[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH . . . . . APPELLANT;
PLAINTIFF,

AND

QUINCE AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1943-1944.

SYDNEY, 1943, *Dec.* 13.

MELBOURNE, 1944, *Feb.* 25.

Latham C.J., Rich, Starke, McTiernan and Williams JJ.

Master and Servant—Action per quod servitium amisit—Injury to member of Royal Australian Air Force—Relation between Crown and member of defence forces—Nature of action per quod servitium amisit—Measure of damages—Air Force Act 1923-1941 (*No.* 33 *of* 1923—*No.* 12 *of* 1941)—*Air Force Regulations* (*S.R.* 1927 *No.* 161—1941 *No.* 228), *regs.* 31, 36, 94, 95.

The action *per quod servitium amisit* does not lie at the suit of the Crown in respect of the loss of the services of a member of the Royal Australian Air Force.

So *held* by *Rich*, *Starke* and *McTiernan* JJ. (*Latham* C.J. and *Williams* J. dissenting).

Nature of the relationship between the Crown and a member of the defence forces considered.

Nature of the action *per quod servitium amisit* and measure of damages therein considered.

Decision of the Supreme Court of Queensland (*Philp* J.): *The Commonwealth* v. *Quince*, (1943) Q.S.R. 199, by majority, affirmed.

APPEAL from the Supreme Court of Queensland.

An action was brought in the Supreme Court of Queensland by the Commonwealth of Australia against William Charles Quince and his wife, for damages for loss and expenses to the Commonwealth consequent upon injuries sustained by Ronald Hugh Rowland, a member of the Royal Australian Air Force, by reason of the negligent

H. C. OF A. 1943-1944.

THE COMMONWEALTH v. QUINCE.

driving by Quince of a motor car on 7th October 1941. Mrs. Quince was the owner of the motor car and as such she had a responsibility under s. 14 of the *Traffic Acts* 1905 *to* 1933 (Q.) for damage resulting from the negligence of the driver of the car.

On 7th October 1941 Rowland was riding on the pillion seat of a motor cycle with which the motor car, then being driven along a public road by Quince, came into collision. As a result of the collision Rowland was thrown to the ground and his left femur and tibia were fractured.

He received medical treatment for his injuries at military hospitals from the date of the accident until the date of his discharge from the Air Force on 22nd December 1942, and thereafter he continued to receive treatment as an outpatient. Until his discharge he continued to receive pay and allowances from the Commonwealth. At the time of the accident Rowland was not in possession of a leave pass, but the secretary of the Department of Air, by letter, informed the chairman of the Repatriation Commission that in view of the facts that a leave pass would have been signed had Rowland applied for the same; that he had finished his duties for the day; and that he was on "stand down" and was travelling from his place of employment at the time when the accident happened, it was considered that substantially an application by Rowland for a pension fell within reg. 6 of the *National Security* (*War Pensions and Repatriation Benefits*) *Regulations*. Rowland was granted a pension.

The trial judge found that Quince negligently injured Rowland, a member of the Royal Australian Air Force; that Rowland had enlisted on 17th July 1941; was injured on 7th October 1941; and was discharged from the Air Force on 22nd December 1942; that between the date of the accident and the date of his discharge from the Air Force, Rowland, who performed no service during that period, was paid £168 8s. being payment at the rates prescribed by various statutory enactments; that before his discharge he received in military hospitals treatment to the value of £286 2s. 1d., such value being based on sums paid by or debited to the Air Force in respect of treatment in army hospitals; that after his discharge Rowland received hospital treatment under the *Australian Soldiers' Repatriation Act* at a cost to the Commonwealth of £72 19s. 7d., inclusive of doctors' fees; that from the date of his discharge up to 30th June 1943 the amount paid to Rowland by way of pension was £60 4s.; and that as a result of Quince's negligence Rowland's trousers, shoes and socks, valued at £1 19s. 7d., were destroyed.

The Commonwealth sought to recover these amounts from Quince as damages, basing its action on the right of a master to sue for loss

of services of a servant due to the negligent act of Quince. The items covered by these amounts were not included in an amount recovered by Rowland as damages in proceedings previously taken by him against the defendants in respect of certain results affecting him caused by Quince's negligence.

At the time of his enlistment, which was voluntary on his part, Rowland took an oath of enlistment in accordance with the terms of reg. 94 under the *Air Force Act* 1923-1941, as follows :—" I swear that I will well and truly serve our Sovereign Lord the King in the Air Force of the Commonwealth of Australia for the term of the duration of the war and twelve months thereafter or until sooner lawfully discharged, dismissed or removed ; and that I will resist His Majesty's enemies and cause His Majesty's peace to be kept and maintained ; and that I will, in all matters appertaining to my service, faithfully discharge my duty according to law. So help me God." Upon taking the oath Rowland became, by reg. 36, a member of the Air Force, and, by reg. 95, bound to serve therein in accordance with the terms of the oath until he was discharged, dismissed or removed therefrom or until his resignation was accepted.

Judgment was given for the Commonwealth in respect of the destroyed clothing only, in the sum of £1 19s. 7d., it being held by the trial judge that the Commonwealth had no right of action for loss of the services of an airman : *The Commonwealth* v. *Quince* (1).

From that decision, except so far as it related to the said clothing, the Commonwealth appealed to the High Court.

Other relevant statutory provisions and regulations are sufficiently set forth in the judgments hereunder.

Sugerman K.C. (with him *Henchman*), for the appellant. The basis of the claim is loss of services. For the purposes of such a claim it does not matter whether the services are services rendered pursuant to a contract or rendered merely in fact without any binding contract or binding obligation of any sort. The word " employer " as used in the statement of claim is a neutral word in that respect and does not make the claim depend upon proof of the existence of an ordinary contract of service. It is a word with a very flexible meaning. Reference to master and servant in relation to this exceptional type of action means (*a*) by master, one who enjoys the services, or has enjoyed the services of another, whether or not pursuant to any ordinary contract of service, and (*b*) by servant, one who has rendered services, whether under contract or not, whether even for reward or

(1) (1943) Q.S.R. 199.

H. C. OF A. 1943-1944.

THE COMMONWEALTH v. QUINCE.

not. Even if he was not a servant of the Crown in the ordinary sense of contractual relationship, the airman concerned in this case was, nevertheless, in all the circumstances, a servant of the Crown. Although taken by him voluntarily, by taking the oath of enlistment in accordance with the terms of reg. 94 under the *Air Force Act* 1923-1941 the airman became, by virtue of reg. 95—which is similar in substance to s. 38 of the *Defence Act* 1903-1941—bound to serve in the Air Force until discharged therefrom. The airman may be regarded as a citizen performing air-force duties under the law of the Commonwealth in the same sense that a public servant is a citizen performing civil duties under the law of the Commonwealth. The relation of a civil public servant to the Crown is contractual (*Lucy* v. *The Commonwealth* (1)). The contract between the airman and the Crown may be of a somewhat exceptional kind and possess some unusual features, but it is a contractual relationship. It is a relationship arising from a voluntary agreement between the parties. In any case, the Crown was entitled to the airman's services, and having been deprived of those services by a tort is entitled to damages or compensation from the tortfeasor ; that is so whether there was a contract or not. The basis of the action is the injury done to the right of the Crown to the services of the airman. For that purpose the existence of a binding contract is not necessary. It is sufficient if there has been an interference with a legal or statutory right to the services, that is, an interference with service whether it be contractual, *de facto* or constructive. In such a case an action *per quod servitium amisit* will lie (*Grinnell* v. *Wells* (2) ; *Harper* v. *Luffkin* (3) ; *Martinez* v. *Gerber* (4) ; *Evans* v. *Walton* (5) ; *Pollock* on *Torts*, 14th ed. (1939), p. 183 ; *Salmond* on *Torts*, 9th ed. (1936), pp. 383-387). There is not any inconsistency between the general existence between two parties of a relationship of master and servant and the absence of any liability on the part of the master in particular cases for the wrongdoing of the servant. *Enever* v. *The King* (6) and *Baume* v. *The Commonwealth* (7) merely illustrate that a servant or employee may not, in particular instances, affix his master or employer with liability under the maxim *respondeat superior* because he may be exercising a discretion conferred upon him by law as an individual. In considering the matter of *respondeat superior*, it must depend entirely upon what is the act of the servant in respect of which it is sought to make the master liable (*Shaw Savill and*

(1) (1923) 33 C.L.R. 229.
(2) (1844) 7 Man. & G. 1033, at p. 1041 [135 E.R. 419, at p. 423].
(3) (1827) 7 B. & C. 387 [108 E.R. 767].
(4) (1841) 3 Man. & G. 88 [133 E.R. 1069].
(5) (1867) L.R. 2 C.P. 615.
(6) (1906) 3 C.L.R. 969.
(7) (1906) 4 C.L.R. 97.

Albion Co. Ltd. v. *The Commonwealth* (1)). The distinction between *respondeat superior* and *per quod servitium amisit* is pointed out in *Fisher* v. *Oldham Corporation* (2). The words " servants " and " employers " are commonly used as applicable to persons in the naval or military service as well as to those in the civil or ordinary public service of the Crown : See *Halsbury's Laws of England*, 2nd ed., vol. 28, p. 599, par. 1229, and cases there cited, *Lucas* v. *Lucas* (3) and *Williams* v. *Howarth* (4). The decision in *McArthur* v. *The King* (5) turns entirely upon the wording and history of the particular statute there under consideration. At the relevant time there was not any regulation depriving the airman of his right to continue being paid while disabled. A claim similar in essential facts to the claim now before the court was decided in favour of the Crown in *Attorney-General* v. *Valle-Jones* (6). So long as a person remains a member of the armed forces the Crown is bound not only to pay him but also to maintain him. Expenditure incurred by the Crown in curing and maintaining a member of the armed forces disabled whilst in its service is, having regard to training, efficiency and morale, reasonably incurred : See *Attorney-General* v. *Valle-Jones* (7), *in arguendo*, and *James Finlay & Co. Ltd.* v. *N.V. Kwik Hoo Tong Handel Maatschappij* (8). Moneys paid to the airman by way of pension are recoverable from the respondent (*Bradford Corporation* v. *Webster* (9)). Medical expenses also are recognized, upon principle and authority, as a proper head of damages (*Hall* v. *Hollander* (10) ; *Dixon* v. *Bell* (11))—see also *Barnes* v. *Pooley* (12) and *Smaill* v. *Alexander* (13). Damages consequential upon the tort and causing the loss of services are recoverable. It is part of a measure of the value of the services that there is a habitual practice on the part of the Crown of rendering free hospital and medical treatment to, and granting a pension to, members of the armed forces injured whilst travelling on leave : See *National Security* (*War Pensions and Repatriation Benefits*) *Regulations*, reg. 6. The pension paid to the airman was not a mere compassionate allowance as in *Admiralty Commissioners* v. *S.S. Amerika* (14), but was as much a part of the consideration for the services as was held to be the pension in *Bradford Corporation* v. *Webster* (15).

(1) (1940) 66 C.L.R. 344.
(2) (1930) 2 K.B. 364, at p. 375.
(3) (1943) P. 68.
(4) (1905) A.C. 551.
(5) (1943) 3 D.L.R. 225.
(6) (1935) 2 K.B. 209.
(7) (1935) 2 K.B., at p. 212.
(8) (1929) 1 K.B. 400.
(9) (1920) 2 K.B. 135, at p. 144.
(10) (1825) 4 B. & C. 660 [107 E.R. 1206].
(11) (1816) 1 Stark. 287 [171 E.R. 475].
(12) (1935) 51 T.L.R. 391.
(13) (1904) 23 N.Z.L.R. 745.
(14) (1917) A.C. 38.
(15) (1920) 2 K.B. 135.

H. C. OF A. 1943-1944.

THE COMMONWEALTH v. QUINCE.

MacGroarty, for the respondent. The decision in *Attorney-General* v. *Valle-Jones* (1) is distinguishable. In that case it was not contested, but on the contrary it was admitted, that the relationship of master and servant existed. In this case, however, the respondent has contended throughout not only that the appellant was not the employer but that there was not any relationship of master and servant existing between the airman and the Air Board (*Tobin* v. *The Queen* (2)). There must be established that relationship either as employer or as master and servant before the appellant can succeed. The decision in *Admiralty Commissioners* v. *S.S. Amerika* (3) is applicable to this case. The moneys paid to the airman were, in the circumstances, compassionate allowances. The matter is correctly stated in the *Law Quarterly Review*, vol. 52, p. 5. The principles that would apply in claims for damages for loss of services as in seduction cases do not apply in the case of an airman and his relationship with the Commonwealth by virtue of his voluntary enlistment. It would appear that in *Bradford Corporation* v. *Webster* (4) there was a definite contract between the corporation and the injured constable as to the payment of both wages and pension. The finding in that case was, apparently, not approved in *Fisher* v. *Oldham Corporation* (5). An enlisted airman cannot be regarded as a servant of the Commonwealth (*In re Grimley* (6) ; *Mitchell* v. *The Queen* (7) ; *Leaman* v. *The King* (8) ; *McArthur* v. *The King* (9)). There was no contractual relationship between the airman and the Commonwealth. It is a general rule that a person cannot make himself the creditor of another by paying that other's debt against his will or without his consent (*Johnson* v. *Royal Mail Steam Packet Co.* (10)). The airman was performing a national duty required of him under the statute.

Cur. adv. vult.

1944, Feb. 25.

The following written judgments were delivered :—

LATHAM C.J. In this case the Commonwealth of Australia, appellant, sued the respondents for damages for loss of the services of Ronald Hugh Rowland, a member of the Active Citizen Air Force. On 7th October 1941 Rowland was riding upon a motor cycle with which the defendant, W. C. Quince, who was driving a motor car,

(1) (1935) 2 K.B. 209.
(2) (1864) 16 C.B.N.S. 310 [143 E.R. 1148].
(3) (1917) A.C. 38.
(4) (1920) 2 K.B., at p. 143.
(5) (1930) 2 K.B., at pp. 374, 375.
(6) (1890) 137 U.S. 147 [34 Law. Ed. 636].
(7) (1896) 1 Q.B. 121 (n.).
(8) (1920) 3 K.B. 663.
(9) (1943) 3 D.L.R. 225.
(10) (1867) L.R. 3 C.P. 38, at p. 43.

came into collision. The other defendant is the wife of W. C. Quince, and, as the owner of the motor car, she has a responsibility under s. 14 of the Queensland *Traffic Acts* 1905 *to* 1933 for damage resulting from the negligence of the driver of the car. It was found, and the finding is not disputed, that Quince was negligent, and that by reason of his negligence Rowland was seriously injured. Rowland recovered damages against the defendants in proceedings taken by him, but did not claim for his pay and allowances, or for hospital and medical expenses. The Commonwealth continued his pay and allowances from the date of the accident, 7th October 1941, up to 22nd December 1942, when he was discharged from the Air Force. It was proved that certain hospital and medical expenses for the treatment of Rowland were reasonably incurred. They were borne by the Commonwealth. There is no dispute as to the amount claimed if such amounts represent categories of damage properly claimable in the present action. The Commonwealth also paid Rowland a pension from and after the date of his discharge. Damage to Rowland's clothing was proved at £1 19s. 7d. The Commonwealth sued the defendants for damages for the loss of the services of Rowland, claiming altogether the sum of £589 13s. 3d., made up of pay and allowances, hospital and medical expenses, pension and damage to clothing, as stated. Judgment was given for the Commonwealth for the sum of £1 19s. 7d., it being held by the learned trial judge that the Commonwealth had no right of action for loss of the services of an airman. The Commonwealth appeals to this Court.

Philp J., who tried the case, held that the action failed because there was no contract between the Commonwealth and the airman which established the relationship of master and servant between them ; the relation between the Commonwealth and the airman was not such that the Commonwealth would be liable under the principle of *respondeat superior* if he committed a tort ; the services of the airman were due by statute, and it would be an extension of the established form of action for loss of services to allow it to cover such a case ; and, finally, the payment of wages and hospital expenses (before and after discharge) and pension were voluntary payments by the Crown, and as they were not payments which the Crown was bound to make, could not be regarded as damage resulting from the defendants' tort. I presume that the claim for damage to clothing was allowed on the basis that the clothing belonged to the Crown.

In the first place, it is necessary to determine the nature of the legal relations between the Commonwealth and an airman. I agree with the learned trial judge that the relation between an airman and the Commonwealth is not contractual in character. The relation

H. C. OF A. 1943-1944.

THE COMMONWEALTH v. QUINCE.

Latham C.J.

is constituted by the airman taking an oath of enlistment. The oath taken by Rowland was in the following form :—" I swear that I will well and truly serve our Sovereign Lord the King in the Air Force of the Commonwealth of Australia for the term of the duration of the war and twelve months thereafter or until sooner lawfully discharged, dismissed or removed ; and that I will resist His Majesty's enemies and cause His Majesty's peace to be kept and maintained ; and that I will, in all matters appertaining to my service, faithfully discharge my duty according to law. So help me, God."

Upon taking the oath Rowland became a member of the Active Citizen Air Force (Statutory Rules 1927 No. 161, reg. 36). Reg. 95 of that statutory rule provides :—" The oath of enlistment shall bind the person taking it to serve in the Air Force in accordance with the tenor of the oath until he is discharged, dismissed, or removed therefrom, or until his resignation is accepted." There are corresponding provisions in the *Defence Act* 1903-1941, ss. 37 and 38, which are applicable to the active forces. An airman cannot terminate his service at his own will, but he may be discharged at any time for any reason as the Air Board may think fit—regs. 109, 115. Thus the general rule of law that members of the forces hold their positions at the pleasure of the Sovereign, who may dismiss them at any time, has not been altered in its application to airmen : See *Dunn* v. *The Queen* (1) ; *Mitchell* v. *The Queen* (2) ; *Leaman* v. *The King* (3). Reg. 31 provides that :—" Any person who has been a member may, after having ceased to be a member, recover from the Commonwealth by suit in any court of competent jurisdiction any moneys which under his engagement or by any agreement with the Commonwealth are due to him." During his engagement, an airman is unable to sue for his pay.

Enlistment in the armed forces of the Crown may be voluntary (as in the case of the Air Force, see reg. 91) or compulsory (see *Defence Act*, ss. 60, 76). As *Philp* J. said in his judgment, it is difficult to suppose that a contract exists in the case of compulsory enlistment, and it cannot be argued that the relations between the Crown and a member of the forces in such a case are different from those which exist between the Crown and the person who has enlisted voluntarily. The oath of enlistment imposes an obligation to render service, but that obligation is created by law, and does not depend upon any contract to which the airman and the Crown are parties. The airman becomes subject to military discipline ; but in enforcing discipline officers in the forces are not performing or acting under a

(1) (1896) 1 Q.B. 116.
(2) (1896) 1 Q.B. 121 (n.).
(3) (1920) 3 K.B. 663.

contract; they are performing duties incidental to their position. The airman cannot sue the Commonwealth for breach of contract, except that he may sue for his pay after discharge. The remedies of damages, injunction and specific performance are not available either to the airman or to the Crown. The airman, in rendering service in the military forces, is performing a national duty, now largely defined by statute, and is not performing a contract made with the Commonwealth. The Commonwealth in relation to the airman acts in pursuance of statutory and common law powers, and is not engaged in performing any contract with him. The distinction is clearly put in the case of *McArthur* v. *The King* (1), and in the case of *Goldstein* v. *New York* (2), quoted in *McArthur's Case* (3). For these reasons I am of opinion that it was rightly held that there was no contract of service between Rowland and the Commonwealth.

The learned trial judge also referred to the fact that, notwithstanding the acceptance by the Commonwealth of liability for tort (*Judiciary Act* 1903-1940, s. 56), the Commonwealth is not liable under the principle of *respondeat superior* for the acts of officers who, though the servants of the Crown, are required in the discharge of their duties to exercise an independent discretion: See *Baume* v. *The Commonwealth* (4); *Field* v. *Nott* (5). *Fisher* v. *Oldham Corporation* (6) is a case which shows that where a corporation engages a constable who (as explained in *Enever* v. *The King* (7)) has public duties to perform in which he exercises an original and not a delegated authority "the normal relation of master and servant" does not obtain between the constable and the corporation so as to affect the corporation with liability for his wrongs.

In my opinion the applicability or non-applicability of the rule *respondeat superior* has no relevance in relation to the liability of the defendant in an action based on a claim for damages for loss of services. The principle or doctrine of *respondeat superior*, which expresses the liability of a master for a tort committed by a servant acting within the scope of his employment, "can hardly be traced in any definite shape beyond the Revolution of 1688" (*Pollock and Maitland, History of English Law*, 2nd ed. (1923), vol. 2, p. 528). But the action for loss of services in some form can be traced to much earlier times. Taking a servant out of the service of another was an actionable trespass at common law, though originally only when the taking was *vi et armis*. Later, the master was allowed to

(1) (1943) 3 D.L.R. 225.
(2) (1939) 281 N.Y. 396.
(3) (1943) 3 D.L.R., at p. 268.
(4) (1906) 4 C.L.R., at p. 110.
(5) (1939) 62 C.L.R. 660.
(6) (1930) 2 K.B. 364.
(7) (1906) 3 C.L.R. 969.

H. C. OF A. 1943-1944.

THE COMMONWEALTH v. QUINCE.

Latham C.J.

sue in case (*Pollock* on *Torts*, 13th ed. (1929), p. 234; *Wright* v. *Cedzich* (1), authorities cited by *Isaacs* J. (2) and by *Rich* J. (3)). After the *Statute of Labourers*, 23 Ed. III. (1349), the employment or harbouring of a servant who had quit the service of a master whom he was obliged to serve became actionable (*Street, Foundations of Legal Liability*, (1906), vol. 1, pp. 265, 266). The action for seduction of a daughter, which is historically an action for loss of services, lay at common law: See *Smith, Master and Servant*, 8th ed. (1931), p. 95, with a reference to a case in 39 Ed. III. The master's action for battery, whereby he lost the services of the servant, was well recognized some centuries before 1688 (*Pollock* on *Torts*, 13th ed. (1929), p. 233; *Street, Foundations of Legal Liability*, (1906), vol. 1, p. 266, with a reference to a case in 21 Henry VI.). These authorities show that it cannot be said that the action for loss of services is limited to cases where the principle of *respondeat superior* is applicable.

But whatever may be the position as to the relevance of the doctrine of *respondeat superior*, I agree that the relations between the Commonwealth and an airman cannot be treated as a branch of the law of master and servant depending upon the existence of a contract, though the duty of the airman is to serve and to obey orders. The source of his obligation is not to be found in a contract between the Commonwealth and the airman. Does it follow that the claim of the Commonwealth in this action must fail?

In the first place, it should be observed that the action of trespass *per quod servitium amisit* originated at a time when the right to the services of another person generally depended upon status, and not upon a contract of employment: See *Admiralty Commissioners* v. *S.S. Amerika* (4), where Lord *Parker* refers to the time when the basis of society was still status, rather than contract, and the King's courts had not invented any procedure for the enforcement of simple contract obligations. Nevertheless there were writs available whereby a master could obtain a remedy in respect of wrongs done to his servant. Lord *Parker* says: "The inference is that all these writs arose out of status at a time when the servant or apprentice, as well as the wife and child, was a member of the family, and the relation between him and the head of the family had not yet come to be looked upon as resting upon contract" (5). So also Sir *William Holdsworth*, referring to the remedies of the master in trespass *per quod servitium amisit*, says: "They rested at bottom on the idea

(1) (1930) 43 C.L.R. 493.
(2) (1930) 43 C.L.R., at pp. 514, 515.
(3) (1930) 43 C.L.R., at pp. 520, 521.
(4) (1917) A.C., at p. 44.
(5) (1917) A.C., at p. 45.

that the master had a quasi-proprietary interest in his servant's services; and that idea is connected with ideas as to the status of a servant, which originated in the rules of law applicable to villein status" (*Holdsworth, History of English Law*, 2nd ed. (1937), vol. VIII., p. 429)—See also *Diamond, The Law of Master and Servant*, (1938), p. 238, to the same effect. The relation between the lord of a manor and his villeins, whether annexed to the manor or land or at large, did not depend upon any contract made between the lord and the villeins. The rights depended upon rules of law. Accordingly, the remedy of the master for loss of services of a villein was not in its origin associated with any contract of service. It may be observed that the word "status" is used in describing the position of a soldier —as in *In re Grimley* (1), cited by *Philp* J.

Next, the application of this form of action to the case of the seduction of a daughter supports the proposition that the right of action was not dependent upon the existence of any contract of service. The action for seduction can be brought by a father whose daughter has been seduced, but only if the father has lost the services of his daughter by reason of the seduction, though a very slight amount of service has been held to be sufficient to support the action, and service is presumed in the case of an infant daughter old enough to give service. Service *de facto* is sufficient without any contract of service. In the case of a father and his infant daughter, there is no contract of service in existence, but the remedy is nevertheless available. There is a loss of service in fact "in which" (the father) "is supposed to have a legal right or interest," as it was put in *Grinnell* v. *Wells* (2) by *Tindal* C.J.: See also *Evans* v. *Walton* (3), where it was held that an action will lie for enticing away a daughter though there be no allegation that there was a binding contract of service between the father and the daughter. See also *Pollock* on *Torts*, 14th ed. (1939), at p. 183; *Salmond* on *Torts*, 9th ed. (1936), p. 383. All authorities appear to agree that *de facto* service without any contract of service is a sufficient foundation for the father's right in cases of seduction.

The right of action for trespass *per quod servitium amisit* and the similar action in case therefore did not depend upon the existence of a contract of service, but upon a right of one person to the services of another. But the mere fact that one person is rendering service to another in the sense of doing something which is for the benefit of another, whether under a contract or otherwise, has not been regarded

(1) (1890) 137 U.S. 147 [34 Law. Ed. 636].
(2) (1844) 7 Man. & G., at p. 1041 [135 E.R., at p. 423].
(3) (1867) L.R. 2 C.P. 615.

H. C. OF A. 1943-1944.

THE COMMONWEALTH v. QUINCE.

Latham C.J.

as a sufficient foundation for the action. A solicitor gives service to his client; a doctor to his patient; an independent contractor does work for the person with whom he has made the contract; but it has never been suggested that an action for loss of services would lie if any of these persons were injured by the tort of a third person. The action has been confined to cases where it has been possible to hold that there is a right to services, whether arising by contract or from status, or implied from parenthood, when in those cases the plaintiff had the right to control the services of the person injured, whether that person was villein, servant or daughter, i.e., to give orders and to have them obeyed. The authorities in my opinion show that the action lies when one person has a right to the services of another and can command that person in the doing of such services. The Commonwealth is entitled to the services of members of the forces. They swear that they will serve the King. Military service is service of the highest order of obligation. The obligation is enforced by discipline under the authority of military law. It is higher in degree than any contractual obligation or any obligation founded upon family relationship. It is, I think, true that a member of the forces is not a servant of the Crown in such a sense that the ordinary law of master and servant determines the relations of the parties. He may not be an officer or servant of the Crown within the meaning of a statute which imposes liability upon the Crown for the acts of its officers and servants— as was held in *McArthur* v. *The King* (1). But the very essence of his position is that he is bound to render service, to obey orders, and, in my opinion, the history of this form of action shows that in such cases the action lies, even though the obligation is not based on contract.

There is, as far as I have been able to discover, no authority which is directly in point. In *Admiralty Commissioners* v. *S.S. Amerika* (2) Lord *Sumner* expressed a doubt whether the action *per quod servitium amisit* could have been brought in respect of loss of service of seamen of His Majesty's Navy, but there is no decision to that effect. So far as authority does exist, it rather favours the claim of the Commonwealth. In *Attorney-General* v. *Valle-Jones* (3), *MacKinnon* J. (now *MacKinnon* L.J.), upon a claim which cannot be distinguished from the present claim, awarded damages to the Crown for the loss of services of an airman. In that case, however, the right of action of the Crown was not disputed (see the report (4)), but at least it may be said that the learned judge was not of opinion that the action was not maintainable. In *Bradford Corporation* v.

(1) (1943) 3 D.L.R. 225.
(2) (1917) A.C., at p. 51.
(3) (1935) 2 K.B. 209.
(4) (1935) 2 K.B., at p. 213.

Webster (1), a corporation recovered damages for the loss of services of a constable, though, as pointed out by *McCardie* J. in *Fisher* v. *Oldham Corporation* (2), the constable was not a servant of the corporation in the sense in which the word servant is used in the phrase " master and servant." *McCardie* J. referred to the *Bradford Corporation Case* (1) as one which could perhaps be supported as resting upon " a special and extremely artificial form of action," namely the action *per quod servitium amisit*. Thus such authority as there is supports the right of the Commonwealth to bring this action and, for the reasons which I have stated, I am of opinion that the action lies.

By reason of the defendants' tort the Commonwealth lost the services of Rowland. The damages in this class of action have been always more or less at large, more particularly in seduction cases, to which special considerations apply. In all cases, medical and hospital expenses have been allowed to a reasonable amount. If the action lies there is no question that the reasonable medical and hospital expenses incurred by the Commonwealth up to the time of discharge of the airman are recoverable. The medical expenses incurred after the discharge of the airman appear to be voluntary payments only and not recoverable.

The pay of the airman was continued by the Commonwealth up to the date of discharge. The question which arises in relation to pay is whether it was reasonable to pay these moneys, for which no service was received, and whether they were so paid, that is, paid without service being rendered, in consequence of the defendants' tort. In my opinion they were so paid by the Commonwealth. A master is not bound to dismiss a servant as soon as he is injured and to leave him to the mercies of charity. He is entitled to behave reasonably, and the payment of his wages for a period while an attempt is being made to restore him to health is a proper head of damage. As to both medical and hospital expenses and pay, see *Bradford Corporation* v. *Webster* (1) and *Attorney-General* v. *Valle-Jones* (3).

The claim for pension, particularly in this case, stands on a different footing. The documents produced to the Court show, I think, that the authorities " stretched a point " in granting a pension at all, and I do not think that the defendant should be made liable under this head.

The amounts which in my opinion are recoverable are :—Pay to time of discharge £168 8s. ; Medical and hospital expenses to time

(1) (1920) 2 K.B. 135. (2) (1930) 2 K.B. 364.
(3) (1935) 2 K.B. 209.

H. C. OF A. 1943-1944.

THE COMMONWEALTH v. QUINCE.

of discharge £286 2s. 1d.; Damage to clothing £1 19s. 7d.; Total £456 9s. 8d.

In my opinion, the judgment of the learned judge should be set aside and in lieu thereof there should be judgment for the plaintiff for £456 9s. 8d., together with the costs of the action and of the appeal.

RICH J. In this case, it has been found that the male defendant, by his negligence, injured an airman of the Royal Australian Air Force. The injury was sustained on 7th October 1941, and the airman was discharged from the Air Force on 22nd December 1942. The Commonwealth paid him, in respect of the intervening period, the sum of £168 8s., this being at his regular rate of pay. He also received in military hospitals during the period, in respect of his injuries, hospital treatment the value of which is alleged to be £286 2s. 1d. After his discharge, he received further hospital treatment which is alleged to have cost £72 19s. 7d. He was paid by way of pension up to 30th June 1943, a sum of £60 4s. In addition, certain clothing worn by the airman at the time of his injury valued at £1 19s. 7d., and alleged to be the property of the Commonwealth, was destroyed. In these circumstances, the Commonwealth claimed to recover all these sums from the defendant, basing its action upon the right of a master to recover damages in respect of the loss of the services of a servant through the act of a wrongdoer. A verdict was obtained for the sum of £1 19s. 7d. claimed in respect of the injury to clothing, which constituted a separate cause of action (*Brunsden* v. *Humphrey* (1)); but the rest of the claim was rejected, and it is in respect of this that the present appeal has been brought.

It becomes necessary, therefore, to consider in what circumstances, when a person has become incapacitated through a wrong done to him by another, a third party who suffers damage through being deprived of the injured person's services may himself maintain an action against the wrongdoer. As a general rule, a person is liable for damage caused to another by his carelessness only when it amounts to negligence, that is, when he owed a duty to the other to be careful and the damage was the proximate result of failure to perform the duty; and the mere fact that the injury prevents a third party from getting a benefit from the person injured which, but for the injury, he would have obtained does not invest the third party with a right of action against the wrongdoer (*La Société Anonyme de Remorquage à Hélice* v. *Bennetts* (2); *Admiralty Commissioners* v. *S.S. Amerika* (3);

(1) (1884) 14 Q.B.D. 141.
(2) (1911) 1 K.B. 243.
(3) (1917) A.C., at pp. 43, 45.

Wright v. *Cedzich* (1)). But to the latter rule there is an exception. If a person is in fact rendering service to another of a kind that is performed under a contract of service, and sustains injury, through the negligence of a third party, which prevents him from continuing to render the service, the person whom he was serving may recover from the wrongdoer compensation for the damage which he has sustained through the loss of service. If service was in fact being rendered, it is immaterial that no binding contract of service was in existence (*Bennett* v. *Allcott* (2) ; *Sykes* v. *Dixon* (3) ; *Martinez* v. *Gerber* (4) ; *Cox* v. *Muncey* (5)). It is for this reason that a father may recover damages for loss of service occasioned by the seduction of a daughter who is rendering him, actually or constructively, domestic service, notwithstanding that no contract of employment exists between them. The exception is of great antiquity in English law. It became established at a time when the head of a household was regarded as having a quasi-proprietary interest in the members of his family, his apprentices, his hired servants, and their servants (*Admiralty Commissioners* v. *S.S. Amerika* (6) ; *Holdsworth, History of English Law*, 2nd ed. (1937), vol. VIII., p. 429 ; *Wright* v. *Cedzich* (7)) ; but, except in a recent case which it will be necessary to consider later, it appears never to have been applied except to persons serving under a contract of service or in fact rendering services such as would be given under such a contract.

Since the present claim is in respect of the loss by the Commonwealth of the services of an airman, it is necessary now to consider the relationship between the Crown and those who render it service whether military or civil. In this connection, it is necessary to distinguish between the holders of public offices created by charter or statute in respect of which *quo warranto* will lie, and the relationships arising from the mere fact that a person is *de facto* engaged in the service of the Crown (*Darley* v. *The Queen* (8) ; *Evans* v. *Donaldson* (9)). Occupants of the former are protected in their offices by the prerogative writs, but the Crown's relation to the latter is not that of master and servant, and they possess no rights against the Crown justiciable in courts of justice unless such rights have been conferred upon them by statute (*Gould* v. *Stuart* (10) ; *Reilly* v. *The King* (11) ; *R. Venkata Rao* v. *Secretary of State for India* (12) ; *Fletcher*

(1) (1930) 43 C.L.R. 493.
(2) (1787) 2 T.R. 166, at p. 168 [100 E.R. 90, at p. 91].
(3) (1839) 9 A. & E. 693, at p. 699 [112 E.R. 1374, at p. 1377].
(4) (1841) 3 Man. & G., at p. 91 [133 E.R., at p. 1070].
(5) (1859) 6 C.B. N.S. 375, at p. 385 [141 E.R. 502, at p. 506].
(6) (1917) A.C., at pp. 44, 45.
(7) (1930) 43 C.L.R., at p. 521.
(8) (1845) 12 Cl. & F. 520, at pp. 541, 542 [8 E.R. 1513, at pp. 1521, 1522].
(9) (1909) 9 C.L.R. 140.
(10) (1896) A.C. 575.
(11) (1934) A.C. 176.
(12) (1937) A.C. 248.

H. C. OF A. 1943-1944.

THE COMMONWEALTH v. QUINCE.

Rich J.

v. *Nott* (1)). It was laid down by Lord *Esher* M.R., in *Mitchell* v. *The Queen* (2) that " all engagements between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown, and give no occasion for an action in respect of any alleged contract. . . . It has been decided over and over again that, whatever means of redress an officer may have in respect of a supposed grievance, he cannot as between himself and the Crown take proceedings in the courts of law in respect of anything which has happened between him and the Crown in consequence of his being a soldier. The courts of law have nothing whatever to do with such a matter." This rule is just as applicable to persons in the civil as in the military service of the Crown, in the absence of some statutory provision to the contrary. " The terms on which persons in the civil and military services were employed were entirely apart from any form of contract which could not be altered without the consent of both parties " (*Kynaston* v. *Attorney-General* (3)). It follows that the Crown has power to dismiss without notice any person so engaged, that any stipulation which purports to restrict this power is void and of no effect (*Dunn* v. *The Queen* (4) ; *Denning* v. *Secretary of State for India* (5)), and that at common law no action can be maintained by any person so engaged for salary or wages claimed from the Crown, because there is no contractual debt (*Mulvenna* v. *The Admiralty* (6) ; *Lucas* v. *Lucas* (7)).

It is evident from the authorities to which I have referred that the facts that the service which is rendered to the Crown is not given under contract, and that no action could be maintained against the Crown in respect of it, would not of themselves prevent the Crown from suing for being deprived of the service through the wrongdoing of a third party. But a *de facto* relationship of master and servant is essential (*Admiralty Commissioners* v. *S.S. Amerika* (8)), and the real question is whether the service which was in fact being supplied, and was interrupted, was of the kind supplied under a contract of service. In *Tobin* v. *The Queen* (9) it was said by the Court of Exchequer, in relation to the question whether the Crown was liable for the acts of a captain in the navy, that the supposed analogy between this relationship and that of master and servant failed ; and in *Admiralty Commissioners* v. *S.S. Amerika* (10) Lord *Sumner*, in relation to the question whether the Crown could claim

(1) (1938) 60 C.L.R. 55.
(2) (1896) 1 Q.B., at pp. 122, 123.
(3) (1933) 49 T.L.R. 300, at p. 301.
(4) (1896) 1 Q.B., at pp. 118, 119.
(5) (1920) 37 T.L.R. 138.
(6) (1926) Sess. Cas. 842, at pp. 859, 860.
(7) (1943) P., at pp. 77, 78.
(8) (1917) A.C., at p. 43.
(9) (1864) 16 C.B. N.S., at p. 352 [143 E.R., at p. 1164].
(10) (1917) A.C., at p. 51.

for damage sustained through losing the services of seamen in the navy, said: "So different both in its nature and its incidents is the service of the seamen of His Majesty's Navy from the service of those who are in private employment that it may be questioned whether in any case an action *per quod servitium amisit* could have been brought at all".

By ss. 2 and 4 of the *Air Force Act* 1923, as amended by the Act No. 74 of 1939, it is provided that members of the Air Force may be required to serve for training or any service required, by or under that Act, to be performed by any member of the Air Force whether on land, sea or in the air. The relations of the Crown and members of the fighting forces are determined and governed by statutes and regulations. They have no real analogy to those of private persons who stand to one another in the relation of master and servant, *de jure* or *de facto*: Cf. *Davies* v. *Littlejohn* (1). In my opinion, the services rendered to the Crown by members of those forces differ in kind from those rendered by a servant to a private master under a contract of service, and there is no principle upon which the Crown can recover in an action *per quod servitium amisit* in respect of the loss of such services.

So far as I am aware, the only other case in which such a claim has been preferred is *Attorney-General* v. *Valle-Jones* (2), in which the Crown recovered damages for the loss of the services of two aircraftsmen of the Royal Air Force who had been incapacitated through the negligence of the defendant. In that case, however, the question whether such a claim was actionable at all was allowed to go by default. The right of the Crown to sue was not disputed, and the only question raised was whether, having regard to the extreme precariousness of the rights of persons engaged in the service of the Crown, any benefits which the Crown might have given them were not *ex gratia* and therefore not recoverable. This is clear from the remark of *MacKinnon* J.: "I think it necessary to bear in mind that the defence in this case is in substance that the plaintiff cannot recover because he has unnecessarily and unreasonably incurred or inflated his damages" (3). In these circumstances, I am of opinion that this case cannot be regarded as constituting even a persuasive precedent for the point which falls to be determined in the present appeal.

For the reasons which I have stated, I am of opinion that the appeal should be dismissed. I think it better to express no opinion as to whether, in the case of Crown servants rendering services of

(1) (1923) 34 C.L.R. 174, at pp. 183, 184.
(2) (1935) 2 K.B. 209.
(3) (1935) 2 K.B., at p. 219.

H. C. OF A. 1943-1944.

THE COMMONWEALTH v. QUINCE.

a kind rendered by employees to private employers, the type of action here in question is maintainable, or as to the correctness of the rulings of *MacKinnon* J. (1), with respect to the damages recoverable.

STARKE J. Appeal from a judgment of the Supreme Court of Queensland in an action against the respondents who were man and wife.

The Commonwealth alleged that it was the employer of a member of the Royal Australian Air Force and that the respondent Quince (who it was alleged was the servant of his wife) so negligently and unskilfully drove, managed and controlled a motor vehicle that it was driven against a motor cycle on which the member of the Air Force was riding whereby he was thrown to the roadway and injured. By reason of the premises it was alleged in substance that the Commonwealth lost the services of the airman and incurred expense for pay and allowances whilst the airman was in hospital, for hospital and medical expenses, for pension and for damage to the airman's clothing.

The trial judge allowed a small sum for damage to the clothing of the airman, which had been supplied to him and was, I gather, the property of the Commonwealth (Cf. *Meux* v. *Great Eastern Railway Co.* (2)), but otherwise held that the Commonwealth had established no cause of action against the defendants. The Commonwealth appealed against the latter part of this judgment.

Ordinarily one person has no claim against and cannot recover from another merely because that other person has committed a tort against a third person which indirectly injured the first-named person (*Cattle* v. *Stockton Waterworks Co.* (3) ; *Admiralty Commissioners* v. *S.S. Amerika* (4)). But there is an anomalous rule in English law that where the defendant has intentionally or by neglect of some duty existing independently of contract inflicted physical harm (which has not resulted in death) upon the plaintiff's servant and the plaintiff has thereby lost wholly or partially the services of such servant an action for damages can be maintained (*Martinez* v. *Gerber* (5) ; *Hodsoll* v. *Stallebrass* (6) ; *Berringer* v. *Great Eastern Railway Co.* (7) ; *Admiralty Commissioners* v. *S.S. Amerika* (4) ; *Bullen and Leake, Precedents of Pleadings*, 3rd ed. (1868), pp. 359, 360 ; *Smith, Master and Servant*, 8th ed. (1931), pp. 106 et seq.).

(1) (1935) 2 K.B. 209.
(2) (1895) 2 Q.B. 387.
(3) (1875) L.R. 10 Q.B. 453.
(4) (1917) A.C., at p. 54.
(5) (1841) 3 Man. & G. 88 [133 E.R. 1069].
(6) (1840) 11 A. & E. 301 [113 E.R. 429].
(7) (1879) 4 C.P.D. 163.

The authorities, however, establish that it is not necessary to establish a contract of service, but that proof of some *de facto* relation of service is enough (*Pollock* on *Torts*, 14th ed. (1939), p. 186 ; *Salmond* on *Torts*, 9th ed. (1936), p. 383 ; *Bullen & Leake, Precedents of Pleadings*, 3rd ed. (1868), pp. 359, 360 ; *Peters* v. *Jones* (1) ; *Admiralty Commissioners* v. *S.S. Amerika* (2)).

The Commonwealth contends that this anomalous rule of English law is applicable as well to public service as to private service. *Attorney-General* v. *Valle-Jones* (3) was relied upon for this proposition and also to some extent *Bradford Corporation* v. *Webster* (4), but there an express contract of service appears to have been made (See the report (5)), and, if not, the case of *Fisher* v. *Oldham Corporation* (6) suggests that it requires further consideration.

Now it is quite plain that a person in the armed forces of the Crown is not in the same category as a person in private employment. In *Admiralty Commissioners* v. *S.S. Amerika* (7) Lord *Sumner* observed that the nature and incidents of the service of the seamen of His Majesty's Navy were so different from those in private employment that " it may be questioned whether in any case an action *per quod servitium amisit* could have been brought at all." A person in the armed forces of the Crown is performing a national duty and does not become a Crown or governmental servant or employee in any true sense of that term : Cf. *McArthur* v. *The King* (8). In time of war all male inhabitants of Australia who are British subjects (other than those exempted from service) and are between certain ages are liable to serve in the Citizen Forces. But in time of peace the armed forces of the Crown are kept up by voluntary enlistment. An oath of enlistment is taken which binds the person subscribing it to serve in the Defence Force according to its tenor, that is, to serve the King as a member of the forces until lawfully discharged, dismissed or removed, to resist the King's enemies and cause his peace to be kept and maintained and in all matters appertaining to his service faithfully to discharge his duty according to law. Pay and allowances are provided for the armed forces pursuant to the *Defence Act* and regulations made thereunder, but no civil contract is created between the King and members of the forces. Indeed, that is expressly provided in the case of officers, but no officer or member of the forces can recover pay alleged to be due to him by action against the Commonwealth in the civil courts.

(1) (1914) 2 K.B. 781.
(2) (1917) A.C., at p. 54.
(3) (1935) 2 K.B. 209.
(4) (1920) 2 K.B. 135.
(5) (1920) 2 K.B., at pp. 135, 136, 143.
(6) (1930) 2 K.B. 364.
(7) (1917) A.C., at p. 51.
(8) (1943) 3 D.L.R., at p. 280.

H. C. OF A. 1943-1944.

THE COMMONWEALTH v. QUINCE.

Starke J.

A member of the armed forces is, however, given a statutory right after he has ceased to be a member to recover from the Commonwealth by action in a Court of competent jurisdiction any moneys which are due to him under his engagement, but he has no other right in respect of pay and allowances: See *Defence Act* 1903-1941, ss. 12, 13, 35, 36, 37, 38, 59, 124 (*d*); *Leaman* v. *The King* (1).

The question is whether the anomalous rule of English law above stated is applicable or should be extended to cases of physical injuries negligently inflicted upon members of the armed forces of the Crown whose service is so essentially different from that of private employees. There is no trace in the books, so far as I know, of its extension to such a case before the decision of *Attorney-General* v. *Valle-Jones* (2). The question involves no principle of law and cannot be solved by any process of reasoning, for the rule itself is anomalous and artificial. The rule contemplates a relationship of service analogous to that of master and servant, for the action *per quod servitium amisit* appears to have begun "as a remedy for a master against one who interfered with his servant so as to deprive him of his services. . . . The tort is in form . . . merely a species of the more general tort of interfering with the relations of master and servant" (*Winfield, Law of Tort*, 2nd ed. (1943), p. 257). The relationship between the Crown and members of its armed forces does not correspond to this relationship. It arises out of a national duty to serve in the defence of Australia based upon the provisions of the *Defence Act*. Such a person is said to serve or to be in the service of the Crown, but that is not to my mind the kind or nature of the service contemplated by or within the rule already mentioned. And it should not be applied or extended to service of so special and peculiar a character.

In my opinion, therefore, the decision of the learned judge that the Commonwealth had established no cause of action against the defendants based upon the loss of services of an airman belonging to the defence forces was right. However, I desire to confine myself to the case of members of the defence forces, who occupy a peculiar and special position, and reserve for further consideration the case of officers or employees in the public service of the Crown whose rights depend upon statutory or other contracts.

Assuming, however, that the Commonwealth can maintain this action, the damages for loss of service might I think include the moneys paid to the airman for a period from the date of the injury until his return to duty could no longer be reasonably contemplated and also for the hospital and medical expenses. The decision in the *Amerika Case* (3) can be distinguished.

(1) (1920) 3 K.B. 663. (2) (1935) 2 K.B. 209. (3) (1917) A.C. 38.

Assuming in this case that the Crown was entitled to the services of its airman, then it appears to me a natural and reasonable result of the defendants' act that the Commonwealth should attempt to cure its servant and maintain him in its service for a reasonable period giving him, without obligation to do so (See *Martinez* v. *Gerber* (1), and note *a*), the pay and allowances provided by the *Defence Act* and regulations made thereunder and which by the Act he would be entitled to recover when he ceased to be a member of the forces. But the pension claimed by the Commonwealth is not the natural and reasonable result of the defendants' act. It is not a consequence which in the ordinary course of things would flow from the defendants' act. The pension is based upon the provisions, I take it, of the *Defence Act*, ss. 57, 123, 124, and is a discretionary, and in the nature of a compassionate allowance without any legal right thereto whatever. The *Amerika Case* (2) makes it clear that this claim for the payment of the pension cannot be sustained.

But for the reasons above stated the appeal, in my judgment, should be dismissed.

McTiernan J. The statement of claim in this action alleges that the Commonwealth was the employer of a member of the Royal Australian Air Force ; that he was injured by the negligent driving of a motor vehicle ; that the respondents are responsible for this negligence ; and that by reason of the injury thus done to the airman, the Commonwealth suffered pecuniary loss consisting of the airman's pay from the time of the accident until his discharge from the service, during which time he was a patient in hospital, the medical and hospital expenses which the Commonwealth incurred in providing treatment for the injury, the pension which it paid him since his discharge, and a further sum, representing the value of the airman's uniform, which was Commonwealth property destroyed in the collision. The Commonwealth claims damages from the respondents for this pecuniary loss and they on their part deny liability. The statement of claim does not in terms allege that the Commonwealth sustained the loss of the service of the airman by reason of the injury. In fact it did totally incapacitate him and the Commonwealth did sustain such loss.

The question is whether the action *per quod servitium amisit* lies at the suit of the Commonwealth to recover damages for the loss it sustained by reason of the injury caused to the airman. The gist of this action is the loss of the service of a servant, but the damages are at large, the plaintiff being entitled to recover what is in the

(1) (1841) 3 Man. & G. 88 [133 E.R. 1069]. (2) (1917) A.C. 38.

H. C. OF A. 1943-1944.

THE COMMONWEALTH v. QUINCE.

McTiernan J.

circumstances of the case a reasonable amount (*Hall* v. *Hollander* (1); *Grinnell* v. *Wells* (2); *Martinez* v. *Gerber* (3); *Hodsoll* v. *Stallebrass* (4)).

The facts of the present case are hardly distinguishable from the facts in the case of *Attorney-General* v. *Valle-Jones* (5). The information in that case alleged that the injured aircraftsmen were in His Majesty's service and that he was deprived of their services by reason of the injuries caused to them by the defendant's negligence. The defendant by his plea admitted these allegations and disputed only that the damages should be awarded according to the measure claimed in the information. The Crown was awarded damages according to this measure. In the course of his reasons for judgment *MacKinnon* J. said that the action *per quod servitium amisit* was based upon "the old common law principle that a master who has, by the tortious act of a third person, been deprived of the services of his servant may claim damages in respect of that deprivation against the third person who has brought it about" (6).

In that case the defendant did not raise the question whether the action *per quod servitium amisit* lies for the loss of the service of a member of the Royal Forces. It does not appear to have been settled that the action did lie in those circumstances, for Lord *Sumner* had expressed strong doubts on the question, in *Admiralty Commissioners* v. *S.S. Amerika* (7). He used these words: "No claim has been made and no evidence has been given relating to damage sustained by the appellants in losing the further services of those who were drowned, and so different both in its nature and its incidents is the service of the seamen of His Majesty's Navy from the service of those who are in private employment that it may be questioned whether in any case an action *per quod servitium amisit* could have been brought at all."

The *Air Force Act* 1923-1941 provides for the establishment, organization and government of the Royal Australian Air Force and that it is to be part of the Defence Force of the Commonwealth. The Act makes applicable to the Air Force a number of sections of the *Defence Act* 1903-1941 and empowers the Governor-General to make regulations for securing its discipline and good government.

The injured airman enlisted in the Royal Australian Air Force and took the oath of enlistment. He thereby promised to serve the King in the Air Force for the duration of the war and twelve

(1) (1825) 4 B. & C. 660 [107 E.R. 1206].
(2) (1844) 7 Man. & G., at p. 1042 [135 E.R., at p. 423].
(3) (1841) 3 Man. & G. 88 [133 E.R. 1069].
(4) (1840) 11 A. & E. 301 [113 E.R. 429].
(5) (1935) 2 K.B. 209.
(6) (1935) 2 K.B., at p. 216.
(7) (1917) A.C., at p. 51.

months thereafter, to resist the King's enemies and to cause his peace to be maintained and in all matters appertaining to his service, faithfully to discharge his duty according to law. The airman was bound under the regulations to serve according to the tenor of the oath.

Lord *Sumner* examined in the *Amerika Case* (1) the basis of the action *per quod servitium amisit*. He said it depended on a special right of the master in relation to his servant. He quoted the following statement by *Tindal* C.J. in *Grinnell* v. *Wells* (2): "The foundation of the action by a father to recover damages against the wrongdoer for the seduction of his daughter has been uniformly placed, from the earliest time hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest. Such is the language of Lord *Holt* in *Russell* v. *Corn* (3), and such the opinion of the court in the earlier case of *Gray* v. *Jefferies* (4), with reference to an action by a father for a personal injury to a child, which stands precisely on the same footing. See also *Randle* v. *Deane* (5). It has, therefore, always been held that the loss of service must be alleged in the declaration, and that loss of service must be proved at the trial, or the plaintiff must fail. See *Bennett* v. *Alcott* (6). It is the invasion of the legal right of the master to the services of his servant, that gives him the right of action for beating his servant; and it is the invasion of the same legal right, and no other, which gives the father the right of action against the seducer of his daughter."

Lord *Sumner* said (7) that in this passage *Tindal* C.J. dealt with the most artificial aspect of this cause of action. Lord *Sumner* pointed out that the wrong which is the subject of this action *per quod servitium amisit* approximates nearly to wrongs to property. He further said: "It is the loss of service which is the gist of the action, and loss of service depends upon a right to the service, and that depends on the contract between the master and the servant" (8). His Lordship added that it was anomalous that the action should exist at all and that it appears to be a survival from the time when service was a status (9). It will be noticed upon reference to the same case (10) that Lord *Parker* accounted for the existence of this right of action in a similar way.

(1) (1917) A.C. 38.
(2) (1844) 7 Man. & G., at pp. 1041, 1042 [135 E.R., at p. 423].
(3) (1704) 6 Mod. 127 [87 E.R. 884].
(4) (1587) Cro. Eliz. 55 [78 E.R. 316].
(5) (1701) 2 Lutw. 1497 [125 E.R. 824].
(6) (1787) 2 T.R. 166 [100 E.R. 90].
(7) (1917) A.C., at p. 54.
(8) (1917) A.C., at p. 55.
(9) (1917) A.C., at p. 60.
(10) (1917) A.C., at p. 45.

H. C. OF A. 1943-1944.

THE COMMONWEALTH v. QUINCE.

McTiernan J.

In *Fisher* v. *Oldham Corporation* (1), *McCardie* J. said that the action "rested on the old rule that a master has some sort of property in the service of one who is a servant, or even a quasi servant. The rule is a highly artificial one." Professor *Holdsworth* in his *History of English Law*, 2nd ed. (1937), vol. VIII., p. 429, describes the basis of the action as a "quasi-proprietary interest" which the master has in the servant's service.

It appears therefore that the right for the invasion of which the action *per quod servitium amisit* lies is a right of a proprietary nature and that the wrong which is the subject of the action approximates to a wrong to property. It would be necessary to decide in order to arrive at the conclusion that the Commonwealth is entitled to maintain this action, that a right of a proprietary nature in the services of the airman arises from his engagement for service.

The relation of master and servant is in modern law created by contract. It is the contractual relation of master and servant which carries on, for the purpose of this action, the idea which was connected with the relation of master and servant, when it was based on status, that the master had a real or proprietary right in his servant's services. It seems to me that there is very great difficulty in saying that the master's proprietary right could arise from anything except a contract or supposed contract creating the relationship of master and servant. The engagement into which the injured airman entered upon his enlistment was not a contract. It was an engagement or promise on his part only. The Crown did not on its part promise or engage to hire or employ him in the service. Legal efficacy is given to the airman's engagement for service by the Act and the regulations. Neither authority nor principle requires that the artificial rule that a master has a right of a proprietary nature in his servant's service should be extended to a relation which is not created by a contract between a master and a servant. Besides, the services which a master hires a servant to perform for him, are so different in nature from those which the airman by his enlistment engaged to render to the King that it is wholly inappropriate to say that an interest of a proprietary nature could exist in the airman's services. His enlistment was an engagement for public service: for the defence and security of the community. As public service it was "for the public benefit" or the "good of the public" and could not at common law be the subject of a contract consisting of mutual promises (*Dunn* v. *The Queen* (2)). These services are on a different plane from those which may at law be the subject of a contract or a supposed contract of hiring and service between a master and a servant.

(1) (1930) 2 K.B., at p. 375.

(2) (1896) 1 Q.B., at pp. 118, 120.

The value of the services lost to a master because of injury done to his servant may be measured by the remuneration which is given in return for such services. But a soldier's pay is not a criterion of the value of his services. This consideration further shows the great difficulty of extending the action *per quod servitium amisit* to the loss of the services of a member of the defence forces.

In my opinion the appeal should be dismissed.

WILLIAMS J. This is an appeal from the Supreme Court of Queensland. The facts may be stated shortly as follows :—On 17th July 1941 R. H. Rowland became a member of the Royal Australian Air Force. This Force is constituted under the provisions of the *Air Force Act* 1923-1941 as part of the Defence Force of the Commonwealth. At the time of his enlistment Rowland took an oath well and truly to serve our Sovereign Lord the King in this Force for the duration of the war and for twelve months thereafter or until sooner lawfully discharged, dismissed or removed, and to resist His Majesty's enemies and cause His Majesty's peace to be kept and maintained, and in all matters appertaining to his service faithfully to discharge his duty according to law.

On 7th October 1941, Rowland was seriously injured by the negligence of the defendants, his leg being broken in two places.

From the date of the accident until 22nd December 1942, when he was discharged and granted a pension of 6s. per day, Rowland remained in the Air Force but was unable to return to duty.

Between 6th October 1941 and 22nd December 1942 the Commonwealth incurred the following expenditure in connection with Rowland's accident. He was a patient, at first at Rosemount Repatriation Hospital, from 7th October 1941 to 17th August 1942, and later at Greenslopes Military Hospital, from 17th August to 22nd December 1942. Both these hospitals are organized and maintained by the Commonwealth, the former being managed and controlled by the Repatriation Department and the latter being a military hospital. The Commonwealth paid Rosemount Hospital £209 18s. 1d. in respect of charges which varied from 12s. 1d. to 14s. 9d. per day, while the expenses at Greenslopes Military Hospital at the rate of 12s. per day amounted to £76 4s. The damage to Rowland's air force uniform, socks and shoes, caused by the accident, amounted to £1 19s. 7d. Between 7th October 1941 and 22nd December 1942 the Commonwealth paid Rowland at the rates fixed by statute from time to time for his rank, varying from 5s. to 6s. 6d. per day, a total of £134 8s., and also paid him £34 deferred pay when he was discharged. These expenses total £456 9s. 8d.

H. C. OF A. 1943-1944. THE COMMONWEALTH v. QUINCE. Williams J.

The Commonwealth also claimed an amount of £25 10s., being at the rate of 6s. per day, from 23rd December 1942 to 17th March 1943 in respect of the pension granted to Rowland, but this claim was not pressed before us, so that the questions for decision are whether the Commonwealth as the employer of Rowland can sue the defendants for the damage it has suffered *per quod servitium amisit*; and, if it can, whether the Commonwealth is entitled to judgment against the defendants for the sum of £456 9s. 8d.

The action was tried by *Philp* J., who held that the Commonwealth was only entitled to succeed in respect of the sum of £1 19s. 7d. for the damage caused to Rowland's uniform, socks and shoes, and that otherwise the action failed. At the end of his judgment his Honour summarized his reasons for reaching this conclusion as follows:— "To sum the matter up in my view the action based on loss of services for wages and hospital expenses before discharge fails because (1) it is essential to such an action that there should be a contract bringing about the relationship of master and servant with the usual incidents of that relationship. (2) That the services of the airman were made due by statute and I feel that I cannot extend the anomaly of a master's right to sue for loss of contracted services to a right in the Crown to sue for loss of statutory services. I think it proper to leave to the legislature the responsibility for introducing such an action. (3) That in any event the payment of these wages and hospital expenses on the part of the Crown was purely voluntary and that as a matter of cold law though not of humanity or policy the Crown should have immediately dismissed the airman on his being injured particularly since the nature of the injury must or should have made it immediately plain that the airman was permanently incapacitated or likely to be useless as a servant for a long period."

It is from this decision of *Philp* J. that the plaintiff, the Commonwealth of Australia, has appealed to this Court.

It is clear from the authorities that the action *per quod servitium amisit* only lies where the relation of master and servant exists, so that, as the result of the defendant's tort, the master loses the benefit of the services of his servant. The damage, which is the gist of the action, is the loss by the master of these services, in which he is supposed to have a legal right or interest, so that a general allegation of service is sufficient without stating that the servant was hired or that he was to receive any wages or salary (*Martinez* v. *Gerber* (1); *Grinnell* v. *Wells* (2)). Service at will is sufficient: an actual binding

(1) (1841) 3 Man. & G. 88 [133 E.R. 1069].

(2) (1844) 7 Man. & G., at p. 1041 [135 E.R. 419, at p. 423].

contract of service is not necessary : so that the father of a family in respect of such service as his daughter renders him from her sense of duty and filial gratitude stands in the same position as an ordinary master (*Evans* v. *Walton* (1)).

Apart from statute the employment of servants by the Crown, naval, military or civil, is at the will of the Crown, so that the Crown is entitled to dismiss them at any time without notice. They are dependent upon the bounty of the Crown for the payment of their remuneration, which does not create a debt, so that they are unable to sue the Crown if the Crown refuses to pay them (*Lucas* v. *Lucas* (2)).

The only relevant statutory provisions to which we were referred in the present case were the following :—In the case of officers in the Royal Australian Air Force, reg. 32 of the *Air Force Regulations*, which provides that the appointment or promotion of an officer under the regulations shall not create a civil contract between the King or the Commonwealth and the officer ; and reg. 72, which provides that an officer shall hold his appointment during the pleasure of the Governor-General, but the commission of an officer shall not be terminated except for cause. In the case of both officers and men, reg. 31, which provides that any person who has been a member may, after having ceased to be a member, recover from the Commonwealth by suit in any court of competent jurisdiction any moneys which under his engagement or by any agreement with the Commonwealth are due to him. And in the case of men, reg. 109, which provides that (1) the Air Board may dispense with the services of an airman at any time ; (2) the competent authority to authorize a discharge shall be the Air Board ; and (3) the airman's commanding officer shall be competent to confirm his discharge. All these regulations are contained in Statutory Rules 1927 No. 161. Thus the original immunity on the part of the Crown is now considerably abridged by the regulations. An officer can no longer be dismissed at pleasure (*Reilly* v. *The King* (3)), and both officers and men can recover their pay by action after they have ceased to be members of the Air Force.

At the time of the accident, therefore, the Commonwealth could have discharged Rowland at any time ; and, whilst he remained a member of the Air Force, could have refused to pay him, and he would have had no legal redress. But upon his discharge he could have recovered any pay that was due to him.

Rowland was not an officer, so that there is no express statutory provision that his enlistment is not to create a civil contract between

(1) (1867) L.R. 2 C.P. 615.
(2) (1943) P. 68.
(3) (1934) A.C. 176.

H. C. OF A. 1943-1944.

THE COMMONWEALTH v. QUINCE.

Williams J.

him and the King or the Commonwealth. But it is immaterial to decide whether his relationship to the Crown was in any respect contractual.

The important consideration is that Rowland upon enlistment bound himself absolutely to serve the Crown for the period of the war and for twelve months thereafter unless the Crown exercised its right to dismiss him in the meantime. He was therefore in the same position with respect to his obligations as he would have been if he had had an enforceable contractual right against the Crown to remain in its service for that period and during his service to receive the pay appropriate to his rank.

In *Clode, Administration of Justice under Military or Martial Law*, 2nd ed. (1874), at pp. 72-82, where the obligations to the Crown created by enlistment are discussed, it is pointed out at p. 73 that under military law as it then existed (and subject to certain ameliorations it is in substance the same to-day) a soldier (and an airman is in the same position) has no right to vacate his enlistment, and that, while he is in the service of the Crown, he is no longer *sui juris* to contract any other obligation, nor can he exercise any rights of citizenship which may conflict with the obligation of implicit obedience under which he stands pledged to fulfil his military duty. "The general purview of the Military Code shows that a soldier gives himself up wholly to his superior officer in . . . civil relations, loyalty, internal and external behaviour. He wears his clothes, cuts his hair, holds his person, and regulates his step and action at the command of officers appointed by the Sovereign." *Clode* proceeds to point out that the law which a member of the Forces has to obey may be divided into two branches: (1) the *lex scripta*, which in the present case includes the *Air Force Act*, and the regulations and other statutory provisions made under the authority of that Act; and (2) the *lex non scripta*, comprising those lawful orders which, *viva voce* or otherwise, the commanding officer may from time to time issue bidding a subordinate to do or refrain from doing, as a member of the forces, certain acts till then undisclosed to him. "Of course in war there is no limit to obedience ('which is the first, second, and third duty of a soldier at all times') save a physical impossibility to obey. 'A subordinate officer must not judge of the danger, propriety, expediency, or consequence of the order he receives: he must obey—nothing can excuse him but a physical impossibility. A forlorn hope is devoted—many gallant men have been devoted. Victories have been obtained by ordering men upon desperate services, with almost a certainty of death or capture.' In peace these orders must be plainly within the limits of the officer's authority."

Under these circumstances the important questions that arise on the appeal are, (1) Does the relationship of master and servant exist between the Crown and an airman? (2) If it does, is loss of naval or military service sufficient to found the action? In *Simmons* v. *Heath Laundry Co.* (1) *Buckley* L.J. said that "broadly stated a contract of service does import that there exists in the person serving under the contract an obligation to obey the orders of the person served." The promise which Rowland made to serve the Commonwealth is contained in the oath which he took on enlistment. Referring to an enlistment *Willes* J. said in *Dawkins* v. *Lord Rokeby* (2) (a case which subsequently reached the House of Lords (3)) that "in *Grant* v. *Gould* (4), it was laid down, upon an application for a prohibition, that a man, by becoming a soldier, and receiving the Queen's pay, does agree and consent that he shall be subject to military discipline, and he cannot appeal to civil courts to rescue him from his own compact." In *Admiralty Commissioners* v. *S.S. Amerika* (5), Lord *Parker* referred to "the contract" between the Admiralty and the seamen whose lives were lost through the respondent's negligence. In *Halsbury's Laws of England*, 2nd ed., vol. 28, p. 586, an enlistment has been described as the acceptance of an engagement in the military service of the Crown which is in the nature of a contract between the person enlisted and the Crown. But the case of father and child shows that the relationship of master and servant need not be created by contract. It is sufficient if the circumstances are such that one person is entitled in fact as a master to the services of another. The King remains the titular head of the armed forces of the Crown, and the Constitution, s. 68, therefore, provides that the command in chief of the Naval and Military Forces of the Commonwealth is vested in the Governor-General as the King's representative. The oath is an oath to serve the King in person according to its tenor. Service in the Air Force, as in the naval or military forces, involves in its most absolute form the right of a member superior in rank to give lawful orders to a member inferior in rank, and the obligation of the member inferior in rank to obey those orders.

In essence the obligation is the same as the obligation of any servant to obey the orders of his master. The difference is that a breach of the obligation does not give rise to an action for damages but to disciplinary punishment.

The control of the Crown over a soldier has been compared to the control of a master over an apprentice. In *R.* v. *The Inhabitants*

(1) (1910) 1 K.B. 543, at p. 552.
(2) (1866) 4 F. & F. 806, at p. 832 [176 E.R. 800, at p. 811].
(3) (1875) L.R. 7 H.L. 744.
(4) (1792) 2 Bl. H. 69 [126 E.R. 434].
(5) (1917) A.C., at p. 42.

H. C. OF A. 1943-1944.

THE COMMONWEALTH v. QUINCE.

Williams J.

of Norton (1) it was held that a deserter from the King's marine service could not gain a settlement under a hiring and service for a year; not being *sui juris*, nor competent lawfully to hire himself within the statute 3 W. & M. c. 11, s. 7. Lord *Ellenborough* C.J. in the course of his judgment referred to "the broad principle that one, who has contracted a relation which disables him from serving any other without the consent of his first master, is not *sui juris*, and cannot lawfully bind himself to serve such second master, so as to gain a settlement by serving for a year under such second contract. In reason and principle it cannot make any difference whether he be originally bound by a contract of apprenticeship, or by any other contract equally obligatory upon him, which disables him from binding himself to serve a second master. The objection is, that he cannot give the master a control over his service for the whole period which the master stipulates for and has a right to require by the contract. The King's officers might at any time have reclaimed him, and taken him out of the service in which he was engaged; he cannot therefore be said to have been lawfully hired into it. The remedy which the master might in that case have had against him is another question: and the very want of power to bind himself, as he assumed, without authority, to do, might have founded a cause of action against him by the master. But a soldier is at least as much bound to the service of the King, as an apprentice is to that of his master: and nothing is to be inferred from the measured language of the court in the case of an apprentice, in not laying down the principle broader than the matter in judgment required: but nothing was said by the court in any of the cases intimating an opinion that the rule there laid down was confined to the single case of an apprentice" (2).

Lawrence J. said: "The decisions referred to have concluded the present question, if they were not made upon any ground peculiar to the case of an apprentice: but, as I understand them, they proceeded upon the ground that an apprentice was not *sui juris*, and could not therefore subject himself to the control of a second master for a whole year under a contract of hiring" (3). The authorities referred to in the judgment of *Bayley* J. in *R.* v. *Inhabitants of Rotherfield Greys* (4) show that, whether a minor enlists voluntarily or compulsorily, he is emancipated from the control of his father and becomes subject to the control of the Crown. The position is entirely different from that of some public officer employed by the Crown to perform

(1) (1808) 9 East. 206 [103 E.R. 552].
(2) (1808) 9 East., at pp. 209, 210 [103 E.R., at p. 553].
(3) (1808) 9 East., at p. 210 [103 E.R., at p. 553].
(4) (1823) 1 B. & C. 345 [107 E.R. 128].

some independent duty which the law casts upon him. Referring to such duties *Griffith* C.J. in *Baume* v. *The Commonwealth* (1) said: —"When the duty prescribed by the statute is to be performed by a designated person, and in the performance of that duty he is required to exercise independent judgment on a preliminary question of fact, the maxim *respondeat superior* does not apply so as to make the superior liable if the officer comes to a mistaken conclusion." See the authorities collected by *McCardie* J. in *Fisher* v. *Oldham Corporation* (2), and by this Court in *Field* v. *Nott* (3). A member of the Air Force is not employed to perform statutory duties in the exercise of his discretion. Section 4 of the *Air Force Act* provides, no doubt, that the members of the Air Force may be required to serve for training or any air force service either within or beyond the limits of the Commonwealth, provided that no member of the Air Force, appointed or enlisted for service within the limits of Australia only, shall be required to serve beyond those limits unless he voluntarily agrees so to serve. But this section merely defines in the most general manner the class of service a member of the Air Force can be called upon to perform and the area in which he can be compelled to serve. Regulations made under the Act provide for the terms and conditions of service of officers and men, for the constitution of courts martial, for the scale of punishments for disciplinary offences, and for many other matters. But, within this broad charter, an airman is bound, as I have said, to obey the lawful orders which he receives from time to time from a superior in rank. The control which the Crown exercises over persons in its naval, military and air force services is in my opinion in every substantial sense the control of a master over its servants.

Further, I cannot see that it makes any difference that members of the forces are employed to render to the Commonwealth naval, military or air force service as opposed to civil service. It is true that in *Admiralty Commissioners* v. *S.S. Amerika* (4) Lord *Sumner* doubted whether the action applied to loss of the services of seamen in His Majesty's Navy, but he expressed no decided opinion either way, while Lord *Parker* (5) appears to have thought the action would lie because, as I have already said, he refers to the contract of service between the Admiralty and the seamen and to that relation as one of master and servant.

It was held in *Bradford Corporation* v. *Webster* (6) that a municipal corporation could sue where one of its constables was injured in

(1) (1906) 4 C.L.R., at p. 110.
(2) (1930) 2 K.B. 364.
(3) (1939) 62 C.L.R. 660.
(4) (1917) A.C., at p. 51.
(5) (1917) A.C., at p. 42.
(6) (1920) 2 K.B. 135.

H. C. OF A. 1943-1944.

THE COMMONWEALTH v. QUINCE.

Williams J.

the execution of his duty. If the loss of the services of a constable, which are of a public nature, can found the action, it is difficult to see why the loss of naval or military services should not also be justiciable.

In *Tobin* v. *The Queen* (1) it was held that a petition of right would not lie where a commander of a ship of the Queen employed in the suppression of the slave trade on the coast of Africa seized a schooner belonging to the suppliant which he suspected of being engaged in slave traffic; and, it being inconvenient to take her to a port for condemnation in a Vice-Admiralty Court, caused her to be burnt. The judgment of the Court was founded, *inter alia*, on two grounds that are now well established, the one that at common law the Crown can do no wrong, so that a petition of right will not lie in respect of a tort committed by one of its servants; and the other, which is the same as that discussed in the cases to which I have already referred, that the commander was engaged in performing an independent duty imposed upon him by statute. But the Court also proceeded to say that the supposed analogy between the relation of the Queen to a captain in Her Majesty's Navy and the relation of a master to a servant varied in the following respects, firstly that the Queen does not appoint a captain to a ship by her own mere will, as a master chooses a servant, but through an officer of State responsible for appointing a man properly qualified; and, secondly, that the will of the Queen alone does not control the conduct of the captain in his movements, but a sense of professional duty. If the first is a good ground it would apply to most public servants who are appointed by some Minister or public body representing the Crown and not by the Crown itself. Further, the plaintiff in the present case is the Commonwealth in right of the Crown and there can be no question that it is the Commonwealth which through appropriate instrumentalities controls the enlistment of volunteers in its armed forces. As to the second ground, the captain of a ship has, no doubt, a wide discretion, but so has the general manager of a business, and there seems to be no reason in principle why a captain of one of His Majesty's ships should not, within the scope of his authority, be the agent of the Crown. The reason now generally advanced for not suing the Crown in England, but for suing the captain of the ship, is that the Crown in England cannot be sued in tort. But the position is different in Australia, where the Commonwealth can be sued in tort, so that in *Shaw Savill and Albion Co. Ltd.* v. *The Commonwealth* (2), which is reported on demurrer, it was not disputed that the plaintiff company could sue

(1) (1864) 16 C.B. N.S. 310 [143 E.R. 1148]. (2) (1940) 66 C.L.R. 344.

the Commonwealth as an employer in tort for damages in consequence of a collision between H.M.A.S. *Adelaide* and the plaintiff's motor vessel *Coptic*, which the plaintiff alleged was caused by the negligent navigation of H.M.A.S. *Adelaide*. For these reasons, if there had been no decision on the point, I would have been of the opinion that the action would lie.

But the point is, to my mind, covered by authority. In *Attorney-General* v. *Valle-Jones* (1) *MacKinnon* J. (as he then was) held, in a case where two aircraftsmen of the Royal Air Force were injured by the negligence of the defendant's driver, that the Crown was entitled to maintain a claim against the defendant for the loss of the services of the men which it had thereby suffered. It is true that counsel for the defendant did not deny that an action for loss of services by the tortious act of a third party was available to the Crown as an employer as well as to a subject and that the defence was that the plaintiff had failed to prove any damage. But it appears to me to be clear from his judgment that *MacKinnon* J. did satisfy himself that the claim was justiciable *per quod servitium amisit*, and, indeed, in distinguishing *Admiralty Commissioners* v. *S.S. Amerika* (2) his Lordship said :—" In this case the action, and the whole essence of the action, is for the loss to a master of the services of his employee " (3). This decision is not, of course, binding upon this Court, but the decision of such a distinguished judge, who is now a member of the Court of Appeal, is entitled to the most serious consideration, and, if I might respectfully say so, the decision appears to me to be right.

It remains to consider what damages the Commonwealth is entitled to recover. It is contended, and his Honour so decided, that because the Commonwealth could have dispensed with Rowland's services without notice it should have done so, and thereby mitigated the damages, but the Commonwealth must be entitled to recover all the damages that naturally and reasonably flowed from the wrong complained of. Rowland had sworn to serve the Commonwealth for the duration of the war and for twelve months thereafter, so that, before it dispensed with his services, it must have been entitled to take reasonable steps to try and restore him to a state of health fit to continue his service in the Air Force. There is no evidence that the Commonwealth persevered for an unreasonable time before deciding that this could not be done. The defendants are not being asked to pay twice the same damages, because, if the Commonwealth had not kept Rowland on the pay list and provided him with

(1) (1935) 2 K.B. 209. (2) (1917) A.C. 38.
(3) (1935) 2 K.B., at p. 220.

H. C. OF A. 1943-1944.

THE COMMONWEALTH v. QUINCE.

Williams J.

medical and hospital services, he could himself have claimed for the loss of the wages which, but for his injuries, he would have earned as a civilian and for reasonable medical and hospital expenses which he would have incurred as a civilian as a result of the accident. In this respect the claim of the Commonwealth for damages is on all fours with the damages claimed and allowed in *Dixon* v. *Bell* (1), *Smaill* v. *Alexander* (2) and *Attorney-General* v. *Valle-Jones* (3). Medical expenses were allowed in *Barnes* v. *Pooley* (4).

For these reasons I am of opinion that the appeal should be allowed, the judgment of the Court below set aside, and judgment entered for the plaintiff for the sum of £456 9s. 8d., and that the defendants should be ordered to pay the plaintiff's costs of the action and of this appeal.

Appeal dismissed with costs.

Solicitors for the appellant, *Chambers, McNab & Co.*, Brisbane.

Solicitors for the respondents, *Stephens & Tozer*, Brisbane, by *P. F. Irvine.*

J. B.

(1) (1816) 1 Stark. 287 [171 E.R. 475].
(2) (1904) 23 N.Z.L.R. 745.
(3) (1935) 2 K.B. 209.
(4) (1935) 51 T.L.R. 391.