Present: Wood Renton J. and Ennis J.

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THE COLOMBO ELECTRIC TRAMWAY CO. *v.* THE ATTORNEY-GENERAL *et al.*

63—D. C. Colombo, 31,840.

Action against the Crown for damages arising out of tort—Not maintainable—Action against the "Government of Ceylon"—Action against servants of the Crown for damages for wrongful acts done by them—Roman-Dutch law—How much of it was introduced into Ceylon.

The Crown cannot be sued in tort in Ceylon.

The plaintiff company sued the Attorney-General of Ceylon and Messrs. Cole Bowen and Bakewell, engineers in the employment of the Government of Ceylon, for a declaration that the plaintiff company had a right to navigate its boats on the Beira lake, Colombo; for an injunction restraining the defendants from further obstructing the navigation and to remove the present obstruction; for damages, Rs. 8,250, up to date of action, or in the alternative Rs. 300,000 by way of compensation or damages in lieu thereof.

Held, that the plaintiff company could not maintain the action as it was one of tort.

Wood Renton J.—The appellants might perhaps have avoided the objection that their action was one of tort by striking out their allegation that the acts of the respondents were wrongful and unlawful and the claim for damages, and praying only for a declaration of title. But this they have expressed no willingness to do.

Courts have gradually enabled the subject in Ceylon to obtain by action against the Crown the relief that the subject in England obtains by petition of right, but nothing more.

An action of tort is not maintainable against the "Government of Ceylon."

Wood Renton J.—I am unable to regard as serious the contention that the Government of Ceylon can be treated as if it were a statutory corporation, such as the Municipal Council of Colombo, entirely distinct from, and entitled to none of the immunities of, the Crown.

Ennis J.—In any case in which the Crown in Ceylon could be sued there is no material distinction between the terms "Government of Ceylon" and "Crown."

Wood Renton J.—The appellants might, if they had chosen to do so, have sued the second and third respondents as individuals for any unlawful and wrongful act committed by them, even although they had only acted on behalf or by the authority of the Crown.

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ENNIS J.—*Obiter*, individual members of the Government are not liable in damages for acts done by them in the ordinary course of their duties and in obedience to the orders of the Government, which are not necessarily or manifestly unlawful.

ENNIS J.—The Roman-Dutch law which prevails in Ceylon is not the entire bulk of that law, but only so much of that Dutch common law as can be shown to be applicable, or of the Dutch statutory law as can be shown to have been specially applied.

WOOD RENTON J.—It is well settled in Ceylon that if any rule of the Roman-Dutch law is found to be inconsistent with the well established practice of the Colony, the reasonable inference is that it was never introduced into Ceylon.

APPEAL from a judgment of the District Judge of Colombo (H. A. Loos, Esq.). The facts appear sufficiently from the judgment.

Bawa, K.C., de Sampayo, K.C., H. J. C. Pereira, Drieberg, and *Hayley*, for the plaintiffs, appellants.—This is not an action in tort. Even if the action is one of tort, the action is maintainable against the Crown. In conquered countries the laws remain in force until altered by the conqueror (*6 Halsbury 421*). Under the Roman and Roman-Dutch law even actions *ex delicto* lay against the Fisc. Counsel cited *Van Leeu, Kotze I., p. 12, note (h); Dutch Consultations, bk. 4, p. 123; Bort's Domain, XVI. Decl., s. 1; Voet, 1, 3, 15; 2, 4, 11; 6, 1, 23; 18, 4, 8; 43, 16, 5; Nathan, vol. I., pp. 406 and 407; Nathan, vol. I., p. 38; Perezius, bk. 10, tit. 1, sec. 46.*

The actions which lay against the Fisc can now be brought against the Attorney-General. The Proclamation of September 23, 1799, has expressly conserved the Roman-Dutch law in all matters.

In a conquered or ceded colony no branch of the royal prerogative is in force unless it is a necessary incident of sovereignty, or unless it could be regarded as a continuation of the prerogative of the conquered or ceding power.

The maxim that " the King can do no wrong " does not apply to Ceylon. Under the Roman-Dutch law there is no such prerogative.

Where the common law is not the English law, the prerogative of the King is not to be decided on the principles of English law. The Crown Debts Ordinance would be unnecessary in Ceylon if the English prerogatives are in force in Ceylon. The prerogative *nullum tempus occurit regi* does not apply to Ceylon, though it is a prerogative of the King.

There are several Ordinances introducing the English law in several matters, and not one of the Ordinances refers to the prerogatives of the King.

It is not right to say that the Crown can be sued on contract and not in tort.

If the English prerogative as to immunity of the Sovereign from being sued exists in Ceylon, it ought to be held to exist in its entirety.

It has been held in a series of cases that the Crown could be sued on contract or for vindication of title. It is illogical to concede these actions and to hold that an action in tort does not lie.

Sections 456 *et seq.* of the Civil Procedure Code do not place any limitation on the right of the subject to sue the Crown. The term " action " is defined in the Code as a proceeding for the prevention or redress of a wrong. The term " cause of action " is defined as the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury. Sections 456 *et seq.* do not draw any distinction between actions *ex delicto* and *ex contractu;* and the terms "action" and "cause of action" include all kinds of actions, including actions *ex delicto.* The Code must, therefore, be taken to have recognized the right of the subject to bring an action even in tort against the Crown.

Judicial opinion is not quite unanimous on the question whether the Crown can be sued in tort. In *Newman v. Queen's Advocate* [1] Clarence J. thought that an action which was one of tort based on a contract was maintainable against the Crown. In *Sanford v. Waring* [2] and in *Le Mesurier v. Layard* [3] Bonser C.J. was inclined to the opinion that the Crown can be sued in tort in Ceylon. Counsel also cited *Simon Appu v. Queen's Advocate,*[4] *Fraser v. Queen's Advocate,*[5] *Don Hendrick v. Queen's Advocate,*[6] *Attorney-General of the Straits Settlements v. Wemyss,*[7] *Farnell v. Bowman.*[8]

If section 117 of Ordinance No. 11 of 1868 indicates a waiver of the prerogative of the Crown, there is no reason why the waiver should be restricted to actions *ex contractu* and not extended to actions *ex delicto.*

Even if the action is one of tort, and even if the action is not maintainable against the Crown, it is maintainable against the " Government of Ceylon." The " Government of Ceylon " cannot claim all the prerogatives which the Crown possesses. Counsel cited *Fraser v. Queen's Advocate,*[5] *In re Holmes.*[9]

The present action is not an action in tort. It is an action in the nature of an action for declaration of a right, for an injunction and compensation. Plaintiffs, as members of the public, bring this action to vindicate a public right of navigation over the lake, on the footing that the interruption of the right of navigation has caused them special damage. An action for declaration of title is usually based upon a wrong or a tort—the wrongful ouster. But,

[1] *(1884) 6 S. C. C. 29.*
[2] *(1896) 2 N. L. R. 361.*
[3] *(1898) 3 N. L. R. 227.*
[4] *(1884) 9 A. C. 586.*
[5] *(1868) Ram. 63-68, 316.*
[6] *(1881) 4 S. C. C. 76.*
[7] *(1888) 13 A. C. 197.*
[8] *(1887) 12 A. C. 643.*
[9] *(1861) 2 J. & H. 527.*

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nevertheless, the action *rei vindicatio* has been permitted against the Crown. Counsel cited *St. James and Pall Mall Electric Lighting Co. v. Rex*,[1] *Ranhamy v. Wijehamy*.[2]

In any case the action can be maintained against the second and third defendants, who cannot plead any immunity from being sued. The maxim that "the King can do no wrong" cannot be pleaded by the servants of the King as a shield for their illegal acts. Counsel cited *Raleigh v. Goschen*.[3]

The public have acquired a right to use the lake and the shores. The Crown has no title to the bed of the lake. Counsel cited *Simpson v. Attorney-General*,[4] *Marshall v. Ulleswater Company*.[5]

The Government has dedicated the lake to the public by its Proclamation of October 23, 1848.

Section 66 of Ordinance No. 10 of 1861 indicates the procedure that is to be followed by the Crown when it desires to alter an existing thoroughfare or lake. That procedure was not followed here. The acts complained against were *ultra vires*.

The evidence shows that the lake has been used by the public from time immemorial, and that it is not the exclusive property of the Government. The public have acquired rights over the lake.

Garvin, Acting S.-G. (with him *Akbar, C.C.*), for the respondents.—The passages cited do not bear out the proposition that the Crown could be sued in tort under the Roman-Dutch law. The passage cited from *1 Nathan 406 and 407* does not support this proposition. The original passage from *Voet 43, 16, 5*, indicates that the action there referred to was created by statute. The word used is "*statuendum.*" See Casie Chitty's translation. The statutory laws of Holland must be shown to have been specially applied in the colonies; otherwise such laws do not apply to the colonies. See *Karonchihamy v. Angohamy*,[6] *Silva v. Balasuriya*.[7]

The passage in *Voet 18, 4, 8* (*Berwick 96*) is not an authority for the plaintiffs' contention. The action there referred to was given as an act of grace to a person whose lands were transferred by the Fisc in view of the doctrine of the Roman-Dutch law that sales by the Fisc were indefeasible. This doctrine was not introduced into Ceylon; and the action was given to the subject as an act of grace.

There is nothing to show that the passage from the *Dutch Consultations* refers to an action in tort. The passage in *Bort on Domain.* refers to disputes as regards regalia, and not to actions in tort.

There are three decisions of the Full Bench which have held that the Crown cannot be sued in tort. See *Fraser v. Queen's Advocate*,[8] *Don Hendrick v. Queen's Advocate*,[9] *Newman v. Queen's Advocate*.[10]

[1] (1904) 90 *L. T. N. S. 344.*
[2] (1911) *14 N. L. R. 175.*
[3] (1898) *1 Ch. 73.*
[4] (1904) *A. C. 476.*
[5] (1871) *L. R. 10 Q. B. 166.*
[6] (1904) *8 N. L. R. 1, at page 19.*
[7] (1911) *14 N. L. R. 452.*
[8] (1868) *Ram. 63-68, 316.*
[9] (1881) *4 S. C. C. 76.*
[10] (1884) *6 S. C. C. 29.*

Ordinance No. 5 of 1835 and the Ordinance No. 11 of 1868 (section 117) did not make a waiver in favour of the subject as to any part of the royal prerogative. A practice had grown up in Ceylon of suing the Crown in certain cases where in England a petition of right lay. These Ordinances only regulated the procedure. But the right to sue was not created by the Ordinances. The practice probably arose as there was no provision for a petition of right in Ceylon.

The Civil Procedure Code has not made any alteration in the law. It is unthinkable that the Legislature would have adopted such an indirect and clumsy method of making such a radical change in the substantive law affecting the royal prerogative after the Privy Council had held that an action in tort does not lie against the Crown.

Chapter XXXI. of the Civil Procedure Code no doubt speaks of actions against the Crown. It does not follow from the sections that every type of action is maintainable against the Crown. The sections merely indicate the procedure to be adopted in actions by or against the Crown.

Where the Government desired to assume liability for a tort it has done so by express legislation. See Railway Ordinance, No. 9 of 1902, section 18; Post and Telegraphs Ordinance, No. 11 of 1908, sections 34 and 35.

Attorney-General of the Straits Settlements v. Wemyss[1] and *Farnel v. Bowman*[2] proceed upon the interpretation of the statutes of New Zealand and the Straits.

If the plaintiffs cannot maintain the action as one of tort, can they maintain this as one for declaration of title to this alleged right of navigation? The action then is based either on a private right in themselves, or they sue as members of the public. The plaintiffs cannot and do not claim a right of servitude over the lake, which can possibly exist only in the case of riparian owners; the right must be in respect to the ownership of another land. Counsel cited *De Silva v. Weerasinghe*,[3] *Ranhamy v. Wijehamy*,[4] *Don Davith v. Agiris*,[5] D. C. Jaffna, 8,690.[6]

If the plaintiffs claim to base their action on their rights as members of the public, they cannot maintain this action. The action must be brought by the Attorney-General. A member of the public may maintain this action if he proves special damages. In that case the action cannot be maintained against the Crown, as it is one of tort. No doubt an action *rei vindicatio* is an action based upon a tort in the sense that it is based upon an ouster. But it is not an action *rei vindicatio* that is allowed against the Crown, but only an action for a declaration of title on the footing that a petition of right would have been allowed in England.

[1] *(1888) 13 A. C. 197.*
[2] *(1887) 12 A. C. 643.*
[3] *(1896) 1 N. L. R. 308.*
[4] *(1911) 14 N. L. R. 175.*
[5] *(1902) 1 Bal. 152.*
[6] *(1879) 2 S. C. C. 195.*

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The fact that the Crown has waived its right not to be sued for declaration of title in respect of property claimed by an individual as his private estate is no authority for the proposition that the Crown has allowed the subject to sue it with respect to a right shared by an individual as a member of the public. The petition of right would not lie in England, and therefore an action for declaration of title would not lie in Ceylon in such a case.

The Roman-Dutch law action *rei vindicatio* was limited in its scope, and was allowed to one individual against another individual to recover property belonging to him. It was not recognized as a mode of declaring a public right (*Voet 6, 1, 2; Casie Chitty 10*).

If the Crown is not the owner of the lake, it must vest in the public. There is no authority for saying that it vests in each member of the public. The action must, therefore, be instituted by the public as a whole, if it can be instituted at all. The Attorney-General represents the public, and the action must be brought by him, and not by an individual member of the public.

The prerogative of the British King exists in all the conquered or ceded colonies, whether the prerogative was enjoyed by the previous Sovereign or not. *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick.*[1]

The action brought by the plaintiffs is clearly against the Attorney-General as representing the Crown. The notice of action makes that clear (see D 39). But it does not matter whether the action is brought against the " Crown " or the " Government of Ceylon." The terms means practically the same thing. See *Le Mesurier v. Layard.*[2]

If there is a distinction between the terms, and if the plaintiffs are suing the Government of Ceylon, then the action must fail, as the Attorney-General does not represent the Government of Ceylon but the Crown.

The plaintiffs were asked at the trial to say whether they sued the second and third defendants in their official capacity or in their private capacity. They would not answer that question. They cannot now turn round and say that they are suing these defendants in their individual capacity. In these circumstances, no application to amend the plaint should be allowed at this stage. See *Raleigh v. Goschen.*[3] The appeal as against the second and third defendants fails.

The lake, even if it be a natural lake, as contended by the plaintiffs is the exclusive property of the State. Under the later Roman law and the Roman-Dutch law things which were considered *res publicæ* under the old Roman law were treated as the property of the State or Sovereign.

[1] (1892) A. C. 437.

[2] (1898) 3 N. L. R. 227.

[3] (1898) 1 Ch. 73.

After the Republic was overthrown, and on the return of the Emperors, all that class of property known as *res publicæ* became part of the regalia (*vide The Lex Regiæ, Buchanan's Translation of Voet 64*). The public as such ceased to be capable of holding property.

Property thereafter was either State property or private property. Neither the later Roman law nor the Roman-Dutch law recognized such a thing as public property in the sense that each member of the public had a proprietary interest in it (*vide Leyser vol. I., pp. 255 to 260; Heinecius, pp. 202-204, section 328.*

Groenewegen, who is a recognized authority on the Roman-Dutch law, makes it clear that that law required a definite owner for each subject of property, and that such a thing as property belonging to the public was neither recognized nor favoured (*vide* his *De Legatis Abrogatio 18, 19*).

Grotius refers to lakes, rivers, &c., as belonging to the State, *i.e.*, the Government of the United Netherlands, which succeeded the Kings of Holland (*vide bk.2, tit. 1, section 25, bk.2, tit. 35, section 9, pp. 63 and 226*).

Voet recognizes the right of the *princeps* to grant permission to build on streets, and gives as his reason the fact that such streets belong to the *princeps* (*vide Buchanan 68*).

There is nothing to show that the Roman-Dutch law recognized such a thing as public property in the sense in which the lake is said to be public property.

The public being incapable of holding property could not acquire such a right even by dedication, which necessarily implies a grantee capable of holding property.

The Legislative Council has approved of the action of the Government in filling up the lake. It is not open to the subject to question the acts of the Government, which have received the sanction of the Legislature. The Government has complied with the provisions of section 66 of Ordinance No. 10 of 1861. A resolution of Council was passed approving of the scheme, and the Legislature voted money for this scheme. This amounts to Parliamentary authority.

The right to ferry is the exclusive right of the Crown both under the English and Roman-Dutch law. *Wood Renton's Encyclopedia of the Laws of England, vol. 6, p. 50; Addison 633; Voet 49, 14, 3; Nathan vol. I., section 94; Buchanan's Reports for 1868, p. 134.* The plaintiffs had no grant of a right to ferry.

The plaintiffs have failed to prove special damages. In this case damage could only have been sustained if the plaintiffs had a legal access to the lake. It is admitted that the lands at both terminii were Crown property, and that the plaintiffs were only tenants at will. The Crown had, therefore, perfect right to stop the access. Stoppage of the access necessarily meant stoppage of the ferry service. The damage complained of arose out of the stoppage of

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access to one terminus. The Crown had a right to do that. The filling up of the lake thereafter caused no special damage to plaintiffs.

Dedication cannot be inferred from the Proclamation of 1848. The Proclamation only means that the lake was assigned to the Provincial Road Committee as opposed to the District Road Committee for purposes of maintenance. The Proclamation was not made by the Governor as representing the King, but merely as a creature of the Ordinance for the purpose of carrying out a classification of thoroughfares into principal and minor. The Ordinance was never intended to create or confer rights which did not exist before. It was merely intended to provide funds for what were or thought to be thoroughfares. The Ordinances of 1844, 1848, and 1861 indicate strongly that thoroughfares were regarded as property of the Sovereign. (*Vide* sections 20-23 of Ordinance No. 16 of 1844; and sections 37, 67, 69, 72 of Ordinance No. 8 of 1848; and sections 9, 84, and 89, &c., of Ordinance No. 10 of 1861). There is nothing in any of these Ordinances to show that there was any intention to confer any proprietary rights on the public. Ordinance No. 12 of 1840, which was intended to prevent encroachments upon Crown lands, embrace public roads and streets (*vide* section 10). This is in accord with the Roman-Dutch law, that all these which were *res publicæ* under the Roman law became the property of the Sovereign.

Bawa, in reply.

Cur. adv. vult.

April 15, 1913. WOOD RENTON J.—

The plaintiffs-appellants—a limited company—sue the Attorney-General of Ceylon and Messrs. Cole Bowen and Bakewell, engineers in the employment of the Government of Ceylon, for alleged wrongful and unlawful acts done by the second and third respondents in the course of reclamation works carried on in and about the Beira lake in Colombo.

The following paragraphs of the plaint disclose the material facts:—

3. The plaintiff company says that the Beira lake in Colombo, commonly called and known as the Colombo lake, which is situate within the town of Colombo within the jurisdiction of this Court, is a piece of water in extent about 416 acres, over which the public always had and have a free right of navigation and passage in all directions by means of boats, canoes, and other vessels, and that for a long period before and at the time of the grievances hereinafter set forth there was of right and ought to have been through, over, and along all parts of the said Colombo lake and in all directions a public and common waterway and right of navigation in boats, canoes, and other vessels for all the King's subjects to go and return at their own will and pleasure. Nevertheless, the second and third defendants, being engineers employed by the Government of Ceylon as aforesaid, their servants and agents, in or about the month of April, 1910, wrongfully and unlawfully, and contrary to and in violation of the aforesaid rights of the public, began

to fill up and have since filled up with earth, bricks, and divers quantities of other materials a large portion of the said lake, namely, at that portion coloured brown in the sketch or plan filed herewith as part of this plaint, whereby the public were prevented from exercising their right aforesaid in and over that portion of the Colombo lake.

4. The plaintiff company says that in or about the year 1899 it purchased and acquired from one F. J. Stewart, who for many years previously had carried on and conducted a service of steamboats for the carriage and conveyance of passengers and goods across the said Colombo lake between the points A and B on the plan annexed hereto, all his rights and interests in the said service of steamboats, and all the steamers, plant, and appliances connected therewith, and all the goodwill of the said business. The plaintiff company considerably improved the said business and imported new steamers and continued to carry on the said service of steamboats, and have up to the time of the acts complained of carried on and conducted the said service of steamboats, taking a certain reasonable freight of ferryage, to wit, the sum of two cents from each person so carried. The plaintiff company also rented from the Colombo Municipal Council and the Military authorities respectively at each of the points A and B a certain plot of land and erected certain landing stages and other buildings for the purpose of the said steam ferry service at each such point. The said ferryboats were daily plying for them across the said lake between the hours of 5.30 A.M. and 9.15 P.M., and were available for the use and convenience of all members of the public on payment of the fare aforesaid.

The appellants further allege that the wrongful interruption of their ferry service has caused them special damage, which they estimate at Rs. 1,000 a month, and value their entire right " in respect of the premises " at Rs. 300,000, and claim—

(1) A declaration of their right to navigate their boats " on the said lake, and between the points A and B."

(2) An injunction directing the respondents to remove so much of the reclamation of the lake as obstructs them and other members of the public in the navigation of steamers and boats between the points A and B.

(3) An injunction restraining the respondents and their agents and servants from reclaiming any further " portion of the lake so as to interfere with the appellants' rights or those of the public."

(4) Rs. 8,250 as damages up to the date of action, with further damages at the rate of Rs. 1,000 a month until all obstruction to the appellants' free right of navigation on the lake has been removed, or, in the alternative, Rs. 300,000 by way of compensation or damages in lieu thereof.

(5) Costs.

The defendants-respondents, who file one answer, plead that the action is not maintainable on the grounds that—

(1) No action for an injunction lies against the Crown or its servants or agents in carrying out its orders or directions.

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(2) No action for damages lies against the Crown for anything alleged to be done wrongfully or in contravention of public rights, nor does such an action lie against the servants or agents of the Crown for anything alleged to be done as aforesaid, provided that such servants or agents did no more than carry out the orders and directions of the Crown, and, as against the second and third defendants, there is no averment that they did anything more than carry out such orders and directions;

(3) The law does not recognize such a state of things as anything being done wrongfully or contrary to or in violation of the right of the public by the Crown or the Government of Ceylon acting *bona fide* and within the scope of their authority.

The respondents deny the alleged public rights of navigation or passage over the Beira lake. The following paragraph in the answer may be cited as a statement in brief of the respondents' case on the facts:—

The whole of the said lake (including its beds and banks and the islands in it), which covered a much larger area than that mentioned by the appellants, belonged to the Crown. Neither the appellants nor any other member of the public had ever acquired any rights in, or with respect to, or in connection with, any part or portion of the said lake, but on the contrary the Government of Ceylon, representing the Crown, has from time to time reclaimed large portions of the said lake without any let, hindrance, or objection by anybody, and used and enjoyed the portions so reclaimed as Crown property, and has from time to time done and exercised divers acts and rights of ownership without demur or objection either by the public or by any private individual, and the Crown has continued to exercise and still exercises such rights in and over the area that has been and is still designated the Beira or Colombo lake, and the same is still the absolute property of the Crown.

Finally, the respondents plead that the improvements effected by the Crown on the lake are mainly for the benefit of the public.

On these pleadings the District Judge framed a variety of issues, which it is unnecessary to cite in detail. The appellants' counsel objected to issues (1) and (2), on the ground that they treated the action as being one against "the Crown" instead of against "the Government of Ceylon"; contended that to issue (6) should have been added the words "and if so, was the Government of Ceylon authorized to do so?"; that in issue (9) their claim for Rs. 300,000 should have been described as "compensation or damages"; that issue (10) was irrelevant, inasmuch as, although the lake was the property of the Crown, there might be a public right of way over it; and that in issue (12) the question should have been raised whether,

even if the improvements effected by the Crown on Beira lake were mainly for the benefit of the public, individuals to whom they had caused loss were disentitled to redress. There was no interlocutory appeal against the District Judge's order settling the issues, and the objections above mentioned were not strongly insisted upon at the argument before us. I see no reason to think that the issues on which the case went to trial were improper or insufficient. Evidence was led on both sides. The learned District Judge answered all the material issues of law and fact in the respondents' favour, and dismissed the appellants' action with costs.

The first point to be determined is whether the action is one of tort. I think that it is. The plaint, which bears a striking resemblance to the petition—admittedly founded on tort—in *Attorney-General of the Straits Settlements v. Wemyss*,[1] alleges a wrongful and unlawful interference by the respondents with the rights of the public in general and the appellants in particular over Colombo lake, and claims special damages. No useful analogy can be drawn between such a case as the present, in which, as the appellants' counsel conceded at a later stage in his argument, the whole reclamation proceedings are challenged as wrongful and unlawful, and authorities such as *St. James and Pall Mall Electric Lighting Co. v. R.*,[2] turning on damage done in the exercise of powers created by statutes, which also made provision for the payment of compensation. The appellants might perhaps have avoided the objection that their action was one of tort by striking out their allegation that the acts of the respondents were wrongful and unlawful and the claim for damages, and, as was done in *Le Mesurier v. Attorney-General*,[3] praying only for a declaration of title. But this they have expressed no willingness to do. Whether, if such an alteration in the character of the action had been made, it would have been maintainable on other grounds, or could have succeeded on the merits, are points with which we are not here concerned.

If, then, the present action is one of tort, will it lie against the Crown? The burden of establishing the affirmative answer to this question is on the appellants. For the purpose of discharging it, they rely on the following line of argument. Under the Roman law and Roman-Dutch law actions *ex delicto* lay against the Fisc. The Proclamation of September 23, 1799,[4] kept the Roman-Dutch law on foot in Ceylon. Actions *ex contractu* and *rei vindicatio* admittedly lie against the Crown in this Colony; and the language of section 456 of the Civil Procedure Code, 1889, is wide enough to include actions of tort also.

After the best consideration that I can give to the authorities to which we have had access, I am not prepared to hold that the appellants have shown that either under the Roman or the

[1] (1883) *13 A. C. 197.*
[2] (1904) *90 L. T. N. S. 344.*
[3] (1901) *5 N. L. R. 65.*
[4] *S. 2.*

Roman-Dutch law the sovereign power could be sued *ex delicto* or *ex quasi-delicto*. Most of the authorities quoted to us are examined by Sir Charles Layard, then Attorney-General, in his argument in *Le Mesurier v. Attorney-General*.[1] The only instance to be found amongst them of a claim *ex delicto* made against the sovereign power is the payment by the States General of Holland of damages to Philip of Spain for injury done to his house in Rotterdam.[2] Submission to a claim for damages by such a monarch as King Philip II. forms a somewhat slender precedent in support of the contention that, under the Roman-Dutch law, the sovereign could be sued *ex delicto* or *ex quasi-delicto* by the subject. No other precedent has been unearthed by the industry of the Bar in the present case. We were furnished with the following translation of the passage in the Dutch Consultations,[3] which was cited in *Sanford v. Waring*[4]:—

The Treasurer of North Holland was sued for the payment of annuities in arrears for some years which it was his duty to pay on the command of the Prince. The plaintiff having filed his plaint on the due date, the Treasurer pleaded that the claim could not be entertained and prayed for absolution from the instance. Just as the Fisc, which represents the Prince, cannot be sued without *venia* (*agendi*), so a vassal or subject cannot, as a matter of right, sue his Lord or Prince without *venia*, the argument being taken from the analogous case of a freedman and his master. The plaintiff prayed that the plea be rejected because, said he, it is not usual to observe this rule in the case of the Prince, seeing that it is a matter of daily occurrence for the Procureur-General and Treasurer, who are the Fisc, and represent the Prince, to be sued without *venia* being previously obtained. And also seeing that this is peculiarly an exception which cannot be relied on as in itself decisive of the action, but one to which, without prejudice to the same, there should be an answer. The Court ordered the defendant to answer peremptorily, or at least in the alternative.

Thus advised at the Hague on February 7, 1600, and signed R. van Amsterdam.

The appellants' counsel were unable to identify the *venia* referred to in this passage with the "sanction" dispensed with in Ceylon by the Proclamation of January 22, 1801, and even if they could have done so, the passage in question relates merely to a claim for arrears of annuities, and does not show that the Fisc could be sued in delict.

The same observation applies to the following citation from Bort's Domain[5]:—

All disputes with regard to regalia, either between the Prince and private parties, or between private parties themselves, must at the first instance come before the Court of Holland, which has jurisdiction by section 7 of the Instructie of the said Court in all matters concerning domains.

[1] *(1901) 5 N. L. R. 65.* And see *Voet 1, 3, 15; 2, 4, 11; 6, 1, 23; 18, 4, 6; 43, 16, 5.*

[2] *Van Leeu, Kotze 1., p. 12, note (h).*

[3] *Decl. IV. Cons. 123.*

[4] *(1896) 2 N. L. R. 364.*

[5] *XVI. Decl. s. 1.* And see also *Perez., bk. 10, tit. 1, s. 46.*

For aught that appears to the contrary, the disputes here referred to may have involved merely the question whether certain rights were *jura regalia* or not. In any case the passage does not show that any private party could sue the Prince *ex delicto*.

But even if the appellants had been able to demonstrate that the right to sue the Prince in delict existed under the pure Roman-Dutch law, the questions would still remain, in the first place, whether the Dutch had introduced that part of their law into Ceylon, and, in the next place, whether, if so, it had not been superseded, on the British occupation, by that branch of the royal prerogative which confers on the sovereign immunity from action in tort at the instance of the subject. The extent to which the Dutch introduced their own law into the outstations, is a subject of great difficulty, and as yet very partial elucidation.[1] We have no access here to the original authorities, or to the recent Dutch or German commentaries upon them. But it is settled in Ceylon [2] that if any rule of Roman-Dutch law is found to be inconsistent with the well-established practice of the Colony the reasonable inference is that it was never introduced. It is on this principle that the indefeasibility of title derived from the Crown, created by a Constitution of Zeno, and undoubtedly incorporated into the Roman-Dutch law, has been held never to have formed part of the law of this Colony. But, supposing that the Dutch Government could be sued in delict in Holland, and had extended the same right of action to its subjects in Ceylon, the immunity of the English sovereign by virtue of his prerogative from being sued in tort would take effect, unless it were excluded expressly, or by necessary implication,[3] as, for instance, where in Ceylon [4] a clear right, pre-existing under Roman-Dutch law, of prescribing against the Crown was recognized in practice and by subsequent legislation. The appellants' counsel contended that in the case of a conquered or ceded colony no branch of the royal prerogative attached, unless it either was a necessary incident of sovereignty, or could be regarded as a continuation of the prerogative of the conquered or ceding power. The immunity of the English sovereign from being sued in tort is, however, a direct consequence of the fundamental maxim of English constitutional law that "the King can do no wrong," and its extension to all the colonies, whether conquered, ceded, or settled, has been assumed in every case in which the question has arisen.[5] The argument that the existence or extent of any branch of the royal prerogative in a conquered or

[1] See *Burge, 2nd ed., vol. 1., pp. 90 et seq.*

[2] *Silva v. Balasuriya, (1911) 14 N. L. R. 452.*

[3] *Cp. In re Wi Matua's Will, (1908) A. C. 448.*

[4] *D. C. Colombo, 1,245, (1870) Vanderstraaten 83, 84.*

[5] *Siman Appu v. Queen's Advocate, (1884) 9 A. C. 586; Farnell v. Bowman, (1887) 12 A. C. 643,* in which counsel in supporting the appeal admitted that, but for the special legislation on which he relied as conferring a right of action in tort against the Crown, the case would be unarguable; and *Attorney-General of the Straits Settlements v. Wemyss, (1888) 13 A. C. 197.*

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ceded colony depends on the question whether it can be linked on to a prerogative of the same character and extent existing before the conquest or the cession is, I think, disposed of by authority. The cases of *Exchange Bank of Canada v. Reg.*[1] as interpreted by the Privy Council in *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*[2] and *New South Wales Taxation Commissioners v. Palmer*[3] show, for instance, that the priority enjoyed by the sovereign over subject-creditors in respect of debts of equal degree will, unless limited by local law or waiver, apply in its fulness in a conquered or ceded colony, although it was not existent in, or was limited by, the antecedent law of that colony.[6] The appellants' counsel strenuously contended that the observations of Lord Watson, as to the extent of the royal prerogative in the colonies, in delivering the judgment of the Privy Council in *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*,[2] were controlled by the context, and applied only in cases, such as *Reg. v. Bank of Nova Scotia*,[4] in which the property in suit was vested in the Crown by Imperial legislation. In *In re Oriental Bank Corporation*,[6] however, Chitty J. said: "No distinction was drawn in argument, and very properly, between the rights of the Crown suing in respect of Imperial rights and the rights of the Crown with regard to the colonies." But the assumption of fact on which this argument rests is, I think, unfounded. Lord Watson's language is perfectly general. He was disposing of a case in which the question was whether, in the distribution of powers effected by the British North America Act, 1867, the Provincial Government had priority over other simple contract creditors, or whether that branch of the prerogative had been reserved for the Dominion Government. The Provincial Governments had possessed that prerogative before the Act; the only question was whether the Act had taken it away. It was under these circumstances that Lord Watson made use of the following language, and incidentally explained *Exchange Bank of Canada v. Reg.*,[5] which might have been thought inconsistent with it:—

> The prerogative of the Queen, when it has not been expressly limited by local law or statute, is as extensive in Her Majesty's colonial possessions as in Great Britain. In *Exchange Bank of Canada v. Reg.*[5] the Board disposed of the appeal on that footing, although their Lordships reversed the judgment of the Court below and negatived the preference claimed by the Dominion Government upon the ground that by the law of the Province of Quebec the prerogative was limited to the case of the common debtor being an officer liable to account to the Crown for public moneys collected or held by him.

[1] (1886) 11 A. C. 157.
[2] (1892) A. C. 437.
[3] (1907) A. C. 179.
[4] 11 S. C. R. 1.
[5] (1886) 11 A. C. 157.
[6] Cp. *In re Henley & Co.*, (1878) 9 Ch. D. 469; *In re Oriental Bank Corporation*, (1884) 28 Ch. D. 643; *In re Bateman's Trusts*, (1873) L. R. 15 Eq. 355.

Has, then, the immunity of the sovereign from liability to be sued in tort been abandoned, either expressly or by necessary implication, in Ceylon? No such abandonment can be inferred from the language of section 2 of the Proclamation of September 23, 1799. That section merely made provision for the continued administration of justice in accordance with the pre-existing law. Section 117 of Ordinance No. 11 of 1868 was interpreted by the Privy Council in *Siman Appu v. Queen's Advocate* [1] as creating no new rights but only regulating procedure. Section 456 of the Civil Procedure Code, 1889, is an enactment of the same character. It provides in effect that actions which can be brought against the Crown in Ceylon are to be instituted against the Attorney-General as representing the Crown. To interpret the section as if it also enacted that any claim for relief falling under the definition [2] of " action " in the Civil Procedure Code could be made against the Crown would do violence both to its language and to its spirit. If the law had recognized a right of action against the Crown for tort, we might have expected that some instances at least of its successful exercise could have been found. Not one is forthcoming. The mere absence in such a case as this of " ancient precedents " is, as Lord Blackburn observed in *Thomas v. Reg.*,[3] "a strong argument." But there is more. There is an almost unbroken current of judicial opinion and authority to the effect that such an action will not lie. The point was raised in *Fraser v. Queen's Advocate.*[4] Fraser was postmaster of Galle by Colonial, and packet agent of Galle by Imperial, appointment. He was suspended under the Colonial Regulations, and sued the Queen's Advocate as representing the Crown for arrears of salary. Creasy C.J. and Stewart J., whose decision was affirmed by the Collective Court, held that the claim against the Queen's Advocate in respect of salary as packet agent could be supported only by an allegation that the Colonial Government, by suspending Fraser, " had prevented him from fulfilling the duties of his packet agency, whereby the Imperial Government had refused to pay his salary," and added (it was unnecessary to decide the point), " we greatly doubt whether such an action was ever maintainable here." In *Don Hendrick v. Queen's Advocate*,[5] the original record of which I have called for and examined in view of the fact that the report of the case in *4 S. C. C. 76* purports only to give a " substantial " reproduction of the judgment, and of the contention of the appellants' counsel that, notwithstanding the sense in which Burnside C.J. (the Queen's Advocate sued in the case), Dias J., and Clarence J. interpreted it in *Newman v. Queen's Advocate*,[6] it was no authority for the proposition that the Crown cannot be sued in tort in Ceylon, the plaintiffs alleged that the Government Agent had " unlawfully

[1] *(1884) 9 A. C. 586.*
[2] *S. 5.*
[3] *(1872) L. R. 10 Q. B. 31.*
[4] *(1868) Ram. 66-68, 216.*
[5] *(1881) 4 S. C. C. 76.*
[6] *(1884) 6 S. C. C. 29.* See *Jayawardene v. Q. A., (1881) 4 S. C. C. 77.*

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and unjustly " ordered the crops of their paddy lands to be taxed at a rate which was too high for private property, and which would create a presumption that they belonged to the Crown, and, in accordance with the settled practice,[1] sued the Queen's Advocate as representing the Crown for declaration of title and damages. There was no averment that the plaintiffs had been disturbed in their possession, and accordingly the Queen's Advocate demurred to the libel, maintaining that it disclosed no cause of action. The District Judge over-ruled the demurrer, treating the action as one *quia timet*. On an appeal by the Queen's Advocate, the Collective Court (Cayley C.J., Clarence and Dias JJ.) upheld the demurrer. The judgment, which is reported *verbatim* and not merely in " substance " in *4 S. C. C. 76*, is short, and was apparently not reserved. " The cause of action," said Cayley C.J., " is an alleged ' unlawful and unjust order ' made by the Government Agent. Whether this order was carried out or not is not stated, but what is complained of is clearly an alleged tort on the part of the Government Agent, for which the Crown is not responsible." Although the Judges do not say so in terms, the *ratio decidendi* of this case obviously was that nothing had occurred to enable the plaintiffs to claim a declaration of title, and that an action in tort would not lie against the Crown.

The case of *Newman v. Queen's Advocate*[2] is a decision of the Collective Court, to the effect that an action in tort will not lie against the Crown in Ceylon. The plaintiff sued the Queen's Advcate for damages for personal injuries sustained by him while travelling as a passenger on the Ceylon Government Railway. Section 13 of Ordinance No. 10 of 1865 imposed upon the Government of Ceylon liability for loss and damage to goods in course of transit by rail, but was silent as to passengers. The case was argued in appeal before Burnside C.J., Clarence and Dias JJ. All three Judges were agreed that a pure action of tort would not lie against the Crown, and Burnside C.J. and Dias J. held that the plaintiff's action must be dismissed. Clarence J. dissented on the ground that the action was only one of tort based on contract, and that in such a case the Crown might be held liable. Even the dissent of Clarence J. will not help the appellants here. The judgments of Burnside C.J. and Dias J. are direct decisions against them. The effect of this chain of authorities was recognized in *Siman Appu v. Queen's Advocate*,[4] where, as the Privy Council state,it was conceded on all hands that an action in tort will not lie against the Crown in Ceylon. In *Sanford v.Waring*,[5] and again in *Le Mesurier v.Layard*,[6] Bonser C.J. raised, without deciding, the question whether, notwithstanding all the previous decisions and *dicta* on the point,

[1] *(1881) 4 S. C. C. 77.*
[2] *(1884) 6 S. C. C. 29.*
[3] And see section 18 of Ordinance No. 9 of 1902.
[4] *(1884) 9 A. C. 586*, and *Cp. Farnell v. Bowman*, *(1887) 12 A. C. 643.*
[5] *(1896) 2 N. L. R. 361.*
[6] *(1898) 3 N. L. R. 227.*

the Crown was not liable to be sued here in tort after all. In support of this view, the learned Chief Justice referred to the Roman-Dutch authorities above mentioned, and particularly to the submission of the States General to the claim of Philip, and also to the decisions of the Privy Council in *Attorney-General of the Straits Settlements v. Wemyss* [1] and *Farnell v. Bowman*.[2] In *Le Mesurier v. Attorney-General*,[3] however, Bonser C.J. modified the view that he had expressed in *Sanford v. Waring*,[4] to the extent of admitting that its soundness must be regarded as at least doubtful, and suggested that the Legislature should bring the law of Ceylon into line with the enactments held by the Privy Council in *Attorney-General of the Straits Settlements v. Wemyss*[1] and *Farnell v. Bowman*[2] sufficient to make the Crown liable to be sued in tort in the Straits Settlements and New South Wales respectively. No such legislation has been enacted. I have already dealt with the Roman-Dutch authorities on which Bonser C.J. relied. I venture to think that they do not justify the inference that he drew from them. The special legislation which formed the *ratio decidendi* in *Attorney-General of the Straits Settlements v. Wemyss*[1] and *Farnell v. Bowman*[2] is of a character very different from section 117 of Ordinance No. 11 of 1868 and section 456 of the Civil Procedure Code, 1889. In each case it directly created rights of action against the Crown, and its language was wide enough to include actions of tort. Section 117 of Ordinance No. 11 of 1868 and section 456 of the Code of 1889 merely prescribe the procedure by which rights of action, already existing, against the Crown are to be enforced. The appellant's counsel argued that if, as the Privy Council held in *Siman Appu v. Queen's Advocate*,[5] section 117 of Ordinance No. 11 of 1868 was wide enough to include actions *ex contractu*, there was no logical reason why that section, or section 456 of the Civil Procedure Code, 1889, should not extend to torts also. But in *Siman Appu v. Queen's Advocate* [5] the Privy Council, as I understand their judgment, did not hold, and would not have been prepared to hold, that section 117 of Ordinance No. 11 of 1868 would by itself have sufficed to create a right of action *ex contractu* against the Crown. On the contrary, they held that, so far from creating new rights, it merely regulated the procedure as to existing rights, and that, therefore, the recognition, in conformity with the established practice of the Courts in Ceylon, of actions against the Crown *ex contractu* by no means involved as a logical consequence the conclusion that the Crown could be sued in tort. I think that the real explanation of the development of the law in Ceylon as to suing the Crown is that the Courts have gradually enabled the subject in Ceylon to obtain by action against the Crown the relief that the subject in England obtains by petition of right,

[1] *(1888) 13 A. C. 197.*
[2] *(1887) 12 A. C. 643.*
[3] *(1901) 5 N. L. R. 65.*
[4] *(1896) 2 N. L. R. 361.*
[5] *(1884) 9 A. C. 586.*

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but nothing more. The extent of the relief obtainable by petition of right is well established. In *Tobin v. Reg.*[1] the suppliant's ship had been seized and destroyed by a naval commander under the authority of the Crown in pursuance of statutes for the suppression of the slave trade. The Court of Common Pleas (Erle C.J., Williams, Willes, and Keating JJ.) held that a petition of right would not lie, *inter alia*, because the action was one of tort. Sir Hugh Cairns had argued for the suppliant that " a petition of right does lie to recover unliquidated damages for a wrong. Not indeed for such a wrong as an assault, but if the Crown is to be held responsible for the seizure of chattels, the Crown must continue to be liable where the wrong cannot be recompensed by the return of the chattels." This contention was over-ruled by the Court. " Whatever," said Erle C.J., " was the form of procedure, the substance seems always to have been the trial of the right of the subject as against the right of the Crown to property or an interest in property which had been seized for the Crown.

" A petition of right does not lie to recover damges from the King for a mere wrong supposed to have done by him. Not a single instance of a recovery of such damages from the King has been cited." In *Feather v. Reg.*[2] the suppliant had obtained a patent for improvements in the construction of ships. The Admiralty Commissioners had infringed it. Cockburn C.J., Crompton, Blackburn, and Mellor JJ., followed *Tobin v. Reg.*,[1] and held that a petition of right would not lie. " The only cases," said Cockburn C.J., " in which the petition of right is open to the subject are where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money; or where the claim arises out of a contract as for goods supplied to the Crown or to the public service..... No case has been adduced ..... in which a petition has been brought in respect of a wrong properly so called."

In *Thomas v. Reg.*,[3] Blackbrun, Quain, and Mellor JJ. held that a petition of right will lie for breach by the Crown of a contract resulting in unliquidated damages. "It appears," said Blackburn J., " that at the time of the passing of the Act " (*i.e.*, the Petition of Right Act, 1860) " there was a general impression that a petition of right was maintainable for a debt due or a breach of contract by the Crown."

" The argument against the petition of right lying in such a case is, we think, entirely grounded on the absence of ancient precedents. And that is undoubtedly a strong argument." It was contended in *Thomas v. Reg.*,[3] however, that the remedy was available only in cases in which the freehold was concerned. But the Court negatived

[1] *(1864) 33 L. J. C. P. 199.* [2] *(1865) 6 B. & S. 257.*

[3] *(1874) L. R. 10 Q. B. 31.*

this contention on the authority of *The Bankers'* case.[1] The *Bankers'* case [1] was regarded as a precedent in point. *Thomas v. Reg.*[2] was followed in *Windsor v. Annapolis Ry. Co.*,[3] during the argument of which Lord Halsbury said:—

> The King can do no wrong means that he cannot commit a tort—he can do wrong in other senses.

The remedy by petition of right has not, so far as I can see, been carried beyond the point at which these authorities leave it, and would not extend to such a claim as we have to deal with in the present action. If the analogous right granted to private individuals by the Courts in Ceylon is to be made more comprehensive, the enlargement of its scope must be the work of the Legislature. I hold that the appellants' action is not maintainable against the Crown.

The next contention on the appellants' behalf was that, even if this is an action of tort, and such an action is not maintainable against the Crown, it is maintainable against the Government of Ceylon. The appellants, however, have not sued the Government of Ceylon. The action is instituted against "His Majesty's Attorney-General," and in the notice of action (D 39) sent by the proctors of the appellants to the Attorney-General, in terms of section 461 of the Civil Procedure Code, 1889, they expressly say that he will be sued "as representing the Crown, for the Crown having filled up that portion of the Beira lake in Colombo lying between Dhoby island and the Pettah railway station, whereby free navigation across the lake up to the bank near the Pettah railway station has been obstructed and the right of the (appellants) and other members of the public to such navigation has been injuriously affected, and whereby the (appellants) have been prevented..... from conducting and carrying on their steamboat service across the lake."

But the matter is concluded, so far as we are concerned, by the decision of the Collective Court in *Le Mesurier v. Layard.*[4] In that case the plaintiff sued the Attorney-General, as representing the "Government of Ceylon," for arrears of salary. The Attorney-General objected that he represented not the Government of Ceylon but the Crown. The District Judge upheld this objection and dismissed the action. The Supreme Court (Bonser C.J., Withers J., Lawrie J. dissenting) reversed his decision on the ground that for most purposes the expressions "Government of Ceylon" and "Crown" are identical, and that an action against the Government of Ceylon is an action against the Crown. Sections 456-462 of the Civil Procedure Code strongly support this view of the law, referring as they do throughout—except in section 458, to which I will revert in a minute—to the "Crown" as the party whom the

[1] *14 How. St. Tr. 6.*
[2] *(1874) L. R. 10 Q. B. 31.*
[3] *(1886) 11 A. C. 607.*
[4] *(1898) 3 N. L. R. 227.*

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Attorney-General is to represent. Moreover, if the distinction which the appellants seek to draw between the "Crown" and the "Government of Ceylon" is sound, this curious result follows, that the latter is not entitled to the notice of action which section 461 secures even to a village headman sued in respect of any act purporting to have been done by him in his official capacity. It was argued that section 458 of the Civil Procedure Code, which enacts that "the Court, in fixing the day for the Attorney-General to answer to the plaint, shall allow a reasonable time for the communication with the Government through the proper channels" told in favour of the appellants' contention on the point under consideration. I do not think so. Section 458 merely provides for the ordinary contingency of the Attorney-General requiring, on behalf of the Crown, to consult the head of a department, or the Government Agent of a Province, as to the circumstances under which any action arises or as to the defence which ought to be set up, before filing answer. I am unable to regard as serious the contention of the appellants' counsel that the Government of Ceylon can be treated as if it were a statutory corporation, such as the Municipal Council of Colombo, entirely distinct from, and entitled to none of the immunities of, the Crown, or a mere department of Government, such as the Commissioners of Public Works (*Graham v. Public Works Commissioners*[1]). The appellants' counsel further relied on *In re Holmes*[2] and *Fraser v. Queen's Advocate* [3] in support of his contention that the Government of Ceylon does not represent the Crown. With *Fraser v. Queen's Advocate* [3] I have already dealt. *In re Holmes*,[2] in so far as it has any bearing on the question, is rather against the appellants than in their favour. There a demurrer to a petition of right in England in respect of land in Canada was allowed on the ground that the Queen was as much resident in Canada as in England and that the suit ought to have been brought in Canada, where the land was situated.[4] The remark already made in regard to actions of tort against the Crown is applicable, *mutatis mutandis*, here. If there had been any reasonable probability of getting rid of the difficulty of suing "the Crown" in tort by making "the Government of Ceylon" the defendant to the action, the experiment would have been tried long before *Le Mesurier v. Layard*.[5] The unbroken practice in regard to actions in contract has been to sue formerly the Queen's Advocate, and now the Attorney-General, as representing the Crown.[6]

The question whether the present action can be maintained against the second and third respondents presents more difficulty. The learned District Judge has held that there is no necessity, in view of the finding that the Crown is not liable, to consider the position of the second and third respondents, "for they are the

[1] (1901) 2 K. B. 781.
[2] (1861) 2 J. & H. 527.
[3] (1868) Ram. 63-68, 816.
[4] See *Reiner v. Salisbury* (*Marquis of*, (1876) 2 Ch. D. 385.
[5] (1898) 3 N. L. R. 227.
[6] See authorities cited above.

servants of the Crown, and have performed the acts complained of on Crown property under the instructions of the Crown." The case of *Raleigh v. Goschen*,[1] however, shows—and the respondents' counsel did not contest this—that the appellants might, if they had chosen to do so, have sued the second and third respondents as individuals for any unlawful and wrongful act committed by them, even although they had only acted on behalf or by the authority of the Crown. It is clear, however, both from the caption and from the language of the plaint, in which they are said to have acted as "engineers employed by the Government of Ceylon," and in the prayer of which the Attorney-General and they are described without distinction as "the defendants," that these respondents were sued in their official capacity. The action could not be held to be maintainable against them without an amendment of the plaint, and without their having a fresh opportunity of giving evidence on their own behalf. In *Raleigh v. Goschen*,[1] a motion for a similar amendment was refused. There, no doubt, the facts were different, as the plaintiffs proposed not merely to sue the original defendants individually as well as officially, but to bring new parties. In opposing the motion, however, Sir Richard Webster, then Attorney-General, said: "It is a serious thing to allow actions of this kind, which are very common, to be cured by amendment," and Romer J., in upholding the objection, observed that what the plaintiffs were seeking to do was to change one action into another of a substantially different character. I think that these considerations hold good here, and that no amendment of the plaint with a view to making the present action maintainable against the second and third respondents should be allowed. I am all the less disposed to sanction such an amendment, because the appellants' counsel when challenged by the Solicitor-General at the commencement of the trial in the District Court to say whether or not the second and third respondents were sued in their official capacity refused to make any statement on the subject, and also because, even as against these respondents, the action would, in my opinion, fail on the evidence.

The case may be considered on the merits more briefly. It is difficult not to feel that what the appellants would really have desired to establish is a right of ferry between the points A and B, referred to in the plaint and in the evidence, *i.e.*, from Pettah railway station to Slave Island. No such claim, however, is made in the plaint, and no right of ferry could have been claimed successfully, in view of the fact that, if for no other reason, the ferry service carried on by the appellants between the points above-mentioned was admittedly not an exclusive one. We must take the appellants' case, therefore, in the form in which it has been presented to us. They come forward as members of the public to vindicate an alleged

[1] *(1898) 1 Ch. 73.*

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public right of navigation over Beira lake, and plead the interruption of their ferry service between points A and B as special damage. It is obviously essential to the establishment of this claim that the appellants should prove that the public have rights—in the proper sense—of navigation over the lake. The evidence adduced for this purpose falls under three categories: evidence as to the origin and character of the lake itself, acts of public user, and the proclamation by the Governor of the lake as a " principal lake " under Ordinance No. 8 of 1848. I will consider each of these categories in turn.

The appellants led very little *vivâ voce* evidence as to the origin and character of the lake. Mr. Coombe, their Chief Engineer, who has only been in Ceylon since 1900, said: "I know only by hearsay the past history of the lake." Mr. Stephens, their Manager, who came to Ceylon in 1880, says nothing on the subject. Mr. Raffel, a Burgher in the employment of Messrs. Aitken, Spence & Co., who was born in Colombo and has spent all his life there, says: "I know as much of the history of the lake as any one," but gives no details, except that it " was called the ' lung of Pettah.' " Mr. F. W. Bois had known the lake for nearly forty-seven years, and gives the following evidence: " The boats used to go along the moat through the Fort to the harbour; the moat was part of the fortifications, and there was the sally port. Colombo had a real fort then—an old Dutch fort. From the lake the boat entered through the sally port into the portion of the moat inside the Fort. The old Fort canal was a very ancient Dutch one. I remember its being filled up. The old moat was certainly artificial, and I infer that the old canal was not a part of the lake, but an artificial one, for it was built up on both sides."

Mr. Buckney, the son of the founder of the ferry service, came to Ceylon in 1878. He says nothing on the subject, nor does Mr. MacMahon, the appellants' Traffic Manager, nor Mr. de Silva, nor Mr. Weinman.

Mr. Loos, Proctor, said in cross-examination: " As a matter of history, I have heard the Dutch built the lake—they excavated the lake; the excavated earth was used for building the forts. The canal which ran into the Fort from the lake must also have been made by the Dutch at the time the lake was made."

This evidence was objected to, and Mr. Loos qualified it in re-examination: " I cannot say in what history I read that the Dutch excavated the land and made the lake. I heard so."

Colonel Symons said: " I believe the portion of the lake where the rope ferry to the Club Chambers was, and the ground on which the Colombo Club stands, are all Military reserve grounds—Colonial Military grounds. The permission of the Military had to be obtained for building the Colombo Club building. I believe the Military are entitled to pull down the Club building for Military purposes."

In re-examination he explained that he had no specific knowledge on the subject.

The late Mr. Justice Wendt said: "It is possible to get from the lake through the canals into the Kelaniya river. I have often gone that way. The Kelaniya river is connected with the lake by a canal—the San Sebastian canal; there is a lock, too."

Sir William Mitchell said: "The canal was made so long ago that I cannot say if it was a part of the lake; there was a moat round the Fort which had communication with the lake. I always regarded that canal as a portion of the lake, and I always thought that I had as much right to use that canal as I had to use the lake. We did not resent the filling up of the canal because it got very low and stank badly. The filling of the canal was an interference with what we thought were our rights, but we did not resent it as it had become a nuisance. At that time we would have resented a filling up of the lake."

This exhausts the appellants' *vivâ voce* evidence as to the origin and character of Beira lake. Even excluding those portions of it which tend to support the contention of the respondents that the lake is Crown property, it obviously is insufficient to raise any kind of presumption that the lake is one over which public rights of navigation would exist. On the other side, we have the evidence of Mr. Gamon, Warrant Officer of the Royal Engineers, that the portion of the lake between the points A and B has always been considered Military property; and the opinion of Mr. Anthonisz, the Government Archivist, based on the books and maps which he mentions, that "the Colombo lake is an artificial lake formation, built by the Portuguese at the time they built the line of ramparts referred to in Ribeiro's book, and enlarged by the Dutch." Mr. Anthonisz was severely cross-examined as to the grounds of this opinion, and confronted with the works of Do Couto and Barros, who wrote before Ribeiro, and who say nothing as to the building of an artificial lake, and also with an article by Commander Somerville, R.N., in "Spolia Zeylanica" (P 13), in which the view is developed that Beira lake is a lagoon like the well-known lakes of Negombo and Puttalam.

Do Couto states, however (pp. 299, 303, Ferguson's translation, D 31), that Raju, King of Ceylon, drained the lake at the time of the siege of Colombo in 1587—a feat scarcely consistent with Commander Somerville's theory that it was a large lagoon. No materials other than those placed before the District Judge with reference to the origin and history of Beira lake were brought to our notice in the argument of the appeal. There is no need to express any opinion of our own on the subject. Suffice it to say that for anything that the appellants have shown to the contrary Mr. Anthonisz's theory may be quite correct.

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The evidence of user consists of various ferry services carried on for hire successively and sometimes simultaneously by native canoes and steamboats, including the service of the appellants themselves, the transport of produce by mercantile firms with lake frontages, an extensive user of the lake for pleasure purposes by the owners of properties on its banks, and an equally extensive user of portions of it by other sections of the community without any riparian interests, *e.g.*, by boys for bathing, by dhobies for washing clothes, and by carters for washing their bulls and carts. All these kinds of user have been long continued, and, for the most part, uninterrupted.

We are not concerned in the present case with the claims of merchants with lake frontages or riparian owners. The appellants admit that they have no right of ferry. Their ferry service has to be considered, therefore, merely as evidence of the alleged public right of navigation. On the one hand, it has been exercised continuously and profitably by the appellants and their predecessors in title at least from 1874 downwards. On the other hand, we find the appellants or their predecessors in title consistently admitting the title of the Military authorities to a portion of the lake traversed by their boats between the points A and B, undertaking (D 6) to discontinue the pier, which they had erected at point B, at any time that the Military authorities might consider it necessary, closing the service of boats for twenty-four hours every year on a day fixed by the Military authorities in order that they might never be in a position to claim a "right of way over Military property in Colombo, including the lake area," presuming (D 5) that the native canoe service would be closed on the same day, and acknowledging thereby the right of the Military authorities to prevent navigation over the Military reserve, and accepting from the Municipal Council, to whom the lake was handed over by Government in 1888, a lease (P 9, No. 427/2,555) of the plot of land at the Pettah terminus on which their boathouse and enginehouse had been erected, containing a recital that the premises were being leased "with the sanction of Government." It would be impossible in the face of this evidence, even if it stood alone, to hold that the appellants had shown that their navigation of Beira lake for the purposes of their ferry service was otherwise than permissive. The same observation applies *a fortiori* to the use of the lake by other classes of the community for boating, bathing, and washing carts and bulls. But there is affirmative evidence, contributed partly by the witnesses for the appellants themselves, showing that Government has throughout, and without protest, till the present action was instituted, dealt with the lake in a manner entirely inconsistent with the appellants' claim.

The following passages from the evidence will suffice to make this clear:—

The Government (says Mr. Loos) did whatever they wanted to do with the lake without any protest from any one. St. John's canal went across Norris road, and boats that came from Slave Island crossed

the land and went right on into the canal; there used to be a bridge in Norris road formerly. That canal was a continuation of the lake. The Government filled up that canal. I did not raise any protest. It did not strike me that any right of mine was being interfered with. I had no boats at that time; if I had had, perhaps I might have protested. I never heard that the public interfered with the filling up of the canal. There was no regular landing stage on the lake before the steam ferry-boats started. A canoe could be hired from any part of the bank, and the passengers could land on any part of the banks of the lake.

Government filled up a large part of the lake when the railway line was built, and passengers then went across the railway line to get to the boats. The Government has reclaimed considerable portions of the lake and possessed the reclaimed portions as Government property. Near the Royal College the lake extended up to its boundary. The Government reclaimed that portion of the lake and made the road which is now there on the spot where formerly the lake stood.

This evidence is qualified in re-examination by the statement that:—

Until recently only very small portions of the lake were filled up, and the free use of the lake by the public was not interfered with.

I know (says Mr. de Silva) the present Norris road. Where it stands now used formerly to be the lake, in parts. It is now Government property. I mean the railway line is Government property. No one objected to the Government taking over that portion. That was since 1874; I cannot give the exact date. The building of the railway caused me much inconvenience in getting to the lake, but I raised no objection. As long as I had access to the water I did not mind; it did cause me inconvenience. After 1874 I ceased to live in the Pettah. I then lived in Slave Island.

Q.—You remember that the Government shifted bathing-places and washing-places from one place and erected them in other places?

A.—Oh, yes; oh, yes. It may have been the Government or the Municipal Council that shifted the bathing-places.

The Government (says Mr. Justice Wendt) has dealt with large portions of the lake in various ways, reclaiming portions for the railway and the road near the Royal College. The railway is Government property. I did not object to the Government's action in the matter, nor did any one else, so far as I can remember. Quite close to my house a large bit of the lake between Vauxhall street and Darley road has been recently filled up and converted into a park by the Municipal Council, I believe. While the public had the use of the lake, the Government also filled up and reclaimed portions of it without any protest from any one that I am aware of.

In re-examination, Mr. Justice Wendt added:—

The building of the railway did not prejudice my interests in any way. The bit of the lake filled up near Vauxhall street was a bit of stagnant water.

The Government (admits Mr. Julius) as a matter of right have reclaimed large portions of the lake and taken them for themselves. I use the Galle Face esplanade without permission as a matter of right. No one has interfered with me. I say I have used it as a matter of

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right. The Military authorities might endeavour to prevent my doing so. I do not know that they can prevent the esplanade being used except for Military purposes. I have never heard that the Military authority claims a large part of the lake.

Q.—As a matter of fact, it might be that the Military authorities claim a large part of the lake ?

A.—I cannot say that the Military authorities have no right over the lake.

Sir William Mitchell explains the acquiescence of the public in the filling up of the canal on the ground that " it got very low and stank very badly," but admits also the reclamation by Government of large portions of the lake for railway purposes.

This body of evidence, most damaging in itself to the appellants' case, is corroborated by affirmative evidence, oral and documentary, of the sale by Government, or settlement on certificate of quiet possession, of eighteen out of the twenty lots of land surrounding the lake, and of the unchallenged reclamation of large areas of the lake, prior to 1874 and subsequently, for the erection of the Government Factory, the Gasworks, the Electric Light Station, the Railway, and the making of streets and parks.

The appellants have, in my opinion, failed to establish any such acts of user of Beira lake as will suffice to make good the alleged public rights of navigation over it. Even had the fact been otherwise, the appellants' case, in my opinion, must fail. They have no ferry, are not riparian owners, and, on the evidence, would have no such rights of passage different from those of the public at large over the lake as could constitute special damage in the eye of the law. Not very much help perhaps is to be derived in a case like the present from English analogies, but it might be argued that if, as is contended by the respondents, the lake is an artificial creation and is the property of the Crown, the decision of the House of Lords in *Simpson v. Attorney-General* [1] would have a more direct application to the circumstances than any of the decisions to which I will now refer. We were strongly pressed on behalf of the appellants with the judgment of the Court of Queen's Bench in *Marshall v. Ulleswater Company* [2] that a public right of navigating an inland lake includes a right of disembarking and coming on shore at any place where persons navigating a river would have a right to come on shore, and that, therefore, if there be an obstruction, although in shallow water, which prevents persons landing where they are entitled to land, that is a public nuisance; and also with the rulings of the House of Lords in *Bristow v. Cormican* [3] and *Johnston v. O'Neill* [4] to the effect that the Crown has no right, as a presumption of law, to the bed and soil of non-tidal inland lakes. There is,

[1] (1904) *A. C. 476.*

[2] (1871) *L. R. 10 Q. B. 166;* and *Cp. Lyon v. Fishmongers' Co.*, (1875) *L. R. 10 Ch. 691;* and see *Bourke v. Davis*, (1890) *44 Ch. D. 110.*

[3] (1878) *3 A. C. 641.*

[4] (1911) *A. C. 552.*

however, a wide difference between the character of Ulleswater and Lough Neagh—the lakes with which those cases were concerned—and that of the Beira lake as it appears on the evidence before us. Moreover, even if the principle which the rulings in question affirm is applicable under the common law and the statute law of this Colony—an assumption strongly contested by the respondents' counsel—the evidence as to the manner in which Government has dealt with the Beira lake would, I think, be sufficient to exclude it.

I have reserved for considertion last of all the appellants' contention that the proclamation of the lake on October 23, 1848 (P 18), under section 2 of Ordinance No. 8 of 1848—an enactment, the effect of which is preserved by section 8 of Ordinance No. 10 of 1861—as a " principal lake " constituted a dedication of it for all purposes to the public. That contention is, I think, unsound. By virtue of section 2 of Ordinance No. 8 of 1848 the lake, under the Proclamation of October 23, 1848, is merely to be " deemed " a " principal lake " for " the purposes of the Ordinance." None of those purposes can fairly be said to involve any dedication of the lake to the public. Section 33 of the Ordinance points to the conclusion that the object of section 2 was to enable the Governor to secure for any road or lake dealt with by Proclamation under it preferential treatment at the hands of the Provincial Road Committee. The appellants' counsel relied on the clause in the preamble, which recites as one of the objects of the enactment " the improvement of the means of communication by land and by water in this Island," and also on the substitution in section 8 of Ordinance No. 10 of 1861 of the words " principal thoroughfare " for " principal lake " in the earlier enactment. The decision of the Government, however, to apply the provisions of the Ordinance of 1848 to Beira lake is quite consistent with an intention to preserve as thoroughfares only certain lines of communication, such as that between the warehouses and the entrance to San Sebastian's canal, and by no means involved a general dedication of the lake to the public. I have made this observation on the assumption that the Ordinance in question did effect some kind of dedication of the lake. But, in my opinion, that assumption is itself untenable. Neither Ordinance No. 8 of 1848 nor Ordinance No. 10 of 1861 empowers the Governor to make such a dedication, or vests the " principal lakes " or " principal thoroughfares," with which they deal, in anybody. They merely create machinery for the maintenance and improvement of such thoroughfares. The case for the appellants on this question cannot, I think, fairly be put higher than to say that the proclamation of a lake under section 2 of Ordinance No. 8 of 1848 or section 8 of Ordinance No. 10 of 1861 involves a recognition by the Government of some pre-existing public rights of passage over it. But from this point it is a far cry to the inference that the proclamation of a lake under the Ordinances above referred to

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confers upon the public legal rights of navigating it in every direction. There is nothing in the Ordinances in question to warrant any such inference, and the manner in which Government has dealt with the lake since 1848 and 1861 clearly shows that nothing of the kind was either effected or contemplated.

The respondents' counsel pressed strongly upon us two additional points, which I do not propose to decide; in the first place, that, adopting the later Roman law [1] and the Roman-Dutch law,[2] the Legislature of this Colony [3] had made, *inter alia*, all lakes State property; and, in the next place, that the approval of the scheme by the Legislative Council would bar any right to relief that the appellants might otherwise have. I am not much impressed with the latter argument, and it is unnecessary to say anything as to the former.

I hold that the appellants' case fails on the merits, as well as on the question whether the action will lie against any of the respondents.

It only remains to express our indebtedness to counsel on both sides for the industry, learning, and ability placed at our disposal in deciding this case. The argument of the appeal was delayed owing to causes over which neither the Supreme Court nor the Bar had any control.

I would dismiss the appeal with costs.

ENNIS J.—

This was an action for a declaration that the plaintiff company had a right to navigate its boats on the Beira lake, Colombo, and more especially between the points marked A and B on the plan filed with the plaint; for an injunction restraining the defendants from further obstructing the navigation, and to remove the present obstruction; for damages, or, in the alternative, for compensation or damages.

The action has been brought against His Majesty's Attorney-General for Ceylon and Mr. Cole Bowen and Mr. Bakewell, Engineers in the Ceylon Government Service.

The Beira lake, commonly known as the Colombo lake, is a piece of water some 416 acres in extent, which members of the public have been in the habit of passing in canoes and boats, and at different spots along the shores certain communities of dhobies have been in the habit of washing clothes, while at other spots members of the public have been in the habit of bathing and washing their carts, horses, and cattle. The lake is of unknown antiquity, and how formed is a matter of speculation.

[1] *Sohm's Institutes, 3rd. ed., 189, 303.*

[2] *Voet 2, 4, 1, 49, 14, 3; Heineccius, s. 328; Leyser, ss. 254, 257; Groenewegen, De Leg., pp. 18, 19; Van Leeu. (Kotze) I., 151, 152.*

[3] *Cp.* Ordinance No. 12 of 1840, ss. 6, 10; Ordinance No. 8 of 1848, ss. 67, 68, 69; Ordinance No. 10 of 1861, ss. 84, 89, 90; Ordinance No. 7 of 1887, ss. 72, 73, 160, 165.

In 1874 a ferry service of boats began to run regularly between the Pettah and Slave Island (the points marked A and B on the plan). About the same time the Government filled some portion of the Pettah side of the lake and constructed the railway over the part filled in, and first a footbridge, then a level crossing, gave access to the Pettah terminus over the railway. The plaintiff company are now the owners of the ferryboats. The whole of the land at the Slave Island terminus was land reserved by the Government for Military purposes, and the ferry pier at that terminus stood in the lake. The proprietors of the ferryboats paid one rupee per year to the Military authorities for the use of the pier and a shed, and another rupee for the use of a pathway over the Military land from the pier to the high road. The pier and pathway were annually closed for one day to prevent any claim to a right of way arising.

Similarly, on the Pettah side the land adjacent to the lake belonged to the Government, the ferryboat proprietors paid rent for their landing stage, and the ferry service appears (D 5) to have been closed at that end also for one day each year. At one period the proprietors of the ferryboats had a lease (P 9, No. 427/2,557) from the Municipal Council, granted with the sanction of the Government, for the Pettah end landing place, but the lease was not renewed on its termination in 1904. Early in 1909 it would appear (P 7) that the Government and the plaintiff company entered into a new agreement for a temporary lease of a spot on Dhoby island, under which the plaintiffs were paying rent, as seen from Mr. Stephen's evidence, at the commencement of the suit.

In 1907 a Commission was appointed to inquire into and report upon the scheme for the improvement of the Colombo lake (appearing in Sessional Paper XLIII. of 1908). The Commission made their recommendations in Sessional Paper V. of 1910, which were approved by the Governor in Legislative Council (D 36) on August 3, 1910. Meanwhile by Ordinance No. 7 of 1909 arrangements were made by the Government to raise a loan for the purposes, among others, of the " Colombo Stations Extensions " and the " Colombo Lake Development."

Then, according to the plaint, in or about the month of April, 1910, the second and third defendants under instructions from the Government began to fill up a portion of the lake. According to the evidence it would seem that a causeway (about quarter mile long) was constructed between the Pettah shore of the lake and Dhoby island in 1909, and that on April 25, 1910, the plaintiff company under protest moved their Pettah terminus to the site offered by the Government on Dhoby island, after which the channel to the old terminus was filled up. The road along the causeway was apparently inconvenient at night and when it was wet, as it was littered with railway material and very rough. The filling in of the

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lake was carried out by the Government as part of the Colombo Stations Extension scheme, which was part of the general scheme for the improvement of the lake.

The plaintiff company say that in 1909 the profits from the ferry service began to diminish, and disappeared altogether in 1911, and their claim for damages or compensation is based on the loss after April, 1910.

The District Court dismissed the plaintiffs' claim on the grounds that the action was one of tort, and as such could not be maintained against the Crown in Ceylon, and that the lake was the absolute property of the Crown, which could do what it pleased with it.

On appeal the following points were argued:—

(1) Can such an action be maintained as against the Crown?

(2) If not, can such an action be maintained against the Government of Ceylon as distinct from the Crown?

(3) If not, can such an action be maintained against the second and third defendants?

(4) Has the plaintiff company shown any right which constitutes a cause of action?

(5) If so, has the plaintiff company shown any damage which would enable it to maintain the action?

As to the first point, in *Siman Appu v. The Queen's Advocate* [1] their Lordships of the Privy Council, referring to the question whether under the Roman-Dutch law the sovereign could be sued, said:—

Whatever speculations may be made upon these points, their Lordships cannot advise Her Majesty that such was the Roman-Dutch law, unless it is shown to them that it was so. And neither the researches of counsel nor their own have enabled their Lordships to attain any certainty on the subject.

Passing then to the law of Ceylon, their Lordships observed that a very extensive practice of suing the Crown had sprung up and had been recognized by the Legislature, particularly in the 117th section of the Ordinance No. 11 of 1886, and they proceeded to say:—

It appears to their Lordships that the latter part of that section would be deprived of its meaning unless it is held that, in the view of the Legislature, suits might be instituted by private persons against the Queen's Advocate for the recovery (amongst other things) of debts and damages. It is said that to give that meaning to the Ordinance would prove too much, for it would include actions for damages *ex delicto*, which, as everybody admits, cannot be brought against the Crown. But it does not follow that, because the words are wide enough to include actions *ex delicto*, they must do so. They are not words adapted to confer a new right or to establish a new kind of suit. They are only

[1] *9 A. C. 571.*

regulative of rights and proceedings already known, and they must be construed according to the state of things to which they clearly refer. They can, therefore, receive a full and sufficient meaning without extending them to actions *ex delicto*, but they cannot receive a full and sufficient meaning, indeed it is difficult to assign them any substantial operation at all unless they embrace actions *ex contractu* ..... It would certainly be inconvenient that there should be no means of obtaining the decision of a Court of Justice in Ceylon on claims made by the subject against the Crown. Yet there are none if actions of this kind do not lie, for the petition of right does not exist in the Colony ..... And finding that the Legislature recognized and made provision for such suits at least twenty-eight years ago, their Lordships hold that they are now incorporated into the law of the land.

The judgment amounts to this, that the civil procedure laid down in the Code for the regulation of actions against the Crown does not establish any new kind of suit, but recognized that suits for debt and damages against the Crown existed. That the right to sue the Crown could not in that particular case be referred to Roman-Dutch law, as it had not been proved that such a right existed under that law, but that a practice had grown up to sue the Crown in actions arising out of contract, and that the provisions in the Code would have no meaning unless it referred to such actions, *i.e.*, actions *ex contractu* for which there was precedent, and accordingly such actions were held to be part of the law of the Colony.

In this case it has been submitted for the appellants that it is now possible to prove that Roman-Dutch law did allow an action against the Prince, and the following authorities on the Roman-Dutch law have been cited:—*1 Nathan 406; Voet 18, tit. 4, s. 6; Van Leeuwen (Kotze), vol. I., p. 12, note (h); Dutch Consultations Decl. IV. Cons. 123 (cited in 11 N. L. R. 364); Bort on Domain XVI. Decl.; 1 Nathan 38; Voet 1, tit. 3, s. 15; Voet 1, tit. 4, ss. 8 and 9; Voet 2, tit. 4, s. 11.*

So far as I understand these references, only one can, without doubt, be said to deal with an action *ex delicto*, viz., the passage cited in *Nathan 1, 406*, but the counsel for the respondents has pointed out that it is open to doubt whether that case refers to law applicable in Ceylon, as the expression " statuendum " used in *Voet, bk. 43, tit. 16, s. 5*, from the passage from Nathan comes, indicates that the right sued upon in that case was one created by statute, and that a Roman-Dutch statutory right can only be accepted as applicable to Ceylon when the particular statute has been proved to apply (which has not been done in this case). The cases of *Karonchihamy v. Angohamy* [1] and *Silva v. Balasuriya*,[2] in my opinion, decisively show that the Roman-Dutch law which prevails in Ceylon is not the entire bulk of that law, but only so much of the Dutch common law as can be shown to be applicable,

[1] *(1904) 8 N. L. R. 1, at page 19.* [2] *(1911) 14 N. L. R. 452, after 456.*

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or of the Dutch statutory law as can be shown to have been specially applied. In these circumstances, it is my opinion that it has not been proved that the Roman-Dutch law appertaining to Ceylon gave any right to sue the State in an action arising *ex delicto*. The other citations also are so vague and uncertain as to leave it open to doubt whether under Roman-Dutch law the State could be sued at all, except as a matter of grace. It remains to be considered whether any practice in relation to such suits has sprung up which could reasonably be said to be incorporated in the law of Ceylon on the principles laid down in *Siman Appu's* case.

There are several cases in which it has been expressly affirmed that the Crown cannot be sued in an action arising *ex delicto*. That claims against the Crown have frequently been contested on the ground that they have arisen *ex delicto* is mentioned by Cayley C.J. in *Jayawardene's* case,[1] and *Newman v. The Queen's Advocate*[2] is a Full Court decision which is binding on us. The question was considered in *Sanford v. Waring*,[3] in which Bonser C.J. reviewed the Roman-Dutch law on the subject and was not prepared to assent to the proposition that an action for tort would not lie against the Crown in Ceylon. The question was again before Bonser C.J. (*Le Mesurier v. Attorney-General* [4]), and there he said: "If the law as to the rights of a subject to sue the Crown in actions of tort is doubtful—and I must admit that it is, since my brother Lawrie is strongly of opinion that the Crown is not liable to be sued in such actions—then it is high time that the Government should take steps to bring the legislation of the Island into line with the legislation of other Colonies, such as New Zealand and the Straits Settlements."

In that case the plaint was allowed to be amended by the deletion of all words alleging delict. It would appear, therefore, that the Courts in Ceylon have never allowed an action *ex delicto* to be maintained against the Crown, and, on the other hand, have expressly affirmed the proposition that they could not be brought.

In this connection an argument was addressed to us that the present case was not one of pure tort, but one for a declaration of rights and for an injunction and compensation. That in Roman-Dutch law damages in actions *ex delicto* were punitive rather than reparatory, and that a petition of right would lie in England in similar circumstances. In view, however, of the practice of the Courts in Ceylon with regard to actions of tort against the Crown, and to the absence of any clear proof as to the Roman-Dutch law on the subject, the argument does not, I consider, affect the present case, especially in view of the circumstances that the Government have not been enriched by filling the lake, and it is doubtful whether a petition of right would lie in England in similar circumstances.

[1] *4 S. C. C. 77.*
[2] *6 S. C. C. 29.*
[3] *2 N. L. R. 361.*
[4] *5 N. L. R. 65.*

As to the second point—whether the action can be maintained against the Government of Ceylon as distinct from the Crown—Cayley C.J. in *Jayawardene's* case [1] said that the question " seemed to be no more than to pray that the Crown be adjudged to pay the money by its agents, the Government of Ceylon," and in the case of *Le Mesurier v. The Attorney-General* [2] Bonser C.J. regarded the matter as " something like a quibble to say that the Attorney-General represents the ' Crown,' but does not represent the ' Government of Ceylon,' holding that for most purposes the two expressions are convertible," and adding, " our local statute book shows numerous instances of these being so treated." Withers J. said he could not appreciate the difference; while Lawrie J. said, " to assent to the proposition that the Attorney-General of Ceylon is the proper defendant in actions against the Crown in this Colony does not touch the question what actions lie against the Crown, nor does an assent to the proposition that the Attorney-General of Ceylon is the proper defendant in actions against the Ceylon Government touch the question what actions may be maintained against that Government . . . . . It seems to me that there is a difference between the ' Crown ' and the ' Government of Ceylon.' The one is greater than the other. There may be actions which may not lie against the Crown, which are sustainable against the Government. I am content to hold that in such actions the Attorney-General is the right defendant "; and in that case, which arose out of contract, the action was allowed to proceed against the Attorney-General as representing the Government of Ceylon. In the present case it is alleged in the plaint that the second and third defendants filled the lake as servants and agents of the " Government of Ceylon," but in the notice of action (D 39) served on the Attorney-General in terms of section 461 of the Civil Procedure Code it is expressed to be an action against him " as representing the Crown for the Crown having filled up that portion of the Beira lake in Colombo," &c.

The argument is that the Government of Ceylon can act only within the scope of its authority, while the Crown is not so limited. That as the Crown can do no wrong—the maxim on which its non-liability to suit is based—so it cannot authorize a wrong, and that the Government of Ceylon is therefore responsible for any wrong done, as it cannot be said to act for the Crown in committing a tortious act. The term " Government " means the Governor (Ordinance No. 21 of 1901).

It seems to me that a consideration of this point involves a consideration of the next, the responsibility of the second and third defendants. In *Feather's* case [3] it was held " that a petition of right which complains of a tortious act done by the Crown or by a public

[1] *4 S. C. C. 71.* [2] *3 N. L. R. 227.*

[3] *6 B. & S. 295.*

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servant by the authority of the Crown discloses no matter of complaint which can entitle the petitioner to redress. As in the eyes of the law no wrong can be done, so in law no right to redress can arise; and the petition, therefore, which rests on such a foundation falls at once to the ground." " No authority," however, " is needed to establish that a servant of the Crown is responsible in law for a tortious act done to a fellow-subject, though done by the authority of the Crown."

As to the position of the Government of Ceylon two points arise: whether the Attorney-General represents the Government of Ceylon when it acts outside the scope of its authority from the Crown? and whether the Governor (the Government of Ceylon) is a servant of the Crown liable separately for tortious acts?

In any case in which the Crown in Ceylon could be sued, there is no material distinction between the terms " Government of Ceylon " and " Crown," and this seems to have been the ground of decision in *La Mesurier's* case,[1] where it was held that the Attorney-General was the right defendant. But just as the Attorney-General of Ceylon does not represent the Crown in all cases, *e.g.*, in cases in which a remedy is sought against the Imperial Government (*Fraser's* case [2]), for he represents only the Crown in Ceylon, so it is open to argument whether he represents the Government of Ceylon, where the local Government is acting in a matter (for which an action could not be maintained against the Crown) outside the scope of its authority. I am of opinion that the Attorney-General represents the Government of Ceylon whenever it acts politically, *i.e.*, as a political body, and that as a political body the Government of Ceylon is not a corporation capable of being sued. It is only liable to be sued in cases in which the Crown in Ceylon could be sued. In the present case, too, it is clear that the plaintiffs have so framed their suit as to claim redress from the Government of Ceylon as a body acting, as appears from their notice of action, for the Crown. The case does not therefore directly raise the question as to the liability of individual members of the Government regarded as servants of the Crown for tortious acts. It would seem that the question has not been definitely decided. In *Musgrave v. Pulido* [3] it was affirmed that it was within the province of the Courts to determine whether any act of power done by the Governor of a colony is within the limits of his authority, but there is no ruling, so far as I am aware, as to whether a Governor mistakenly acting within the limits of his authority is protected. In my opinion he would be protected on grounds of public policy, for it would render the Government of a country impossible if individual members acting as servants of the Crown in the administration of Government, *bona fide* and for the public good, were responsible for acts done

[1] *3 N. L. R. 227.* [2] *Creasy's Reports 1.*

[3] *5 A. C. 102.*

without malice and in the ordinary course of their duties which should subsequently transpire, on minute examination, to be outside the scope of their authority.

Similarly, as regards the second and third defendants. They are sued as servants and agents of the Government of Ceylon, and were admittedly acting in the ordinary course of their duties and in obedience to the orders of Government. A public servant is bound by the rules of the service to obey all orders of the Government. This obedience is required of them by the direct command of the Crown in the Letters Patent constituting the office of Governor, and it would be impossible to hold them liable to punishment for disobedience and at the same time liable to damages for obedience to orders which are not " necessarily or manifestly unlawful." I am therefore of opinion that the second and third defendants are protected in this case.

The appropriate remedy would be by proceedings in the nature of a petition of right, for which, as I have found above, there is, in my opinion, no provision in Ceylon in respect of tort, either in the Roman-Dutch law applicable or in the legislation of the country. For these reasons I am of opinion that the action cannot be maintained against any of the defendants.

Apart from this, I am of opinion that the plaintiff company could not in any event succeed. They ask for a declaration of a public right, for which the Attorney-General alone is entitled to bring action, unless it can be shown that the plaintiff has suffered special damages, apart from any injury which the public generally may have suffered. It is necessary to ascertain what right, if any, has been infringed. For the respondent it was contended that the lake is the absolute property of the Crown, and that the public have no rights in or over it. In England it appears to be an open question whether the land under large lakes belongs to the Crown or to the adjoining owners, but it seems to be generally accepted that the land belongs to the Crown, unless the lake is entirely within the limits of a private estate, or evidence of private ownership is otherwise shown. The ownership of the land, however, does not prevent the public from acquiring rights over the water.

A long argument was addressed to us to show that by Roman-Dutch law large lakes were the sole and exclusive property of the Prince as part of his regalia, and it was contended that the Roads Ordinances did not create any new right or alter the Roman-Dutch law. I do not consider it necessary to go into the Roman-Dutch law, as, in my opinion, the Ordinances must be construed to infer a dedication to the public of a right of navigation over the waters of the lake, even if they do not go further and legislate to preserve a long pre-existing right.

In 1844 the Ordinance No. 16 of 1844 was passed " for the preservation and improvement of the streets, roads, thoroughfares, and public

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places within towns, and of the public roads, navigable rivers, lakes, and canals of this Island." This Ordinance gave certain officers of the Government power to do certain acts to which they would otherwise not have authority to do, *e.g.*, to alter the lake and to enter upon adjacent land and there carry out certain works. In 1848 another Ordinance, No. 8 of 1848, was enacted to make " better provision for the formation and maintenance of roads, and for the improvement of the means of communication by land and by water " in the Island, and to apply the labour to be performed and the money raised under the Ordinance for the benefit of the roads and the means of communication. Section 2 of this Ordinance empowered the Governor to declare by Proclamation that any lake, &c., should be deemed to be a principal lake, &c., for the purpose of the Ordinance, and on October 23, 1848, the Colombo lake was declared to be deemed a principal lake by Proclamation under the Ordinance. In 1861 a consolidating Ordinance was enacted (No. 10 of 1861), which provided (section 8) that lakes, &c., declared principal lakes, &c., under Ordinance No. 8 of 1848 were to be deemed to be principal thoroughfares for the purposes of the new Ordinance, which was enacted to consolidate and amend the law relating to public thoroughfares.

In 1888 the Government handed over the lake to the Municipal Council, reserving a right to resume possession, with an undertaking by the Council to keep it in navigable order (D 25, D 26, D 27). This transfer, however, does not appear (D 28) to have been made under the provisions of section 72 of the Municipal Councils Ordinance, No. 7 of 1887, so no argument can, in my opinion, be based on the terms of that Ordinance.

These Ordinances of 1844, 1848, and 1861 did not give the public any new rights over roads and lakes, and the effect of declaring the Colombo lake to be deemed to be a principal lake for the purposes of the Ordinance was to allocate to its maintenance (section 33 of No. 8 of 1848) a somewhat greater share of the maintenance provision, but these Ordinances and the Proclamation do acknowledge that the Colombo lake is a navigable lake and a means of communication for the public, maintainable as a public thoroughfare. It seems to me the Ordinances clearly indicate a public right of navigation on certain lakes, and of these the Colombo lake was unquestionably one. How the right was acquired does not seem to me to be now relevant, as the Ordinances are based on the assumption and recognize that the public had the right of navigation over the waters of the lake.

This right of navigation is a right to pass and re-pass in any direction over the waters of the lake, and it cannot be denied that the filling in of the lake was an injury to this right. This right is a public right. The plaintiff company have not shown or alleged any private right as injured, they were not reparian owners, and they

do not claim a right of ferry. At the Pettah terminus, the access to which has been prevented by the filling in of the lake, the plaintiff company held the landing place on a license from the Government, and P 7 shows that the Government had withdrawn that license prior to filling up the channel which gave access to that terminus. The plaintiff company, therefore, had no private interest in the land at the Pettah terminus, and it is clear that no right of way over the Government land at that spot had been acquired, as it appears that even the canoe service was stopped for one day every year to prevent any right of way being established. Throughout the evidence the plaintiff company's service of boats is spoken of as a ferry service. The right of ferry belongs only to the Crown, and the plaintiff company had not acquired any right of ferry from the Crown. The damage to the plaintiff company would clearly be special damage to them if any right of ferry in them had been injured, for the damage is virtually based on a claim to land passengers at a particular spot on the lake shore. No other damage that I can see has been proved. It has not been shown that it cost them any more than the rest of the public to go round the lake, or to stop at the point on Dhoby island and use the causeway for the quarter of a mile from that spot and the Pettah. Any inconvenience they may have suffered they have suffered with the rest of the public, and they have not received any special injury to themselves other than through an inability to land passengers at a particular spot on the shore, a matter which I consider can be claimed only by virtue of riparian ownership or as incidental to a right of ferry to which they can lay no claim, and which would in any event be valueless without a right to pass over the private land along the Pettah shore.

I would dismiss the appeal with costs.

Appeal dismissed.