect of the location and conduct of a prison.

In giving judgment, *Simpson* J. said[20]:—"I do not think the Claims Against the Government Act (39 Vict. No. 38), repealed and re-enacted by 1897 No. 30, affects the question. That Act, no doubt, extended the rights of private persons against the Government by making the Government liable to be sued for a tort: Farnell v. Bowman312 App. Cas., 643., but I do not think it was intended to put the Government in the same position as private persons. If it were, this would amount to submitting to the control of a jury the exercise of various important functions of Government, such as the administration of military matters, of justice, the control and management of prisons, lunatic asylums, public schools, &c. Practically, this would render the Government departments in these important matters helpless."

This passage illustrates the doubts I have suggested as to the supposed universality of the effect of the class of Statutes which deal with remedies against the Crown.

In my opinion, then, the Government is not liable for the tort complained of in this case either on the ground that, on the occasion in question, and within the scope of the duties he was performing, the constable was acting as a servant of the Crown, or on the ground that this was an occasion on which an action would lie between subject and subject. On both those grounds I am equally clear, and I need not add to what the learned Chief Justice has so clearly and exhaustively said in relation to the question depending on the construction of the words in sec. 4 of the *Crown Redress Act 1891*, because, having regard to the history of the institution and administration of the police and their regulation by Statute, the circumstances and the reasons of the administration sections are so wholly different from anything that could exist in relation to the adjustment of civil rights as between subject and subject, that it is impossible to suppose that the words of sec. 4 apply so as to render the Crown liable for the tortious act of a constable in the mistaken belief that he is performing a statutory duty. I agree that the appeal fails.

O'Connor J.

There is no difficulty in the interpretation of sec. 4 of the *Crown Redress Act 1891*. It is true that the word "Government" is sometimes used to describe the whole power of a community, legislative and judicial as well as executive, but to my mind it is absolutely clear that in the section under consideration it has been used in the sense explained in the passage from *Anson on the Constitution* (3rd ed., vol. *i.*, p. 39), cited by Mr. Dobbie. In other words, it has been used in its ordinary sense, and means the Executive Government of Tasmania. As to the remainder of the section it was properly admitted by the appellant's counsel that the *Crown Redress Act 1891* imposes no greater liability upon the Government for the acts or defaults of its servants than would attach to an individual employer under like circumstances. In order, therefore, to test the liability of the Government in this case the ordinary law of master and servant must be applied. In a general sense, no doubt, the constable was the servant of the Government at the time when the trespass complained of was committed. He held his office under the *Police Regulation Act 1898*, which gave the Government power to employ, to pay, and to dismiss him. He was probably required to perform many duties besides those imposed upon a constable at common law or by Statute, and in the performance of such duties he would be the servant of the Government, and they would be directly liable for any neglect or default committed by him in the course of his employment; but the question for our decision is was he the servant of the Government in the performance of the particular duty of making the arrest which is the subject of this action. The test of liability in this as in every case is, was the servant in doing the particular act complained of subject to the control of the master, as stated by *Bowen* L.J. in *Donovan v. Laing, Wharton, and Down Construction Syndicate*[22]. The rule is well explained by *Erle* C.J. in *Tobin v. The Queen*[23]. "The liability of a master for the act of his servant attaches in the case where the will of the master directs both the act to be done and the agent who is to do it." It is not contended here that there were any direct instructions from the Government to make this arrest. It was made by the constable in the ordinary course of his duty as constable under the authority conferred on a constable by sec. 179 of the *Police Government Act* (20 Vict. No. 10). The Act is one for the preservation of order, decency, and public health in municipalities and towns; that section makes the disturbance of the public peace under certain circumstances an offence punishable on summary conviction, and gives authority to arrest for the offence in the following words:—"And any Constable or Public Officer may take into custody without warrant and forthwith convey before a justice any person who within his view commits any such offence." The liability of the Government, therefore, did not arise directly, but it was sought to be implied from the general relation of master and servant between the Government and the constable created by the *Police Regulation Act 1898* under which the constable served. It becomes necessary, then, to consider what is the relation between the Government and a constable serving the Government under the *Police Regulation Act 1898*, when the constable is using the power conferred on him by Statute for the preservation of the peace. It will be noted that the constable by his oath under the *Police Regulation Act 1898* swears that he "will well and truly serve ... the Queen in the office of constable for the Colony of Tasmania" and that he will to the best of his power &c. ..."cause the peace to be kept and preserve and prevent all offences against the persons and properties of Her Majesty's subjects" and will hold the "said office" to the best of his ability while he continues to "discharge all the duties thereof faithfully according to law." The "office of constable" is still further recognized in sec. 15, which provides that every member of the police force appointed under the authority of the Act shall have such powers and privileges, and be liable to all such duties as any constable duly appointed now has or hereafter may have, either by the common law or by virtue of an Act of Parliament now or hereafter to be in force in Tasmania. Whilst, by the joint effect of secs. 31 and 62, any member of the police force who is guilty of misconduct, neglect, or violation of duty in his office may be punished by fine on summary conviction, and, as at common law, he may be proceeded against for such offences by any member of the public who may complain against him. By sec. 18 it is provided that a person taking the oath shall be deemed "to have entered into a written agreement with and be thereby bound to serve Her Majesty as a member of the police force in whatsoever capacity he may be at any time thereafter required to serve" at the current rate of pay for the rank to which he may be appointed.

The common law has always recognized the office of constable. The duty of locally preserving the peace in England from the earliest times has been placed upon local bodies, upon the decennaries and hundreds in the time of Alfred, and later upon different local bodies, in more modern times upon the Boroughs and Municipalities. The recognized officers for the preservation of the peace in these localities have been the constable or constables chosen, elected, or appointed by the local bodies as by law provided. The power to arrest for breach of the peace or other offences is given by the common law, not to the local bodies responsible for keeping the peace, but to their officer the constable, who in the words of *Bac. Abr.* ("Constable" Chapter C.) "is not only empowered as all private persons are to part an affray in his presence, but is bound at his peril to endeavour it." In another passage of the same work the constable's duty is stated as follows:—"And it is said that if he sees persons actually engaged in an affray whether the violence were done or offered to another or even to himself or see them upon the very point of entering on an affray; as where one threaten to beat another ... he may either carry the offender before a Justice of the Peace in order to his finding sureties for the peace," &c. Statutes giving power to arrest have followed the same principle. The power to arrest is given not to the local body, nor the municipality, nor, in cases where a Government Police Force exists, to the Government—but to a constable, that is to a person who for the time being holds the office of constable. It is in this form that the power to arrest without warrant is given under sec. 179 of the *Police Government Act* which I have quoted—not to the Municipality, which at the time when that Act was passed employed and controlled the police in towns, but a constable of police, the holder of an office, which by law carried with it an obligation to the public to discharge its duties faithfully and efficiently, and a liability to punishment on summary conviction at the suit of any member of the public if those duties were violated or neglected. The *Police Regulation Act 1898* makes it clear from the sections I have cited that the office of constable, with its duties, obligations, and responsibilities directly to the public, was intended to be recognized under the Act just as it was recognized by the former Act, the *Police Regulation Act 1865*, under which the municipality, instead of the Government, controlled the police in towns. I can see no difference between the two Acts in their recognition of the office of constable with all its direct responsibilities and liabilities to the public. It is abundantly clear that the municipality could not have been held liable for this arrest if it had occurred while the *Police Regulation Act 1865* was in force. That a municipality would not, under such circumstances, be liable appears from the judgment of *Wills* J. in *Stanbury v. Exeter Corporation*[24]: "This case is," he says, "to my mind, almost exactly analogous to the case of a police officer. In all boroughs the watch committee by Statute has to appoint, control, and remove the police officers, and nobody has ever heard of a corporation being made liable for the negligence of a police officer in the performance of his duties." In that case the servant for whose act it was sought to make the defendant corporation liable was not a police officer. He was an officer of the corporation appointed by them to carry out certain duties for enforcement of the *Diseases of Animals Act 1894*, which Act directed the enforcement of its provisions by local authorities. The power to do the act complained of was given by the Statute, not to the local authority, the Corporation of Exeter, but to "the Inspector of the local authority or other officer appointed by them in that behalf." The same principle was held by *Wills* J. to apply as if the act complained of had been done by a constable in the discharge of his duties as constable. Lord *Alverstone* C.J.[25], puts the position in the following words: "To adopt the language of the county court judge, the inspector was not acting in performance of duties imposed by Statute upon the defendants, or, in other words, was not performing as their agent duties imposed upon them and delegated by them to him, but was acting in discharge of duties imposed on him as inspector by the order of the Board of Agriculture." The principle thus applied was stated in a more general form by *Erle* C.J. in *Tobin v. The Queen*[26], as follows:—"When the duty to be performed is imposed by law, and not by will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment." That principle is, to my mind, clearly applicable to the facts under consideration. In this case the duty of arrest in the particular instance was imposed upon the constable by the law, and not by will of the Government. For the proper discharge of that duty he was responsible to the public in the first instance, and if the Government had taken upon themselves to

interfere with him in the discharge of that duty, it would have been no answer to a prosecution by a member of the public for neglect of duty that he had been commanded by the Government to abstain from carrying it out. The appellant's counsel relied upon *Goff v. Great Northern Railway Co.*[27], and *Moore v. Metropolitan Railway Co.*[28], in which cases it was established that where powers of arrest are given to servants of railway companies, the companies themselves are liable for the improper exercise of those powers. But those cases are clearly distinguishable. By the express words of the *Railway Clauses Act*, sec. 104, power is given to the railway servants to arrest "on behalf of the Company." Agency is thus created on the face of the authority to arrest; power to arrest is in reality given to the company to be exercised on their behalf by their servants. In this case the authority to arrest is not conferred on the Government, nor is it to be exercised on behalf of the Government, it is conferred on the constable as the holder of a recognized public office to which well known duties and responsibilities are attached. He made the arrest in the discharge of his duty as holder of the office of constable, and not by the direction or under the control of the Government. His act was thus not the act of the Government by its servant, but was his own act, done in the exercise of his duty as constable, and in the doing of it the relation of master and servant between him and the Government cannot be implied. Applying therefore the ordinary principles regulating the law of master and servant to the relation between the Government of Tasmania and the constable in regard to this arrest, I am of opinion that the Government cannot be made liable for the act of the constable. For these reasons I think that the decision of the majority of the Supreme Court of Tasmania was right, and the appeal must be dismissed.

Appeal dismissed.

Solicitor, for appellant, Harold Sargent.

Solicitor, for respondent, Solicitor-General for Tasmania.

[1] (1905) 2 K.B., 838, at p. 841.

[2] (1905) 2 K.B., 838, at pp. 842-3.

[3] [1855] EngR 106; 4 E. & B., 570.

[4] (1893) 1 Q.B., 629, at p. 634.

[5] [1864] EngR 21; 16 C.B.N.S., 310; 33 L.J.C.P., 199.

[6] [1864] EngR 21; 16 C.B.N.S., 310.

[7] [1855] EngR 106; 4 E. & B,, 570.

[8] (1893) 1 Q.B., 629.

[9] 2 C.P.D., 205.

[10] L.R. 6, C.P., 24.

[11] L.R. 6, C.P., 24, at p. 26.

[12] (1904) 1 K.B., 743.

[13] (1904) 1 K.B., 743, at p. 748.

[14] (1904) 1 K.B., 743.

[15] (1905) 2 K.B., 838, at p. 840.

[16] (1905) 2 K.B., 838, at p. 843.

[17] [1851] EngR 884; 7 Ex., 36, at p. 40.

[18] 12 App. Cas., 643, at p. 649.

[19] [1901] NSWStRp 79; (1901) 1 S.R. (N.S.W.), 196.

[20] [1901] NSWStRp 79; (1901) 1 S.R. (N.S.W.), 196, at p. 212.

[21] 12 App. Cas., 643.

[22] (1893) 1 Q.B., 629, at pp. 633-4.

[23] [1864] EngR 21; 16 C.B.N.S., 310, at p. 350.

[24] (1905) 2 K.B., 838, at p. 842.

[25] (1905) 2 K.B., 838, at pp. 841-2.

[26] [1864] EngR 21; 16 C.B. N.S., 310, at p. 351.

[27] [1861] EngR 316; 3 E. & E., 672.

[28] L.R. 8 Q.B., 36.
