[PRIVY COUNCIL.]

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

AND

PERPETUAL TRUSTEE COMPANY (LIMITED) . . . . . } RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

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Jan. 24-27, 31; *Feb.* 1, 2; *Mar.* 14.

Viscount Simonds, Lords Morton of Henrytown, Radcliffe, Cohen and Somervell of Harrow.

Master and Servant—Public office—Holder—Relationship between Crown and holder—Member of police force—Injury—Damages—Action per quod servitium amisit—Nature—Competency—"Serve"—Police Regulation Act 1899-1947 (*N.S.W.*) (*No.* 20 *of* 1899—*No.* 19 *of* 1947), *ss.* 4-6, 9, 10, 12, 18, 19, 27—*Police Regulation* (*Superannuation*) *Act* 1906-1944 (*N.S.W.*) (*No.* 28 *of* 1906—*No.* 1 *of* 1944)—*Industrial Arbitration Act* 1940-1948 (*N.S.W.*) (*No.* 2 *of* 1940—*No.* 13 *of* 1948).

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 appointed under the *Police Regulation Act* 1899-1947 (N.S.W.).

There is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office, which includes a member of the police force appointed under the *Police Regulation Act* 1899-1947 (N.S.W.).

The meaning of the word "serve" discussed.

Bradford Corporation v. *Webster* (1920) 2 K.B. 135, and *Attorney-General* v. *Valle-Jones* (1935) 2 K.B. 209, explained.

Owners of S.S. Raphael v. *Brandy* (1911) A.C. 413, referred to.

R. v. *Richardson* (1948) S.C.R. (Can.) 57, *United States* v. *Standard Oil Co.* (1946) 332 U.S. 301 [91 Law. Ed. 206] and dictum of Lord *Sumner* in *Admiralty Commissioners* v. *S.S. Amerika* (1917) A.C. 38, at p. 60, considered.

Attorney-General and Minister for Justice v. *Dublin United Tramway Co. Ltd.* (1939) 1 I.R. 590, disapproved.

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

Decision of the High Court: *Attorney-General for New South Wales* v. *Perpetual Trustee Co.* (*Ltd.*) (1952) 85 C.L.R. 237, affirmed.

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APPEAL from the High Court to the Privy Council.

This was an appeal by special leave from a judgment of the High Court (1) affirming a judgment of the Supreme Court of New South Wales (2).

The facts and relevant statutory provisions appear in the judgment hereunder.

Frank Gahan Q.C. and *J. G. Le Quesne*, for the appellant.

Viscount *Hailsham* Q.C. and *Dingle Foot* Q.C., for the respondents.

Their Lordships took time to consider the advice which they would tender to Her Majesty.

Mar. 14.

Viscount SIMONDS delivered the judgment of their Lordships as follows :

This appeal, which is brought from a judgment of the High Court of Australia affirming a judgment of the Supreme Court of New South Wales, raises a question of first rate importance.

The suit out of which the appeal arises was commenced by the Attorney-General for New South Wales by information dated 30th June 1950, filed in the Supreme Court of New South Wales. In this information it was alleged on behalf of the Crown that the first and second respondents were executors of the will of Frederick James Johnson deceased and as such the owners of a certain motor vehicle, that the vehicle was being driven on a public highway by the fourth respondent as agent of the third respondent, and that one Bertrand Leslie Hayden, a member of the police force of New South Wales, was passing along the highway in a tram car when the motor vehicle was negligently driven against the tram car whereby Hayden received bodily injury disabling him from the performance of his duties as a member of the police force. The information further alleged that during his period of disability and whilst he continued as a member of the police force Hayden was paid the salary and allowances appropriate to his office although the Crown was during the same period deprived of his services as a member of such police force, and that upon his discharge Hayden was paid and had since been and would continue to be paid a pension in accordance with the provisions of *Police Regulation (Superannuation) Act* 1906-1944, whereas but for such disablement he would not have commenced to receive a pension in accordance

(1) (1952) 85 C.L.R. 237.

(2) (1951) 51 S.R. (N.S.W.) 109 ; 68 W.N. 116.

with the provisions of the said Act for a long time. The Attorney-General claimed on behalf of the Crown to recover the salary and allowances paid as aforesaid and to be reimbursed in respect of the moneys already paid and which would thereafter be paid to Hayden pursuant to the said Act. The amount of the Attorney-General's claim was expressed to be £5,050 3s. 9d.

On 13th September 1950, the respondents delivered a defence pleading the general issue and denying the allegations contained in the information. In addition, the respondents demurred to the information in the following terms: "And the defendants and each of them further say that the declaration herein is bad in substance.

On the argument of this demurrer it will be contended that the said declaration is bad in substance on the following amongst other grounds: (1) That it discloses no cause of action. (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."

On 25th September 1950, the Attorney-General filed a joinder in demurrer and a replication joining issue on the respondents' pleas. The case was set down and argued on the defendants' demurrer on 13th February 1951.

On 9th March 1951, the Supreme Court of New South Wales gave judgment on the demurrer in favour of the respondents (1). *Street* C.J. held that the case was completely covered by the decision of the High Court of Australia in *The Commonwealth* v. *Quince* (2) in which case it was decided that an action would not lie at the suit of the Crown in respect of the loss of the services of a member of the Royal Australian Air Force as a result of injuries sustained by him owing to the negligent driving of the respondent. The other learned judges of the Supreme Court concurred and gave further reasons for holding that the action would not lie.

On appeal to the High Court the learned judges of that Court dismissed the appeal by a majority (3) (*Dixon* C.J., *McTiernan*, *Webb*, *Fullagar* and *Kitto* JJ., dissentiente *Williams* J.), but *Dixon* C.J. said that he felt constrained to follow the decision in *Quinces' Case* (2) and that, had the matter been *res integra*, he would have held that the action was maintainable. The questions that appear to arise are what are the nature and limits of the action *per quod servitium amisit* and whether a constable appointed under the *Police Regulation Act* 1899-1947 (N.S.W.) stands in such a relation to the Crown that the action lies at the suit of the Crown for the loss of his services by reason of the tortious act of a wrongdoer.

(1) (1951) 51 S.R. (N.S.W.) 109; 68 W.N. 116.
(2) (1944) 68 C.L.R. 227.
(3) (1952) 85 C.L.R. 237.

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It will be convenient first to set out some of the relevant provisions of this Act since reliance has been placed upon them by both parties. Reference may be made to the following sections: 4.—(1) 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. (4) The commissioner may be suspended or removed from his office for misbehaviour or incompetence as follows:—(a) The commissioner may be suspended from his office by the Governor for misbehaviour or incompetence, but shall not be removed from office except as hereinafter provided. The Minister shall cause to be laid before Parliament a full statement of the grounds of suspension within seven sitting days after such suspension if Parliament is in session, and if not, then within seven sitting days after the commencement of the next session; (b) the commissioner suspended under this section shall be restored to office unless each House of Parliament within twenty-one days from the time when such statement has been laid before it, declares by resolution that the commissioner ought to be removed from office, and if each House of Parliament within the said time does so declare, the commissioner shall be removed by the Governor accordingly. 4A.—(1) The Governor may from time to time appoint a deputy commissioner of police who shall assist the commissioner generally in the superintendence of the police force of New South Wales.

5.—(1) The Governor may appoint such number of superintendents and inspectors of police as may be found necessary.

6.—(1) The commissioner may, subject to disallowance by the Governor, appoint so many sergeants and constables of police of different grades as he deems necessary for the preservation of the peace throughout New South Wales. (2) Such constables shall, unless and until their appointments respectively are disallowed by the Governor, 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.

9. 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.

Such oath shall be administered by a justice, and shall in all cases be subscribed by the person taking the same, and when so taken and subscribed shall be forwarded to the commissioner by the justice before whom the same was taken".

10. Every person taking and subscribing such oath shall be deemed to have thereby entered into a written agreement with and shall be thereby bound to serve Her Majesty as a member of the police force and in the capacity in which 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.

12. The Governor may make rules for the general government and discipline of the members of the police force and to give effect to this Act or any amendment thereof.

18.—(1) No member of the police force shall be at liberty to resign his office or to withdraw from the duties thereof unless expressly authorized in writing so to do by the commissioner or other member of the police force under whom he is placed, or unless he gives to such member of the police force three months' notice of his intention so to resign or withdraw. (2) Any member of the police force who so resigns or withdraws without such previous permission or notice shall, on conviction before two justices, be liable to a penalty not exceeding twenty pounds.

19.—(1) When any member of the police force is dismissed from or ceases to hold his office, all powers and authorities vested in him shall immediately cease.

27. Nothing in this Act contained shall be deemed to diminish the duties or restrict or affect the liabilities of constables at common law, or under any Act now in force or hereafter to be passed.

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References in the Act to the " office " of a constable and to his powers and duties at common law make it desirable to say something about this ancient office, and this is the more important because, unless the action *per quod servitium amisit* is held to extend to every case in which what is in any context called service is rendered by one who is called a servant, it is essential to define with what precision is possible the nature of the service rendered and the relation in which he who renders it stands to him to whom it is rendered. It must be said at once that it does not appear to their Lordships that the matter is concluded by recalling that under the Act a constable taking the statutory oath is deemed to be bound to " serve Her Majesty as a member of the police force " or that he may be referred to as a servant of the Crown.

The position of a constable has been the subject of decision in recent times both in Australia and in England and it will not be necessary to traverse the whole field which their Lordships in the course of the hearing were able to survey. In *Enever* v. *The King* (1) the question was as to the liability of the Government of Tasmania for the wrongful arrest of the plaintiff by a constable in the intended performance of his duties as an officer of the peace and a passage from the judgment of *Griffith* C.J., in the High Court of Australia illuminates the position. " At common law the office of constable or peace officer was regarded as a public office, and the holder of it as being, in some sense, a servant of the Crown. The appointment to the office was made in various ways, and often by election. In later times the mode of appointment came to be regulated for the most part by Statute, and the power of appointment was vested in specified authorities, such as municipal authorities or justices. But it never seems to have been thought that a change in the mode of appointment made any difference in the nature or duties of the office, except so far as might be enacted by the particular Statute " (2). The learned Chief Justice then cites with approval an observation of Lord *Alverstone* C.J., in *Stanbury* v. *Exeter Corporation* (3). " ' This case . . . is, I think, very analogous to that of police and other officers, appointed by a corporation, who have statutory duties to perform, where, although they owe a duty to the corporation appointing them, there is no ground for contending that the corporation are responsible for their negligent acts ' (4)"(5). In the same case *Barton* J. points out that it is not enough merely to describe as a servant the person for whom it is sought to make the executive government responsible. " As I have pointed

(1) (1906) 3 C.L.R. 969.
(2) (1906) 3 C.L.R., at p. 975.
(3) (1905) 2 K.B. 838.
(4) (1905) 2 K.B. 838, at p. 841.
(5) (1906) 3 C.L.R., at p. 976.

out" he says "the person must be not only the servant of the superior, but must be under the control of the superior before the latter can be held liable. I am of opinion that that is not the case where a constable is obeying a Statute, because when an act is done under a Statute, an order not to do it is one which has no weight or validity, while the order of the Executive Government to do the duty imposed by the Statute gives no added force to the command of the Statute" (1). The passages cited from the judgments in *Enever's Case* (2) referred to the relation of the constable to the Government in a case where the doctrine of *respondeat superior* was under review and their Lordships do not suggest that the areas of the applicability of that doctrine and of the action *per quod servitium amisit* are necessarily co-terminous. Upon this point they concur in the view expressed by *Latham* C.J., in *Quince's Case* (3). But in both classes of case the same question arises as to the position of a constable and the cited passages appear to be strictly apposite. So also in *Fisher* v. *Oldham Corporation* (4) where it was held that the police appointed by the watch committee of a borough corporation, if they arrest and detain a person unlawfully, do not act as the servants or agents of the corporation so as to render that body liable to an action for false imprisonment, it was necessary to consider the same question and *McCardie* J., after a review of the authorities, ancient and modern, in the course of which he referred with approval to *Enever's Case* (2) and with something less than approval to the *Bradford Corporation* v. *Webster* (5) presently to be mentioned, made this observation which appears to their Lordships to be well worth citing. "Suppose" he said "that a police officer arrested a man for a serious felony? Suppose, too, that the watch committee of the borough at once passed a resolution directing that the felon should be released? Of what value would such a resolution be? Not only would it be the plain duty of the police officer to disregard the resolution, but it would also be the duty of the chief constable to consider whether an information should not be at once laid against the members of the watch committee for a conspiracy to obstruct the course of criminal justice" (6). The value of this vivid illustration is that it indicates how inappropriate it would be in the view of the learned judge to describe the relation of watch committee and police officer as that of master and servant. This view is reinforced by his observations upon the *Bradford Corporation Case* (5) which he

(1) (1906) 3 C.L.R., at p. 983.
(2) (1906) 3 C.L.R. 969.
(3) (1944) 68 C.L.R., at p. 235.
(4) (1930) 2 K.B. 364.
(5) (1920) 2 K.B. 135.
(6) (1930) 2 K.B., at pp. 372, 373.

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said he could not regard as in any way a decision that the normal relation of master and servant or principal and agent exists between a police officer and the municipal corporation within whose area he acts. " So to hold " he said " would be contrary, in my view, to establish decision and to sound public policy " (1). *Fisher's Case* (2) demands further consideration. For in it there are not only the passages already cited and other passages which appear to their Lordships, consistently with *Enever's Case* (3) to state the law correctly as to the relation of a constable to the watch committee or other appointing body, but also observations upon which appellant's counsel relied as showing that a constable is at least the servant of somebody and that with somebody the relation of master and servant exists. The learned judge, for instance, says of a police constable that " he is a servant of the State, a ministerial officer of the central power, though subject, in some respects, to local supervision and local regulation " (4) and somewhat earlier he says : " It is clear from *Mackalley's Case* (5) that a constable, watchman or the like person was regarded as a servant or minister of the King " (6). And he is to be regarded as a servant or minister of the King because, as Lord *Blackburn* said in *Coomber* v. *Justices of Berks* (7) the administration of justice, both criminal and civil, and the preservation of order and prevention of crime by means of what is now called police, are among the most important functions of government and by the Constitution of this country these functions do of common right belong to the Crown. A constable then may be said in a certain context and sometimes with the appendage " or minister " to be a " servant of the Crown ". It remains to be considered whether between him and the Crown, or in the present case the Government of New South Wales, the relation of servant and master exists so as to found the action *per quod servitium amisit.* But before doing so their Lordships will refer to some of the points made in the course of the argument upon the position of a constable.

For the appellant great stress was laid on the change that had taken place in the organization of the police force in England since the first *Metropolitan Police Act* 1829 was passed. No doubt great changes have been made which are reflected in the organization of the police force in New South Wales today, but the substantial change was made long before *Enever's Case* (3) was decided in Australia or *Fisher's Case* (2) in England, and those cases show

(1) (1930) 2 K.B., at p. 375.
(2) (1930) 2 K.B. 364.
(3) (1906) 3 C.L.R. 969.
(4) (1930) 2 K.B., at p. 371.
(5) (1611) 9 Co. Rep. Pt. IX, 61b. at pp. 65b, 68b [77 E.R. 824, at pp. 828, 834, 835].
(6) (1930) 2 K.B., at p. 369.
(7) (1883) 9 App. Cas. 61, at p. 67.

convincingly that neither changes in organization nor the imposition of ever-increasing statutory duties have altered the fundamental character of the constable's office. Today as in the past he is in common parlance described in terms which aptly define his legal position as " a police officer ", " an officer of justice ", " an officer of the peace ". If ever he is called a servant, it is in the same sense in which any holder of a public office may be called a servant of the Crown or of the State. And here their Lordships must observe that, if a constable is by reason of his terms of service to be regarded as the servant of a master, the Government of New South Wales, so also are his superiors in the same service up to and including the commissioners who take the same oath and are subject to the same provisions of the *Police Regulation Act*. The appellant did not shrink from this conclusion, but it appears to their Lordships to emphasize in a convincing manner the danger of reasoning which would admit the entertainment of an action *per quod servitium amisit*, wherever it can be said in however general a sense that there is a contract of service or that a man is a servant of the Crown.

Next their Lordships would refer briefly to the oath which appears from early times to have been required of the constable, as it was in varying forms required of other persons holding public office. In such an oath the word " serve " will commonly be found, just as in the case under appeal the constable Hayden swore that he would well and truly serve his Sovereign in the office of constable. It appears to their Lordships that in such a context the use of the word " serve " is of negligible significance. It is the traditional word in the context of subject and Sovereign and does not by itself import the relation of master and servant in the ordinary sense of those words. A single illustration will suffice. A special constable appointed under the *Special Constables Act* 1831, is required to swear (unless, instead, he affirms) that he will well and truly serve his Sovereign in the office of special constable and so on. It may on the other hand be of some significance that an oath should be required to be taken at all. It is not the usual concomitant of the master and servant relationship.

Finally before examining the history and scope of the action to which this appeal relates it is proper to refer to *Blackstone's Commentaries*. In the early part of the 17th century *Lambard* writing on the " duties of constables " had referred to them as " constables and such other law ministers of the peace ". *Blackstone* following *Lambard* a century and a half later deals with the subject in a manner to which (in agreement with *Kitto* J.) their Lordships attach much importance. Reference is made to the 20th ed., 1841. In

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Book I, Chapter IX the author deals with the " rights and duties of the principal subordinate magistrates " and he treats in turn of, first, the sheriff and his officers, second, the coroner, third, the justices of the peace, fourth, the constable, fifth, the surveyor of highways, and, last, the overseers of the poor. Later writers have pointed out some errors in his treatment of the constable but none that is relevant to the present purpose. A later chapter, the XIVth, opens with these significant words " 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." He then states that there are three great relations in private life of which the first is that of master and servant " which is founded in convenience, 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 ". It is in this connection that he discourses on the relation of master and servant and, amongst other things, on the actions which a master may maintain in respect of his servant, including the form of action now under review. It is in the same connection that the matter is treated in modern text books on the law of torts, of which a single example will suffice. In *Salmond* on *Torts*, 11th ed. (1953), at p. 406 under the heading " Master and Servant: Loss of Service " the learned editor after referring to the action says " In truth the doctrine is a historical relic of the days when a master had a proprietary interest in his servant and seems anomalous in modern industrial conditions ". This citation is more strictly relevant to the later part of this judgment but its present importance lies in the broad distinction which *Blackstone* had previously made between public officers and domestic relations. There appears to their Lordships to be ample justification for saying as was said in the High Court that the service of a constable is " different in nature " or " on a different plane " from the domestic relation, that it is " different both in its nature and its incidents ", and that, even if some of the incidents which the law implies in the ordinary contract of service are present also in the relation of the constable to the Crown, there is a fundamental difference which makes it necessary to approach with caution the question whether a form of action available in the one case is available in the other also.

It is now time to consider the action *per quod servitium amisit*, its origin and development.

There is no doubt that from early days a master could maintain an action against a wrongdoer for the loss of the services of his

servant and that this right (to quote Sir William *Holdsworth*) "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". It is clear too from the cases cited from the Year Books and elsewhere in the learned judgment of *Dixon* C.J. (1) that the action did not depend on any contract of service between master and servant but on the single fact of service. Thus an action lay by the father for the seduction or debauching of his daughter if he could prove that she had rendered him service, however slight, and that he had been thereby deprived of that service. The law could indeed hardly have been otherwise as the form of action in trespass was established before the concept of contract had been developed in our jurisprudence.

But, though the contractual relation had no part in the historical origin of the action, it was inevitable that, as the relation of master and servant came to be less and less a matter of status and to depend more and more on a contract between the parties, that relation should become more prominent in the cases in which this form of action was used. In particular, where the relation of master and servant lay in contract, it was an easy development to found an action *per quod servitium amisit* on the fact that the defendant had induced the servant to break his contract and enticed him from his master's service. And this development led in turn to the establishment of a right of action for malicious procurement of a breach of contract for personal service even where the employer and employed did not stand in the strict relation of master and servant. This was the point at issue in the celebrated case of *Lumley* v. *Gye* (2) and in the course of the hearing before their Lordships' Board the judgments of the majority of the judges (*Crompton*, *Erle* and *Wightman* JJ.) and of *Coleridge* J., who dissented, were extensively canvassed.

It does not appear to their Lordships that the case of *Lumley* v. *Gye* (2) throws much light upon the problem to be solved in the present case. If the law had developed in all respects logically, that case would be an authority for saying that, if Miss Wagner had not been maliciously enticed from the service of the plaintiff but had been by battery or otherwise wrongfully prevented from serving him, the plaintiff would have had a good cause of action against the wrongdoer. But it has never been suggested that that is the law. On the contrary it is fundamental (as *Rich* J., pointed out in

(1) (1952) 85 C.L.R., at pp. 243-253. (2) (1853) 2 E. & B. 216 [118 E.R. 749].

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Quince's Case (1)) that the mere fact that an injury to A. prevents a third party from getting from A. a benefit which he would otherwise have obtained does not invest the third party with a right of action against the wrongdoer : see *La Société Anonyme de Remorquage à Hélice* v. *Bennetts* (2). Nor, strictly, is *Lumley* v. *Gye* (3) an exception to this rule, for it was not by reason of any injury to Miss Wagner that the plaintiff suffered damage. It is the better course, then, ignoring the way in which the law has developed where the wrongdoer has procured the breach of a contract of service, to examine solely the case where the master has lost the services of a servant by reason of injury to the servant. For that is the historical origin of the action and those are alleged to be the facts of the case under appeal. It appears to their Lordships to be permissible in approaching this question to bear in mind what Lord *Sumner* said in *Admiralty Commissioners* v. *S.S. Amerika* (4) :—" Indeed, what is anomalous about the action *per quod servitium amisit* is not that it does not extend to the loss of service in the event of the servant being killed, but that it should exist at all. It appears to be a survival from the time when service was a status " (5). The question then may once more be stated. Is the relation of the Government of New South Wales to a constable engaged under the provisions of the *Police Regulation Act* 1899-1947 such that this action lies ? Of the two aspects of this question, viz. first, what is the relation of a constable to the Government and, secondly, what is the scope of the action, enough has been said upon the first to indicate their Lordships' view that the relation is not that of master and servant in the sense in which those terms are ordinarily used. But the appellant says that, whatever those terms strictly mean and whatever may have been the historical origin of the action, today an action lies in such a case as this. For, he says, even if (to quote again from *Latham* C.J., in *Quince's Case* (6)) a member of the forces (and equally a constable) is not a servant of the Crown in such a sense that the ordinary law of master and servant determines the relation of the parties yet by analogy and upon a consideration of the history of the form of action the action lies. This was perhaps the determining factor with *Williams* J. (7) who said that the decision in *Quince's Case* (6) was manifestly wrong because it proceeded on the view that the relationship of the Crown and a member of the armed forces was not analogous to that of a master and servant under a contract of service. And this consideration probably

(1) (1944) 68 C.L.R., at p. 240.
(2) (1911) 1 K.B. 243.
(3) (1853) 2 E. & B. 216 [118 E.R. 749].
(4) (1917) A.C. 38.
(5) (1917) A.C. 38, at p. 60.
(6) (1944) 68 C.L.R. 227.
(7) (1952) 85 C.L.R., at p. 266.

influenced *Dixon* J., to say " 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 " (1). With much of this their Lordships respectfully agree, but it appears to them more pertinent to consider when in its historical development and upon what consideration this form of action was first used at the suit of the Crown for the loss of the service of persons of high or low degree whose service lay in the public field. It will be seen that in England at least it was first so used at a very recent date and upon little or no consideration.

Their Lordships have been referred to a large number of relevant cases. The great majority have been concerned with enticing servants from their service or harbouring them after they had left it. As already pointed out, this class of case, though it may have developed out of the original form of action, yet differs essentially from it in that injury has not been done to the servant whereby the master has lost his service but has been done solely to the master whose servant has been enticed or harboured. If this distinction is recognized, it is easy to reconcile subsequent cases. Thus in *Taylor* v. *Neri* (2) it was held that the action *per quod servitium amisit* would not lie for the manager of a place of public entertainment against a person for beating one of the performers who was thereby prevented from performing, *Eyre* C.J., saying that " he did not think the Court had ever gone further than the case of a menial servant " (3). It is not clear to what range of service the term " menial " extended in the judgment of the Chief Justice but it is difficult to suppose that he was unaware of the limits of the action or that he did not know how far it had gone in cases of enticement and harbouring. It is more reasonable to infer that he recognized the distinction to which *Crompton* J. referred in *Lumley* v. *Gye* (4). That learned judge after commenting on the decision in *Taylor* v. *Neri* (2) said :—" Whatever may be the law as to the class of actions referred to, for assaulting or debauching daughters or servants *per quod servitium amisit*, and *which differ from actions of the present nature for the wrongful enticing or harbouring with notice*, as pointed out by Lord *Kenyon* in *Fores* v. *Wilson* (5), it is clear from *Blake* v. *Lanyon* (6) and other subsequent cases, (*Sykes* v. *Dixon* (7) ;

(1) (1952) 85 C.L.R., at p. 248.
(2) (1795) 1 Esp. 386 [170 E.R. 393].
(3) (1795) 1 Esp., at p. 386 [170 E.R., at p. 393].
(4) (1853) 2 E. & B., at p. 228 [118 E.R., at p. 754].
(5) (1791) 1 Peake's 77 [170 E.R. 85].
(6) (1795) 6 T.R. 221 [101 E.R. 521].
(7) (1839) 9 Ad. & E. 693 [112 E.R. 1374].

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Pilkington v. *Scott* (1) and *Hartley* v. *Cummings* (2)), that the action for maliciously interfering with persons in the employment of another is not confined to menial servants as suggested in *Taylor* v. *Neri* (3)" (4).

The distinction thus recognized is of great importance in considering the present scope of the action, for it affirms the view that the development of the law in relation to enticing and harbouring and maliciously procuring a breach of contract may properly be disregarded where the cause of action lies in injury to a servant whereby the master has lost his services. The scope of the inquiry is accordingly narrowed down to those cases in which such injury has been done and damage suffered. It must at once be said that the relevant cases are few. Up to the end of the 19th century the widest extension of the master and servant relationship appears to be in *Martinez* v. *Gerber* (5). In that case the injured person, whose service was lost to the plaintiffs by reason of the reckless driving of the defendant's gig, was described as the plaintiffs' " servant and traveller ". The terms of his service are not stated, but the substantial question in the case was the somewhat technical one, whether the master could maintain the action inasmuch as the servant could not have maintained an action in trespass but must have sued in case. The decision must however be regarded as establishing that at this date a person described as a servant and traveller stood in such a relation to his master as to support the action, and this probably represents some advance from the limit suggested by *Eyre* C.J. The 19th century closed without, so far as their Lordships are aware, any further advance and in particular without any decision that the holder of any such office as that of a constable was a " servant " for the purpose of the rule. But in 1920 in *Bradford Corporation* v. *Webster* (6) it was held that the plaintiff corporation was entitled to recover as damages for the loss of service of a constable in their service who had been damaged by the negligent driving of the defendant's steam wagon. The importance, however, of this decision is greatly reduced by the fact that the question whether the action lay was allowed to go by default. The question, and the only question, was what was the measure of damages which the plaintiff corporation was entitled to recover. None of the cogent considerations, which prevailed with the High Court of Australia in *Quince's Case* (7) and in the present case, were

(1) (1846) 15 M. & W. 657 [153 E.R. 1014].
(2) (1847) 5 C.B. 247 [136 E.R. 871].
(3) (1795) 1 Esp. 386 [170 E.R. 393].
(4) (1853) 2 E. & B., at p. 228 [118 E.R., at p. 754].
(5) (1841) 3 M. & G. 88 [133 E.R. 1069].
(6) (1920) 2 K.B. 135.
(7) (1944) 68 C.L.R. 227.

brought to the notice of the Court. It does not appear to their Lordships that *Webster's Case* (1) can be relied on. The same observations apply to the case of *Attorney-General* v. *Valle-Jones* (2). In that case two aircraftmen of the Royal Air Force were injured as a result of a collision with a motor lorry whereby the Crown lost their services, but again the only question was as to the measure of damage. The reported argument of counsel opens with the admission that the action was available to the Crown as an employer as well as to a subject. Some weight no doubt may be attached to the fact that judge and counsel alike in these cases assumed without question that the action lay, but their Lordships cannot regard it as a predominant consideration.

Reference should also be made to *Owners of S.S. Raphael* v. *Brandy* (3) because reliance was placed upon it by the appellant and by *Williams* J. in the High Court of Australia. In that case a stoker in the mercantile service, who was also a stoker in the Royal Naval Reserve and as such entitled to a retainer of six pounds a year, met with an accident while employed on a merchant ship. The question was whether for the purpose of assessing his compensation under the *Workmen's Compensation Act* he was serving under concurrent contracts of service within the meaning of the Act and this depended on whether he had a contract of service with the Crown under which he earned his retainer. It was held that he had, Lord *Loreburn* L.C. saying that he agreed with *Fletcher Moulton* L.J. that it was almost a typical case of concurrent contracts because the workman was being paid wages for his service on board a merchant ship and at the same time was earning his six pounds a year by virtue of his engagement with the Crown and he was giving his equivalent for that because he was keeping himself fit and doing the work which he stipulated to do. But this case is relevant only if it is assumed that where there is any contract of service the relation of servant and master necessarily arises and their Lordships agree with *Kitto* J. (4) in thinking that *Brandy's Case* (3) does not justify the view that the House of Lords if it had occasion to consider the matter would have held that the contract there under review created that relation.

The case last cited is however useful as again illustrating how easily the words "serve", "service", and "servant", may be used to describe one side of a relation which is not that of master and servant. For it may be repeated that a soldier or sailor may

(1) (1920) 2 K.B. 135.
(2) (1935) 2 K.B. 209.
(3) (1911) A.C. 413.
(4) (1952) 85 C.L.R., at p. 302.

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be called a servant of the Crown : yet as *Latham* C.J. said in *Quince's Case* (1) " It is, I think, true that a member of the forces is not a servant of the Crown in such a sense that the ordinary law of master and servant determines the relations of the parties " (2).

Their Lordships' attention has been properly called (as was that of the High Court) to relevant cases which were decided in Canada, Eire, and the United States of America and something must be said about them. In the Canadian case *R.* v. *Richardson* (3) the question turned on the meaning and effect of a Canadian statute of 1943 which, *inter alia*, 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 ", and it was held that under this statute an action lay at the suit of the Crown for damages arising out of the loss of service of a member of the forces owing to the tortious act of the defendant. It is not for their Lordships to determine whether this case was correctly decided ; its persuasive value is undoubtedly diminished by the powerful dissenting judgment of *Kellock* J. It is perhaps sufficient to say that the statute appears to have been enacted shortly after the decision in *McArthur* v. *The King* (4) that the Crown was not liable under the maxim *respondeat superior* for the negligent act of a member of its forces and it was not difficult to come to the conclusion that the master-servant relation, having been thus established for one purpose, should prevail for another also.

In the American case, *United States* v. *Standard Oil Co.* (5) the actual decision, as *Fullagar* J. said, went on the grounds that no State law could apply to the Federal " Government-soldier relation " and that there was no Federal law which gave to the United States the right claimed. Their Lordships agree too with him in thinking that the majority of the judges of the Supreme Court were disposed to the view that the " Government-soldier relation " differed materially from the ordinary master and servant relation.

In the Irish case *Attorney-General and Minister for Justice* v. *Dublin United Tramways Co.* (1896) *Ltd.* (6) it appears that a different view was taken, for there it was held that the relationship of master and servant existed between the People of Eire and the Civil Guard and that the Attorney-General representing the People could sue for

(1) (1944) 68 C.L.R. 227.
(2) (1944) 68 C.L.R., at p. 238.
(3) (1948) S.C.R. (Can.) 57.
(4) (1943) 3 D.L.R. 225.
(5) (1946) 332 U.S. 301 [91 Law. Ed. 206].
(6) (1939) I.R. 590.

and recover damages for loss of the service of a member of the Guard. Their Lordships find themselves unable to agree with this decision which in their respectful view gives too little weight to the considerations which have influenced them.

Their Lordships have made many references to *Quince's Case* (1) which was in the High Court regarded as indistinguishable in principle from the present case, and have freely borrowed from the judgments of *Rich*, *Starke* and *McTiernan* JJ., in that case. In their view its facts, at least as clearly as those of the present case, support the view that the master and servant relation, upon which the action *per quod servitium amisit* rests, is wholly different in kind from the relation of the Crown to a member of the armed forces, whether Field Marshal or private soldier, and that a rule of law which applies to one should not be applied to the other unless there is compelling authority to do so. The review of the case law on the subject has shown that is far from being the fact. Their Lordships share the opinion entertained by all the judges of the High Court that the case of the constable is not in principle distinguishable from that of the soldier. Certain differentiating features such as the right given to the police under the *Industrial Arbitration Act* 1940-1948 cannot affect the position.

Their Lordships can now express their final opinion upon the case. They repeat that in their view there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he is said to serve. The constable falls within the latter category. His authority is original not delegated and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract. The essential difference is recognized in the fact that his relationship to the Government is not in ordinary parlance described as that of servant and master. Nor, as would appear from quotations that have been made and others that might have been made from the dissentient judgments in *Quince's Case* (1) and the present case, would a different view be taken upon this point by learned judges who have come ultimately to a different conclusion. It is rather upon what has been called the second aspect of the question that the difference arises. Their Lordships, differing with great respect upon this part of the case from the judgment of *Latham* C.J., in *Quince's Case* (1) and from *Dixon* C.J. and *Williams* J., in the present case, think that this form of action should not be extended beyond the limits to which it has been carried by binding authority or at least by authority long recognized

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

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as stating the law. Their review of the relevant case law shows that, where in recent times it has been extended to cases of persons in the public service who (to repeat the now familiar words) are not servants of the Crown in such a sense that the ordinary law of master and servant determines the relation of the parties; the extension has been made without argument or deliberation. The form of action appears, as Lord *Sumner* said, to be a survival from the time when service was a status. That status lay in the realm of domestic relations. It would not in their Lordships' view be in accord with modern notions or with the realities of human relationships today to extend the action to the loss of service of one who, if he can be called a servant at all, is the holder of an office which has for centuries been regarded as a public office.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed.

The appellant must pay the respondents' cost of this appeal as between solicitor and client in accordance with the condition upon which special leave to appeal was given.

Appeal dismissed with costs.

Solicitors for the appellant, *Light & Fulton.*
Solicitors for the respondents, *Bell, Brodrick & Gray.*

J. B.