[HIGH COURT OF AUSTRALIA.]

GIBBONS . . . . . APPELLANT;
PLAINTIFF,

AND

DUFFELL . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1932.

SYDNEY, *April* 11; *Aug.* 4.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Defamation—Libel—Privilege—Police officer—Report in course of duty.

Held, that a report, made in the course of his duty by an inspector of police to his superior officer, which contained defamatory references to a subordinate officer, was not the subject of absolute privilege.

Dawkins v. *Lord Paulet*, (1869) L.R. 5 Q.B. 94, discussed and distinguished.

Decision of the Supreme Court of New South Wales (Full Court): *Gibbons* v. *Duffell*, (1931) 32 S.R. (N.S.W.) 31, reversed.

APPEAL from the Supreme Court of New South Wales.

An action for libel was commenced by William Resolute Gibbons against Thomas Alfred Duffell based upon a report made by the latter to the Metropolitan Superintendent of Police, New South Wales Police Force, and by consent of the parties a special case was stated submitting a question of law for the determination of the Supreme Court of New South Wales.

The plaintiff, who was a first class constable, had applied for transfer from the police station to which he was attached. It was his duty to make such application through the defendant, who was an inspector of police in charge of the division to which the plaintiff

was attached. The defendant's duty in forwarding such an application was to make a report in writing to the Metropolitan Superintendent of Police, and, when forwarding the application, to express a definite recommendation or opinion thereon. The libel sued upon was contained in the report of the defendant. That report, the declaration alleged, stated of the plaintiff, among other things, that he was not amenable to discipline and was untruthful and had not displayed any outstanding ability; and that it would be seen that the reason given by the plaintiff and two other applicants for transfer showed clearly that it was a concerted action on their part for the purpose of causing annoyance to their officers, to endeavour (*sic*) their own ends, and cause younger members of the service to follow their example and show their disregard for discipline. It was also set out in the declaration that the report stated that it appeared to the defendant to be nothing less than a conspiracy between them to cast discredit on his reputation; and that their reasons given are false, and prove them liars of a very dangerous class, and whilst they remain here he must protect himself to the extent of having one witness at least present before giving any one of them any departmental instructions in future. To this declaration the defendant pleaded "Not guilty."

The question stated for the opinion of the Supreme Court was: Can an action for a libel contained in such a report be maintained or is such a document the subject of absolute privilege?

The Full Court of the Supreme Court decided that the report was the subject of absolute privilege: *Gibbons* v. *Duffell* (1).

From this decision the plaintiff now appealed to the High Court.

Other material facts appear in the judgments hereunder.

Flannery K.C. (with him *K. A. Ferguson*), for the appellant. The police force of New South Wales is a statutory body, and the rights, powers and duties of its members are only such as are contained in the *Police Regulation Acts* 1899-1927 (N.S.W.), the *Police Regulation* (*Appeals*) *Act* 1923 (N.S.W.) and the *Police Regulations* appearing in *Rules, Regulations and By-laws* (*N.S.W.*) 1925, vol. XIV. An examination of the statutes and the regulations shows that the police force is a branch of the Public Service which

(1) (1931) 32 S.R. (N.S.W.) 31.

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differs from such Service only in the fact that its members have the authority of constables as at common law or by statute over ordinary subjects of the Crown. Although a report by the head of a State department may be the subject of absolute privilege, such privilege does not apply in the case of a report made as here by a person occupying a subordinate position in such a department. No action will lie in respect of a statement in a report which, although defamatory, is made in the course of naval or military duty (*Dawkins* v. *Lord Paulet* (1); *Dawkins* v. *Lord Rokeby* (2); *Fraser* v. *Balfour* (3)), even if such statement was made maliciously and without reasonable and probable cause (*Heddon* v. *Evans* (4)), and although the principle of absolute privilege has been extended to communications relating to State matters made by an officer of State to another in the course of his official duty (*Chatterton* v. *Secretary of State for India* (5); *Isaacs & Sons* v. *Cook* (6)), it has not been, and should not be, extended to include reports by, and concerning, members of the Police Force. A member of the Police Force is in exactly the same position as a civil servant, which is different from that of a member of the Naval or Military Forces because the latter are governed by rigid disciplinary rules framed for the purpose of preserving the welfare of the State. But even a member of the Naval or Military Forces may appeal to the civil Courts in the event of his civil rights being affected by the decision or judgment of a naval or military tribunal given in excess of its jurisdiction (*In re Mansergh* (7)). A report by an inspector of police cannot be regarded as an act of State; such a report made in pursuance of duty is actionable if false and malicious.

Owen, for the respondent. If the action were allowed to proceed, the onus would pass to the respondent to prove that the report in question was not made maliciously, and, in order to disprove malice, it would be necessary to inquire into and put in evidence confidential matters of importance to the State. Whether a particular communication is absolutely privileged or not does not depend upon the status of the State officer by whom it was made, but upon the

(1) (1869) L.R. 5 Q.B. 94.
(2) (1873) L.R. 8 Q.B. 255.
(3) (1918) 87 L.J. K.B. 1116.
(4) (1919) 35 T.L.R. 642.
(5) (1895) 2 Q.B. 189.
(6) (1925) 2 K.B 391.
(7) (1861) 1 B. & S. 400; 121 E.R. 764.

subject matter of the communication (*Chatterton* v. *Secretary of State for India* (1)). In the public interest it is essential that reports made by police officers in the course of their duty should be absolutely privileged even though such reports may be regarded as defamatory by persons referred to therein.

[DIXON J. referred to *Coe* v. *Simmonds* [*No.* 2] (2).]

If it appears to the Court that the production of such a report would be prejudicial to the public interest, no action thereon will be permitted. A communication by the Secretary of State is privileged, and such privilege should extend to the subordinate officers from whom he receives the information contained in this communication.

[STARKE J. referred to *Hart* v. *Gumpach* (3).]

Whether it be a question of the production of a document or its admission in evidence, the matter for consideration by the Court is whether such production or admission would be prejudicial to the public interest (*M'Elveney* v. *Connellan* (4) ; *Hennessy* v. *Wright* (5)). Immunity is given to some servants of the Crown and is not necessarily limited to Ministers of the Crown (*Chatterton* v. *Secretary of State for India* (1) ; *Isaacs & Sons* v. *Cook* (6)). Such immunity should be extended to police officers, based on the necessity that they should be free to do their duty without fear of consequences (*Gatley* on *Libel and Slander*, 2nd ed., p. 206). Even if the appellant is unable to maintain an action against the respondent no matter how malicious the latter has been, he is entitled to have his grievance dealt with by the special tribunal constituted by sec. 6 of the *Police Regulation* (*Appeals*) *Act* 1923, to deal with matters arising between police officers in the course of their duty.

[STARKE J. How is this case distinguishable from the case of *Royal Aquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson* (7) ?]

The Society in that case was in no sense a servant of the Crown, and, therefore, was not entitled to immunity.

Cur. adv. vult.

(1) (1895) 2 Q.B. 189.
(2) (1911) 30 N.Z.L.R. 488.
(3) (1872) L.R. 4 P.C. 439.
(4) (1864) 17 Ir. C.L.R. 55.
(5) (1888) 21 Q.B.D. 509.
(6) (1925) 2 K.B. 391.
(7) (1892) 1 Q.B. 431.

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The following written judgments were delivered :—

GAVAN DUFFY C.J., RICH AND DIXON JJ. The plaintiff appellant, who is a first class constable of police, has brought an action of damages for libel against the defendant respondent, who is a third class inspector of police. The alleged libel consists of a report made by the defendant in the course of his duty to the Metropolitan Superintendent of Police forwarding an application by the plaintiff for a transfer from the division under the defendant's charge to another division. The question for decision is whether the privilege attaching to this publication is absolute or qualified. The Supreme Court of New South Wales, consisting of *Harvey* C.J. in Eq., *Davidson* and *Halse Rogers* JJ., held that the privilege is absolute upon the ground that the public interest requires that in the Police Force, as in the Naval and Military Forces of the Crown, reports made by one person in the service in the course of his duty with respect to another so engaged with reference to matters affecting the government or discipline of the service should be absolutely privileged.

The Police Force of New South Wales is established under and governed by the *Police Regulation Acts* 1899 to 1927 and the regulations made thereunder in 1925 and 1930. It is a service of the Crown under the administration of the Chief Secretary. The head of the Force is the Inspector-General and under him are superintendents and inspectors, who are called commissioned officers, and sergeants and constables. For police purposes the State is divided into districts, sub-districts and divisions. Inspectors are in charge of sub-districts or divisions and are responsible for the supervision of the police immediately under their charge. Secrecy is required of officers and constables in respect of information relating to police or matters connected with the duties of police. " Instructions " for the government or direction of the Force are issued by the Inspector-General, and it is the duty of every member of the Force to enforce them according to his rank and to observe them. One such " instruction " obliged the plaintiff to apply through the defendant for the transfer he sought, and another made it the duty of the defendant in forwarding the application to express a definite recommendation or opinion thereon. It could not be disputed that the duty to express such a recommendation or opinion carried with

it a privilege which would afford protection for defamatory statements made in the course of discharging that duty. The question in dispute is whether the privilege is defeasible so that the protection may be defeated by proof that the defamatory statements were not made honestly for the purpose of fulfilling the duty but maliciously, that is, for some purpose foreign to that for which the privilege is given. The conclusion that the privilege is absolute and gives an indefeasible immunity assigns it to a category of narrow, although uncertain, limits. " There are a few, not many, cases where untrue communications or statements which are defamatory are by the law of England treated as absolutely privileged, so that, although they are untrue, defamatory and malicious, the law does not allow any action to be brought in reference to them. The reason is that there are certain relations of life in which it is so important that persons engaged in them should be able to speak freely that the law takes the risk of their abusing the occasion and speaking maliciously as well as untruly, and in order that their duties may be carried on freely and without fear of any action being brought against them, it says: ' We will treat as absolutely privileged any statement made in the performance of those duties ' " (per *Scrutton* L.J. in *More* v. *Weaver* (1)).

Freedom of utterance has always been considered indispensable to the administration of justice, and, therefore, persons acting judicially, advocates and witnesses alike receive absolute protection for what they say. The privilege is an incident of the proceedings of military tribunals as well as of Courts of Justice. Even preparatory steps may be within the privilege, and what a witness states to a solicitor, who obtains his proof, is not actionable (*Watson* v. *M'Ewan* (2)). How far communications between solicitor and client obtain an unqualified protection is not yet finally settled (*More* v. *Weaver* (3); *Minter* v. *Priest* (4)). The same absolute privilege attends the proceedings of the Legislature. In the executive department of government, communications between Ministers and the Crown, or among Ministers themselves, clearly have complete immunity (*Chatterton* v. *Secretary of State for India* (5)). The

(1) (1928) 2 K.B. 520, at pp. 521, 522.
(2) (1905) A.C. 480.
(3) (1928) 2 K.B. 520.
(4) (1929) 1 K.B. 655; (1930) A.C. 558, at pp. 570, 574, 578, 586, 587.
(5) (1895) 2 Q.B., at pp. 191, 194.

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privilege extends to communications in the course of duty between high officers of State and Ministers (1). It includes statements made by the High Commissioner to the Prime Minister (*Isaacs & Sons* v. *Cook* (2)). It has been considered too that an official statement to the Board of Trade prepared by one of its officers to enable it to make its annual general report to Parliament under the *Companies (Winding up) Act* 1890 was absolutely privileged (*Burr* v. *Smith* (3)). But it was not without the dissent of *Cockburn* C.J. that unqualified privilege was given to the report of a commanding officer of a regiment to the Adjutant-General upon a complaint made by an officer (*Dawkins* v. *Lord Paulet* (4)). In *Hart* v. *Gumpach* (5) Sir *Montague Smith* speaks of " the immunity accorded to Judges, counsel, and others engaged in the administration of justice, against actions for statements made in the course of duty, and the recent case of *Dawkins* v. *Lord Paulet*, in which the same protection was extended to reports made by a military officer for the information of the Commander-in-Chief, were referred to. The immunity in these cases rests upon grounds of public policy and convenience: the object being to secure the free and fearless discharge of high public duty in the administration of justice, and the maintenance of military discipline, on which the welfare and the safety of the State depend."

In the application of absolute privilege to statements made in the course of naval and military duty two independent considerations operate together. The desirability in the public interest of permitting free communication of confidential opinions between officers discharging responsible duties combines with considerations arising from the necessity of maintaining complete discipline among the armed forces of the Crown and requiring unquestioning submission to superior authority. In *Dawkins* v. *Lord Paulet* (6) *Mellor* J. relied upon the following observations of *Willes* J. in *Dawkins* v. *Lord Rokeby* (7): " With respect to military men, I beg to say that I cannot conceive anything more fatal to themselves—anything more fatal to the discipline or the subordination of the

(1) (1895) 2 Q.B. 189.
(2) (1925) 2 K.B. 391.
(3) (1909) 2 K.B. 306, at p. 313, per *Fletcher Moulton* L.J.
(4) (1869) L.R. 5 Q.B. 94.
(5) (1872) L.R. 4 P.C. 439, at pp. 464, 465.
(6) (1869) L.R. 5 Q.B., at p. 119.
(7) (1866) 4 F. & F. 806, at p. 841; 176 E.R. 800, at p. 815.

army—if every officer who considers himself to have been slighted by his inferiors, or every officer aggrieved by his superiors, whom, having become a soldier, he has consented to submit to, should seek to undo their judgment before a tribunal which must necessarily have but slight acquaintance with those matters upon which it is called to pronounce an opinion."

These observations were subsequently relied upon (*Dawkins* v. *Lord Rokeby* (1)) for the proposition that a case involving questions of military discipline and military duty alone is cognizable only by a military tribunal and not by a Court of law. Yet the House of Lords has said that the question of the soundness of this proposition is still open at all events to their Lordships. " It involves constitutional questions of the utmost gravity, and a decision upon it should be given only when the facts are before the House in a complete and satisfactory form " (per Lord *Finlay* L.C. in *Fraser* v. *Balfour* (2)). Shortly after this pronouncement, *McCardie* J. formulated his conclusions on the matter, upon the decisions as they stood, as follows :—" First. A military tribunal or officer will be liable to an action for damages if when acting in excess of, or without, jurisdiction, it or he does, or directs to be done, to a military man, whether officer or private, an act which amounts to assault, false imprisonment, or other common law wrong, even though the injury purports to be done in the course of military discipline. Secondly, if the act causing the injury to person or liberty be within jurisdiction and in the course of military discipline no action will lie upon the ground only that such act has been done maliciously and without reasonable and probable cause " (*Heddon* v. *Evans* (3). Compare *Lindsay* v. *Lovell* (4)). But whatever view may be finally adopted, to reason by analogy from the naval and military forces of the Crown to the Police is unsafe. The analogy is imperfect and in many respects false. The *Police Regulation Act* and regulations thereunder bear small resemblance to the Articles of War and the Army Act. The functions and purposes of an Army and a Police Force differ as widely as their organizations and administration. How far absolute privilege extends in naval and military matters is

(1) (1873) L.R. 8 Q.B., at p. 271.
(2) (1918) 87 L.J. K.B., at p. 1118.
(3) (1919) 35 T.L.R. 642, at p. 645.
(4) (1917) V.L.R. 734 ; 39 A.L.T. 88.

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by no means settled. To transfer it by analogy to the Police officers, who are parties to this action, so as to protect the defamatory statements declared upon involves a double extension of the decided cases. The truth is that an indefeasible immunity for defamation is given only where upon clear grounds of public policy a remedy must be denied to private injury because complete freedom from suit appears indispensable to the effective performance of judicial, legislative or official functions. The presumption is against such a privilege and its extension is not favoured (*Royal Aquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson* (1)). Its application should end where its necessity ceases to be evident.

The functions of an inspector of police are not, either in point of delicacy or consequence, so removed from the common round of official duty, and his situation is not so elevated, as to require for the satisfactory execution of his office the same freedom from apprehension of suits as a Cabinet Minister or a General Officer. The discipline of the Force can survive an investigation of the motives by which he is actuated in detracting from the character of a subordinate. There is nothing subversive of Police administration in requiring that he shall act honestly and for the purpose of his duties in making such a report. Possibly upon a balance of convenience it might be better for the Force, if worse for the individual, that libel actions between policemen should be disallowed. But the Legislature has not said so, and there is no sufficient warrant in the principles of common law for denying to one police officer the protection of the law from malicious defamation by another.

The appeal should be allowed and the order of the Supreme Court discharged.

STARKE J. The defendant is an officer of police in New South Wales, and it is alleged that in the course of his duty as an inspector of police he made a report to his superior officer, the Metropolitan Superintendent of Police, which contained statements reflecting upon the plaintiff, another and a subordinate officer of police. The question is whether the immunity or privilege attaching to the publication of this report is absolute, or whether it is defeasible or qualified.

(1) (1892) 1 Q.B. 431.

The law has recognized a limited number of cases in which absolute immunity attaches though the words be false, and written maliciously, "without any justification or excuse, and from personal ill-will and anger against the person defamed," but we are told that the Courts are unwilling to extend these cases (*Royal Aquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson* (1)). Such cases are based upon public policy, and the injury to the public interest that would arise in the absence of immunity. But we must not confuse on the one hand the protection which is afforded in many cases against the disclosure in evidence of documents and oral communications, and on the other hand the protection or immunity (either absolute or defeasible) which arises in respect of the publication of defamatory matter in various circumstances and on various occasions (*Minter* v. *Priest* (2) ; *Isaacs & Sons* v. *Cook* (3) ; *Home* v. *Lord Bentinck* (4)). Prima facie, it would seem that the report alleged to have been made by the defendant in the present case is and ought to be protected from disclosure in evidence ; but if it be admitted in evidence at the trial, the question still remains whether the defamatory matter contained in that report is the subject of the absolute immunity claimed.

Statements made in Parliament or in the course of judicial proceedings have, no doubt, absolute immunity or privilege, but this immunity has never been extended to statements made to or before administrative bodies, or authorities, or public officers, whose duty or function is the redressing of public grievances (*Royal Aquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson* (5) ; *Proctor* v. *Webster* (6) ; *Fraser* on *Libel and Slander*, 5th ed., p. 224). Yet it is asserted that defamatory statements contained in reports made by a public official, in the course of his official duty, to his superior officer, are absolutely privileged, though published maliciously, because public policy requires that all servants of the Crown should make their official communications without any fear of consequences before them (cf. *Clerk and Lindsell* on *The Law of Torts*, 8th ed., pp. 528, 529). Special immunities and privileges for

(1) (1892) 1 Q.B., at p. 451.
(2) (1929) 1 K.B. 655 ; (1930) A.C. 558.
(3) (1925) 2 K.B. 391.
(4) (1820) 2 Brod. & Bing. 130 ; 129 E.R. 907.
(5) (1892) 1 Q.B. 431.
(6) (1885) 16 Q.B.D. 112.

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State servants are, however, opposed to the rule of English law, and it is difficult to support the argument upon principle. How, therefore, stand the authorities?

In *Chatterton* v. *Secretary of State for India* (1) a communication in writing containing matter defamatory of the plaintiff was made by the Secretary of State for India to the Parliamentary Under-Secretary for India, to enable him to answer a question asked in the House of Commons with regard to the treatment of the plaintiff, an officer of the Indian Staff Corps, by the Indian military authorities and Government. The Court of Appeal held that an absolute immunity or privilege existed as regards this communication. *Esher* M.R. said (2):—"The law seems . . . to me to be accurately summed up in *Fraser* on the *Law of Libel and Slander*, p. 95, where he says, after stating that no action lies in respect of a defamatory statement in a report made in the course of military or naval duty, 'For reasons of public policy, the same protection would, no doubt, be given to anything in the nature of an act of State, e.g., to every communication relating to State matters made by one Minister to another, or to the Crown.' I adopt that paragraph as stating the law correctly. In my opinion, the statement of which the plaintiff complains, being a communication relating to a State matter made by one State official to another, was absolutely privileged." But there is here no definition of what is meant by an act of State, or a State matter, nor any description of the classes of State officials within the rule. In English law an "act of State" is usually connected with actions of the Imperial or Dominion Governments towards foreigners outside British territory (cf. *Walker* v. *Baird* (3); *Dicey* on *The Conflict of Laws*, 4th ed., p. 227; *Harrison Moore, Act of State in English Law*); but Lord *Esher* (4), in the judgment already referred to, does not so confine himself. In *Isaacs & Sons* v. *Cook* (5) the absolute immunity or privilege of a communication in writing from the High Commissioner of Australia to the Prime Minister of Australia was also upheld; *Roche* J. said (6) that, "the report being made by the defendant in his official capacity to the Prime Minister of

(1) (1895) 2 Q.B. 189.
(2) (1895) 2 Q.B., at pp. 191, 192.
(3) (1892) A.C. 491.
(4) (1895) 2 Q.B., at pp. 190-192.
(5) (1925) 2 K.B. 391.
(6) (1925) 2 K.B., at p. 399.

Australia pursuant to " his " powers and duties . . . was a communication relating to State matters and therefore absolutely privileged," and that the fact that the communication related to commercial matters did not of itself preclude it from being one relating to State matters. These, I think, are all the relevant cases, for *Hart* v. *Gumpach* (1) is quite indecisive and *Dawkins* v. *Lord Rokeby* (2), *Bottomley* v. *Brougham* (3) and *Burr* v. *Smith* (4) are based on other considerations. In my opinion, it is quite impossible to say that the report of an inspector of police to his superior officer is a matter or act of State within this rule, or that an inspector or subordinate officer of police is a State official contemplated or indicated by these cases. Apart from these decisions, there is no principle or case which affords absolute immunity to the report complained of in this case.

It was further said that no action will lie against a military or naval officer for any defamatory statement contained in any report made by him, in the course of his duty, to his superior officer. *Dawkins* v. *Lord Paulet* (5) is, of course, the authority for this contention. But that decision, Sir *Frederick Pollock* assures us (*Torts*, 11th ed., p. 267), is not received as conclusive. It was rested on two propositions, one, that cases involving questions of military discipline and military duty alone are cognizable only by a military tribunal and not by a Court of law (cf. *Fraser* v. *Balfour* (6)); the other, that as a matter of public policy all military officers of His Majesty should make their official communications without fear of consequences before them. This latter reason is but a particular instance of the general protection claimed for all public servants. But whatever the ultimate fate of the decision may be as regards naval and military officers of the Crown, it is not, in my opinion, of any authority whatever as regards police officers, if and when they are officers of the Crown. True, they are a body of men well organized and disciplined for the maintenance of civil order, but I cannot agree that their organization is in any way comparable to that set up by the provisions of the Army Act and the King's

(1) (1872) L.R. 4 P.C. 439.
(2) (1873) L.R. 8 Q.B. 255; L.R. 7 H.L. 744.
(3) (1908) 1 K.B. 584.
(4) (1909) 2 K.B. 306.
(5) (1869) L.R. 5 Q.B. 94.
(6) (1918) 87 L.J. K.B. 1116.

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Regulations. If the police in the execution of their duties use more force than is reasonably necessary to effect the object in respect of which they are entitled to use force, their responsibility in law is clear. What reason is there of public policy that makes it necessary that a police officer should be immune from legal responsibility when he makes statements defamatory of others which he knows to be false, and maliciously for the purpose of injuring or ruining their reputations? *Dawkins* v. *Lord Paulet* (1), if its authority be finally established, is an exceptional case and applicable to a limited class of Crown servants. It should not be extended, and cannot be applied by way of analogy to officers of the police or other Crown servants.

The appeal should be allowed, and the question stated answered: The document is not subject to absolute privilege.

EVATT J. The defendant, who was a Divisional Inspector of Police, made a written report to the Metropolitan Superintendent of Police at Sydney. The report contained libellous imputations against the plaintiff. The plaintiff was a constable of police attached to the same Division and had made an application for transfer. It was the plaintiff's duty to make the application through the defendant, and he did so. It was the duty of the defendant in sending forward such application to higher authority, to express a definite recommendation or opinion upon the application of the plaintiff. The only question which arises is one of law—can an action for the libel contained in such report be maintained by the plaintiff against the defendant?

It is clear that the report was published upon an occasion upon which the defendant was entitled to the legal protection of qualified privilege or defeasible immunity. But the defendant's claim of absolute privilege or immunity is of a different order. The Supreme Court yielded to the claim upon the suggestion of an analogy between the Police Force and the Army and Navy. The learned Judges said that:—

> "The government and discipline of the Army and Navy are so vital to the preservation of the State that no cause of action should be allowed to arise in favour of a member of the Army or Navy out of any report dealing with

(1) (1869) L.R. 5 Q.B. 94.

the government or discipline of the Army or Navy by another soldier or sailor whose duty it was to report on the matter in question" (1).

And they added:—

"The Police Force in New South Wales is a State force organized on a semi-military basis for preservation of the safety of the State from internal enemies, as the Army and Navy are for its preservation from external enemies. It is, in our opinion, just as necessary for the safety of the State that, in matters relating to the government and discipline of the Police Force, one police officer should be allowed the shelter of an absolute privilege for any report which he makes in the course of his duty about another police officer" (2).

Such an absolute privilege would shield any report made by one police officer about another police officer, if made "in the course of his duty." In ordinary circumstances such a report would be made by a superior officer and would relate to the conduct of his inferior officer. But the officer reporting may have a very high or a relatively low rank in the hierarchy of the Force. Occasion may also call for a report by an inferior officer concerning his superior officer. Would the protection also cover such a case?

Counsel could not suggest any distinction which would concede the immunity to servants of the Crown in one department but deny it to those in another. But it is true that few, if any, branches of the Public Service are organized "on a semi-military basis," and that distinction in fact is the basis of the judgment appealed against.

The officers of police are seldom engaged in operations of a military character. They are organized to maintain the peace of the King, but that is a right and a duty which the law imposes upon all the King's subjects. The main work of the police force is to prevent and detect the commission of offences against the law of the land. They also discharge other functions. To them is committed the control of vehicular and pedestrian traffic, they administer licensing regulations and systems, and they register dogs. No one desires to underestimate the dignity and importance of their principal duty. Perhaps it is sufficient to say that much of their work is not different in kind from what is done by many of the departments of the Executive Government.

The basis of the defendant's argument was that it was decided in *Dawkins* v. *Lord Paulet* (3) that in the case of the Army and Navy,

(1) (1931) 32 S.R. (N.S.W.), at p. 38. (2) (1931) 32 S.R. (N.S.W.), at p. 39.
(3) (1869) L.R. 5 Q.B. 94.

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official communications cannot be made the subject of actions of defamation. "In our opinion," says the judgment of the Full Court,

> "that decision can only be regarded as an authority for the proposition that, as between military and naval officers, there is an absolute privilege for anything written in a report made in the course of his duty by one officer with respect to another officer on a matter touching the discipline and government of the armed forces of the Crown" (1).

According to Mr. *Spencer Bower*, in his well-known work,

> "*Dawkins* v. *Paulet* (2) is an anomalous case, and the judgments of the majority (*Mellor* and *Lush* JJ.) are undoubtedly wrong, and the dissentient judgment of *Cockburn* C.J. right. The defendant there, in the supposed exercise of his military duty, transmitted to the Adjutant-General certain letters and communications which he had received relative to the conduct of the plaintiff, who was a colonel in the Coldstream Guards. The majority of the Court considered it to be a case of absolute protection, on the ground that military affairs ought not to be canvassed in a court of law at all, but the weighty opinion of *Cockburn* C.J., who thought that the protection might be defeated by proof of malice, has since met with such marked judicial approval that it must be accepted as good law" (*Bower* on *The Law of Actionable Defamation*, 2nd ed., p. 87, note (j)).

But if it be assumed that *Dawkins* v. *Lord Paulet* (2) is still good law, there is no justification for extending to members of the police force, in respect of their official reports, an absolute protection against all actions of defamation.

By the year 1892 when the case of *Royal Aquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson* (3) was decided, the classes of publication to which the common law had attached a complete immunity were ascertained, and any proposed extension of the classes was looked upon with disfavour. "Absolute immunity from the consequences of defamation," as Mr. *E. E. Williams* wrote in 1909,

> "is so serious a derogation from the citizen's right to the State's protection of his good name that its existence at all can only be conceded in those few cases where overwhelmingly strong reasons of public policy of another kind cut across this elementary right of civic protection; and any extension of the area of immunity must be viewed with the most jealous suspicion, and resisted, unless its necessity is demonstrated" (25 *Law Quarterly Review*. p. 200).

Extension of the privilege by reason of analogies to recognized cases is not justified. Even if it were, there is no analogy between

(1) (1931) 32 S.R. (N.S.W.), at p. 38. (2) (1869) L.R. 5 Q.B. 94.
(3) (1892) 1 Q.B. 431.

the Police Force preserving the State from " internal enemies " and the Army preserving it from " external enemies."

Those who break the law—whether it be contained in the *Crimes Act* or the *Liquor Act*—are punishable by the King's Courts, but they do not thereby become the King's enemies. They remain his subjects. Rhetoric sanctions the epithet " enemies within our gates," even in times of profound peace. But the epithet may only mean that the speaker strongly disapproves of or dislikes certain persons and makes them the subject of his condemnation.

In my opinion, the only privilege of which the defendant can avail himself is qualified by the right of the plaintiff to succeed upon proving the existence of express malice. No question now arises which concerns the production of the defendant's report in order to tender it in evidence at the trial, and I refrain from dealing with any such question.

The appeal should be allowed.

McTIERNAN J. I agree that the appeal should be allowed. The statements complained of in the present case do not merely impugn the fitness or efficiency of the plaintiff as a police constable, but asperse him in his personal capacity. Their libellous character does not depend on their publication of and concerning the plaintiff in the way of his calling as a police constable. The plaintiff in his declaration alleges that the libel sued upon was published " of and concerning the plaintiff." The damage alleged is that the " plaintiff was injured in his reputation and was held up to hatred ridicule and contempt and he lost the confidence of his superior officers and his chance of advancement in the Police Force was and will be seriously affected and he was otherwise greatly damaged." The libel alleged in the declaration contains the following statements :— " He (meaning the plaintiff) is not amenable to discipline and is untruthful." " It appears to me nothing less than a conspiracy between them (meaning *inter alios* the plaintiff) to cast discredit on my reputation. Their (meaning *inter alios* the plaintiff's) reasons given are false, and prove them liars of a very dangerous class, and whilst they remain here I must protect myself to the extent of having one witness at least present before giving any one of them any departmental instructions in future."

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Referring to the libel upon which the plaintiff sued in *Dawkins* v. *Lord Paulet* (1) *Lush* J. said, at p. 120 :—" It is to be observed that the letters complained of reflect on the plaintiff in his capacity of military officer, and in that capacity only. They affect his character, not as a citizen, but as a soldier, and they were written, not for circulation amongst the public, nor to a private individual, but to the proper military authority, and for the purpose of originating an inquiry into the competence of the plaintiff, and the propriety of an order which the defendant, as his superior officer, had made." *Cockburn* C.J., in his dissenting judgment, interpreted the gist of the plaintiff's action in these words (2) : " This is an action for a libel written by the defendant concerning the plaintiff as an officer holding her Majesty's commission as a captain in the Coldstream Guards." The first count of the plaintiff's declaration alleged that the offending letter, sued upon in that count, was published " of and concerning the plaintiff and of and concerning him as such officer and captain as aforesaid." The damage alleged was that " the plaintiff lost the value of his said commission, and was compelled to leave his regiment, and was deprived of the emoluments he might and otherwise would have acquired from the holding of his said commission and continuing in his said regiment, and has been and is injured in his reputation as an officer and a soldier, and was and is otherwise greatly injured and damnified." The second count alleged that the other letter was published " of and concerning the plaintiff and of and concerning him in his profession as such officer as aforesaid." The damage alleged in that count was that the plaintiff " was injured in his reputation as an officer and a soldier." There is a striking difference between the letters pleaded in *Dawkins* v. *Lord Paulet* and the terms of the report set out in the declaration in the present case. Questions of military discipline and fitness alone were raised by the letters complained of in *Dawkins* v. *Lord Paulet*, but the report in the present case raises questions affecting the character of the plaintiff as a citizen. In *Dawkins* v. *Lord Paulet* it was decided that questions of public policy and convenience require that the opinion of a Commander on military questions

(1) (1869) L.R. 5 Q.B. 94.

(2) (1869) L.R. 5 Q.B., at p. 100.

should not be submitted to a jury "ignorant of such matters," by whom that opinion may be overruled (1).

If the declaration in the present case raised only police questions, the difficulty of applying *Dawkins* v. *Lord Paulet* (2) may be diminished. But in any case I do not think that the principle of that decision should be extended to a report made by a police officer with reference to one of his subordinates. Furthermore, the position of the respondent does not, in my opinion, warrant the application of the principle in *Chatterton's Case* (3) or *Isaacs & Sons* v. *Cook* (4) to the report which he made of and concerning the appellant.

Appeal allowed. Order of the Supreme Court discharged. In lieu thereof question in the special case answered as follows: The publication is not the subject of absolute privilege. Respondent to pay the costs of this appeal and of the special case in the Supreme Court.

Solicitors for the appellant, *P. V. McCulloch & Buggy.*
Solicitor for the respondent, *W. Parker.*

J. B.

(1) (1869) L.R. 5 Q.B., at p. 115, per *Mellor* J.
(2) (1869) L.R. 5 Q.B. 94.
(3) (1895) 2 Q.B. 189.
(4) (1925) 2 K.B. 391.