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SERVANTS OF THE CROWN.

The multiple responsibilities which have been entrusted to administrative tribunals in the last decade or two have resulted in a variety of legal problems, in some cases giving rise to what may almost be termed a new branch of jurisprudence and in other cases calling to the forefront in a practical way doctrines which have in the past been left largely to the academist.

Important questions have come before the courts in recent years relating to questions of appeal from statutory Boards of various kinds. The procedure which such Boards must follow has been the subject of judicial decision in important cases.[1] A question which has presented itself with increasing frequency in recent years in connection with administrative tribunals concerns itself with the relationship of such tribunals to the Crown and it is that question which forms the subject matter of this article. It is not proposed to deal here with the results which would follow from a finding that an administrative tribunal is a servant of the Crown. That the question is a live one however, will be readily appreciated when one considers the variety of ways in which it may become acute. Without attempting an exhaustive enumeration of such situations it may be pointed out that the question may arise in situations such as the following: It may be claimed that proceedings may be taken by petition of right; the tribunal in question may claim a trial at Bar; the doctrine that the "King can do no wrong" may be invoked; a claim may be made that *mandamus* or *certiorari* does not lie against the Crown; priorities due to the Crown might be claimed; the common law doctrine that the Crown neither gives nor receives

[1] See for example *Northwestern Utilities Limited* v. *Edmonton,* [1929] 2 D.L.R. 4; Administrative Finality, 6 C.B. Rev. 497.

costs might be invoked; the rule that the Crown is not bound by statute where it is not expressly mentioned might be invoked.

These instances should indicate that the subject matter under discussion is of practical everyday importance. Undoubtedly other applications of the doctrine of the servant of the Crown exist. It is not, however, proposed to deal with the effects or results which would follow from a finding that an administrative tribunal is a servant of the Crown. It is proposed however to attempt an analysis of the circumstances which would justify the conclusion that a particular person or tribunal is a servant of the Crown.

Various factors have been brought to the forefront in cases where it has been argued that some legal person or other is a servant of the Crown. The most important of these factors may be enumerated as follows:—(a) The property administered by such person is the property of the Crown. (b) Moneys received by such person are remissible to the Crown. (c) The members of such person when it is an artificial person are appointed by and perhaps removable by a Lieutenant-Governor or some other representative of the Crown. (d) Some or all of the members of any such artificial person are servants of the Crown at least in some capacity such as being ministers of the Crown. (e) Actions against such person may only be taken with the consent of the Attorney-General. (f) The subject matter administered by such person is a public work.

It will be useful at the outset to adopt a working hypothesis as to the nature of the Crown, for the conception of "servant" presupposes a conception of "master." A servant of the Crown is not a servant of a servant of the Crown, but of the Crown itself. This is illustrated by the circumstance that the death of a Crown servant superior to another Crown servant does not terminate the inferior service. Both are servants of a common master—the Crown.[2] It is on this account that a Crown servant who appoints a subordinate escapes liability for the acts of the subordinate except in cases where he has directly ordered the act in question. The theory which best accords with the result of decided cases, attributes to the Crown a fictitious personality, and considers it to be in the nature of a common law corporation. Only on such a theory can an explanation be found for certain fundamental features of the Crown conception. That the King is not the Crown follows from the fact that servants of the Crown continue to be such notwithstanding the death of a King. The Crown enjoys perpetual succession, and should be regarded as in its nature at least similar to a common law corporation with special constitutional powers, accorded it by the common

[2] *Lane* v. *Cotton*, 91 E.R. 1332; (1701), 1 Ld. Raym. 646.

law, and with certain statutory attributes and restrictions such as may be found in the Bill of Rights. The King is the highest servant of the Crown, but authority emanates from the Crown, through the instrumentality, in the first instance of the King, the Royal agent of a constitutional conception.[3]

The working hypothesis which is above suggested finds its less dignified counterpart in the modern law of corporations and incorporated companies. The conception of a legal entity which lies at the root of that branch of jurisprudence necessarily leads to anomalous variations of the law of agency. A corporation can only act through its agents, but the fictitious "legal entity" cannot possibly exercise a potential control as to details over its directors—the original possessors of the delegated authority of the "legal entity." The directors act as principals, but in law they are regarded as agents of a fictitious personality.

A similar concept is thus suggested in regard to the Crown. From this conception, it doubtless follows that certain acts even of the King might not be deemed to be acts of the Crown.[4] The hypothesis has the merit however of reconciling the necessity of finding a common master for all servants of the Crown, while at the same time preserving the concept of perpetual succession.

The acceptance or rejection of the above conception of the Crown will not materially affect the real subject matter of this article. If the King is the Crown, then every alleged servant must it is believed, trace his authority to the King. If the hypothesis above suggested is accepted, then the King is the incumbent of a corporation sole, the Crown, and all authority of the Crown must emanate through but not from him. It is hoped in this article to show that the doctrine of the servant of the Crown cannot be invoked unless a relationship of agency can be established, between the Crown and the alleged servant.

The close relationship between the government, and many statutory, corporate and *quasi* corporate bodies has been productive of much legal argument relating to the doctrine of servants of the Crown. Liquor Control Boards, National Railway Commissions, Taxation authorities and other *quasi* governmental tribunals have

[3] Cf. *Viscount Canterbury* v. *The Attorney-General* (1843), 1 Ph. 306, at p. 322.

[4] The King however enjoys a personal immunity due to the dignity of his office. The King can do no wrong. A personal immunity from arrest extends to his immediate personal servants, due no doubt to the inconvenience which might result to His Majesty if such were not the case. 6 Hals. s. 620. Crown servants, in general, do not enjoy *personal* immunity from action even though they hold positions of high importance. *Hill* v. *Bigge* (1841), 3 Moo. P.C. 465.

tempted lawyers into ingenious arguments about trials at Bar, priorities and costs.

It is believed that the doctrine can only be invoked in cases where the relationship of agency exists between Crown and alleged servant—a conclusion almost tautologous on the surface; but one which has been challenged either directly or indirectly with sufficient frequency to warrant its examination. From this conclusion it follows that the legislature cannot of itself establish a servant of the Crown, for the relationship is a fiduciary one of a dual nature—both Crown and alleged servant would have to commit themselves to its existence, and by its establishment, the servant would have to recognize the right of the Crown to control and direct his or its actions within the limits of the agency. Without complicating this discussion by an excursion into the fields of "apparent scope of authority" and "agency by estoppel" it may nevertheless be assumed that the actual relationship terminates when either principal or agent ceases to recognize the fiduciary connection. Similarly it is clear that legislation in itself cannot create the fiduciary relationship. To use a homely adage, the legislature may be able to "lead a horse to water but it cannot make it drink."

The fact that Parliament acting is the Crown acting by and with the consent of the House of Lords and House of Commons does not affect the conclusion just suggested. The Crown cannot be a master if it can only control the alleged servant with the consent of another. A servant whose allegiance is due to A & B jointly is not a servant of either A or B alone.

An Act of Parliament however may establish an artificial person, or add attributes to a natural person in such a way that such artificial or natural person could thereafter place itself or himself in the position of servant to the Crown and exercise its or his statutory attributes as such servant. A master controls acts—not effects. The statute may change the effects which follow certain acts, leaving the actor to place the control of his or its acts under another.

A casual reading of the judgment of his Lordship, Mr. Justice Duff in *Quebec Liquor Commission* v. *Moore*[5] might indicate that the view where advanced would not find favor in the Supreme Court of Canada. That impression however is dispelled upon a more careful analysis of the case. Their Lordships Anglin and Mignault, JJ., reached their conclusions on grounds which need not concern us here. The judgment of His Lordship Mr. Justice Idington, dissenting, lends support to this article. The action in that case was in tort and

[5] [1924] 4 D.L.R. p. 901 at p. 910.

arose out of an injury to one Moore caused by the act of one Simard, alleged to be a servant of the Quebec Liquor Commission. Among other defences, the Commission claimed that it was not liable in tort on account of its connection with the government of Quebec. (This defense was not raised until the case reached the Supreme Court of Canada). The exact nature of the defense is not clear from the report, but if the Commission meant that it was a "servant of the Crown" it was then doubtless setting up a defense which was upheld over two hundred years ago in *Lane* v. *Cotton* (*supra*). The theory of the defense would be that both the Commission and Simard were servants of a common master—the Crown—and that Simard was not therefore the servant of the Commission. The defense may have been, however, that on account of its close connection with the government, the Commission should be held to be immune from liability for tort as a matter of statutory construction.

With reference to the defense so raised, Duff, J., said:

> That the Commission is an instrumentality of government is clear from the circumstances that the members of the Commission are appointed by the Governor in Council and are removable at pleasure (s. 6); that all property in the possession of or under the control of the Commission is expressly declared to be the property of the Crown; and that all moneys received by the Commission at the discretion of the Provincial Treasurer are remissible to him, and, on receipt by him, become part of the consolidated funds of the Province (s. 18); that the commission is accountable to the Treasurer in the manner and at the times indicated by the latter (s. 19). The Commission, moreover, exercises authority respecting the sale of liquor in the Province, and infractions of the law dealing with that subject are prosecuted in the name of the Commission or of the municipality where the infraction occurred. By s. 13, the employees of the Commission are declared to be public officers, and they are required to take the oath of public service as such.

That the Commission was an "instrumentality of government" can hardly be denied. It is suggested however that the learned judge deliberately used that phrase rather than the phrase "servant of the Crown." At a later point in his judgment his Lordship observed that "the broad principle, of course, is that the liability of a body created by statute must be determined by the true interpretation of the statute" and he finally concluded (p. 911) that

> Not only does the statute fail to disclose any expression of an intention that the Commission shall be subject to such a principle of responsibility, but the explicit affirmations as to the property in possession of the Commission being the property of the Crown, as to the accountability of the Commission to the Provincial Treasurer and the Provincial Treasurer's control over its funds, and especially the explicit declaration as to the status of the employees of the Commission as public officers, would appear to indicate with not much uncertainty an intention to the contrary.

It is therefore submitted that this judgment does not find the Quebec Liquor Commission to be a servant of the Crown, but rather an "instrumentality of government." The judgment really deals with construction of a statute. It does not find non-liability on the part of the Commission on the basis of *Lane* v. *Cotton* (*supra*).

Had the judgment decided that the Commission was a servant of the Crown then the view taken in this article would be taken in opposition to a very able judge, for it nowhere appears in the case that the Commission had any *direct* connection with the Crown. Its attributes were purely statutory.

The case presents many features which have on other occasions given rise to arguments involving the doctrine here under review. An analysis of those features will serve as a means of introduction to the case law on the subject.

The first circumstance worthy of note in the Quebec Liquor Commission case is that the members of the Commission are appointable by the Governor-in-Council and are removable at pleasure. That factor however, does not require a finding that the Commission is a servant of the Crown.[6]

The next factor of interest is found in the circumstance that all property in the possession of or under the control of the Commission is expressly declared to be the property of the Crown. No legal principle requires a finding that the Commission is a servant of the Crown on that account.[7]

Next it should be noted that all moneys received by the Commission, at the discretion of the Provincial Treasurer, are remissible to him and on receipt by him, become part of the consolidated funds of the Province and that the Commission was accountable to the Treasurer in the manner and at the times indicated by the latter.

No case involving such a factor appears to have distinctly held that the person or tribunal in question was not a servant of the Crown. Analogies are not wanting however. A trustee may have the management of funds and be accountable to his *cestui que trust,* but he is not on that account a servant or agent of his *cestui que trust.* The case of *The King* v. *Commissioners for Special Purposes of Income Tax*[8] is also instructive. In that case, the Commissioners

[6] *St. Catharines* v. *H.E.P. Com'n,* [1930] 1 D.L.R. 409, 410, 418; *Viscount Canterbury* v. *The Attorney-General,* 1 Ph. 306, 324 (1842); *Metropolitan Meat Industry Bd.* v. *Sheedy,* [1927] A.C. 899.

[7] *Michaud* v. *Canadian National Railways,* 51 N.B.R. 220, 233 (1923); see dissent of Idington, Acting C.J., in *Moore* v. *Quebec Liquor Com'n* (*supra*); *The Queen* v. *McFarlane* (1882), 7 S.C.R. 216, 244-245.

[8] [1920] 1 K.B. 26, 37 *et seq.* affirmed on other points, the question of interest in the present connection not having been appealed. [1920] 1 K.B. 468; [1921] 2 A.C. 1.

for Special Purposes of Income Tax were held not to be servants of the Crown. The Commissioners did not, it is true, collect revenue, but they had administrative and judicial powers connected with the English Income Tax law, and in particular they had the power to order repayment of taxes which had been paid into the Treasury of the Crown. It is not a far stretch from the holding in this case to postulate that the circumstance of some body or other actually receiving moneys and paying them to a Crown official pursuant to a statutory duty, does not require a holding that such body is a servant of the Crown.

It further appears that infractions of the law dealing with liquor control in the Province of Quebec are prosecuted in the name of the Commission or of the municipality where the infraction occurred. Comment on this phase of the case is unnecessary. The inferences from this factor are all against the application of the doctrine under analysis.

It then appears that the employees of the Commission are declared to be public officers, and that they are required to take the oath of public office as such. It was clearly established many years ago that a person is not a servant of the Crown merely because he or it is entrusted with the management of public works.[9] The use of the words "public officers" in the Quebec Alcoholic Liquor Act[10] is deliberate, since those words are clearly employed for the purpose of ensuring the application of a statute of that Province entitled the "Public Officers Act."[11] The words, however, even in a purely common law sense, do not require a finding that the persons denominated "public affairs" are servants of the Crown.[12] The oath of office which may be required under the Quebec Alcoholic Liquor Act is also statutory and though administered by the Lieutenant-Governor or his appointee[13] the requirement of such an oath does not appear to require a finding that the person taking it or the body of which he is a member is a servant of the Crown.[14]

The procedure in the Quebec Liquor Commission case was not on petition of right, so the Crown funds could not have been reached in the manner usual in the case of claims against the Crown. Nor could the Crown funds be reached by suing the Commission as agent of the Crown, even if it were such, for the Crown revenue cannot be

[9] *Mersey Docks* v. *Cameron* (1864), 11 H.L.C. 443, 463, 504, 508; *Gilbert* v. *Corp. of Trinity House*, 17 Q.B.D. 795. Cf. *Mersey Docks & Harbour Bd. Trustees* v. *Gibbs* (1864), 11 H.L.C. 686.

[10] Now R.S.Q. 1925, c. 37.

[11] Now R.S.Q. 1925, c. 9.

[12] Cf. *Viscount Canterbury* v. *The Attorney-General* (*supra*).

[13] R.S.Q. 1925, c. 37, s. 10; c. 22, s. 11.

[14] Cf. *Bainbridge* v. *The Postmaster-General*, [1906] 1 K.B. 178 at p. 188.

reached by suing a servant of the Crown, in his official capacity.[15] His Lordship in the Liquor Commission case, intimated however that a judgment against the Commission, *if effective*, "would have to be satisfied out of the Crown funds." Unless statutory provision would enable the plaintiff to reach those funds, it seems clear that they could not be so reached. Assuming that Crown funds could not be reached if the Commission were a servant of the Crown—and as just observed they could not be so reached—*ex facie* those funds could not be reached if it were not a servant of the Crown, unless by statutory authority. His Lordship felt that the Quebec Legislature could not have intended to allow the Crown funds to be reached in any such manner and therefore refused to find any statutory implication allowing an action in tort *against the Commission.* This conclusion was reached notwithstanding the decision in *Mersey Docks* v. *Gibbs* (*supra*). Prior to that case it had been frequently argued that as a matter of statutory construction the funds of a public corporation not existing for purposes of gain could not be reached by action. That contention was laid at rest by the *Mersey Docks* case, wherein the House of Lords indicated that in the absence of words showing a contrary intention, the legislature should be deemed to have contemplated that a statutory corporation should be liable even though not formed for the purpose of gain. Duff, J. felt however that the argument should prevail when the corporation was administering Crown funds—his judgment is one of statutory interpretation and is not a decision that the Commission is a crown servant.

To return to the main thesis, it appears that the Commission would not necessarily be a Crown servant even if it could be sued and even if the legislature had provided that a judgment against it must be satisfied out of Crown funds.

No sufficient reason therefore appears to justify a finding that the Commission is a servant of the Crown—nor it is submitted, did Duff, J. so find.

Two other factors should be mentioned—factors which did not appear in the Quebec Liquor Commission case. It is sometimes provided that some or all the members of statutory commissions shall or may be members of the executive government. Such a provision does not make the commission a servant of the Crown.[16]

[15] *Palmer* v. *Hutchinson* (1880-1881), 6 A.C. 619; *Bainbridge* v. *The Postmaster-General* (*supra*), at p. 190; *McKenzie-Kennedy* v. *Air Council.* [1927] 2 K.B. 517, at p. 531; *Rattenbury* v. *Land Settlement Board,* [1929] 1 D.L.R. 242, at p. 249 (S.C.R.).

[16] *St. Catharines* v. *H.E.P. Com'n,* [1930] 1 D.L.R. 409, at pp. 410 and 418. Cf. *Dixon* v. *Farrer* (1886), 17 Q.B.D. 658 at p. 663.

Nor does a provision prohibiting action against a Commission without the consent of the Attorney-General have any such effect;[17] nor does a gubernatorial veto power have any such effect (*supra*).

Thus far attention has been directed toward the elimination of casual factors.[18] What conditions then will justify the conclusion that a given person is a servant of the Crown?

An unusually instructive case separating the destructive from the constructive side of this article has already been briefly noticed. The case referred to is *The King* v. *Commissioners for Special Purposes of Income Tax* (*supra*). In that case, an application for *mandamus* had been sought, to force the Commissioners to allow an income tax exemption. The mandamus was granted and counsel entered upon an argument as to whether or not costs should be awarded against the Commissioners. The costs were awarded. Both of these issues raised the question as to whether or not the Commissioners were servants of the Crown, since mandamus will not lie against the Crown[19] and it is a Crown prerogative not to pay costs. As has been observed, the Commissioners had certain administrative and judicial duties to perform in connection with income tax collection. Their genesis as such was statutory and no direct connection with the Crown, arising from a non-statutory source appeared. The court said on page 40:

> In other words, I think that the common law rule with reference to the costs of the Crown has no application to a case where an official is charged with the performance of a duty imposed by statute, but is also discharging functions as a servant of the Crown. To my mind, the fact that he is charged with the performance of a duty by the express provision of a statute makes an essential distinction. It seems to me to follow as a matter of course that wherever the Court can order a mandamus to issue to an officer charged with the performance of a statutory duty it can order that officer to receive or pay costs, for the reason that the mandamus is not an order directed to the Crown, which this Court can never issue, but is an order directed to an officer who is bound to perform a certain duty imposed upon him by statute.

That interesting opinion, delivered by the Earl of Reading, illustrates two important matters. To begin with, a person may be a

[17] *Op. cit.*

[18] In *Rattenbury* v. *Land Settlement Board* (*supra*), the Board was by Statute made a part of one of the departments of the Provincial Government. Probably the department of which it formed a part did establish the fiduciary relationship which this article postulates as necessary to the doctrine under discussion. Such does not however definitely appear. On the other hand the Supreme Court of Canada did not definitely hold that the Board was a servant of the Crown but rather held that even if it were such a servant, injunction would lie against it if it purported to exercise statutory powers conferred upon it by *ultra vires* legislation.

[19] Since it is a prerogative writ and the Crown cannot order itself.

servant of the Crown in some aspects, though not in others.[20] Secondly, when such a person is acting in accordance with a statutory duty, he is not acting as a servant of the Crown. There is no apparent reason so far why the ordinary rules for determining service or agency should be dispensed with[21] and an official acting in accordance with a statutory duty is certainly not under the control, potential or otherwise, of the Crown.[22]

The case went on appeal on the substantive law involved, but the attack upon the propriety of granting the writ of mandamus and of awarding costs was abandoned.[23]

The same principles were affirmed in an Australian case in which the court said:

> It is settled law that a mandamus will not lie against an officer of the Crown to compel him to do an act which he ought to do as agent for the Crown, unless he also owes a separate duty to the individual seeking the remedy. We do not think that the Governor of a State in the issuing of a writ for the election of senators is acting as agent for the Sovereign in this sense, since the duty imposed by the Constitution is imposed by Statute law and not by delegation from the Sovereign himself.[24]

In this case for the first time in this article, a hint of the necessity of executive delegation may be observed. That factor which is the piece de resistance of the analysis here in process, has been further developed in several important cases, but appears to have a habit of appearing feebly and then retreating behind the legal umbrage of casual circumstances.

An early case that definitely assigns a place to this factor takes us into the tortuous by ways of Constitutional law. The case is *Musgrave* v. *Pulido* (*supra*). In that case, the plaintiff sued Sir Anthony Musgrave for unlawfully detaining a schooner. Sir Anthony pleaded that he was Captain-General and Governor-in-Chief of the Island of Jamaica, that the acts complained of were done by him as Governor and in the exercise of his reasonable discretion as such, and as acts of state. Sir Anthony therefore claimed privilege. His counsel were forced to aver that the acts in question were done by Sir Anthony "as Governor" and "as acts of State," because of an earlier case in which the Judicial Committee had decided that the Governor of Trinidad could not claim privilege as to *personal* debt.[25] Their Lordships had said at page 476:

[20] Cf. *Musgrave* v. *Pulido*, 5 A.C. 102.

[21] Cf. *Montreal L.H. & P. Co.* v. *Quinlan*, [1929] 3 D.L.R. 568; *Kearney* v. *Oakes*, 18 S.C.R. 148. But cf. *Tobin* v. *Reg.*, 16 C.B. (N.S.) 349.

[22] See also *Nireaha Tamaki* v. *Baker*, [1901] A.C. 561; *Rattenbury* v. *Land Settlement Board*, (*supra*); *Queen* v. *McFarlane* (1882), 7 S.C.R. 216 at pp. 244-6; *Viscount Canterbury* v. *Atty.-Gen.* (*supra*).

[23] [1920] 1 K.B. 468; [1921] 2 A.C. 1.

[24] *The King* v. *The Governor of the State of S. Australia* (1907), 4(2) C.L.R. 1497 at p. 1512.

[25] *Hill* v. *Bigge* (1841), 3 Moo. P.C. 465.

If it be said that the Governor of a Colony is *quasi* Sovereign, the answer is, that he does not even represent the Sovereign generally, having only the functions delegated to him by the terms of his commission, and being only the officer to execute the specific powers with which that commission clothes him.

And in *Musgrave* v. *Pulido* (*supra*) their Lordships said on p. 107:

It is enough here to say that it appears to them that if the Governor cannot claim exemption from being sued in the Courts of the colony in which he holds that office, as a personal privilege, simply from his being Governor, and is obliged to go further, his plea must then shew by proper and sufficient averments that the acts complained of were acts of state policy within the limits of his commission, and were done by him as the servant of the Crown, so as to be, as they are sometimes shortly termed acts of state.

The immunity from legal process claimed by these two Governors is not a necessary concommitant of the doctrine of the servants of the Crown. Every servant of the Crown, even when acting as such, is not entitled to such privilege. It is only when an act done by such a servant is an Act of State that privilege may be accorded to the actor.

It is not necessary to consider "acts of State" in the present connection however.[26] It is only necessary to note that both factors, namely state importance and Crown service must co-exist before a Governor can claim privilege. Therefore, in *Musgrave* v. *Pulido* (*supra*) it is worthy of note that their Lordships looked to Sir Anthony's Commission, and held that he must bring the act complained of within the limits of his commission before he would be in a position to claim privilege.

[26] Although not directly involved in the present enquiry, a brief note on "acts of State" may be appended. From the maxim "the King can do no Wrong" it follows that proof of wrong on the part of an alleged Crown servant, in cases wherein it is sought to reach Crown revenue, ordinarily defeats its own object; if the King can do no wrong, he can authorize no wrong, and no culpable act can be imputed to the Crown. (*Nireaha Tamaki* v. *Baker*, [1901] A.C. 561). The alleged servant however, is liable for his wrongful act unless he may invoke the privilege accorded to perpetrators of Acts of State. The latter phrase is not a term of art. Privilege may be pleaded where an actor has acted (a) as servant of the Crown, (b) in a matter of state importance. (*Musgrave* v. *Pulido, supra*). The latter factor is confined within prescribed though flexible limits and partakes in its nature of the Royal Prerogative. Within a relatively narrow sphere, the Crown, by its authorization, may make rightful what would otherwise be wrongful. (23 Hals. s. 646). The view that the act remains wrongful, but is beyond the cognizance of the Courts (cf. 37 H.L.R. 338; 39 H.L.R. 221) seems untenable; if wrongful, the act cannot be imputed to the Crown, and the actor is not a Crown servant. But the actor, under *Musgrave* v. *Pulido* cannot set up the doctrine of Act of State unless he is a Crown servant. Ergo, the act is not wrongful, but is made right by Crown authority. See in general *Rattenbury* v. *Land Settlement Board* (*supra*). But see *Salaman* v. *Sec'y of State in Council of India*, [1906] 1 K.B. 613 (C.A.).

A later case which has been frequently cited and may be regarded as leading in this field is that of *Gilbert* v. *Corporation of Trinity House*.[27] In that case, the defendant corporation was sued in tort, the action being based on the act of an alleged agent. The plaintiff was met with the defense that the defendant was a servant of the Crown. The following quotation (p. 801) from the case explains the pertinent facts and also illuminates the doctrine under discussion:

> The Trinity House, to my mind, is not in the position of a great officer of state. It is nothing more than an amalgamation by authority of state of a vast number of bodies having general authority over the lighthouses and beacons and buoys throughout the country for the general convenience. It is a corporation with very great powers vested in it by statute, but in no possible sense can it be deemed to represent the Crown. All the great officers of state are, if I may say so, emanations from the Crown. They are delegations by the Crown of its own authority to particular individuals. That is not the case with the Trinity House, which has its nature and origin defined with sufficient clearness to enable us to say that at any rate it is in no sense an emanation from the Crown, nor in any way whatever a participant of any royal authority.

The court in this passage talks of "officers of state." Every servant of the Crown is not an officer of state, of course, but since the Corporation of Trinity House would have escaped liability if it were a servant of the Crown[28] though not an "officer of state" the case may be considered apposite. Trinity House was not a servant of the Crown because it was not "an emanation from the Crown, nor in any way whatever a participant of Royal authority."

The cases which have been discussed should justify the tentative adoption of two conclusions. Firstly, it appears that acts done in accordance with a statutory *duty* cannot be regarded as done in Crown service. Secondly it may be assumed that no person is a Crown servant in the absence of the fiduciary relationship of agency between Crown and alleged servant.

A valuable test of this second conclusion is furnished by a late case decided by the Judicial Committee. In *Metropolitan Meat Industry Board* v. *Sheedy* (*supra*) the Appellant Board which had been created by statute, claimed priority as to a debt due to it by a company in process of liquidation. The Board had been formed for certain purposes in connection with the administration of slaughter houses, and based its claim to priority on the contention that it was a servant of the Crown. Their Lordships said at page 905:

> In the statute before their Lordships they think it not immaterial to observe that under the previous legislation of 1902 the local authorities en-

[27] 17 Q.B.D. 795.
[28] *Lane* v. *Cotton*, (*supra*).

trusted with the powers which the Act of 1915 readjusts were certainly not constituted servants of the Crown under the then existing Acts. Their Lordships agree with the view taken by the learned Judge in the Court below that no more are the appellant Board constituted under the Act of 1915 servants of the Crown to such an extent as to bring them within the principle of the prerogative. They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs. That they were incorporated does not matter. It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions, even when taken together, do not outweigh the fact that the Act of 1915 confers on the appellant Board wide powers which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown. Such are the powers of acquiring land, constructing abattoirs and works, selling cattle and meat, either on its own behalf or on behalf of other persons, and leasing its property. Nor does the Board pay its receipts into the general revenue of the State, and the charges it levies go into its own fund. Under these circumstances their Lordships think that it ought not to be held that the appellant Board are acting mainly, if at all, as servants of the Crown acting in its service.

The opening words of this quotation might be construed as meaning that a servant of the Crown may be constituted by statute. It is submitted however that Viscount Haldane meant to indicate that a statutory tribunal might be created in such a way that the Crown could then assume control over it. It would then become a servant of the Crown. Cases involving such a situation will be discussed later.

The italicized sentence on the other hand, indicates clearly enough, the importance which their lordships attach to the necessity of direct connection between Crown and alleged servant. In the absence of that factor, their Lordships could not find Crown Service.[29]

Thus far, the hypothesis adopted in this article has been tested by cases which have decided that the person or tribunal in question is *not* a servant of the Crown. A review of the more important cases wherein the relationship of Crown service has been upheld should be undertaken, since a single authoritative finding that a person is a servant of the Crown in the absence of a direct control by the Crown, would destroy the hypothesis.

It should first be observed that an artificial person may be a servant of the Crown notwithstanding the fact that it is made a cor-

[29] *Fox* v. *Government of Newfoundland,* [1898] A.C. 667, 672 (J.C.) also supports this conclusion. The *Fox case* was followed in the *Metropolitan Meat Industry Board* v. *Sheedy* (*supra*).

poration by the legislature.[30] There is nothing to prevent the legislature from forming a corporation equipped with various powers and capacities to be exercised in accordance with the instructions and under the control, of the Crown. Under such circumstances, the Crown might or might not assume control. Should it assume control, the corporation would thereupon become a servant of the Crown, capable of acting as such within the limits permitted it by the doctrine of *ultra vires*. An instructive instance of such a situation appears in *The Queen* v. *McFarlane*.[31] In that case a claim had been made against the Crown on petition of right. The claim was substantially based on alleged negligence of one Harvey, an employee on the Madawaska River, one of the Public Works of the late Province of Canada. Due to the then rule that petition of right was not available to suppliants complaining of tort, it had been claimed that the Crown, through officials controlling the river rights, had contracted as carrier with the suppliants and had broken its contract in connection with the transportation of suppliants' logs. It thus became important to determine whether or not the persons operating the public work were servants of the Crown. The river, as a public work, was by statute, placed under the direction of the Minister of Public Works, and suppliants attempted to trace Crown Service through the medium of the minister. The Attorney-General on the other hand contended that the minister, in the aspect in question, was not a servant of the Crown, and argued that:

> The Statute[32] vests the control and management of the work in the Minister irrespective of her Majesty's desire in the premises. The Crown may refrain from appointing a Minister of Public Works, but if one be appointed he becomes by force of the statute clothed with control of the works, and so long as the statute is in force, his powers under it cannot be interfered with. Therefore, deriving his powers from a statute and not because they are given to him by the Crown, Her Majesty cannot be made responsible by petition of right for the improper exercise of those powers.

The Attorney-General's argument cannot be overlooked. His argument, of course, has its genesis in a hypothesis similar to that adopted here. There is, however, a possible answer. A master has a potential control over the acts of his servants due, in general at any rate, to a voluntary submission of the servant to that potential control. A fiduciary relationship arises. The possibility that a person or tribunal, invested with statutory discretion capacity or powers, might place itself or himself in such a fiduciary relationship to the Crown, must be recognized. Not so as to statutory *duties*,

[30] *Bainbridge* v. *The Postmaster-General*, [1906] 1 K.B. 178; *Roper* v. *Works & Public Bldgs. Com'rs*, 84 L.J.K.B. 219 (1914); *Metropolitan Meat Industry Board* v. *Sheedy* (*supra*).

[31] (1882), 7 S.C.R. 216.

[32] Public Works of Canada Act, 31 Vict. c. 12.

for the Crown could not control a person as to such duties. It is conceivable also that in any given case, the recipient of statutory discretion might be precluded from placing himself or itself under the potential control of the Crown as to the exercise of that discretion. So to do would in effect be to delegate discretion. The courts have inclined to the view that statutory administrative and judicial functions, cannot be delegated.[33] In any given case however where statutory power or discretion is given, two questions should be asked—first, does the statute contemplate delegation or submission to the potential control of the Crown—secondly, has the Crown in fact established such a potential control. Only if both questions can be answered in the affirmative, has Crown service been established.

This article has no concern with particular cases so a tedious analysis of the Act will not be attempted. Qwynne, J. thought that the statute imposed statutory *duties* and so held that the Minister and his subordinates appointed under the Act were not Crown servants. The other judges did not discuss the Attorney-General's argument as quoted above but decided the case on other grounds.

Bainbridge v. *The Postmaster General* (*supra*) however, clearly illustrates the distinction suggested above. It had been decided in *Lane* v. *Cotton* (*supra*) that the Postmaster General was not liable for the delicts of his subordinates, since he was a Crown servant. The *Bainbridge* case followed *Lane* v. *Cotton* notwithstanding the partial incorporation of the Postmaster General, and in *Roper* v. *Works & Public Buildings Commission* (*supra*) it was held that complete incorporation does not prevent the existence of the relationship of servant of the Crown.[34]

An interesting case in the High Court of Justice for Ontario, decided in 1896, raised many of the issues which have been discussed in this article. The Commissioners for Queen Victoria Niagara Falls Park were involved,[35] a body in whom certain park lands were vested in trust for the Province of Ontario. Many of the powers of the Commissioners were to be exercised by them, subject to the direction of the Lieutenant-Governor. It is clear therefore that the

[33] *Simon* v. *Gastonguay*, [1931] 2 D.L.R. 75; *King* v. *Lloyd*, [1906] 1 K.B. 552, 557: *Cook* v. *Ward*, 46 L.J.Q.B. 554, 556; *Bottomley's Case*, 16 Ch. D. 681, 686; *In re Leed's Banking Company* (1866), 1 Ch. App. 561; *Ex parte The Municipality of York re Local Board of Health*, 37 N.B.R. 546; cf. *Metropolitan Meat Industry Board* v. *Sheedy* (*supra*).

[34] The fact that some statutes, in addition to incorporating also grant franchises over-riding the general law should not effect the question here involved. Such franchises touch upon the effect, and do not prevent the existence of agency. A master has a potential control over acts—not over the effect of acts, for effects flow from law, natural or made by man.

[35] *Graham* v. *Commissioners for Queen Victoria Niagara Falls Park* (1896), 28 O.R. 1.

statute contemplated the establishment of a relationship such as that of master and servant between the Commissioners and the Crown. The case is not as clear as might be desired on the existence or non-existence of such a relationship—presumably however the Lieutenant-Governor had established a potential control. It was held that the statutory body was a servant of the Crown.

One further case should be noted before passing on to generalization—that is the case of *Sanitary Commissioners of Gibraltar* v. *Orfilia*[36]—a case worthy of mention on account of its being a Privy Council decision, rather than for anything that it adds to this thesis. It was sought in that case to charge the Sanitary Commissioners with negligence. The Commissioners were appointed under the terms of The Sanitary Order in Council, Gibraltar, 1883. When it is remembered that Gibraltar is a Crown colony, whose governing officer is vested with legislative power, it will doubtless be conceded that the Commissioners owe their official existence to a legislative rather than an executive edict. Their Lordships appear to have so treated the matter. It was held however that the Commissioners were not liable; on the ground that the order in council did not intend to expose the Commissioners to liability to any greater extent than the Crown would have been liable had it been doing the work entrusted to the Commissioners. The case, in its ratio decidendi, is reminiscent of *Quebec Liquor Commission* v. *Moore* (*supra*). After pointing out certain features in which the Commissioners were under executive control however, their Lordships intimated that the Crown was principal to, and acted through the instrumentality of the Commissioners. The case is quite in accord with the view above advanced that to be a servant of the Crown a statutory body must be free, if it so desires to place itself under the control of the Crown and that that control must in fact exist.[37]

The following statement of the law is believed to be consistent with, and substantially supported by the authorities:

(a) A person, natural or artificial, may at the same time be a servant of the Crown as to some acts, and not a servant as to other acts.

(b) A person, natural or artificial, cannot be a servant of the Crown with regard to an act which he or it is required to do by statute.

(c) A person, natural or artificial, endowed by statute with capacities or powers may under certain conditions be a servant of

[36] [1890] 15 A.C. 400 (J.C.).

[37] The following cases, it is submitted, are also consistent with that hypothesis: *Violette* v. *Bd. of Liquor Com'rs of N.B.* (1922), 50 N.B.R. 157, *Bonanza Creek Gold Mining Co.* v. *The King*, 26 D.L.R. 273; *Fisher* v. *Oldham Corp.*, [1930] 99 L.J.K.B. 569.

the Crown. Those conditions are (i) statutory intention express or implied, that such person may submit its discretion to the potential control of the Crown (ii) actual establishment of such potential control.

(d) From the above, it has already appeared that the *sine qua non* is the existence of that fiduciary relationship which is the essence of the relationship of agency in everyday life. As a corollary, it follows that the legislature cannot create that relationship but it must arise out of mutual arrangement between Crown and alleged agent.

(e) A corollary from "c," *supra*, would indicate that a person, natural or artificial, endowed by statute with powers or capacity which by statutory intent, could not be subjected to Crown control, could not be a servant of the Crown. There remains however, an interesting situation which has been deliberately reserved till after conclusions had been drawn. Let it be supposed that the legislature has provided that Mr. X shall be deemed to be a servant of the Crown. It would appear that all the attributes of the doctrine would then attach to Mr. X. Such statutes, however, must be rare. A close analogy is presented by certain remarks of Viscount Haldane in *Bonanza Creek Gold Mining Co.* v. *The King* (*supra*), a case familiar to every company lawyer. In that case his Lordship said:

> It has been urged in several cases which have occurred that the Governor-General and the Lieutenant-Governors of the provinces, excepting so far as the Royal prerogatives have been reserved expressly or by necessary implication, have the right to exercise them, as though by implication completely handed over and distributed in such a fashion as to cover the whole of the fields to which the self-government of Canada extends. The Governor and the Lieutenant-Governors would thus be more nearly Viceroys than representatives of the Sovereign under the restrictions explained in *Musgrave* v. *Pulido* (*supra*), where it was laid down that, in the case of a Crown Colony, the Commission of the Governor must in each case be the measure of his executive authority, a principle which, in such a case as that of a self-governing Dominion like Canada, might find its analogy in the terms not only of the commission, but of the status creating the constitution.

This passage should serve as a warning that, while a given person may not be actually a servant of the Crown, he may be deemed so, or indeed, be deemed a co-ordinate Sovereign with all the legal regalia that would embellish such a position.

Much more might be said about the doctrine of the Servant of the Crown, but over refinement in the discussion of legal oddities too often leads to obscurity.

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