CASE AND COMMENT

CY-PRÈS DOCTRINE—GENERAL CHARITABLE INTENT—GIFT OUT AND OUT—RULE AGAINST PERPETUITIES—ANONYMOUS AND IDENTIFIED SUBSCRIBERS—INITIAL IMPOSSIBILITY AND SUPERVENING SURPLUS.—Two English cases decided in July last contribute to the discussion[1] of whether a general charitable intent is essential to an application of the cy-près doctrine. They are *Re Cooper's Conveyance Trusts*,[2] decided by Upjohn J., and *Re Ulverston and District New Hospital Building Trusts*,[3] a decision of the Court of Appeal.

The *Cooper* case was one of supervening impossibility. It arose out of a conveyance in fee simple in 1864 of land on trust for the Orphan Girls' Home at Kendal. On failure of the trust for the orphanage, the conveyance gave the land over, upon the same trusts as those attaching to a mansion house called Levens Hall. (Levens Hall was in 1864 the residence of the Honourable Mary Howard, who had provided the consideration for the conveyance of 1864.) The orphanage functioned from 1864 until 1954. Latterly, it had been largely maintained by grants from public authorities. By 1954, however, these authorities no longer sent many children to the orphanage, as their policy had veered towards accommodating orphans in small homes, and accordingly public support stopped. The orphanage closed, the primary trust failed, and the question of what to do with the property was put to the court.

Upjohn J. held that the express gift over was void for perpetuity, and so the contest became one between a cy-près application and a resulting trust. The learned judge came to the conclusion that, as a matter of construction, the presence in the conveyance of the abortive gift over negatived both an intention to give the property out and out to the charity and a general charitable

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[1] For earlier episodes in the Canadian Bar Review, see vol. 32, pp. 599 and 1100, and vol. 34, pp. 364 and 366.

[2] [1956] 1 W.L.R. 1096; [1956] 3 All E.R. 28.

[3] [1956] 3 W.L.R. 559; [1956] 3 All E.R. 164.

intention. He accordingly declared that the property was held on a resulting trust. Particular reliance was placed on Maugham J.'s decision in *Re Talbot*.[4]

No criticism can be levelled at the findings that the gift was not out and out and that there was no general charitable intent. Objection may, however, be taken to the opinion expressed by Upjohn J. that the distinction between these two is one of language. He said: "Mr. Buckley, on behalf of the Attorney-General, referred to a number of authorities to establish the proposition that when once the charitable gift has taken effect, as distinct from an initial failure through impracticability or lapse during the testator's lifetime, the question of general charitable intention is irrelevant, although he concedes that one must in the first place find a perpetual or out and out gift to charity. I think the matter is really one of language."[5] And later: "Thus, in the present case, if there had been no gift over on the failure of the orphanage, it would hardly have been suggested that upon the subsequent failure of it there would have been a resulting trust. Where, however, the donor uses language showing an intention that in some circumstances he contemplates a failure of the purpose or indicates that his gift is only to be for a limited time or purpose, then it becomes a question of construction, whether he has made an out and out gift to charity or not, and that is not inaptly expressed by asking whether he has evinced a general charitable intention."[6]

With respect, the matter is not merely one of language. Without bothering what expressions are apt, there are two types of cy-près application, and not merely two ways of describing cy-près occasions. Where property is given out and out on trust for a charitable purpose, it will be devoted to charity for ever. Where, on the other hand, cy-près application is based on what is usually called a general charitable intent, the property will be applied to charity only so long as there is some possible method of carrying out the donor's general intention. A general charitable intention is not necessarily so vague as to cover all charity. A general charitable intent is one to benefit a type of charity, however narrow, which is wide enough to include the stated (impossible) purpose and at least one other (possible) purpose. By way of example, suppose the facts of the *Cooper* case to be altered by removing the gift over. If the gift to the orphanage is now construed as out and out, the property will be applied cy-près for ever. If it is construed

[4] [1933] Ch. 895.
[5] [1956] 1 W.L.R. at p. 1102.
[6] [1956] 1 W.L.R. at p. 1103.

as not being out and out, a general charitable intent must be sought. If there is such a general intent, it may be of various kinds. It may, for example, be a general intent to benefit the poor orphans of Kendal. In this case the property could be applied cy-près only so long as there is some possible way of benefiting the poor orphans of Kendal. There would then (subject to the ensuing argument as to the rule against perpetuities) be a resulting trust if, for example, there ceased to be any poor Kendal orphans.

As stated before, the construction by Upjohn J. of the conveyance is not being criticized. The non-application of the rule against perpetuities to the contingent interests arising under the resulting trust is, however, anomalous. It is true that what may be termed an equitable possibility of reverter has been held exempt from the rule in several English cases.[7] But in the only English decision on the point—*Hopper* v. *Liverpool Corporation*[8]—a legal possibility of reverter was held void for perpetuity. The rule's application to common-law interests is disputed. If it does apply to any particular common-law interest, the rule ought *a fortiori* to apply on principle to interests of similar quantum operating in equity. The rule against perpetuities was developed to control interests not subjected to the rigours of seisin. No policy ground is apparent which would lead to the distinction between the legal possibility of reverter and its equitable counterpart, so far as perpetuity is concerned. Morris and Leach would apply the rule.[9]

Had the interests of persons claiming under the resulting trust in the *Cooper* case been held void for perpetuity, what would have happened to the property? It would not have gone as on the donor's intestacy, for the interests of the next of kin are presumably void for perpetuity too. A possibility of reverter (legal or equitable) is presumably subjected to the test of the rule against perpetuities on creation (if at all), not when first alienated otherwise than by operation of law. If this is right, the property would be *bona vacantia*. Then it would presumably have been applied cy-près as a matter of grace. This would seem to lead to the conclusion that once property has been effectively devoted to a charitable purpose it will always be applied cy-près if (i) the gift (however specific) is out and out; or (ii) there remains some general

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[7] *Re Randell* (1888), 38 Ch. D. 213; *Re Blunt's Trusts*, [1904] 2 Ch. 767; *Re Chardon*, [1928] Ch. 464; *Re Chambers*, [1950] Ch. 267.

[8] (1944), 86 Sol. Jo. 213. Otherwise in Ireland: *A.-G.* v. *Cummins*, [1906] 1 I.R. 406. See, generally, Morris and Leach, Rule Against Perpetuities (1956) pp. 203-211.

[9] Rule Against Perpetuities, pp. 206-211.

charitable intent capable of fulfilment, or (iii) the purpose specified is not bound to fail, if at all, within the perpetuity period.

The *Ulverston* case was one of initial impossibility. Starting in about 1928, a committee organized the collection of funds for building a hospital. Contributions were received as the years passed by, partly from subscribers who gave their names, partly in the form of bequests, and partly from anonymous sources, such as the proceeds of whist drives, rummage sales, and the like. By 1937 it was reasonably plain that it would never be possible to collect enough to go ahead with the plan to build a hospital. All hope had certainly gone long before 1955, when the trustees of the fund applied to the Chancery Court of the County Palatine of Lancaster asking whether there was to be cy-près application or a resulting trust. Stone V.-C. held that there was a resulting trust of a proportionate part of the fund (that is, after allowing for expenses) in respect of contributions received from identified donors. The question of what to do with anonymous donations was left over for a further hearing. The learned Vice-Chancellor's decision was unanimously affirmed by the Court of Appeal.

It is not the purpose of this comment to quarrel with the result, but two aspects of the judgment of the Court of Appeal invite remark. These are, first, the effect on the cy-près doctrine of the fund in question being partly derived from anonymous and partly from identified subscribers—and the relations between the *Ulverston* case and *Re Hillier's Trusts*; and, secondly, the importance accorded to the question whether a cy-près application arises out of an initial impossibility or a supervening surplus.

Jenkins L.J., in whose judgment Hodson L.J. and Lord Evershed concurred, held that there was no general charitable intent. He then went on to consider the argument that the contributions were given out and out. The Attorney-General had urged that the anonymous contributors had given their money out and out, and that it followed that subscribers who gave their names and were aware that their subscriptions would be mixed with non-returnable contributions from anonymous sources must be taken to have contributed with a similar intention. Jenkins L.J. rejected this argument. He first of all suggested that an anonymous contributor may claim on a resulting trust if he can adduce the necessary evidence of his gift. Secondly, in the case of anonymous contributors who can establish no claim, the learned lord justice thought that that part of the fund was *bona vacantia* (and could therefore not be applied cy-près by the court unless the Attorney-

General disclaimed). Finally, he thought that the position of the anonymous subscribers had no bearing on that of the others. *Re Welsh Hospital (Netley) Fund*[10] was then considered and distinguished by Jenkins L.J. on the grounds that it was a case of surplus after the charitable purpose of the fund had been fulfilled, and that the language of the appeals was different. He evidently thought that supervening surpluses were always to be applied cy-près, for he quoted with approval from the judgment of Danckwerts J. in *Re Wokingham Fire Brigade Trusts*[11] and said that the principle applied there would have been equally appropriate in the *Netley* case. The learned lord justice then turned to *Re Hillier's Trusts*,[12] which he distinguished on the basis that in it the named subscribers did have a general charitable intent. This is where difficulty is encountered, as a quotation from the judgment of Jenkins L.J. will show:

> In my view, Evershed M.R.[13] was not seeking to lay down a general principle to the effect that in all cases where a fund of this kind is found to include contributions from anonymous sources, a general charitable intention must be imputed to the named subscribers, however clear it may be that their subscriptions were solicited and made solely and exclusively for one particular purpose. I think his observations as to the effect of the inclusion in the fund of contributions from anonymous sources were intended to be confined to cases comparable to the one then in hand, that is to say cases in which the fund is raised [*sic*][14] are such as to leave it open to doubt whether the named subscribers did or did not contribute with a general as distinct from a particular charitable intention. In such cases the inclusion of anonymous contributions is a factor which—so Evershed M.R. held—may be taken into account for the purpose of resolving the doubt in favour of a general charitable intention.[15]

Presumably Jenkins L.J. accepts as good law what he concludes that Evershed M.R. meant, otherwise he would have to be accused of cavalier treatment of the doctrine of precedent, for, in *Re Hillier's Trusts*, Denning L.J. went even further. But compare an earlier passage in the judgment of Jenkins L.J.: "Even if a general charitable intention is rightly to be attributed to the anonymous contributors to collection boxes, neither the fact that they have chosen to contribute in that way, nor the named subscriber's knowledge that anonymous contributions have been made in that

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[10] [1921] 1 Ch. 655.
[11] [1951] Ch. 373.
[12] [1954] 1 W.L.R. 700.
[13] In *Re Hillier's Trusts*.
[14] Probably a misprint for "cases in which the circumstances in which the fund is raised . . .". This is the version appearing in the All England Reports.
[15] [1956] 3 W.L.R. at p. 572.

way, seems to me to have any bearing on the intention of the named subscriber".[16] This must mean that Jenkins L.J. regards the *Ulverston* case as distinguished from the *Hillier* case by the absence of doubt (in the *Ulverston* case) whether the named subscribers had any general charitable intent. In other words, the distinction turned on the terms of the appeals. The use of the words "general charitable intention" to describe both an intention to benefit a wider charitable object than the immediate species detailed and an intention to part with all interest in the money given makes it difficult to follow which type of intention is being referred to at any given moment.

Lord Evershed, in the *Ulverston* case, agreed with Jenkins L.J.'s interpretation of his judgment in the *Hillier* case.

Jenkins L.J. observed that cy-près application is more likely in cases of surpluses left over after carrying out a charitable purpose than in cases of initial impossibility. This is the experience of the cases. Referring to the *Netley* case, the learned lord justice said:[17]

> With regard to this case, I would observe that it concerned the disposal of a surplus after the immediate purposes for which the fund was raised had been fully fulfilled, and not a case of total failure ab initio like the case with which we now have to deal. It seems to me that this makes a material difference. The intention of a subscriber might well be that his contribution should be returned in the event of a total failure ab initio of the purpose for which he made it, but that in the event of a surplus being left over after that purpose had been duly fulfilled, any share in such surplus which might be regarded as representing his subscription or some part thereof should be permanently devoted to charity. In forming his intention as to the fate of his contribution in the latter event (if, indeed, he formed one at all) he might well be influenced by the fact that the inclusion of contributions from anonymous sources, and the indiscriminate spending of a mixture of anonymous contributions and contributions from named subscribers, would make it impossible to ascertain whether the whole or any and, if so, what part of any particular contribution had been spent. In the case of initial failure different considerations apply, for the whole of the fund is ex hypothesi intact and there has been no effective application of it for the purpose for which it was raised.

The key words, it is submitted, are: *if, indeed, he formed one at all.* One does not know with what quaint varieties of intention people contribute to charity. An intention to give money only so far as necessary to achieve a specific charitable object, a general charitable intent (with or without a preference for a more or less

[16] [1956] 3 W.L.R. at p. 567. [17] [1956] 3 W.L.R. at p. 568.

specific object) and an intention to give for a specific object without any other thought on the subject are all likely to be met. It is the last which causes difficulty, and which is probably the most usual. Unless advised by a lawyer, and made to consider all eventualities with a view to a formal dispositive document, the donor is unlikely to have contemplated the possibility of a problem arising out of his gift, and therefore unlikely to have formed opinions as to the precise effects of initial impossibility and supervening surplus. The anonymity or otherwise of a gift, and the knowledge or its absence on the part of a named subscriber that anonymous contributions are to be mixed with his, would seem to be of equal significance in cases of initial impossibility and in cases of surplus. Moreover, it is not easy to appreciate the force of the last sentence quoted from Jenkins L.J.'s judgment. The fund in the *Ulverston* case was not intact, there having been expenses over the decades of collecting. The declaration of Stone V.-C., as affirmed by the Court of Appeal, was a resulting trust of a rateable part of the fund. The same machinery could be applied to a surplus.

Yet it remains true that throughout the English decisions it has been hard to obtain cy-près application in cases of initial impossibility and easy in cases of supervening surplus. The justification of this on policy grounds would seem to be that in cases of initial impossibility the donor or his near relations are at hand trying to get the money, while in cases of supervening surplus the aspiring beneficiaries of a resulting trust may be very remote from the donor and are in any case unlikely to have been part of his financial structure, so to speak. Yet it must not be overlooked that it has also been much easier to obtain cy-près application in cases where the surplus is quickly apparent than in cases of initial impossibility. Initial surpluses have usually received the same treatment as those which supervene after a long time. This has been so not only in cases of anonymous contribution (such as *Re North Devon and West Somerset Relief Fund Trusts*,[18] where the surplus became apparent within the year), but also in cases of legacies, for example *Re King*[19] and *Re Raine*.[20] Perhaps this can be accounted for by the fact that in all cases of surplus the whole gift has initially been subject to a charitable trust, while in cases of initial impossibility no charitable trust has taken effect (unless and until cy-près application is ordered).

The policy aspects of the cy-près doctrine need reconsideration.

[18] [1953] 1 W.L.R. 1260.
[19] [1923] 1 Ch. 243.
[20] [1956] 2 W.L.R. 449.

By tradition, the courts are biased in favour of charity. In practice this bias is not always apparent. In certain circumstances a presumption in favour of the next of kin may be preferable.

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HABEAS CORPUS—DEPORTATION ORDER AGAINST ALIEN—BAIL —"CONFINED OR RESTRAINED OF HIS LIBERTY"—COURT'S POWER TO INTERFERE WITH FINDINGS OF IMMIGRATION BOARD.—Grave misapprehensions concerning the efficacy of the writ of habeas corpus for testing the validity of deportation orders made against aliens have arisen in view of the decision handed down by the Supreme Court last year in *Masella* v. *Langlais*.[1] The principal holding was that the alien involved, since he was at liberty on bail, was not sufficiently restrained of his liberty to be entitled to the writ, while two of the five judges held that, in view of the particular circumstances of the case, the courts were not entitled to interfere with the deportation order.

Masella was an Italian who emigrated to Canada in 1951 with the intention of establishing permanent residence here. Some months after his arrival, it was discovered that the Canadian visa on his passport had been issued without proper authority; he was taken into custody, and a Board of Inquiry duly summoned for the purpose ordered his deportation on the ground that he had not undergone the medical examination required by the Immigration Act before entering Canada. Masella appealed to the Minister of Citizenship and Immigration against the decision of the board and, while the appeal was pending, he was released from custody on $500 bail, with the condition that he report once a month to the immigration authorities in Montreal. The appeal was dismissed and a deportation order was issued against him, addressed to Langlais, Chief Immigration Officer in Montreal; Langlais, however, was prevented from enforcing the order by the issue of a writ of habeas corpus from the Superior Court in Montreal.

At the hearing on the merits the writ was dismissed, and this judgment was confirmed by the Court of Queen's Bench sitting in appeal,[2] Gagné and Rinfret JJ. dissenting. The principal ground

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[1] [1955] S.C.R. 263; recently followed by the Supreme Court in *Attorney-General for Canada* v. *Brent*, [1956] S.C.R. 318.

[2] [1954] B.R. 667.

for dismissing the writ was that, the board of inquiry which ordered Masella's deportation having had authority and sufficient evidence to act as it did, the courts were precluded from further inquiry. Before the Supreme Court two arguments were put forward by the respondent: firstly, that since the appellant was not, at the time of the application for the writ, actually detained by the respondent, habeas corpus was not the proper remedy for him to seek; and, secondly, that the courts are prohibited by section 23 of the Immigration Act[3] from inquiring into the reasons for which any immigrant was ordered deported.

Three judges out of five[4] held that the appeal should be dismissed because the writ of habeas corpus, by its very nature, did not apply to a situation where the person is at liberty on bail and not confined or restrained of his liberty. The terms of article 1114 of the Quebec Code of Civil Procedure certainly justify this conclusion,[5] but it is necessary at the same time to consider the arguments advanced in *de Bernonville* v. *Langlais*,[6] where it was held that a person who, although at liberty on bail, is subject to immediate deportation and is under the continual surveillance of immigration officers, is sufficiently restrained of his liberty to be entitled to the writ of habeas corpus. There it was argued that the courts had long recognized the use of the writ where the person is not actually detained by someone else, and reference was made to the large number of cases in which the writ is used to recover the custody of children, although in most cases the child is not confined or restrained of his liberty, but is free to come and go as he likes. In the *Masella* case, Locke J. dismissed this argument merely by saying (at p. 275):

> I am quite unable to understand how the fact that a writ may issue under these circumstances, where the person to whom it is directed has the actual custody of the infant, supports the view that in the circumstances of *de Bernonville's* case the remedy was available to him.

With all respect, the point of the argument was that in most cases the custody of the child does not amount to a confinement or detention, but that the fact that he is not in the proper custody is regarded as a "restraint of liberty": the restraint exists only by analogy, and not in fact.[7]

[3] R.S.C., 1927, c. 93: now R.S.C., 1952, c. 325, in which similar words are found in s. 39.

[4] Locke, Cartwright and Fauteux JJ.

[5] "1114. Where a person is confined or restrained of his liberty . . .".

[6] [1951] C.S. 277 (Brossard J.).

[7] See, for example, *Daoust* v. *Schiller* (1899), 2 R.P. 529, at p. 553 (Mathieu J.); *Stevenson* v. *Florant*, [1925] S.C.R. 532, at p. 540 (Rinfret J.).

Although we might, in the same manner, assimilate to a restraint of liberty the fact that a person's freedom is in constant jeopardy, there is no historical basis for doing so. It is unquestionable that, in English constitutional history, the most frequent use of the writ of habeas corpus ad subjiciendum has been to secure the release of persons unlawfully detained or imprisoned. This appears in passages quoted by Locke J. from *Barnardo* v. *Ford*[8] and *Secretary of State for Home Affairs* v. *O'Brien*,[9] where the Earl of Birkenhead said of habeas corpus, "It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement". Thus the Supreme Court disapproved, along with *de Bernonville*'s case, of an earlier case of *R.* v. *Cameron*,[10] where Wurtele J. said at page 170 that "bail is custody and he [the accused] is constructively in gaol; and he has the same right to be released from this custody as he would have to be released from an imprisonment". Reference was also made in the *Masella* case to *Re Isbell*,[11] where Rinfret J. said in part: "In my view, in order to make a case for *habeas corpus* in criminal matters, there must be an actual confinement or, at least, the present means of enforcing it". The final words of this sentence were used to support the decision in *de Bernonville*'s case, but their true interpretation is only appreciated by reading the two succeeding sentences: "A person may apply for the writ while in the custody of a constable, immediately upon being arrested, and need not wait until he is actually incarcerated. But a person at large on bail is not so restrained of his liberty as to entitle him to the writ."

The Supreme Court's judgment in the *Masella* case gives a certain amount of comfort to legal purists, in that it shows how the courts will resist any attempt to reduce the writ of habeas corpus to a mere instrument for exerting judicial control over immigration proceedings, but will confine it to its proper rôle as a safeguard for individual liberty. The decision also gives rise to certain regrets: thus Cartwright J., in concurring with the reasoning of his brother Locke, said that he regretted the result not only because the court's time had been wasted on a full discussion of Masella's plight, but also "because had the matter been properly before us it would have been my view that the conclusion arrived at by Rinfret J. and concurred in by Gagné J. was right".[12] In the

[8] [1892] A.C. 326, at p. 333 (Lord Watson).
[9] [1923] A.C. 603, at p. 609.
[10] (1898), 1 Can. C. C. 169.
[11] [1930] S.C.R. 62, at p. 65.
[12] Page 277.

Court of Queen's Bench, Rinfret J. reviewed all the facts surrounding Masella's admission to Canada and concluded that the man was being wrongly deported. This inquiry into the merits of the board's decision runs counter to the provisions of the Immigration Act, and was disapproved of by two judges in the Supreme Court (Abbott and Taschereau JJ.), who dismissed Masella's appeal on the ground that the court did not have the power to interfere with the findings of the board of inquiry. In the words of Abbott J. (at page 281), "a court has no jurisdiction to substitute its judgment for that of the board".

The jurisdiction of the courts to interfere with deportation orders made under the Immigration Act is severely restricted by section 39 of the act, which reads as follows:

> 39. No court and no judge or officer thereof has jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister, Deputy Minister, Director, Immigration Appeal Board, Special Inquiry Officer or immigration officer had, made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile.

As Taschereau J. pointed out in his decision, at page 266, this section of the act closes the door to intervention by the courts, provided that the decision or order has been had, made or given in accordance with the provisions of the act, and all that the court can do is ascertain that the board of inquiry which made a deportation order was properly constituted and reached its decision only after a properly conducted hearing.[13] This appears especially from *Samejima* v. *The King*[14] and *de Marigny* v. *Langlais*.[15]

Assuming that the inquiring authority is properly constituted, what procedure must it follow in reaching its decision? Section 27 of the Immigration Act, which lays down the procedure for a deportation inquiry, requires that the hearing be held in the presence of the person concerned "wherever practicable", and provides that the person shall have the right to be represented by counsel at his own expense, if he so wishes. With regard to evidence, subsection three merely says that "the Special Inquiry Officer may at the hearing receive and base his decision upon evidence considered credible or trustworthy by him in the cir-

[13] The *Masella* case involved an interpretation of the old Immigration Act, R.S.C., 1927, c. 93, under which deportation orders were made by a Board of Inquiry: under the new act, they are made by a Special Inquiry Officer.

[14] [1932] S.C.R. 640.

[15] [1948] S.C.R. 155.

cumstances of each case". These provisions do not give much opportunity for interference by the courts. The only other possible grounds for interfering would be a violation of the rules of natural justice; the courts will generally insist that the person whose rights are affected be given notice of the hearing[16] and that the inquiring authority have some evidence on which to base its decision,[17] but how far they will go in this direction is uncertain. The courts should not examine the evidence with an eye to ascertaining whether the decision was justified, although (with great respect) this is exactly what Rinfret J. did in the Court of Queen's Bench.

It must be noted that section 39 only excludes the jurisdiction of the courts where the person is not a Canadian citizen and has not acquired Canadian domicile. Just as the court determines its jurisdiction by deciding whether an order was made in accordance with the provisions of the act, so must it decide also whether the person is a Canadian citizen or has acquired Canadian domicile; these are questions which are answered only by an examination of the evidence submitted to the board, but the interpretation and application of section 39 are the job of the courts, and not of the immigration authorities.[18] On all other matters the decision of the immigration authorities is final, and the courts should not inquire any further into the merits of the particular case.

The *Masella* case raises doubts concerning the appropriateness of habeas corpus as a remedy in cases of this nature. It is certainly appropriate in that where a person is detained for deportation it is an effective way of getting his case before the courts. But what the immigrant wants to have the courts review is not so much his right to personal liberty as his right to remain in Canada and acquire Canadian citizenship, to whatever extent they are competent to do so; this is quite evident from the fact that Masella demanded the writ at a time when he was free on bail but was liable at any time to be arrested and put on a ship leaving for Italy. Is it fair that a person against whom a deportation order has been issued should be prevented from having the validity of the order tested in the courts, merely because he is not actually in custody? It is true that the proceedings might be reviewed on a writ of certiorari, but in the province of Quebec

[16] *Alliance des Professeurs Catholiques de Montréal* v. *Quebec Labour Relations Board*, [1953] 2 S.C.R. 150. The case was commented upon in this Review at the time by Le Dain (1953), 31 Can. Bar Rev. 821.

[17] *Wright's Canadian Ropes* v. *M.N.R.*, [1947] A.C. 87.

[18] See section 4(1); also *Shin Shim* v. *The King*, [1938] S.C.R. 378.

there is no appeal in matters of certiorari[19] while there is one in matters of habeas corpus,[20] so that the right of access to the courts is in the two cases unequal.

This writer does not advocate in the slightest degree that the courts should go beyond the limitations created in section 39 of the Immigration Act and decide whether or not an immigrant should, on the merits of his case, be deported. Whatever control is allowed by that section should not be throttled, however, by mere questions of procedure, or exerted in varying degrees according to circumstances, such as those in the *Masella* case, which have no real bearing on the ultimate question—whether or not a deportation order against an immigrant has been made in accordance with the provisions of the Immigration Act.

J. W. DUNTON*

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ACTION PER QUOD SERVITIUM AMISIT—MENIAL SERVANTS—A FUNERAL NOTE.—It is very seldom that one sees three English judges conspiring together unobtrusively to put to death a well-established doctrine of the common law, but this was precisely the situation in a recent case before the Court of Appeal in *Inland Revenue Commissioners* v. *Hambrook*.[1] The victim marked down for judicial assassination was the action *per quod servitium amisit*, a sickly creature, already frightened almost to death by the denunciations launched at it from time to time by the House of Lords.[2] The lethal weapon consisted of a careful examination of the history of the action and the motive for the attack was probably a feeling that it was a legal anachronism in a modern industrial society. The court may also have been moved by a general reluctance to extend protection against negligent conduct to cases of pecuniary loss as distinct from injury to the person or property.[3]

The facts of the case have previously been noted in this Review.[4] The Crown brought an action to recover damages for the loss of services of an established civil servant, a clerk in the taxa-

[19] Art. 43 C.C.P.

[20] Habeas Corpus Act, R.S.Q., 1941, c. 340, s. 3.

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[1] [1956] 3 W.L.R. 643; [1956] 3 All E.R. 338.

[2] *Admiralty Commissioners* v. *S. S. Amerika*, [1917] A.C. 38, at p. 60; *Best* v. *Samuel Fox & Co., Ltd.*, [1952] A.C. 716, at p. 728 (consortium).

[3] See P. Brett: Consortium and Servitium: A History and Some Proposals (1955), 29 Aust. L.J. 321, 389, 428.

[4] (1956), 34 Can. Bar Rev. 598.

tion offices of the Inland Revenue. While off duty, he had been injured in a collision with the defendant's automobile. The accident was due partly to his own negligence and partly to that of the defendant. The trial judge, Lord Goddard C.J., held that no action lay to the Crown, as a civil servant was not truly a servant but the holder of a public office.[5] The Court of Appeal upheld the decision, but on quite a different ground. It expressed the opinion that the *per quod* action is properly confined to "menial servants", that is to say, those living *intra moenia* the household of the master or, as Denning L.J. put it, "to the realm of domestic relations". It does not extend to employees generally, whether they are the servants of the Crown or of a private individual, unless they fall within this category.

This somewhat startling decision has the obvious effect of confining the action within the narrowest limits. Until quite recently, there had been no very serious assertion that the action is so confined. Indeed, in *Attorney-General for New South Wales* v. *Perpetual Trustee Co. (Ltd.)*[6] Dixon J., after a careful examination of the authorities, had reached the opposite conclusion:[7]

> There is no reason to suppose the action *per quod servitium amisit* would lie only for the loss of the services of persons of low degree. In the historical development of the actions *per quod servitium amisit* there has not been any limitation on the class of services for the loss of which a private employer may sue. All that is required is that the relation of master and servant shall exist.

In the English decisions of *Martinez* v. *Gerber*,[8] *Lumley* v. *Gye*,[9] *Bradford Corporation* v. *Webster*,[10] *Att.-Gen.* v. *Valle-Jones*[11] and *Mankin* v. *Scala Theodrome Co. Ltd.*,[12] and in the Canadian decision in *The King* v. *Richardson*,[13] there has been no finding that only the loss of the services of a menial servant could be the subject of an action. Yet the Court of Appeal has now declared any extension outside this class to be an illegitimate one.

The argument of the court is mainly historical and, in order to test its validity, it is necessary briefly to examine the history of the action. There is no doubt that the action *per quod servitium amisit* is a very ancient one. From a very early period, the peculiar feudal relationship existing between a lord and his villeins resulted in the lord having a proprietary interest in his servants. The shortage of labour occasioned by the Black Death gave to

[5] [1956] 2 W.L.R. 919.
[6] (1952), 85 C.L.R. 237.
[7] *Ibid.*, at p. 248.
[8] (1841), 3 Man. & G. 88.
[9] (1853), 2 E. & B. 216.
[10] [1920] 2 K.B. 135.
[11] [1935] 2 K.B. 209.
[12] [1947] K.B. 257.

the villeins a greater measure of economic independence, but the Statutes of Labourers, 1352, restored the position by restricting the free movement of labour, and a master could have a writ to recover a servant enticed away by another.[14] As a result, the early cases show that an injury to the servant might also be an injury to the proprietary interest of his lord. In a case of 1441,[15] concerning "where my servant is beat", it is said:

> he shall have a good action of trespass and recover damages and I another action of trespass and recover damages: and yet it is only the same trespass, but the trespass is done as well to the one as to the other: and here the master recovers his damages for the loss of the services, and the servant for the damage done to his person: and so damages are recovered twice for one and the same trespass *diversis respectibus*. And that is adjudged anno 11 Rich. 2 II in a writ of trespass.

At that time, of course, it would be true to say that the relationship of master and servant was really a domestic one, since all lived together in the same house or on the same estate in a manner similar to that of the Roman *familia*. Even in the seventeenth century, in *Robert Marys's Case*,[16] where the emphasis is seen to have shifted from the master's proprietary interest in the servant to the economic damage sustained by the loss of his services, it was still true to say that most contracts of service would take place in the domestic or agricultural sphere. But there is nowhere during this period any express limitation to menial servants as such.

During the eighteenth and early nineteenth centuries the action, or actions, *per quod servitium amisit* appear in a number of different forms: loss by enticement, loss by injury, loss by harbouring, and so on.[17] Yet, although each of these branches covered a different situation, they were all governed by the same principles of master and servant. There is no perceptible distinction between the classes of servants to which each is to apply. It is not until the middle of the nineteenth century that differences begin to appear as three modern torts developed out of a single cause of action. The first of these, inducement of breach of contract, took shape in *Lumley* v. *Gye*,[18] where the action for loss by enticement was extended to cases outside the strict master-servant relationship.

[13] [1948] S.C.R. 57.
[14] Fitzherbert: N.B., p. 167.
[15] (1441), Y.B. 19 H. VI, pl. 94, fo. 115, cited by Dixon J. in (1952), 85 C.L.R. 237, at p. 245.
[16] (1612), 9 Co. Rep. 111b, 113a.
[17] Blackstone's Commentaries, Bk. I, p. 429.
[18] (1853), 2 E. & B. 216.

Secondly, injuries to family relationships were remedied by an action for seduction based on the notional loss of the services of the woman seduced.[19] Finally, that branch of the *per quod* action with which we are now concerned, loss by injury, was extended in *Martinez* v. *Gerber*[20] to cases where the injury to the servant was consequential and not direct. Up to this time, however, the same principles of master and servant governed each branch of the action.

Yet it is to the earlier period, to the eighteenth century, that the Court of Appeal looked to support their limitation of the action to menial servants. Denning L.J. contended:[21]

> The eighteenth century sees an important development. We find that the action per quod has become confined to menial servants and apprentices, those who lived in the household as part of the family, for the very good reason that they alone could then be considered as the property of the master. The reason for the law only applied to them and the cause of action should therefore only be given in respect of them.

In support he cites a passage from Blackstone[22] where that author, having divided servants into the four categories of menials, apprentices, labourers and superior servants, explains that the justification for the *per quod* actions lies in "the property that every man has in the service of his *domestics*". He also relied on *Taylor* v. *Neri*,[23] where Eyre C.J. refused the action in the case of a singer hired to sing and expressed the opinion that it was confined to menial servants. Also it was said that the precedents in seduction cases described the daughter as "a menial servant".[24]

With respect, however, this is not a correct representation of the law during this period. One has only to look at the cases decided between 1750 and 1850 to see that the action was not so confined. A master could and did recover damages for the loss of the services of a journeyman shoemaker,[25] a journeyman currier,[26] a powder-flask maker,[27] an apprentice,[28] a "servant and traveller",[29] a Crown glass maker,[30] as well as members of his own family.[31]

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[19] *Terry* v. *Hutchinson* (1868), L.R. 3 Q.B. 599.
[20] (1841), 3 Man. & G. 88.
[21] [1956] 3 W.L.R. 643, at p. 648.
[22] Commentaries, pp. 425 and onwards.
[23] (1795), 1 Esp. 385.
[24] *Bennett* v. *Allcott* (1787), 2 Term Rep. 166.
[25] *Hart* v. *Aldridge* (1774), 1 Cowp. 54.
[26] *Blake* v. *Lanyon* (1795), 6 Term Rep. 221.
[27] *Sykes* v. *Dixon* (1839), 9 Ad. & El. 693.
[28] *Hodsoll* v. *Stallebrass* (1840), 11 Ad. & El. 301.
[29] *Martinez* v. *Gerber* (1841), 3 Man. & G. 88.
[30] *Pilkington* v. *Scott* (1846), 15 M. & W. 657.
[31] *Hall* v. *Hollander* (1825), 4 B. & C. 660.

It is true that most of these are enticement or harbouring cases, but the several branches of the action had not yet developed into their modern forms.[32] If a master could not have sued for one, he could not have sued for the others. It is therefore suggested that the conclusion of the Court of Appeal, however meritorious from a present-day standpoint, is historically unsound and cannot be supported.

As a postscript it is interesting to note that while their lordships were busied in dealing death blows to the action, behind their backs, in another court, a different principle was being employed to achieve very much the same result as a *per quod* action. In *Receiver for the Metropolitan Police District* v. *Croydon Corporation*[33] a statutory board, who had paid out wages and allowances to a police constable injured by the defendants, recovered from the defendants in quasi-contract. The principle relied on was one of unjust enrichment enunciated by Cockburn C.J. in *Moule* v. *Garrett*[34] and set out in *Leake on Contracts* (8th ed.) at page 46. It may be that we have not yet seen the last of the action *per quod servitium amisit* in one form or another.

A. G. GUEST*

The Judicial Dilemma

The most delicate of the problems of judicial craftsmanship is no doubt that of determining when it is wise to decide a matter on the narrowest possible basis and when it is both legitimate and salutary to grasp the opportunity to formulate general principles in the hope that they may have an influence extending far beyond the immediate case. Every great judge from Coke and Marshall to our own day has been confronted with the dilemma and dilemma it will necessarily remain in every successive case in which the problem arises. The skill with which the dilemma is resolved is perhaps the ultimate test of both judicial craftsmanship and judicial statesmanship. (C. Wilfred Jenks, Craftsmanship in International Law (1956), 50 Am. J. Int'l L. 32, at pp. 59-60)

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[32] Cf. the judgment of Lord Simonds in *Attorney-General for New South Wales* v. *Perpetual Trustee Co. (Ltd.)*, [1955] A.C. 457.

[33] [1956] 1 W.L.R. 1113. Cf. *Monmouthshire County Council* v. *Smith*, [1956] 1 W.L.R. 1132.

[34] (1872), L.R. 7 Exch. 101, at p. 104, and applied in *Brook's Wharf and Bull Wharf Ltd.* v. *Goodman Brothers*, [1937] 1 K.B. 534, and in *Receiver for the Metropolitan Police District* v. *Tatum*, [1948] 2 K.B. 68.

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