DONATO MASELLA *(Petitioner)* .....APPELLANT

AND

J. M. LANGLAIS *(Defendant)* .....RESPONDENT

1954
*Nov. 17
1955
*Mar. 7

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Immigration—Habeas Corpus—Entry in Canada—Visa irregular—Immigrant detained then freed on bail—Whether order of deportation can be reviewed—Whether immigrant entitled to writ of habeas corpus—Immigration Act, R.S.C. 1927, c. 93, ss. 3(i), 13, 19, 23, 40—Code of Civil Procedure, Art. 1114.

The appellant, an Italian subject, was allowed to enter Canada as an immigrant. He had obtained what purported to be a visa from a Canadian officer in Naples, authorized to issue such documents, but, in fact, the issue of that visa had been irregular and the usual medical and other examinations required of an immigrant by the *Immigration Act*, R.S.C. 1927, c. 93 and regulations thereunder had not taken

*PRESENT: Taschereau, Locke, Cartwright, Fauteux and Abbott JJ.

1955

MASELLA
v.
LANGLAIS

place. Subsequently, a complaint, under s. 40 of the Act, to the effect that he was a prohibited immigrant under s. 3(i) of the Act, was lodged. He was taken into custody and appeared and was represented by counsel before a Board of Inquiry, who ordered that he be detained and deported. He was released on bail and undertook in writing to report in person once a week to an immigration officer. Upon appeal, the order of the Board was confirmed by the Minister. While thus at liberty, the appellant obtained the issue of a writ of *habeas corpus ad subjiciendum*. The writ was quashed by the trial judge and this judgment was affirmed by a majority in the Court of Appeal.

Held: The appeal should be dismissed.

Per Taschereau J.: When, as was the case here, the order of the Board of Inquiry, confirmed by the Minister, seems to have been made in accordance with the provisions of the *Immigration Act*, the courts cannot intervene: s. 23 of the *Immigration Act*. The courts cannot decide if in fact an immigrant is or not a desirable person.

Per Taschereau and Abbott JJ.: The legality of the appellant's entrance to Canada was subject to question at any time until he had acquired Canadian domicile, and, consequently, his contention that because he was allowed to land in Canada on the strength of a visa and a certificate of medical examination assumed to have been legally issued, no complaint to the Minister could be validly laid under s. 40 of the Act, cannot be sustained. Immigration to Canada is a privilege and not a matter of right. In this case, it was established to the satisfaction of the Board of Inquiry that the requirements of the Act and regulations had not been met. Furthermore, by virtue of s. 23 of the Act, it is clear that where a board of inquiry has taken evidence in good faith and has otherwise complied with the provisions of the statute, as was done here, a court has no jurisdiction to substitute its judgment for that of the board.

Per Locke, Cartwright and Fauteux JJ.: The writ of habeas corpus, by its terms and its very nature, is inapplicable to a situation where the person is at liberty on bail and is not confined or restrained of his liberty. The language of Article 1114 of the *Code of Civil Procedure* is to be construed in the same manner as similar language in the statutes to which it owes its origin. In the present case, the immigration officer to whom the writ was directed had neither the custody or control of the appellant, either at the time the writ was issued or when it was served or when he made his return to the writ and the contention that he was restrained of his liberty within the meaning of Art. 1114 C.P.C. was without foundation. Consequently, the appellant was not entitled to the remedy of a writ of habeas corpus and as no proceeding by way of certiorari was taken, this was fatal to the appeal. *Reg* v. *Cameron*, (1898) 1 C.C.C. 169 and *de Bernonville* v. *Langlais*, Q.R. [1951] S.C. 277 disapproved.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming, Gagné and Rinfret JJ.A. dissenting, the quashing by the trial judge of a writ of *habeas corpus ad subjiciendum*.

(1) Q.R. [1954] Q.B. 667.

A. H. Malouf and P. V. Shorteno for the appellant.

G. Adam Q.C., L. A. Couture and E. Trottier for the respondent.

TASCHEREAU J.:—Il s'agit dans la présente cause d'un bref *d'habeas corpus ad subjiciendum* que le requérant-appelant a fait émettre contre le défendeur-intimé, qui exerçait à Montréal la fonction d'officier d'Immigration.

L'appelant allègue qu'il est un citoyen italien par naissance, et qu'après qu'une application eut été faite par son frère résidant et domicilié à Montréal, et après enquête du Ministère de la Citoyenneté et de l'Immigration, il a été informé vers le 3 novembre 1950, de la permission qui lui était accordée d'entrer au Canada.

L'appelant prétend en outre que vers le 25 mai 1951, un officier de l'Ambassade Canadienne à Naples a estampé son passeport avec le sceau du Ministère de la Santé Nationale et du Bien-Être Social, et a émis un visa en faveur de l'appelant lui permettant d'entrer au Canada pour y établir une résidence permanente. Le 18 juin 1951, il a reçu une lettre, alors qu'il était encore en Italie, de l'Ambassade Canadienne à Rome lui demandant de se présenter au bureau canadien, et là il a produit ses passeport, visa et autres documents, et il a été informé qu'il pouvait partir pour le Canada quand il le désirerait.

Pour faire suite à ces autorisations, l'appelant est parti pour le Canada, est arrivé à Halifax le 27 juin 1951, d'où il se rendit immédiatement à Montréal et où, depuis ce temps, il est employé par une compagnie, la "Liquid Carbonic Canadian Corporation Limited".

Le 11 octobre 1951, l'appelant s'est présenté au bureau de l'Immigration du Ministère de la Citoyenneté à Montréal, afin de faire application pour l'admission permanente au Canada de son épouse qui était restée en Italie, et sur présentation de ses passeport et preuve de son entrée au Canada, le requérant a été arrêté, détenu et incarcéré par un officier du Ministère.

Un conseil d'enquête constitué aux termes de l'article 13 de la *loi de l'Immigration* a décrété l'expulsion de l'appelant, et a émis un ordre suivant les dispositions de la *Loi de l'Immigration,* chapitre 93, des Statuts Revisés du

1955

MASELLA v. LANGLAIS

Taschereau J.

Canada, telle qu'amendée. L'appel qu'il a interjeté devant l'honorable Ministre de l'Immigration a été rejeté, et l'appelant prétend qu'il est privé de sa liberté au Canada depuis le 11 octobre 1951, et qu'il est sous la surveillance continuelle de l'intimé qui agit pour la Division de l'Immigration du Ministère de la Citoyenneté. Et depuis le 11 octobre, l'appelant est obligé, après avoir donné un cautionnement de $500.00, de se présenter tous les samedis à la Division de l'Immigration, à Montréal.

C'est la prétention de l'appelant que cet ordre d'expulsion est illégal vu que toutes les formalités nécessaires ont été remplies, et que le Ministère de la Citoyenneté et de l'Immigation du Canada a accepté son application, et qu'il est entré au pays avec la permission des autorités compétentes.

L'honorable Juge Ferland de la Cour Supérieure à Montréal a autorisé l'émission du bref le 2 avril 1952. Après audition, l'honorable Juge Perrier de la Cour Supérieure de Montréal a cassé et annulé le bref. La Cour du Banc de la Reine (1), les honorables Juges Gagné et Rinfret dissidents, a confirmé ce jugement.

Le Juge Perrier a été d'opinion que l'article 23 (maintenant article 39) de la *Loi de l'Immigration* devait trouver son application. Cet article est ainsi rédigé:—

> 23 (39). Nulle cour, nul juge ou fonctionnaire d'une cour, n'a compétence pour reviser, annuler, infirmer, restreindre ou autrement entraver une procédure, une décision ou une ordonnance du Ministre, du sous-ministre, du directeur, de la commission d'appel de l'immigration, d'un enquêteur spécial ou d'un fonctionnaire à l'immigration, intentée, rendue ou décernée sous l'autorité et en conformité des dispositions de la présente loi relatives à la détention ou à l'expulsion d'une personne, pour quelque motif que ce soit, à moins que cette personne ne soit un citoyen canadien ou n'ait un domicile canadien.

La majorité de la Cour d'Appel en est arrivée à la même conclusion. Evidemment, et la jurisprudence est unanime sur ce point, cette disposition de la loi ferme la porte à l'intervention des tribunaux, à condition cependant que la *décision et l'ordonnace soient rendues conformément aux dispositions de la loi.* Si le comité d'enquête a suivi les prescriptions qu'ordonne le statut, il est clair que les tribunaux ne peuvent pas intervenir. C'est d'ailleurs ce qui

(1) Q.R. [1954] Q.B. 667.

a été décidé par cette Cour dans la cause de *Samejima* v. *Sa Majesté le Roi* (1). A la page 641, Sir Lyman Duff s'exprime de la façon suivante:—

The chief question I desire to discuss is the effect of section 23 of the *Immigration Act*. The words,

> had, made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any rejected immigrant, passenger or other person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile

are an essential part of this section; and its disqualifying provisions obviously can only take effect where the conditions expressed in these words are fulfilled. In particular, the phrase "in accordance with the provisions of this Act" cannot be neglected; their meaning is plain. The "order" returned as justifying the detention must be "in accordance with the provisions of this Act." It must not, that is to say, be essentially an order made in disregard of some substantive condition laid down by the Act. This applies to the order of the Minister, as well as to the order of the Board of Inquiry.

Dans la cause de *de Marigny* v. *Langlais* (2), M. le Juge Kellock dit à la page 159:—

In proceedings such as this the court is precluded from reviewing the findings of fact made by the Board of Inquiry; section 23; *Samejima* v. *The King* (1932) (SCR 640 at 650), per Lamont, J., at 650. But equally the applicant for a writ of habeas corpus may show that the proceeding of which he complains "has not been had, made or given in accordance with the provisions of the Act".

Et à la page 165, M. le Juge Rand émet l'opinion suivante:—

In the administration of the "Immigration Act", what is to be looked for and required is a compliance in substance with its provisions. The case of *Samejima* v. *Rex* shows that this Court will not hesitate to condemn "hugger-mugger" proceedings, as Sir Lyman Duff called them, or proceedings in which a defect in substance appears.

Le même principe a été décidé dans la cause de *Leong Ba Chai* v. *La Reine* (3). Dans cette cause, l'officier d'Immigration avait refusé d'exercer sa juridiction parce qu'il croyait que celui qui faisait l'application n'était pas l'enfant légitime d'un Chinois aux termes de la loi. Cette Cour a jugé qu'il y avait eu une erreur de droit en arrivant à cette conclusion, et qu'en conséquence, il devait exercer sa jurisdiction et prendre en considération l'application qui lui était faite.

(1) [1932] S.C.R. 640.
(2) [1948] S.C.R. 155.
(3) [1954] S.C.R. 10.

1955

MASELLA v. LANGLAIS

Taschereau J.

Ce sont ces principes qui doivent nous guider dans la détermination de la présente cause. Je ne crois pas qu'il soit utile d'analyser davantage les faits. Il me sera suffisant, je pense, de dire que l'ordonnance du comité, confirmée par le Ministre, me paraît avoir été émise en conformité des dispositions de la loi de l'Immigration, et qu'il n'appartient pas aux tribunaux d'intervenir et de décider si en fait un immigrant est désirable ou ne l'est pas.

Je partage entièrement les vues de mon collègue M. le Juge Abbott, et particulièrement les observations qu'il fait au sujet de la légalité du visa, de l'examen médical qu'a subi l'appelant, de la révocation de la permission qui lui a été donnée d'entrer au Canada, et du droit qu'il peut avoir au bénéfice du bref d'habeas corpus.

L'appel doit être rejeté avec dépens.

LOCKE J.:—On October 1, 1951, a written complaint was made to the Minister of Citizenship and Immigration by an Immigration Officer at Ottawa under the provisions of s. 40 of *The Immigration Act* (R.S.C. 1927, c. 93) that the appellant, a person other than a Canadian citizen or person having Canadian domicile, was a prohibited immigrant under s. 3, s-s. (i) of that Act, in that he did not fulfill, meet or comply with the conditions and requirements of Orders in Council P.C. 2744 and P.C. 2856. On October 10, 1951, the appellant was taken into custody at Montreal and detained for examination and an investigation of the facts alleged in the complaint upon the order of the Deputy Minister of Citizenship and Immigration.

On October 12, 1951, a Board of Inquiry constituted under the provisions of the Act heard the complaint. The appellant was present and was represented by counsel and gave evidence. The decision of the Board that he be detained and deported from Canada was in the following terms:—

> Mr. Donato Masella, this Board of Inquiry has established that you are not a Canadian citizen, or a person having Canadian domicile, and that you come within the undesirable classes as defined in Section 40 of the Immigration Act; that you are a prohibited immigrant under section 3 s.s. (i) of the *Immigration Act,* in that you do not fulfil, meet or comply with the conditions and requirements of Orders in Council P.C. 2744, in that your passport does not contain a valid immigrant visa, and P.C. 2856,

in that you do not otherwise comply with the provisions of the *Immigration Act,* the said Orders in Council P.C. 2744 and P.C. 2856 which, for the time being, are in force and applicable to you.

Therefore, this Board of Inquiry hereby orders that you be detained, and deported to the country whence you came to Canada, or to the country of your birth or citizenship.

On the same date, the appellant gave written notice of his intention to appeal to the Minister under the provisions of s. 19 of the Act and, on that date, he was released from custody upon depositing with the Immigration Officer at the Port of Montreal the sum of $500 and signing a written undertaking which read as follows:—

I, the undersigned, agree that I, Donato Masella, will report in person to the Canadian Immigration Inspector in Charge at 901 Bleury Street, Montreal, on Saturday, the twentieth day of October, 1951, at eleven o'clock in the morning and every Saturday thereafter at the same hour or at any other time that I may be called upon to do so until such time as my case has been disposed of.

In default of which I agree to forfeit to the Consolidated Revenue Fund of Canada the moneys deposited as shown on above receipt.

The decision of the Minister by which the appeal was dismissed was made on January 17, 1952. In the interval between the date upon which the deportation order had been made and the date of the dismissal of the appeal, the appellant had been employed at a trade in the vicinity of Montreal. While thus at liberty, the appellant, by petition dated March 3, 1952, asked that a writ of *habeas corpus* issue, to be addressed to the respondent Immigration Officer

lui enjoignant d'amener le Requérant, Donato Masella, sans délai devant l'un des Juges de ce Tribunal.

This application, which was made *ex parte,* was granted and the issue of the writ directed by Ferland J. on April 2, 1952.

The writ issued was in the customary form of a writ of *habeas corpus ad subjiciendum,* commanding the respondent to produce the body of the appellant at the Court House in the City of Montreal on April 7, 1952, at 10 a.m. On that date, the respondent made his return to the writ. Of the matters set forth in that document, there is first to be considered the statements in paragraphs 1 and 2 that, neither at the time of the filing of the petition for the writ nor at the time of its issue or presentment, was the appellant detained by the respondent.

1955

MASELLA v. LANGLAIS

Locke J.

By a judgment delivered on September 15, 1953, by Perrier J. it was directed that the writ of *habeas corpus* issued be quashed. An appeal taken from that judgment to the Court of Queen's Bench was dismissed on April 26, 1954, Gagné and Rinfret JJ. dissenting (1).

Throughout the progress of this litigation the appellant has been at liberty, carrying on his customary occupation, subject only to the obligations assumed by him in his written undertaking of October 12, 1951. There is, first, to be determined the question as to whether, in these circumstances, the appellant was entitled to the remedy of a writ of *habeas corpus*.

The relief afforded by the writ of *habeas corpus* is in England a common law right and not one created by statute (Re Besset (2)). In Bacon's Abridgment (Vol. 4, p. 113 *Habeas Corpus* (A), the nature of the writ of *habeas corpus ad subjiciendum* is thus stated:—

> Wherever a person is restrained of his liberty by being confined in a common gaol, or by a private person, whether it be for a criminal or civil cause, he may regularly by *habeas corpus* have his body and cause removed to some superior jurisdiction, which hath authority to examine the legality of such commitment, and on the return thereof either bail, discharge, or remand the prisoner.

On the return of the writ pending the hearing, the prisoner is detained not under the authority of the general warrant but under the authority of the writ of *habeas corpus* and he may be bailed or remanded, in the discretion of the court (*R.* v. *Bethel* (3)).

In *Barnardo* v. *Ford* (4), Lord Watson said in part:—

> The remedy of *habeas corpus* is, in my opinion, intended to facilitate the release of persons actually detained in unlawful custody, and was not meant to afford the means of inflicting penalties upon those persons by whom they were at some time or other illegally detained. Accordingly, the writ invariably sets forth that the individual whose release is sought, whether adult or infant, is taken and detained in the custody of the person to whom it is addressed, and rightly so, because it is the fact of detention, and nothing else, which gives the Court its jurisdiction.

In *Secretary of State for Home Affairs* v. *O'Brien* (5), the Earl of Birkenhead referred to the purpose of the writ in these terms:—

> It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases

(1) Q.R. [1954] Q.B. 667.
(2) (1844) 6 Q.B. 481.
(3) (1697) 5 Mod. 19.
(4) [1892] A.C. 326 at 333.
(5) [1923] A.C. 603 at 609.

of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward 1. It has through the ages been jealously maintained by Courts of Law as a check upon the illegal usurpation of power by the Executive at the cost of the liege.

In *Re Isbell* (1), a person who had been arrested in Ontario on a criminal charge and released on bail made application for a writ of *habeas corpus* to Rinfret J. (as he then was) and that learned Judge in refusing the application said in part (p. 65):—

> In my view, in order to make a case for *habeas corpus* in criminal matters, there must be an actual confinement or, at least, the present means of enforcing it. A person may apply for the writ while in the custody of a constable, immediately upon being arrested, and need not wait until he is actually incarcerated. But a person at large on bail is not so restrained of his liberty as to entitle him to the writ.

The language of *The Habeas Corpus Act* of Ontario which affected the matter (R.S.O. 1927, c. 116, s. 1) read: "where a person . . . is confined or restrained of his liberty."

We have not been referred to any case, and my own researches have not discovered any, in which in England where the right to the remedy originated, a writ of *habeas corpus* was granted to a person who was at liberty on bail. I would assume the reason for this is that the writ, by its terms and by its very nature as above described, is inapplicable to such a situation. It is my understanding of the practice in this country that if a person who has been under detention, either under criminal or civil process, and set at liberty on bail or on his own recognizance, wishes to test the jurisdiction of the court which has ordered him to be detained, he surrenders himself into custody and make the application when thus under restraint.

As it is pointed out in *Re Isbell,* the matter has, however, been considered in a number of American cases. In *Respublica* v. *Arnold* (2), it was held that *The Habeas Corpus Act of Pennsylvania,* the provisions of which were taken from the English Statute 31 Car. 2, c. 2, applied in criminal matters only to persons in actual custody of some officer of justice and not to one at liberty on bail.

In *Wales* v. *Whitney* (3), an application for a writ of *habeas corpus* had been made to the Supreme Court of the District of Columbia on behalf of a medical officer in the

(1) [1930] S.C.R. 62. (2) (1801) 3 Yeates 263.
(3) (1884) 114 U.S. 564.

1955

MASELLA v. LANGLAIS

Locke J.

American Navy, against whom charges had been laid which were to be heard by a court martial. Pending the hearing, he was notified by the Secretary of the Navy that he was placed under arrest and was required to confine himself to the limits of the City of Washington. The application was denied and, on appeal to the United States Supreme Court, it was held that no restraint of liberty was shown to justify the issue of the writ. Mr. Justice Miller, who delivered the opinion of the court, referred with approval to the decision in *Dodge's Case* (1) to the same effect and, referring to the decision in *Respublica* v. *Arnold* with approval, said:—

> The court held that the Statute of Pennsylvania, which was a reenactment of the *Habeas Corpus Act* of 31 Car. 2, c. 2, spoke of persons committed or detained and clearly did not apply to a person out on bail.

The only decisions to the contrary to which we have been referred are two cases in the Province of Quebec. The legislation which has affected the exercise of the right of *Habeas corpus* in that province is referred to in the judgment of our brother Taschereau in *Re Storgoff* (2).

In *Reg.* v. *Cameron* (3), a physician residing in British Columbia was arrested in that province and brought into Quebec on a charge of having written and published a defamatory libel. When committed for trial, he was admitted to bail to appear at the November sittings of the Court of Queen's Bench and, at that time as no indictment was preferred against him, he applied for a writ of *habeas corpus*. Wurtele J. considered that the rights of the applicant were to be determined under the provisions of c. 95 C.S.L.C. (1860) and said that (p. 170):—

> Bail is custody and he is constructively in gaol; and he has the same right to be released from this custody as he would have to be released from an imprisonment.

In *de Bernonville* v. *Langlais* (4) an application was made for the issue of such a writ against the Inspector in charge of the Bureau of Immigration by a person against whom a deportation order had been made who had been released upon bail, on terms requiring him to report monthly to the Immigration Office at Montreal. The

(1) 6 Martin (La.) 569.
(2) [1945] S.C.R. 526 at 569.
(3) (1898) 1 C.C.C. 169.
(4) Q.R. [1951] S.C. 277.

charge not being a criminal charge, Article 1114 of the *Code of Civil Procedure* applied which, so far as it is necessary to consider it, reads:—

> Any person who is confined or restrained of his liberty . . . may apply to any one of the Judges of the Court of King's Bench, or of the Superior Court, for a writ addressed to the person under whose custody he is so confined or restrained . . .

The words "confined or restrained of his liberty" were taken apparently from s. 20 of *An Act respecting the Writ of Habeas Corpus* (C.S.L.C. 1860, c. 95). In the Act of Car. 1 (c. 10 1640), which related to imprisonment in criminal proceedings, the opening words of the recital in the first paragraph are:—

> Whereas by the Great Charter many Times confirmed in Parliament, it is enacted, That no Freeman shall be taken or imprisoned, or disseised of his Freehold or Liberties, . . . but by lawful Judgment of His Peers . . .

and in s. 8, which defines the circumstances in which the writ may issue, the opening words are:—

> . . . That if any Person shall hereafter be committed, restrained of his Liberty, or suffer Imprisonment.

In the Act of Car. 11 (c. 2, 1677), referring also to imprisonment in criminal matters, the applicant for the writ is referred to as "the party so committed or restrained."

In Lower Canada by c. 1, Geo. III (1784), an Ordinance of the Captain General and Governor in Chief of the Province, it was declared that all persons who should be or stand committed or detained in any prison for any criminal or supposed criminal offence should be entitled to demand the issue of a writ of *habeas corpus* in the same manner and for the same purposes as His Majesty's subjects within the Realm of England.

In 1812, by c. 8 of the Statutes of Lower Canada, being an Act extending the powers of His Majesty's Courts of law as to writs of *habeas corpus ad subjiciendum,* it was provided that "when any person shall be confined or restrained of his or her liberty otherwise than for some criminal or supposed criminal matter" such a writ might issue. In this respect, the Act of 1816 relating to civil matters in England (56 Geo. 111, c. 100) is in the same terms.

1955

MASELLA v. LANGLAIS

Locke J.

The language of Article 1114 of the *Code of Civil Procedure* is to be construed, in my opinion, in the same manner as similar language in the statutes to which it owes its origin.

In *de Bernonville's case,* after the order for deportation was made, he was released upon furnishing a bond effective for a limited period of time but which was renewed for successive periods, the condition of which was that he would report at stated times to the Inspector of Immigration at Montreal. The bond expired on March 15, 1951, and on that date de Bernonville, being at liberty, applied for a writ of *habeas corpus.* Brossard J. in directing the issue of the writ, after referring to the judgment in *Re Isbell* and distinguishing it, held that on the expiry of the bond, since the Inspector had the order for deportation at his command under which de Bernonville might immediately have been taken into custody, the remedy was available to him. The learned Judge, amongst other reasons for his conclusion, pointed out that the remedy of *habeas corpus* was granted in cases where the custody of children was in issue, even though there was no forceable detention.

It is my opinion that de Bernonville's case, upon which Ferland J. relied was wrongly decided. If the principal ground assigned by Brossard J. for his opinion, namely, that the fact that there was an order for deportation outstanding under which the applicant might be taken into custody, afforded ground for the issue of the writ, any accused person for whose arrest a warrant has been issued but which has not been executed might apply by *habeas corpus* for his discharge. I know of no authority for any such proposition.

The learned Judge, in coming to this conclusion, relied partly upon the fact that in the reasons delivered by Rinfret J. (as he then was) in *Re Isbell* he had said that:—

> In order to make a case for *habeas corpus* in criminal matters, there must be an actual confinement or, at least, the present means of enforcing it.

The concluding words of this passage appear to me to have been taken from the judgment of the Supreme Court of the United States in *Wales* v. *Whitney.* What was meant

by "the present means of enforcing it" was explained by Miller J. in that case in the next sentence of his judgment which read (p. 572):—

> The class of cases in which a sheriff or other officer, with a writ in his hands for the arrest of a person whom he is required to take into custody, to whom the person to be arrested submits without force being applied, comes under this definition.

That it was in this sense that the expression was used in *Re Isbell* is made clear by the sentence in the reasons which followed the language quoted, which reads (p. 65):—

> A person may apply for the writ while in the custody of a constable, immediately upon being arrested, and need not wait until he is actually incarcerated.

It is undoubted that in the case of infants where, as pointed out by Lord Esher M.R. in *R.* v. *Barnardo (Jones' case)* (1), the question is one not of liberty but of nurture and education, the writ may issue commanding the person in possession of the child to produce it. The reason for this is accurately expressed, in my opinion, in the last edition of Eversley on Domestic Relations (6th Ed. 339), as follows:—

> The issue of a writ of *habeas corpus* proceeds on the fact of an illegal restraint, and the person entitled to the legal custody of the infant, whether the father, mother, or other guardian, may sue out this writ without making any previous demand for the possession of the child. If the possession is found to be illegal, and the applicant is entitled to custody, the Court will make an order to that effect; but if neither the applicant nor the custodian is entitled to the custody, the writ will not be confirmed; the Court will either restore the infant to the custody from which it was taken, or discharge it from that custody, with liberty to return to it. Where the legal custody of the infant is shown to exist, the Court must order it to be delivered over to or remain in that custody. Though the father has at common law *prima facie* the right to the custody of his child, and so is entitled to his writ of *habeas corpus*, yet since the *Judicature Act, 1873* (which provides that the rules of equity in relation to the custody of infants shall prevail), and the *Infants' Custody Act, 1873*, the Court has a discretion to refuse the father this writ in order to remove a child of tender years from the custody of the mother, and other relations, whose conduct with regard to the child is impeached.

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

(1) (1890) 7 T.L.R. 109.

1955

MASELLA v. LANGLAIS

Locke J.

In *Re Isbell,* the decision in *Reg.* v. *Cameron,* upon which Brossard J. partly relied in *de Bernonville's case,* is referred to and it is pointed out that it was a term of the granting of the bail that Cameron should appear at the November term of the Court of Queen's Bench "and in the meantime not to depart the Court without leave." I assume the meaning to be assigned to the language quoted is that it was a term of his release that he should not go beyond the jurisdiction of the Court. The point is academic in considering the present matter since there was no such condition of the recognizance given by Masella but, if it were necesary to decide the point, it is my opinion that no such restriction entitled Cameron to the remedy of *habeas corpus* when, as the case shows, he was at liberty on bail.

There can, of course, be no pretence in the present matter that the Immigration Officer to whom the writ of *habeas corpus* was directed had either the custody or control of Masella, either at the time the writ was issued or when it was served or when he made his return to the writ, and the contention that he was restrained of his liberty within the meaning of Article 1114 is, in my opinion, quite without foundation.

No proceedings by way of *certiorari* were taken in this matter and the objection that the remedy by way of writ of *habeas corpus* was not available to the appellant is fatal to his appeal, in my opinion. I refrain from expressing any opinion as to whether, had a writ of *certiorari issued,* the Court would have been at liberty to examine the evidence in such proceedings in the Province of Quebec, or as to the application of the decision of the Judicial Committee in *Rex* v. *Nat Bell Liquors Ltd* (1) to any such proceedings.

The appeal should be dismissed, with costs.

CARTWRIGHT J.:—For the reasons given by my brother Locke I agree with his conclusion that the remedy by way of writ of *habeas corpus* was not available to the appellant and that consequently the appeal fails.

The objection to the form of the proceedings was made in the courts below and although, as Rinfret J. points out in his reasons, it was not pressed in argument before the

(1) [1922] 2 A.C. 128.

Court of Queen's Bench it does not appear to have been abandoned. It was re-asserted before us and we are compelled to give effect to it.

I regret this result not only because the time of counsel, of the courts below and of this Court has been taken up in a full discussion of matters with which, owing to the fact that the appellant was not in custody at the time of the issue or return of the writ, the courts could not deal in these proceedings but also because had the matter been properly before us it would have been my view that the conclusion arrived at by Rinfret J. and concurred in by Gagné J. was right.

I would dismiss the appeal with costs.

FAUTEUX J.—En première instance, devant la Cour d'Appel et devant cette Cour, l'une des prétentions de l'intimé fut que, dans les circonstances de cette cause, l'appelant n'était pas dans les conditions requises pour se pourvoir par voie d'*habeas corpus*. Comme mes collègues, MM. les Juges Locke et Cartwright, je suis d'avis que cette prétention de l'intimé est bien fondée. Je renverrais l'appel avec dépens.

ABBOTT J.:—The issue raised in this appeal is one which has frequently been before the Courts. It relates to the validity of a deportation order made against the appellant under the provisions of the *Immigration Act*.

The appellant is an Italian citizen whose brother had applied here in Canada for his admission to this country as a "sponsored immigrant". The brother in Canada was advised in writing by the Immigration authorities in Montreal to inform appellant that he would be called for examination at the Canadian Immigration Office in Rome and, if he satisfied the requirements of the Immigration authorities there, would be given a visa to enter Canada.

Without going into the facts in detail, it seems clear that while the appellant obtained what purported to be a visa, from a Canadian officer in Naples, authorized to issue such documents, in fact the issue of such a visa was irregular and the usual medical and other examinations of the appellant required by the *Immigration Act* and regulations thereunder had not taken place.

1955

MASELLA v. LANGLAIS

Abbott J.

When appellant arrived in Canada on June 18, 1951, appellant's passport, the visa stamped on it, and the certificate of prior medical examination appearing to be in order, the Immigration Officer at the port of entry stamped appellant's passport "Landed Immigrant", and he was allowed to enter Canada and proceed to Montreal.

Subsequently, on September 12, 1951, when he presented himself at the immigration office in Montreal to find out what must be done in order to bring his wife to Canada, his passport was examined and inquiries made to ascertain whether his entry to Canada has been obtained as a result of an irregular visa. As a result of these inquiries a complaint was made to the Minister pursuant to s. 40 of the Act, that appellant was "a prohibited immigrant under section 3 subsection (i) of the *Immigration Act* in that he does not fulfil, meet or comply with the conditions and requirements of Orders-in-Council P.C. 2744 and P.C. 2856 which for the time being are in force and applicable to the said immigrant." Following the lodging of this complaint an order was issued under s. 42 of the Act for the detention of the appellant and the setting up of a board of inquiry to investigate the facts alleged in the complaint.

After a hearing, at which appellant was present, testified, and was represented by counsel, the Board ordered his deportation. Appellant, who had been released after six days' detention, upon furnishing security, then appealed to the Minister, as he was entitled to do under the provisions of the Act, and the Minister in due course confirmed the decision of the Board. *Habeas corpus* proceedings followed in which the validity of the deportation order was challenged.

The only ground with which I find it necessary to deal is that urged by appellant on the hearing before this Court to the effect that since the Immigration authorities had allowed him to land in Canada, the burden of proof was on the Department to establish that he was not eligible to enter this country as an immigrant and that in consequence a complaint could not be validly laid under s. 40 of the Act.

The relevant part of that section is as follows:—

> 40. Whenever any person, other than a Canadian citizen or person having Canadian domicile, ...
>
> .....
>
> enters or remains in Canada contrary to any provision of this Act, it

shall be the duty of any officer cognizant thereof, and the duty of the clerk, secretary or other official of any municipality in Canada wherein such person may be, to forthwith send a written complaint thereof to the Minister, giving full particulars.

Counsel for the Attorney General of Canada took the position that a prerequisite to a legal entry into this country as an immigrant is the compliance by such immigrant with the requirements of the *Immigration Act* and the regulations made thereunder, including compliance with the requirements with respect to medical and other examinations and the issue of a valid visa; that these not having been complied with, it is immaterial whether or not the failure to so comply was due to some act or omission on the part of the employees of the Department, the admission to Canada of an immigrant being subject to review by the Minister in accordance with the provisions of the Act.

Counsel for respondent further submitted that even assuming for the purposes of this case the appellant was in perfect good faith, since he had not in fact complied with the requirements of the *Immigration Act* and the regulations made thereunder and was not a Canadian citizen or a person having acquired Canadian domicile, he was therefore a prohibited immigrant under s. 3(1)(i) of the Act, which reads as follows:

3(1) No immigrant, passenger, or other person unless he is a Canadian citizen, or has Canadian domicile, shall be permitted to enter or land in Canada, or in case of having landed in or entered Canada shall be permitted to remain therein, who belongs to any of the following classes, hereinafter called "prohibited classes":—

.....

(i) Persons who do not fulfil, meet or comply with the conditions and requirements of any regulations which for the time being are in force and applicable to such persons under this Act.

The Orders in Council made under the provisions of the Act, which were applicable to appellant, are P.C. 2744 and P.C. 2856, the relevant parts of which read as follows:—

P.C. 2744

From and after the date hereof (June 2, 1949), every person seeking to enter or land in Canada shall be in possession of an unexpired passport issued by the country of which such person is a subject or citizen; Provided:

1. That this Regulation does not apply to:

(here follow exempting provisions which are inapplicable to appellant)

1955

MASELLA v. LANGLAIS

Abbott J.

2. That the passport of every alien other than defined in paragraph (*b*) of section 1 of this Regulation sailing directly or indirectly from Europe shall carry the visa of a Canadian Immigration Officer stationed in Europe; Provided that this section shall not apply to the non-immigrant nationals of any country with which Canada has a reciprocal agreement abolishing visas.

3. That the passport of every alien immigrant not included in section 2 of this Regulation shall carry the visa of a British diplomatic or consular officer or of a Canadian diplomatic or consular officer in the country of issue, as may be required by the Minister of Mines and Resources (now Minister of Citizenship and Immigration).

P.C. 2856

From and after the 1st July, 1950, and until such time as otherwise ordered, the landing in Canada of immigrants of all classes and occupations is prohibited, except as hereinafter provided:

The Immigration Officer-in-Charge may permit any immigrant who otherwise complies with the provisions of the Immigration Act to land in Canada, if it is shown to the satisfaction of such Officer-in-Charge that such immigrant is:

4. A person who satisfies the Minister, whose decision shall be final, that:

(*a*) he is a suitable immigrant having regard to the climatic, social, educational, industrial, labour, or other conditions or requirements of Canada; and

(*b*) is not undesirable owing to his peculiar customs, habits, modes of life, methods of holding property, or because of his probable inability to become readily adapted and integrated into the life of a Canadian community and to assume the duties of Canadian citizenship within a reasonable time after his entry.

The appellant was in possession of a valid passport issued by the Italian Government and endorsed with what purported to be a visa signed by one George G. Wilson, a Canadian Immigration Officer entitled to issue visas in Italy.

As I have already mentioned, evidence adduced at the court of inquiry indicated that this visa had been issued improperly and that appellant had not been medically examined by an officer of the Canadian Government although a stamped entry on the passport falsely indicated that such examination had taken place.

It also seems clear from this evidence that no examination of appellant took place in Italy in order to ascertain his suitability to enter Canada as an immigrant.

In my view appellant's contention, that because he was allowed to land in Canada on the strength of a visa and a certificate of medical examination assumed to have been legally issued no complaint to the Minister could be validly

laid under s. 40 of the Act, cannot be sustained. The legality of his entrance to Canada was subject to question at any time until he had acquired Canadian domicile within the meaning of the Act.

Immigration to Canada by persons other than Canadian citizens or those having a Canadian domicile is a privilege determined by statute, regulation or otherwise, and is not a matter of right.

In the *Immigration Act,* Parliament has set up the machinery for the control of immigration to this country and for the selection of prospective immigrants. To accomplish this purpose, very wide discretionary powers are given under the Act, to the Governor-in-Council and to the Minister, and perhaps it is necessary that this should be so. An example of these wide discretionary powers is to be found in s-s. 4 of Order in Council P.C. 2856 above quoted, in virtue of which the Minister is given in effect an absolute discretion to determine who is, or who is not, a suitable immigrant.

In order to provide for the effective administration of an Act such as this, it would seem not unreasonable that the Immigration authorities should be in a position to insist upon strict compliance abroad with the requirements of the Act or regulations concerning medical and other examinations in order to determine the suitability of a proposed immigrant whether from a medical standpoint, an internal security point of view, or otherwise. In this case it was established to the satisfaction of the board of inquiry that these regulations had not been met.

In my opinion the proceedings before the board of inquiry were regularly taken and a proper investigation made of the subject-matter of the complaint in accordance with the provisions of the Act. As to the application of s. 23, the effect of that section has been considered by this Court on a number of occasions: See *Samejima* v. *The King* (1) and *De. Marigny* v. *Langlais* (2). It is clear that under that section, where a Board of inquiry has taken evidence in good faith and has otherwise complied with the provisions of the statute, a court has no jurisdiction to substitute its judgment for that of the board.

(1) [1932] S.C.R. 640.
(2) [1948] S.C.R. 155.

1955

MASELLA v. LANGLAIS

Abbott J.

In view of the conclusion that I have reached, I do not find it necessary to deal with the issue as to whether in the circumstances of this case the appellant was entitled to the remedy of *habeas corpus,* which was raised in respondent's factum but was not argued before this Court.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. H. Malouf.*

Solicitor for the respondent: *E. Trottier.*