1947) 756–759, Salmond (10th edn. 1945) 411–414, Pollock (15th edn. 1951) 190–193, Winfield (5th edn. 1950) 277–280). Salmond (413) for example, does say that when a statement can be interpreted either as fact or comment, then to be regarded as comment the facts on which it is based must be "stated or referred to", but he does not say that the facts relied on must be stated in every case. Halsbury (2nd edn., 20, art. 599) seems to justify Lord Porter's treatment of *Hunt's* case, *Joynt's* case and *Campbell's* case—not that the facts must *all* be set out, but that there must be no misstatement of the facts *as* set out.

On the whole, it seems a perfectly reasonable inference from discussions in cases and texts on the defence of fair comment on matters before the public, particularly from the discussions on literary criticism, that where such matters are indicated with sufficient clarity in the comment complained of, there is no need for the actual facts on which it is based to be set out therein, and it is surprising that specific statements to this effect should have been practically non-existent. However, several supporting dicta are to be found—per Kennedy L.J. in *Peter Walker and Son Ltd. v. Hodgson*[4] and per Ferguson J. in *Myerson v. Smith's Weekly*[5]; see also *O'Brien v. Salisbury*[6] (cited in the Court of Appeal). The Court of Appeal placed considerable reliance on *McQuire v. The Western Morning News Co.*[7], in which comment on a musical play was upheld as fair, although (in their opinion) it contained no facts on which it was based; but the point of the present appeal was not then in question.

The decision of the House, though not of major importance, has clarified satisfactorily a point which had been necessarily uncertain because virtually unconsidered.

R. L. SHARWOOD

[4][1909] 1 K.B. 239, 256.
[5](1923) 24 S.R. (N.S.W.) 20, 26–27.
[6](1889) 6 T.L.R. 133.
[7][1903] 2 K.B. 100.

CROWN—POLICE—LOSS OF SERVICES CAUSED BY TORTFEASOR—ACTION *PER QUOD SERVITIUM AMISIT* DOES NOT LIE FOR THE CROWN

Attorney-General for New South Wales v. Perpetual Trustee Coy. Ltd.[1] raises again the question of liability for injuring a servant of the Crown. A member of the police force of New South Wales was injured by the negligence of the defendant. As a result of the injuries

[1][1952] A.L.R. 125.

he was discharged from the service. The Attorney-General for New South Wales brought an action *per quod servitium amisit* against the defendant. It was held by the High Court (Williams J. dissenting) that the loss of services of a policeman caused by another person's wrongful action does not give the Crown a cause of action against the tortfeasor. The High Court had previously held in *The Commonwealth v. Quince*[2] that the Crown could not sue for the loss of the services of a member of the armed forces. In the instant case all members of the court, except Webb J., agreed that *Quince's* case was indistinguishable. Dixon J., while disagreeing with that decision, considered that as there was no sufficient ground put forward for overruling it other than that it was wrongly decided, he should feel bound by it.

The judgments, as in *Quince's* case, contain a very full and thorough examination of the history and present use of the action *per quod servitium amisit*. The historical basis of the action was status; the interest of the master in the services was of a proprietary kind. Today the action rests on some relationship of master and servant, and although this is most clearly shown in a contract of service, such contract is definitely not necessary. In a view representative of the majority Kitto J. insisted that the action was confined to master and servant in that strict sense which formerly connoted a status. But Dixon J. warns that the essential character of the action (the master-servant relationship) should not be confused with the conditions (status) in which it arose, and the fact that those conditions are inapplicable to the Crown today is irrelevant to the essential relationship between the Crown and its servants. Historically, he said, the relevant relations between the Crown and its servants and between a subject and his servants would be found to be much the same at any one stage.

The majority stated that there is an essential distinction between private and public service. But as Williams J. pointed out, the gist of the action is loss of services, and if the Crown can require services just as a private employer can, then it must equally suffer the same damage from their loss. Why should the essential relationship be different merely because the Crown is the employer, and the work is for a public purpose?

The majority placed great reliance on the fact that a policeman has certain discretionary powers not controllable by the Crown.[3]

[2](1943) 68 C.L.R. 227 (Latham C.J. and Williams J. dissenting.)

[3]*Enever v. The King* (1906) 3 C.L.R. 969, where it was held that the Crown was not responsible for the wrongful acts of a policeman done in the course of exercising his independent discretion.

Dixon J. convincingly argues that such a difference is not sufficient to dispose of the cause of action. If the essential element of obedience and control exists between the Crown and a policeman, as it does, then the necessary master-servant relationship is established, and any independent duties cannot affect this. The fact that the Crown can sue was the assumption giving rise to the decisions in two recent cases in England.[4]

The doctrine of *respondeat superior* applies to the Crown in respect of the services of its officers acting in the course of employment. Dixon and Fullagar JJ. disagree with the reasons given by Erle C.J. in *Tobin v. Reg.*[5] for the proposition that a commander in the navy is not a servant of the Crown so as to make the Crown liable for his torts. The fact that he may have a sense of professional duty, or that he was not directly appointed by the Queen, cannot possibly prevent him from being a servant so that the Crown will be liable for his torts. Williams J. claimed that it is anomalous that the Crown should be liable for the wrongs of its servants, yet cannot claim for loss of their services. Fullagar J., however, contended that the relationships between master and servant required for the two actions were of a different kind, and that no conclusions could be drawn by comparisons of the two.

There seems a great deal in the dissenting judgments left unanswered by the majority. However, the law, which had remained uncertain after *Quince's* case, is now fixed for Australia, and can only be changed by a decision of the Privy Council or the House of Lords.

H. STOREY

[4] *Bradford Corporation v. Webster* [1920] 2 K.B. 135; *Attorney-General v. Valle-Jones* [1935] 2 K.B. 209. A dictum in agreement with the assumption appears in *The Receiver for the Metropolitan Police v. Tatum* [1948] 2 K.B. 68. But note the strong doubt expressed by Lord Sumner in *Admiralty Commissioners v. S.S. Amerika* [1917] A.C. 38, 51.

[5] (1864) 10 C.B.N. 307.