REPORTS

OF

APPEAL CASES

IN THE

HOUSE OF LORDS,

During the Session, 1816.

56 Geo. III.

ENGLAND.

APPEAL FROM COURT OF EXCHEQUER.

MUCKLOW—*Appellant*,
ATTORNEY GENERAL—*Respondent*.

Feb. 16, 29, 1816.

CUSTOMS KING'S WAITERS.—TRUSTEE.—INTEREST.—COSTS.

THE Commissioners of Accounts appointed under 20 Geo. 3. c. 54. having recommended the abolition of the office of the nineteen King's waiters in the Customs, the number from that period was not filled up, and the fees of the vacant offices were generally applied to the use of the Customs' Superannuation Fund (now abolished by 51 Geo. 3. c. 55.) though without any legislative authority. By 38 Geo. 3. c. 86. the vacant offices of waiters were abolished subject to regulation, and the fees for such offices received previous to July, 1798, were ordered to be applied to the fund. The Appellant was appointed receiver in 1799; but as the Act 38 Geo. 3. made no provision for the appropriation of the fees of the vacant offices subsequent to 1798, he retained them in his own hands. By 47 Geo. 3. sess. 1. c. 51. the fees of offices, vacant and abolished under 38 Geo. 3. c. 86. received since July, 1798, were directed to be applied to

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the fund. An information was, in 1807, then filed in the Exchequer against the Appellant for the fees which he still refused to pay, alleging that they ought not to have been received at all, and might be reclaimed by the merchant, or that, if receivable, they belonged to the surviving King's waiters, &c. But it was held that the fees were consolidated, and properly received from the merchant in full, but that the offices were separate and distinct, and that the fees did not go to the surviving waiters—and the Court below decreed for the Crown for principal, interest, and costs. But, on appeal, though the Appellant had admitted in his answer below that he had mixed this money with his own and so derived profit from it, the Lords held that, as the money remained unappropriated till 47 Geo. 3. interest ought not to be demanded during the period between 1798 and 1807; and that, as it was a fair question whether the money did not belong to the surviving waiters, the Appellant ought not to be called upon to pay costs to the Crown.

The Lords were of opinion that this, being public money, might be sued for by the Attorney General in his own name alone; but that, as the managers of the fund had been added as Relators upon the suggestion of the Appellant himself in his answer below, whether the information was objectionable in a general view on that ground or not, he was precluded from availing himself of that objection.

Rule 24 annexed to and made part of the Act.

BY the 12th Car. 2. c. 4., which was an act for granting certain duties of tonnage and poundage to his Majesty, it was enacted "that no officer, &c. "belonging to any Custom House shall exact, re- "quire, or receive any other or greater fee of any "merchant, &c. than such as are or shall be estab- "lished by the Commons in Parliament assembled, "&c." In pursuance of this authority the House of Commons, by an order dated 17th May, 1662, signed by their Speaker, appointed and regulated the

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fees to be taken by different officers of the customs, and among others by certain officers called King's

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waiters. They are mentioned in the Order of the Commons in these terms: "To the King's Majesty's "waiters, *being in number eighteen*," and then followed the fees which they were authorized to demand. Another officer was afterwards added to the King's waiters (it did not appear how nor when), making the number *nineteen*. This however was constantly acquiesced in, and the fees were divided into nineteen instead of eighteen shares.

Their number 18, afterwards 19.

By the act 20 Geo. 3. c. 54. a Commissioner of Accounts was appointed, and the Commissioners in their 14th Report, dated 30th Dec. 1785, recommended the abolition of certain offices in the Customs, including that of King's waiters. In consequence of this the offices, as they became vacant, were not filled up, though the fees were still collected, the offices not being abolished. The fees of such vacant offices appeared to have been generally applied in augmentation of the Customs' superannuation fund, though without any legislative authority for it. This fund had been established at the beginning of the last century by the parties concerned, with the approbation of the Treasury, and was formed at first by small deductions out of the salaries of the officers, and an allowance was made out of it to superannuated officers of the Customs without regard to the pecuniary circumstances of the object. There was no legislative enactment for the establishment or regulation of this fund, of which the Commissioners of the Customs took upon themselves the management. In August, 1797, Mr. Long, Secretary of the Treasury, wrote a letter to the Board, desiring that the fees of the vacant

The abolition of the office recommended, and the offices not filled up as they became vacant.

The Customs' Superannuated Fund.

The fund abolished by 51 Geo. 3. c. 55. and the amount, &c. transferred to the consolidated customs.

Letter, August, 1797, desiring that fees of vacant offices of King's waiters might be paid to the superannuation fund.

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offices of King's waiters might be paid over to the superannuation fund.

By the act 38 Geo. 3. c. 86. it was enacted that the offices of King's waiters and others should not be filled up by patent or otherwise, save as thereinafter mentioned; and that such of these offices as were vacant should be and were abolished, save as thereinafter provided; and that the rest should be abolished as they became vacant, save as thereinafter mentioned; and that the money which had been or might be received *previous to the* 1*st of July*, 1798, for fees of offices so abolished and vacant as aforesaid, should be applied in augmentation of the superannuation fund. By this act the Commissioners of the Customs were empowered to consolidate and abolish these offices, to appoint other officers to discharge the duties, &c. No further attendance was to be required of the existing officers than before. The abolition therefore appeared to be subject to the regulation of the offices by the Commissioners of the Customs.

Act 38 Geo. 3. c. 86. s. 2. 3. 4. prohibiting the filling up of the vacant offices, and abolishing them save as thereinmentioned, and directing the fees received for such offices previous to July, 1793, to be paid to the fund.

Mucklow was appointed to the office of clerk of the rates in 1799, and received the fees, out of which he paid 1-19th to each surviving waiter, the number being then thirteen; the surplus he retained in his own hands, refusing to pay it for the use of the fund on the ground of the uncertainty to whom it was due.

Appellant appointed 1799, receives and retains the fees.

Passed April 5, 1807.

By 47 Geo. 3. sess. 1. cap. 51. it was enacted that the money received *since* the 5th of July, 1798, or which might be at any time thereafter received for fees of offices in the Customs (without specifically mentioning the King's waiters) so abolished

Fees received since July, 1798, applied to superannuation fund.

or vacant (viz. by the act 38 Geo. 3. c. 86.) should be applied in augmentation of the superannuation fund.

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Mucklow still refusing to pay, the Attorney General in his own name alone, in M. T. 1807, filed an information against him in the Exchequer Chamber, praying an account and payment for the use of the superannuation fund. Mucklow in his answer insisted that the vacant offices were abolished by the act 38 Geo. 3. c. 86., and that the fees ought not to have been received at all, and that the receiving them was contrary to the act 6 and 7 William and Mary, c. 1. s. 2., and that if receivable they belonged to the surviving waiters; and he denied that he had derived any emolument or interest from the money, except as having at times mixed it with his own money and derived profit from it, but what amount of interest or profit he could not state. He also objected to the information for want of proper parties.

Information M. T. 1807.

Answer.

Appellant derived profit from the money retained by mixing it with his own money.

The information was, according to suggestion in the answer, amended by making the surviving waiters Defendants, and afterwards by adding the Commissioners of the Customs as Relators. In H. T. 1810, Mucklow paid into Court in obedience to an order to that effect, the principal sum of 9599*l.* 0*s.* 3*d.* arising out of those fees, and then admitted to be in his hands. About this time the surviving waiters brought an action in K. B. against Mucklow for these surplus fees. The Court was of opinion that the officers held several and distinct offices, and that each could claim no more than his

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Decree, June 1811.

nineteenth part or share of the fees, however the number of existing officers might be reduced.

The cause having come on to be heard, the Court on the 27th of June, 1811, decreed an account of the fees of these vacant offices received by Mucklow since the period of his appointment, and directed that interest at four per cent should be computed on the sums received on account of such fees when and as often as they amounted to 100*l.*, and that the Defendant Mucklow should pay the Crown's costs to be taxed.

In a note of the grounds of judgment in the Exchequer annexed to the Appellant's case, it was stated that the Court in giving interest proceeded on the principle laid down by Lord Thurlow in *Perkins v. Baynton*, 1 Bro. Ch. Ca. 375. The cause was reheard, and on the 11th of June, 1812, the decree was affirmed; and from this decree and decretal order of affirmance Mucklow appealed.

Romilly and *Brougham*. 1st, The Attorney General could not sustain this suit. It was not a public, but a mere private fund, and therefore the Attorney General could not proceed by information in his own name alone. It was not a public charity, and was held not exempted as such from the income tax, and therefore the Attorney General could not proceed at the relation of others. And, if not a charity, even if it should be considered as a matter of public revenue, the Attorney General could not proceed as he had done in this case at the relation of others, but ought to have proceeded in his own

name; for in a question of revenue the Attorney General does not proceed at the relation of others. And at any rate not only the surviving waiters, but the representatives of such as had died since the offices were allowed to remain vacant, ought to have been parties, and likewise those who had paid the fees, as they might contend that they never ought to have been paid. 2d, The offices had been abolished as they became vacant, and therefore the fees ought never to have been received; so that neither the managers of this fund nor Mucklow had any title to them, and Mucklow was still liable to an action by the merchant for them, and an action had in fact been brought by the surviving waiters for them, in which however the question was decided against them. 3d, Though the claim for the fund should be held to be well founded, it did not arise till 1807, so that no interest ought to be charged for the sum previously received. They spoke of a trustee being liable for interest on sums improperly retained by him, but how could there be a trustee without a *cestui que trust?* 4th, Mucklow under these circumstances ought not to have been found liable in costs.

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Solicitor General (*Shepherd*) and *Mitford* (contra). 1st, As to the objection for want of parties, Mucklow ought to have demurred in the first instance, or filed his bill of interpleader and paid the money into Court. This fund was in the nature of a public charity, of which the Commissioners of the Customs were trustees, and the Attorney General rightly sued by information at their relation.

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If the Attorney General had sued in his own name they would say that this was not a matter of revenue. But even though he might have proceeded in his own name, it did not follow that he might not proceed at the relation of another. (*Lord Redesdale.* There have been instances where the Crown officer, though he might proceed in his own name, has required a relator; as where the right is doubtful it becomes the Crown to have a relator, that the Court may award costs if it thinks proper.) 2d. Mucklow could be liable to no action by the merchant, as the fees were indivisible as to him and rightly exacted in full, and it was impossible at any rate that they could be called back. Yet the fees were separate as to the waiters, and the survivors had no title to the surplus; and so it had been decided in *Hudson v. Mucklow*, 12 East. 273. Besides, the act 47 Geo. 3. c. 86. by appropriating these fees to this fund, destroyed all other claims, and would be Mucklow's indemnity. 3d. As to the question of interest, however Mucklow might be justifiable in resisting the Commissioners' claim under Mr. Long's letter, when the act 47 Geo. 3. passed he was glaringly a wrongful holder, and ought to pay interest. (*Lord Eldon,* (C.) I see no difficulty in your way as to interest after 1807; but what becomes of your interest between 1798 and 1807, when the Commissioners had no title? Mr. Long's writing a letter could not bind Mucklow, and the act 38 Geo. 3. related only to fees previously received.) But he received the money not for himself but for others, and as he made interest of it there could be no injustice in making him pay interest. 4th. Then as

to costs, this is a public officer keeping the public money in his own pocket, and he ought to pay costs.

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Judgment, Feb. 25, 1816.

Where certain persons were made parties to an information below on the suggestion of the Defendant, he cannot be permitted to object to the information, on appeal, on the ground that these persons ought not to be parties.

Lord Eldon, (C.) This was an information against Mucklow, by his Majesty's Attorney General, *at the relation* of the Commissioners of the Customs. And I mention that fact, as an objection was made in argument to the information on that ground. But I do not enter into any discussion on that point, because, whatever may be the value of that objection on the general ground, as the Appellant himself insisted below that the Commissioners ought to be parties, it does not in the present instance deserve much attention.

The judgment of the Court of Exchequer was to this effect—(his Lordship here read the Decree, and after noticing the Order of the House of Commons, the number of the waiters, eighteen, afterwards nineteen, and the provisions of the act 38 Geo. 3. c. 86. proceeded): I have only to observe on that act that it applies only to the fees received previous to 1798, and has no application whatever to what was received after 1798; and it might be questionable whether it was meant that any fees at all were to be received after that period. I think that was not the meaning. But if the matter was at all doubtful, it cannot be considered as vexatious to have agitated the question.

The Appellant was appointed Clerk of the Rates in 1799, and then the question might arise whether these offices could be filled up; and if not, whether the fees of the vacant offices ought to be collected at all; and if they could, whether they were divisible into

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eighteen or nineteen shares, each surviving waiter to receive only his eighteenth or nineteenth share, and the surplus to be carried over to some other purpose, such as this fund; or whether the whole of the fees received ought not to be divided among the surviving waiters; and whether the receiver might not be liable to an action by the surviving waiters, or to an information by the Attorney General. It might be considered as difficult to say whether they should have been received at all, or to whom the receiver was accountable for them after he had received them; and this difficulty was countenanced even by the opinions and conduct of the law officers of the Crown themselves.

In 1807 an information was filed by the Attorney General to have the money thus received applied to the purposes of the superannuation fund, and to this information only himself and the Appellant were parties. To this information an answer was put in by the Appellant, and he insisted that the Commissioners of the Customs, &c. should be parties. I should have stated that, in the 47th of the King, an act passed, by which the fees, &c. of offices in the Customs, abolished or vacant, under the act 38 Geo. 3. c. 86., which had been received since the 1st July, 1798, should be applied in augmentation of the superannuation fund, &c.; and it appeared to be considered that all claims were set aside, except that of the public, for the purposes of this fund, and that the money was now legally applicable in this manner. But though I think that correct, yet it is no very easy thing to say what is the meaning of the act altogether, which is nto drawn with that precision which is desirable in

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acts regulating transactions between the public and the individual. Feb. 25, 1816.

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Then the Attorney General amended his information and made the surviving waiters parties to it, but not any representatives of deceased waiters; and it appears that an action was brought by the surviving waiters, insisting upon their right to the whole of the fees. The Court of K. B. considered the offices and fees as separate and distinct, and that the fees of such as became vacant devolved to the public; and that was its decision. But it was that only which set at rest this question, and led to the decision in the Exchequer. Then the Attorney General again amended his information, by adding the Commissioners of the Customs as Relators, and the Court made the decree which I have mentioned.

First, as to whether this fund can be considered as a charity, I say nothing on that head, as I have no doubt, attending to these acts, that the fees were public money, and might be sued for as such by the Attorney General alone. But as to whether the Commissioners could properly be made parties, the Appellant, for the reason which I before stated, has no right to be heard on that question. Then taking this to be public money, and liable as such to be thus called for after the passing of the act 47 Geo. 3. it appears that there is no good objection to this decree, except in so far as it gives interest upon the money during the period between 1798 and 1807; and except likewise in as far as it gives costs against the Appellant. I agree in the principle that, in the case of a trustee, whether exe-

If a trustee has received money as

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such, the mode in which, and person to whom it ought to be paid over being ascertained, and instead of putting it out of his hands, makes profit of it for himself, he shall be charged with the profit or interest: *secus*, it seems, where it is not clear how and to whom the money ought to be paid.

Where the Crown sued for money, and the Deft. resisted; there being a reasonable doubt whether the money did not belong to other parties, though the Crown succeeded, it was held to be too much to visit the Deft. with the payment of the Crown costs.

cutor, administrator, &c., if he has received money in that capacity, and the mode of putting it out of his hands is ascertained, he ought so to put it out; and that if he derives profit from it, he ought to be charged with the profit or interest. But the case is very different here, where the money is in the hands of the receiver unappropriated between 1798 and 1807, the act 38 Geo. 3. having appropriated only such of the fees as had been received previous to 1798, and he being appointed in 1799, without knowing to whom he was accountable for it, until the act 47 Geo 3. gave him a legislative authority to pay it for the use of this fund; and my humble opinion is that he ought not to be charged with interest for the period during which the money so remained unappropriated.

And I also think it reasonable that the decree should be altered so far as respects costs. Why was not the information filed sooner? If the Att. Gen. did not sooner make the demand, it must be because he doubted whether he could make it successfully before 1807. I do not say how far the doubt might be well founded; but even after he had filed the information, and during the pendency of the suit, the surviving waiters brought their action for this money, and a question at law was made, which cannot be said to have been unfit to be tried; and we are to consider whether, under these circumstances, the Appellant is so far wrong as to be visited with costs to the other party. I think, therefore, your Lordships may safely be advised to alter the decree to the extent which I have stated,

so far as relates to interest and costs, and subject to such alterations to affirm it. Feb. 25, 1816.

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Lord Redesdale. The act 38 Geo. 3. c. 86. has many clauses relating to this office and others, and it speaks of the offices of the nineteen waiters; so that it is clear that the act had in view nineteen officers of this description: and it enacts that none of these offices should be granted by patent or otherwise, *save as thereinafter mentioned.* And that such of them as were vacant at the passing of the act, and the rest as they became vacant, should be abolished, *save as thereinafter provided, &c.* Then we must look at what are the provisions of the act, and we find that it gives power to the Commissioners of the Customs to provide for the exercise of the duties of the offices by appointing other officers, or consolidating the offices as they should think fit, it being clear that the duties of the nineteen waiters were to be performed somehow; but whether by deputies of the waiters, or others, is left to the Commissioners. Another clause provides that the officers before-mentioned should not be compelled to any other attendance on the duties of their several offices during the existing grants than before. From this it follows that the duties of the offices must be still executed; and yet that the existing officers should not be bound to more attendance and duty than before: so that it was the intent of the legislature that the surplus should not go to the surviving waiters. It is clear, therefore, that the decision of the Court of K. B. was right.

Sect. 4.

Sect. 3.

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But it still remained in suspense what was to be done with the surplus fees received after 1798. It

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could not be the intention to increase the allowance to the survivors, and these being consolidated fees were all paid to the receiver, and the surplus remained undisposed of. The act 38 Geo. 3. c. 86. was defective therefore in not providing for what might have been easily foreseen.

So the matter stood till 1807. In the mean time Mucklow, having been appointed receiver, was called upon for the surplus fees both by the waiters and by the Commissioners, as each thought they were entitled. The act gave no authority to the Commissioners, unless with reference to some regulation of the office, which did not take place. They had no right to direct these fees to the superannuation fund, and the act gave no such direction. The survivors claimed in opposition to the Board of Customs. And thus the receiver was called upon on the one side by the Commissioners and on the other by the surviving waiters, neither of them having any clear title to the money claimed.

Then the act 47 Geo. 3. sess. 1. c. 51. was passed to supply the defect, and it was unfortunate that the object had not been sooner attended to. Now the act 47 Geo. 3. is still a general act, whereas it should have provided for the particular cases. But it does enact that the several sums of money received since the 1st July, 1798, or which at any time thereafter ought to be received for fees or emoluments of offices in the Customs, abolished or vacant, &c. should be applied in augmentation of the superannuation fund, &c.—What right then did this act give? It gave a right merely to the sums, but no right beyond that; and yet this information, which

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is founded on the act, claims interest to which the act gives no title.

It has been objected to the information that the merchants from whom these fees had been taken might claim them. But no such claim has been made, nor could well be made with effect; and at any rate that signifies nothing now, as the act directs the money to be applied to this fund.

It was the receiver's duty to obey the act, and the act would be his indemnity. I therefore think the decree right as to the sums received, and as to the giving interest from the time when the receiver was in default in not paying, which could not be before the passing of the act 47 Geo. 3.

The information was then filed, and these fees were public money, for which the Attorney General might alone sue.—The fund is for the remuneration of public officers, and is therefore a public fund, though in the nature of a charity. There can be no objection therefore to the decree in principle, the only question being whether the act was to be obeyed or not.

As to the costs, that is a different question. The surviving waiters insisted upon what they conceived to be their rights. The receiver was in the nature of a stake-holder, and might fairly submit the question whether he ought to pay the surplus to them. The Court of K. B. decided that they had no right to them. The money had been paid into the Court of Exchequer, and the question at the hearing was chiefly as to the interest and costs. The information was several times amended, which was an admission that there was some foundation for the Ap-

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pellant's objections. But the Appellant was properly charged with interest for the time during which he kept the money in his hands after the filing of the information in 1807, because then by paying the money into Court he might certainly have indemnified himself. But where there had been so much doubt it was hard upon the Appellant to say that he should pay the costs of the Crown as well as his own, and even to his own he would be entitled according to the rules of Courts of Equity if he had at first paid the money into Court. I agree therefore that the decree ought to be affirmed, subject to the proposed alterations.

Judgment. Decree accordingly *affirmed*, with these alterations as to interest and costs.

Agent for Appellant, PALMER.
Agent for Respondent, SUDLOW.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

HICKES—*Appellant*.
COOKE—*Respondent*.

Feb. 23, March 14, 1816.

LONG ACQUIESCENCE A BAR TO RELIEF.

LENGTH of time, or long acquiescence in a transaction, may be a bar to relief in cases where the transaction, if impeached within a reasonable time, would be set aside.

Therefore where a fee-farm grant or lease, at a fixed rent, was made of mortgaged premises by the mortgagor to the mort-