[HIGH COURT OF AUSTRALIA.]

ATTORNEY-GENERAL FOR NEW SOUTH WALES . . . . . } APPELLANT;
INFORMANT,

AND

THE PERPETUAL TRUSTEE COMPANY (LIMITED) AND OTHERS . . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1951-1952.

SYDNEY, 1951, *July* 25, 26.

MELBOURNE, 1952, *March* 3.

Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ.

Master and Servant—Action per quod servitium amisit—Injury to member of police force—Crown—Relation between Crown and its servants—Number of police force—Nature of action—Damages—Police Regulation Act 1899-1947 (*N.S.W.*) (*No.* 20 *of* 1899—*No.* 19 *of* 1947), *ss.* 4, 6, 9, 10, 12, 14—*Police Regulation* (*Superannuation*) *Act* 1906-1944 (*N.S.W.*) (*No.* 28 *of* 1906—*No.* 1 *of* 1944)—*Industrial Arbitration Act* 1940-1951 (*N.S.W.*) (*No.* 2 *of* 1940—*No.* 10 *of* 1951)—*Crown Employees Appeal Board Act* 1944 (*N.S.W.*) (*No.* 15 *of* 1944).

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 police force of the State of New South Wales.

So *held* by *Dixon*, *McTiernan*, *Webb*, *Fullagar* and *Kitto* JJ. (*Williams* J. dissenting).

The Commonwealth v. *Quince*, (1944) 68 C.L.R. 227, followed.

Nature of the relationship between the Crown and a member of the police force, considered.

Dixon J. concurred in the decision of the Court on the ground that *The Commonwealth* v. *Quince*, (1944) 68 C.L.R. 227, governed the question but expressed the view that it was wrongly decided.

Decision of the Supreme Court of New South Wales (Full Court): *Attorney-General* v. *Perpetual Trustee Co.* (*Ltd.*), (1951) 51 S.R. (N.S.W.) 109; 68 W.N. 116, affirmed.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

APPEAL from the Supreme Court of New South Wales.

By an information brought in the Supreme Court of New South Wales by the Attorney-General for that State, suing on behalf of His Majesty the King, against Perpetual Trustee Co. (Ltd.) and Matilda Jane Bruce Johnson, the executor and executrix respectively of the will of Frederick James Johnson, trading as F. W. Johnson, and Arthur Douglas Dunn and William Frederick Johnson, the informant claimed from the defendants the sum of £5,050 3s. 9d.

It was alleged in the declaration that at all material times the said executor and executrix were, as such, the owners of a motor vehicle which was being driven on a public highway by the defendant Arthur Douglas Dunn for and on behalf of and as agent for the defendant William Frederick Johnson, and Bertrand Leslie Hayden was a member of the police force of the said State and was lawfully passing along that public highway in a tram-car which was one of the daily or other periodic journeys referred to in s. 10A of the *Police Regulation (Superannuation) Act* 1906-1944, and thereupon the motor vehicle was driven, managed and controlled so negligently, carelessly and unskilfully that it was forced and driven against the tram-car whereby Hayden, without his own or wilful act and otherwise than during or after any substantial interruption of or deviation from the said journey made for a reason unconnected with his duty and otherwise than during or after any other break in that journey which having regard to all the circumstances was not reasonably incidental to that journey, received bodily injury which disabled him from the performance of his duties as a member of the said police force, and during the period of that disability and whilst Hayden continued as a member of that police force he was paid the salary and allowances appropriate to his office and to which he was entitled although His Majesty was during that period deprived of his services as a member of the police force by reason of the said disability, and afterwards Hayden by reason of the said disablement was discharged from the police force and His Majesty was thereby deprived of his services as a member thereof and upon his discharge was paid and would continue to be paid a pension in accordance with the provisions of the *Police Regulation (Superannuation) Act* 1906-1944, whereas but for such disablement Hayden would not have commenced to receive a pension in accordance with the provisions of that Act for a long time. The Attorney-General claimed on behalf of His Majesty to recover the salary and allowances so paid and to be reimbursed in respect of the moneys already paid and which would thereafter be paid to Hayden pursuant to the said Act.

In addition to pleading not guilty and denying some of the facts alleged in the declaration, the defendants demurred to the declaration on the grounds: (1) that it did not disclose any cause of action, and (2) that the action *per quod servitium amisit* did not lie at the suit of the Crown for the loss of the services of a member of the police force.

Issue was joined.

The Full Court of the Supreme Court (*Street* C.J., *Maxwell* and *Owen* JJ.) gave judgment for the defendants on the demurrer: *Attorney-General* v. *Perpetual Trustee Co. (Ltd.)* (1).

From that decision the informant appealed to the High Court.

Relevant statutory provisions are sufficiently set forth in the judgments hereunder.

E. S. Miller K.C. (with him *H. Maguire*), for the appellant. The facts of this case are distinguishable from the facts in *The Commonwealth* v. *Quince* (2), upon which the decision of the Court below was based. Alternatively, that case was wrongly decided: see *Australian Law Journal* (1945), vol. 19, p. 2, particularly at p. 4. Police officers are now within the scope of the jurisdiction of the Industrial Commission to the same extent as any other employees of the Crown: *Industrial Arbitration Act* 1940-1951 (N.S.W.), s. 5. The Industrial Commission can regulate the terms and conditions of their employment to the same extent as other Crown employees. The Commissioner of Police is an "employer" within the meaning of the *Crown Employees Appeal Board Act* 1944 (N.S.W.), and members of the police force are "officers" within the meaning of that Act. So far as that Act is concerned, a member of the New South Wales police force is in the same position as any officer of the public service. Police officers are excluded from the operation of the *Workers' Compensation Act* 1926-1951 (N.S.W.) by s. 6 of that Act, but by reason of ss. 10 and 10A of the *Police Regulation (Superannuation) Act* 1906-1944 (N.S.W.) they are in exactly the same position as other persons working under a contract of service. The relationship of a civil servant to the Crown is contractual, and he can bring an action for breach of contract (*Lucy* v. *The Commonwealth* (3)). The decision in *Shaw Savill and Albion Co. Ltd.* v. *The Commonwealth* (4) establishes that a shipping company can sue the Commonwealth for damages for negligence on the part of the master of a vessel of the Royal Australian Navy, and must have been on

(1) (1951) 51 S.R. (N.S.W.) 109; 68 W.N. 116.
(2) (1944) 68 C.L.R. 227.
(3) (1923) 33 C.L.R. 229.
(4) (1940) 66 C.L.R. 344.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

the basis that the principle of *respondeat superior* applies. In *Quince's Case* (1) each of the members of the Court who constituted the majority confined his attention to the matter there in question, that is, to the position of a member of the services. Under s. 10 of the *Police Regulation Act* 1899-1947 (N.S.W.) a member of the police force may sue for his salary, independently of any award, and this distinguishes him from a member of the forces under consideration in *Quince's Case* (1). As was pointed out by *Latham* C.J. in *Quince's Case* (2) the right to bring this type of action does not depend upon the existence of a contract of service: see also *Bradford Corporation* v. *Webster* (3), *Attorney-General* v. *Valle-Jones* (4), *Fisher* v. *Oldham Corporation* (5), *United States* v. *Standard Oil Co. of California* (6), *R.* v. *Richardson* (7) and *Receiver for the Metropolitan Police District* v. *Tatum* (8). The remarks of Lord *Sumner* in *Admiralty Commissioners* v. *S.S. Amerika* (9) were merely *obiter*. In *Attorney-General* v. *Dublin United Tramways Co.* (1896) *Ltd.* (10) the Court took the view that the relationship of master and servant existed between the people of Eire and a member of the civic guard, and that the Attorney-General suing on behalf of the people can recover damages for the negligence of the defendant *per quod*. Regard should also be had to *Carolan* v. *Minister for Defence* (11). Decisions such as *Enever* v. *The King* (12) do not determine the soundness of the claim put forward on behalf of the appellant. The fact that members of the police force have, by law, an independent discretion conferred upon them does not prevent them from being servants in the ordinary sense, nor does it prevent the principle of *respondeat superior* from applying. The *Coal Mines Regulation (Amendment) Act* 1941, (N.S.W.) by the Sixth Schedule, confers duties and discretions on many employees, and if such an employee injured another person by negligence in the performance of his statutory discretions and duties it could scarcely be contended that the principle of *respondeat superior* did not apply. The damages recoverable are shown in *Attorney-General* v. *Valle-Jones* (13). The informant is entitled to recover whether the police officer is a servant or not because the tortious act of the defendants brought about the situation whereby the constable became entitled to the benefits provided by statute.

(1) (1944) 68 C.L.R. 227.
(2) (1944) 68 C.L.R., at pp. 233-239.
(3) (1920) 2 K.B. 135.
(4) (1935) 2 K.B. 209.
(5) (1930) 2 K.B. 364.
(6) (1947) 332 U.S. 301 [91 Law. Ed. 2067].
(7) (1948) S.C.R. (Can.) 57.
(8) (1948) 2 K.B. 68.
(9) (1917) A.C. 38, at p. 51.
(10) (1939) I.R. 590.
(11) (1927) I.R. 62.
(12) (1906) 3 C.L.R. 969.
(13) (1935) 2 K.B. 209.

K. A. Ferguson K.C. (with him *E. M. Martin*), for the respondent. The action is an anomalous one. It is an exception to the rule that A cannot recover damages for injury to B which prevents B from performing his contract to A. The rule had an historical basis. The head of the household was deemed to have a proprietary interest in the members of his family, his apprentices and servants, and their services. The basis of the action was trespass to chattels, and loss of service was essential (*Admiralty Commissioners* v. *S.S. Amerika* (1), *Clerk and Lindsell* on *Torts*, 10th ed. (1947-1950), p. 329). The head of the household could only have a proprietary interest in services personal to himself and over which he could exercise complete control—give orders and have them obeyed. Control is inherent in a proprietary interest. If the head of the household could not control the services he would not suffer any damage. It follows that the servant must have been performing delegated duties and exercising delegated authority. He must have been doing something for his master otherwise there was not any loss. The concept of property in services has long since disappeared. The relationship is now contractual. Had the law developed along logical lines the action would have disappeared as its very basis had disappeared. It is now an anomaly, contrary to recognized principles and resting solely on procedure. Though it has survived, it has done so only in relation to the type of services to which it originally applied. The area of its application has not been increased. A contract of service is not essential, *de facto* service is sufficient. But the *de facto* service being performed must be capable of being the subject of a personal contract of service. The basis of the decision in *The Commonwealth* v. *Quince* (2) is that (a) the services must be such as are performed under an ordinary contract of service, and (b) the services performed by the forces are not such services. One important difference is that a soldier in the execution of his duty is not performing delegated duties. The minority opinion in that case was that the degree of control provided a sufficient analogy to a contract of service (3). The element of control is absent from this case. The relationship between the Crown and the members of the police force is governed by common law and statute. A member of that force exercises common law and statutory rights, which cannot be exercized under the authority of any person but himself. He is a ministerial officer of the Crown exercising common law and statutory rights independent of control

(1) (1917) A.C., at pp. 44, 50, 60.
(2) (1944) 68 C.L.R. 227.
(3) (1944) 68 C.L.R., at pp. 238, 254, 256.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

(*Police Regulation Act* 1899-1947 (N.S.W.); *Enever* v. *The King* (1); *Fisher* v. *Oldham Corporation* (2)). It is true that for disciplinary purposes, he, the member of the police force, must obey the orders of his superiors, and that at times he exercises delegated duties; but those matters are incidental to his office, and are equally applicable to members of the forces.

E. S. Miller K.C., in reply. If control is a necessary ingredient in this type of action, then that requirement is satisfied by the provisions of the *Police Regulation Act* 1899-1947, for example, ss. 4, 4A and 5 provide sanctions for the performance by a member of the police force of his duties according to law. Superintendents and inspectors are appointed under the Act to control subordinate officers.

Cur. adv. vult.

March 5, 1952.

The following written judgments were delivered:—

DIXON J. By the order under appeal the Supreme Court of New South Wales allowed a demurrer to an information *in personam* by the Attorney-General and entered judgment for the defendants.

The cause of action set up by the information is for the loss of the services of a member of the police force of New South Wales owing to physical injuries sustained by him in consequence of the negligent management of a motor vehicle for which negligence the defendants were responsible. The pleading contains an allegation that the member of the police force was discharged by reason of disablement caused by such injuries and it alleges facts directed to show that up to his discharge it was incumbent upon the Crown to pay him the salary and allowances appropriate to his office and upon his discharge to pay him a pension which otherwise would not have commenced at so early a date. The claim of the Attorney-General on behalf of the Crown is to recover the salary and allowances so paid and to be reimbursed in respect both of the moneys already paid and of the moneys which will hereafter be paid to him, and the information concludes with a claim to a money sum. The basis of the information is a cause of action *per quod servitium amisit* and in such a cause of action, whether framed in trespass or in case, the damages have always been unliquidated. The payments made, and to be made, to the injured man may or may not afford a proper measure of damages. According to *Bradford Corporation* v. *Webster* (3); *Attorney-General* v. *Valle-Jones* (4); *Attorney-General* v. *Dublin*

(1) (1906) 3 C.L.R., at pp. 975, 982, 991.
(2) (1930) 2 K.B., at pp. 371, 374.
(3) (1920) 2 K.B. 135.
(4) (1935) 2 K.B. 209.

United Tramways Co. (1896) *Ltd.* (1) and *R.* v. *Richardson* (2) the salary and allowances do form a measure of damages and the actual and prospective payments of pension are relevant to the assessment of damages. But according to the dictum at the end of Lord *Sumner's* opinion in *Admiralty Commissioners* v. *S.S. Amerika* (3) none of these payments would enter into the measure of damages and according to a dictum of Lord *Parker* in the same case (4) the payments on account of pension would not do so. If Lord *Sumner's* opinion is right it may be a question whether the information sufficiently alleges damage legally resulting from the loss of the injured policeman's services to sustain the pleading, if otherwise it discloses a cause of action. But it was not upon this point that the demurrer was argued. Moreover for the purpose of answering a general demurrer enough may perhaps be extracted from the information to supply the necessary allegation that the loss of his services involved damage, even if it were held that none of the specific expenditure alleged ought in law to be considered part of the damage. I shall therefore confine my decision to the point that was relied upon in support of the demurrer namely that the loss of the services of a member of the police force owing to his disablement caused by a wrongful act does not give the Crown a cause of action against the tort feasor.

Unless we are to reconsider what the majority of the Court decided in *The Commonwealth* v. *Quince* (5) that case in my opinion requires us to hold that the Crown is not entitled to such a cause of action. No doubt the relation of a member of the armed services to the Crown is not the same as that of a member of the police force of New South Wales to the Crown. But the reasoning upon which the judgments of the majority of the Court depend, in spite of some variation, appears to me to apply to the case of a member of the police force. It is true that *Starke* J. (6) places some stress on the national duty of military service and also that his Honour confines his decision to members of the defence forces. But the distinctions between the military service of the Crown and service in a police force do not seem sufficiently relevant to the want of that correspondence with the relation of master and servant which his Honour considered to be lacking to warrant an opposite conclusion in the case of the police force.

In my opinion we ought to follow and apply the decision in *The Commonwealth* v. *Quince* (5). This Court has adopted no very definite

(1) (1939) I.R. 590.
(2) (1948) S.C.R. (Can.) 57.
(3) (1917) A.C., at p. 61.
(4) (1917) A.C., at p. 42.
(5) (1944) 68 C.L.R. 227.
(6) (1944) 68 C.L.R., at pp. 245, 246.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Dixon J.

rule as to the circumstances in which it will reconsider an earlier decision. Certainly the rigid rule accepted in the Court of Appeal in *Young* v. *Bristol Aeroplane Co. Ltd.* (1) is incompatible with the practice of the Court and is inappropriate. The attention paid in this jurisdiction to developments in English case law would be enough to make the rule inappropriate, even if the history of constitutional interpretation did not show it to be so and even if, subject to the prerogative, this were not a court of final resort. In any case it may be permitted to doubt the wisdom or justice of the rule: cf. *Williams* v. *Glasbrook Brothers, Ltd.* (2) following *Wilds* v. *Amalgamated Anthracite Collieries Ltd.* (3), then challenged and subsequently reversed in Dom. Proc. (4).

But there appears to me to be no ground for reconsidering the decision in *Quince's Case* (5) unless it be a sufficient ground simply that the opposite conclusion is to be preferred. It is evident that the decision was reached only after a very full examination of the question. It cannot be said that any compelling consideration or important authority was overlooked or that the decision conflicts with well established principle or fails to go with a definite stream of authority. It is a recent and well considered decision upon what is evidently a highly disputable question. The question stands by itself. The decision does not affect some wider field of law so that its importance goes beyond the matter in hand.

In my opinion the proper course to take is simply to follow the decision and apply it. Accordingly I think that the appeal should be dismissed.

Had the matter been *res integra* I would for myself have adopted the view that an action does lie at the suit of the Crown for damage suffered by reason of the loss of the services of a Crown servant caused by a wrongful act and that the services of a member of the police force of New South Wales are of a description falling within the principle. I state my opinion only because separate judgments are to be delivered in which the question is examined anew.

My reason for preferring the view in favour of the Crown's right of action is simply that the grounds upon which the services to the Crown of a soldier or a policeman or an employee in its civil service are distinguished from the services for the loss of which an employer who is a subject of the Crown may complain do not appear to me to be relevant to the cause of action, either in point of historical development or in point of principle as at present understood and applied.

(1) (1944) K.B. 718.
(2) (1947) 2 All E.R. 884.
(3) (1947) 1 All E.R. 551.
(4) (1948) 2 All E.R. 252.
(5) (1944) 68 C.L.R. 227.

It is better to go first to the historical origin of the cause of action and the relation of the Crown to the forms of action involved. It is better to do so because it may at first sight seem a striking consideration that before the twentieth century no precedent has been found for the Crown's suing for the loss of services.

From early times trespass could be brought by a master for a battery of his servant whereby the master lost his services. Trespass lay at the suit of a master also for a forcible taking of his servant. This was the law before the *Statute of Labourers* (23 Ed. III.) as *Coleridge* J. showed in his judgment in *Lumley* v. *Gye* (1). Actions on the case for enticement were based on that statute. In trespass by a master for the battery of his servant it was necessary to allege that thereby the plaintiff lost the services of his servant. In such a case " the master might recover for the services and the servant for the battery " *Brooke's Abrid.* Vol. II. fo. 292. Trespass pl. 442 abridging Y.B. 20 H. 7 pl. 5.

In Y.B. 19 H. VI. pl. 94 (fo. 45) there occurs a statement of what the law is " where my servant is beaten ", viz. : " he shall have a good action of trespass and recover damages and I another action of trespass and recover damages : and yet it is only the same trespass, but the trespass is done as well to the one as to the other : and here the master recovers his damages for the loss of the services, and the servant for the damage done to his person : and so damages are recovered twice for one and the same trespass *diversis respectibus.* And that is adjudged anno 11 Rich. 2 II in a writ of trespass ". But the master's right to recover for the services did not depend upon a retainer of the servant. " Trespass for beating his servant *per quod servitium amisit* lies although he was not retained but served only at will : 11 H. 4. 2. per Hull accordant ". Fitzh. N.B. p. 200. " Trespass for a servant beaten, the plaintiff need not allege a retainer for where a man serves me at his pleasure and he is beaten by which I lose his services trespass lies for me, quod nota " : *Brooke's Abrid.* Vol. II. fo. 283 Trespass pl. 157 abridging Y.B. 22 H. 6 fo. 43, Hilary Term pl. 25. This has remained the law, notwithstanding occasional dicta as to the need of a contract to continue serving. The judgment of *Willes* J. in *Evans* v. *Walton* (2) makes this clear. His Lordship refers to the plea from 22 H. 6 abstracted by Brooke. In an action on the case for harbouring a servant who has broken the relation of service a retainer must be shown and this may be necessary too in an action for enticing him from the service. See *Jenk's Digest of English Civil Law* par. 976, and notes.

(1) (1853) 2 El. & Bl. 216 [118 E.R. 749].

(2) (1867) L.R. 2 C.P. 615, at pp. 621, 622.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

DIXON J.

But clearly a master could recover in trespass for the loss of services without making out any contractual right to them. " . . . it does not matter as regards the master's right to sue, how the injury is caused to the person of his servant, whether by an assault, by battery, by negligence or otherwise. The *loss of service* is, on the other hand, essential, but a service, *de facto*, is enough to support the action " : *Dicey* on *Parties in an Action* (1870), p. 326. This rule formed the basis of the action for seduction. If the injury to the servant was committed with force but is the consequence of negligence and was not intended as, for instance, if he is run down in the street, the master might sue in trespass for the forcible wrong or in case for the negligence. See *Williams* v. *Holland* (1) and 2 *Saunders Pleading* p. 653. In each form of action the master's right was to recover for the loss of services, not for the loss of the performance of a contract of service. During the greater part of the development of English law these rules were regarded from the point of view of the remedy. They determined the scope of the remedy and the conditions in which it lay. Bearing that in mind it is necessary now to turn to the history of the Crown's right to the remedies.

The common law was that the King might resort to any remedy available to the subject. Writing of *quare impedit*, *Fitzherbert*, *Natura Brevium* p. 32 F. says " for the King may sue this writ and every writ in what Court he will ". And elsewhere in the *Natura Brevium* he writes (p. 7 B) " For the King hath a Prerogative in this matter before others to sue in what Court he will ; but he cannot alter or change the nature of the writ, otherwise than the Law giveth the same to him and others ". And under Trespass p. 90 I " And the King shall have an action of Trespass for taking his goods and the writ is such : ' Wherefore with Force and Arms our goods and chattels to the value of &c. and other injuries there committed, in contempt and to the great damage of us and against our Peace ' ". Instances of the King suing in trespass occur in the abridgements ; see *Brooke* Vol. II Fo. 283 Trespass pl. 172 Fo. 142 Prerog. le Roy pl. 29 (" Trans. pro rege ") ; *Comyns Dig.* citing Y.B. 4 H. V. 4 b. 10 H. IV. 3 and *Theloall's Digest of Briefs Original* L. 1 C. 3 f. 19. I have not seen any actual reference to a writ of trespass brought by the King for the loss of services. But the King possessed many menial and other servants and it is difficult to suppose that if the services of any of these were lost through his being beaten the King might not have brought trespass *per quod servitium amisit* if he had chosen, just as he might bring trespass

(1) (1833) 10 Bing. 112 [131 E.R. 848].

de bonis asportatis or trespass *quare clausum fregit*. Violence to the King's servants and violence to the King's officers would naturally be considered to call for much stronger measures than a writ of trespass. Accordingly it is not surprising if the Year Books do not contain an actual instance of trespass *per quod servitium amisit* brought by the King. The *Liber Assissarum* does, however, contain a plea of trespass which is close enough to show that no difficulty would have been felt in the King bringing a writ of trespass *per quod servitium amisit*. It is 27 Ass. pl. 49 and is abridged by *Brooke* under Joinder en Action Vol. II. fo. 31 pl. 57 and under Prerogative le Roy Vol. II. fo. 141 pl. 48 and is referred to in the *Case of Mines* (1). The case depended on two propositions which are to be found in Co. Lit. at 135b and 137b respectively thus:—"If a Villeine be made a secular chaplaine, yet his lord may seise him as his Villeine and seise his goods &c." "If a villeine be a priest in the King's Chapel, the lord cannot seise him in the presence of the King for the King's presence is a privilege and protection for him". The material part of pl. 49 of 27 Ass. describes the proceeding thus: "Trespass brought by the King and by a priest, and pleaded that he was a priest (chaplain) of the King of his chapel of Westminister and was in the protection of the King, alleging the trespass to be done to him within the Palace of Westminister in the presence of the King and of his Justices and in contempt of the King and in contravention of his protection to the damage of the plaintiff". The defendant's plea, which apparently did not take the form of a justification, set up the Villenage of the chaplain and a right to the manor of which he was Villein, a plea which failed "because a man may not take his Villein in the presence of the King". Even if this chaplain sued for the King *qui tam* (a matter as to which see Bro. Abr. joinder en action pl. 57 and Wms. Saunders Vol. 1 p. 136 note (1)) the case none the less shows a cause of action in the King. Clearly enough a chaplain might be a servant, although he might not fall within the *Statute of Labourers*, a question discussed by *Coleridge* J. in *Lumley* v. *Gye* (2), cf. *Holdsworth* H. *History of English Law*, vol. 2, p. 461, note 3. The case places the relation of the chaplain to the King, by whose protection he was enveloped, in antithesis to his status of Villenage. Evidently why trespass lay for the King is that what may be called his sphere of personal control had been invaded by the seizing of his chaplain who lay within it. It is because a forcible deprivation of the services of his servant amounts to a similar invasion of a master's sphere

(1) (1613) 1 Plow. 310, at p. 323 [75 E.R. 472, at p. 491].

(2) (1853) 2 El. & Bl., at pp. 262-266 [118 E.R., at pp. 766, 767].

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

DIXON J.

of control that he might bring trespass, not because of the personal status of the servant.

There is no reason to suppose that the action *per quod servitium amisit* would lie only for the loss of the services of persons of low degree. In the historical development of the actions *per quod servitium amisit* there has not been any limitation upon the class of services for the loss of which a private employer may sue. All that is required is that the relation of master and servant shall exist. A modern trading company whose general manager is disabled through the negligence of a stranger may sue him for the loss of the manager's services in the same way as the company might have sued had the injured man been an artisan in its employment. The remedy has followed the relation of master and servant unaffected by the changes that have taken place in the social and economic purposes for which the relation has been used. Nor has the essential character of the cause of action been influenced by the fluctuating changes over the centuries in the extent to which the terms and conditions of the employment are left to free contract. To compare the medieval conditions or conceptions in which the remedy of trespass *per quod servitium amisit* arose with those affecting the service of the Crown at the present time and to regard the very great difference as bearing upon the question whether the remedy belongs to the Crown for loss of the services of a soldier or policeman or a public servant appears to me to be a mistaken form of reasoning. The comparison should be between the relation to the Crown of its servants from time to time and the corresponding relation at the same respective times of a servant to a master who is a subject. I venture to think that if this form of comparison is made it will be found that at no stage in the long course of legal development the law has undergone did the relevant attributes of the relation between the servants of the Crown and the Crown so differ from those of the relation between the servants of a subject and their master as to take a loss of services by the Crown in consequence of a wrongful injury to its servant outside the scope of the remedy of trespass or of case or the modern equivalent but innominate cause of action accorded to a subject sustaining a loss of services by such a wrongful injury to his servant.

No doubt, at all times there have been offices under the Crown whose occupants serve the Crown but do not stand in the relation of a servant to his master. In former times many offices of profit existed, some of freehold, the holders of which exercised rights and performed duties of an independent character. In modern times

there are many public offices existing under statute and sometimes charter the occupants of which discharge functions belonging to them by law.

But there always have been employments under the Crown where the command and direction of the Crown given mediately or immediately is the sole measure of the duty of the servant. Where the right of control exists in the Crown and extends to the manner in which the employment is carried out, that is, to the doing of the work, the test of the relation of master and servant is satisfied. Why should it be supposed that where a relation exists which is typically that of master and servant the fact that the Crown is the employer places it in a different category ? The Crown in right of New South Wales and in right of the Commonwealth may be sued in tort. No one has yet denied that the Crown is liable for the tort of an officer committed within the scope of his duty, except in situations where the duty which he is attempting to fulfil is one cast upon him by law to be executed as an independent responsibility, so that the Crown is not acting through him.

It does not appear to me to matter that constitutionally the Sovereign must act through Ministers and does not give commands personally to the servants of the Crown. We are concerned here with the liability of the Crown considered as the executive government of the state and what is in question is whether the relation between executive government of the state and the member of the police force is that of master and servant. The growth of ministerial responsibility for the acts of the Crown has not changed the character of the legal relation to the Crown of the servants of the Crown. Again the question being whether employment by the Crown as the government of the country involves the relation of master and servant so that the Crown may sue for loss of services, I cannot see how the governmental character of the master or the public purpose of or interest in the service of the servant is relevant. I presume that the Railway Commissioner (as to which see *Victorian Railway Commissioners* v. *Herbert* (1)) may maintain the action in respect of the services of for example a fireman or porter ; that the Rural Bank (with the position of which we dealt in *Rural Bank of New South Wales* v. *Hayes* (2)) may sue for the loss of the services of a clerk, and that the Grain Elevators Board (with which we dealt in the case of *Grain Elevators Board (Vict.)* v. *Dunmunkle Corporation* (3)) may sue in respect of the loss of the services of a mechanic.

(1) (1949) V.L.R. 211.
(2) (1951) 84 C.L.R. 140.
(3) (1946) 73 C.L.R. 70.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Dixon J.

Of course there may be a question whether an officer does hold an office with independent functions or stands in the relation of an ordinary servant of the Crown. But it does not follow that because in some duties the law invests him with an independent responsibility he is not otherwise a mere servant of the Crown. For example a collector of customs discharges an independent function in passing or refusing to pass an entry and if he acts wrongfully in that respect the Crown is not vicariously responsible (*Baume* v. *The Commonwealth* (1)). Nevertheless we have regarded him as a servant for whose libels the Crown was responsible in damages (*Musgrave* v. *The Commonwealth* (2)).

Quince's Case (3) related to a member of the armed services. If there is any example of the duty of implicit obedience in all things great or small, it is that of the soldier or naval rating, and the aircraftsman is under the like discipline. The command which the Crown has over the services of an officer or man of the navy, army, or air force appears to me to place the Crown exactly in the legal situation which entitles a master to maintain an action *per quod servitium amisit* against a wrongdoer causing disablement to his servants. The fact that at common law neither commission nor enlistment in the armed services does or can amount to a contract with the Crown and neither officer nor man obtains any legal right against the Crown to pay deferred pay, half pay, pensions or other emolument does not appear to me to be relevant to the conditions of the cause of action. The Crown is entitled to the services of the officer or man and it is for their loss by a wrongful act that the Crown sues the tort feasor.

It is perhaps desirable to refer to the first ground given by *Erle* C.J. for the judgment of the Court in *Tobin* v. *The Queen* (4) about which some misunderstanding seems to me to have existed. The ground treats Captain Sholto Douglas for whose alleged tort the petitioner proceeded against the Crown by petition of right as having purported to act in the execution of an independent responsibility imposed on him by the *Slave Trade Act* 1824 (Imp.) (5 Geo. 4 c. 113, s. 43), so that his wrong would come within the principle that when an officer in the service of the Crown is executing an independent duty which the law places upon him the Crown is not liable for the wrongful acts he may commit in the course of carrying on his duties (*Field* v. *Nott* (5)). It is interesting to note that in imposing a liability upon the Crown for tort the *Crown Proceedings*

(1) (1906) 4 C.L.R. 97.
(2) (1937) 57 C.L.R. 514, at p. 548.
(3) (1944) 68 C.L.R. 227.
(4) (1863) 10 C.B.N.S. 310, at pp. 347-349, 351, 352 [143 E.R. 1148, at pp. 1162-1164].
(5) (1939) 62 C.L.R. 660, at p. 675.

Act 1947 (Imp.) (10 & 11 Geo. 6 c. 44) expressly negatives this ground of immunity: s. 2 (3). I do not understand *Erle* C.J. to treat all the duties of a naval officer in command of a King's ship as of this description; clearly enough they are not. But reasons are given (*Tobin* v. *The Queen* (1)) for the view that the analogy between the relation of the Crown to a captain in the Royal Navy and a master to a servant fails which I think could not in principle, at all events as principle is now understood, be considered grounds for denying the vicarious responsibility of the Crown for an officer's tortious acts.

The passage states that the analogy "fails in the following respects: First, 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: and, thirdly, because the act complained of was not done by the order of the Queen, but by reason of a mistake in respect of the path of duty". Of course if "duty" in the third reason means an independent duty under the *Slave Trade Act* 1824 it is not open to any criticism in principle. But it is hardly necessary to say that a typical case of liability for a servant's tort is when his wrongful act is not done by the order of the master but by reason of a mistake in respect of the path of duty, provided of course that for no other reason is the act outside the course of the employment. The first reason given by *Erle* C.J., however, appears not only to treat the liability established by proceedings in the name of the Crown as something other than the liability of the government of the country, but also to regard the fact that the power of selection resides in a servant or agent of the master who is the ultimate party to the relation with the person employed as inconsistent with the relation being that of master and servant. The second of the three reasons appears to suppose that, if a person is employed to exercise professional skill or fulfil a function the manner of performing which is governed by standards of professional duty, such an employment cannot give rise to a relation of master and servant. If so shipowners should not be liable for the faulty navigation of their ships, hospital authorities for the negligence of radiologists or public undertakers for the failure of constructional works by reason of want of care and skill in their engineers. In the proceedings against the Commonwealth arising from the collision of H.M.A.S. *Adelaide* with the ship *Coptic*, a

(1) (1863) 16 C.B.N.S., at p. 352 [143 E.R., at p. 1164].

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Dixon J.

stage of which is reported in *Shaw Saville & Albion Ltd.* v. *The Commonwealth* (1) I ultimately held the Commonwealth liable for the fault of the captain of *Adelaide* in setting or keeping a particular course, it being treated as obvious throughout that the Commonwealth was responsible vicariously for the fault of the captain or of any other naval officer in the navigation of the ship.

The second reason given by *Erle* C.J. if it were sound would be important to this case. For s. 6 of the *Police Regulation Act* 1899-1947 (N.S.W.) invests the Commissioner of Police with the power of appointing sergeants and constables of police. When they are so appointed, however, they must be sworn to serve the Crown and on taking and subscribing the oath they are to be deemed to have thereby entered into a written agreement with and they are to be thereby bound to serve the King as members of the police force until legally discharged : ss. 9 and 10. The police force is a disciplined body for the general government and discipline of whose members the Governor is empowered to make rules : s. 12. So far I should have thought that everything pointed to a member of the police force occupying the position of a servant of the Crown for the loss of whose services owing to an injury caused by a wrongful act the Crown might sue the wrongdoer. But the question remains whether because a constable is entrusted by law with specific powers and given specific duties which he must execute as a matter of independent responsibility (*Enever* v. *The King* (2) ; *Little* v. *The Commonwealth* (3)), the general relation between the Crown and a member of the police force is not that of master and servant. In my opinion this consequence does not follow. In most respects a member of the police force is subject to the direction and control which is characteristic of the relation of master and servant. It does not matter that there is a chain of command. That is necessary in some degree in all organizations military and civil, public and private. It is only when in the course of his duties as a servant of the Crown he is confronted with a situation involving the liberty or rights of the subject that the law places upon him a personal responsibility of judgment and action. I see no reason for regarding the assumptions on which the decisions in *Bradford Corporation* v. *Webster* (4) and *Attorney-General* v. *Valle-Jones* (5) were respectively based as incorrect.

There is one further decision to mention. It is that of the Supreme Court of the United States in *United States* v. *Standard Oil Co. of*

(1) (1940) 66 C.L.R. 344.
(2) (1906) 3 C.L.R. 969.
(3) (1947) 75 C.L.R. 94, at p. 114.
(4) (1920) 2 K.B. 135.
(5) (1935) 2 K.B. 209.

California (1) where a majority of the Supreme Court declined to concede to the United States a right to recover the pay and expenses of medically treating a soldier injured by the negligence of the defendant.

The decision was not based upon the common law. The United States did not succeed to the prerogatives or other rights of the Crown in relation to the subject or citizen. The causes of action to which the United States is entitled against the citizen are not the creatures of the common law. There is no relevant common law applying to the United States' claim against the citizen and State law was held inapplicable.

The question for decision was whether the Court should not, on general principles, develop a doctrine giving a cause of action to the government and this it refused to do. The refusal was based upon grounds which ultimately were brought down, in the majority judgment, to the consideration that it was a matter into which fiscal policy entered and not a pure question of what ought to be considered a tort; it was a matter for Congress. As will be seen an understanding of the situation with respect to the rights of action of the United States leaves the decision without relevance to the matter for determination here.

For the foregoing reasons, if the matter were to be considered afresh, I should prefer the view in favour of the Crown's right of recovery.

But I do not think that we should reconsider the correctness of the decision to the contrary in *Quince's Case* (2). The proper course judicially is to follow and apply that decision. To do so results in my opinion in the dismissal of the appeal.

McTIERNAN J. This action was brought in the Supreme Court of New South Wales by the Attorney-General on behalf of the Crown. The defendants demurred to the Attorney-General's information and the Full Court allowed the demurrer. The Attorney-General brings this appeal from the judgment allowing the demurrer. The defendants are now the respondents.

The action is shaped as an action *per quod servitium amisit* and is based on the loss of a policeman's services. The Attorney-General's information alleges, in substance, that by the negligent driving of a motor car, for which the respondents are responsible, physical injury was done to the policeman and the Crown was thereby deprived of his services, and damages are claimed for this

(1) (1947) 332 U.S. 301 [91 Law. Ed. 2067].

(2) (1944) 68 C.L.R. 227.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

McTiernan J.

loss. There is an averment that the injured policeman was a member of the police force of New South Wales but no averment that he was a " servant " of the Crown. If the latter averment were made the information would adhere more closely to the precedents for declarations in an action *per quod servitium amisit*: *Bullen and Leake, Precedents of Pleading*, 3rd ed. (1868), p. 359. However, the gist of the cause of action set forth in the Attorney-General's information seems to be the loss of the policeman's services, occasioned by a wrong for which the respondents are alleged to be responsible. One of the matters stated in the information is that the policeman was injured in circumstances entitling him to pecuniary benefits under the *Police Regulation (Superannuation) Act* 1906-1944 (N.S.W.), upon the basis that he was then on duty. This matter could be relevant only to the issue of damages. The action *per quod servitium amisit* is not confined to wrongs done in the course of employment resulting in the loss of service; but the information is not attacked for any defect of pleading.

The demurrer raises the question whether, assuming the respondents are responsible for the wrong alleged and it resulted in physical injury to the policeman, the Crown may bring an action *per quod servitium amisit* against the respondents to recover damages for the loss of the policeman's services. The question is not whether any employer of a person who has any of the authority of a constable may bring an action *per quod servitium amisit* for the loss of his services occasioned by an actionable wrong causing physical injury to such person. The case is concerned with a member of the police force of New South Wales and two matters make the question one of a somewhat special character. These matters are that the policeman was engaged in the public service of the Crown and his engagement, duties, discipline and rights were governed by certain Acts of New South Wales. The *Police Regulation Act* 1899-1947 (N.S.W.) is the Act of the greatest importance in the case. This Act, by s. 4, empowers the Executive Government of New South Wales to appoint a Commissioner of Police and he, under s. 6, has authority to appoint sergeants and constables of police for the preservation of the peace throughout the State, and they, under s. 6, become bound by all the duties and responsibilities of a constable under the common law or any statute of New South Wales. Every member of the force is, by s. 9, required to take an oath to serve the Crown and cause the peace to be kept and to prevent crime. The oath is, by s. 10, deemed to be a written agreement with the Crown, binding everybody who takes it to serve the Crown as a member of the police force at current rates of pay until

legally discharged. This is a unilateral engagement on the part of the member of the force: to s. 10 there is added the proviso that the agreement is not to be set aside, cancelled or annulled "for want of reciprocity"; but may be cancelled by discharge, dismissal, removal from "office", or by resignation accepted by the commissioner. Rules for the general government and discipline of the Force may be made under s. 12 by the Executive Government of the State.

The legal relations between the Crown and the policeman, with whom this case is concerned, and the nature of his services for the loss of which the Crown claims damages, are established by these references to the *Police Regulation Act*. The relations arose out of the Act and *ex lege*: the Crown and the policeman were not master and servant in the legal sense: the members of the police force of New South Wales are engaged in public service: they are organized by the Executive Government of New South Wales as a civil force responsible for maintaining public order: the policeman was bound by an engagement having statutory force to serve the Crown in the public office of a constable and as a member of this force: and the relations of its members, as such, with the Crown are in no wise private or domestic.

In the case of *Commonwealth* v. *Quince* (1) the Court by a majority decided that the law did not provide the Commonwealth, in other words the Crown in right of the Commonwealth, with an action *per quod servitium amisit* based on the loss of the services of a member of the Royal Australian Air Force, even though the loss resulted from physical injury occasioned by the defendants' wrong. The Full Court of New South Wales applied that decision in the present case and founded the judgment allowing the demurrer upon it. Their Honours were of opinion that so far as the *Police Regulation Act* 1899-1947 regulated the relations of the policeman to the Crown, it was parallel with the Commonwealth laws which determined the airman's relations with the Crown, and the service which the policeman engaged to perform for the Crown was analogous to service which the airman engaged to render for the Crown, and the service in each case fell into the category of public service.

In the first place it was argued for the Attorney-General that *Quince's Case* (1) does not govern the present case because material distinctions can be drawn between the airman's and the policeman's relations to the Crown and the nature of their duties and discipline. It was argued that by virtue of the Acts of New South Wales,

(1) (1944) 68 C.L.R. 227.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

McTiernan J.

a member of the police force of the State is a servant, in the legal sense, of the Crown. The references made to the *Police Regulation Act* show that this contention cannot stand upon that Act. Reliance, in order to sustain the contention that the policeman was in the situation of a servant in the legal sense, was placed upon other Acts of New South Wales under which rights and privileges are given to members of the force. It was argued that the relations of a member of the police force of New South Wales are thereby assimilated to those of an ordinary worker in industry. The Acts upon which most reliance was placed were the *Crown Employees Appeal Board Act* 1944 and the *Industrial Arbitration Act* 1940-1951. These Acts granted to members of the police force of the State certain rights that are enjoyed by other branches of the public service of the State and by industrial workers. In either Act, or in any Act, to which reference was made in argument, there is nothing which alters the essential character of the relations between the Crown and any policeman, as determined by the *Police Regulation Act* 1899-1947, or the nature of his service. The Crown's right to the service of the policeman did not depend upon a contract of hiring and service: it depended upon laws analogous to those upon which the Crown's right to the services of the airman in *Quince's Case* (1) depended: police service in the police force of New South Wales and military service in the Royal Australian Air Force are both public service. The result is that *Quince's Case* (1) governs the present case.

Upon the assumption that the Court would arrive at that conclusion a submission was made for the appellant that *Quince's Case* (1) should be reviewed. In view of this submission, perhaps it is useful to repeat some of the things said in the judgments in *Quince's Case* (1). The action *per quod servitium amisit* comes down from an epoch when the master's right to the service of his servant depended on status: the master was considered to have an interest of a proprietary nature in the service. The action survived the change from status to contract or free service, remaining as an incident peculiar to the relationship of master and servant. The law had applied the action to protect the relations between parent and child, but upon the basis that the child was in the parent's service. When the action arose the relations of master and servant in the legal sense belonged to the order of domestic relations: then, father, mother, children, apprentice and servant were all members of the *familia*. In modern times the law continues to use the action for the protection of the relations of father and

(1) (1944) 68 C.L.R. 227.

child; and still upon the basis that the child is in her father's service. *Tindal* C.J. said in *Grinnell* v. *Wells* (1): "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". But, of course, the action *per quod servitium amisit* is not limited to the family circle. *Abbott* C.J. said in *Hall* v. *Hollander* (2): "It is a principle of the common law that a master may maintain an action for a loss of service, sustained by the tortious act of another, whether the servant be a child or not". The principle is anomalous as an incident of a contract: yet it is annexed to the relations of master and servant even though they are created by contract and nobody now supposes that a master has an interest of a proprietary nature in the service performed for him under a contract. *Tindal* C.J. observed in *Martinez* v. *Gerber* (3) that it is enough to allege that the person injured was the plaintiff's "servant", but there is no need to state that he was "hired at any wages or salary". *Bovill* C.J. said in *Evans* v. *Walton* (4) that the "authorities and the principle upon which the action for assaulting a servant (*per quod servitium amisit*) is founded, would seem to shew that an actual binding contract is not necessary". That is true at least in the case of an action *per quod servitium amisit* brought by a father against the seducer of his daughter. Perhaps the statements made in *Admiralty Commissioners* v. *S.S. Amerika* (5) about the action *per quod servitium amisit* contain the most authoritative account of it. Lord *Sumner* said (6): "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".

In *Bradford Corporation* v. *Webster* (7) the corporation successfully sued for an injury done to a constable in the service of the corporation whereby they were deprived of his service. It appears from the report of the case (8) that the City of Bradford had a duly established police force and the Corporation of the City, acting through their Watch Committee, were "the police authority of the force". The corporation entered into a "contract of service" with each member of the force, which bound

(1) (1844) 7 Man. & G. 1033, at pp. 1041, 1042 [135 E.R. 419, at p. 423].
(2) (1825) 4 B. & C. 660 at p. 663 [107 E.R. 1206, at p. 1207].
(3) (1841) 3 Man. & G. 88, at p. 91 [133 E.R. 1069 at p. 1070].
(4) (1867) L.R. 2 C.P. 615, at p. 620.
(5) (1917) A.C. 38.
(6) (1917) A.C., at p. 55.
(7) (1920) 2 K.B. 135.
(8) (1920) 2 K.B., at pp. 135, 136.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

McTiernan J.

him to devote the whole of his time to the police force and not to engage in any other occupation: and his pay and allowances were subject to the contract. The defendant denied liability on the ground that from the date of the injury the corporation did not suffer any damage by the loss of the service of the constable. The question whether the corporation had a right of action was not raised. That case can be distinguished. There the constable was not in the service of the Crown: he was paid, no doubt, out of the funds of the corporation. *Cave* J. said in the case of *In re Mirams* (1): "To make the office a public office, the pay must come out of the national and not out of local funds, and the office must be public in the strict sense". By this criterion the constable in the *Bradford Corporation Case* (2) was not engaged in public service in the strict sense. Another distinction is that the corporation had entered into a contract of service with him; its right to his service depended on the contract.

The *Bradford Corporation Case* (2) was discussed by *McCardie* J. in *Fisher* v. *Oldham Corporation* (3). He said that the Bradford Corporation action was apparently framed on the assumption that the police constable was the servant of the corporation and the point, whether he was or not, was not raised in the case. The learned judge said nothing to suggest that it could not have been successfully raised. The *Oldham Corporation Case* (4) was not an action *per quod servitium amisit*. The question there was whether a police constable appointed by the corporation was their servant in the legal sense so that the corporation was liable for torts committed by him in the execution of his duty within its area. *McCardie* J. said that the *Bradford Corporation Case* (2) was no authority to establish that the corporation and a constable appointed by them were master and servant. After referring to, among other cases, *Enever* v. *The King* (5) the learned judge said, as to the proposition that the corporation and the constable were master and servant, "So to hold would be contrary, in my view, to statute, to established decision and to sound public policy". However, he set forth some considerations by which he thought that the decision in the *Bradford Corporation Case* (2) might be supported. *McCardie* J. said that the action *per quod servitium amisit* rested on the old and very artificial rule that "a master has some sort of property in the service of one who is a servant, or even a quasi servant" (6); and he observed that even "so slender a claim" such

(1) (1891) 1 Q.B. 594, at p. 596.
(2) (1920) 2 K.B. 135.
(3) (1930) 2 K.B. at pp. 374, 375.
(4) (1930) 2 K.B. 364.
(5) (1906) 3 C.L.R. 969.
(6) (1930) 2 K.B., at p. 375.

as a father has to the service of a grown-up daughter who happens to be living at home may afford the basis for the action. The Bradford Corporation's right to the service of the constable depended upon the contract of service between them and the constable. The constable could hardly have been a quasi-servant on the analogy of the relation of a daughter to her father. If under the express contract of service between the corporation and the constable he was not in the strict sense a servant of the corporation, there was no fiction under which he could be their servant or quasi-servant.

In the case of *Attorney-General* v. *Valle-Jones* (1), counsel for the defendant said it was not denied that " an action for loss of the services of a servant by the tortious act of a third party is available to the Crown as employer as well as to a subject ". The action was determined on the footing that the airmen in that case were the servants of the Crown and as master of each airman the Crown could recover damages for the loss of his services. The defendants in *Quince's Case* (2) did not concede that the action would lie. The Commonwealth alleged in the statement of claim that it was the employer of the airman. This was a somewhat vague allegation. In truth, the airman's relations with the Commonwealth were governed by the *Air Force Act* 1923-1941 and the regulations made under this Act. On enlistment the airman took the prescribed oath and he was bound by these statutory provisions to serve the King according to its tenor. He swore that he would serve His Majesty in the air force, resist the King's enemies, cause his peace to be maintained and discharge his duties according to law.

It must be remembered that Lord *Sumner* said in the case of *Admiralty Commissioners* v. *S.S. Amerika* (3), " 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 absence of such a count in that case is important in considering whether the action *per quod servitium amisit* pertained to the field of public employment as well as to private employment and domestic relations. It may be presumed that if the claim could have been made for the loss of the services of the seamen it would have been made. However, in the case of

(1) (1935) 2 K.B., at p. 213.
(2) (1944) 68 C.L.R. 227.
(3) (1917) A.C., at p. 51.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

McTiernan J.

the *Attorney-General* v. *Valle-Jones* (1) it was conceded that there was a good cause of action. Yet the airmen and the seamen appear to have belonged to the same category of servants. Our attention was not directed to any development in the law in the period between those cases which removed the doubt raised by Lord *Sumner*. Perhaps between the case of the airmen and that of the seamen there were distinctions which explain why in the action brought by the Attorney-General against Valle-Jones, the substantial point which was doubted by Lord *Sumner* was allowed to go by default.

The differences between the nature and incidents of public service and private employment are brought out in the Thirteenth and Fourteenth Chapters of Book 1 of *Blackstone's Commentaries*. The former chapter deals with public service and the latter with private employment. The 13th chapter begins with a statement about the " military state ", and at a later stage discusses the " maritime state ". The seamen of the Royal Navy are assigned to this order. The airman in *Quince's Case* (2) and the policeman in the present case both belong to the categories which are to be found in the 13th chapter. The 14th chapter is headed " Of Master and Servant " and the introduction is as follows :—" Having thus commented on the rights and duties of persons, as standing in the public relations of magistrates and people, the method I have marked out now leads me to consider their rights and duties in private economical relations ". The relation " of master and servant " is described as one of the " three great relations in private life ". The others are stated to be " husband and wife " and " parent and child ". The nature and incidents of private employment are then discussed. *Blackstone* says the relation of master and servant was instituted to enable a master to answer cares incumbent on him for which " his own skill and labour will not be sufficient ". The incidents of the relation are set forth. One of the matters mentioned is this : " A master also may bring an action against any man for beating or maiming his servant : but in such case he must assign, as a special reason for so doing, his own damage by the loss of his service ; and this loss must be proved upon the trial " : *Blackstone's Commentaries*, p. 429. The action which the master could bring is an action *per quod servitium amisit*. The learned author observes " The reasons and foundation, upon which all this doctrine is built, seem to be the property that every man has in the service of his domestics ; acquired by the contract of hiring, and purchased by giving them wages ". The doctrine includes the principle that the master may bring trespass, and also

(1) (1935) 2 K.B. 209.

(2) (1944) 68 C.L.R. 227.

case, for personal injury to a servant *per quod servitium amisit*. The enlistment of the airman for the loss of whose service the Commonwealth sued in *Quince's Case* (1) was not a contract of hiring and service. There is no warrant in the law for attributing to the enlistment and service under it the incidents peculiar to the relation of master and servant in the legal sense, and to private service for a master. The airman was a servant in the popular sense : he was engaged in public service in the strict sense : his duties and functions were official and public. The airman was not in the personal or private employment of the Crown. Within that field the Crown had not acquired by a contract of service any right to the airman's service. The statement, made by Lord *Sumner* in the case of *S.S. Amerika* (2) that the action *per quod servitium amisit* depends upon the right to the service and that right depends upon the contract of hiring is an affirmation of the doctrine regarding the relations of master and servant set forth in the 14th chapter of *Blackstone's Commentaries*. This is true also of the explanation given by *McCardie* J. in *Fisher* v. *Oldham Corporation* (3) that the action was based on the artificial rule that the master had some sort of property in " the service of one who is a servant, or even a quasi servant ". The doctrine set forth in the 14th chapter gives much force to Lord *Sumner's* statement questioning whether public service was within the scope of the action. Clearly the action *per quod servitium amisit* had its origin in the rules applying to the legal relationship of master and servant. Public service is not within the scope of the action because master and servant is a relation in private life : private employment is not within its scope unless the employer and employed are respectively master and servant. It would be wrong to extend the action to public service or to service which is incident to any relationship other than that of master and servant in the legal sense. Such an extension would open the door to actions by the Crown for the loss of the service of holders of public offices of all grades. There is no authority for deciding that the action lies in those cases.

Nothing said in argument has given me any reason to conclude that *Quince's Case* (1) was wrongly decided. In my opinion it was rightly decided. At any rate, it has not been shown to be manifestly wrong. The rule of *stare decisis* should be applied to the decision. In the present case the policeman was engaged in public service : he was not a servant in the legal sense of the Crown : his service was strictly and exclusively public service.

(1) (1944) 68 C.L.R. 227.
(2) (1917) A.C. 38.
(3) (1930) 2 K.B. 364.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

For the reasons which I have given this action for the injury done to the policeman, *per quod servitium amisit*, is not authorized by law. The Full Court's judgment allowing the demurrer is right. Accordingly, the appeal should be dismissed.

WILLIAMS J. This is an appeal from an order of the Full Supreme Court of New South Wales that judgment on demurrer be entered for the defendants in the action. The action is one brought by the Attorney-General of New South Wales on behalf of His Majesty and the information alleges that a member of the police force of that State was injured by the negligent driving of a motor vehicle by one of the defendants, for whose negligence the other defendants were responsible, which disabled him from performing his duties as a member of the police force and later caused his discharge. The action is therefore one *per quod servitium amisit* and the ground on which the demurrer succeeded was that this action does not lie at the suit of the Crown for the loss of the services of a member of the police force. The damages claimed include reimbursement of the salary and allowances paid to the policeman whilst he remained in the force and moneys paid and payable in the future to him in respect of a pension to which he became entitled on his discharge under the provisions of the *Police Regulation (Superannuation) Act* 1906-1944 (N.S.W.) but we are not concerned on this appeal with the quantum of damages but only with the question whether the action lies. Their Honours in the Supreme Court were of opinion that the action was indistinguishable in its facts from the decision of this Court in *The Commonwealth* v. *Quince* (1) in which it was held by a majority that the Commonwealth could not sue *per quod servitium amisit* for damages for the loss of the services of a member of the Royal Australian Air Force who was injured by the negligent driving of a motor car by the defendant. In these circumstances the Supreme Court, as it was bound by that decision, necessarily had to allow the demurrer.

The service of a member of the police force of New South Wales is regulated mainly by the *Police Regulation Act* 1899-1947 (N.S.W.) which provides for the appointment, discipline and duties of the force. The *Industrial Arbitration (Police) Amendment Act* 1946 (N.S.W.) included in the definition of employees of the Crown employees employed under the *Police Regulation Act* 1899 or any statute passed in substitution for or in amendment of the same. The *Crown Employees Appeal Board Act* 1944 (N.S.W.) included amongst officers who have a right of appeal to the Crown Employees

(1) (1944) 68 C.L.R. 227.

Appeal Board any person who is a member of the police force within the meaning of the *Police Regulation Act* 1899-1947 and amended the *Police Regulation (Appeals) Act* 1923 as amended by subsequent Acts. But the two last-mentioned Acts, the first of which gives members of the police force similar rights to those of other Crown employees to apply to the Industrial Commission of New South Wales to have their wages fixed, and the second of which gives members of the police force who are dissatisfied with any decision of the commissioner on such questions as granting or refusing promotion, or the imposition of certain punishments such as fines, suspensions, reductions in rank or pay, or dismissal, discharge or transfer, the right to appeal to the Crown Employees Appeal Board, do not appear to me to throw any light on the question at issue. The important Act is the *Police Regulation Act*. Section 4 of that Act provides for the appointment by the Governor of a commissioner of police who shall, subject to the direction of the Minister, be charged with the superintendence of the police force of New South Wales. The Act also provides for the appointment by the Governor of a deputy commissioner and for such number of superintendents and inspectors of police as may be necessary. It also provides for the appointment of sergeants and constables of police by the commissioner. Section 6 (2) provides that such constables shall . . . have all such powers, privileges and advantages and be liable to all such duties and responsibility as any constable duly appointed now has or hereafter may have either by the common law or by virtue of any Statute or Act of Council now or hereafter in force in New South Wales. Section 9 provides that no person appointed to be a member of the police force shall be capable of holding such office or of acting in any way therein until he has taken and subscribed the following oath :—I, A.B., do swear that I will well and truly serve our Sovereign Lady the Queen in the office of Commissioner, superintendent, inspector, sergeant, or constable of police (as the case may be), without favour or affection, malice or ill-will, for the period of . . . from this date, and until I am legally discharged, that I will see and cause Her Majesty's peace to be kept and preserved, and that I will prevent to the best of my power all offences against the same, and that while I continue to hold the said office I will to the best of my skill and knowledge discharge all the duties thereof faithfully according to law. So help me God . Section 10 provides that every person taking and subscribing such oath shall be deemed to have thereby entered into a written contract with and shall be thereby bound to serve Her Majesty as a member of the police force and in the capacity in which

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Williams J.

he has taken such oath, at the current rate of pay for such member, and from the day on which such oath has been taken and subscribed until legally discharged, provided that—(a) no such agreement shall be set aside, cancelled, or annulled for want of reciprocity; (b) such agreement may be cancelled at any time by the lawful discharge, dismissal, or other removal from office of any such person, or by the resignation of any such person accepted by the commissioner or other person acting in his stead. Section 12 provides that the Governor may make rules for the general government and discipline of members of the police force and to give effect to this Act or any amendment thereof. Rules under this section were published in the Government *Gazette* on 21st August 1925 and have been subsequently amended. Section III, r. 2, provides that "The first duty of a member of the Force, no matter what his rank, is to show proper respect for and to give unquestioning obedience to the commands of his official superiors, and the second is to give considerate treatment to subordinates. The latter is as important as the former". Rule 27 provides that "Every member of the Force will be presumed to know his duty in every case, and, in the absence of orders or instructions, will be held responsible for the due performance thereof; and in case of failure or neglect will be liable to punishment or dismissal". Section IV relates to the conditions of service. Its rules provide that the police are admitted to the service in accordance with the provisions of the Police Regulation Acts, and upon the following conditions, *inter alia*, that they are to devote their whole time and energy to the police service; that they are to serve and reside wherever they are appointed, and perform fatigue or any other duty as directed; that they are to wear uniform at all times when on duty, unless otherwise authorized; that they are strictly to comply with the rules and instructions, and promptly obey all lawful orders from those in authority over them; that they will be liable to punishment or dismissal for disobedience, neglect or omission of duty, incompetency, intemperance, disrespect to any person in authority, insolent or indecorous behaviour, or any words or actions subversive of discipline or calculated to impair the efficiency of, or bring discredit upon the police service, or any misconduct punishable by law or contrary to rules and instructions; and will also be liable to such legal penalty as may be incurred; that they are not to resign or withdraw themselves from their duties without the permission of the Inspector-General, unless they have given three months' notice in writing. If they resign or withdraw without leave or notice they will forfeit all pay due, and may be charged before

a Court under the *Police Regulation Act* 1899. During the period an applicant is at the depot, before being sworn in, he may leave at any time by giving notice to the officer-in-charge.

These short extracts from the *Police Regulation Act* and rules are sufficient, I think, to illustrate the general nature of the conditions of service in the police force of New South Wales. A policeman has many duties cast upon him by the common law and by statute in the exercise of which he acts at his own discretion *virtute officii* as a principal and the Crown is not responsible for his conduct (*Enever* v. *The King* (1); *Field* v. *Nott* (2)). But they are servants of the Crown at least to the same extent that pilots were held to be such servants in *Fowles* v. *Eastern and Australian Steamship Co. Ltd.* (3). It is the Crown that selects the members of the police force and which is responsible for providing a proper supply, a proper supervision, and a proper remuneration of men who play such an important part in the maintenance of internal law and order. There is an obligation on the Crown to maintain such law and order similar to the obligation on the Crown to provide for the defence of the realm against external foes. The Crown provides the necessary forces for each purpose, the police force for the former purpose and the armed forces for the latter purpose. The members of all these forces perform public services, and these services are provided by the Crown. The men who perform these services are employed and paid by the Crown, are subject to the orders of their superior officers, and may be dismissed by the Crown. In *Fisher* v. *Oldham Corporation* (4) *McCardie* J. described a police officer as a servant of the State. The principle of *respondeat superior* may apply in more instances to make the Crown vicariously liable for torts committed by members of the armed forces than it does to make the Crown so liable for torts committed by members of the police force. But the Crown suffers a loss of the same essential character if it is deprived of the services of a member of the police force as it does if it is deprived of the services of a member of the armed forces. Each form of service combines a high degree of obedience to the orders of superior officers with a considerable latitude of discretion in the execution of such orders. Each form of service is regulated to a large degree by statutes and regulations or rules made under statutes but also includes by implication many of the incidents which the law implies in an ordinary contract of service (*Reading* v. *Attorney-General* (5)).

(1) (1906) 3 C.L.R. 969.
(2) (1939) 62 C.L.R. 660.
(3) (1916) 2 A.C. 556.
(4) (1930) 2 K.B., at p. 371.
(5) (1951) A.C. 507.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Williams J.

In these circumstances I agree with their Honours of the Supreme Court that it is impossible to distinguish the present case from *Quince's Case* (1). Accordingly we can only allow the appeal if we are prepared to reconsider *Quince's Case*, as we were invited to do, and overrule it. I am of opinion that *Quince's Case* should be reconsidered and that it should be overruled on the grounds on which this Court reconsiders and overrules its previous decisions, namely that the decision is manifestly wrong and its maintenance is injurious to the public interest (*Perpetual Executors and Trustees Association of Australia Ltd.* v. *Federal Commissioner of Taxation* (*Thomas's Case*) (2)).

Its maintenance is injurious to the public interest because it is highly anomalous that the Crown in right of the Commonwealth (in the present case the Crown in right of the State of New South Wales) should be vicariously liable for wrongs done to members of the public by its servants in all cases where the doctrine of *respondeat superior* applies, whilst it is denied any remedy for the loss of their services caused by the wrongful acts or omissions of members of the public. The decision is manifestly wrong because it proceeds on the view that the relationship of the Crown and a member of the armed forces is not analogous to that of a master and his servant under a contract of service. This view is inconsistent with that expressed by the House of Lords in *Owners of S.S. Raphael* v. *Brandy* (3), and there is no logic or common sense in confining the action *per quod servitium amisit* to the loss of the services of servants of private employers and denying the action to the Crown. The action is essentially an action by a master against a wrongdoer where as a result of a wrongful act or omission affecting his servant the master is deprived of the services of his servant. The simplest way of establishing the relationship of master and servant is to prove a contract of service but it has long been held that the father of a family in respect of such services as his daughter renders him from her sense of duty and filial gratitude stands in the same position as an ordinary master. The action has never been confined to any particular service. It could always be brought whether the servant was a domestic servant, an employee in a business, or any other kind of servant. See, for instance, the contracts of services in the cases cited in the judgments in *Evans* v. *Walton* (4) ; *Berringer* v. *Great Eastern Railway Co.* (5) ; *Mankin* v. *Scala Theodrome Co. Ltd* (6). In *Robert Marys's Case* (7)

(1) (1944) 68 C.L.R. 227.
(2) (1949) 77 C.L.R. 493.
(3) (1911) A.C. 413.
(4) (1867) L.R. 2 C.P. 615.
(5) (1879) L.R. 4 C.P.D. 163.
(6) (1947) 1 K.B. 257.
(7) (1612) 9 Co. Rep. 111b [77 E.R. 895, at pp. 898, 899].

it is said " And therefore, if my servant is beat, the master shall not have an action for this battery, unless the battery is so great that by reason thereof he loses the service of his servant, but the servant himself for every small battery shall have an action; and the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by reason of a *per quod, viz. per quod servitium*, &c. *amisit*; so that the original act is not the cause of his action, but the consequent upon it, viz. the loss of his service is the cause of his action; for be the battery greater or less, if the master doth not lose the service of his servant, he shall not have an action ".

The majority of the Justices in *Quince's Case* (1) seem to have thought that the action was confined to the loss of services which could only exist under a private contract of employment. *Rich* J. said: " 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* . . . 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 " (2). *Starke* J., after referring to a relationship of service analogous to that of master and servant said, " 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 " (3). *McTiernan* J. said, " 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

(1) (1944) 68 C.L.R. 227.
(2) (1944) 68 C.L.R., at p. 243.
(3) (1944) 68 C.L.R., at p. 246.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Williams J.

services. His enlistment was an engagement for public service: for the defence and security of the community" (1).

As I have said there is no case in which it has been held that the action is confined to the loss of any particular kind of service. All kinds of services are rendered to masters under contracts of service. It is clear that the action does not require that there should be a contract of service. *De facto* service is enough. It is sufficient if the service is being rendered gratuitously. It is unfortunate that in *Quince's Case* (2) the Court was not referred to the case of the *Owners of S.S. Raphael* v. *Brandy* (3). That case has been recently cited in a number of cases of which I need only mention *M'Mahon* v. *David Lawson Ltd.* (4). The *Workmen's Compensation Act* 1906 (Imp.) (6 Edw. 7 c. 58), First Schedule, par. 2 (*b*) provided that where a workman who had been injured had entered into concurrent contracts of service with two or more employers under which he worked at one time for one such employer and at another time for another such employer, his average weekly earnings should be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident. In *Owners of S.S. Raphael* v. *Brandy* (3) the question was whether a stoker in the mercantile service, who was also a stoker in the Royal Naval Reserve, and as such entitled to a retainer of £6 a year, and met with an accident while employed on a merchant ship, was serving under concurrent contracts of service within the meaning of this provision. In the Court of Appeal (5), *Cozens-Hardy* M.R., referring to the stoker's service in the Royal Naval Reserve, said "It is no doubt true that at the moment of the accident he was not in actual service with the Fleet. Nevertheless, I think there was a subsisting contract of service under which the Admiralty had a right to require him to leave the *Raphael*" (6). *Fletcher Moulton* L.J. said, "I fail entirely to understand the grounds on which it is suggested that these are not earnings. They are payments under a definite contract of service which includes not only actual service during a certain period of the year (when of course the payment is at a different rate), but also the liability to be called upon to perform actual service at any other period. This contract of service lasts throughout the year, and to my mind the payment is typically in respect of a concurrent contract of service" (7). In the House of Lords Lord *Loreburn* L.C. said, "A point

(1) (1944) 68 C.L.R., at p. 250.
(2) (1944) 68 C.L.R. 227.
(3) (1911) A.C. 413.
(4) (1944) A.C. 32.
(5) (1911) 1 K.B. 376.
(6) (1911) 1 K.B., at p. 380.
(7) (1911) 1 K.B., at p. 382.

was made before your Lordships which does not appear to have been made in the Court below, that there was no contract with the Crown at all here. The authorities cited go no further than to say that when there is an engagement between the Crown and a military or naval officer the Crown is always entitled to determine it at pleasure, and that no obligation contrary to that would be recognized or valid in law " (1). Lord *Shaw of Dunfermline* said, " My Lords, beyond that it appears to me that there was in this case service under the Crown. It appears to me further that the Crown was the employer, and I agree that this was a typical case of concurrent contracts of service " (2). There is also the statement of Lord *Parker of Waddington* to the same effect in *Admiralty Commissioners* v. *S.S. Amerika* (3), " These pensions and allowances are granted under statutory authority, but it does not appear that their grant formed any part of the contract between the Admiralty and the seamen whose lives have been lost through the respondents' negligence ".

Can there be any doubt that when a person enters the service of the Crown, at any rate voluntarily, he enters into an engagement to serve the Crown on the terms and conditions express or implied, whether statutory or otherwise, relating to his engagement. In the absence of any statute to the contrary it is an engagement which, as Lord *Loreburn* pointed out in *Raphael's Case* (4) the Crown is entitled to determine at will. It is also an engagement under which, again in the absence of any statute to the contrary, the servant is dependent upon the bounty of the Crown for the payment of his remuneration which does not create a debt so that he is unable to sue the Crown if the Crown refuses to pay him (*The Commonwealth* v. *Welsh* (5)). Nevertheless the engagement creates a legal right in the Crown to have the services performed. It is a voluntary engagement and therefore in the nature of a contract with the Crown to perform the services. If the Crown can require the performance of these services to the same extent as a master can require the performance of the services of a servant under a contract of service, then the Crown must suffer damage from the deprivation of these services analogous to the damage which a private employer suffers if he is deprived of the services of an employee. In *Grinnel* v. *Wells* (6), *Tindal* C.J. pointed out in a passage that is frequently cited that " It is the invasion of the legal right of the master to the services of his servant, that gives

(1) (1911) A.C., at p. 414.
(2) (1911) A.C., at p. 415.
(3) (1917) A.C., at p. 42.
(4) (1911) A.C. 413.
(5) (1947) 74 C.L.R. 245.
(6) (1844) 7 Man. & G., 1033, at p. 1041 [135 E.R. 419, at p. 423].

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Williams J.

him the right of action for beating his servant" (provided the beating is so severe that the master is deprived of those services). The legal right is to have the services performed and the Crown has that right in the case of all those persons who agree to serve the Crown. In the case of land the highest form of ownership known to the common law is an estate in fee simple. That estate orginally arose out of a grant of land by the Crown to its noblemen in return for military service. So there is nothing novel in the conception of the Crown having a legal right or interest in the services of the members of its armed forces.

It was contended for the respondents that the action *per quod servitium amisit* is anomalous and artificial and should not be extended. But it is of very ancient vintage and is after all only one aspect of that branch of the law which gave a master a right of action where he was deprived of the services of his servant by that servant being knowingly enticed away, or harboured, or where that servant was seduced or injured by the wrongful act or omission of the defendant and thereby became unable to do his work. In the present case s. 10 of the *Police Regulation Act* provides that every person taking and subscribing the oath required by s. 9 shall be deemed thereby to have entered into a written contract and shall be bound to serve Her Majesty as a member of the police force until legally discharged. Such a contract would embody terms and conditions equivalent to the provisions of the statutes and rules appertaining to that service. Under his engagement a policeman must wear uniform as required, must go on duty when and where directed, and must give unquestioned obedience to the commands of his superior officers. He must continue to perform these duties until he is discharged or can lawfully resign. These are terms and conditions which are applicable to a contract of service. They are not applicable to a mere contract for services. The anomaly, if there be any, is that while *Quince's Case* (1) stands, it is the law of Australia that the action *per quod servitium amisit* lies where a master, including presumably the Crown, is wrongfully deprived of the services of any servant performing services that could be rendered under a contract of private employment, but does not lie where the victim is performing services of a public nature for the Crown.

The question at issue on this appeal recently arose in Canada in *R.* v. *Richardson and Adams* (2). The Supreme Court of Canada was considering the effect of s. 50A of the Canadian *Exchequer Court Act* 1927, introduced into that Act by 7 Geo. VI. c. 25,

(1) (1944) 68 C.L.R. 227.

(2) (1948) 2 D.L.R. 305.

s. 1, which provides that "For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown". A Canadian serviceman was injured by the negligence of the driver of a motor vehicle and it was held, reversing the trial judge, that the Crown could sue both the driver and the owner of the vehicle *per quod servitium amisit*. The trial judge found that the accident was solely caused by the negligence of the driver of the vehicle but dismissed the information on the ground that the services of members of the naval, military and air forces of His Majesty in right of Canada are so different from those in private employment that an action *per quod servitium amisit* could not succeed. The Supreme Court held that the action lay. They relied on the previous decision of that Court in *Attorney-General of Canada* v. *Jackson* (1), that s. 50A places the Crown in a recognized common law relation and that its rights are those arising from that relation under the rules of that law. The presiding judge, *Kerwin* J., with whose judgment *Taschereau* J. agreed, said that, in the absence of s. 50A, he would have arrived at the same conclusion as *Latham* C.J. and myself in *Quince's Case* (2). Section 50A was passed to overrule the previous decision of the Supreme Court of Canada in *McArthur* v. *The King* (3) cited in *Quince's Case*, where it was held that a member of the armed forces was not an officer or servant of the Crown within the meaning of s. 19 (1) (c) of the Canadian *Exchequer Court Act*. The decision in *McArthur's Case* would probably have been different if the *Raphael Case* (4) had been cited to the Court. The importance of *Richardson's Case* (5) is that it is a decision that where the relationship of master and servant exists between the Crown and the victim, the Crown can sue *per quod servitium amisit* although the services of the victim are of a public and not of a private nature.

For these reasons I would allow the appeal.

WEBB J. This is an appeal from a judgment on a demurrer for the defendants in an action *per quod servitium amisit* brought by the appellant, the Attorney-General of New South Wales, against the respondents, Perpetual Trustee Co. (Ltd.) and others, to recover salary and allowances paid to a police constable whilst disabled

(1) (1946) 2 D.L.R. 481.
(2) (1944) 68 C.L.R. 227.
(3) (1943) 3 D.L.R. 225.
(4) (1911) A.C. 413.
(5) (1948) 2 D.L.R. 305.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Webb J.

from performing his duties, and for damages in respect of a pension paid to him on his discharge. The constable, it was alleged, was injured and permanently disabled when a tram in which he was travelling between his residence and his place of duty collided with a motor vehicle negligently driven by an employee of the respondents. The respondents demurred on the ground that the declaration was bad because :

(1) it disclosed no cause of action ;

(2) the action *per quod servitium amisit* did not lie at the suit of the Crown for loss of the services of a member of the police force.

It was submitted for the appellant that *The Commonwealth* v. *Quince* (1) was distinguishable ; or, if not, that it was not correctly decided ; that a member of the New South Wales police force was deemed on taking the oath of office to have a statutory contract with, and to be the employee of, the Crown ; that under an award of the State Industrial Commission he had a right to his remuneration which he could recover as it became payable during his service ; and that he was obliged to obey commands given on behalf of the Crown. On the other hand it was submitted for the respondents that the action *per quod servitium amisit* was based on history and not on legal principle ; that it began when the head of the household had complete control of, and a proprietary interest in, the services of his family and servants ; that the basis of the action was not extended ; that the services, the subject of the action could not be different from what they were in the days when status and proprietorship applied ; and that the action was available where there was a contractual relationship to which the doctrine *respondeat superior* applied ; whereas a constable was a ministerial officer exercising statutory rights independently of contract.

The action *per quod servitium amisit* originated at a time when the relationship of master and servant (or quasi-servant in the case of a member of the master's family) to which it has always been confined, was based on status and not on contract, that is to say, when the legal right or interest of the master in the services lost was of a proprietary nature, and the master, therefore, had complete control of those services. The right of action did not depend on the payment of wages by the master to the servant. The damages were measured by the value of the services lost, which in turn might be measured by the extent of the remuneration, if any, of the servant. The action did not disappear with status, but continued when the relationship of master and servant became contractual.

(1) (1944) 68 C.L.R. 227.

The nature and incidents of the service of a constable as a peace officer or ministerial officer of the Crown are stated in *Enever* v. *The King* (1) per *Griffith* C.J. and include authority to arrest on suspicion of felony, which does not admit of control by the Crown. This authority could not have arisen from status and have been of a proprietary nature; and so a claim for the loss of the services of a constable could never, I think have been within the scope of the action *per quod servitium amisit*. However, the contrary view appears to have been taken in *Bradford Corporation* v. *Webster* (2) and in *Receiver for the Metropolitan Police District* v. *Tatum* (3). But in neither case was the question of liability raised: the only question in each case was the quantum of damages.

Considerable attention was paid by counsel for the appellant to the statutory provisions securing the payment of salaries of constables in New South Wales. But these provisions do not alter the peculiar nature and incidents of the constable's services as an officer of the Crown, which are, I think the only relevant consideration in determining whether the action lies: see *Admiralty Commissioners* v. *S.S. Amerika* (4) per Lord *Sumner*.

As to the application of *Quince's Case* (5), although much help is to be derived from the arguments of counsel and from the reasoning of their Honours in that case, still I think the duties of a soldier and those of a police constable are, and always have been, so different that if the decision had been in favour of the Crown it would not have governed this case. A police constable has always been an arm of the law and never a servant employed to do a master's bidding on all occasions and in any circumstances. His authority is original, and not derived from a master or exercised on behalf of one, but is exercised on behalf of the public, and so the loss of services rendered in its discharge cannot, in my opinion, be the subject of compensation recoverable in an action *per quod servitium amisit*: see *Enever* v. *The King* (6), per *Griffith* C.J. and (7), per *O'Connor* J.

I would dismiss the appeal.

FULLAGAR J. This is an appeal from a judgment of the Full Court of New South Wales on a demurrer to the declaration in an action in which the Attorney-General for New South Wales sued the Perpetual Trustee Co. Ltd., Matilda Jane Bruce Johnson, William Frederick Johnson and Arthur Douglas Dunn. The

(1) (1906) 3 C.L.R., at pp. 975, 976.
(2) (1920) 2 K.B. 135.
(3) (1948) 2 K.B. 68.
(4) (1917) A.C., at p. 51.
(5) (1944) 68 C.L.R. 227.
(6) (1906) 3 C.L.R., at p. 976.
(7) (1906) 3 C.L.R., at p. 994.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Fullagar J.

declaration alleged that one Bertrand Leslie Hayden, a member of the police force of New South Wales, was injured by the negligent driving of a motor car, which was owned by the first two defendants as executors of the will of Frederick James Johnson, and was being driven by the defendant Dunn for and on behalf of and as agent for the defendant William Frederick Johnson. The injuries received by Hayden disabled him from the performance of his duties, and during the period of his disability he was paid by the Crown the salary and allowances to which he was entitled. At a later date he was discharged from the force by reason of disablement consequent on his injuries. He thereupon became entitled to receive, and has been paid and is still being paid, a pension under the *Police Regulation (Superannuation) Act* 1906-1944 (N.S.W.). If he had not been injured, he would not, it is alleged, have become entitled to a pension "for a long time". The declaration concludes:—"And the Attorney-General claims on behalf of His Majesty to recover the salary and allowances paid as aforesaid and to be reimbursed in respect of the moneys already paid and which will hereafter be paid to the said Bertrand Leslie Hayden pursuant to the Act aforesaid". The grounds of the demurrer were (1) that the declaration disclosed no cause of action, and (2) that the action *per quod servitium amisit* does not lie at the suit of the Crown for the loss of the services of a member of the police force. The Full Court, considering the case to be covered by *The Commonwealth* v. *Quince* (1) ordered that judgment in demurrer be entered for the defendants.

Counsel for the plaintiff sought, in the first place, to distinguish the claim made in this case by the Crown in right of New South Wales from the claim made by the Crown in right of the Commonwealth in *Quince's Case*. In that case the Commonwealth alleged that one Rowland, a member of the Royal Australian Air Force, had been injured by the negligent driving of a motor car by the defendant. Rowland received treatment of his injuries at military hospitals from the date of the accident until the date of his discharge from the Air Force, a period of some fourteen months. Until his discharge he continued to receive pay and allowances from the Commonwealth. After his discharge he was granted a pension under reg. 6 of the *National Security (War Pensions and Repatriation Benefits) Regulations*, but it was very doubtful whether he was legally entitled to such a pension. The action came on for trial before *Philp* J. in Brisbane. The learned Judge found that Rowland's injuries were caused by negligent driving on the part of the defendant. He also found that Rowland received before his dis-

(1) (1943) Q.S.R. 199; (1944) 68 C.L.R. 227.

charge pay and allowances to the amount of £168 and hospital and medical treatment to the value of £286, and after his discharge further medical treatment at a cost to the Commonwealth of £73 and a pension of which the amount paid to date of action brought was £60. The Commonwealth claimed to recover these sums from Quince and also a sum of about £2 in respect of clothing destroyed in the accident. Rowland had previously brought an action and recovered damages himself, but his damages did not include any of the items in question in the Commonwealth's action. *Philp* J. gave judgment for the plaintiff for the £2 owed in respect of clothing—presumably, as *Latham* C.J. said (1) on the ground that the clothing was the property of the Commonwealth. Otherwise he dismissed the action, holding that the Commonwealth had no right of action in respect of loss of service of a member of its air force. His Honour thought that the relationship was not one of contract, but he said (2): "Whether there be a contract or not, it seems to me that the incidents of the relationship are very different from those of the relationship of master and servant".

An appeal to this Court was dismissed. *Latham* C.J. and *Williams* J. thought that the action could be maintained, but the majority of the Court (*Rich*, *Starke* and *McTiernan* JJ.) thought that it could not. It may be noted that the two dissentient justices would have assessed the damages at £456, which would have excluded the claim in respect of medical attention after discharge and the claim in respect of the pension. These were presumably excluded because the payments made were thought to be discretionary and not made in pursuance of a legal duty.

Each of the justices who formed the majority in *Quince's Case* (3) delivered a separate judgment, but they reached their conclusion, I think, for substantially the same reasons. Perhaps the fullest statement of them is to be found in the judgment of *Rich* J., and it will be sufficient at this stage to refer to that judgment. In a very important and obviously very carefully considered passage his Honour said (4):—"As a general rule, a person is liable for damages 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

(1) (1944) 68 C.L.R., at p. 233.
(2) (1943) Q.S.R., at p. 205.
(3) (1944) 68 C.L.R. 227.
(4) (1944) 68 C.L.R. at pp. 240, 241.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Fullagar J.

does not invest the third party with a right of action against the wrongdoer (*La Société Anonyme de Remorquage à Hélice* v. *Bennetts*, (1); *Admiralty Commissioners* v. *S.S. Amerika* (2); *Wright* v. *Cedzich* (3). 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 . . . 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 services (*Admiralty Commissioners* v. *S.S. Amerika* (4); *Holdsworth*, *History of English Law*, 2nd ed. (1937), vol. viii, p. 429; *Wright* v. *Cedzich* (5)), 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". His Honour then proceeded to consider the nature of the relationship between the Crown and those who render it military service. The relationship was not, he said, contractual, but it was not essential that a contractual relationship should exist. It was, however, essential that there should be at least "a *de facto* relationship of master and servant" (6). His Honour was of opinion that no such relationship existed between the Crown and a member of the air force. He said:—"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* (7). 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" (8). See also the judgments of *Starke* J. (9) and of *McTiernan* J. (10).

(1) (1911) 1 K.B. 243.
(2) (1917) A.C., at pp. 43, 45.
(3) (1930) 43 C.L.R. 493.
(4) (1917) A.C., at pp. 44, 45.
(5) (1930) 43 C.L.R., at p. 521.
(6) (1944) 68 C.L.R., at p. 242.
(7) (1923) 34 C.L.R. 174, at pp. 183, 184.
(8) (1944) 68 C.L.R., at p. 243.
(9) (1944) 68 C.L.R., at pp. 246, 247.
(10) (1944) 68 C.L.R., at pp. 250, 251.

Constables of police have, of course, rights, powers and duties at common law, but in New South Wales the relation between members of the police force and the Crown depends primarily on the *Police Regulation Act* 1899-1947 (N.S.W.). The history of the earlier legislation is traced in the argument of Sir *Julian Salomons* in *Bell* v. *Nigro* (1). Section 4 of the Act provides that the Governor may from time to time appoint a commissioner of police, who shall, subject to the direction of the Minister, be charged with the superintendence of the police force of New South Wales. He is to receive such remuneration as the Governor may determine, but such remuneration is not to be reduced during his term of office. He may be suspended from office by the Governor for misbehaviour or incompetence, but he may not be removed except upon a resolution of each House of Parliament, and, unless such resolutions are passed within a prescribed time, a suspension will cease to have effect. He is to retire at the age of sixty-five years, and his office is deemed to be vacated in certain events such as bankruptcy and insanity. By s. 4A the Governor is authorized to appoint a deputy commissioner of police, and by s. 5 such number of superintendents and inspectors of police as may be found necessary. By s. 6 the commissioner may, subject to disallowance by the Governor, appoint so many sergeants and constables of police as he deems necessary for the preservation of the peace throughout New South Wales. Such constables are to have all such powers, privileges and advantages and be liable to all such duties and responsibilities as any constable had at the passing of the Act or thereafter may have either by the common law or by virtue of any statute in force in New South Wales. Section 9 provides that every member of the police force shall take and subscribe an oath that he will well and truly serve His Majesty in his office without fear or affection, malice or ill-will, that he will cause His Majesty's peace to be kept and preserved, that he will prevent to the best of his power all offences against the same, and that he will to the best of his skill and knowledge discharge all the duties of his office. Section 10 provides that every person taking and subscribing this oath shall be deemed to have thereby entered into a written agreement with, and shall be thereby bound to serve His Majesty as a member of the police force at the current rate of pay for such member until legally discharged. There are provisions (a) that no such agreement shall be set aside cancelled or annulled for want of reciprocity and (b) that such agreement may be cancelled at any time by lawful discharge dismissal or other

(1) (1898) 15 W.N. (N.S.W.) 28.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Fullagar J.

removal from office or by resignation accepted by the commissioner. There are a number of other provisions relating to duties, discipline, offences and so on. In *Fletcher* v. *Nott* (1) it was held that a police constable is liable to dismissal at the pleasure of the Crown.

This brief survey of the position under the statute of members of the police force of New South Wales shows clearly, I think, that it is impossible to distinguish that position in any relevant respect from the position in Tasmania as explained in *Enever* v. *The King* (2). The very special position of a constable of police is well illustrated by *Horne* v. *Coleman* (3). And it seems to me to make it equally clear that it is impossible to distinguish the present case from *The Commonwealth* v. *Quince* (4) or to say that a relation which was held by the majority not to exist between Rowland and the Crown did exist between Hayden and the Crown. It is necessary only, I think, to refer briefly to two particular arguments which were submitted by counsel for the plaintiff in this case.

In the first place much reliance was placed on s. 10 of the *Police Regulation Act*, the effect of which I have set out above. It says that the person taking the oath shall be deemed to have thereby entered into a written agreement with His Majesty, and shall be thereby bound to serve His Majesty as a member of the police force. I am prepared to assume that the second " thereby " means " by the agreement which is to be deemed to have been made ", though I do not think that the argument really loses anything in force if the word is taken to mean " by the taking of the oath ". The argument was that s. 10 introduced into this case an element which was absent from *Quince's Case*. There was in law a contract between a member of the police force and the Crown—a contract not perhaps " reciprocal ", as the first proviso suggests, but a contract whereby the member bound himself to serve the Crown and became a servant of the Crown. I do not think that this argument affords a sound basis for distinguishing *Quince's Case*. All of the justices who formed the majority in that case clearly recognized that a soldier or a member of the air force was, in a sense, " bound " to " serve " the Crown. But they were of opinion that that was a different thing altogether from being the servant of a master in the sense which was relevant for the decision of the question whether an action by the master would lie for a wrong *per quod servitium amisit*. *Rich* J. said :—" 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

(1) (1937) 37 S.R. (N.S.W.) 430.
(2) (1906) 3 C.L.R. 969.
(3) (1929) 46 W.N. (N.S.W.) 30.
(4) (1944) 68 C.L.R. 227.

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 " (1). *Starke* J. said :—" 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 " (2). *McTiernan* J. said :—" 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 engages 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 " (3). It cannot be maintained that these passages do not apply to and govern the present case.

The other argument which I think should be mentioned rested on the fact that the *Industrial Arbitration Act* 1940-1943 (N.S.W.) which applied to the Crown as an " employer " but expressly excepted the police force from its operation, was so amended by s. 2 of Act No. 28 of 1946 as to make its provisions generally applicable as between the Crown and members of the police force. The result of proceedings under the Act might, of course, be to affect profoundly the content of the rights and duties of the Crown and members of the police force with respect to one another. But the Act of 1946 does not appear to me to affect the nature or kind of the duties of members of the police force under the common law or under the *Police Regulation Act*, or the nature or kind of the " services " which they perform. And it is the nature or kind of their duties and services that forms the whole basis of the view taken by the majority in *Quince's Case*.

For these reason I am of opinion that the present case is indistinguishable from *Quince's Case*. We were, however, invited, if we formed that view, to reconsider *Quince's Case* and to say that the view of the minority in that case was correct. This invitation was supported mainly by reference to certain authorities, one of which is earlier than *Quince's Case* but was not cited therein, and the rest of which are later than *Quince's Case*. I propose to refer to certain authorities and then attempt to explain, as briefly as I can, why I think that there should be no departure from *Quince's Case*.

I should have thought myself that the weight of English authority at the time when *Quince's Case* was decided, while not very strong, was definitely in favour of the view of the majority in that case.

(1) (1944) 68 C.L.R., at p. 243.
(2) (1944) 68 C.L.R., at p. 246.
(3) (1944) 68 C.L.R., at p. 250.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Fullagar J.

In the *S.S. Amerika Case* (1) Lord *Sumner* in a well known passage had 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 ". It may be truly said, of course, that this merely expresses a doubt, but a doubt so expressed by Lord *Sumner* comes very near to being authority against the proposition which is doubted. The passages in the opinion of Lord *Parker*, to which *Latham* C.J. referred in *Quince's Case* (2) tend, to my mind, strongly in the same direction. These dicta of their Lordships are entitled, of course, to the greatest weight. The view of the majority in *Quince's Case* was also supported by *Fisher* v. *Oldham Corporation* (3) in which *McCardie* J. had delivered a careful and closely reasoned judgment holding that a police officer appointed by a borough corporation was not a servant of the corporation. He had called attention to *Stanbury* v. *Exeter Corporation* (4) and had shown grave reasons for doubting the correctness of *Bradford Corporation* v. *Webster* (5). He had expressed agreement with the judgment in *Enever* v. *The King* (6). On the other hand, in *Attorney-General* v. *Valle-Jones* (7) effect had indeed been given to a similar claim by the Crown, but the question of the Crown's right was never raised, and what is said by *MacKinnon* J. (8) most certainly does not dispose of what Lord *Sumner* said in the *Amerika Case* (1).

The case of *Attorney-General* v. *Dublin United Tramways Co. Ltd.* (9), was decided before *Quince's Case*, but does not appear to have been cited in it. In this case *Maguire* P. decided that the relationship of master and servant existed between the People of Eire and the members of the civil guard, that the Attorney-General, as representing the People of Eire, could sue for damages for loss of the services of a member of the Guard, and that the wages payable to him for the period of his incapacity provided a proper measure of the value of his services. The three later cases cited by counsel for the Crown were *United States* v. *Standard Oil Co. of California* (10); *R.* v. *Richardson* (11) and *Receiver for the Metropolitan Police District* v. *Tatum* (12).

The actual decision in the *Standard Oil Case* (10) (a case of an injured soldier) went on the grounds that no State law could apply

(1) (1917) A.C., at p. 51.
(2) (1944) 68 C.L.R., at p. 236.
(3) (1930) 2 K.B. 364.
(4) (1905) 2 K.B. 838.
(5) (1920) 2 K.B. 135.
(6) (1906) 3 C.L.R. 969.
(7) (1935) 2 K.B. 209.
(8) (1935) 2 K.B., at p. 220.
(9) (1939) I.R. 590.
(10) (1947) 332 U.S. 301 [91 Law. Ed. 2067].
(11) (1948) S.C.R. (Can.) 57.
(12) (1948) 2 K.B. 68.

to the federal " Government-soldier relation ", and that there was no federal law which gave to the United States the right claimed. It is clear, however, that the majority were disposed to the view that the " Government-soldier relation " differed materially from the ordinary master-and-servant relation. They refer (1) to the fact that " it is the Government's interests and relations that are involved, rather than the highly personal relations out of which the assertedly comparable liabilities arose ", and (in a note (2)) to the " rather far-fetched " view which regards " the drafted soldier as having entered into a ' contract implied in law ' ". *Jackson* J. dissented, but it is interesting to note that he did not base his dissent on the view that liability arose because the soldier was a servant and the United States was his master. He based it on the very much broader ground that the damages claimed represented loss flowing from a wrongful act for which the defendant was responsible. I will refer again later to this view.

In the Canadian case, *R.* v. *Richardson* (3) (also a case of a soldier) a Canadian statute, passed in 1943, had provided that " for the purpose of determining liability in any action or other proceeding *by or against* His Majesty a person who was at any time since the 24th day of June 1938 a member of the naval military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown ". *Quince's Case* was referred to in the course of the judgments, but it was not disputed that the statute covered the question which was at issue in, and decided by, *Quince's Case*. The main importance of the case lies in what is said as to the measure of damages. On this question, the majority of the Court took the same view as was taken by *Maguire* P. in *Attorney-General* v. *Dublin United Tramways Co. Ltd.* (4) but the dissenting judgment of *Kellock* J. on this matter must command the respectful attention of any Court in which the actual decision is not binding authority.

In *Tatum's Case* (5) the plaintiff receiver was a statutory corporation sole, and, as such, the custodian of a fund out of which he had the duty of paying the wages and allowances of members of the police force and all other " charges and expenses " which the Home Secretary should direct him to pay. Out of this fund he lawfully paid the hospital charges and the pay and allowances of a member of the force who was injured through the negligence of the defendant, and he sued to recover from the defendant the

(1) (1947) 332 U.S., at p. 313 [91 Law. Ed., at pp. 2074, 2075].
(2) (1947) 332 U.S., at p. 312 [91 Law. Ed., at p. 2074].
(3) (1948) S.C.R. (Can.) 57.
(4) (1939) I.R. 590.
(5) (1948) 2 K.B. 68.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Fullagar J.

amounts so expended. The sole argument presented by counsel for the defendant appears to have been that the Crown ought to have been the plaintiff, because the policeman was a servant of the Crown and not of the receiver. The whole question now at issue, therefore, simply went by default, *Atkinson* J. holding that the receiver, having suffered loss to his fund, was entitled to recover. I think, with great respect, that it was quite wrong to suggest that *McCardie* J. in *Fisher* v. *Oldham Corporation* (1), thought either that the Crown (if it were liable in tort) would be liable for a wrongful arrest made by a police officer or that the Crown could maintain an action for a wrongful act through which it had lost the services of a police officer. It is true that that learned Judge referred more than once to such an officer as being in the service of the Crown or in the service of the State, but the purpose of this was merely to emphasize that he was *not* a servant of the defendant corporation. The whole trend of the judgment is against the view implicitly imputed to him, and his Lordship respectfully expressed his strong approval (2) of each of the judgments in *Enever* v. *The King* (3).

It seems at first sight a very remarkable thing that the question should have received so little serious consideration, but I think it is simply because it is only in the *Dublin Tramways Case* (4) and *Quince's Case* that it has been fairly and squarely raised and argued. As is testified by the differences of opinion in those two cases, the question is both difficult and important, and the concession to the Crown of the right claimed seems to me to involve some very serious implications. The difficulty of the question perhaps derives in part from the poverty of our technical vocabulary, which makes it often hard to express with any degree of accuracy distinctions which one feels are fundamental. But, however this may be, it is clear, in my opinion, that there is nothing in any of the cases, to which I have referred, to compel or justify a reconsideration of *Quince's Case*. No point is made in any of them that was not fully considered in *Quince's Case*, and we ought not to depart from decided cases except in the light of clear and cogent reasoning or very definite superior authority. We should, in my opinion, adhere to *Quince's Case* unless and until the House of Lords or the Privy Council may require us to adopt a different view.

Up to this point, I have been attempting to look at the whole matter from the point of view of authority. But I think that I

(1) (1930) 2 K.B. 364.
(2) (1930) 2 K.B., at pp. 371, 372.
(3) (1906) 3 C.L.R. 969.
(4) (1939) I.R. 590.

ought to express, and attempt to explain, my own opinion on the question. If the matter were entirely open, I would regard the view that the defendants should succeed in this case not only as more in accord with modern notions and with the realities of human relationships to-day, but as on the whole more just. The view which I would myself take does not, as will be seen, rest on a distinction between the Crown and a private employee of to-day. If, however, I were persuaded that it is too late in the day for my view to be accepted, I would regard the distinction taken in *Quince's Case* as a perfectly sound distinction.

I begin by thinking that every member of the navy or the army or the air force or the police force is a servant of the Crown in the sense which is required for the application of the rule of *respondeat superior*. If the Crown is liable in tort, it will be liable for a tort committed by any such person in the course of his employment. The subordinate is not the servant of his superior in the service: subordinate and superior are alike servants of the Crown (*Bainbridge* v. *Post Master-General* (1)). It may be said that the famous case of *Tobin* v. *The Queen* (2) is authority for the proposition that a commander or other officer of one of His Majesty's ships of war is not a servant of the Crown, and indeed this is explicitly stated by *Erle* C.J. (3). But it was a sufficient and overriding ground for the decision in that case that the Crown in England was not liable in tort, and it is worthy of note that at the end of his judgment the learned Chief Justice said (4) :—" The *result* has the sanction of all my learned brothers who heard the argument; but I am desirous of adding that some of the *reasons* have not the concurrence of my much respected brother *Willes* ". (The italics are, of course, mine). In *Shaw Savill & Albion Co. Ltd.* v. *The Commonwealth* (5) it was treated as clear that the officers responsible for the navigation of H.M.A.S. *Adelaide* were servants of the Commonwealth: see especially per *Starke* J. (6) and per *Williams* J. (7). There is, I think, nothing in *Enever* v. *The King* (8) or in *Baume* v. *The Commonwealth* (9) to weaken or affect this view. The distinction taken in those cases seems to be in substance between an act or default of an officer in the course of his service under the Crown on the one hand, and an act or default in executing some independent duty cast upon him by the common law or by

(1) (1906) 1 K.B. 178.
(2) (1864) 16 C.B.N.S. 310 [143 E.R. 1148].
(3) (1864) 16 C.B.N.S., at pp. 349, 350 [143 E.R., at p. 1163].
(4) (1864) 16 C.B.N.S., at p. 368 [143 E.R. at p. 1172].
(5) (1940) 66 C.L.R. 344.
(6) (1940) 66 C.L.R., at pp. 352, 353.
(7) (1940) 66 C.L.R., at p. 365.
(8) (1906) 3 C.L.R. 969.
(9) (1906) 4 C.L.R. 97.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Fullagar J.

statute on the other hand. The distinction itself has been criticized, and it may be that it was not fully observed in *Zachariassen* v. *The Commonwealth* (1) and *Field* v. *Nott* (2), though it most probably provided the reason why the person holding the office of Commissioner of Taxation, and not the Commonwealth, was made defendant in *Jackson* v. *Magrath* (3). But, whether the distinction has been soundly applied or not, it has turned, as it seems to me, not on the presence or absence of the relation of master and servant as such (though it may, of course, be loosely said that the servant is not a servant *quoad hoc*) but on the question whether the servant is acting in the course of his employment by the Crown.

I would think, in the next place, however, that there is no relation or correspondence whatever between the rule which has made a master vicariously responsible for torts committed by his servant in the course of his employment and the rule which has entitled a master to sue for an act which is tortious as against his servant and has deprived him of that servant's services. Neither historically or logically would it be true to say that the one rule is, or ever was, the complement of the other, or has or ever had anything to do with the other. This is made very plain (though I think, with great respect, that it points in a direction opposite to that in which it led his Honour) in the judgment of *Latham* C.J. in *Quince's Case* (4) in a passage which cites a number of authorities and begins with the sentence :—" 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 ". There may indeed be said to have been a sort of negative community between the two rules. For the notion that the Crown should be liable for the torts of its servants was probably not more remote from any conception of the common law than was the notion that the Crown should be able to bring an action in trespass or case *per quod servitium amisit*.

The truth is that the two classes of action have always involved radically different notions of what constitutes service. For the purposes of a master's liability in tort, a particular relation (normally contractual) involving a right of control over the acts of the immediate wrongdoer is essential. The servant is distinguished from the independent contractor : see e.g. *Queensland Stations Pty. Ltd.* v. *Federal Commissioner of Taxation* (5). The theory

(1) (1917) 24 C.L.R. 166 ; (1920) 27 C.L.R. 552.
(2) (1939) 62 C.L.R. 660.
(3) (1947) 75 C.L.R. 293.
(4) (1944) 68 C.L.R., at pp. 235, 236.
(5) (1945) 78 C.L.R. 539, at p. 545.

is that he who has the control should carry the responsibility, and the right of control in the actual execution of the work is said to be the test to be applied in determining whether the relationship which involves responsibility exists or not. When control ceases, responsibility ceases, and a master is not liable for wrongs committed by his servant outside the course of his employment. All these considerations are wholly irrelevant when a master brings an action for a tort committed against his servant. Here the only relevant questions (apart from damages) are (1) whether services were in fact being rendered to him by the injured person, and (2) whether he had a reasonable expectation, because of the existence of a contract or otherwise, that that person would, if the tort had not been committed, have continued to render services to him. A servant may have two or more masters, but only one master (the master in the course of whose employment he was acting at the relevant time) can be vicariously liable for his wrongs. On the other hand, there is no reason why two or more masters could not sue for the same wrong committed against the servant: see for example *Rist* v. *Faux* (1).

These considerations remove, or ought to remove, the temptation, which is so apt to assail us, to import a meretricious symmetry into the law. But they are important for another reason. They serve to explain why it is that the question of nature and degree of control over the acts of an alleged servant has arisen in countless cases where the vicarious liability of an alleged "master" is asserted, but seems never to have arisen in an action for damages *per quod servitium amisit*. There is a theoretical justification for asking it in the former class of case, because what we are concerned with is the responsibility of the defendant for the act of another. In the latter class of case, there is no such justification for asking it, because what we are concerned with is what the plaintiff has lost.

Logically, at the present day, I can see no reason for distinguishing, where A has suffered loss through injuries inflicted on B, between a case in which B was a servant of A and a case in which B was a partner or an independent contractor, or between a case in which B was a servant of A and a case in which A and B were insurer and insured. As Lord *Kinloch* said in *Allan* v. *Barclay* (2), "If the claim be competent to a master, it is, by parity of reason, competent to everyone, in whatever relation, who can shew himself to have suffered loss by the physical incapacitation of another". It is possible to perceive a tendency to say that liability exists

(1) (1863) 4 B. & S. 409 [122 E.R. 573].

(2) (1864) 2 M. (S.C.) 873, at p. 874.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Fullagar J.

in all these cases in the dissenting judgment of *Jackson* J. in *United States* v. *Standard Oil Co. of California* (1); see also *Mankin* v. *Scala Theodrome Co. Ltd.* (2), in which it appears to have been assumed without much justification that Mankin was a servant of Cochrane. With *Mankin's Case* (2) may be usefully contrasted the robust and logical view taken in Scotland in *Reavis* v. *Clan Line Steamers Ltd.* (3). It is necessary, however, to add that the circumstances in *Mankin's Case* (2) were peculiar, and it might well have been held that, whether Mankin was a servant or not, Cochrane, as well as Mankin, ought to have been within the contemplation of the defendant as a person likely to suffer, through the negligence alleged, the damage which he did in fact suffer. I am very far from suggesting that the actual decision in *Mankin's Case* (2) was wrong.

The view which seems implicit in the judgment of *Jackson* J. (4) would represent an enormous extension of liability, and would, in my opinion, go far beyond what justice requires. It cannot be doubted that the general rule of the common law is that which is stated in the judgment of *Rich* J. in *Quince's Case*. "The mere fact that the injury prevents a third party from getting a benefit from the person injured does not invest the third party with a right of action against the wrongdoer" (5). It perhaps does not matter very much, for present purposes, whether we regard the rule as a rule relating to remoteness of damage, or whether we say that what it really means is that the wrongdoer has not been guilty of any breach of any duty owed by him to the third party. Lord *Kinloch* in *Allan* v. *Barclay* (6) stated the rule in much the same way as *Rich* J. He said:—"The grand rule on the subject of damages is that none can be claimed except such as naturally and directly arise out of the wrong done and such therefore as may reasonably be supposed to have been in the view of the wrongdoer". I am inclined to think, however, that his Lordship was really thinking in terms of duty, for he added:—"The personal injuries of the individual himself will be properly held to have been in the contemplation of the wrongdoer. But he cannot be held bound to have surmized the secondary injuries done to all holding relations with the individual, whether that of a master or any other". On the whole I would prefer to state the position in terms of duty, because it seems to me that, if the third party has a cause of action, it *must* rest on a distinct and different obligation from that subsisting between the wrongdoer and the person immediately injured.

(1) (1947) 332 U.S. 301 [91 Law. Ed. 2067].
(2) (1947) K.B. 257.
(3) (1925) S.C. 725.
(4) (1947) 332 U.S., at pp. 317, 318 [91 Law. Ed., at pp. 2076, 2077].
(5) (1944) 68 C.L.R., at p. 240.
(6) (1864) 2 M. (S.C.) at p. 874.

If we look at the matter in this way and think of *Hay or Bourhill* v. *Young* (1), it appears absurd enough to say that, while the cyclist in that case owed no duty to the plaintiff, he did owe a duty to any third party who might suffer loss through an injury inflicted on a person run down by him.

But, while the general rule is clear, and while it would probably be generally agreed that cases such as I have been considering fall within it, an exception was in early times in England engrafted upon it. What is the extent of the exception, and what is the justification for the exception ? Its justification suggests, I think, its extent, so far as it is necessary to consider its extent for the purposes of the present case. It would find, of course, its complete and absolute theoretical justification in a society in which slavery was a recognized institution. If I injure your slave, I damage your property. And it seems to be agreed that, in English law, its theoretical justification is to be found in the idea that a master had *quodam modo* a proprietary right in the services of his servant or a quasi-proprietary right in the servant himself. In a passage, quoted by *Latham* C.J. in *Quince's Case* (2), Sir *William Holdsworth* (*History of English Law*, 2nd ed. (1937), vol. VIII, p. 429) speaks of the remedies given by law for the abduction of a servant, observing that they were supplemented by the provisions of the Statutes of Labourers. He adds :—" They rested at bottom on the idea 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 ". The modern idea of the service relation is not merely different from the old : it may be said to be the very antithesis of it. The conception was really appropriate only to the case of a household or " familia ", in which the withdrawal of a unit was more or less bound to cause disorganization and monetary loss. The typical case was that of a child or an apprentice, who lived, as a rule, on his master's premises. It is very significant that both *Pollock* and *Salmond* have dealt with this branch of the law of tort under the heading of " Injuries to Domestic Relations ". *Winfield* deals with it under the head of " Interference with Contract " along with such cases as *Lumley* v. *Gye* (3) but these cases involve a malicious interference with a right known to exist. Moreover the principle of such cases is not confined to cases of master and servant. Whatever may be the history of such actions, we are moving into different country

(1) (1943) A.C. 92.
(2) (1944) 68 C.L.R., at pp. 236, 237.
(3) (1853) 2 El. & Bl. 216 [118 E.R. 749].

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Fullagar J.

altogether, when we come to cases where there is said to be a *negligent* interference with a right *not* known to exist.

In the famous words of Lord Chief Justice *Willes*, " when the nature of things changes, the law must change too " (1). Because the proprietary idea on which the exception to the general rule was founded has long since ceased to have any life or reality, and because the exception is intrinsically illogical and unreasonable, my own opinion is that claims such as that made in the present case ought not to be recognized at all to-day. I think that that would have been Lord *Sumner's* view, if it had been necessary for him to decide the point. The adoption of such a view might well be accompanied by a similar realistic approach to the action of seduction, and by a recognition that it is, as *Salmond* puts it, " based in substance and in fact on the injury to the honour and feelings of the parent ". " It is greatly to be desired ", says *Salmond* (*Torts*, 2nd ed., p. 393), " that the law should be put on a more rational basis, and that the real cause of action should receive legal recognition instead of being made available by means of a device which is little better than a legal fiction ". The hardship and inconvenience that may be caused by the survival of the fiction are well illustrated in Serjeant Manning's note to the report of *Martinez* v. *Gerber* (2). The action of seduction is still a living thing, and probably a necessary thing, though it is not, I think, a very common action to-day. Seduction is a malicious wrong against a person whose existence is known to, or ought reasonably to be contemplated by, the wrongdoer. Such a claim as the present is based on a breach of an alleged duty of care owed to a person who could no more fairly be expected to be in the contemplation of a defendant than an independent contractor or a partner or an insurer against accident.

I think that it is quite open to this Court to take either or both of the steps suggested in the preceding paragraph. And, as at present advised, I should myself be prepared to take it. It is for this reason that, even if I did not regard *Quince's Case* as binding upon me, I should nevertheless decide this case in favour of the defendants. As I have said, however, if I could be persuaded that this view is too iconoclastic, I would regard the distinction taken in *Quince's Case* as sound. If the exception to the general rule *must* stand, I do not think that its scope ought to be extended, and I do think that its application in favour of the Crown does involve a drastic extension of it. On this aspect of the matter I will say no more

(1) (1864) 16 C.B.N.S. 310 [143 E.R. 1148].

(2) (1841) 3 Mon. & G., at p. 91 [133 E.R., at p. 1070].

than that I have read the judgment of my brother *Kitto*, and that I respectfully agree with it.

I will conclude with certain observations on the question of damages. These have, I think, a two-fold importance. In the first place the remoteness of the theory of the action *per quod servitium amisit* from the relation of the Crown to its servants is emphasized when we look at the measure of damages in such cases. In the second place, it becomes apparent, I think, that, even if it be conceded that the Crown can maintain an action of this nature, the declaration in this particular case is demurrable because no loss is alleged in respect of which damages are recoverable.

In considering damages, it will be well to put on one side the action of seduction, which developed along lines of its own. This action was (or became) available although, because she was capable of consenting and had consented, no actionable wrong had been done to the woman or girl seduced. In every other case it was necessary that the act complained of should have been wrongful as against the servant. Again, seduction is a malicious wrong, and, if " service " be formally proved—even in the form of the proverbial " making of cups of tea "—damages may be said to be " at large " in the sense that, within wide limits, a jury's verdict will not be interfered with. They may include *solatium* for dishonour and wounded feelings, and they may even be exemplary or punitive. It is interesting at this stage to reflect on the possibilities of an action brought by the Crown for the seduction and subsequent confinement of a senior officer in a Women's Auxiliary Army Corps. Such an action would, of course, lie if the plaintiff is right in the present case. The officer might be dismissed from the service *pour encourager les autres*, but she might be retained in the service and paid, and it might be necessary to appoint additional sergeant-majors, and engage in costly propaganda, in order to prevent or cure a decline in morale in the Corps. Other expensive consequences suggest themselves as capable of being visited on the seducer, who may not have known until too late that the lady, with whose full approval he acted, was owned by the Crown. Whether damages could be recovered for the lacerated feelings of the Crown as *parens patriae* is a question which may be left to be considered when it arises.

In master and servant cases other than actions of seduction it is, in my opinion, a great mistake to say that damages were ever " at large ". It is quite possible that exemplary damages might be allowable if the wrong were a malicious wrong as against the master, but in a case of negligence I would think it clear that the

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Fullagar J.

field of damages was strictly limited to pecuniary loss actually sustained through the loss of the services of the servant and (so far as it was not included in the estimate of that loss) expenditure necessarily incurred in consequence of the injury to the servant. In *Flemington* v. *Smithers* (1) *Abbott* C.J. directed the jury to award damages " for the loss the plaintiff has sustained in being deprived of the assistance of his son, and also the expense he may have been put to by his being out of his place ": Cf. the direction of Lord *Denman* C.J. in *Hodsoll* v. *Stallibrass* (2) and note the form of the declaration at p. 302. There can be no justification for saying that the measure of damage is provided even prima facie by the amount paid as wages to the servant during incapacity, even if wages are so paid in pursuance of a legal obligation. It is simply not true to say that they represent the loss suffered. Such an amount bears no necessary relation whatever to the loss (if any) sustained, and the adoption of it as a sort of rule of thumb serves simply to reveal the practical impossibility of applying the conception of damages for loss of services to the cases under consideration. As *McTiernan* J. said in *Quince's Case* (3) " a soldier's pay is not a criterion of the value of his services ". It is, in truth, idle to attempt to assess the value to the Crown of the services of a police constable or a soldier.

Two special heads of damage require a little consideration. The first is medical expenses, and the second is payment of a pension. The damages claimed in *Quince's Case* included medical expenses, but there is no such claim in the present case. In both cases a claim in respect of payment of a pension was included as part of the damages. In *Quince's Case* all the justices were of opinion that the claim in respect of the pension could not be sustained, while the minority thought that the medical expenses could be recovered.

With regard to medical expenses, it is a possible view that these should be recoverable, irrespective of any services rendered by the victim, by any person who was under a legal duty to the injured person to pay them. It may well be said that, whoever has to pay them, they cannot be regarded as too remote : their being incurred is in every sense the natural and probable consequence of the tort. This view was suggested in *Hall* v. *Hollander* (4), where the plaintiff was unable to prove that his injured child had rendered any services to him. It is not necessary to determine this question.

(1) (1826) 2 C. & P. 292, at pp. 292, 293 [172 E.R. 131, at p. 132].
(2) (1840) 11 Ad. & E. 301, at p. 303 [113 E.R. 429, at p. 430].
(3) (1944) 68 C.L.R., at p. 251.
(4) (1825) 4 B. & C. 660 [105 E.R. 1206].

However it should be answered, it seems entirely contrary to principle to say that such expenses are recoverable by any person who was *not* under a legal duty to pay them. A father is under a duty to provide medical services for his child. Whether a master was subject to a similar duty in relation to his servant (apart from express contract) is a question on which there has been some conflict of authority. The better view seems to be that he was not. The cases are discussed in a note to *Sellan* v. *Norman* (1). Lord *Kenyon* in *Scarman* v. *Castell* (2) held that a master was bound to pay for medicines supplied to his servant while under his roof and part of his family, but in *Wennall* v. *Adney* (3), *Heath* J. said: "I believe that the humanity of Lord *Kenyon* misled him". In *Reg.* v. *Smith* (4), *Patterson* J. directed a jury that by the general law a master was not bound to provide medical services for a servant, but that the case was different with respect to an apprentice. It seems never to have been thought that a master owed such a duty to a servant except to an apprentice or one who lived under his roof, and I think, with respect, that *Williams* J., in *Smaill* v. *Alexander* (5) wrongly applied the cases relating to father and child to a case which was merely that of master and servant. The seduction cases, as I have already said, stand on a footing of their own.

With regard to pensions, the question has several times arisen whether the value of a pension is to be taken into account in assessing damages in an action by the person actually injured. The cases have not been, at first sight, easy to reconcile. In *Bradburn* v. *Great Western Railway Co.* (6) it was held that moneys payable to the plaintiff under an accident policy were not to be taken into account in the assessment of damages. (The doctrine of subrogation could not, of course, apply to such a case). But in *Lory* v. *Great Western Railway Co.* (7), *Asquith* J. (as he then was) held that pensions were of a different nature and must be taken into account. In *Payne* v. *Railway Executive* (8) (in which *Lory's Case* was not cited) *Sellers* J. appeared to have taken a different view. In *Baker* v. *Dalgleish Steam Shipping Co.* (9) the Court of Appeal held that a pension which was in fact being paid by the Crown ought to be taken into consideration notwithstanding that it was dependent on the voluntary bounty of the Crown, although, if it were voluntary,

(1) (1829) 4 C. & P. 79 [172 E.R. 616].
(2) (1795) 1 Esp. 270 [170 E.R. 353].
(3) (1802) 3 B. & P. 247 [127 E.R. 137].
(4) (1837) 8 C. & P. 153 [173 E.R. 438].
(5) (1904) 23 N.Z.L.R. 745.
(6) (1874) L.R. 10 Ex. 1.
(7) (1942) 1 All E.R. 230.
(8) (1951) W.N. 240.
(9) (1922) 1 K.B. 361.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Fullagar J.

allowance must be made for the possibility or probability that the Crown would reduce the amount of the pension in the light of the award of damages. The latest case which I have seen is *Smith* v. *British European Airways Corporation* (1) in which *Hilbery* J. applied *Lory's Case* (*Payne's Case* not being cited) and held that a pension must be taken into consideration. *Payne's Case* has now been considered by the Court of Appeal, which has affirmed the judgment of *Sellers* J. (2). A distinction is drawn between cases at common law and cases under Lord Campbell's Act. In the former class of case the amount of the pension must be disregarded : in the latter class of case it is to be taken into account.

The position thus seems to be that cases under Lord Campbell's Act form, by reason of the special measure of damages applicable in such cases, an exceptional class of case. Cases at common law are governed, in respect of pensions and other sums which become payable by reason of injury, by the rule in *Bradburn* v. *Great Western Railway Co.* (3) which has generally, I think, been regarded as laying down an important general principle. In that case *Pigott* B. said : " There is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons by which he has bargained for the payment of a sum of money in the event of an accident happening to him. He does not receive that sum of money because of the accident, but because he has made a contract providing for the contingency : an accident must occur to entitle him to it, but it is not the accident but his contract that is the cause of his receiving it " (4). If the pension is paid voluntarily, the case seems *a fortiori* : it would surely be out of the question to reduce damages by a sum which some benevolent persons had collected for the benefit of a man crippled in an accident.

In a case in which a pension is not to be taken into account in assessing damages recoverable by the person injured, it would seem very unreasonable to allow the payer of the pension to recover damages in respect of the pension from the wrongdoer. But, whether or not the case is one in which the pension must be taken into account in assessing the damages of the person injured, it would be contrary to principle that the payer of the pension should be able to recover damages in respect of the pension. The matter is explicitly covered by what is said by Lord *Parker* and Lord *Sumner* in the *Amerika Case* (5). Lord *Parker* after observing that such damages are obviously not recoverable if the payment of

(1) (1951) 2 K.B. 893.
(2) (1952) 1 K.B. 26.
(3) (1874) L.R. 10 Ex. 1.
(4) (1874) L.R. 10 Ex., at p. 3.
(5) (1917) A.C. 38.

a pension is made voluntarily, proceeds:—" But further, even if the pensions and allowances in question were granted pursuant to contracts between the Admiralty and the deceased seamen, I should still be of opinion that they could not properly constitute an item of damage for loss of service. They would in this case constitute deferred payment for services already rendered, and have no possible connection with the future services of which the Admiralty had been deprived " (1). Lord *Sumner* says:—" Nor would it have assisted the appellants' case if they could have established that the making of these compassionate allowances by the Crown was in the nature of a contractual obligation. In any case the contract would have been a contract with the deceased man, and the damages must be measured by the value of his services which were lost, not by the incidents of his remuneration under the terms of his contract of employment " (2). This is, as his Lordship proceeds to point out, entirely in accord with the principle of *Bradburn's Case* (3). So *Cohen* L.J. (as he then was) in *Payne* v. *Railway Executive* (4) says:—" the accident in this case was not the *causa causans* of the receipt by the first plaintiff of the disability pension, but the *causa sine qua non*. The *causa causans* was his service in the Royal Navy ". Cf. what is said by *Singleton* L.J. (5).

I am of opinion that the Crown has no cause of action in such a case as the present. But, even if I were of a contrary opinion, I should still regard the declaration in this case as demurrable on the ground that no loss is alleged in respect of which damages are recoverable.

KITTO J. This is an appeal from an order of the Supreme Court of New South Wales allowing a demurrer to an information exhibited against the respondents by the appellant, the Attorney-General of New South Wales, suing on behalf of His Majesty. The information alleges, in effect, that one Bertrand Leslie Hayden, who was a member of the police force of New South Wales, received bodily injury by the negligent management of a motor vehicle on a public highway by a person for whose negligence the defendants were responsible, and that by reason of Hayden's resulting disablement from the performance of his duties, which led to his discharge from the police force, His Majesty was deprived of his services as a member of that force. The information also alleges that while Hayden continued in the police force after his disablement, he

(1) (1917) A.C., at p. 42.
(2) (1917) A.C., at p. 61.
(3) (1874) L.R. 10 Ex. 1.
(4) (1952) 1 K.B., at p. 36.
(5) (1952) 1 K.B., at p. 38.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Kitto J.

was paid the salary and allowances appropriate to his office and to which he was entitled, and that since his discharge he has been paid and will continue to be paid a pension in accordance with *Police Regulation (Superannuation) Act* 1906-1944 (N.S.W.). The claim made by the Attorney-General on behalf of His Majesty is " to recover the salary and allowance paid as aforesaid and to be reimbursed in respect of the monies already paid and which will hereafter be paid to the said Bertrand Leslie Hayden pursuant to the Act aforesaid ".

As a general rule, where A is prevented from fulfilling his obligations to B by reason of an injury wrongfully inflicted upon him by C, B has no right of action against C in respect of his loss; but an exception exists in the case where A's obligations arise out of a relationship of master and servant existing between B and himself (*Admiralty Commissioners* v. *S.S. Amerika* (1)). The question in this case is whether the relationship of master and servant exists between the Crown in right of the State of New South Wales and a member of the police force of that State so as to entitle the Attorney-General to maintain his action as falling within the exception to the general rule. The main difficulty in answering the question arises from the fact that the expression " master and servant " has not a fixed meaning at all times and in every context. Sir *John Macdonell* observed in his work on *The Law of Master and Servant*, 2nd ed. (1908), at pp. 9, 10: " The term (servant) is, in fact, used loosely and in different senses. No definition which would include all its significations in statutes, in questions as to common employment, in settlement cases, in actions for seduction or for enticing away, and in wills, is possible. The word has not been employed in the same sense at different periods of history. It has been extended to relations to which it was not once applicable ".

The expression must be considered for the purposes of this case in the particular context of a principle of the common law, which has its roots in the remote past. The principle has sometimes been referred to as if it formed an exception to the rule that no liability arises for breach of a duty of care unless damage to the person to whom the duty was owed is the proximate result of the breach; but it is not a principle which is directed to questions of proximity or remoteness of damage resulting from breach of a duty of care. It provides a remedy for the wrongful invasion of a quasi-proprietary right which a master is considered to possess in respect of the services which his servant is under an obligation to render him.

(1) (1917) A.C., at pp. 43, 45.

If that right is invaded by a wrongful injury to the servant which disables him from performing his due service, the *injuria* to the master is collateral to, and not consequent upon, the *injuria* to the servant: see *Martinez* v. *Gerber* (1). The speeches delivered by their Lordships in the case of the *Admiralty Commissioners* v. *S.S. Amerika* (2) explain how it is that the law concedes the existence of this quasi-proprietary right or interest. Briefly stated, the explanation is that the law has perpetuated a notion which originally was a corollary of the ancient conception of the relationship of master and servant as one of status (*Mankin* v. *Scala Theodrome Co. Ltd.* (3)). That conception has gone, but the notion of a right in the master, as a species of property, that others shall not, by their wrongful acts, deprive him of the benefit of the relation between himself and his servant has not been abandoned. An infringement of that right entitles the master to recover damages. In common law pleading the appropriate action was distinguished by the words which attributed to the defendant's wrongful conduct the character which alone entitled the plaintiff to succeed: *per quod servitium amisit*. Unless *servitium* had been lost, there was no title to sue; and there could be no *servitium* to be lost unless the relation of master and servant existed between the plaintiff and the person upon whom the defendant had inflicted a wrongful injury. This is not the occasion to consider whether the principle expounded in *Donoghue* v. *Stevenson* (4) and cases which have followed it, may enable damages to be recovered in a case where that relationship does not exist but the circumstances are such that the loss of services was a reasonably foreseeable consequence of a failure to exercise due care. No such circumstances are alleged in the information in this case. The information is supported by reference only to the principle of the common law upon which the action *per quod servitium amisit* is founded. That principle is of a technical character, and the question whether this case falls within it must of necessity be considered on technical lines. Even those who regard the limitations of the action *per quod* as anomalous, and think that the action ought to be available in cases of a wider description than those in which it has hitherto been allowed, must concede that, as the law stands, the action is so rigorously confined to cases of master and servant in that strict sense which formerly connoted a status, that nothing but legislation could now extend it to other cases.

(1) (1841) 3 Man. & G., at pp. 90, 91 [133 E.R., at pp. 1069, 1070].
(2) (1917) A.C. 38.
(3) (1947) K.B. 257.
(4) (1932) A.C. 562.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Kitto J.

This is made very clear by the decisions of the courts as to the right of a parent to recover damages in respect of injury inflicted on his child. Even under the pressure of the sentimental considerations inseparable from such cases, the courts have always steadfastly refused to allow the competence of such an action on any other basis than that of master and servant, for only in the infringement of rights considered to be proprietary have they been able to see any sound foundation for giving a remedy to one person by reason of physical injury wrongfully done to another. Thus in *Barham* v. *Dennis* (1) it was said in the Court of Common Pleas that: "it hath been adjudged that (a writ of trespass) lies for a parrot, a popinjay, a thrush, and . . . for a dog; the reason thereof is, because the law imputes that the owner hath a property in them . . . Here the father hath not any property or interest in the daughter, which the law accounts may be taken from him . . . It is clear also, that for the imprisoning of the daughter, the action is not given to the father, but to the daughter herself". But where the child renders services to the parent, however slight they may be, the law is content to conclude (by "a species of fiction": *Blackstone's Commentaries*, 15th ed., Book 1, p. 429 (n); see also Serjeant *Manning's* note to *Grinnell* v. *Wells* (2)), that the relation of master and servant exists; and, once that step is taken, a proprietary interest in the parent has been discovered, and a right of action on an established principle can be allowed: *Hall* v. *Hollander* (3); *Grinnell* v. *Wells* (4); *Evans* v. *Walton* (5).

It is important to notice in this connection a point of fundamental distinction between actions for loss of services by physical injury to a servant and actions for enticing a servant to leave his employment, or for receiving or continuing to employ the servant of another. The latter class of actions has not been restricted to the case of a "servant" in the original sense of the term; it has been extended to apply to all contracts of employment: *Lumley* v. *Gye* (6) (see especially *De Francesco* v. *Barnum* (7)), in which *Fry* L.J. expressly distinguished between a case of master and servant and one merely of employer and employed); and by parity of reasoning a right of action has been conceded for every interference with contractual relations committed knowingly and without justification (*Bowen* v. *Hall* (8); *Quinn* v. *Leathem* (9)). The conception which

(1) (1630) Cro. Eliz. 770 [78 E.R. 1001].
(2) (1844) 7 Man. & G., at p. 1044 [135 E.R. 424].
(3) (1825) 4 B. & C. 660 [107 E.R. 1206].
(4) (1844) 7 Man. & G. 1033 [135 E.R. 419].
(5) (1867) L.R. 2 C.P. 615.
(6) (1853) 2 El. & Bl. 216 [118 E.R. 749].
(7) (1890) 63 L.T. 514, at p. 515.
(8) (1881) L.R. 6 Q.B.D. 333.
(9) (1901) A.C. 495, at p. 510.

has led to this development of the law may be said to be that a person has a right, a right *in rem*, in respect of the contractual rights, the rights *in personam*, which he possesses as against the other party to his contract. This conception cannot be relied upon in order to extend the scope of the action for loss of services by injury to the servant, for that is an action which depends, not upon the existence of a personal right in the master as against the servant to have the agreed services rendered, but upon a supposed real right in the master in respect of the services themselves which are the fruit of the relationship of master and servant. Its origin, as has been mentioned, is to be found in the status of a servant in older times, and accordingly it is available if the relationship exists, whether or not it was created by binding contract; in other words, whether or not the master has any legally enforceable right against the servant to have the services performed. It is no doubt for this reason that the courts have always held a declaration in such an action to be sufficient if it alleges that the person injured by the wrongful act of the defendant was the plaintiff's servant, although it does not allege that he was hired at any wages or salary or under a binding contract of service: see *Martinez* v. *Gerber* (1); *Evans* v. *Walton* (2). It is the fact that the plaintiff and the person injured stand in a particular relationship to one another which gives the title to sue; and that title depends not at all on the manner in which the relationship was created or on the existence of any right in the master as against the servant to insist upon its continuance. These considerations make it impossible, by a process of judicial extension resembling that which took place in *Lumley* v. *Gye* (3) to allow an action for loss of the services of a person standing in a relation to the plaintiff other than that of a servant.

It is necessary, then to examine the meaning of the words "master and servant" in the statement that a wrongful injury to A, whereby B loses his services, gives a right of action to B against the wrongdoer if B and A were master and servant. Authorities which give a meaning to the expression as used in other contexts may have little or no value for this purpose; they are not necessarily *in pari materia*. Sir *John Macdonell* remarked that "Judges have generally acted in regard to this matter on the principle *omnis definitio in lege periculosa est* . . . They have been content to deal with each case as it arose": *The Law of Master and Servant*, 2nd ed. (1908), at pp. 7-9. In *Short* v. *J. & W. Henderson Ltd.* (4),

(1) (1841) 3 Man. & G. 88 [133 E.R. 1069].
(2) (1867) L.R. 2 C.P. 615.
(3) (1853) 2 El. & Bl. 216 [118 E.R. 749].
(4) (1946) S.C. (H.L.) 24, at pp. 33, 34.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Kitto J.

Lord *Thankerton*, in a judgment with which the rest of their Lordships concurred, referred to four suggested *indicia* of a contract of service, in the sense in which that expression was used in a *Workmen's Compensation Act* 1925 (Imp.) (15 & 16 Geo. 5 c. 84) namely: (a) the master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the method of doing the work; and (d) the master's right of suspension or dismissal. He mentioned that the learned Judge below had added "that a contract of service may still exist if some of these elements are absent altogether, or present only in an unusual form, and that the principal requirement of a contract of service is the right of the master in some reasonable sense to control the method of doing the work, and that this factor of superintendence and control has frequently been treated as critical and decisive of the legal quality of the relationship". His Lordship then said: "Modern industrial conditions have so much affected the freedom of the master in cases in which no one could reasonably suggest that the employee was thereby converted into an independent contractor, that, if and when an appropriate occasion arises, it will be incumbent on this House to reconsider and to restate these *indicia*. For example (a), (b) and (d) and probably also (c), are affected by the statutory provisions and rules which restrict the master's choice to men supplied by the labour bureaux, or directed to him under the essential work provisions, and his power of suspension or dismissal is similarly affected. These matters are all affected by trade union rules, which are, at least primarily, made for the protection of the wage-earners". This serves as a warning against treating judicial descriptions of the symptoms by which the relation of master and servant has been recognised as existing for the purposes of some branches of the law, as if they are necessarily definitive of the substance of that relation for all purposes.

Blackstone in his *Commentaries*, Book 1, p. 422, described the relation of master and servant as one of "the three great relations in private life", and as a relation "whereby a man is directed to call in the assistance of others, where his own skill and labour will not be sufficient to answer the cares incumbent upon him". There is here a recognition that the particular relation of master and servant which formerly was a matter of status is essentially a relation in the affairs of private life with respect to work to be done by one person for another. For the performance of such work, the persons immediately available in more primitive times would naturally be those in the *potestas* of the master—the members of

his actual household. But he may need the aid of others, and, if so, those whose services he obtains become part of his *ménage* either in a narrow or an extended sense. Thus at the root of the conception of the master and servant relation was the family, that is to say the *familia*, the household establishment. So we find *Sir Frederick Pollock* saying in connection with this subject: " the relation of master and servant . . . is still regarded for some purposes as belonging to the permanent organism of the family ": *Pollock* on *Torts*, 14th ed. (1939), p. 179. And perhaps it was this which led *Eyre* C.J. in *Taylor* v. *Neri* (1), to say at *nisi prius* that he did not think the court had ever gone further than the case of a menial servant; for the word " menial " was derived from the Saxon word *meiny* or *mesnie*, signifying a household or family (*In re Unemployment Insurance Act*, 1920 (2)).

Of course the widening of the range of private enterprise meant that the link between many kinds of servants and the households of their masters became attenuated and ceased to have any reality; but the relation has remained in the law as one which enables a man in the conduct of his private affairs to avail himself of the services of others who will enter into the appropriate relationship with him for that purpose. This is reflected in one of the definitions of " service " given in the *Oxford English Dictionary*: " work done in obedience to and for the benefit of a master "; and the correlative definition of a " servant " may be quoted from the same source: " one who is under obligation to work for the benefit of a superior and to obey his (or her) commands ". The definition in the *American Restatement of the Law*, Vol. 1, Agency, p. 483, is to the like effect: " A servant is a person employed to perform service for another in his affairs, and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control ": (quoted, as being in accordance with our law, by *Latham* C.J. in *Federal Commissioner of Taxation* v. *J. Walter Thompson (Aust.) Pty. Ltd.* (3)).

It will be seen that three elements are involved: first, the relationship must entail, on the part of the servant, obedience to orders; secondly, the obedience to orders that is required is obedience to orders in doing work; and, thirdly, the doing of the work must be for the benefit of the master, that is, it must relate to his own affairs. As to the first, no more need be said than this, that the obligation of obedience exists while the relationship continues. The relationship may be voluntary; and whether voluntary

(1) (1795) 1 Esp. 386 [170 E.R. 393].
(2) (1922) 1 K.B. 166, at p. 170.
(3) (1944) 69 C.L.R. 227, at p. 233).

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Kitto J.

or not, it may be determinable at the will of either party; but without the obligation to obey orders there can be no meaning in the relationship, and it therefore cannot subsist. As to the second element, that the obedience entailed must be obedience to orders in doing work, the point which is vital is that the master's authority must extend both to ordering that the work shall be done and to directing how it shall be done. *Bramwell* L.J. said, in *Yewens* v. *Noakes* (1): "A servant is a person subject to the command of his master as to the manner in which he shall do his work"; and in *Mersey Docks and Harbour Board* v. *Coggins and Griffith (Liverpool) Ltd.* (2), Lord *Porter* said "... it is not enough that the task to be performed should be under his (the master's) control, he must also control the method of performing it". Citations to the like effect might be multiplied. As to the third element, the statement that the doing of the work must be for the benefit of the master does not mean, of course, that the direct benefit from the work itself must necessarily accrue to the master; he may, without altering the relationship, direct his servant to do work which will benefit another. A good illustration of this may be found in *Mersey Docks and Harbour Board* v. *Coggins and Griffith (Liverpool) Ltd.* (3). But the doing of work by one person must be required by another as a means whereby that other may attain ends of his own. A foreman, a head of a government department, or an army officer, may have full power to give the most detailed orders to a subordinate as to the manner in which the latter shall do work, and yet no one would suppose that the relation of master and servant exists between them. The point is that the power of direction residing in a person must belong to him for the purpose of enabling him to conduct his own affairs; and only if that is the situation is it possible for him to complain that conduct causing him to lose the service is an infringement of a right to enjoy them which he may vindicate in an action *per quod servitium amisit.*

These considerations suggest an explanation of the fact that, with one recent exception, no reported case is to be found in England, throughout the long history of the action *per quod servitium amisit*, in which the Crown has recovered damages in such an action. What is the relationship between the Crown and members of that broad class of persons who are said to be "in the service of the Crown"? It is a relationship which may or may not entail obedience to orders; judges, for example, in the performance of their judicial functions are immune from all control by the Crown. Again,

(1) (1880) 6 Q.B.D., 530, at pp. 532, 533.

(2) (1947) A.C. 1, at p. 17.

(3) (1947) A.C. 1.

where there exists an obligation of obedience to orders, the obligation may not extend to the manner in which duties shall be performed; witness the case of the pilots with whose position the Privy Council was concerned in *Fowles* v. *Eastern and Australian Steamship Co. Ltd.* (1). Further, where there is an obligation to obey orders as to how work shall be done, the power to give orders may reside in another officer of the Crown, so that the King may have no power of control, or only an indirect power as a result of the fact that the Ministers of the Crown hold office during the King's pleasure: *Maitland, Constitutional History of England*, p. 418. And of the greatest significance for present purposes is the fact that, even where there is an obligation to obey the orders of the Crown as to the manner in which duties are to be performed, the power of the Crown exists, not for its own benefit, but for the benefit of the State of which the Sovereign is the head. The employment is to perform service for the State in its affairs, not for the King in his own affairs; and the relationship is therefore not one which is created for the furtherance of any person's individual ends and is not a relationship of private life at all.

It is true that the word "servant" is commonly used in such expressions as "public servant", "civil servant" and "servant of the Crown"; but the very qualifying words themselves point to the essential difference. They lift the word "servant" into a new and very different context; they emphasize that the services which flow from the relationship are of a public character, and are not owed to any individual for the advancement of his own concerns. In so far as the Executive may be entitled to insist upon their performance, it is for the reason only that the Executive is the organ of the State invested with that function. As Lord *Esher* M.R. said in *Dunn* v. *The Queen* (2), "All service under the Crown itself is public service . . . all public service under the Crown is for the public benefit"; and the Court of Appeal held in that case that it was the public policy of the country—"the public interest" as Lord *Herschell* said (3)—that made it necessary to import into contracts of employment in the service of the Crown (in the absence of statutory provision to the contrary) a term entitling the Crown to determine the employment at its pleasure. The service of the Crown and private service, despite their points of resemblance, belong, therefore, to different fields of law. The Crown has its own peculiar rights, powers and responsibilities in connection with the conduct of the public affairs of the State; and it is, I think,

(1) (1916) 2 A.C. 556.
(2) (1896) 1 Q.B. 116, at p. 118.
(3) (1896) 1 Q.B., at p. 119.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

KITTO J.

a mistake to try to force the relationships into which the Crown enters with its subjects for the conduct of those affairs into categories established in the domain of private law, which, by their nature and their history, are appropriate only to relationships between subjects.

The Supreme Court of the United States in *United States* v. *Standard Oil Co.* (1) drew a sharp distinction between " the Government's interests and relations " and " the highly personal relations " out of which the liability for causing loss of services arises. In *Admiralty Commissioners* v. *S.S. Amerika* (2) Lord *Sumner* said: " . . . so different both in its nature and 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 ". In *Reading* v. *Attorney-General* (3) Lord *Normand* said: " . . . the relation of a member of His Majesty's forces to the Crown is not accurately described as that of a servant under a contract of service " ; and Lord *Oaksey* said (4) : " the appellant, who was a soldier on active service in time of war, was not an ordinary servant ". " The relation of an officer (in the Indian Army) . . . to the Crown ", said *Grove* J. in *Grant* v. *Secretary of State for India* (5) " is not in the nature of an ordinary contract ". I do not understand the decision of the House of Lords in *Owners of S.S. Raphael* v. *Brandy* (6) to be at all inconsistent with this view. All that was there decided was that the employment in the Royal Naval Reserve of a person who was also employed on a merchant ship was a concurrent contract of service within the meaning of the *Workmen's Compensation Act*, 1906 (Imp.) (6 Edw. 7 c. 58). It does not follow that their Lordships, if they had had occasion to consider the matter, would have held that the contract created the strict relationship of master and servant as it is understood in the common law.

The only reported case in England in which the Crown has obtained damages for the loss of services of one of its " servants " appears to be *Attorney-General* v. *Valle-Jones* (7) where the point went by concession, and the only matter contested before the Court was the measure of damages. The case cannot stand with the decision of this court in *The Commonwealth* v. *Quince* (8). The correctness of that decision having been challenged in this case,

(1) (1949) 332 U.S., at p. 313 [91 Law. Ed., at pp. 2074, 2075].
(2) (1917) A.C., at p. 51.
(3) (1951) A.C., at p. 517.
(4) (1951) A.C., at p. 518.
(5) (1877) 2 C.P.D. 445, at p. 453.
(6) (1911) A.C. 413.
(7) (1935) 2 K.B. 209.
(8) (1944) 68 C.L.R. 227.

I must say, with respect, that in my opinion the case was rightly decided. There are two observations which I am led to make by consideration of the criticisms offered upon the decision in *Quince's Case*. The first is that, while an obligation of obedience to orders as to the manner of doing work is a *sine qua non* of the relation of master and servant, it does not follow that the existence of such an obligation is conclusive that the relation out of which it arises is that of master and servant. Secondly, I have not been able to follow how (apart from some special statutory provision) it can be maintained that the relation of master and servant may exist without a liability attaching to the master for acts of his servant done in the course of his service.

The particular class of persons in the service of the Crown with which the present case is concerned is the police force of New South Wales. That force is a regular service of the Crown; it is a disciplined force in the service of the Crown (*Fletcher* v. *Nott* (1)). Its organization and government are provided for by the *Police Regulation Act*, 1899-1947 (N.S.W.), the provisions of which have been sufficiently stated in the judgments already delivered.

The position of a police officer under provisions such as these has been examined by this Court in *Enever* v. *The King* (2), and *Ryder* v. *Foley* (3). These cases establish that in the execution of his duties a constable has powers and discretions which he derives, not by delegation from the Crown, but from the nature of his office, and which he exercises on his own independent responsibility. They justify the views expressed in *Delacauw* v. *Fosbery* (4) in which *Stephen* J. said: "The acts of a police constable are not in any sense performed on behalf of the Government, but are done by reason of the allegiance he owes to the Crown"; and *Simpson* J. said, "A constable is not an ordinary servant of the Government. He is a servant of His Majesty, and he has certain special duties which attach to him as a peace officer". (The latter statement provides a good illustration of the different senses in which the word "servant" may be used.) The matter may be summed up by saying that a member of the police force is under an obligation to perform duties of which some are statutory, some derive from the common law, and all are of a public character; and although a member of the police force is bound to obey the lawful orders of his superiors (s. 14), neither they nor the Crown itself can lawfully require him to abstain from performing the duties which the law imposes upon him with respect to the preservation of the

(1) (1938) 60 C.L.R. 55, at p. 77.
(2) (1906) 3 C.L.R. 969.
(3) (1906) 4 C.L.R. 422.
(4) (1896) 13 W.N. (N.S.W.) 49.

H. C. OF A. 1951-1952.

ATTORNEY-GENERAL FOR N.S.W. v. PERPETUAL TRUSTEE CO. (LTD.).

Kitto J.

peace and the apprehension of offenders, or can lawfully direct the detailed manner in which he shall perform those duties, and neither they nor the Crown itself (although amenable to actions of tort in New South Wales) can be held liable for acts done by a constable in relation to the duties of his office. These considerations seem to me sufficient in themselves to negative the existence of a master and servant relationship.

It may be said that it is the King's peace that a constable is required to preserve; but that peace "according to ancient ideas is the peace of the nation rather than of the King"; *Maitland, Constitutional History of England.* p. 108. It is worth mentioning, too, that the ultimate direction of the police force is vested, by s. 4 of the *Police Regulation Act*, not in the Crown but in the Minister; and, although in a political sense this may come to much the same thing, the distinction exists in point of law. Indeed a similar provision relating to the police force in England was selected by *Maitland* to give point to his observation that "To a very large extent indeed England is now ruled by means of statutory powers which are not in any sense, not even as strict matters of law, the powers of the King": *Maitland, Constitutional History of England*, pp. 415, 417.

Accordingly, even if it were to be conceded that with respect to some classes of persons in the service of the Crown the relation of master and servant in the strict sense exists, I should be of opinion that that relation does not exist between the Crown and a member of the police force, having regard to the nature of his office, the public character of his duties, the absence of power in the Crown to control the performance of his duties, and the consequential non-liability of the Crown for acts done within the scope of his duties.

A decision which, if correct, is against this view was given by *A. T. Lawrence* J. in *Bradford Corporation* v. *Webster* (1) in which the learned Judge held that a constable appointed by a municipal corporation was a servant of the corporation, and that the corporation could recover against a person by whose wrongful act the constable was disabled from performing his duties. No reasons for this conclusion were stated. In *Fisher* v. *Oldham Corporation* (2) *McCardie* J. thought that the *Bradford Corporation Case* (1) might, perhaps, be supported "as resting on a special or extremely artificial form of action", in which "so slender a claim" as that of a father for the loss of the service of his daughter "may afford a basis for an action". His Lordship had no occasion to form a considered

(1) (1920) 2 K.B. 135.

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

view on the matter. Earlier in this judgment it has been shown that the case of a father suing for loss of his child's services provides a cogent illustration of the insistence of the law upon confining the action *per quod servitium amisit* to cases where the peculiar relation of master and servant in its strict sense exists. In my opinion the *Bradford Corporation Case* (1) ought not to be accepted as a correct decision on the question of liability. The decision in *Fisher* v. *Oldham Corporation* (2) is one denying the liability of the body which appointed a constable for acts done by him in that capacity. It is in line with, and in fact follows, *Enever* v. *The King* (3) and contains a valuable discussion of the nature of a constable's office. *McCardie* J. said (4) " He is a servant of the State ", and then explained the statement by the words: " a ministerial officer of the central power, though subject, in some respects, to local supervision and local regulation ". It is difficult to suppose, in view of the whole tenour of the judgment, that, if his Lordship had had to decide the question with which the present case is concerned, he would have held that the central power and its ministerial officer are, in the strict sense, master and servant.

The Court was referred to the case of *Receiver for the Metropolitan Police District* v. *Tatum* (5), but no separate argument was based upon it. The case has no bearing upon the matter I have been discussing, but, if correctly decided, it might provide support for an alternative argument in favour of the appellant. With great respect to the learned Judge who decided it, I find myself unable to regard his decision as a correct application of the principles to which he referred, and in my opinion the case affords no assistance to the appellant here.

In my opinion the demurrer was rightly allowed, and the appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant, *F. P. McRae*, Crown Solicitor for New South Wales.

Solicitors for the respondents, *P. V. McCulloch & Buggy.*

J. B.

(1) (1920) 2 K.B. 135.
(2) (1930) 2 K.B. 364.
(3) (1906) 3 C.L.R. 969.
(4) (1930) 2 K.B., at p. 371.
(5) (1948) 2 K.B. 68.