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Master and Servant in England and the Empire: A Comparative Study

Douglas Hay and Paul Craven

THE LAW OF MASTER and servant was a complex of legislation and related case law that defined the terms of the individual contract of employment for many hundreds of years, and was distinguished by the use of penal sanctions, notably imprisonment, for breach by the servant (but not the master).¹ Reconstituted by repeated legislation from early modern times until the 19th century in England, it was repealed after one of the first organized campaigns of united trade unions in 1875. Yet the 19th century and the 20th century saw the extension of the same kind of legislation, and the legal doctrines based on it, to almost every jurisdiction in the empire and subsequently the commonwealth, as well as other parts of the common law world. It was crucially important in the organization of colonial labour regimes, and in the constitution of employment relations in England itself until repeal. Its doctrines continue to be felt in some parts of modern employment law. Much of the English and colonial history of master and servant legislation and its administration remains unexplored. While there is a growing international literature, the law has most often been treated as a local phenomenon with only the vaguest of links to its counterparts elsewhere in the world. Yet both in terms of legal doctrine and

¹See below, "Methodology: Scope."

practical significance for labour, this body of law had extremely widespread implications in those jurisdictions.

Paul Craven is presently researching master and servant in British North America; Douglas Hay is writing on the history of the legislation and its application in England from the late 17th to the late 19th centuries. This work is part of a wider comparative and collaborative study of the spread and role of master and servant legislation throughout the British Empire over a period of about four centuries. This research note reports the assumptions behind the study, the methodology used in constructing computer databases of the statutes, and the progress to date in the analysis of the statutory materials and in the preparation of a volume of explicitly comparative studies.²

Background to the study

IN ENGLAND ITSELF, master and servant law was part of the large legislative inheritance from medieval, Tudor, and Stuart regimes that continued to be actively enforced up to the 19th century, in constantly revised but substantially similar forms. It balanced claims by servants and apprentices (for unpaid wages, ill-treatment, etc.) against penal sanctions and other remedies demanded by masters (for leaving work or other forms of breach of contract, insubordination, etc.) It was arguably the single most important area of contract law (affecting as it did a very large proportion of those in employment) although often ignored by the standard legal commentators. Like other areas of contract, it was substantially recast in the 19th century, and deeply affected by the market assumptions increasingly found in 19th-century private law. Preliminary work suggests that it was contested, undermined, and ultimately destroyed as a coherent body of law and practice, in ways that closely parallel the rise of 19th-century classical notions of freedom of contract. The legislation and decisions of the courts are equally important for legal history and labour history. There is a very large literature on the statutes against "combination" in England during this period, but the contemporary argument that employers used master and servant more often is amply borne out by our preliminary findings: in one English county, 130 men and women were imprisoned under master and servant for every one imprisoned for combination. Of course, resort to the penal sanctions could be greater or less in different times and places. In mid-19th-century Canada, imprisonment for breach of the employment contract was quite rare. The legislation itself was repealed in England (and then Canada) after concerted attack by trade unions (1875-77). Examination of the sources for the local administration of the law illuminates how much this was a symbolic fight for the unions, how much a practical issue arising in part from the use of master

²The research has been funded by SSHRC General and Internal Research Grants, York Faculty of Arts Research Grants, and Work-Study funding from York University, and has also been assisted by the Osgoode Hall Law School (York University) IBM project. The final volume will be preceded by a number of articles and working papers.

and servant sanctions to break strikes as well as to discipline individual workers. Of equal importance is the case law built around the statutes; it preserved into the 20th century, in the doctrine of the contract of employment, significant aspects of the old legislation.

In its wider imperial forms, the law of master and servant was re-enacted in virtually every British colonial jurisdiction between the 17th century and the 20th, but with significant and distinctive amendments and additions. The genesis and filiation of the legislation is full of intricacy, recurrence, and irony. The intricacy occurs in part because the pattern of borrowing is very complex. A common form in settler colonies was that of indentured labour (which we include, with apprenticeship, as part of master and servant law). In Caribbean and African and Asian jurisdictions there developed a wide range of provisions to provide for compulsory labour, labour agents, congruency with pass laws, family labour, and other variations. In the West Indies, the use of an apprenticeship model in the transition from slavery to free labour under master and servant recapitulated English law but also developed distinctive characteristics of its own. There is now an extensive international literature on master and servant law in many of these jurisdictions (although many also remain untouched). The resulting body of work nonetheless has some curious gaps and emphases. The Canadian, American, Australian, African, and Caribbean works with few exceptions treat the relationship of the contract of employment to industrialization, plantation economies, and proletarianization since the early 19th century at the earliest. But because its history in England, during the classic case of primary industrialization in the 18th and early 19th century, has been comparatively neglected, the use of penal sanctions in England has been underestimated, and colonial studies often attribute to the special conditions of colonial economies or the mid-19th century, elements that actually characterized the law of the home country over a long period.

If, as we argue, master and servant legislation was not only revised and re-enacted in 17th and 18th and early-19th-century England, but also enforced at significant levels, several issues arise. One is the possibility of relatively unreflective copying of statutes as part of general programmes of legislation, using first English, then also other colonial, models. But comparisons of levels of enforcement in colonial settings also become more interesting and suggestive. The conditions which favoured extensive use of the legislation in the English Midlands in the mid-19th century can usefully be compared with the hundred-times as intensive use of similar legislation in Trinidad at the same period, or the difficulties of labour recruitment and coercion in Northern Rhodesia in the early 20th century where cognate legislation was also enacted and used. Such comparisons of both the legislation and its enforcement have been unusual in the literature in part because so little has been written about master and servant in England in the period during which many of the colonial regimes were being created, about its actual administration from the imperial centre, and about the respective strengths of imperial and colonial initiatives behind the enactments in each colony.

Where changes occurred in colonial master and servant law, explanations have been couched almost entirely in terms of the local economy. The possibility that legislative action elsewhere in the empire, changes in the common law in England or in other colonies, or direct intervention by the Colonial Office might also be of importance, has not often been tested. We do know that there were many instances of borrowing, some more voluntary than others, but without a collation of all the legislation and case law, and collaboration between scholars working in different jurisdictions, the extent and significance of that borrowing, in an imperial perspective, has remained unknown.

Three main questions raised by the replication and revision of master and servant legislation throughout the empire are the dynamics and vectors of diffusion; the different uses made of the legislation; and its importance, within the empire as a whole, in constructing an imperial political economy.

The process of diffusion of English and colonial legislative models to a succession of different colonies, beginning with the American colonies, Upper and Lower Canada and other parts of British North America, and the Caribbean, and simultaneously in the Cape Colony, some of the Indian states, and small but important jurisdictions such as Mauritius, and continuing in the 19th and the 20th centuries with sub-Saharan Africa, the Union of South Africa, and ultimately in scores of jurisdictions, can only be studied through extensive, detailed comparison of the legislation itself, and through examination of the mechanisms by which legislative models became known in jurisdictions widely separated in space and time. The roles played by the imperial state and colonial administrations are complex, and changed over time. In some cases control from the imperial centre was very important; in others, the movement of judicial and administrative personnel within the imperial structure was important; in others, the demands and prescriptions of colonial capital played a dominant role. It also appears likely that there are distinctive families of master and servant legislation, types of regimes characterized by clusters of particular detailed provisions in the law. Identifying such clusters of provisions, and their recurrence in particular sets of colonies, will make it possible to consider whether certain types of colonial political economies are associated with particular legislative provisions, and why.

A study of legislative diffusion, however detailed and specific, may nonetheless reveal very little about the actual application of the legislation. We know that in some colonial regimes, or areas of their economies, master and servant law was virtually a dead letter; other economic, social and political structures provided the compulsions and constraints that the legislation was supposed to supply. Equally diverse were the uses sometimes made of very similar legislation in colonies with very different economic structures and labour supply. The existing literature suggests several insights, including the relationship between penal sanctions and the pass laws, and particular uses of master and servant at the abolition of slavery in a number of colonies. Virtually none of the existing literature is comparative, either between colonies or between colonies and England. Only detailed work in

each jurisdiction or group of jurisdictions, by experts in each area, can reveal the ways in which legislation of this kind was used. The crucial problem here is that because it was administered at the local level, before magistrates (or their equivalent), and often in highly informal or unrecorded circumstances, detailed archival work is often the only way to understand local administration. We are collaborating with a number of other scholars, especially David Arnold (History, School of Oriental and African Studies, University of London), Michael Anderson (Law, also SOAS), Amanda Banton (Public Record Office, London), Hilary Beckles (History, University of West Indies), Martin Chanock (Law, LaTrobe University), Michael Quinlan (Griffith University), and Chris Tomlins (Law, LaTrobe, currently at the American Bar Foundation). The intention here is to generate a body of writing in which explicitly comparative analysis of the impact of penal sanctions for breach of contract becomes possible.

Similar collaboration will address the related question of the degree to which labour law of this kind was important in constructing an imperial economy in the 18th and 19th centuries, beginning with the integration of Ireland and Scotland. In the 19th and 20th centuries penal sanctions for breach of contract were extended to the wider Empire, presenting the striking case of colonial enactments in the very years in which England was abandoning this policy as untenable under the rule of law. The possibility of an interpretation of this experience partly as a response to the successive incorporation of different sources of labour with comparable defects (in the eyes of employers) will be examined. There are similarities between some regimes of plantation labour, for example Trinidad and Assam; Scots millowners thought Highlanders as unamenable to the loom as deer, and strikingly similar observations and legal instruments are to be found among colonial employers in 20th-century Africa. The kinds of legal coercion felt necessary in each jurisdiction, at different times, may make international and diachronic comparisons of labour law and regulation possible to a degree not done before.

There is also a broader analytic point: that master and servant law was never simply master and servant law, a doctrine dealing with breach of contract. It was not in England, where it was suffused with assumptions of superordination and subordination, and designed indeed to reinforce them: "the question really is, whether the master or servant is to have the superior authority."³ That question had even greater resonance in the farther reaches of empire, where superior authority had to be created, not simply sustained. The relationship of coercive master and servant legislation to civil disorder or its possibility may often be significant; the degree to which judicial interpretations of master and servant gave relatively unconstrained authority to employers could sometimes determine relationships of power throughout most of a plantation society.

³*Spain v. Arnott* (1817), 2 Starkie 256.

*Methodology**a) Scope:*

IN THE COMMON LAW JURISDICTIONS, "the law of master and servant" refers to the whole body of law about the individual contract of employment. This study is more circumscribed. It is concerned with the master and servant legislation which was adopted in most parts of the British empire and commonwealth at various times in the 17th, 18th, 19th and 20th centuries. While there were large and significant differences among the statutes, they all shared three features in common. They applied to contractual relations of employment (and hence for the most part to wage labour); they supplied penal sanctions for the worker's breach of the contract (disobedience, desertion, etc.); and they were administered locally by magistrates or cognate officials whose relatively informal proceedings were not courts of record. The first two elements — a contract of employment, enforced against the workers by penal sanctions — constitute the unique policy of the master and servant acts. The third element, its summary forms of administration, helps to explain why the striking recurrence of this policy in widely dispersed times and places has not received the attention it deserves from lawyers or historians. But it is also an extremely important aspect of the law, because it permitted and encouraged a wide range of informal mechanisms, threats, and forms of mediation, designed to get the worker back to work rather than consign him or her to jail. As law it was distinctive in this informality and in the lack of judicial scrutiny it received; its legal informality complemented its ubiquity.

We include in the scope of our study all the master and servant acts which shared this common policy and administrative form. These statutes often included, or were associated with, other legislative provisions for the regulation of the employment relationship. Among these were provisions for the recovery of unpaid wages; for suppressing payment in kind or credit; and for dissolving the contracts of unduly cruel employers. In many cases, master and servant acts were also associated with provisions regulating apprenticeship relations and worker mobility, for example "settlement" and pass laws. Forced recruitment and recruitment-related offences are also recurrent features of the legislation. To the extent that such provisions formed part of a system of employment regulation organized around individual contracts and the criminalization of worker misconduct, we consider them within the scope of the study.⁴ Their association in statutes with such other aspects as embezzlement or wage regulation or factory legislation is less immediately relevant, although we have noted such connections where they occur.

The master and servant acts were also associated historically with the regulation of collective labour relations. Doctrinally, the notion that a collective suspension of work was a criminal conspiracy may have flowed in part from the idea that an individual worker's disobedience or desertion should be treated as a crime. In

⁴See Appendix, "Coverage."

practical terms, master and servant legislation was probably far more widely used than the combination acts to attack strikes, because it was generally much simpler to prove that an individual was in breach of his or her contract (or that another individual had procured such a breach) than to prove all the elements of a combination. Certainly the nascent trade union movements of several countries pursued repeal of the criminal provisions of the master and servant acts as a necessary complement of legislation that formally decriminalized trade unions. In certain trades and jurisdictions, there was also a close association between master and servant statutes and legislation for the settlement of disputes by arbitration. While we are aware of and intend to comment upon these links to the prohibition or regulation of collective action, the primary focus of our project is on the regulation of individual employment relations through the policy and administration of the master and servant acts.

b) Construction of computer databases

The project's computerized database of master and servant statutes has three main components: the inventory, the codebase, and the textbase. Each component consists of groups of interrelated files, and there are also explicit and implicit links among the three components. This database allows us to reconstruct the statutory history of master and servant in different jurisdictions, and also provides for sophisticated analysis of the statutes and their transmission.

The *inventory component* is a group of cross-indexed files that we use to keep track of statutes we have identified, ordered, or received; record processing; and generate various kinds of reports, including summaries of statutes by jurisdiction, and lists of statutes ordered and on hand for specific jurisdictions. The inventory component also includes the cross-reference file, which links later statutes to earlier ones which they amend, repeal, continue or otherwise mention.

The *codebase* consists of coded representations of the provisions of selected statutes. We have developed an extensive hierarchical coding scheme, which in an early form incorporated about 1,000 choice-points. This scheme proved unwieldy to apply and much more fine-grained than necessary for the analysis; it was pruned and simplified to yield the coding scheme which is now in use.⁵ We have implemented a new method of computer-assisted coding which should prove useful for a wide variety of scholarly applications.⁶ Data in the codebase are used to analyze similarities and differences among statutes and whole regimes. Because of the large numbers of statutes and the wide variety of provisions found in them, this analysis cannot be done by inspection, nor are standard quantitative methods sufficient for

⁵Martha Kanya-Forstner's research assistance was particularly helpful.

⁶See Paul Craven, "A general-purpose hierarchical coding engine," *ALLC/ACH92 Proceedings* (Oxford University Press, 1992) and Craven, "A general-purpose hierarchical coding engine and its application to computer analysis of statutes," *The Journal of Literary and Linguistic Computing* (forthcoming).

this analysis. Using an heuristic technique known as "conceptual clustering" we search the codebase and group together statutes which have sets of properties in common. By linking the codebase to the cross-reference file (amendments, repeals, etc.) through a system of production rules, we hope eventually to be able to apply this analysis to chronological cross-sections through whole regimes, as well as to individual statutes.

The *textbase* consists of plain-text representations of selected statutes. We first experimented with summaries, using research assistants to prepare abstracts of the statutes. This was useful early in the project in familiarizing ourselves (and our assistants) with the materials but proved to be a rather unsatisfactory method in the longer run, and one which foreclosed the use of pattern-matching techniques to search for textual similarities between statutes. We are now using full-text entry (by a copy typist) of all the principal statutes. This will enable us to use lexical analysis to supplement the conceptual analysis of the codebase, and will also enrich the codebase in certain respects (for example, in tracking the dissemination of closely related offence categories such as "absenting," "deserting," "absconding," and "leaving employ.")

The inventory component of the database is maintained in askSam v.5, a very flexible commercial free-text database package which allows relational look-up and the optional use of implicit and explicit user-defined fields. We also use askSam to manage the abstract files and for our own research notes, bibliographies, etc. The coding and analysis systems are written in PDC Prolog, and we plan to use the same language for the production rule system that will extract cross-reference information from the askSam database and apply it to the representations of statutes in the codebase. The codebase is stored as a set of Prolog terms in nested-list form, but is readily translated into other forms; we have implemented machine translation into a rough approximation of English text. The entire database runs on IBM-compatible personal computers under DOS, although the large-model Prolog necessary for the conceptual clustering analysis requires a 386 or 486 processor. The lexical analysis is based on standard Unix utilities. It may also involve the use of TACT, a textual analysis system developed at the University of Toronto's Centre for Computing in the Humanities.

Progress to Date

THE AMOUNT OF LEGISLATION to be located, copied, edited, and coded for computer analysis has proved to be very much greater than we originally anticipated. We anticipated locating and photocopying perhaps 500 statutes; currently we have 1,290, with more to come. One of the most difficult aspects of this phase of the research has been locating original versions of statutes which are generally available only in much-amended form. Most have been obtained from the Foreign and Commonwealth Office Library, a collection which in large measure has now been relocated to the library of the Institute of Advanced Legal Studies, London: they

incorporate the manuscript notations of the Colonial Office clerks respecting amendments and repeals. Of the 1,290, between 400 and 500 are being entered as full-text for computer textual analysis, and are also being coded for the clustering analysis. This work will be completed by the summer of 1993. We plan a conference of contributors and other colleagues in 1995, and the publication of a volume of comparative studies later that year.

At this point in the project we would particularly welcome bibliographic and other information from others working on the history of master and servant legislation. Because of the local, often very informal, enforcement of the legislation by magistrates (and cognate officials), the frequency and nature of the use of master and servant legislation is usually the most difficult historical information to recover. All references to magistrates' notebooks or other papers, registers of summary convictions, jail and prison registers, or statistical information on the application of the law, in England and Canada, or in other colonial jurisdictions, would be of especial interest.

Acknowledgements

RESEARCH ASSISTANCE in compiling the collection of statutes, producing the inventory, preparing abstracts, developing the coding and analysis programmes, data entry and coding the statutes has been provided by Dr. Ruth Paley (in London, England) and by Karen Cunningham, Martha Kanya-Forstner, Craig Morrison, Carey Nieuwhof, Adele Perry, Stuart Swartz, Will Traves, and Tracy Wynne (students in history, political science, mathematics and law, at York University and Queen's University).

Appendix

Coverage: Statutory Materials Included in the Database

STATUTES, ORDINANCES, and other legislation, either entire or isolated clauses, that deal with 1) the individual contract of employment in which 2) breach by the servant is punishable by sanctions of a criminal kind, and 3) the administration of which is under local and summary jurisdiction. We are interested in all terms relating to the formation, enforcement, and termination of such contracts, and related forms. Specifically:

Respecting the contract itself:

- regulation of recruitment, voluntary and involuntary
- regulation of wage payment (but not wage-fixing for a whole group)
- regulation of when, where and in what form wages are to be paid (truck acts, etc.)
- term of the contract, including maximum duration
- ancillary issues like board
- issues of form (need to be in writing, terms certain, etc.)

- legal limits on the length of the contract
- definitions of when the contract comes into effect
- trades, etc., covered; racial terms; capacity of parties
- requirements for certain papers, such as discharge certificates, tickets of leave, passes, character references, but only as they are related to individual employment
- the responsibility of the master for the acts of servant

Respecting breach:

- actions for recovery of unpaid wages, other breaches by master
- disciplining of misbehaviour by the worker, including refusal to work, desertion, disobedience, damage to tools, careless work, embezzlement of materials or product, assault, miscegenation, pass offences, and other specific acts identified as being in breach
- limitations on the employer's right to discipline (issues of cruelty, mistreatment, deprivation, etc.)
- remedies and penalties for breach on either side
- third-party breaches (enticing, harbouring, seducing), and civil and criminal remedies and penalties

Respecting administration of the law:

- legal process for enforcement of the contract, including rights of appeal, access to or limitations on review, etc.
- specific qualifications for magistrates or others given the right to enforce such contracts (as opposed to their general qualifications)
- requirements that contracts be registered
- requirements for magisterial approval of dismissals, dissolution or amendment of the contract
- regulations re how punishment is to be administered

Related forms:

- all the above issues as seen in related contractual forms such as apprenticeship and indenture.