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Present : Bertram C.J. and Ennis J. **1924.**

THE BRITISH PETROLEUM CO., LTD., *v.* THE ATTORNEY-GENERAL.

183—D. C. Colombo, 953.

Damage caused to steamship in harbour—Negligence of pilot—Action against the Crown—Tort—Contract.

The ss. " British Ensign " entered the Colombo harbour in the ordinary course and was allotted berth No. 21 by a pilot. When the steamer attempted to leave the harbour on the following morning, she found herself aground on a large and dangerous rock. Through grounding on this rock or through the efforts which were made to get her off it, she sustained serious damages. The plaintiff company sued the Government of Ceylon for damages.

Held, that the Government of Ceylon was not liable in damages.

An action does not lie against the Crown in this Colony in respect of a tort.

In the case of our harbour such obligations as rest upon the Crown with reference to the safety of the harbour are obligations arising out of the relation between the Crown as the harbour authority and the persons using the harbour. A breach of these obligations could only give rise to an action in tort, if such an action lay against the Crown, and the payment of these dues does not create a contractual relationship between the Crown and the subject.

If an action in tort would lie against the Government, such an action would be excluded in the present instance, in so far as it was based on the negligence of the pilot.

1—J. N. B 53477-201 (2/56)

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THE facts are set out in the judgment.

Akbar, S.-G. (with him *V. M. Fernando*, C.C.), for defendant, appellant.

Elliott, K.C. (with him *Hayley*, *H. H. Bartholomeusz*, and *L. M. de Silva*), for plaintiffs, respondents.

February 27, 1924. BERTRAM C.J.—

This is an action against the Attorney-General of Ceylon, as representing the Ceylon Government, in respect of damages sustained by the steamship "British Ensign" in Colombo harbour. This ship entered the habour in the ordinary course, and, in pursuance of an application received some days previously, was allotted a berth in a particular region of the harbour. She called at Colombo solely for the purpose of taking in fresh water and oil for her bunkers. This purpose being accomplished, she attempted to leave the harbour on the following morning, but found herself aground on a large and dangerous rock, which was situated practically within the berth itself, and the existence of which was unknown to the harbour authority. Through grounding on this rock or through the efforts which were made to get her off it, she sustained serious damages which were discovered on her reaching England at the close of her voyage, and it is in respect of these damages that the action is brought.

Various important questions of law arise in the case, and, in particular, the old question whether in this Colony the Crown can be sued in an action founded on an alleged tort. There is the alternative question, whether, assuming that the plaintiffs are bound to found their action on a contract, there is any contractual relationship between the Crown as the harbour authority in Colombo and the owners of ships making use of the harbour. But before these questions of law are considered, it is necessary to determine the facts.

The harbour of Colombo is under the control of the Government, and the Government officer in charge is the Master Attendant (see Ordinance No. 6 of 1865). In the direction of the harbour the Government is for some purposes assisted by an Advisory Board known as the Colombo Port Commission. Compulsory pilotage is enforced, and the only authorized pilots are Government officers who receive a salary from the Government, but are also entitled in certain cases to receive fees (see Pilots Ordinance, No. 4 of 1899). The harbour comprises an area of some 640 acres, and within this area ships are berthed by the pilots under the direction of the Master Attendant in a system of regular berths lying at intervals between buoys stationed for the purpose. The assignment of these berths to ships requiring them is one of the statutory functions of the

Master Attendant (see rule 3 of the rules for the port of Colombo made under the Masters Attendant's Ordinance), but in recent times this has, in fact, been delegated to the senior pilot on duty.

The ss. " British Ensign " entered the harbour about 9 A.M. on September 10, 1919. Other ships arrived about the same time, and Pilot Hamilton, as senior pilot, assigned this steamer to berth No. 21, and she was taken in charge by Pilot Sorensen. The ss. " British Ensign " is an oil tank steamer of 17,084 tons gross register. She is 440 feet in length (330 feet at the keel), and her beam is 57 feet. Her draught on arrival was 24 feet 10 inches aft and 25 feet 6 inches forward. The oil she intended to take in would affect her draught, and on departure, judging from previous voyages, her draught aft would be 27 feet 9 inches. There seems no question that Pilot Sorensen ascertained this fact from the Captain. Berth No. 21 lay between two buoys, Nos. 33 and 43 respectively, situated 600 feet apart. The berth lies partly within and partly without a 30-foot contour line marked on a chart of the harbour which is exhibited for the use of the pilots. The season was what is described as the tail end of the south-west monsoon, and at this season of the year ships lying in that berth would have their stem moored to buoy 23 and their stern moored to buoy 43. It was in the region of buoy 43 that the part of the berth outside the 30-foot contour line was situated. The soundings in the neighbourhood of this buoy were such that it would be, on the face of it, highly unsafe to berth a steamer of this length and of the draught she would require on departure in this berth, if she were berthed evenly between the two buoys. As it was put by the pilots in their evidence, at this end of the berth there is what is described as a " shallow patch. " The existence of this " shallow patch " is the most elementary fact in conection with this berth. The pilots all say they were familiar with it. One of them, Hamilton, observes that the knowledge of its existence is bread and butter to him. Pilot Sorensen asserts that it was never customary to moor a large ship like the ss. " British Ensign " actually between the buoys, and says that, for the reasons above explained, he took particular care to moor her in a position a little to one side of the berth, in such a way that she lay wholly within the 30-foot contour line and some 50 feet from the " shallow patch. " It is in this way, so he asserts, and his evidence is confirmed by Pilot Hamilton, that it is customary to berth steamers of this magnitude in such a berth as No. 21. The ss. " Paul Lecat," a very large steamer, some 530 feet in length, which was berthed in the next berth at the very same time, was berthed in this manner. What is more Pilot Olssen, who was engaged in berthing the ss. " Paul Lecat " while Sorensen berthed the ss. " British Ensign, " confirms the evidence of Sorensen, and definitely says that he saw the ss. " British Ensign " berthed in the manner described.

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The ship took in all the oil and water she required, and the Captain arranged for her to leave the harbour before dawn the next morning. For this purpose Pilot Hamilton came aboard, but when measures were taken to start the ship it was found that she was aground. Pilot Hamilton who knew nothing about the rock in the neighbourhood of the berth, and who assumed in the darkness that she was lying at the place where she ought to have been lying, concluded that she was " mud-sucked aft, " and tried to move her with the engines. This he found impossible. He then signalled for a tug. Dawn soon broke, and it then became evident that the steamer was not lying in the position at which Sorensen and Olssen swear she was moored, but in an entirely different position. As Pilot Hamilton says: " When daylight broke I realized that the ship was much too near the stern buoy and that she was on this patch. " Pilot Green who came on board later also realizeld this fact: " When I went on board, the ss. ' British Ensign ' was on the ' shallow patch, the stern was right over the stern buoy." So also Pilot Olssen : " Her position was quite different from the position in which I saw her the previous day."

It was assumed by everybody that the steamer was aground on the mud, and measures to get her off were taken on this basis. Orders were given to fill the tanks forward and to shift the oil fuel so as to bring the ship down by the head. A tug, as already stated, was requisitioned by Hamilton, and in agreement with the Captain he attempted to slew the vessel round, in the hope of working her off the mud. This manœuvre proved ineffective. As the Captain says in his evidence (see question 99) : " It being sand and mud on the chart and no rocks, we thought she would work herself out. " Between 7 and 8 A.M. Pilot Hamilton was relieved by Pilot Green who employed two tugs: " I decided to use both tugs. I sent the tugs abreast of the funnel on the starboard side with instructions to push her to port so as to shove her off the patch. I found after three minutes that it was hopeless. "

The effect of these operations was to pivot the ship on her stern. While they were being carried out and the engines were working full speed ahead, the Captain heard thuds from the bridge. One of his officers reported that there were two or three throbs from aft. The engines were accordingly stopped. Pilot Green now adopted a fresh expedient. He ran a line to the head buoy, got in all the slack of the stern moorings, and gave instructions to heave the buoy under water. The object of this operation was to pull her head to port, so that at high water (which was at noon) she might be pulled off the patch. This operation succeeded, and at 11.30 A.M., with the rise of the tide, the ship floated.

Before sailing the Captain prudently took measures to have the bottom of the ship surveyed by a local diver. This survey appears to have been of the most perfunctory description. It was reported

that the ship had sustained no damage; she resumed her homeward voyage, but, on her being dry-docked at Southampton, it was discovered that she had sustained damage of a very extensive character. The character of this damage was such that it was suspected that she must have gone aground not on mud, but upon a rock. Her owners accordingly took measures to have a survey made by a diver of a section of the harbour in the neighbourhood of berth No. 21. A considerable rock was thereupon discovered, reaching in places to about 25 feet from the surface. The diver, in his report, describes it as " hard rock bottom with big rock projections, surrounded by 3 to 4 feet of soft mud. " He says in his evidence: " In some parts, when I stood up by the rock, it came up above my head, straight up. My height is 5 feet 7 inches." It thus became apparent, what had already been suspected, that when the pilot were pivoting the vessel this way and that with the tugs, in the hope of working her off supposed mud, she was really aground upon this rock, and that the thuds and throbs above referred to were caused by her being pulled about on the surface of the rock.

The problem at once presents itself: How, if the evidence of Sorensen be true, could she ever have got into this position at all? The singular thing is that in the evidence no attempt whatever is made to explain this obvious point. Though counsel on both sides and the learned District Judge himself were all aware that the officers told an entirely different story as to the place in which she was berthed, neither Sorensen, who swore that he had berthed her outside the " shallow patch, " nor Olssen, who said he saw Sorensen berth her there, nor Hamilton and Green who state that they found her in the morning in a place in which she never ought to have been berthed, were asked a single question either by counsel or by the Court with a view to explaining how she could possibly have got there. This is all the more singular when it is borne in mind that the pilots, or some of them, had attended conferences at the Attorney-General's Office, and that according to their own evidence they had from time to time discussed the story of the case in detail, and had read and studied the evidence given by the officers in London. The Solicitor-General in his argument could only suggest that the ship had drifted into this dangerous position, because those on board had negligently interferred with her moorings. He insisted that a steamer moored and anchored as Sorensen described would be held absolutely rigid, and could not possibly shift from her place. No expert evidence was tendered as to the possibility of such a ship shifting from her moorings under the weather conditions of the time. No reason is given to us why those on board should have interfered with the moorings. In the result it is quite inexplicable that if Soresen moored her where he says he moored her, she could have been found where she was found.

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It is necessary, therefore, to consider the evidence given on the other side. This was given in London when those who gave it had no inkling whatever of the case for the Crown. It is plain and straightforward evidence, and those who gave it obviously had no conception that the ship had been berthed in any special manner, or under any other conditions than those which they had themselves described. The officers of the ship assert that she was berthed actually between the buoys with an anchor on the port bow and her stern slightly in the same direction. In this position her stern would lie just above the end of the rock.

If one has to choose between these two stories, it is obvious that the latter is the more probable, but there is one circumstance which clinches the matter. Within half an hour after the steamer was berthed, the Captain took soundings. These are recorded in a paper of notes which he had made at the time, and which he gave to the ship's agents at Colombo who forwarded it to the owners with the Captain's report. It appears from these soundings that the depth of the water aft, at the time they were taken, was according to the Captain 28 feet, or according to the Chief Officer 28 feet 3 inches. This depth of water is entirely reconcilable with the position in which the ship was berthed according to the evidence of her officers; it is quite irreconcilable with the story told by Sorensen.

The Solicitor-General treats these "master's notes" with a certain reserve, pointing out that they are put forward as being an enclosure in the master's letter to his owners of September 11, 1919, whereas that letter, in referring to its enclosures, speaks not of "master's notes," but of "a list of suondings taken later round the ship this A.M." The Solicitor-General's attitude of reserve is certainly prudent, but the document seems to me, on the face of it, to be genuine.

This version of the berthing as told by the ship's officers is, however, not without difficulty. The position in which they say the steamer was berthed was not by any means the position in which she was found by Pilot Hamilton in the morning. Indeed, if on completing her bunkers she had settled down precisely at the spot where she is said to have been berthed, she would only just have come in contact with the rock, and, indeed, if regard be had to the conformation of the hull at the stern, it is just possible that she would have escaped the rock altogether. When she was found in the morning she must have been hard aground on the very centre of the rock. Pilot Hamilton marked on the diver's chart the place in which he found her. It is very difficult to define the position in which she was when he first came aboard in the dark, because he states that when he tried to slew her round she did not move forward, but pivoted slightly. It is very difficult to understand the Captain's account of the position of this steamer in the morning. He speaks of her being canted "2½ points to starboard" from her original

position by the operation of the tugs, but he appears to have assumed that she was lying in the morning in her original position on the line between the two buoys. This cannot possibly be. If she was berthed between the two buoys, her position had appreciably shifted by the time Hamilton came aboard, and no explanation of this shifting is given to us. On the contrary such shifting is denied.

"168. *Q.*—Was there anything to cause your ship to range or move at all?

"*A.*—No, nothing at all.

"169. *Q.*—Did she lie perfectly properly moored the whole time she was there?

"*A.*—Yes."

The shifting, however, is very slight compared with the shifting which must have taken place if she was berthed in the manner described by Sorensen. If we have to choose between the two stories, it seems clear that the story told by the ship's officers is the more probable. This is confirmed by the striking circumstance of the soundings above mentioned. The learned District Judge has found, as a fact, that the steamer was not berthed as described by Sorensen, but was berthed approximately between the two buoys, and this finding of fact, under the circumstances, cannot possibly be disturbed. We are driven to the conclusion, therefore, that the ship got aground on this unsuspected rock owing to its negligent berthing by Pilot Sorensen.

It is extremely difficult to understand how Pilot Sorensen came to be guilty of this negligence. According to his own admission, he was furnished by the Government with information which, to a careful and experienced man, ought to have made such negligence impossible. It is clear, too, that when called to account by the Master Attendant by his letter of September 17, 1919, he replied at once on September 21, 1919, that he was fully aware of the existence of the "shallow patch," and berthed the ship accordingly. Some suspicion appears to have been raised as to the genuineness of his letter, but we now know that that suspicion was unjustified. Nevertheless, it was a letter written after the event, when he had realized that it was necessary for him to defend himself. No negligence is to be imputed to Pilot Hamilton for assigning berth No. 21 to the ss. "British Ensign," as it is quite clear that the ship could have been placed within that berth in a position of perfect safety.

There are certain other contentions or suggestions of fact which we must now consider. The suggestion is made by the Crown that some, at any rate, of the damage sustained by the ship was not sustained at Colombo, but at some other place. It is pointed out that according to the evidence of the diver who examined the ship before her departure no damage was then visible. The suggestion

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thus, at first sight, would appear to be that she must have grounded somewhere in the course of her voyage to England, but no place is indicated as a possible place for such a grounding. The suggestion, however, turns out to be that she must have grounded at Spezzia, not on her voyage home, but on her voyage to Colombo. There is no evidence whatever to confirm this suggestion, and it does not seem in the least likely that if the ship had grounded in Spezzia harbour, the fact would have been suppressed in the log book and no protest made at the time. The suggestion is, indeed, wholly unplausible. There is one circumstance, and one circumstance alone which creates a difficulty. Certain damage appears to have been inflicted on the bottom of the steamer at a point some 150 feet away from the stern, and this damage cannot possibly have been sustained in Colombo harbour. It remains unexplained. No separate particulars are given of the cost of repairing this damage. As the damage is not very considerable, and as the learned Judge finds that the plaintiffs have proved more damages than they have claimed, the circumstance does not seem to require any special order. It is clear, at any rate, that the steamer did ground upon a rock in Colombo harbour, and that the operations undertaken for the purpose of getting her off it were well calculated to cause the damage which was subsequently discovered.

There is a final question of fact of some importance. It seems fairly clear (though the point is contested) that if measures had simply been taken to shift the weight of the cargo and bring the steamer down by the head, and if she had been left to await the rise of the tide, she would probably have floated off without any damage. It is certain that if Pilot Hamilton had known that a dangerous rock was lying immediately under the place where he found her aground, he would have taken very different measures, at any rate, from the moment when dawn broke and he realized her position. It is equally certain that Pilot Green would not have attempted to pivot the steamer by means of tugs unless he had imagined that her stern was resting on mud. It appears to have been suggested on behalf of the Crown that the measures undertaken to get the steamer off were undertaken by the Captain; that he was responsible for them; that they were wrongful measures; and that he was thus guilty of contributory negligence. I am entirely unable to follow this argument. As to whether these measures were wrongful or not, the experts are in conflict. According to those called by the plaintiffs, it was urgently necessary to get the steamer off at once at all costs; she was an oil tanker, the wether might change, and developments might arise which would not only be fatal to the steamer, but dangerous to the port of Colombo itself. The measures adopted, they assert, were most reasonably adopted in the emergency. The experts called by the Crown, however, maintain that there was no emergency; the weather was fine;

the season was the tail end of the monsoon; no damage whatever would have been entertained by waiting a few hours for the rise of the tide ; and here, I must confess, that it appears to me that the experts called for the Crown are right. Anyone acquainted with the normal September weather of Colombo must feel that the fears expressed by the experts called by the plaintiffs are illusory. The experts for the Crown, however, go further and say that even supposing the stern of the vessel were resting on mud, the pivoting operations were most reprehensible. While one must always speak modestly in the presence of expert opinion, it appears to me that the contentions on the other side are more plausible. I am content to adopt the opinion of the Captain himself (see question 211) " there being sand and mud he was justified in trying to work her out of her bed. If the pilot did not know that there was a rock there, if it is sand and mud on that plan, he was justified in moving the ship a point or two each way. "

With regard to the responsibility for the methods adopted, it seems clear to me that the responsibility was the pilot's. He came on board to get the vessel out ; he assumed control from that moment ; he is treated as being in control throughout the evidence. As was natural, he was spoken of as acting in consultation with the Captain. It appears then that mistaken measures were adopted, and that it was these mistaken measures that substantially caused the damage. Were then the pilots guilty of negligence in taking these mistaken measures ? It appears to me that in the state of their knowledge that they were not. They had no knowledge of the existence of the rock which made these measures inexpedient. If they had known of its existence, they would not have taken them. They had no knowledge of the existence of this rock, because no information had been given to them on the subject by the harbour authority.

There is yet one more question of fact to be dealt with. Immediately after the steamer was berthed, the Captain, on his own admission, took soundings, and one of these taken aft showed a depth of only 28 feet. If the Captain had reflected on this figure, he must have seen that he was in a dangerous position. He was fully acquainted with the tide conditions in Colombo harbour (see question, 347 *seqq.*). When his bunkering was completed, his draught would be 27 feet 9 inches. From a calculation which has been furnished to us, it would appear that at the spot where this sounding was taken the height of water at low tide would be about 27 feet 4 inches. He would thus be certain to be aground at low water. It is quite true that he would be afloat again at 4.30 A.M. when he intended to sail, at which time the height of the water would be about 29 feet 3 inches. It is suggested, therefore, that he ought to have taken measures to shift his position, and that by failing to take these measures he was guilty of contributory

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negligence. I think too much has been made of this point. Even if the Captain did run this risk, it was not his doing so that was the cause of the substantial damage, but, as I have shown above, the real cause of this damage was the ignorance of the pilots of the existence of the rock. In any case, there was no issue framed alleging contributory negligence on the part of the Captain.

On the question of fact, therefore, I have come to the conclusion that the primary cause of the damage sustained by the ship was its negligent berthing by Pilot Sorensen, but that its secondary cause was that Pilots Hamilton and Green had not been supplied by the harbour authority with any information of the existence of the rock; and that in consequence of their ignorance they adopted mistaken measures for getting the ship off, and that but for these mistaken measures the substantial damage would not have been sustained.

These being the facts it now becomes necessary to consider the legal issues. The plaintiffs maintain that the Crown is responsible for the damage which has been suffered by their ship. It has been already decided by this Court in a series of decisions culminating in *The Colombo Electric Tramway Co. v. The Attorney-General* [1] that an action will not lie against the Crown in this Colony in respect of what in English law is known as a tort. The plaintiffs formally contest the correctness of those decisions, with a view to testing them, if necessary, before another tribunal, but we consider ourselves bound by those decisions, and it would be useless for us to discuss them. In order to make the Crown responsible, therefore, it is necessary for the plaintiffs to show a contractual relationship between themselves and the Crown, and a breach of some stipulation—express or implied—incidental to that relationship. This they essay to do.

The responsibility of harbour authorities, or other authorities of a similar nature, in respect of damage to ships incurred within their sphere of action, has been considered in a series of English cases. The leading cases of this series are *Parnaby v. The Lancaster Canal Co.*, [2] where damage was caused to a boat in a canal; *The Mersey Docks and Harbour Board Trustees v. Gibbs*, [3] where damage was caused to a ship by a bank of mud in the Mersey; *The Burlington*, [4] where damage was caused to a ship in a channel forming part of the harbour of Wisbech through the negligent allotment of a berth by the Harbour Master; *The Queen v. William* [5] where the Executive Government of New Zealand was held responsible for damage caused by a snag to a ship lying at a wharf belonging to the Government. To these may be added the kindred case of *Lax v. The Corporation of Darlington*, [6] which was a case in which damage was caused to a

[1] *(1913) 16 N. L.R. 161.*
[2] *(1838) 11 Ad. & E. 223.*
[3] *(1864) L. R. 1 H of L. 93.*
[4] *72 L. T. (N. S.) 890.*
[5] *(1884) A. C. (P. C.) 418.*
[6] *(1879) L. R. 5 Ex. Div. 28.*

cow by the existence of a dangerous railing in a public market. In all these cases (though there is a certain laxity in the use of some expressions in *The Mersey Docks and Harbour Board Trustees v. Gibbs* (supra) and *The Burlington* (*supra*)), the liability of the authority is founded on tort, that is to say, on breach of the common law duty arising from the relationship of the parties.

The plaintiffs, however, contend that this was an accident, and that the liability of all these cases might have been founded on contract if it had been necessary so to found it. They rely upon another series of cases which they seek to apply by analogy to the present situation. The most important of these is *Francis v. Cockrell*,[1] in which it was held that a person letting a seat in a race-stand impliedly contracted that the building was reasonably fit for the purpose, and was liable in damages for a breach of this contract, and where Martin B., on page 509, observed: "I do not at all pretend to say whether the relation of the parties raised a contract or a duty. It seems to me exactly the same thing." The same doctrine was applied in a carefully reasoned judgment by McCardie J. in *Maclenan v. Segar*.[2] This was a case relating to a hotel, and it was held that, by reason of the contractual relationship existing between an innkeeper and a guest in the inn, there is an implied warranty by the innkeeper that the inn premises are as safe as reasonable care and skill can make them. The learned Judge carefully distinguished between the liability in contract and the liability in tort in such a case, and held that the former was more extensive than the latter.

In conjunction with these two cases they cited another line of authorities which deals with the subject of implied warranty, and, in particular, the well-known case of *The Moorcock*[3] where it was held that the defendants, who were private wharfingers and entered into a contract with the plaintiff for the discharge of his vessel at their jetty, impliedly warranted that they had taken reasonable care that the bottom of the river (not within their own control) adjoining the jetty was in such a condition as not to cause injury to the vessel. They also cited *The Bearn*,[4] where a railway company, the owners of a wharf at Shoreham, were held liable on a similar implied warranty; *The Calliope*,[5] where the same principle was discussed; and in particular *Scrutton v. The Attorney-General for Trinidad*,[6] where the liability of the Government of Trinidad was considered in respect of an alleged implied warranty of safe access to a floating dock which they carried on in a bay on the coast of that Colony.

In this latter series of cases (beginning with *The Moorcock* (*supra*) the contractual relationship of the parties was clearly

[1] (*1870*) *L. R. 5 Q. B. 501.*
[2] (*1917*) *2 K. B. 325.*
[3] (*1889*) *14 Pro. D. 64.*
[4] (*1906*) *Pro. 48.*
[5] (*1891*) *A. C. 11.*
[6] (*1920*) *90 L. J. K. B. 30.*

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established, and the implied warranty was a warranty incidental to that relationship, but it was contended that a contractual relationship could be inferred in the present case also ; that all that it was necessary to do was to treat a public harbour as being on the same footing as a race-stand or a hotel. This implied only a single step, and the desirability of the taking of that step had been expressly considered and recommended by McCardie J. in *Liebig's Extract of Meat Co., Ltd., v. Mersey Docks and Harbour Board* [1]: " It is in my view well worthy of argument, whether the principle of *Francis v. Cockrell* (*supra*) should not be applied in its entirety to the case of the occupiers of docks and quays who invite third persons to use for reward the facilities provided for ships and goods. ".

On this basis the plaintiffs would put their case as follows : That the Colombo harbour in substance constitutes a public service carried on by the Government as a piece of state socialism. It is exactly on the same footing as the Government Railway. In this harbour the Government provides facilities for the berthing of vessels and the landing and loading of cargo in return for charges sanctioned by law. As a result of the business thus carried on, the harbour, like the railway, is a great revenue-producing enterprise. A ship which enters the harbour and, either expressly (as in the present instance) or impliedly as by signalling for a pilot, applies for a berth, and has one allotted to it, thereby impliedly enters into a contract with the Crown under which it makes itself liable to pay the statutory dues and under which the Crown, in return for those dues, undertakes to put at its disposal the ordinary facilities of the harbour. Annexed to this contract by implication of law, on the authority of *The Mooncock* (*supra*) and other cases, is a warranty that any berth in which that steamer shall be moored by the harbour authority is as safe for that ship as reasonable care and skill can make it.

In my opinion this argument is a fallacy. In order that we may see what is the real situation, it is necessary to consider what is the nature of the Colombo harbour. It is described in a recent Government publication: " A Handbook of Ceylon " by Mr. L. J. B. Turner, p. 3., as " a capacious artificial harbour constructed out of an insecure anchoring place by the building of extensive breakwaters. " These breakwaters were constructed at the public expense, and, as appears from the history as recited by the learned District Judge, with the help of special dues levied on ships using the harbour. What is the position of such a harbour under our common law ? It is laid down in *Voet*, *1*, *8*, *8*, that harbours are public property, and that the public are entitled to the use of them in the same manner as to the use of public ways, shores, and river

[1] *(1918) 2 K. B. on p. 386.*

banks, and that everybody has a right of navigation and fishery within their limits :—

> *" adscribuntur autem publicis hisce flumina perennia et portus, et quia horum communis est usus sicut viarum publicarum et littorum et riparum huic cuilibet in illis navigare licet et piscare. "*

No distinction is drawn either in Voet or in the passages from the compilations of Justinian which he cites between a natural harbour and an artificial harbour constructed at the public expense. Nor, can I imagine that the Roman jurists on whom Voet bases this principle made any distinction between a natural harbour such as that of Syracuse and an artificial harbour such as that of Alexandria. " *Portus* " is defined in Facciolati's lexicon as " *locus in secessu litoris vel natura vel manu conclusus*," and a similar definition appears to have been given by Lord Esher in *R. v. Hannan.*[1] Every ship, therefore, is entitled to enter Colombo harbour to navigate and, by implication, to anchor within its limits. The control of the traffic, the anchoring, and the mooring of vessels in the Colombo harbour is placed in the hands of a Government officer, the Master Attendant, by the Masters Attendant's Ordinance, No. 6 of 1865 ; but the right of every ship to an anchorage is expressly recognized by section 9 of that Ordinance. By another Ordinance, No. 17 of 1869, certain port dues were declared to be leviable upon all ships ariving at the harbour. The Government, as the harbour authority, provides certain facilities such as buoys for mooring, tugs to assist the movements of vessels, quays and jetties for landing and loading, and certain special facilities for oil bunkering. Some of these are provided free, others are provided free to a certain extent, for example, pilotage and the use of tugs for certain vessels. According to the Solicitor-General the case is analogous to that of a system of public thoroughfares to which the public have access, but on which a public officer has authority to direct the traffic, and, if necessary, the parking of vehicles, and in connection with the use of which a tax is imposed upon these vehicles.

It is certainly very difficult to see how a ship which is entitled to enter and anchor in the harbour, and is bound to pay dues levied upon its entrance, can be said by virtue of that entry and that payment to enter into an implied contract with the harbour authority for the use of the public facilities provided in the harbour. It does not enter the harbour on the invitation of the harbour authority, but in the exercise of a public right. As was said by Lush J. in *Lax v. The Corporation of Darlington* (*supra*) : " The subject using a port . . . . . is not a mere licensee. He is exercising a right as one of the public for whose benefit the port . . . . . was erected. " Can it be said, then, that on

[1] *(1886) 2 T. L. R. 234.*

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so entering and making himself liable to the statutory dues, he contracts individually with the harbour authority by this payment for the use of the special facilities which the harbour authority affords him?

The nature of these facilities and the nature of that payment will be best understood if we consider the history of the subject under English law, the principles of which are not, I think, in this respect different from our own. It is only in the light of that history that we can understand the English authorities cited in the case. A consideration of that history will also enable us to appreciate what is the nature of that "common law duty" which is referred to in those authorities as being imposed upon harbour, canal, and market authorities.

In old English law the duties imposed upon shipping in ports and harbours were generally referred to as tolls. Such tolls might be levied either in respect of goods landed or in respect of anchorage. The right to levy a toll was a "franchise," and could only be created by a royal grant or charter, but the imposition of such a toll was considered as an interference with navigation, because under our law, as under the Roman law, the subject was free to navigate the sea in all parts and to anchor upon its coasts. This right of free navigation was specially guaranteed by Magna Charta. It was not competent for the King, therefore, to grant such a franchise unless the grantee in return rendered some consideration to the public. See *per* Hale C.J. in *Warren v. Prideaux* [1]: "If any man will prescribe for a toll upon the sea, he must allege a good consideration, because by Magna Charta and other statutes everyone has a liberty to go and come upon the sea without impediment." Not only could the King grant such a franchise, but he could himself impose a toll. See *per* Best C.J. in *Lord Falmouth v. George* [2]: "There is no doubt that the King may at this time establish a reasonable toll for the enforcement of any duty that the public convenience or safety requires should be performed. The creation of a toll is only a mode of paying for a public service."

As the origin of many of these tolls was lost, it was necessary for any toll owner, who required to set up the presumption of a grant, to show that some public service was in fact rendered as a consideration for the toll. See the case of *Lord Falmouth v. George* (*supra*).

The situation is thus explained by Lord Wenleydale in *Gann v. Free Fishers of Whitsdale* [3]: "The right to the soil of the *fundus maris* within three miles below low water mark and to the fishery in it, though granted before Magna Charta, is undoubtedly subject to the rights of all subjects to pass in their vessels in the ordinary and usual course of navigation and to take the ground there or to anchor there at their pleasure, free from toll, unless the toll is imposed

[1] *1 Mod. 104.*

[2] *(1828) 5 Bing. on p. 292.*

[3] *(1864) 11 H. L. C. 213.*

in respect of some other advantage conferred upon them or at least on the public. Subjects may have that advantage where they anchor in a port in respect of the owner of the port being obliged to maintain it and keep it sufficiently repaired and ready for the reception of ships."

The facilities provided may be of many descriptions, such as buoys, wharves, piers, and capstans, but where a port is artificially provided the situation is specially clear. Lord Hale, *De Portibus Maris, Chap. 6*, describes a port as follows (*see Foreman v. Free Fishers and Dredgers of Whitstable* [1]: " A port is *quid aggregatum*, consisting of somewhat that is natural, viz., an access of the sea whereby ships may conveniently come, safe situation against winds where they may safely lie, and a good shore where they may well unlade ; something that is artificial as quays and wharves, and cranes and warehouses, and houses of common receipt ; and something that is civil, viz., *ius applicandi, ius mercati*, and divers other additaments given to it by civil authority. "

The provision of a port was considered as, on the face of it, a good consideration for a toll. See *per* Lord Mansfield in *Mayor of Yarmouth v. Eaton* [2]: " The making of a port is in itself a consideration. It is a self-evident convenience to a merchant. It speaks for itself."

It will be observed that these authorities speak of the necessity of a consideration. But what is the nature of this consideration ? Is it a consideration arising as the basis of a contract between the grantee of the franchise supplying the facility and the person paying the toll ? Clearly not ; it is a general consideration as between the grantee and the public at large. A ship entering the port is bound to pay the dues, even though it does not make use of the facility. The fact that it is there for the use of he public when they require it is of itself sufficient consideration : " We think that the keeping of the capstan and rope ready for the use of fishermen who resort to this cove is a sufficient consideration for a toll to be paid by them, whether they actually use it or not." *Lord Falmouth v. George* (*supra*); see also *Jenkins v. Harvey*,[3] and this is the meaning of Lord Mansfield when he says in the case above cited, " the making of a port is itself a consideration."

A toll or harbour due is thus in the nature of an imposition placed upon the subject in return for a benefit conferred upon the public. It is not an individual contractual consideration. Of course, in modern times, with respect to modern ports and harbours, franchise owners are replaced by public authorities and royal grants by statutory enactments, but the dues paid by the public are on precisely the same footing, and the nature of those dues

[1] *(1869) 4 H. L. C. 285.*

[2] *(1763) 3 Burrs. on p. 416.*

[3] *2 C. M. R. 393.*

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is explained with precision by Lord Tenterdon in *Kingston-upon Hull Dock Co. v. Browne* [1]: "These rates are a tax upon the subject, and it is a sound general rule that a tax shall not be considered to be imposed (or at least not for the benefit of the subject) without a plain declaration of the intent of the Legislature to impose it." When once it is realized that these dues are a 'tax' on the subject, the whole situation becomes clear, and, indeed, if the enacting words in our own Ordinance are considered, it is plain to demonstration that these dues are a tax. See section 17 of the Customs Ordinance, No. 17 of 1869: "Port dues shall be leviable and payable for entry inwards and for clearance outwards on all ships arriving at or departing from any port of this Island."

If, then, these dues are a tax, what is the nature of the facilities which are afforded by the port authority? These as already explained are the equivalent which it must render for the public privilege which it secures, and as the privileges which it secures are public and general, so the facilities are public and general also. It is a common law obligation of the owner of the franchise to maintain these franchises, and, if necessary, to keep them in good order. As Lord Mansfield said in *Mayor of Yarmouth v. Eaton* (*supra*): "A port may in fact not require repair, but if it does require repair, the owner of the franchise must repair it." See *per* Parke B. in *Jenkins v. Harvey* (*supra*): "Here the right of corporations to tolls is not merely a consideration for the use of the port, but also of an obligation to repair and cleanse it." Of course, the owner of a franchise may find in his franchise what I have above described as a revenue-producing enterprise. The more and better facilities he provides, the more vessels may resort to his port, but fundamental and necessary facilities he is under a common law duty bound to provide and maintain and when such facilities are provided in pursuance of a modern statute, they are provided in recognition of this general obligation.

It is, I think, here that we must seek the origin of that "common law duty" which is referred to in *Parnaby v. The Lancaster Canal Co.* (*supra*) and the succeeding cases. In the judgment of Lord Denman C.J., in that case the Canal Co. are spoken of as inviting the whole public to navigate in their canal, and the obligation is treated as being in the same nature as that which applies to a trader who leaves an open trap-door in his shop and causes a customer to fall down and suffer injury. In the case of *The Mersey Docks and Harbour Board Trustees v. Gibbs* (*supra*), however, the duty of the trustees was treated as being incidental to the receipt of tolls. The difficulty of applying the principles relating to the rights of invitees to a case where the public cannot be said to be invited, but where they have an actual right of access, was considered, but brushed aside by the Judges of the Court of Appeal in *Liebig's*

[1] *2 B. & A. 42.*

Extract of Meat Co., Ltd., v. Mersey Docks and Harbour Board (supra). I think that in the case of our own harbour such obligations as rest upon the Crown with reference to the safety of the harbour are obligations arising out of the relation between the Crown as the harbour authority and the persons using the harbour, and, in particular, the fact that the Crown exacts dues as an equivalent for services rendered to the public. A breach of these obligations could only give rise to an action in tort if such an action lay against the Crown, and the payment of these dues does not create a contractual relationship between the Crown and the subject.

Some question may arise with regard to some of the services rendered by the Crown in connection with the port, and, in particular, with regard to pilotage and use of buoys. It might be convenient, therefore, that I should explain the history of these facilities. The harbour dues as originally imposed made no reference to any special facilities (see the schedule of dues annexed to Ordinance No. 20 of 1898). By section 18 of Ordinance No. 14 of 1907 a buoy rent was imposed in cases where a ship remained in the harbour longer than 288 hours. A ship calling for bunkers and water only, notwithstanding this enactment, got the use of buoys free. By Ordinance No. 29 of 1909 a consolidated special rate was provided for certain ships, and this was held to cover both pilotage and the use of tugs. The payment of buoy rent was still confined to ships staying longer than 288 hours. Pilotage charges are imposed under Ordinance No. 4 of 1899, or more specifically by rules made under that Ordinance. There is no provision for a ship, calling like the ss. "British Ensign," simply for oil bunkering, but in practice oil bunkering is treated on the same footing as coal bunkering. This ship, therefore, enjoyed free pilotage, free use of tugs for berthing and unberthing, and free use of buoys. I do not think that the fact that if she had stayed longer, she would have had to pay a special charge for these services effects the question whether her owners by payment of the consolidated rate entered into a contractual relation with the Government. Ships which outstay 288 hours may possibly in respect of the payment of these special charges enter into contractual relations with the Government. It is not necessary to decide that question in the present case. The fact that these facilities are given gratis under the consolidated rate does not, in my opinion, convert what would otherwise have been a non-contractual relationship into a contractual relationship.

The situation may perhaps be made clear by an analogy. Suppose that a Municipality in respect of the general services which it renders levies a rate upon all premises within its limits varying with their annual value. Clearly no one would suggest that there is a contract in respect of the rates between the Municipality and each individual ratepayer. Next, suppose that the Municipality is

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also the electric light authority and supplies electric light to all residents requiring it under individual contracts. Next, suppose that the Municipality introduced a change in its rating system and declares that all premises of a certain class, whatever their rental, should pay a special uniform rate, and that electric light should be supplied free to those premises up to a certain number of lights, but that if more than this number of lights were required they should be supplied on special terms. The supply of these services free on these conditions would not convert the general relationship between the Municipality and the ratepayers into a contractual relationship. Similarly, the free supply of pilotage and tugs and the use of buoys to ships calling for bunkers does not create a contractual relationship.

It may be convenient at this place to notice another point. The learned District Judge sees no difference between the Colombo harbour, the Colombo Graving Dock, and the floating dock in the bay at Trinidad. It seems to me that there is all the difference in the world. In the case of the harbour, there is a free right of entry and a rate levied in respect of facilities rendered. In the case of the graving dock and the floating dock, special services are rendered in pursuance of a specific contract. In the case of the graving dock, the form of the contract is prescribed by statutory regulations.

There is another class of cases in which a contractual relationship may be deemed to arise, that is to say, cases in which a person may be deemed to have entered into a warranty through the publication of an advertisement. Such a case was held to arise in *Bede Steamship Co. v. River Wear Commissioner* [1] on the issue of an advertisement by the Commissioners as to the depth of water on the sill of their dock. A similar warranty was argued to arise in the recent case of the *Orita*, reported in the *Times* of December 19, 1923, but not at present in any regular report. No doubt if the Ceylon Government issued an advertisement and advertised certain facilities in connection with the harbour, and a shipowner, acting upon that advertisement, took advantage of the facilities, it is possible that a contract might arise on such a basis. But no such advertisement was issued in the present case. I cannot regard the annual Administration Reports, in which all the departments of Government give an account of their stewardship for the information of the Government and the public, as being in the nature of an advertisement, holding out offers to traders. Nor can I see anything in these Administration Reports of the nature of a warranty. A pamphlet certainly was issued by the Port Commission with the authority of Government lauding the advantages of the port of Colombo, but this was not issued until after the arising of the present cause of action. Such a pamphlet cannot, therefore, form the basis of a warranty in this case even if it proved, on examination, capable of doing so. I should add that I do not think that the fact that the agents of this

[1] *(1907) 1 K. B. 310.*

steamship some time before her arrival applied for a berth for her in a particular part of the harbour on a certain day (quite apart from the fact that she did not arrive on that day) in any way affects the contractual position of the Government. The Government would certainly be in an awkward position if whenever, as a matter of courtesy, it accorded any special facility with regard to a public service it should be held to have entered into a contract in relation to that service.

In this view of the law it becomes unnecessary to consider the numerous cases cited by the Solicitor-General and Mr. Elliott with reference to the words "founded on contract" and "founded on tort" in the County Courts Act, or the Solicitor-General's contention that even if it were established that there was a contract between the plaintiffs and the Government, no action would lie against the Crown for a breach of a common law obligation arising out of the contract, such a breach being according to his argument a tort. It is not necessary for us to consider whether the principles which determine the liability for costs under the County Courts Act would be applicable to cases in which the subject is seeking redress against the Crown.

In case, however, it should be ultimately held that the case of *The Colombo Electric Tramway Co. v. The Attorney-General (supra)* and the other cases to the same effect have been wrongly decided, and that in Ceylon an action for a civil wrong does lie against the Crown, it might be well to examine the question whether upon that supposition the Crown has in fact been guilty, in this case, of the breach of a duty it owes to the subject.

It might be convenient at the same time that we should consider what would be the obligations of the Crown in the matter if it were held, as Mr. Elliott contends, that a contractual relation was in fact established between the Crown and the plaintiffs, and whether on that supposition there has been any breach of any such obligation for which the Government is responsible.

I will consider the liability in tort first. From this point of view, assuming that an action lies against the Crown, the case is on very similar lines to that of *The Burlington (supra)*. It was there held, in effect, that it was the duty of a harbour authority undertaking to berth ships in the harbour to do so with due care. The Harbour Master assigned to the ss. "Burlington" a berth which was in fact dangerous, and the harbour authority was held liable for his negligence. In this case berth No. 21 was assigned to the ss. "British Ensign", by Pilot Hamilton, acting under the presumed authority of the Master Attendant. There was nothing negligent about the assignment of berth No. 21 to the steamer. She could have been moored in that berth with perfect safety. She was, however, not in fact so moored, and we have been forced to the conclusion that Pilot Sorensen in the manner in which he moored her was guilty of

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negligence. This case, however, is distinguished from *The Burlington* (*supra*) by the fact that in the case of a ship in Colombo Harbour the Crown is exempted from all liability in respect of "any loss or damage occasioned by the fault or incapacity of any pilot acting in charge of that ship" in the harbour (see section 11 of the Pilots Ordinance, No. 4 of 1899). There appears to be no question that in Colombo harbour a pilot remains in charge of the ship until she is berthed.

Mr. Elliott, however, raises the contention that section 11, if rightly understood, is not capable of this interpretation. He points out that the section is based upon a provision in English legislation, now represented by section 633 of the Merchant Shipping Act, 1894. The object of that section is to exempt the shipowner, while his ship is under compulsory pilotage, from any damage which may be caused through the negligence of the pilot, either to any other ship with which the piloted ship may come into collision, or to any goods on board the piloted ship in respect of which a shipowner would be otherwise liable to the owner of the goods. He maintains that when our own Legislature associated the Governor with the shipowner for this purpose, the exemption was intended to apply only within the same limits, that is to say, that the Governor was only to be exempted in respect of any damage done to other interests than the ship itself, and that he was not exempted when the negligence of the pilot caused damage to the ship which the pilot was conducting. I am not able to import any such limitation into the section. I think that the section was intended to exempt the Government from liability altogether. The words themselves do not imply any such limitation, nor do I think such limitation could be implied from the nature of the case. Certainly the limitation of the pilot's own personal liability in section 10 is not subject to any such qualification, and both the exemption of the Government and the limitation of the pilot's liability seem to me on the same footing. It is not necessary to discuss another point in this connection namely, whether the section is intended only to exempt the Governor for the time being from any personal liability. It is admitted that in this context the "Governor" means the "Government." Note in this connection the Interpretation Ordinance, No. 21 of 1901, section 3 (5). If then an action in tort would lie against the Government such an action would be excluded in the present instance in so far as it was based on the negligence of Pilot Sorensen.

The position is the same if we regard the case from point of view of contract. Assuming that there was a contractual relationship between the Government and the shipowners, then (but for the same statutory exemption) there would be most reasonably annexed to the contract an implied warranty that the berth in which the ship would be placed would be in fact safe for that ship, subject to this qualification that the Government would not be responsible for any

hidden danger which could not be discovered by reasonable care. One must be on one's guard here against a confusion in using the word " berth. " The word " berth " here may have two meanings : It may mean what is conventionally known as " berth 21 ", that is to say, the space between and within reasonable range of the two buoys Nos. 33 and 43, or it may mean the actual position in which the ship was placed by Pilot Sorensen. I think that in the circumstances supposed, the implied warrantly must extent to " berth " in the latter meaning, that is to say, that the Government would impliedly warrant that the ship was in fact safely placed where she was moored. But in either case the same exemption applies. If she was not safely placed this was due to the negligence of Pilot Sorensen, and the Government is not responsible for that negligence, whether it is sought to fix it with responsibility on the basis of tort or on the basis of contract. The supposed implied warranty is in fact inconsistent with the statutory exemption. I cannot conceive any distinction between a warranty that the ship shall be safely berthed, and a warranty that when she is berthed the berth in which she is placed shall be safe. It seems to me that in whichever way the supposed warranty is phrased, the statutory exemption is inconsistent with it.

But the action might be considered from a wider point of view, independent of the negligence of any particular pilot. It appears to be, on the face of it, a grave circumstance that an oil tank steamer berthed by a Government pilot in a recognized berth in the Colombo harbour sustained serious injuries through grounding in that berth upon a dangerous rock, within the very ambit of the berth itself, the existence of which was unknown to the harbour authority. Nevertheless, striking though this circumstance appears, it must be submitted to a detailed examination. The questions which arise appear to be these : (1) Was the ignorance of the existence of this rock negligent ignorance on the part of the harbour authority ? and (2) did the damage to the ship occur in consequence of this ignorance ?

In considering the obligation of the Ceylon Government towards the public with respect to rocks in the Colombo harbour, it is necessary to bear in mind the nature of that harbour. Colombo is a harbour where ships are intended to ride always afloat. It is not contemplated that they will ever touch the bottom except by accident. Moreover, it is not a place in which ships can any longer navigate at the will of their Captains. From the time when they enter Colombo harbour till the time when they leave it, in all their movements, they are in charge of a pilot. It is not necessary for the Captains of these ships to know either the depth of the soundings in the harbour, or the existence of such rocks as may exist, or the nature of the bottom of the harbour. Such information as may be published in Admiralty Charts on these matters is not intended

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for the use of these navigating officers. The persons whom the Government is under an obligation to keep informed are their own pilots. They are the persons who berth and unberth all steamers, and it is certainly in the highest degree essential that they should be furnished with all information necessary for the discharge of their function. This is, undoubtedly, a duty which lies on the Government.

Further, the existence of a rock on the bottom of Colombo harbour is not necessarily a breach of duty by the Government. Whether it is such a breach of duty depends on the place where it is situated and on the depth at which it lies. A rock situated in a channel in the harbour, a few feet below the surface, so that it might constitute a standing danger to navigation, is obviously in a different position from a rock situated elsewhere at a depth beyond the draught of any ordinary steamer. The rock in the present instance lies some 25 feet below the surface. Whether the existence of such a rock is dangerous to any steamer moored in the berth must depend partly on the draught of that steamer and partly upon the position in which she is berthed.

Let us consider then what was the information with which the Government in fact supplied its pilots for the purpose of the berthing of steamers. It exhibited at the Pilot's House periodically corrected charts. On these charts it displayed a series of contourlines showing depths of 36, 33, and 30 feet. Outside these contour lines it showed soundings taken at regular intervals of 200 feet horizontally and 50 feet vertically. On these charts, the berths were conspicuously marked by means of numbered buoys. Any pilot looking at this chart would see that many of these berths lay wholly within the 33-foot contour line, that others lay within the 30-foot contour line, while others, again (like the berth now in question), lay partly within the 30-foot contour line and partly outside it, and that finally other berths lay outside it altogether. Any pilot who had studied this chart and was berthing a ship in this berth would know that unless he took particular care in the way he placed it, part of the ship might lie within the contour line and part of it outside it. To determine whether it might safely so lie he must have regard to the soundings exhibited on the chart. This contour line and the regularly marked soundings outside it were in effect a warning to the pilot that, in berthing any ship of any considerable draught in this berth, he must have special regard to the soundings shown. The soundings in the region of the lower buoy of this berth, buoy No. 43, were in themselves a warning. They showed across the berth a depth varying from 23 feet 3 inches and 29 feet. A pilot would see that the depth of the bottom under this berth at that end might be anything from 23 to 29 feet, and that it would be unsafe for him to assume any greater depth than 23 feet. With this warning before him it would clearly be an act of gross negligence for a pilot to place a ship, which on departure would require a draught

of 27 feet 9 inches, in the position in which we have found the ss. " British Ensign " was placed.

Was the harbour authority bound to provide its pilots with any further information ? No doubt a rock marked in the actual berth amid a region of shallow soundings would bring home to the mind of the pilot in a very striking manner the dangers he would incur if he disregarded these soundings. So far as the berthing of such a steamer is concerned, I think that the Government had supplied its pilots with all necessary information. Its ignorance of the existence of the rock was not negligent ignorance. The ship did not ground upon the rock because of such ignorance, but because of the negligence of the pilot in disregarding the warnings of the soundings.

But a distinction must be drawn. The whole duty of the pilot is not limited to berthing the ships; he has also to unberth them. There is always the possibility that by accident or miscalculation a ship may go aground. If it does go aground, or, at any rate, if it goes aground through the original mistake of a pilot, and if it is found aground when it requires to leave the harbour, it is the business of the pilot sent to unberth the ship to get her off. I do not see that such a probability can prudently be left out of account. It is essential that any one undertaking such a task should know the nature of the bottom on which the ship is lying. If a pilot knows that a ship is resting on rock, his measures might be very different from what they would be if he knew it was resting on mud. I do not think that it is the business of the Government to supply a flat bottom for ships to lie on, but I do think it was its duty to undertake such a general examination of the bottom as would disclose any rocky protuberances which a pilot would take into account in taking measures to float a ship which had gone aground, and I think it was the duty of the Government to bring any such circumstances to the notice of the pilots.

I have already expressed the opinion that the substantial damage caused to the ship was caused through the ill-advised measures of Pilots Hamilton and Green, and that these measures were not due to any negligence on their part, but to the ignorance in which they were left by the harbour authority. If, therefore, an action lies against the Crown in respect of a tort, the Government would, I think, be liable in such an action. The same considerations apply from the point of view of a contract. If it is the case (which in my opinion it is not) that the harbour is a commercial enterprise carried on by the Government, and that the Government, as part of that enterprise, undertakes to see to the berthing and unberthing of all steamers with which it deals, then I think there is an implied warranty on its part that its pilots are supplied with all information necessary to enable them to deal with any emergency which may arise in the course of such berthing and unberthing. On that supposition there would be a breach of that warranty in the present case.

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There is one other aspect of the case which was considered in the argument, and to which I must allude. It was suggested that even though there might be no general contractual relationship between the shipowners and the Government, there might be a special contract with regard to pilotage and implied obligations arising out of that contract. I am disposed to think that in the case of vessels whose stay exceeds 96 hours, there is a contract for pilotage. The Pilots Ordinance enforces compulsory pilotage. The Captain, therefore, is bound to engage the services of a pilot. The Government has in fact secured to itself the monopoly of the pilotage service. The position is much the same as if the Government had granted this monopoly to a local company and had regulated the rates which the company was entitled to charge. The ship would be bound to employ a pilot belonging to the company, and would be bound to pay the regulation charges. Under such conditions there would clearly be a contract between the shipowners and the company, and in the case of ships not entitled to pay the consolidated special rate there would, on the same reasoning, be a contract with the Government. But in the case of ships paying the consolidated rate, there is no special charge for pilotage. Pilotage for such ships is a public service granted free, and the ss. " British Ensign " must, I think, be treated on this footing. I am not satisfied, therefore, that there was any special pilotage contract with regard to the ss. " British Ensign."

The Solicitor-General in his argument before us raised certain contentions as to the rate of exchange on which any damages held to be due should be calculated, and cited to us the cases of *The Steamship Celia v. The Steamship Volturno* [1] and *In re British-American Continental Bank, Ltd.*[2] We were, however, not disposed to go into these considerations, inasmuch as that point was not taken in the Court below and additional evidence would be necessary to enable us to determine it. It is sufficient to note that the point was taken in this Court.

For the reasons I have given, I am of opinion that the appeal should be allowed, with costs, both in this Court and in the Court below.

ENNIS J.—

In this case the question whether the Government of Ceylon can be sued in tort has been raised again. The point was decided in the case of *The Colombo Electric Tramway Co. v. The Attorney-General* (*supra*), and I would adopt the decision there given, and hold that the Government of Ceylon cannot be sued in tort.

[1] *(1921) 2 A. C. 544.*

[2] *(1922) 2 Ch. 575.*

The claim in this case has, however, been pressed on the ground that there was a breach of an implied warranty, arising out of a contractual relation between the two parties. The learned District Judge has found in favour of the plaintiff on this ground, and the defendant appeals.

It seems to me that some of the facts of the case have not been fully appreciated, and that, on the facts, the plaintiffs, respondents, cannot succeed, in view of the express provision of section 11 of the Pilots Ordinance, No. 4 of 1899, which says :—

> " The Governor or the owner or the master of a ship shall not be answerable to any person whatsoever for any loss or damage occasioned by the fault or incapacity of any pilot acting in charge of that ship within the limits of any port brought under the operation of this Ordinance. "

By the Interpretation Ordinance, No. 21 of 1901, the term " Government " means the Governor, and the term " Governor " includes the officer for the time being administering the Government. So the term " Governor " used in the Pilots Ordinance is practically equivalent to the term " Government. "

Briefly the facts are as follows : On September 10, 1919, the ss. " British Ensign " entered Colombo harbour shortly after 9 A.M. piloted by Pilot Sorensen, who took her to berth No. 21, between the buoys Nos. 33 and 43 marked on the pilot plan D 1, which had been allotted by Pilot Hamilton acting on behalf of the Master Attendant. The berth appears to have been selected in pursuance of a request by the agents of the plaintiffs to berth the ships, for their convenience, as near the petroleum jetty as possible. There was a conflict of evidence as to the manner in which the ship was moored. The pilot explained that he had moored the ship with her bows abreast of buoy No. 33 towards and on a line with buoy No. 32; that she was held there by her anchor and a mooring attached to buoy No. 33, with two long moorings attached to buoy No. 43. In this position the ship could ride safely in not less than 30 feet of water. The ship's officers, on the other hand, say that the ship was moored evenly between the two buoys. The next morning, after the ship had bunkered, she was found fast aground in a position well to the right of a line drawn from buoy No. 43 to buoy No. 33. No question appears to have been put to any of the witnesses to explain how she could get there. If moored, as Pilot Sorensen said he moored her, she could not get into this position unless the anchor had dragged or the anchor chain had been let out. If moored, as the ship's officers say, evenly between the two buoys with moorings taut, there would not be sufficient lateral play for the ship to have moved so far from the line between the two buoys unless the moorings had slackened. The learned

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Judge has accepted the version given by the ship's officers, and, inasmuch as the log book shows a sounding of 28 feet astern taken at 10.30 A.M., *i.e.*, within half an hour of the mooring, it is impossible, in the absence of any explanation, to say that the view taken by the learned Judge is wrong. This sounding is apparently inconsistent with Sorensen's story that the ship was moored within the 30-foot contour line shown on D 1. The fact which is certain is that the ship was found aground, and that a sounding then taken near the galley showed 24 feet 6 inches. Subsequent investigations of the bed of the harbour disclosed that the ship was on the rock depicted in the plan P 15.

The Judge has found that the ship was damaged " while lying at berth No. 21, and the damage was caused by the insufficiency of water and the nature of the harbour bottom in the said berth, " and there is no reason to think that the finding is wrong, but the learned Judge has gone further and said: " The size of the rock makes it obvious that the dangerous character of the berth might have been discovered with reasonable care, " and he holds the defendant responsible because of this absence of reasonable care. The learned Judge has not discussed the evidence showing the care, or absence of care, but has based his conclusion on the size of the rock.

It appears that a chart is issued for the information of the pilots from time to time as new soundings are taken of the harbour. D I was the chart in use when the ss. " British Ensign " was moored. It shows lines of soundings 200 feet apart wherever the harbour is less than 30 feet deep. D 1 shows that there is room in berth No. 21 to moor a ship of the size of the ss. " British Ensign " if moored well towards buoy No. 33, so that she can ride in 30 feet of water in safety. It also shows that towards buoy No. 43 there is not 30 feet of water. It gives soundings of 23 feet 9 inches, 23 feet 3 inches, 24 feet 3 inches along the line of soundings to the right of the buoy. These soundings, in fact, are soundings to the rock. In other words the pilot chart discloses that no ship drawing more than 23 feet can ride safely nearbuoy No. 43, but it is a safe mooring for ships drawing less than 23 feet. There is nothing in the evidence to show that any portion of the rock is above the safe riding line indicated by the chart. The defendant, therefore, appears to have taken reasonable care to show the safe riding line for ships. I am unable to see that it was necessary to show the nature of the harbour bed below the safe riding line, as the object of the information is to indicate how much water there is for ships to ride in, it is not for beaching purposes, so there is no occasion to indicate a mud, or gravel, or rock bed. As I read the chart D 1 it is a notice that the position is dangerous for ships drawing more than 23 feet of water, and it would not be reasonable to expect further notice.

The pilots appear to have been well aware of the depths of water at this point. Pilot Sorensen says—

> " I have known the water north of buoy No. 43 as the patch. That is a patch of shallow water ever since I became a pilot. The word ' patch ' is not used on the chart, but certain soundings are shown indicating the patch. They are 42 feet 3 inches, 23 feet 3 inches, 23 feet 9 inches, at distances of 50 feet apart, and soundings 200 fees to northward are from 24 feet 9 inches to 21 feet 6 inches. All these soundings indicate that there is a shallow patch. That is, an area of some size above the level of the bed."

The other pilots have given evidence in equally clear terms. So far then, as the Government is concerned, they appear to have taken reasonable precautions to keep pilots informed of the depth of water within which it was safe for ships to ride. It would not be, in my opinion, reasonable to expect the Government to ascertain and give information as to the nature of the danger below the sounding. This appears to have been the view of the ship's Captain, for he stated in his evidence that the important point to consider was the draught of the vessel, and that the nature of the botom under the ship did not matter.

We then come to the next fact. The berth was allotted to the ss. " British Ensign " by Pilot Hamilton acting for the Master Attendant. Was there any negligence or want of care in this ? Pilot Sorensen said that he had berthed other big ships in berth No. 21, and he mentioned the ss. " Magna, " a ship of 26 feet draught and the same length as the ss. " British Ensign. " He said :—

> " Ordinarily I would not hesitate to make use of berth No. 21, even for a ship of the size and depth of the ss. " British Ensign. "

Pilot Hamilton said :—

> " I know all about berth No. 21. I know the berth was capable of being occupied by the ss. " British Ensign. " In mooring a ship like the ss. " British Ensign " in berth No. 21, I could drop the anchor sufficiently far ahead to enable her stem to rest in the line of head buoys, and stern sufficiently far from the stern buoys to avoid the water in the vicinity of the stern buoy, because there is not sufficient water round the stern buoy to accommodate a deep draught ship. "

The evidence of all the pilots amounts to this that berth No. 21 can be used for a ship of the length and draught of the ss. " British

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Ensign " if caution be used to avoid the shallow water to the north of buoy No. 43. This evidence is consistent with the information as to soundings given in chart D 1. The ss. "British Ensign " was 440 feet long, and D 1 shows deep water for 460 feet from buoy No. 33. Want of care was, therefore either by Pilot Sorensen or the ship's officers, and in either event the defendant is not liable. It is impossible to say that the learned Judge was wrong in accepting the evidence of the ship's officers as to the method of mooring the ss. " British Ensign, " but it is to be observed that Pilot Sorensen left the ship at 10 A.M. At 10.30 A.M. the log shows that a sounding of 28 feet astern was registered, the evidence of the Captain of the ss. " British Ensign " shows that he was aware that there was a tide rise and fall in the harbour of 2 feet. The ss. " British Ensign " was drawing 24 feet 10 inches aft when she came in, and bunkering was expected to add 3 feet. It would seem, then, that within half an hour of the pilot's departure, the Captain of the ss. " British Ensign " was in a position to know that there would not be enough water for his ship at low tide after bunkering, and he could have applied for another berth. As no issue on this point was raised, this does not affect the decision of the case.

In my view of the facts the plaintiffs' case is met by section 11 of the Pilots Ordinance, and the intricate points relating to the liability of the harbour authorities do not actually arise. As, however, they have been discussed at length, I will briefly set them out.

The Solicitor-General first argued that there could be no contract, as the Government was not the owner of the harbour, and he cited *Voet 1, 8, 8, Nathan 308, and Maasdorp 10, and 11, and Van der* Linden 4, 2, 1 to show that in Roman-Dutch law the use of the harbour was common to all. The argument did not impress me, because, assuming that the harbour belongs to the public and that the Government controls its use only, there remains the position that all public property is vested in the Government.

It was next argued that practically all the English cases, except *The Moorcock* (*14 P. D. 65*), were cases of tort. *The Moorcock* was a case of a wharf and jetty by the river Thames, beside which there was not sufficient water at low tide for the ss. " Moorcock " to remain without grounding, and the Court held that in the contract between the parties such an implication had to be made as would give such business efficacy to the transaction as must have been intended by both parties to it as business men, so the Court found that there was an implied representation by the wharfinger that he had taken reasonable care to ascertain that the bottom of the river near the jetty was in such a condition as not to endanger the vessel, although the wharf owners had no control over the bed of the river No question of pilotage arose in that case.

In *Liebig v. The Mersey Docks and Harbour Board* [1] a distinction was drawn between an implied warranty as to safety arising out of the contractual relation and an obligation under the common law to take all reasonable care. The Solicitor-General argued that the latter was a breach of duty, and hence a tort and not a matter arising out of contract. The Solicitor-General then cited a series of cases arsing out of County Court decisions to show that when there was a question as to whether the act complained of was founded on tort or founded on contract, and it transpired that both elements were present, the act was held to be a tort. These cases are not of great weight, as in them the Court was driven by the terms of the Act to fix for the purpose of costs one or other alternative as there was no provision for the dual position.

It seems to me that harbour dues are payments made in return for services rendered; that pilot fees are more clearly such payments; and that the words of Martin B. in *Francis v. Cockrell* (*supra*): "I do not at all pretend to say whether the relation of the parties raised a contract or a duty. It seems to me much the same thing" are very much to the point. The extent to which such a contract or duty would give rise to a petition of right in England for damages for a breach of such contract or duty to take reasonable and proper care, as distinct from an implied warranty, has never been decided. The authorities seem to show that it is a question of fact in each case, and in *The Moorcock* the guiding factor was found to be the intention of both parties as business men. The essence of the relation between the master of a ship using a harbour and the harbour authority is, primarily, safe anchorage, ... an assurance that there is, somewhere in the harbour, a position where the particular ships can ride at anchor safely. In the case of pilotage the essence of the relation between the ship master and the pilot is an undertaking to guide the ship to such a position with due regard to the soundings. This, in fact, is the origin of the word "pilot.*" The respective duties of the harbour authority and the pilot thus become clear. The harbour authority must take reasonable care to ascertain the soundings; the pilot must take reasonable precautions having regard to the soundings and the particular ship. It seems to me that business acumen in relation to the use of a harbour, which is free to all, does not go beyond this. In my view of the facts in this case there was no want of reasonable and proper care on the part of the Government to ascertain and make known the soundings. Damage arose owing to some want of care by the pilot, *i.e.*, an insufficient precaution to moor the

[1] *(1918) 2 K. B. 381.*

* From Annandalis Dictionary: Pijloot, a pilot, from pijlem, to sound the depth, and loot, the sounding lead.

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particular ship in such a position that she could float above the riding line indicated by the sounding, and section 11 of the Pilots Ordinance exempts the Government from liability in this respect. The express provision exempting the Government found in the Ceylon Ordinance, and not found in the equivalent section in the English Act (section 633, Merchant Shipping Act), seems to indicate that the rule that the Government can be sued in contract only is not to be extended beyond a clearly implied warranty, and that no suit would lie for a breach of a duty or obligation not within the clear intention of the parties considered so far only as the mutual intention imports a purely business relation.

One other point was urged by the appellant, namely, that the rate of the exchange should be calculated at the rate of the time of the breach. In my opinion it is too late to urge this. The rate of exchange was clearly set out in the plaint, and an issue should have been raised if it were desired to contest it. I would allow the appeal, with costs.

Appeal allowed.