12 C.L.R.1

## [HIGH COURT OF AUSTRALIA.]

## NEW SOUTH WALES COUNTRY PRESS CO-OPERATIVE CO. LTD. DEFENDANTS.

APPELLANTS ;

AND

GEORGE ANDREW STEWART PLAINTIFF.

RESPONDENT.

ON APPEAL FROM THE SUPREME NEW SOUTH WALES.

Defamation-Principal and agent-Liability of company for slander uttered by H. C. of A. agent-Agent employed for special purpose-Evidence-Admission by agent of 1911. liability of principal-Statement by agent as to his own antecedent acts.

The plaintiff and the defendant company were rival traders engaged in obtaining advertisements for insertion in country newspapers. D., a canvassing agent working on commission on his own account, but who had previously been employed as a canvasser by the defendant company, informed S., the defendant company's manager, that the plaintiff had contracted with B. to insert advertisements in certain newspapers under the control of the defendant company. S. asked D. to obtain for him a copy of this contract. In applying to B. for a copy of the contract D. made slanderous statements concerning the plaintiff, and the contract he had entered into with B. S., upon hearing of the slanders, interviewed B., and other persons to whom D. had made similar statements concerning the plaintiff, and explained that D. had said more than he had any authority to say, and that he had "bungled the matter." The plaintiff sued the defendant company for slander. D. was not called as a witness.

Held, that there was no evidence that the uttering of the slanders was within the scope of D.'s authority and employment so as to render the defendant company liable.

Quære, whether statements made by an agent as to his own antecedent acts are admissible evidence of those acts as against the principal.

SYDNEY, April 13, 19; May 10.

> Griffith C.J., Barton and O'Connor JJ.

H. C. of A. 1911.

Decision of the Supreme Court, Stewart v. New South Wales Country Press Co-operative Co. Ltd., 10 S.R. (N.S.W.), 747; 27 W.N. (N.S.W.), 197, reversed.

NEW SOUTH
WALES
COUNTRY
PRESS COOPERATIVE
CO. LTD.
v.
STEWART.

APPEAL by the defendants from the decision of the Supreme Court discharging a rule nisi to enter a nonsuit, or for a new trial, in an action for slander, upon the ground that there was no evidence that Dunn (who uttered the slander) was in the service of the defendants at the time the slander was uttered, or that he was acting within the scope of any employment, and upon the ground of the wrongful admission of evidence of conversations between Dunn and the persons he interviewed, and of conversations between Shakespeare (the defendant's manager), and certain of the plaintiff's witnesses.

The plaintiff was a printer, and portion of his business consisted in obtaining advertisements for publication in newspapers circulating in the country. Contracts were made by the plaintiff with his customers specifying the number of papers in which the advertisements were to appear. The plaintiff then sent the advertisements to the country newspapers for publication, or printed them on a sheet which he then sent to the various newspapers in the country with whom he had an agreement for their publication, and the sheets were then issued by the newspapers as a supplement to their papers.

The defendant company was engaged, in competition with the plaintiff, in obtaining advertisements for insertion in the country papers. The Country Press Association, with which the defendant company was associated, controlled some 80 country newspapers, and the Association bound themselves not to receive advertisements from any agents except Gordon & Gotch, Reuter and the defendant company. One Shakespeare was secretary of the Association and also of the defendant company.

Dunn entered the service of the defendant company as canvasser on 25th November 1909, but was discharged on 5th January 1910, before the slander in question was uttered. After he had left this employment he still continued canvassing for advertisements on his own account, and was paid a commission by the persons to whom he brought advertisements. At the end of January, or beginning of February 1910, Dunn called on Shakespeare, and said that, while he was canvassing for the H. C. of A. Farmer and Settler at Sir John See & Co., Brakespeare, their manager, told him that two persons had called, and tried to get NEW SOUTH their firm to advertise in a supplement proposition; that they offered him 40 papers, while they only proposed to charge for 25. Dunn asked Shakespeare whether any firm could get 40 supplements into the country papers. Shakespeare said it was highly improbable any firm in Sydney could do that on a supplement proposal, and it would be interesting to see the contract. Dunn said "when I am canvassing along Sussex Street I will try and get you one." Dunn then went to a man named Boylson, a commission agent and produce broker in Sussex Street, and handed him a card on which was printed "representing the New South Wales Country Press Co-operative Company." Boylson said he had a contract with the plaintiff for advertising in country newspapers, and Dunn then uttered the slander complained of as follows:—" Stewart & Co. have a bogus list of papers, and cannot do what they say they can do with the supplements. cannot give you the number of papers they say they can. Four of the papers, the Moss Vale Record, the Robertson Advocate, the Mittagong Express, and the Southern Mail are one paper, and they call it different names. The Country Press Co. have an injunction against them, and are going to put it in force. You had better break your contract with Stewart & Co. If I cannot prove what I say I will pay the cost of your advertising." Dunn and Dunridge, Boylson's clerk, then went to the plaintiff's office and obtained a copy of Boylson's contract. They then went to the defendant company's office and saw Shakespeare, and showed him the contract. Shakespeare ticked off a number of the papers in the list at the back of the contract, and said the plaintiff could not advertise in these papers, as these papers had a contract with the defendant company. Dunn afterwards visited a number of other persons who had contracts with the plaintiff, and made similar statements regarding the plaintiff's right to advertise. In some cases Dunn said he was acting under Shakespeare's instructions. Shakespeare did not know of the statements made by Dunn until he received a letter from the plaintiff's solicitors on 11th February. He then went to Boylson and told him that

1911.

WALES COUNTRY Press Co-OPERATIVE Co. LTD. v.

STEWART.

WALES COUNTRY PRESS Co-OPERATIVE Co. LTD. v. STEWART.

H. C. of A. Dunn had no authority to make the statements he had made. After issue of the writ he also interviewed some of the other NEW SOUTH persons to whom Dunn had spoken. In these conversations he said that Dunn was perhaps over enthusiastic, and had done more than he had been told to do, and said more than he had any authority to say, and that he had bungled the matter. The evidence of these conversations was objected to. Dunn was not called as a witness.

> At the close of the plaintiff's case a nonsuit was moved for and refused, and the jury found a verdict for the plaintiff for £250. The Supreme Court refused to set this verdict aside (1).

> Wise K.C., Loxton, K.C., James, and J. A. Ferguson, for the appellants. Dunn had no authority to utter slanders on behalf of the defendants. He was only authorized to obtain a copy of Boylson's contract for Shakespeare. This is at the most a case of special authority, and it is for the plaintiff to show what the nature of the employment was, or the limits of the agent's authority, in order to prove that it was within the scope of his authority to bind the defendants by the slanders he uttered. This case is not governed by Citizens' Life Assurance Co. Ltd. v. Brown (2). In that case the company was held liable for the acts of a person holding a high and responsible position in their service. Dunn was not in the defendants' employment, and there is no evidence that the defendants placed him in their place to do acts of the class complained of: Bunk of New South Wales v. Owston (3); Mackay v. Commercial Bank of New Brunswick (4); Abrahams v. Deakin (5); Hanson v. Waller (6); Swire v. Francis (7).

> It was not within the scope of Shakespeare's authority to make admissions as to the defendants' liability for past transactions: Garth v. Howard (8); Great Western Railway Co. v. Willis (9); Bowstead on Agency, 4th ed., p. 151; Barnett v. South London Tramways Co. (10).

<sup>(1) 10</sup> S.R. (N.S.W.), 747.

<sup>(2) (1904)</sup> A.C., 423.

<sup>(3) 4</sup> App Cas., 270, at p. 288. (4) L.R. 5 P.C., 394. (5) (1891) 1 Q.B., 516.

<sup>(6) (1901) 1</sup> K.B., 390.

<sup>(7) 3</sup> App. Cas., 106, at p. 113.

<sup>(8) 8</sup> Bing., 451. (9) 18 C.B.N.S., 748.

<sup>(10) 18</sup> Q.B.D., 815.

GRIFFITH C.J. referred to Packet Co. v. Clough (1).

H. C. of A. 1911.

WALES COUNTRY Press Co-OPERATIVE Co. LTD. v. STEWART.

Pilcher K.C., Blacket, and Edwards, for the respondent. NEW SOUTH Shakespeare received information from Dunn as to a rival firm encroaching on the defendants' sphere of operations, and employed Dunn to thoroughly investigate the matter, and find out what the rivals were doing. He had authority to appoint Dunn to make this inquiry. If in order to carry out his appointed task of obtaining the copy of the contract from Boylson, Dunn found it necessary to make the alleged statements, the defendants are liable. They were uttered by Dunn as Shakespeare's mouthpiece; not for private purposes of his own, but for the purpose of furthering the employment upon which he was engaged, that is, to secure advertisements by disparaging rival traders: Barwick v. English Joint Stock Bank (2). There need not be an express command or privity of the employer: Dyer v. Munday (3). This case comes within the principle of liability laid down by the Privy Council in Citizens' Life Assurance Co. Ltd. v. Brown (4).

The statements made by Shakespeare were admissible against the defendants: Kirkstall Brewery Co. v. Furness Railway Co. 5).

Loxton K.C. in reply, referred to Lucas v. Mason (6).

Cur. adv. vult.

The following judgments were read:-

GRIFFITH C.J. This was an action for damages for slander uttered by one Dunn, who is alleged by the respondent to have been, at the date of publication, employed by the appellants under such circumstances as to render them responsible for his utterances. The appellants are a joint stock company carrying on the business of advertising agents in connection with country newspapers, to which they also supply a common supplement. respondent is a rival advertising agent, trading as McCarron,

May 10.

<sup>(1) 87</sup> U.S., 528.

<sup>(2)</sup> L.R. 2 Ex., 259.

<sup>(3) (1895) 1</sup> Q.B., 742.

<sup>(4) (1904)</sup> A.C., 423.

<sup>(5)</sup> L.R. 9 Q.B., 468. (6) L.R. 10 Ex., 251.

NEW SOUTH WALES COUNTRY PRESS Co-OPERATIVE Co. LTD. 12. STEWART. Griffith C.J.

H. C. of A. Stewart & Co. The only question for determination is whether the appellants are responsible for Dunn's slanderous statements.

The learned Judges of the Supreme Court apparently thought that the case fell within the rule laid down in Citizens' Life Assurance Co. v. Brown (1), in which Lord Lindley, delivering the opinion of the Judicial Committee (in 1904), quoted with approval the words of Acting Chief Justice Stephen: "Although the particular act which gives the cause of action may not be authorized, still if the act is done in the course of employment which is authorized, then the master is liable for the act of his servant." The phrase "in the course of employment" is not free from ambiguity, as has become only too manifest since 1904, but the sense in which the learned Lord used it was made clear by other parts of the opinion. He had just before said (2):—" It is clear that the scope of Fitzpatrick's authority and employment was wide and by no means clearly defined. In considering the scope of his authority and employment their Lordships agree with the Acting Chief Justice in thinking that the jury were entitled to act on their own knowledge of Colonial business and habits." Then, quoting the words which I have read, and referring to some cases, he added: - "Such being the evidence, their Lordships cannot judicially hold that there was no evidence to warrant the jury in finding that it was within the scope of Fitzpatrick's authority and employment to write," &c. The real question, then, is whether the act complained of was within the scope of the authority and employment of the alleged servant or agent. The reasons and the limits of the rule are, if I may respectfully say so, well expressed by Willes J. in the case of Bayley v. Manchester, Sheffield, and Lincolnshire Railway Co. (3), quoted by Rigby L.J. in Dyer v. Munday (4):- "A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so entrusted either in the manner of doing such an act, or in doing such an act under

<sup>(1) (1904)</sup> A.C., 423, at p. 428. (2) (1904) A.C., 423, at p. 427.

<sup>(3)</sup> L.R. 7 C.P., 415, at p. 420. (4) (1895) 1 Q.B., 742, at p. 748.

circumstances in which it ought not to have been done; provided H. C. of A. that what was done was done, not from any caprice of the servant, but in the course of the employment." Rigby L.J. NEW SOUTH added:—"The class of acts to be done by the manager . . . was the resumption of furniture . . . and it was left to him to determine when such an act should be done and the manner in which it should be done."

It is apparent, therefore, that the first step in the present case was to show what was the scope of the authority and employment of Dunn; and the burden of proof was on the plaintiff. Dunn was not called as a witness. It was proved that he had been employed by the defendants as a canvasser for advertisements under a written engagement from 26th November 1909 to 5th January 1910, when the engagement was terminated on the ground of the defendants' dissatisfaction with his efforts.

The words complained of were uttered about the end of January or beginning of February in the course of interviews between Dunn and two persons named Mulholland and Boylson, in connection with requests to supply him with copies of advertising contracts said to have been made by plaintiff with them respectively.

The only direct evidence as to the nature of Dunn's employment by defendants at that time was given by defendants' manager Shakespeare in the course of the defendants' case. He deposed that, on a day between 6th January and 14th February, Dunn called upon him and told him that another advertising firm were offering advantages to advertisers in a supplement supplied to as many as 40 country newspapers, to which Shakespeare replied that it was highly improbable that any firm in Sydney could do so, and that it would be interesting to see the contract, and that Dunn then said "Well, when I am canvassing Sussex Street, I will try and get you one." If there were no more in the case the plaintiff would plainly have failed to show that the defendants were liable for Dunn's statements.

He had, however, in his own case endeavoured to show the scope of Dunn's authority and employment. Evidence was given that on two occasions, one at the end of February and the other at the end of March, both being after Dunn had ceased to be in

WALES COUNTRY PRESS Co-OPERATIVE Co. LTD.

STEWART.

Griffith C.J.

1911. NEW SOUTH WALES COUNTRY PRESS Co-OPERATIVE Co. LTD. STEWART.

Griffith C.J.

H. C. of A. the defendants' employment, they had accepted an order for advertisements through his agency. As to this Shakespeare said that his company accepted from any persons orders which they considered satisfactory. This was not questioned. I do not think that it can be inferred from these facts that Dunn was at the times in question in defendants' employment in any relevant sense of the word.

> Evidence was also offered of admissions said to have been made by Shakespeare after the publication. This evidence was objected to, but I will deal with it on the assumption that it was admissible. Mulholland, who was a witness for the plaintiff, said that Shakespeare called at his office early in May and asked if Dunn had called on him and what he had said. The witness proceeded:—"I told him that Dunn had called at the office and had asked me was I advertising with McCarron, Stewart and had asked me to show the contract; I asked him who he was and he said it did not matter; I said 'Well I won't discuss the matter with you until you tell me who you are, and who you are representing.' He then produced his card, which I think is the card produced. I did not show this card to Mr. Shakespeare then, but I told him that Dunn had produced a card and that Dunn then told me that these people could not carry out their contract, and he asked me for my contract, but I did not have it because I had never had it given back to me. Dunn produced a blank contract with Stewart and showed me the list of papers on the back and said that McCarron, Stewart could not advertise in those papers because they had an injunction against them which prevented them from advertising in those country papers. He also pointed out four papers and said they were all one; he mentioned the Mittagong, Moss Vale, Robertson and another paper. He said they could not carry out their contracts and I need not pay them. In fact he said he would guarantee to pay the account for me if they could prove they carried out their contract, if they forced me. I told Mr. Shakespeare that, and he said that Mr. Dunn was evidently over enthusiastic and had bungled the matter. He said they were there to protect the interests of honest traders, and that they did the whole of the country advertising, and they were there to save honest traders

from being taken down. A lot passed between us, but I can't H. C. of A. recollect anything at the moment. He apologized for the trouble Mr. Dunn had put me to, and then he left."

The words relied on as an admission are "He said that Dunn was evidently over enthusiastic and had bungled the matter." cannot find in these words anything to show that the scope of Dunn's authority and employment was such as to empower him to say anything he thought fit in disparagement of plaintiff, while endeavouring to obtain a copy of plaintiff's contract with Mulholland. The utmost that can be inferred from them is that Shakespeare had authorized him to ask for a copy of the contract.

Another witness, Caldicott, deposed that at Shakespeare's request he had an interview with him towards the end of February, when Shakespeare asked him about a conversation which he had had with Dunn, and that he told him substantially what Dunn had said, which he narrated as follows:-

Dunn said "We claim that McCarron, Stewart & Co. cannot insert Smith's advertisement in all those papers named on the back of their 'contract.' The copy of the contract which he produced to me had certain of the papers marked with a red dot, and he said 'we claim that they cannot insert that advertisement in those papers marked with the red dot.' On the list I saw that the Walcha Witness was marked. I immediately picked up the Walcha Witness with Smith & Co.'s advertisement in it and I said 'how do you account for this; here is the Walcha Witness with the advertisement in it.' He said 'well of course this list was marked from memory; it has not been checked.' I said 'that's a very peculiar thing for you to do; you are doing a very serious thing in going about making a statement like that; you ought to verify your references and get your facts in order before you do a thing like this.' He said 'well, of course I am only doing what Mr. Shakespeare told me to do.'

"I cannot say whether I told Mr. Shakespeare that, but I believe that I told Shakespeare all that occurred in the office.

"I am not at all clear as to what I told Shakespeare. He asked me what had occurred in my office, and so far as I know I told him everything that occurred in the office. That is all I remember telling him.

1911.

NEW SOUTH WALES COUNTRY PRESS Co-OPERATIVE Co LTD.

STEWART.

Griffith C.J.

H. C. of A. 1911.

NEW SOUTH
WALES
COUNTRY
PRESS COOPERATIVE
CO. LTD.
v.
STEWART.
Griffith C.J.

"Shakespeare then told me that Dunn had not had the authority of the Country Press Co. to make the statements he had made.

"I was rather angry because Dunn had gone to my client, Mr. Smith, without coming to me. Mr. Shakespeare knew Smith was my client, and I spoke to him about that. I remember Shakespeare saying that Dunn was perhaps over enthusiastic and that he had done more than he had been told to do, or said more than he had any authority to say.

"Q. Did he say anything about where Dunn was over enthusiastic. A. Yes, in Sussex Street. He told me he had sent Dunn down to Sussex Street as the representative of some of these papers to make certain statements. He said that certain of these papers on this list were their papers and the proprietors of them were members of the Country Press Company, and he told me he had sent him down there as representing those papers. The Country Press Company is the defendant company."

Upon this evidence the learned Chief Justice remarks (1):—"If the jury believed that Dunn was sent down to interview persons and protect the interests of newspaper proprietors who were shareholders in the company, the conclusion would be correct enough that the man was doing the company's work, assuming that Shakespeare had authority from the company to so employ him. I only read that witness's evidence, but putting it side by side with that of other witnesses, it seems to me that there was evidence from which the jury could find that Shakespeare sent Dunn down to interview these people in Sussex Street on the business of the company."

I agree that in the case put the conclusion that Dunn was doing the company's work would in one sense be correct. I also agree that it might be inferred that he was sent to interview people on the business of the company, using that expression in the sense of "some business of the company" as distinguished from the "business of the company in general," that business being to make certain statements, of which we know nothing. But I fail to find in the evidence anything to show that he had more than a special and limited authority, or to adopt the words of Willes J. and Rigby L.J., anything to show that he had authority

to do a class of acts and that it was left to him to determine the H. C. of A. manner in which they should be done. The difference between a special and a general authority does not need exposition. I think that the employer of a special agent may fairly be held responsible for all such acts as the latter may reasonably be expected to do in carrying out his mandate. But I do not think that the uttering of promiscuous slander is such an act. was no other material evidence on the point.

In my opinion there was no evidence upon which the jury could properly find that the uttering of the slanders complained of was within the scope of Dunn's authority and employment, or that they were uttered in the course of his employment in the only relevant sense of that term.

It was contended for the defendants that Shakespeare's statements as to his own previous acts alleged to be done on their behalf were not admissible in evidence against them. On this point I accept the rule laid down by the Supreme Court of the United States in Packet Co. v. Clough (1) "Declarations of an agent are, doubtless, in some cases, admissible against his principal, but only so far as he had authority to make them, and authority to make them is not necessarily to be inferred from power given to do certain acts.

"It is true that whatever the agent does in the lawful prosecution of the business intrusted to him is the act of the principal, and the rule is well stated by Mr. Justice Story that 'where the acts of the agent will bind the principal, there his representations, declarations and admissions respecting the subject matter will also bind him, if made at the same time, and constituting part of the res gestae.' A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified or explained, either by his declarations, which amount to no more than a mere narrative of the past occurrence, or by an isolated conversation held, or an isolated act done at a later period. . . . The reason is that the agent to do the act is not authorized to narrate what he had done or how he had done it, and his declaration is no part of the res gestae."

(1) 87 U.S., 528, at p. 540.

1911.

NEW SOUTH WALES COUNTRY PRESS Co-OPERATIVE Co. LTD. STEWART.

Griffith C.J.

H. C. of A. 1911. WALES COUNTRY PRESS Co-OPERATIVE

Co. LTD. STEWART. Griffith C.J.

Whether a conversation between an agent and a third person on the subject of a claim made by the third person against the NEW SOUTH principal (evidence of which is probably admissible for some purposes) can be regarded as res gestae within the meaning of this rule, so that statements made by the agent in the course of the conversation as to his own antecedent acts should be held to constitute part of the res gestae, is a question of some difficulty which may depend upon the facts of the particular case, and upon which I reserve my opinion.

For, even assuming that the evidence objected to was admissible as evidence of statements made on defendant's behalf, I think, for the reasons which I have given, that Shakespeare's statements did not show that it was within the scope of Dunn's authority and employment to utter the slanders complained of.

In my opinion, therefore, the rule should have been made absolute to enter a nonsuit, and the appeal should be allowed.

BARTON J. It was not disputed on the appeal that Dunn, the alleged agent of the defendants (now appellants), had uttered the slanders complained of. The appellants deny that Dunn was at the time an agent of theirs, and if the Court thinks that he was, then they deny that they are answerable for the slanders, because they say that if he was employed at all it was for a special purpose, and the uttering of the slanders was not within the scope of that employment. By letter from the manager, dated 26th November 1909, Dunn was appointed by the Board of the appellant company as a canvasser for advertisements, to be inserted in newspapers included in their agency, and his duties began on the 29th of that month. It appears that the directors were "not impressed with the result" of his efforts, and accordingly the manager dismissed him by letter of 5th January 1910. This letter was put in evidence for the defendant company, but it had been elicited in the course of the plaintiff's case that Dunn's employment ceased "early in January." If the slanders had been published while he held his appointment under the company, the respondent's case would have been very strong. A person employed as a canvasser, as Dunn then was, would be expected by his employers to extol their business as a medium for adver-

tisements, and to endeavour to attract custom by comparing it H. C. of A. favourably with rival concerns such as that of the respondent. The choice of the terms in which he described similar enterprises NEW SOUTH with the view of showing the superiority of that for which he was canvassing would necessarily be left by his employers to his own judgment, and therefore they would be responsible if in the course of doing so he defamed a rival concern and thus exceeded his authority, which did not extend to the doing of actionable wrongs to others. In Dyer v. Munday (1), Lord Esher M.R. said:—"The liability of the master does not rest merely on the question of authority, because the authority given is generally to do the master's business rightly; but the law says that if, in course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable." That was the case of an excess (an assault) committed by the manager of a branch of the defendant's business, the sale of furniture on the hire-purchase system, in the course of resuming possession of furniture on which an instalment was in arrear. It was held that the jury were justified in finding that the excess, though of course not authorized, had been committed in the course of the manager's employment, that is, in the course of acting within the scope of his authority. As Willes J. said in Barwick v. English Joint Stock Bank, in the Exchequer Chamber (2):- "In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in." It is upon this principle that the case of Citizens' Life Insurance Co. v. Brown (3) was decided. But the considerations are not quite the same, as I shall endeavour to show presently, where the authority is limited in extent and special as to occasion, and where it does not sanction the performance of a whole class of duties in the execution of which necessity must arise for the exercise of judgment on the part of the person authorized, in the absence of the employer.

1911.

WALES COUNTRY PRESS Co-OPERATIVE Co. LTD.

STEWART.

Barton J.

<sup>(1) (1895) 1</sup> Q.B., 742, at p. 746. (2) L.R. 2 Ex., 259, at p. 266. (3) (1904) A.C., 423.

H. C. of A. 1911.

WALES COUNTRY PRESS Co-OPERATIVE Co. LTD. STEWART.

Barton J.

In the present case, however, the slanders were uttered after the dismissal of the person who spoke them from his employment NEW SOUTH as canvasser for the company. Some weeks after that event, namely, on the 17th February and the 18th March respectively, Dunn brought to the appellants' manager two advertisements for insertion in the newspapers controlled by the appellants. He had not in the interval been employed by them as a canvasser, nor had he been authorized to seek the advertisements in question, but he had brought them "as a free lance," as other people who solicit advertisements are wont to do, and it appears that a percentage is ordinarily paid to anyone who brings in such an order. I do not think the mere acceptance of these orders can be argued to have involved the company in any responsibility for the slanders, supposing them to have been published in the act of obtaining the orders. But, on the evidence for the respondent, the slanders took place before even these orders were obtained by Dunn, and it is not to be concluded, from the mere fact of his afterwards bringing them to the appellant company, that between his dismissal and that time he was in any sense their agent or servant. If the case rested there, clearly the respondent would have failed for want of proof of authority. He was therefore bound to show that at the time of the slanders Dunn was in the employment of the appellants either generally, or for the transaction of some class of matters, or of some particular matter, and that the slanders came within the scope of the authority expressly given or properly inferred from the nature of the employment and its course. It is almost a truism to say that the difficulty of showing that particular excesses are within the scope of authority increases in proportion as the authority proved is more restricted.

There was no direct evidence to show that Dunn was in any sense employed by the appellants at the time of the slanders, for clearly his own representations to third persons were not evidence of such a fact. But the case for the respondent rested in this regard on the admissions said to have been made by the appellants' manager and secretary, Mr. Shakespeare. In respect of these, two questions arose: First, whether they were admissible, and secondly, whether, if admissible, they were evidence of

employment, and of an authority sufficient in its scope to import H. C. of A. responsibility for the slanders.

WALES COUNTRY PRESS Co-OPERATIVE Co. LTD. STEWART. Barton J.

I do not deem it necessary to decide whether these conversa- NEW SOUTH tions were rightly admitted, because, in my opinion, their admission did not make the respondent's case sufficient to go to the jury, since, even after their inclusion, his case was one upon which a jury could not reasonably find in his favour. In that view, it follows that the question of admissibility is immaterial, as the nonsuit asked for at the trial ought to have been granted, notwithstanding the conversations. The question of admissibility is highly arguable, and I do not pronounce an opinion upon it for the reason given.

Assuming them to have been evidence, I think the conversations contained some admissions by Shakespeare of an authority given to Dunn, and existing at the time of the slanders, to do something for the appellant company. I do not include the conversation with Johnson "in the second or third week of February." It is not shown to have taken place before the bringing by Dunn of the first of the two orders for advertisements and is as referable to that incident—a mere casual one—as to any real employment. The same observation applies to what Johnson said as to the first week in March. As a matter of fact Dunn was employed on a salary and commission as canvasser for the Star, of which Johnson was the advertising manager, at the time of both these colloquies. But there is something more material in the evidence of Caldicott, who testifies that towards the end of February he related to Shakespeare a conversation he had had with Dunn, though Caldicott is not clear as to what he told Shakespeare. But it is clear that Dunn had made statements to this witness which were equivalent to some of the slanders complained of. Caldicott says that Shakespeare, on hearing of them, said that Dunn "had not had the authority of the company to make the statements he had made"; that he "was perhaps over enthusiastic, and that he had done more than he had been told to do," or "said more than he had any authority to say"; that "he had sent Dunn down into Sussex Street as the representative of some of these papers to make certain statements"; that "certain of the papers on this list" (meaning a list appended to the form

WALES COUNTRY PRESS Co-OPERATIVE Co. LTD. 2. STEWART.

Barton J.

H. C. of A. of contract used by the respondent) "were their papers, and the proprietors of them were members of the Country Press Co."; NEW SOUTH that he had sent Dunn down there as representing "certain papers whose proprietors were the members of the Country Press Co."

> While the jury might well conclude from this evidence that by Shakespeare's admission Dunn had been sent by him to make certain statements, yet it also appears that his authority was limited to the duty of making the statements, the nature of which is not shown by the respondent.

> The remaining conversation, that with Mulholland, took place early in May, after action brought, when Shakespeare was accompanied by his company's solicitor. In response to inquiries by Shakespeare, Mulholland related a slander upon the respondent's firm, uttered by Dunn to him, and which has already been detailed. He also stated that Dunn, before uttering the slander, had asked him (Mulholland) to show him an advertising contract that he had with the respondent. On this narrative Shakespeare said that "Mr. Dunn was evidently over enthusiastic and had bungled the matter"; that they, the company, "were there to protect the interests of honest traders, that they did the whole of the country advertising, that they were there to save honest traders from being taken down." Before leaving, Shakespeare apologized for the trouble to which Dunn had put the witness.

> Here again is evidence of some authority given to Dunn. Its precise nature is left to inference, and it may be inferred that Dunn had acted within it in asking Mulholland to show him that witness's contract with the respondent. It cannot however be inferred, any more than in the case of Caldicott, that he had any authority to "do a class of acts" in the doing of which he was necessarily "left to determine, according to the circumstances that arise, when an act of that class is to be done" (See per Willes J. in Bayley v. Manchester, Sheffield, and Lincolnshire Railway Co. (1). There is no evidence that Dunn was sent to Caldicott with any authority to do more than to make certain statements, of which the respondent does not prove the nature; or that he was sent to Mulholland to do more than endeavour to

procure a sight—or perhaps a copy—of an advertising contract. H. C. of A.

In these circumstances, can the slanders be deemed to be within the scope of the authority given to Dunn in either instance? NEW SOUTH Can it be said that the slanders were "in the course of carrying out his employment," as Lord Esher puts it?

Among the many decisions on the question of the responsibility of principals, since Barwick's and Bayley's Cases, the case of Lucus v. Mason (1) may usefully be referred to. The reasoning affords, I think, a discrimen for the present question. The plaintiff was present in the gallery of a hall where there was a meeting convened by members of an association. The defendant acted as chairman. Some disturbance occurred in the gallery near the plaintiff, but he did not join in it. The defendant said :- "I shall be obliged to bring those men to the front who are making the disturbance. Bring those men to the front." Thereupon a man with a white ribbon on his arm (apparently a steward authorized to assist in keeping order) together with two policemen, seized the plaintiff and dragged him to the front, and he was injured. There was no evidence that the defendant had given any instructions as to keeping order to the plaintiff's assailants before the assault. The plaintiff was nonsuited, and the Court of Exchequer (Bramwell, Cleasby and Pollock BB.) refused to set the nonsuit aside. They held that the evidence did not show that the defendant's order meant "Determine who are the disturbers, and when you have done so, bring forward those whom you so determine to be the disturbers." The evidence did not appear to them to show an authority to bring forward any persons other than the actual disturbers. After stating the law in terms equivalent to those used by Willes J. in Bayley's and Barwick's Cases, they said (2):-"This rule holds especially where the master is absent, and the duty to be performed vicariously is general in character, as in the case of conductors of public vehicles, railway servants, and the like." . . . "In the present case there was no relation of master and servant, or of principal and general agent, or agent for such cases as might occur in the absence of the principal, but a particular direction as to a particular matter, and this, in our judgment, not only prevents the decisions referred to binding

1911.

WALES COUNTRY PRESS Co-OPERATIVE Co. LTD. STEWART.

Barton J.

(1) L.R. 10 Ex., 251. \*

(2) L.R. 10 Ex., 251, at p. 253.

WALES COUNTRY PRESS CC. OPERATIVE Co. LTD. STEWART. Barton J.

H. C. of A. us as authorities, but makes them inapplicable in principle." Although in that case the principal was present, yet it has this NEW SOUTH in common with the present case, that the cardinal feature was "the particular direction as to a particular matter," and the rest of the judgment shows that feature as the ratio decidendi. The judgment proceeds:-"In the case of master and servant, the character and duties attaching to the employment are known and defined beforehand, the servant who is to perform them is selected accordingly. In the present case no such relationship existed in the first instance, nor did it arise during the transaction. There is no such pre-existing relationship as exists in the case of master and servant, and there is, we think, no ground for extending by implication an express authority limited in its terms." That is precisely such an authority as I conceive to have existed in the case of Dunn. The Court concluded by expressing the opinion that there was not any evidence which should have been submitted to the jury of a general or implied authority going beyond the limit of that which was created by the express words used, or of any authority, to the persons ordered to bring the disturbers forward, to exercise a discretion as to who were disturbers.

Holding, then, that an authority existed, but that it was expressly limited to the performance of a single act and not of a class of acts, and that it did not import or imply such a discretion as would necessarily attend a general or extensive authority, the Court held that the principal was not responsible as for an act which merely exceeded the limits of the discretion given. Notwithstanding that in Lucas v. Mason (1) the principal was present when the act complained of was done, I am of opinion that that fact does not hinder the application of the reasoning of the Court to the present case.

I think, therefore, that the slanders of Dunn were not acts within the scope and in the course of any employment proved upon the respondent's case.

It remains to consider whether there is anything in the evidence given for the defence to make the respondent's case good, so that a nonsuit could not now be ordered.

After carefully considering the evidence of Shakespeare, who H. C. of A. was the only witness for the defence on the sole material question, I am unable to point to any part of it which proves or tends NEW SOUTH to prove a more general authority than that which is to be collected from the evidence for the respondent. Indeed I doubt whether the authority to which Shakespeare deposes is not limited to the mere matter of obtaining a copy of the contract which, according to Dunn, was being offered by another firm. If, then, as I think, the respondent failed to prove his case, it seems clear that it was not reinforced by any part of the appellant company's defence.

I am of opinion, therefore, that the appeal should be allowed, and a nonsuit entered.

O'CONNOR J. The appellant company and the respondent were advertisement agents in the same line of business, and there was obviously keen competition between them. The defamatory statements charged in the declaration were made to two of the respondent's customers, and they were made, not by the manager or by any servant of the appellant company, but by a person named Dunn whom the manager, Shakespeare, had employed to carry out a particular duty. The grounds of appeal involved in substance two questions. First, whether Dunn had authority to bind the appellant company in making the statements complained of. Secondly, whether certain conversations were admissible in evidence—conversations which took place between Shakespeare and other persons after the uttering of the defamatory words, and in the course of which it was claimed that Shakespeare had made admissions material in determining the scope of Dunn's authority. I shall deal with the latter ground first as it involves the whole question of Shakespeare's authority to bind the company.

The general principles of law to be applied, in determining when a principal is liable for a wrong committed by his agent while engaged in the principal's business, are well stated in Lord Justice Lindley's judgment in Citizens' Life Assurance Co. v. Brown (1) and the cases therein cited by him. He adopts as correct the

(1) (1904) A.C., 423, at p. 428.

1911.

WALES COUNTRY PRESS Co-OPERATIVE Co. LTD. v. STEWART.

Barton J.

H. C. of A. following statement of Mr. Acting Chief Justice Stephen in the 1911. Court below :-

NEW SOUTH WALES COUNTRY PRESS Co-OPERATIVE Co. LTD. v. STEWART.

O'Connor J.

"Although the particular act which gives the cause of action may not be authorized, still if the act is done in the course of employment which is authorized, then the master is liable for the act of his servant."

To ascertain whether a thing is done or said "in the course of an employment which is authorized" must depend primarily upon the scope of the employment, in other words, upon what the principal has employed the agent to do. Having ascertained what the agent is employed to do, it may be taken that he has authority to do and say everything which may reasonably be deemed necessary for effectively carrying out the duty on which he is employed. Moreover within these limits it will generally be taken that he has been allowed by his principal a discretion as to the manner in which he will discharge his duties.

In Barwick v. English Joint Stock Bank (1), cited by Mr. Justice Lindley in the judgment to which I have referred, Mr. Justice Willes illustrates that position. After giving instances of cases in which principals have been held liable for wrongs committed by agents in the course of their employment he says: "In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in."

The determination of what the principal has appointed the agent to do, in other words, the scope of the agent's authority, rests in most cases upon inferences to be drawn from the relevant circumstances, and the jury in drawing inferences are entitled to act on their knowledge of business and of business methods. In this connection I may refer to the distinction between the proof required in determining what is the scope of a general agent's authority, and that required in determining what is the authority of a special agent. The distinction is founded in the differing state of facts from which in each case the inference of authority

<sup>(1)</sup> L.R. 2 Ex., 259, at p. 266.

is to be drawn. It is explained in Bank of New South Wales v. H. C. of A. Owston (1), and was properly insisted on by Mr. Loxton, in contrasting the scope of Shakespeare's authority as general manager New South with that of Dunn appointed by him to discharge a particular duty. In a business such as that of the appellant company the general manager is necessarily put forward as their representative in all the company's ordinary dealings with the public. It is an everyday part of their dealings to commend their own business, to criticise the methods of rival businesses, to defend their own from what the manager may deem unfair competition. An authority must be implied in discharging this part of his duty to exercise his discretion as to what methods of criticism and defence he will adopt.

He may, for instance, comment on the rival company's conduct, and, if in doing so he makes false and defamatory statements, the company will be liable. That was the kind of liability which in Citizens' Life Assurance Co. v. Brown (2) the Privy Council held that the company in that case had incurred. There can be no doubt therefore that if Shakespeare had interviewed the respondent's customers, and had himself made the libellous statements which Dunn is charged with making, the company would have been liable for what he said. It follows that, when the respondent afterwards complained to the company of Dunn's defamatory statements, it was within the ordinary scope of Shakespeare's employment to inquire from the respondent's customers to whom Dunn had made the statements, or from any other persons who could throw light on the matter, what it was that Dunn had said, and generally to ascertain the merits of the complaint and to safeguard the company's interests in the matter. A jury might very well find it to be within the scope of the manager's business at those interviews to explain Dunn's real position and the limitations of his authority. There can be no doubt therefore that those conversations were properly admitted in evidence.

A question was raised as to whether statements alleged to have been made by Shakespeare, in the course of those conversations, admitting authority in Dunn to discuss the subject matter

(2) (1904) A.C., 423.

1911.

WALES COUNTRY PRESS Co-OPERATIVE Co. LTD.

STEWART.

O'Connor J.

1911. NEW SOUTH WALES COUNTRY PRESS Co-OPERATIVE Co. LTD.

STEWART.

O'Connor J.

H. C. of A. of the alleged slanders, could be used as admissions against the company. I think it unnecessary to determine the point, because after a careful examination of the evidence I am unable to see anything in those conversations which could afford a jury reasonable ground for finding that Shakespeare had expressly or by implication made any such admission. Expressions appear to have been used by him from which it might be fairly inferred that he had expected Dunn to make some statement on the subject of the contract to the person from whom he was to obtain it, but there is nothing in the expressions to justify the further inference of an admission that he had authorized Dunn to mention the matters which were the subject of the alleged slanders. While therefore I agree that the conversations were rightly admitted, I am of opinion that they afford no evidence whatever that Shakespeare had expressly or impliedly authorized Dunn to bind the company in making the defamatory statements complained of.

> Turning now to the other ground of appeal, it becomes necessary to inquire whether there was any evidence from which the jury could reasonably infer that Dunn in making the defamatory statements acted as the company's agent. It must, I think, be conceded that Shakespeare might if he had thought fit have employed Dunn to make any statements which he himself could make. But in that case it would be necessary to prove the authority expressly, or give evidence from which special authority to make the statement might be reasonably inferred. The only evidence on the point is that Shakespeare employed Dunn to obtain for his information, from one or more of the respondent's customers, one of the contracts which the respondent had entered into. The respondent was bound to prove that it was within the scope of that employment that Dunn should make statements to those customers as to the respondent's methods in obtaining and carrying out such contracts. I am unable to see how anyone could reasonably suppose that the obtaining of those documents necessitated any statement with reference to the respondent's methods of business. Even if full effect is given to Mr. Blacket's argument that Dunn must be taken to have had authority to make such statements as would make his request for a loan of the

documents appear reasonable, such an authority could not H. C. of A. reasonably be interpreted as authorizing him to make statements as to the respondent's power to enter into certain advertising NEW SOUTH contracts, or his power or intention to fulfil them when made. The argument however most relied on by respondent's counsel was that Dunn was employed as a canvasser for advertisements to obtain the documents, and that it was within the scope of such employment to make the statements complained of. It may be, no doubt, that criticism of competing advertiser's business methods is an ordinary part of a canvasser's business, and that if Dunn had been employed to get the document in the course of a canvass, authority to make statements about the respondent's business methods might fairly be inferred, and if at the time he was sent on this duty Dunn was in the company's employ as a canvasser, there might be something in the contention that he was sent in that capacity. But that was not the case. His services had been dispensed with by the company some time before, and the only evidence of his having acted subsequently as a canvasser for the company was their acceptance of two advertisement contracts, which he obtained after the speaking of the defamatory words. The uncontradicted evidence as to the course of advertising business was that advertising agents do offer and accept advertisements brought to them by independent canvassers, paying commission to the canvasser when the advertisement is accepted, but that the advertising agent may please himself as to accepting or declining the advertisement when it is brought to him under these circumstances. It would be indeed a serious liability immeasurable in extent if the acceptance by an advertising agent of advertisements, brought to him under such circumstances, were taken to import an authorization of every statement the canvasser might have made in the course of his canvass as to the merits of rival advertising agents. For these reasons it seems to me that the fact that Shakespeare chose as his agent in the discharge of the special duty of obtaining the document in question an independent canvasser from whom the company sometimes accepted advertisements is a circumstance from which no inference can be drawn in support of the authority in Dunn which the respondent alleged, and of which he was bound to give

1911.

WALES COUNTRY PRESS CO-OPERATIVE Co. LTD.

STEWART.

O'Connor J.

NEW SOUTH WALES COUNTRY PRESS Co-OPERATIVE Co. LTD. 22.

STEWART. O'Connor J.

H. C. of A. sufficient legal evidence before his case could go to the jury. Stripped of the many immaterial considerations upon which it was attempted to found the proof of Dunn's authority, the only fact upon which it really can be put is his employment by Shakespeare in the special duty of obtaining possession of some of the respondent's contracts from certain of the respondent's customers. No attempt was made to prove express authority conferred on Dunn to make statements with reference to the subject matter of the alleged slanders, and for the reasons I have given I have come to the conclusion that it would be impossible for a jury legally to draw the inference that it was within the scope of Dunn's special employment to make those statements. It follows that, in my opinion, the plaintiff ought to have been nonsuited, and that the Supreme Court not having so held this appeal must be allowed.

Appeal allowed.

Solicitor, for the appellants, R. Sullivan. Solicitors, for the respondent, McCoy v. McCoy.

C. E. W.

## [HIGH COURT OF AUSTRALIA.]

LORIMER AND OTHERS

APPELLANTS ;

AND

SMAIL AND ANOTHER.

RESPONDENTS

H. C. OF A. 1911.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Melbourne, Insolvency—Settlement by woman who afterwards becomes insolvent—Registration Sept. 20, 25. of settlement-Insolvency Act 1897 (Vict.) (No. 1513), sec. 100.

Griffith C.J., Barton and O'Connor JJ.

Sec. 100 of the Insolvency Act 1897 (Vict.) provides that " Every settlement of property on or for the wife or children or both wife and children of the