CASE AND COMMENT.

CROWN—ROYAL PREROGATIVE OF MERCY—IMMIGRATION ACT.—Three recent cases arising over deportation proceedings under the *Immigration Act*[1] raise several important questions respecting the prerogative of mercy.[2] The cases arose out of the attempt of the Department of Immigration and Colonization to deport to Russia Peter Veregin, before he had completed the term of imprisonment to which he was sentenced for perjury. The prisoner, a person not a Canadian citizen and not having a Canadian domicile within the meaning of the *Immigration Act,* was sentenced to eighteen months' imprisonment in Prince Albert Jail from May 6, 1932. On January 24, 1932, the Minister of Justice, acting under authority of the *Immigration Act,* section 43, ordered the jailer to detain the prisoner and deliver him to the officer duly authorized by the Deputy Minister of Immigration and Colonization with a view to deportation. On the same date Immigration officials were duly authorized by warrant to receive the prisoner for deportation and under authority of the warrant the prisoner was conveyed to Halifax where *habeas corpus* proceedings were instituted in the Supreme Court of Nova Scotia before Mellish, J. The Court released the prisoner on the grounds that his sentence had not "expired" within the meaning of the *Immigration Act,* that the Crown, though it might remit the penalty, could not alter the term of sentence, at least against the will of the prisoner, and further that if the prisoner were pardoned he could not be deported since deportation was incident to imprisonment. Subsequently, reference was made by the Governor-General in Council to the Supreme Court of Canada in which the Court was asked the following questions arising out of the decision of Mellish, J.

"1. Is it competent to the Governor-General in the exercise of His Majesty's royal prerogative of mercy, to release from prison without his consent a convict undergoing sentence for a criminal offence (a) conditionally, (b) unconditionally?

2. Would a convict so released, whether with or without his consent, be deemed to have "endured the punishment adjudged" within the meaning of section 1078 of the *Criminal Code?*

[1] R.S.C. 1927, c. 93.

[2] *Re Veregin,* [1933] 2 D.L.R. 362; *Re Royal Prerogative of Mercy upon Deportation Proceedings,* [1933] 2 D.L.R. 348; *In re Veregin* (1933), 41 Man. R. 306.

3. Would the sentence or term of imprisonment of a convict so released be deemed to have expired, within the meaning of section 43 of the *Immigration Act*?

4. If such a convict be other than a Canadian citizen, and be, by reason of having been convicted of a criminal offence in Canada, subject to be deported under the provisions of section 42 of the *Immigration Act,* would he cease to be so subject

(i) upon serving his sentence in full,

(ii) upon release from prison in the exercise of the royal prerogative prior to the expiration of his sentence (a) conditionally, (b) unconditionally?

The Court answered questions 1 and 3 in the affirmative, and questions 2 and 4 in the negative. The grounds will be considered later.

At 12.10 p.m. on June 9th, Veregin was re-arrested in Winnipeg on a complaint under the *Immigration Act,* and a hearing before a Board under the Act commenced at 2.30 p.m. The prisoner's counsel arrived at 2.45 p.m. and protested against proceeding at once. He was over-ruled and the Board, the same afternoon, ordered deportation. Counsel then moved before Robson, J.A., for a rule absolute for *habeas corpus* directed to the Immigration authorities on the grounds: (1) that the prisoner had already been discharged on *habeas corpus* on the same facts; and (2) that the proceedings before the Board did not constitute a fair hearing as required by law. Robson, J.A, while considering the objection as to previous adjudication serious, released the prisoner on the second ground, that is, no fair hearing.

At the outset it must be recognized that the decision of Mellish, J. still stands. The answers of the Supreme Court of Canada merely being answers to general questions. Taschereau, J. said in the Supreme Court of Canada, in the *Fisheries* case[8]: "Our answers" (to the questions submitted) "are merely advisory and we have to say what is the law as heretofore judicially expounded, not what is the law according to our opinion. We determine nothing. We are mere advisers, and the answers we give bind no one, not even ourselves." Or as the Judicial Committee has said on another occasion, "Their Lordships must further observe that these questions, being in their nature academic rather than judicial, are better fitted for the consideration of the officers of the Crown than for a court of law. . . . It must, therefore be understood that the answers which follow

[8] (1895), 26 Can. S.C.R. 444.

are not meant to have, and cannot have the weight of a judicial determination . . .[4]

The opinion of the Supreme Court of Canada does not therefore over-rule the decision of Mellish, J. The opinion of the Manitoba Court leaves it equally unquestioned. It remains, however, to examine the decision by Mellish, J. and to compare it with the opinion of the Supreme Court of Canada.

Neither opinion attempts to go behind the contention of the Crown that the release from prison and the transfer of the prisoner to the Immigration authorities prior to the expiration of the term of sentence fixed by the Court constituted a pardon. While the form in which pardon is actually granted has become very loose as compared with the old common law rule of issuing pardon under the Great Seal only, it would seem highly questionable whether the mere release from custody as assumed by the Supreme Court of Canada, or the recommendation of a Minister approved by the Governor-General that the prisoner be "released" for the purpose of deportation and "delivered" into the custody of the appropriate Immigration officer constitutes a valid pardon.

Assuming that it may, the two opinions are contradictory with respect to the interpretation of the phrase of section 42 of the *Immigration Act,* "after the sentence or term of imprisonment of such person has expired." Mellish, J., interpreting the Act, strictly holds that the sentence or term of imprisonment does not expire by reason of pardon, that the Crown may wipe out the punishment but not the time limit of the sentence, and that the prisoner has a right to insist on the term or time limit of sentence even while enjoying remission of the punishment.[5] The Supreme Court on the other hand holds that the grant of pardon automatically wipes out the term of sentence, and that the sentence or term of imprisonment is deemed to have expired when pardon is granted. While the opinion of Mellish, J. is perhaps too broadly stated it would appear to have some application to the *Immigration Act.*

The *Criminal Code,* section 1079, expressly provides that completion of sentence, or remission from the Crown, shall free the offender from "all further or other criminal proceedings for the same

[4] See *Brewers* case, [1896] A.C. 348 at p. 371.

[5] "It hath been clearly adjudged that the King may, if he think fit, pardon the execution and no more" (Hawkins, *Pleas of the Crown,* 8th ed., vol. 2, c. 37, s. 12). This would appear to enable the Crown to distinguish in the pardon between the punishment and the time limit of sentence. The Supreme Court replies, however, that this raises the question of the intention of the pardon and apparently thinks that "intention" should be discovered from the face of the document extending pardon.

cause." Moreover the Code expressly saves the Royal prerogative of mercy from any restriction by the pardoning provisions of the Act.[6] On the other hand the *Immigration Act* provides for deportation only after the expiration of sentence. The provisions of the *Criminal Code* for alternative ways of escaping subsequent prosecution, and the mention only of expiration of sentence before deportation in the *Immigration Act* can scarcely be without meaning. Nor is there any mention of saving the prerogative of mercy in the *Immigration Act.* It may well be that the *Immigration Act* means that the time provided in a sentence is a limitation on the power of the Crown to deport a convicted alien. To hold otherwise would enable the Crown to deport at any time after sentence is passed, provided it goes through the formality of extending a pardon before deportation. If this is what the Act means, why does it not say so?

There is a further apparent contradiction on the question whether a pardon must be accepted. Mellish, J. holds that while the Crown may grant a pardon subject to conditions, "they must be lawful conditions," further, "If the prisoner is pardoned conditionally he has, I think, the right to refuse the pardon if he is unwilling to accept the conditions."[7]

The Supreme Court of Canada, while declining to investigate hypothetical conditions and addressing its remark to the subject pardons in general, held that a pardon is effective in law without the consent of the prisoner. It considered the analogy between an act of clemency on the part of the Crown and a private gift is entirely unfounded. Faced with a long citation of authorities including Hawkins' Pleas of the Crown, indicating that a pardon may be waived, the Court contended that the instances cited referred only to the "necessities of pleading," and that "the doctrine more consonant with the real nature of the prerogative" was laid down in an old case.[8] "If the King pardons a felon, and it is shown to the court; and yet the felon pleads not guilty, and waives the pardon, he shall not be hanged; for it is the King's will that he shall not; and the King has an interest in the life of his subject." Applying the doctrine to the *Veregin* case it would seem a fair question to ask whether a subject might not equally have the right to waive a pardon to avoid deportation, as waive a pardon to avoid pleading.

[6] See s. 1080.

[7] Mellish, J., could find no conditions attached in the pardon (so-called) extended to Veregin. The reason attached for his release, viz., to facilitate deportation, he held, showed merely "the purpose or motive" on the part of the Crown. His remarks on the subject of conditional pardon can scarcely be held binding since they are in the nature of *obiter dicta* and not the *ratio decedendi* of the case.

[8] See Ed. IV, Jenk 129; 145 E.R. 90.

A further difference of opinion concerns the effect of a pardon. Mellish, J. held that "freedom from deportation is incident to pardon, because deportation was incident to imprisonment" (under the *Immigration Act.*) The Supreme Court, on the contrary, citing *Marion* v. *Campbell,*[9] held that while pardon "takes away *poenam et culpam*"[10] it did not remove the prisoner from the class of persons listed as undesirable immigrants under the *Immigration Act.* Further, it contended that deportation was not a penalty since it did not follow of necessity but was effected at the discretion of a Minister of the Crown, that in fact the whole procedure for deportation was administrative, not judicial. On a strict construction of the *Immigration Act* the opinion seems correct and yet it seems a travesty on justice that a pardoned alien may be subjected to what the same Court, speaking through the same judge[11] referred to in another connection as the "hugger-mugger of legal proceedings" permitted under the *Immigration Act.*[12]

R. A. MacKay.

Dalhousie University.

* * *

Trust — Charitable — Administration "Cy-près" — Lapse of Gift.—If a legacy is given to A, it cannot be validly claimed by B. To this premise there is found in the law relating to charitable trusts an exception known as administration *cy-près.* Wilmot, C.J., in *Attorney-General* v. *Downing*[1] stated the rationale of the exception in the following words: "The donation was considered as proceeding from a general principle of piety in the testator. Charity was the expiation of sin and to be rewarded in another state; and therefore, if political reasons negatived the particular charity given, this Court thought the merits of the charity ought not to be lost to the testator nor to the public, and that they were carrying on his general pious intention; and they proceeded upon a presumption, that the principle, which produced one charity, would have been equally active in producing another, in case the testator had been told that the particular charity he meditated could not take place. The Court thought one kind of charity would embalm his memory as well as another, and being equally meritorious would entitle him to the same reward." Upon the failure of a particular charitable purpose it must be shown, in order to obtain administration *cy-près* in favour

[9] [1932] 3 D.L.R. 433 at p. 450.
[10] See Hale P.C. (1800), p. 278.
[11] Duff, C.J.C.
[12] See *Samejima* v. *The King,* [1932] 4 D.L.R. 246 at p. 251.

[1] (1767), Wilmot 1.

of some other particular object, that there is to be found in the trust instrument a transcendant intention on the part of the settlor to benefit charity in general.[2]

An application of the principles with respect to administration *cy-près* solved the problem before the Court in *Re Fitzgibbon.*[3] The testatrix directed in her will that a certain sum should be set apart in trust for a prize to be given to any immigrant domestic going through the Women's Welcome Hostel. Subsequently to the death of the testatrix, the Women's Welcome Hostel was amalgamated with the Girls' Friendly Society and the property of the Hostel was transferred to the General Council of the Girls' Friendly Society in Canada. The Society was not carrying on the work of caring for immigrant domestics in the manner of the Hostel. Middleton, J., found that there was no general intention to devote the fund to charity for the main and only object of the testatrix was to forward the work of the Hostel. Administration of the fund *cy-près* was refused.

One would have expected a similar treatment of the issue in the recent case of *In re Withall, Withall* v. *Cobb.*[4] The testatrix, Alice Withall, directed her executors to sell the residue of her property and "to pay the proceeds to the Margate Cottage Hospital." At the date of her will there was a hospital bearing that name. Before her death and to her knowledge, the work carried on by the Margate Cottage Hospital including the medical and nursing staff and the patients was transferred to and was carried on by a new hospital called the Margate and District General Hospital which had been built and established. The old hospital was a free hospital whereas the new one makes a charge for patients and serves a wider district. The invested funds held by trustees for the Margate Cottage Hospital and the income thereof were dealt with by the same trustees for the purposes of the new hospital. An originating summons raised the questions whether the gift was charitable, and if so, whether, in view of the events which happened, the gift lapsed in favour of the statutory next-of-kin of the testatrix or took effect for the benefit of the Margate and District General Hospital. The gift was held to be charitable. From the facts two avenues would appear to have been open to the Court in proceeding to answer the second question. The first, if property is given in trust for A hospital, it cannot be validly claimed by B, or, secondly, if there was a general charitable intention and the gift to A hospital failed the Court may direct the

[2] See Kay, J., in *Biscoe* v. *Jackson* (1887), 35 Ch. D. 460 at p. 463.
[3] (1922), 51 O.L.R. 500; 69 D.L.R. 524.
[4] [1932] 2 Ch. 236.

trustees of the property to apply it for the benefit of B hospital in pursuance of a scheme. Clauson, J. took neither of these approaches in deciding the case. Notwithstanding that the identity of the first hospital was destroyed, he held that the next-of-kin had no interest in the property in question.

The learned judge reasoned that there were funds dedicated for the purposes of the first hospital. Those funds were subsequently dealt by those who had control of them for the benefit of a new hospital. If their action was right, the result is that the new hospital is a mere expansion of the old one. If their action was wrong, the Attorney-General, he pointed out, can force them to administer the funds properly. He said: "The trusts still exist. . . . The institution itself may be, for the moment, in abeyance and not in fact being carried on, but the institution exists in the sense that there are in existence funds dedicated to particular trusts which ought to be carried out, and the performance of which the Court can and will enforce." This result was not reached by interpretation of the will; no one suggested that the second hospital was identical with the first. The Court personified the hospital funds which the testatrix had sought to increase by her gift and held that, while those funds existed, any accretion to them would be valid and would not lapse in favour of next-of-kin.

The Ontario case of *Re Fitzgibbon* seems to be reconcilable with *In re Withall.* The trustees of the Hostel in the former case, it would appear, had power to apply or transfer its funds as they saw fit. Once they transferred them to the Girls' Friendly Society, the fund as property held for the Hostel ceased to exist and in the absence of a general charitable intention the gift of the testatrix in favour of the Hostel funds lapsed. Administration *cy-près* may be properly sought of funds given in trust for a particular charitable institution which could not be operated because of lack of funds.[5] Or, because, as in the case of war hospitals the need for which a particular fund had been established had ceased to exist.[6] Similarly, administration *cy-près* might be properly sought of funds given in trust for a particular charitable institution, the operation of which has been declared illegal. In the *Withall* case there was no case of failure of the trust of the funds dedicated to the first hospital; the trustees of them could still be directed to apply them so as to accomplish the purposes for which they were held. Funds dedicated to particular purposes which can be carried out have not as such, through a failure known

[5] See *Re Rymer,* [1895] 1 Ch. 19.

[6] See for example, *In re Welsh Hospital (Netley) Fund,* [1921] 1 Ch. 655.

to the law, ceased to exist. This principle was applied in the recent New Brunswick case of *In re Stephens.*[7]

The decision in *In re Withall* gives point to the thesis put forward by that discerning and erudite student of the English trust, Mr. Pierre LaPaulle of the Paris Bar in a recent article "Trusts and The Civil Law."[8] He examines the statement of text-writers and judges that a trust is a legal relationship between trustee and *cestui que trust,* and he finds that a valid trust is created even if no trustee is appointed, and that in the case of charitable trusts there is in effect no *cestui que trust* in whom an equitable interest in the *res* may vest. He cannot reconcile the orthodox doctrine with the cases in which it is decided that trusts to say masses for the repose of souls, trusts for the upkeep of cemeteries, trusts for the maintenance of particular animals are valid. He concludes with reason that in order to have a valid trust two elements only are essential, a *res* and an appropriation, and that the English trust appears to be, at least to the civilian, a patrimonium appropriated to a certain end. The Court in *In re Withall* had in mind a *res,* the Margate Cottage Hospital funds, and the character of that *res* as appropriated to a certain end, the benefit of that Hospital. Clauson, J. was not concerned about the character of the trustees, that is, whether they were trustees of the old or new foundation. The particular charity represented by these funds was still in existence. There was no failure and therefore no occasion to consider *cy-près* administration of accretions to the funds.

S. E. S.

[7] (1933), 6 M.P.R. 305.
[8] (1933), 15 Jour. Comp. Leg. 18.