all covenants set out in both contracts" (the "purchasing" and the "hiring" agreements). I do not think such an implication can be properly made in this case, where all the express rights to cancel the agreements are retained by the dealer and none are given to the retailer.

The appeal of the plaintiff should, in my opinion, be dismissed and the decision of the Full Court affirmed.

Appeal allowed. Order of Long Innes J. for injunction restored, modified by the deletion therefrom of the words "or after due notice at other reasonable prices."

Solicitors for the appellant, *McDonell & Moffitt.*

Solicitors for the respondent, *Faithfull, Maddock, Oakes & Baldock.*

J. B.

[HIGH COURT OF AUSTRALIA.]

WEBB . . . . . APPELLANT;
PLAINTIFF,

AND

BLOCH AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

MELBOURNE, *April* 30; *May* 1, 2; *June* 14.

ON APPEAL FROM STARKE J.

Starke J.

Libel—Joint liability—Privilege—Publication by agent—Malice of agent—Knowledge of untruth of statements—Liability for agent's statements—"Publication"—Justification—Appeal—Duty of appellate Court—No disputed evidentiary facts—Jurisdiction.

ADELAIDE, *Sept.* 25-28.

MELBOURNE, *Nov.* 5.

Knox C.J., Isaacs and Gavan Duffy JJ.

The plaintiff in an action for libel was the chairman of the South Australian Wheat Compensation Committee, the object of which was to endeavour to obtain compensation from the Government of South Australia for alleged

H. C. OF A. 1928. WEBB v. BLOCH.

negligence in keeping and protecting certain wheat delivered to it for sale on behalf of growers. The defendants, B., P., M. and C. were members of a Victorian Committee which had a similar object. The persons for whom these Committees acted were growers who had delivered wheat to the Government for sale, and purchasers of scrip issued in respect of the wheat so delivered. Various legal proceedings were instituted against the Government and were controlled by one or other of these Committees. The same solicitor acted for both Committees. The South Australian Committee arranged to abandon the litigation of which it had control, and the Victorian Committee desired to carry on proceedings and for that purpose to appeal to South Australian subscribers to furnish further funds. The solicitor was employed by the Victorian Committee to compose, for the purpose of publication, a form of circular he would advise being sent to each grower and he submitted a draft circular to B., who was the secretary of the Victorian Committee. B. instructed the solicitor to publish the circular in the way he thought most advisable; and B.'s action in so doing was confirmed by P., M. and C. The solicitor published the circular but only to persons who had delivered wheat to the Government for sale and to purchasers of wheat scrip. The circular contained untrue matter defamatory of the plaintiff. On the view taken of the evidence by the majority of the appellate Court, the solicitor did not believe in the truth of certain of the defamatory matter in the circular; at the time of publication B. knew the contents of the circular and did not believe in the truth of certain of the defamatory matter therein; P. was unaware of the contents of the circular, but was in fact aware of the untruth of defamatory statements in it concerning the plaintiff; M. and C. were unaware of the contents of the circular or whether the statements in it were true or false. The defendants pleaded (*inter alia*) justification and publication without malice on a privileged occasion. On appeal from the judgment given by the trial Judge in favour of the defendants,

Held, by *Knox* C.J. and *Isaacs* J. (*Gavan Duffy* J. dissenting), that the appeal should be allowed:

By *Knox* C.J. and *Isaacs* J., on the ground that the defendants were all responsible in law for the publication, and, although the occasion was privileged, as B. and the solicitor knew the circular contained untrue defamatory statements concerning the plaintiff, malice was to be attributed to them, and such malice defeated the privilege of all the defendants.

Observations by *Isaacs* J. as to the duty of an appellate Court in a case in which there are no disputed evidentiary facts, and also as to the meaning of "publication" and as to the defence of justification.

Decision of *Starke* J. reversed.

APPEAL from *Starke* J.

An action for damages for libel was brought by Thomas Henry Webb against Mark Bloch, Joseph Cleveland Pratt, F. V. Murphy

and H. S. Crocker. The plaintiff was the chairman of the South Australian Wheat Compensation Committee, the object of which was to endeavour to obtain compensation from the Government of South Australia for alleged negligence in keeping and protecting certain wheat delivered to it for sale on behalf of the growers. The defendants were residents of Victoria and members of a Victorian Committee formed for a similar purpose. The persons for whom these Committees acted were growers who had delivered wheat to the Government for sale and purchasers of scrip issued in respect of the wheat so delivered. Various legal proceedings were instituted and pursued with a view to obtaining redress for this alleged negligence, and all these proceedings were substantially controlled and directed by the South Australian or the Victorian Committee. The same solicitor, Norman, a resident of South Australia, acted for both committees. No finality had been reached when, in the latter part of 1925, the South Australian Committee made arrangements to abandon the litigation of which it had control. The Victorian Committee desired to carry on proceedings, and for that purpose to appeal to South Australian subscribers for further funds. A circular was drafted by Norman on the instructions of the defendant Bloch, who was the secretary of the Victorian Committee. The draft was received by Bloch from Norman on 10th February 1926, and apparently none of the other defendants saw it. On 16th February 1926 Bloch instructed Norman to issue circulars the best way he thought advisable, and his action in so doing was confirmed by the Victorian Committee at a meeting held on 22nd February 1926, at which time Bloch was still the only defendant aware of the contents of the circular. The defendant Crocker was supplied with a copy on 23rd February 1926, and the defendant Pratt saw a copy on 23rd or 24th February 1926. It was not shown that the remaining defendant, Murphy, ever saw the document. The circular was issued by Norman; its contents, so far as material, sufficiently appear hereunder. The matter complained of by the plaintiff was contained in that document.

The material portions of the statement of claim were as follows:—

8. In or about the month of February 1926 the defendants jointly falsely and maliciously published to Mr. J. O'Neill of

H. C. OF A. 1928.

WEBB v. BLOCH.

Kensington Road, Kensington, in the State of South Australia and to Mr. W. Wedd of Kensington Road, Leabrook, in the State of South Australia, and to many other persons whose names the plaintiff cannot at present specify, through the post office in prepaid letters addressed to them respectively, of and concerning the plaintiff a letter or circular headed "South Australian 'B' Wheat Scrip Compensation Committee" the words and figures following:—"In order to smooth out the difficulties between them one of the members of my Committee, Mr. John Sloan, offered to take over the liabilities of the chairman (Mr. Webb) provided he would resign from the South Australian Committee and set aside £1,600 out of the funds to cover the then liabilities. This offer was refused by Mr. Webb." "About September last, however, the chairman of the South Australian Committee, Mr. Webb, carried a resolution and informed the Victorian Committee that unless they would take over all the liabilities of the South Australian Committee he proposed to discontinue Welden's action. Again an offer was made to relieve him of liability, but he stipulated that his scrip and the scrip of his son-in-law must also be bought at slightly over cost. Mr. Sloan was agreeable to do even this, but Mr. Webb could give no guarantee that Mr. Welden would be willing to proceed with this case, and the negotiations fell through." "Early in December last Mr. Webb approached the Attorney-General—without consulting either his solicitors, the growers or my Committee—and came to an arrangement regarding the abandonment of the litigation. The arrangement was afterwards confirmed by letter. But for the action of the chairman of the South Australian Committee, our solicitors say they would have had the case ready for hearing during the first few months of this year. But he would not allow them to proceed to obtain evidence and he opposed their endeavour to get the inspector's reports at every step."

9. The said words mean that the plaintiff was unwilling to resign from the South Australian Wheat Compensation Committee although requested to do so by his Committee; that the plaintiff would discontinue or cause to be discontinued the Welden action to the detriment of the said South Australian Wheat Compensation

Committee unless the South Australian "B" Wheat Scrip Compensation Committee would take over the liabilities of the South Australian Wheat Compensation Committee; that the plaintiff was attempting to further his own personal interests and the interests of the plaintiff's son-in-law to the detriment of the subscribers to the South Australian Wheat Compensation Committee; that the plaintiff was under an obligation to consult the South Australian "B" Wheat Scrip Compensation Committee before abandoning litigation and that he neglected to fulfil such obligation; that the plaintiff was under an obligation to consult his solicitors before abandoning litigation and that he neglected to fulfil such obligation; that the plaintiff was under an obligation to consult the growers before abandoning litigation and that he neglected to fulfil such obligation; that the plaintiff delayed the proceedings; that the plaintiff prevented the solicitors for the South Australian Wheat Compensation Committee from obtaining evidence necessary for the proper trial of the action and opposed to the detriment and prejudice of the interests of the said subscribers the endeavour of his solicitors to get the inspector's reports; and generally that the plaintiff after accepting a position of trust betrayed that trust by acting in the interests of the defendant in the said action and finally in an arbitrary manner and without proper or any reason arranged with the Attorney-General to discontinue the said action to the detriment and prejudice of the interests of the said subscribers.

The defences were (in addition to a traverse) no libel, justification, and publication on a privileged occasion without malice.

Other material facts are fully set out in the judgments hereunder.

The action was tried by *Starke* J. sitting without a jury.

Cleland K.C. and *Wilson*, for the plaintiff.

Owen Dixon K.C. and *Walker*, for the defendants.

Cur. adv. vult.

June 4.

STARKE J. delivered the following written judgment:—

The plaintiff, Thomas Henry Webb, has brought an action for libel against the defendants, Mark Bloch, Joseph Cleveland Pratt, F.

H. C. OF A. 1928.

WEBB v. BLOCH.

Starke J.

V. Murphy and H. S. Crocker, based upon the issue of a circular in the year 1926. An outline of the events preceding the issue of this circular is necessary for the proper understanding of the case. In 1915-1917 the Parliament of South Australia enacted the *Wheat Harvest Acts*. Substantially they provided that every owner of wheat who desired to do so might deliver his wheat to the Government for sale on his behalf; the Government was authorized to sell the wheat at the best price obtainable, and the net proceeds of all wheat sold by the Government under the Act were to be divided among the wheat-owners concerned in proportion to the amount of wheat delivered by them respectively for sale. Scrip was issued by the Government to the owner of the wheat who delivered wheat under the scheme. Apparently the scrip so issued was largely bought and sold in Australia and treated as if it were negotiable. Of the wheat so delivered to the Government large quantities were destroyed or damaged by mice or exposure to the weather. Evidently this destruction and damage was attributed by many persons to carelessness on the part of the Government, its agents, officers and servants in keeping and protecting the wheat. A committee was formed in South Australia, and one also in Victoria for the purpose of obtaining compensation from the Government. The plaintiff was for long a member of the South Australian Committee, and, perhaps, its leading spirit. The defendants are members of the Victorian Committee. Considerable funds were collected; in South Australia mainly from the growers of wheat who had delivered wheat to the Government, in Victoria mainly from the purchasers of wheat scrip in the market. Legal proceedings were taken to establish the liability of the Government, and ultimately it was established in the Privy Council that "the Government, having undertaken to receive, handle, and market the wheat of all the owners concerned and to pay them a price dependent on the due handling and sale of all the wheat received, must be regarded as the mandatary of all the owners and bound by the ordinary obligation of reasonable care"; and their Lordships saw no reason "why this obligation should not extend to the handling and marketing (including the storage) of all the wheat dealt with by the Government, so as to be enforceable

by each owner interested in the total sales" (*Welden* v. *Smith* (1)). So soon as this decision was given further proceedings were commenced mainly for the purpose of obtaining discovery in aid of the main proceeding—*Welden* v. *Smith*—in which discovery could not be obtained. An order for discovery was obtained, but the Government ultimately claimed immunity from discovery in respect of many documents on the ground that their discovery would be prejudicial to the public interests (*Griffin* v. *South Australia* (2)). The protracted legal proceedings and heavy costs filled the South Australian Committee, not unnaturally, with alarm, and it saw no reasonable hope, with the funds at its disposal, of pushing the proceedings to a final judgment. Anxious consideration was given for many months by both the South Australian and the Victorian Committees as to the conduct of the proceedings and to the financial arrangements for that purpose. Moreover, the plaintiff Webb and other members of the South Australian Committee were under personal liability for the costs of the action and had given guarantees as to costs in various proceedings. On 12th June 1925 the plaintiff Webb and others withdrew as from that date a guarantee in the Griffin action; and that announcement was accentuated in October 1925, when the South Australian Committee notified the solicitors conducting proceedings that they refused further personal responsibility for the costs of any proceedings. Arrangements had almost been completed for the Victorian Committee to take over further financial responsibility for the conduct of proceedings, but three events, I think, operated to prevent such completion: the first was the refusal of Welden, instigated, I think, by the plaintiff Webb, to give any irrevocable authority to the solicitors acting for the Committees to continue the proceedings in his name unless he was fully protected; the second was the death of a most influential member of the Victorian Committee (Mr. John Sloan); and the third, the then almost certain failure of the proceedings to obtain discovery in respect of which the Government claimed immunity (see *Griffin* v. *South Australia* (3)). At all events, on 20th October 1925 the South Australian Committee resolved to approach the

(1) (1924) A.C. 484, at p. 493; 34 C.L.R. 29, at pp. 35-36.

(2) (1924) 35 C.L.R. 200; (1925) 36 C.L.R. 378.

(3) (1925) 36 C.L.R. 378.

H. C. OF A. 1928. WEBB v. BLOCH. Starke J.

Government to make terms as to costs for the abandonment of the litigation in connection with the 1916-1917 Wheat Pool, unless (a) the Melbourne Committee or some of its subscribers were prepared to take over all liabilities as to Griffin's and Welden's costs, provided that (b) the South Australian Wheat Compensation Committee transferred to a trust account at the disposal of the Melbourne Committee the whole of the funds covering twenty-one £100 six per cent bonds and costs from the High Court (about £250), and also (c) that a fourth appeal be made to the South Australian subscribers who still held their scrip for further funds with which to continue the action, and in that event (d) this Committee would then retire and leave the future conduct of the case in the hands of the Melbourne Committee or their nominees.

Events now moved rapidly. The Attorney-General of South Australia was sounded, and apparently he was prepared to allow the Committee to abandon both actions without costs. Some negotiations took place with the Melbourne Committee for carrying on the proceedings. The South Australian Committee, however, heard that Government officers were inquiring into Welden's financial position. This led them to fear that the Attorney-General might recede from the concession made to the Committee. On 8th December 1925 the South Australian Committee despatched a letter to the Attorney-General in the following terms :—" Following the interview our chairman (Mr. Webb), in company with Mr. E. Anthoney, had with you at Parliament House on Thursday 19th November, when the abandonment of litigation against your Government for compensation for losses suffered by the 1916-1917 Wheat Pool was discussed, we, the undersigned members of the South Australian Wheat Compensation Committee, beg to inform you that we accept the terms agreed upon by you for the abandonment of all such litigation, namely, that the actions *Elijah Welden* v. *George John Smith* (nominal defendant for the Government), and *Hurtle Griffin* v. *State of South Australia* be struck out without costs to either side. Further, we the undersigned members of the South Australian Wheat Compensation Committee, in consideration of the said actions being struck out without costs to either side, hereby undertake to advise the wheat-growers who

subscribed to our fund that we have abandoned all litigation against the Government. We further undertake not to interest ourselves in any other action against the Government in connection with the 1916-1917 Wheat Pool. We would further add that our acceptance of your offer is conditional upon immediate arrangements being made for the actions involved to be formally struck out. Mr. Welden has authorized us to arrange for the abandonment of the action in which he was plaintiff. We understand that Messrs. Wadey, Norman & Waterhouse have already advised your solicitors that the action *Griffin* v. *State of South Australia* is to be discontinued. While we regret that so important and legitimate a claim should be abandoned after five and a half years without reaching a decision, we must thank you for your courtesy in meeting our chairman."

Thus came to an end some six years of litigation without the slightest benefit to any of the litigants. The Melbourne Committee, however, was by no means satisfied, and resolved to continue proceedings against the South Australian Government in the name of other plaintiffs, and for that purpose to appeal to the holders of scrip—both growers and purchasers—for support and further funds. This led to the issue of the circular containing the following statements, which the plaintiff says defame him :—" In order to smooth out the difficulties between them one of the members of my Committee, Mr. John Sloan, offered to take over the liabilities of the chairman (Mr. Webb) provided he would resign from the South Australian Committee and set aside £1,600 out of the funds to cover the then liabilities. This offer was refused by Mr. Webb." " About September last, however, the chairman of the South Australian Committee, Mr. Webb, carried a resolution and informed the Victorian Committee that unless they would take over all the liabilities of the South Australian Committee he proposed to discontinue Welden's action. Again an offer was made to relieve him of liability, but he stipulated that his scrip and the scrip of his son-in-law must also be bought at slightly over cost. Mr. Sloan was agreeable to do even this, but Mr. Webb could give no guarantee that Mr. Welden would be willing to proceed with this case, and the negotiations fell through." " Early in December last Mr. Webb

H. C. OF A. 1928.

WEBB v. BLOCH.

Starke J.

approached the Attorney-General—without consulting either his solicitors, the growers, or my Committee—and came to an arrangement regarding the abandonment of the litigation. The arrangement was afterwards confirmed by letter." "But for the action of the chairman of the South Australian Committee, our solicitors say they would have had the case ready for hearing during the first few months of this year. But he would not allow them to proceed to obtain evidence and he opposed their endeavour to get the inspectors' reports at every step." This circular was, I gather, prepared by Mr. W. A. Norman, who had acted as solicitor both for the South Australian and the Victorian Committees throughout the litigation. At all events, the defendant Bloch on 16th February 1926 authorized its issue, and on 22nd February 1926 the defendants Pratt, Murphy and Crocker confirmed the action of Bloch instructing Norman to issue the circular. In my opinion all the defendants are responsible in law for the issue of the circular. Further, in my opinion, the statements complained of are defamatory of the plaintiff. Any man, reading the circular as a whole, would reasonably understand that the plaintiff had acted perversely in abandoning the litigation against the South Australian Government and had forgotten the interests of those he represented.

Now, the defendants have pleaded that the circular was published only to persons who had a common interest with them in the matter referred to in the circular, without malice, under a sense of duty and in the belief that it was true, and therefore under such circumstances as to make the publication privileged. The defendants were members of the Victorian Committee claiming compensation from the South Australian Government in respect of damage to wheat delivered to it under the *Wheat Harvest Acts*, and they also were holders of scrip issued by the Government in respect of wheat so delivered. The circular I find was published only to persons who had delivered wheat to the Government under the provisions of these Acts and to purchasers of scrip issued in respect of the wheat so delivered. The defendants had clearly, I think, an interest in the subject matter of the communication, and the persons to whom the communication was made had a corresponding interest in connection with the matter, and there is nothing in my opinion in

the publication that is not relevant and pertinent to the occasion (*Adam* v. *Ward* (1)). Further, I am satisfied that none of the defendants were guilty of any malice in publishing the circular or in authorizing its publication, and this despite the plea that the defamatory words are true in substance and in fact. They were not actuated by any spite or ill-feeling against the plaintiff, or by any indirect or improper motive. They acted honestly in what they conceived to be their right and duty, and in the belief that the statements in the circular were true.

It is insisted, however, that Norman, who prepared and issued the circular, knew that it was untrue and that he was actuated by malice towards the plaintiff. It is argued that Norman was an agent or servant of the defendants and also a joint tortfeasor with them in the publication of the circular, and that his malice infected the occasion and so destroyed the privilege claimed by the defendants (*Citizens' Life Assurance Co.* v. *Brown* (2); *Smith* v. *Streatfeild* (3)). It is true that the plaintiff Webb and Norman had used—quite unjustifiably—some harsh expressions about each other. It is true also, I think, that the circular states the facts of the case unfairly so far as Webb is concerned. Norman, however, was obsessed with the view that the abandonment of the litigation was a gross mistake ; that Webb instigated the abandonment and placed whatever obstacles he could in the conduct of the litigation. Norman seems to have been quite incapable of understanding the very serious difficulties that faced the South Australian Committee in the conduct of the proceedings both financially and practically. He was not called as a witness in this action, but an attentive perusal of the evidence has not satisfied me that he was guilty of malice in writing or in issuing the circular. I think he believed that the statements in the circular detrimental to Webb were true. The statement I have had most doubt about is this : "Again an offer was made to relieve him of liability, but *he*" (*Webb*) "*stipulated that his scrip and the scrip of his son-in-law must also be bought at slightly over cost.*" On the evidence as it stands, Norman was anxious that the South Australian Committee should be rid of Webb and he suggested that

(1) (1917) A.C. 309. (2) (1904) A.C. 423.
(3) (1913) 3 K.B. 764.

H. C. OF A. 1928.

WEBB v. BLOCH.

Starke J.

an arrangement might be made to take over Webb's scrip if that would induce him to resign. Webb ultimately intimated that he was willing to accept £300 for scrip held on joint account with his son-in-law Brennan, and thereupon to resign on being satisfactorily indemnified. The price surprised and disgusted Norman, who characterized it much too strongly in a letter to a member of the Victorian Committee. I think this sentence of the circular is unfair and even untrue, but that Norman knew and believed it to be untrue is another matter. I think it possible that the statement would have been modified if Norman had known that Webb and Brennan also held scrip on separate account which they did not even bring under the notice of the Victorian Committee. As already stated, Norman believed that Webb was unnecessarily hindering the litigation and proceedings which he (Norman) thought necessary, and the price suggested for taking over the joint account scrip was, in his view, merely in line with the rest of Webb's actions. Mr. Norman took, I think, too strong a view of the situation and did not allow sufficiently for the difficulties and responsibilities facing the South Australian Committee, but that he acted maliciously or with any indirect motive in issuing the circular is not proved to my satisfaction.

A somewhat interesting question of law would arise if Norman had been actuated by malice in the preparation and issue of the circular. No doubt a person is liable for defamatory matter published by his agents within the scope and in the course of their employment (*Citizens' Life Assurance Co.* v. *Brown* (1)). In this case Norman's only authority was to issue the particular circular approved by the defendants: he had no general or discretionary authority. Again, it has been held that if malice be proved against the defendant who is the author of the defamatory statement, the defence of privilege is not available for any co-defendant concerned in the publication (*Smith* v. *Streatfeild* (2); *Pollock* on *Torts*, 11th ed., p. 269). In this case I do not regard Norman as the author of the circular but rather as the amanuensis of the defendants. Finally, in *Adam* v. *Ward* (3) it is said: " When an agent, in obedience to the command

(1) (1904) A.C. 423.

(2) (1913) 3 K.B. 764.

(3) (1917) A.C. 309.

of his principal, merely does the mechanical act of publishing the libel handed to him complete the privilege of the principal becomes, as it were, his privilege, and if the principal has caused the communication to be made to protect the interest or discharge the duty which would have made the occasion privileged if he had published the libel with his own hand, the agent can equally rely on the publication having been made on a privileged occasion," (1). Apparently the malice of the agent in such circumstances is irrelevant (2). The issue of the circular by Norman was not merely a mechanical act: he drew up the circular and submitted it in substance for the approval of the defendants, who believed it to be true and necessary in the common interest of those concerned in the Wheat Harvest Scheme. No doubt it is obiter, but it may be advantageous for the parties to know that, despite *Smith's Case* (3), my opinion is that the malice of Norman would not have destroyed the privilege of the defendants who were not guilty of malice. They merely authorized the publication by Norman of a specific circular which they honestly believed to be true and necessary for the common interest of scrip-holders in the Harvest Scheme. It was their privilege to publish the circular and any improper motive on Norman's part unknown to the defendants would not, in my opinion, have infected the occasion and destroyed their privilege.

The defendants have also pleaded that the words complained of in the circular are true in substance and in fact. In my opinion this plea has not been proved. The circular distorts the facts and gives them a colour decidedly unfair to the plaintiff. A critical examination of all the facts is unnecessary, but it was not right in point of fact to state, in substance, that the plaintiff had perversely obstructed litigation and forgotten the interests of those whom he represented—an interpretation of the words complained of which was open to reasonable people.

The action must be dismissed and with the usual consequences.

From this judgment the plaintiff now appealed to the Full Court.

Cleland K.C. (with him *Wilson*), for the appellant. The occasion was not privileged, i.e., not such an occasion as had attached to it

(1) (1917) A.C., at p. 341. (2) (1917) A.C., at p. 331.
(3) (1913) 3 K.B. 764.

H. C. OF A. 1928. WEBB v. BLOCH.

a privilege which would protect this communication. For purposes of the circular it was unnecessary to defame the plaintiff, and the defamatory statements were not within any privilege that might have existed. From this point of view the question of malice does not arise (*Toogood* v. *Spyring* (1); *Macintosh* v. *Dun* (2); *Clark* v. *Molyneux* (3); *Adam* v. *Ward* (4)). Even if the occasion was privileged, Norman was guilty of actual malice. The finding of *Starke* J. that Norman was obsessed with certain things brings the case very near *Royal Aquarium &c. Society Ltd.* v. *Parkinson* (5). A circumstance to be taken into account in considering whether there is malice is that no real attempt has been made to establish the defence of justification. If Norman made the statements recklessly, not knowing or caring whether they were true, malice is established; but the evidence goes further and shows actual malice. Norman's malice must be attributed to the defendants. Their liability is not affected by the fact that they did not see the circulars. They instructed an agent and must take the responsibility for his acts (*Citizens' Life Assurance Co.* v. *Brown* (6)).

Owen Dixon K.C. (with him *Walker*), for the respondents. This Court has no jurisdiction. The essential ingredient in the cause of action is the act of publishing by Norman in South Australia, and the next ingredient is his state of mind. The plaintiff's case involves that Norman and the defendants are joint tortfeasors. There is a single cause of action and Norman is liable on it. The parties to the tort are not all residents in a different State from that in which the plaintiff resides, and accordingly the action is not cognizable by this Court (sec. 76 of the Constitution). The word "matter" means the claim of right or controversy, not the particular proceedings (*In re Judiciary Act* 1903-1920 *and In re Navigation Act* 1912-1920 (7); *Watson and Godfrey* v. *Cameron* (8); *King* v. *Hoare* (9)).

(1) (1834) 1 Cr. M. & R. 181.
(2) (1908) A.C. 390; 6 C.L.R. 303.
(3) (1877) 3 Q.B.D. 237.
(4) (1917) A.C. 309.
(5) (1892) 1 Q.B. 431.
(6) (1904) A.C. 423.
(7) (1921) 29 C.L.R. 257.
(8) (1928) 40 C.L.R. 446.
(9) (1844) 13 M. & W. 494.

[GAVAN DUFFY J. The right against joint tortfeasors is a right against them all or any of them : why should the Constitution affect the position because the plaintiff exercises his right to sue some only ?

[ISAACS J. The question is the responsibility ; here it is joint and several, and each several responsibility is a " matter."]

Greenlands Ltd. v. *Wilmshurst and London Association for Protection of Trade* (1) deals with damages in a case where there is a single cause of action against several defendants arising from a joint tort.

Coming to the substance of the appeal, the privilege relied on rests on common interest. Malice implies an indirect motive, a misuse of the occasion (*Clark* v. *Molyneux* (2)). If substantially the matter were published from motives of duty, the protection would not be affected, even if a feeling of anger were present. The evidence does not show that Norman was actuated by malice. But even if he were, that malice would not affect the defendants. This is not a case of a general agent composing a libel within the scope of his authority. His functions never included the privilege of the defendants to publish the statement.

[ISAACS J. referred to *Fountain* v. *Boodle* (3).]

The individual malice (if any) of Bloch must be ascertained at the time he directed the publication, and that of the other defendants at the time they ratified it. The test of malice is the motive of publication. Publication and writing are two distinct acts. If Norman had any wrongful motive, it was in the writing and not in the publication, and there is no reported case in which privilege has been defeated not by malice of the publisher but by malice of the writer.

[ISAACS J. referred to *Hamlyn* v. *Houston & Co.* (4).]

At no stage did Norman purport to exercise on behalf of the defendants the privilege given to them (*Fraser* on *Libel and Slander*, 6th ed., p. 269, citing *Jones* v. *Great Central Railway Co.* (5) ; *Hay* v. *Australasian Institute of Marine Engineers* (6) ; *Brisbane Shipwrights' Provident Union* v. *Heggie* (7)). The report of *Smith* v.

(1) (1913) 3 K.B. 507.
(2) (1877) 3 Q.B.D., at p. 246.
(3) (1842) 3 Q.B. 5.
(4) (1903) 1 K.B. 81.
(5) Unreported.
(6) (1906) 3 C.L.R. 1002.
(7) (1906) 3 C.L.R. 686, at p. 695.

H. C. OF A. 1928. WEBB v. BLOCH.

Streatfeild (1) does not show who actually published, and the malice was that of the privileged person. The case has been criticized by *Salmond* on *Torts*, 4th ed., pp. 475-476. Where a person with a privilege employs an agent to compose a document, the only relevant malice is that of the principal. This was not a case of the defendants co-operating with Norman. They ratified his act, not his motives, and the ratification cannot supply the malice. That must be present when the tort is committed. The evidence shows that the matter complained of was true in substance.

Cleland K.C., in reply, referred to *Lionel Barber & Co.* v. *Deutsche Bank (Berlin) London Agency* (2); *S. Pearson & Son Ltd.* v. *Dublin Corporation* (3).

Cur. adv. vult.

Nov. 5. The following written judgments were delivered :—

KNOX C.J. This is an appeal by the plaintiff in an action for libel in which judgment was entered for the defendants. The course of events preceding the issue of the circular which contained the alleged defamatory words is outlined in the reasons for judgment delivered by my brother *Starke* at the trial, and it is unnecessary to add to that statement. The words complained of were as follows : " In order to smooth out the difficulties between them one of the members of my Committee, Mr. John Sloan, offered to take over the liabilities of the chairman (Mr. Webb) provided he would resign from the South Australian Committee and set aside £1,600 out of the funds to cover the then liability. This offer was refused by Mr. Webb." " About September last, however, the chairman of the South Australian Committee, Mr. Webb, carried a resolution and informed the Victorian Committee that unless they would take over all the liabilities of the South Australian Committee he proposed to discontinue Welden's action. Again an offer was made to relieve him of liability, but he stipulated that his scrip and the scrip of his son-in-law must also be bought at slightly over cost. Mr. Sloan was agreeable to do even this, but Mr. Webb could give no guarantee

(1) (1913) 3 K.B. 764.
(2) (1919) A.C. 304.
(3) (1907) A.C. 351, at pp. 354, 358, 359.

that Mr. Welden would be willing to proceed with this case, and the negotiations fell through." "Early in December last Mr. Webb approached the Attorney-General—without consulting either his solicitors, the growers, or my Committee—and came to an arrangement regarding the abandonment of the litigation. The arrangement was afterwards confirmed by letter. But for the action of the chairman of the South Australian Committee, our solicitors say they would have had the case ready for hearing during the first few months of this year. But he would not allow them to proceed to obtain evidence and he opposed their endeavour to get the inspectors' reports at every step."

I agree with my brother *Starke* in thinking (1) that all the defendants are responsible in law for the publication of the circular; (2) that the words complained of are defamatory of the plaintiff, and (3) that the occasion on which the words were published was privileged.

I agree also in thinking that "the circular distorts the facts and gives them a colour decidedly unfair to the plaintiff," and that it was "not right in point of fact to state, in substance, that the plaintiff had perversely obstructed litigation and forgotten the interests of those whom he represented—an interpretation of the words complained of which was open to reasonable people." I think the statements in the circular that "about September last . . . the chairman of the South Australian Committee, Mr. Webb, carried a resolution and informed the Victorian Committee that unless they would take over all the liabilities of the South Australian Committee he proposed to discontinue Welden's action," and that "early in December last Mr. Webb approached the Attorney-General—without consulting either his solicitors, the growers, or my" (i.e., the Victorian) "Committee—and came to an arrangement regarding the abandonment of the litigation," were calculated, and probably intended, to convey to the South Australian growers that the abandonment of the litigation was brought about by the plaintiff without the advice of the solicitors and acting independently of the South Australian Committee and without the authority of its members. They seem to me to support the innuendo that the plaintiff in an arbitrary manner and without proper or any reason arranged with the

H. C. OF A. 1928. WEBB v. BLOCH. KNOX C.J.

Attorney-General to discontinue Welden's action to the detriment and prejudice of the interests of the subscribers, and that he had, in effect, betrayed his trust. It must be remembered that the circular was prepared by Norman, who was acting as solicitor for both the Victorian and the South Australian Committees in the litigation and who was on bad terms with the plaintiff, and was issued with the object of inducing the South Australian growers to subscribe funds for the purpose of further litigation. This object would certainly not have been served by stating, as the fact was, that all the members of the South Australian Committee, which represented the growers' interests, were in favour of approaching the Attorney-General for the purpose of coming to an arrangement that the litigation should be abandoned, that in approaching the Attorney-General the plaintiff acted with the authority of the Committee, and that before the arrangement was concluded the Victorian Committee was given an opportunity of taking over the conduct of the litigation and proceeding with it. On the other hand, by attributing the abandonment of the litigation to the plaintiff's individual and unsupported efforts, the author and the publishers of the circular conveyed the impression that the plaintiff had gone behind the backs of his own Committee and ignored the interests of the growers whom it represented, and that he alone was responsible for the abandonment of Welden's action. On this part of the case it is necessary to examine the evidence in some detail in order to ascertain the true facts relating to the settlement of the litigation, and the part played by the plaintiff in connection therewith. If the statement in the circular, in the meaning which I have attributed to it, was untrue, it is necessary to inquire further whether the defendants or any of them knew the true state of facts, in order to determine whether the statement in question was published with an honest belief in its truth. On 3rd September 1925 the South Australian Committee passed a resolution "to drop the Welden action before any further costs are involved." The evidence of O'Neill (a member of the South Australian Committee) shows that the South Australian Committee was unanimous as to the desirability of settling the action. In communicating this fact to Mr. Ulbrich, a member of the Victorian Committee, Mr. Alford the secretary of the South

Australian Committee wrote on 4th September 1925 as follows:— "To me there now seems to be only one of two courses open:—(1) Put £500 in trust to protect Welden. We find £200 (my Committee have about £80 in cash left beside the bonds) and Mr. Sloan £300. (2) For my Committee to approach the Government and offer to drop the whole thing if they will forgo costs." In reply to this Mr. Ulbrich, signing "pro secretary," wrote that Mr. Sloan and he had come to two conclusions: (1) that the Welden case must proceed and (2) that Welden must be protected up to the hilt; and he asked Alford to bring this before his Committee at once. He described the second proposition in Alford's letter as unthinkable. On 5th September 1925 Alford, by direction of the South Australian Committee wrote to their solicitors, Wadey, Norman & Waterhouse, to ascertain what would probably be the amount of costs recoverable by the Government if the Welden action were abandoned forthwith, and requesting them not to incur any further costs in connection with that action *as his Committee had resolved that it should be abandoned* if it were possible to do so at that juncture without any undue liability for costs falling on Welden. In reply to this letter the solicitors wrote estimating the Government's costs to date in Welden's case at £300, and advancing reasons why that case should be kept pending until Griffin's action had been discontinued and the costs therein taxed. At a meeting of the South Australian Committee held on 30th September 1925 this correspondence was considered, and it was *unanimously resolved* that the solicitors be informed that the members of the Committee would not be responsible for any costs in regard to Welden's or any other action. This resolution was duly communicated to the solicitors on 2nd October 1925. At the same meeting, after the plaintiff expressed his dissatisfaction at the delay in the hearing of Welden's action and suggested offering Welden a guarantee of £500 against his liability for costs, it was decided to arrange an interview with Welden. On 15th October 1925 the solicitors wrote to Alford that they were convinced that judgment in Griffin's action would be given against the plaintiff (as it subsequently was), that it was impracticable to do anything but discontinue that action, *that it was impracticable to go on with Welden's action unless further arrangements were made for indemnifying him,*

H. C. OF A. 1928. WEBB v. BLOCH. Knox C.J.

and advising that a fresh action should be started in the name of a person who had nothing to lose. The advice given with reference to Welden's action is stated to be the conclusion arrived at by the Victorian Committee and Norman in conference. On 16th October 1925 the solicitors wrote further with regard to the proposed new action, apparently on the footing that Welden's action was to be dropped. On 20th October 1925 a meeting of the South Australian Committee was held at which these letters were considered. The following is an extract from the minutes of that meeting :—" Letter read from solicitors dated 15th October relating to Griffin, intimating that they thought the High Court decision would be against us, and suggested dropping Griffin and Welden actions. Then a new action could be started by a Victorian who would have no assets. They asked for instructions to proceed on the question of proving negligence. A general discussion followed and the opinion was expressed that we should not proceed with the action owing to danger with regard to further costs. The question was raised of approaching the Government to settle costs. Mr. Anthoney moved, Mr. Gray seconded :—' That this Committee resolves to approach the Government to make terms as to costs for the abandonment of the litigation against the Government in connection with the 1916-17 Wheat Pool unless (a) the Melbourne " B " Committee or some of its subscribers are prepared to take over all liabilities as to Griffin's and Welden's costs, provided that (b) the S.A. Wheat Compensation Committee transfer to a trust account at the disposal of the Melbourne Committee the whole of its funds covering twenty-one £100 six per cent bonds and costs from the High Court (about £250), and also (c) that a fourth appeal be made to the South Australian subscribers who still hold their scrip for further funds with which to continue the action, and in that event (d) this Committee will then retire and leave the future conduct of the case in the hands of the Melbourne Committee or their nominees who would take over the services of the secretary.' " On the same day Alford wrote to the solicitors communicating this resolution, and asking them to forward copies to Ulbrich and the defendant Bloch to enable them to bring the same before the Victorian Committee and others interested. On 21st October 1925 the solicitors wrote to the defendant Bloch

enclosing a copy of Alford's letter of 20th October and saying:— "As regards the future conduct of the case, we enclose copy of a letter which we have just received from Mr. Alford and which we think is self-explanatory. We would, however, say this, that if you can find some one to take over the present liability of the members of the South Australian Committee and thus get rid of this Committee it will be very much to your advantage because you will thus be able to make a further call on South Australian subscribers which will bring in a considerable amount of funds. On the other hand, if you do not do this, then the *S.A. Committee will drop both Griffin's and Welden's actions* and make it extremely difficult to continue proceedings." On 23rd October defendant Bloch wrote to the solicitors acknowledging receipt of their letter of 21st October and saying: "We can see the urgency of the position but feel it would be unwise for us to take any further steps until we clearly know how we stand in reference to the two cases we have now before the Court, and also what is the best step to take should we decide to drop both these cases." On 27th October the solicitors informed the South Australian Committee that, unless they received £50 on the following Saturday, they would give notice of discontinuance of Griffin's action. On 30th October Alford wrote to the solicitors asking them to defer giving notice of discontinuance for a week, in order to enable the Victorian Committee to reach a decision with regard to the proposals which had been submitted to them by the letter of 21st October, and stating: "If the Melbourne Committee is not prepared to come to some arrangement on the terms submitted, it is the intention of my Committee to approach the Government with regard to terms in connection with costs for the abandonment of both the Griffin and Welden actions and any other litigation"; and asking that a copy of the letter should be forwarded to Melbourne. It does not appear from the evidence whether this was done. On 17th November 1925 Alford wrote to Norman a letter the relevant portion of which is as follows:—"Both Messrs. Gray and Anthoney favour abandonment. They do not think the Melbourne people can do sufficient to warrant my Committee continuing the fight. They absolutely disagree with the chairman's optimism regarding another appeal. The chairman's attitude is

H. C. OF A. 1928. WEBB v. BLOCH. Knox C.J.

uncertain. He strongly objects to waiting six months to get to trial. I am quite sure the present negotiations will collapse immediately unless the Melbourne people are prepared to put up £3,000 towards the cost of the proceedings. For that reason, whatever they do in Melbourne next week must be definite." It is clear from a statement of defendant Pratt that this letter was brought to the knowledge of the Victorian Committee. On 19th November 1925 Norman wrote to the defendant Crocker that he was satisfied that the South Australian Committee were anxious to abandon everything, because they feared liability under the indemnities they had signed. He added that the secretary had told him that the plaintiff was to have a conference with the Attorney-General that day, and that he believed the object of the conference was to endeavour to abandon all proceedings upon the Government making no claim for costs. On 19th November the plaintiff and Anthoney (a member of the South Australian Committee) saw the Attorney-General. The plaintiff's evidence as to what took place at that interview, which is uncontradicted, is as follows:—"I had a conference later on with Mr. Denny, the Attorney-General. Mr. Anthoney, a member of Parliament, one of our committee-men, arranged that appointment. Mr. Anthoney introduced me to the Attorney-General and left the room shortly afterwards. Mr. Anthoney had told me the night before that he had had a chat with Mr. Denny and Mr. Denny was prepared to settle on these terms. I then rang up every member of the Committee and asked them what they thought about it. I rang each member of the Committee and each one of them expressed delight at the chance. Some such settlement as this had been the subject matter of correspondence between our Committee and Mr. Norman. That was before I saw the Attorney-General. Mr. Norman had advised us to get out. To his Honor:—"Mr. Norman had advised the Committee personally. The matter came before the Committee in letters from Mr. Norman telling us to drop the two matters." To Mr. Cleland:—"I am referring to correspondence which passed between Mr. Norman and the Committee. After seeing the Attorney-General I went straight to Mr. Norman's office. I told him the matter was practically settled, because I knew every member of the Committee would be glad. I

stipulated with the Attorney-General that this matter could be accepted or otherwise within a certain time, that we must have a month in which to consult our subscribers and I told him it was right that we should do so, and he agreed." It appears also from O'Neill's evidence that at this time all the members of the South Australian Committee were anxious to settle Welden's case. At a meeting of the South Australian Committee held on 21st November 1925 the following resolutions were carried—apparently unanimously:—"That this Committee accepts the Attorney-General's offer to forgo all costs against the plaintiffs in return for the Committee abandoning both actions against the Government in connection with the 1916-1917 Wheat Pool. That the solicitors be instructed to inform the Attorney-General that the Griffin and Welden cases will be dropped on the Attorney-General's terms to forgo all costs against the plaintiffs." On the same day Alford wrote to the solicitors informing them of this, and instructing them to arrange for the abandonment of the litigation. So far as appears from the evidence, nothing further was done in the matter until 1st December 1925, when the defendant Pratt (who was chairman of the Victorian Committee) and Mr. Sloan jun. came to Adelaide from Melbourne at the instigation of the Victorian Committee, and discussed the whole position with the South Australian Committee with a view to stay their hands. It is clear, from the minutes of this meeting and from the evidence of the defendant Pratt, that the proposal to abandon Welden's action was regarded as emanating from the South Australian Committee and not from the plaintiff personally, and that at this time it was still open to the South Australian Committee to accept or reject the proposed arrangement for the abandonment of Welden's action. It appears from the plaintiff's evidence that at this meeting he told the defendant Pratt that the South Australian Committee had decided to accept the Attorney-General's offer, and that they wanted to know whether he (Pratt) had any suggestion or proposal to make. The result of the discussion was that the South Australian Committee agreed to defer closing with the offer of the Attorney-General for fourteen days in order to give the Victorian Committee an opportunity of considering what action (if any) they would take for the purpose of avoiding the

H. C. OF A. 1928.

WEBB v. BLOCH.

KNOX C.J.

abandonment of Welden's action. Norman was present at this meeting, and he took part in the discussion. Alford was also present and expressed a doubt whether the farmers would contribute freely to the fund which would have to be raised if Welden's action should be prosecuted. Mr. Pratt returned to Melbourne on the morning of 3rd December 1925. It does not appear from the evidence what, if any, steps were taken on his return to inform members of the Victorian Committee of the position, or to ascertain whether any proposition could be made to the South Australian Committee in order to prevent the abandonment of Welden's action. The defendant Bloch was not called as a witness; and the other defendants who were called appeared to have little or no knowledge of the business transacted at meetings of the Committee. After Pratt's departure from Adelaide it came to the knowledge of members of the South Australian Committee that inquiries were being made, apparently at the instance of the South Australian Government, as to Welden's financial position; and they formed the opinion that, if the proposed arrangement with the Attorney-General were not concluded at once, the offer he had made to forgo any claims for costs of the actions might be withdrawn. Accordingly, on Saturday 5th December 1925, Alford wrote to the defendant Bloch as follows:—"Following the visit of Messrs. Pratt and Sloan who conferred with my Committee on Tuesday last I am now instructed to advise you that owing to a sudden development of a serious character in connection with the position of Mr. E. Welden as plaintiff my Committee have decided to advise the Attorney-General on Wednesday morning (9th inst.) that they accept his offer to have both the Welden and Griffin cases struck out without costs. If your Committee have anything to say or desire to do anything that may influence my Committee's decision I am further instructed to add that you must communicate definitely by telegram by Tuesday afternoon 8th inst. Please advise Mr. Pratt of this immediately." This letter would in the ordinary course of post be delivered in Melbourne on the morning of Monday 7th December. I gather from the evidence of the defendant Pratt that Bloch told him of the receipt of this letter on the 7th of December but nothing was done. No reply was sent to the South Australian Committee, and

on 9th December the offer of the Attorney-General was formally accepted by letter signed by the plaintiff and two other members of the South Australian Committee, Messrs. Gray and O'Neill, and the settlement was confirmed by letter from the Attorney-General dated 11th December. At a meeting of scrip-holders held in Melbourne on 11th December 1925 it was decided that, if the South Australian growers and subscribers would fall into line with the Melbourne holders of scrip, fresh proceedings were to be taken. It does not appear that any exception was taken by the Victorian Committee to the action of the South Australian Committee in settling Welden's action. At a meeting of the Victorian Committee held on 29th January 1926 the defendant Bloch was instructed to obtain from Messrs. Wadey, Norman & Waterhouse a list of the South Australian growers and subscribers, and to prepare a circular to be sent out for the purpose of obtaining subscriptions from those persons with a view to further proceedings being taken. A circular drafted by Norman was received by the defendant Bloch on 10th February 1926, and a meeting of the Victorian Committee was called for 15th February. Only two members of the Committee attended that meeting—Ulbrich and the defendant Crocker—and they declined to deal with the draft circular as they did not consider a quorum was present. It is significant that a statement in the draft circular that Anthoney was present when the arrangement was made with the Attorney-General does not appear in the circular as published. The draft circular was sent by Norman to the defendant Bloch, and, so far as appears from the evidence, he was the only person who saw it. On 16th February 1926 the defendant Bloch telegraphed to Norman : " Issue circulars best way you think advisable forward us some copies." At a meeting of the Victorian Committee held on 22nd February Bloch reported what he had done with regard to the circular, and it was resolved that his action in instructing Norman to issue circulars be confirmed. At this time none of the defendants except Bloch had seen the circular or knew what it contained, but the defendant Crocker was supplied with a copy on the following day, and the defendant Pratt saw a copy on 23rd or 24th February 1926. It does not appear from the evidence that the defendant Murphy ever saw the circular. On 23rd or 24th February the

H. C. OF A. 1928.

WEBB v. BLOCH.

KNOX C.J.

defendants Pratt and Bloch went to Adelaide, and on 25th February they attended a meeting of the South Australian subscribers at which the final report of the South Australian Committee was received and the existence of the Committee terminated.

The evidence to which I have referred is all either documentary or substantially uncontradicted, and the learned trial Judge did not base his finding that none of the defendants was guilty of malice on his view of the credibility of any witness. In these circumstances I think it is my duty to form my own conclusions as to the effect of the evidence. In doing so, I cannot overlook the fact that neither the defendant Bloch nor Norman was called as a witness, and consequently no explanation is available as to matters which might possibly have been explained by them.

I have already expressed my opinion as to the meaning to be attributed to the statements in the circular referring to the discontinuance or abandonment of Welden's action. On the questions (a) whether these statements, so interpreted, were true, and (b) whether, if they were untrue, the defendants honestly believed them to be true, the evidence, in my opinion, establishes the following facts:—(1) The suggestion to abandon Welden's action had its origin in the resolution of the South Australian Committee of 3rd September 1925 referred to in Alford's letter of 4th September. It appears that this resolution represented the unanimous opinion of the Committee. The resolution was by this letter communicated to Ulbrich, who was the treasurer, and apparently then acting as secretary, of the Victorian Committee, and was by him discussed with the then chairman of that Committee. (2) On 15th October 1925 the solicitors who acted for both Committees, after conferring with the Victorian Committee, advised the South Australian Committee that it was impracticable to go on with Welden's action unless further arrangements were made for indemnifying him, and advised further that a fresh action should be commenced, a step which would have been wholly unnecessary unless Welden's action were abandoned. It is manifest that at this time the proposal to abandon Welden's action must have been within the knowledge of the Victorian Committee and of the defendant Bloch as secretary of that Committee. (3) From the letter of 16th October 1925

from the solicitors to Alford it is to be inferred that the solicitors regarded the intention to abandon Welden's action as a matter already settled. (4) The record of the proceedings at the meeting of 20th October 1925 shows that the resolution to approach the Government on the question of abandoning Welden's action was proposed by Anthoney and seconded by Gray. There is nothing to show that the plaintiff took any part in this beyond presiding at the meeting. The defendant Bloch was informed that this resolution had been passed by the South Australian Committee after careful consideration of the position, and that if the South Australian Committee was not got rid of Welden's action would be dropped. It is to be inferred from the defendant Bloch's letter of 23rd October 1925 that the contents of Norman's letter to him of 21st October 1925 had been brought before the Victorian Committee. (5) By Alford's letter of 17th November 1925 Norman was informed that both Gray and Anthoney were in favour of abandoning Welden's action and that the plaintiff's attitude was uncertain. This letter was communicated to the Victorian Committee. (6) Although the plaintiff was the person who interviewed the Attorney-General, it is clear from his evidence that he did so at the request and on behalf of the South Australian Committee, and that every member of that Committee was consulted and expressed himself in favour of accepting the proposal made at that interview. (7) The question whether the proposal should be accepted was fully discussed at the meeting held in Adelaide on 1st December 1925 at which the defendant Pratt as chairman of the Victorian Committee and Norman were present. At that meeting Anthoney objected to a suggestion made by the plaintiff that the Attorney-General should be asked to give further time for consideration of the proposed compromise, and it was stated by the plaintiff in answer to a question that the general opinion here (i.e., in South Australia) was in favour of abandoning the action. (8) Norman personally had advised the Adelaide Committee before the interview with the Attorney-General to "get out." (9) All the other members of the South Australian Committee and Alford the secretary were in favour of closing with the offer of the Attorney-General on 8th or 9th December.

H. C. OF A. 1928. WEBB v. BLOCH. Knox C.J.

The conclusion which I draw is that the following statements in the circular are untrue: (a) about September last the chairman of the South Australian Committee, Mr. Webb, carried a resolution that unless the Victorian Committee would take over all the liabilities of the South Australian Committee he proposed to discontinue Welden's action; (b) early in December last Mr. Webb came to an arrangement regarding the abandonment of the litigation; (c) the arrangement was made without consulting either his solicitors or the Victorian Committee. I am also of opinion that the proper inference to draw from the evidence is that the defendants Bloch and Pratt knew that these statements were untrue, and that the other defendants ratified the publication of the circular containing them without knowing or making any attempt to ascertain what statements were contained in the circular or whether such statements were true or false. In the absence of any explanation by Bloch, I infer that his object in saddling the plaintiff with responsibility for a course of action which he knew was authorized and concurred in by the other members of the South Australian Committee was to furnish to the South Australian farmers to whom the circular was sent an explanation of the abandonment of Welden's action which would lead them to believe that it was brought about, not by the Committee which they had appointed to look after their interests, but by one member of that Committee without the consent or authority of the others, and without the advice of the solicitors. Both Bloch and Norman must, I think, have realized that, if the farmers were told that the abandonment of the action was the result of unanimous action on the part of the members of their Committee, the prospect of obtaining further contributions from the farmers for the purpose of prosecuting another action would be extremely remote. The statements in the circular relating to this matter not only suggest what is false but suppress the true state of facts in a manner calculated, and I think intended, to mislead those to whom it was published.

The circular having been published on a privileged occasion, the plaintiff in order to succeed must prove malice in the defendants. In the present case the defendant Bloch published the circular containing statements which, in the absence of any explanation by

him, I think he must be taken to have known to be untrue. In *Royal Aquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson* (1) Lord *Esher* M.R. thus explained the meaning of the word malice in relation to a privileged occasion:—"The question is whether" the defendant "is using the occasion honestly or abusing it. If a person on such an occasion states what he knows to be untrue, no one ever doubted that he would be abusing the occasion." Accepting this explanation, the evidence in this case shows, in my opinion, malice in the defendant Bloch. With regard to the defendant Pratt, he is in no better position, although at the time of publication he did not know what was stated in the circular. He chose to accept responsibility for the publication without knowing what it contained, and, as it contained statements which, in my opinion, were not only defamatory but untrue to his knowledge, malice is established against him also. The other defendants seem to have had no knowledge, and to have made no attempt to ascertain, what statements were contained in the circular, or whether such statements were true or false. It is unnecessary to consider whether the evidence establishes that they were personally guilty of malice, for they are jointly responsible with the defendants Bloch and Pratt for the publication of the libel and so joint tortfeasors with them; and in such a case the malice of one or more of the joint tortfeasors defeats the privilege of all those responsible in law for the publication of the defamatory matter (*Smith* v. *Streatfeild* (2)).

In my opinion the appeal should be allowed, the judgment for the defendants set aside, and judgment entered for the plaintiff for £500 damages with costs of the action (including the additional costs reasonably incurred by the plaintiff by reason of the trial of the action in Melbourne instead of in Adelaide) and of this appeal.

ISAACS J. This is an appeal from *Starke* J. sitting without jury. It is a rehearing (*Appeal Rules*, sec. I., r. 1). Nothing turns on credibility, on demeanour of witnesses, or any other advantage possessed by the learned trial Judge. There are no disputed evidentiary facts: the only questions of fact for determination are to be arrived at solely by inferences equally open to the appeal

(1) (1892) 1 Q.B., at p. 443. (2) (1913) 3 K.B. 764.

H. C. OF A. 1928.

WEBB v. BLOCH.

Isaacs J.

Court as to the primary tribunal. An exact precedent exists in *Owners of S.S. Draupner* v. *Owners of Cargo of S.S. Draupner* (1). The principal authorities applicable to appeals I have collected in *Federal Commissioner of Taxation* v. *Clarke* (2). The two authorities there mentioned which are most in point in the present case are *Clarke* v. *Edinburgh Tramways* (3) and *Wilson* v. *Kinnear* (4); to these may be added *Coghlan* v. *Cumberland* (5). There is, therefore, a constitutional and statutory duty upon this appellate Court to form its own independent opinion as to the proper construction of documents and the proper inferences from the evidentiary facts. For myself, I see no conclusion possible but that the appeal should succeed.

The general narration by my brother *Starke* as to the introductory facts up to and including the resolution of 20th October 1925 I adopt with one modification and some additions that are, however, all-important in view of the arguments addressed to us. The modification is with respect to Welden's refusal to give the irrevocable retainer required by Norman as a condition of settlement in August 1925. As I read the evidence relative to that period, the refusal was the resolve of Welden himself, independently of and even contrary to the advice of Webb. There is no evidence that Webb stood in the way of Welden giving that assurance. There is evidence to the contrary. Besides, it would, on the theory of the circular and the defence, have been entirely against the personal interests of the appellant to induce Welden at that juncture to refuse.

1. *Defamation.*—I agree with the learned trial Judge that the circular was defamatory of the appellant. It is deftly framed. Its opening sentence would lead a reader to believe not only that it was true, but that it omitted nothing material. It gives an introductory history of the litigation down to the Privy Council decision, which left nothing in the way of success but the mere proof of negligence. In the course of doing this, what proves to be a subtle misrepresentation is introduced. It states in heavy type, to attract attention: " We have taken counsel's opinion and believe that on an appeal to the Privy Council production of these reports would have

(1) (1910) A.C. 450.
(2) (1927) 40 C.L.R. 246, at pp. 263-266.
(3) (1919) 56 S.L.R. 303.
(4) (1925) 2 D.L.R. 641, at p. 646.
(5) (1898) 1 Ch. 704.

been ordered." In its collocation that meant, when the whole document came to be read, that but for Webb's discontinuance of Griffin's action the defendants *believed* the Privy Council would have ordered production in that action. Then, the way being prepared, the circular proceeds by a series of separate but consecutive steps to represent that the litigation—that is, the two actions of Griffin and Welden—was discontinued only because Webb for despicable reasons betrayed his fellow growers.

The *first step*, shortly expressed, is that in May 1925, when the Adelaide Committee refused to incur further costs, Webb unreasonably refused to stand aside and allow the action to proceed. The *second step* is that, after an arrangement in July that the Melbourne Committee would finance the case in future and the Adelaide Committee continue it and bear past costs, Webb in September deliberately broke the bargain, the breach being twofold. In the first place, after some months of co-operation, and, of course, of commitment of the Melbourne Committee, Webb is said to have " carried " (which I apprehend means promoted and pressed through) a resolution of the Adelaide Committee to discontinue Welden's action, unless Melbourne also took over the past liabilities. When this was yielded, then, secondly, Webb, as an exclusive benefit, demanded further that he and his son-in-law should be bought out of their scrip " at slightly over cost." The imputation of dishonourable motives is patent. But this step is preparatory to something still worse. The circular says that, as Webb could give no guarantee that Welden would proceed, the negotiations fell through. That is, inasmuch as Webb could not promise the only consideration that would give any reason for the demands he made, he did not get what he asked for. (This is the Welden refusal that I think Webb did not induce ; and it would have been against his own interest on the hypothesis of the circular.) The *third step* is a culmination of the Webb betrayal which the circular is manifestly designed to portray. It says : " Up till this time, you see, both the Victorian and South Australian Committees had worked together." " This time " means about September 1925. The next date mentioned is December. *No mention is made of the events in September, October and November*, which are the very heart and soul of the discontinuance

H. C. OF A. 1928. WEBB v. BLOCH. Isaacs J.

of the Griffin and Welden actions. The reader of the circular could not have the faintest notion of the advice given both by Norman and the Melbourne Committee as to that discontinuance. The circular leaps from the disappointment of Webb in September to his action in December, as from cause to consequence. It says: "Early in December last Mr. Webb approached the Attorney-General without consulting either his solicitors, the growers, or my Committee —and came to an arrangement regarding the abandonment of the litigation." All that is in heavier type for emphasis. Then, in ordinary type: "The arrangement was afterwards confirmed by letter." Reading it as a whole, it means that Webb, for no reason but selfish personal considerations, and disappointed at not getting what he had demanded, personally and solely—being chairman—made verbally an arrangement terminating the litigation, that is both Griffin's and Welden's actions. The subsequent letter, comparatively unimportant, was treated merely as a formal official confirmation of what had been done verbally by Webb personally. This was a glaring distortion, and by those largely responsible for what Webb actually did. After some eulogy of the solicitors and the Victorian Committee, the circular requests assistance for the Bloch case, and then, by way of climax, adds:—"Our solicitors inform us that they believe the case will be heard and finally disposed of this year. But for the action of the chairman of the South Australian Committee, our solicitors say they would have had the case ready for hearing during the first few months of this year. But he would not allow them to proceed to obtain evidence, and he opposed their endeavour to get the inspectors' reports at every step." If that were true, Webb was a traitor. But, though scarcely credible, it is a fact that the statement just quoted is in direct opposition to Norman's own letter, written during the suppressed period. On the whole, the picture painted by Norman under his commission by Bloch, and approved by the other defendants, portrays Webb as betraying his friends right through, and at last, when success seemed at hand, surrendering their rights for the sake of his own pecuniary safety.

2. *Publication.*—One strongly contested question in this case is as to the responsibility of the defendants for the malice of Norman.

Much of the difficulty was occasioned, in my opinion, by a misunderstanding as to what is meant by " publication." It was urged that, whatever he did or whatever was the state of his mind, the defendants took into their own hands the question of publishing the circular, and as they did that, Norman's malice—if there were malice on his part—in framing and distributing the circular pursuant to express direction, did not affect the defendants. Norman's part in the matter is seen by reference to the evidence. He was employed in general terms to compose " a form of circular he would advise being sent to each grower and contributor," and at the same time to send " a full list of names and addresses of growers and contributors." He was, therefore, employed to compose the circular " for the purpose of publication " (*Adams* v. *Kelly* (1) ; *Bond* v. *Douglas* (2) ; *Jones* v. *Great Central Railway Co.* (3) ; *Fraser* on *Libel and Slander*, 6th ed., pp. 269-270). His skill and experience, his knowledge acquired while acting as solicitor for Webb as well as others, his legal knowledge, in short, his expert ability and mentality, were enlisted and utilized by defendants for the very purpose. His was no subordinate part. He subsequently consciously distributed it, and I regard this distribution not as an isolated act, but as the consummation of the task he had suggested and had undertaken, he being selected as the best one to see it effectively carried home to the 2,000 or 3,000 growers it was intended to affect. When that was completed, his " publication" of the libel did not consist merely in the distribution of the paper vehicle which embodied it. To publish a libel is to convey by some means to the mind of another the defamatory sense embodied in the vehicle (see per *Williams* J. in *Amann* v. *Damm* (4), quoting Lord *Hobart*). On the facts of this case, Norman in law " published " the libel on Webb, even if not he but another had undertaken the actual distribution of the circular: he would still have been one of the principals in relation to Webb.

The meaning of " publication " is well described in *Folkard* on *Slander and Libel*, 5th ed. (1891), at p. 439, in these words : " The term *published* is the proper and technical term to be used in the case of libel, *without reference to the precise degree* in which the

(1) (1824) Ry. & M. 157.
(2) (1836) 7 C. & P. 626.
(3) (1910) A.C. 4.
(4) (1860) 8 C.B. (N.S.) 597, at p. 600.

H. C. OF A. 1928.

WEBB v. BLOCH.

Isaacs J.

defendant has been instrumental to such publication; since, *if he has intentionally lent his assistance to its existence for the purpose of being published*, his instrumentality is evidence to show a publication by him." In *Starkie* on the *Law of Slander and Libel*, 1st ed. (1830), vol. II., at p. 29, it is said: "The declaration generally avers, that the defendant published and caused to be published; but the latter words seem to be perfectly unnecessary either in a civil or criminal proceeding; in civil proceedings, *the principal is to all purposes identified with the agent* employed by him to do any specific act" &c. In *Parkes* v. *Prescott* (1) *Giffard* Q.C. quotes from the second edition of *Starkie*: "All who are in any degree accessory to the publication of a libel, and by any means whatever conduce to the publication, are to be considered as *principals in the act of publication*: thus if one *suggest* illegal matter in order that another may write or print it, and that a third may publish it, all are equally amenable for the act of publication when it has been so effected." In *R.* v. *Paine* (2) it is held: "If one repeat and another write a libel, and a third approve what is wrote, they are all makers of it; *for all persons who concur, and show their assent or approbation to do an unlawful act, are guilty*: so that murdering a man's reputation by a scandalous libel may be compared to murdering his person; for if several are assisting and encouraging a man in the act, though the stroke was given by one, yet all are guilty of homicide." A little later, in *R.* v. *Drake* (3), that law was reaffirmed. In *The Queen* v. *Cooper* (4) Lord *Denman* C.J. said: "If a man request another generally to write a libel, he must be answerable for any libel written in pursuance of his request: *he contributes to a misdemeanour and is therefore responsible as a principal.*" In that case the defendant was indicted for "publishing and causing to be published" the libel in question. The judgments show that all the defendant did was to authorize the publication of the libel, in law that he published it. In *Burdett* v. *Abbot* (5) Lord *Erskine* expresses that view. *Adams* v. *Kelly* (6) is an instance. In *Parkes* v. *Prescott* (7) *Montague Smith* J. says: "If a man gives a copy of his speech to another to publish, he is answerable as a

(1) (1869) L.R., 4 Ex. 169, at p. 173.
(2) (1696) 5 Mod. 163, at p. 167.
(3) (1706) Holt 425.
(4) (1846) 8 Q.B. 533, at p. 536.
(5) (1817) 5 Dow 165, at p. 201.
(6) (1824) Ry. & M. 157.
(7) (1869) L.R. 4 Ex, at p. 178.

publisher." He quotes with approval the words of Lord *Denman* C.J. in *The Queen* v. *Cooper* (1). "If," says the learned Judge (2), "the law were otherwise, it would in many cases throw a shield over those who are the real authors of libels, and who seek to defame others under what would then be the safe shelter of intermediate agents." *Keating* J. and *Hannen* J. concurred. In relation to Webb, it is Norman who was the "real author," the master mind, and the defendants, for their own independent objects, no doubt, were the real "intermediate agents" to disseminate the libel. They cannot employ the master mind for the very purpose, accept its suggestions, approve and disseminate its production, and then disclaim its malice. *S. Pearson & Son Ltd.* v. *Dublin Corporation* (3) is rightly considered by text-writers (as *Fraser* on *Libel and Slander*, 6th ed., at p. 269; *Gatley* on *Libel and Slander*, at p. 409; *Spencer Bower* on *Actionable Defamation*, 2nd ed., at p. 265) an authority for the position that principal and agent *inter se* are principals in relation to the person defamed. It answers the contention of the respondent that, however this might be the case had the defendants not reserved to themselves the final right of approval, the reservation and exercise of that right made a difference. In the case cited Lord *Loreburn* L.C. said (4): "*The principal and the agent are one*, and it does not signify which of them made the incriminated statement or which of them possessed the guilty knowledge." Lord *Halsbury* agreed, and said (5):— "It matters not in respect of principal and agent (who represent but *one person*) which of them possesses the guilty knowledge or which of them makes the incriminating statement. If *between them* the misrepresentation is made so as to induce the wrong, and thereby damages are caused, it matters not which is the person who makes the representation or which is the person who has the guilty knowledge." Now, in that case it appears from the reports of the case in the English Courts and in the House of Lords that the fraud complained of was the fraud of engineers employed by the corporation to draw up plans for works to be let, not by the engineers, but by the corporation itself. "These plans were furnished by the engineers to the corporation and by the latter issued to applicants, of whom

(1) (1846) 8 Q.B. 533.
(2) (1869) L.R. 4 Ex., at p. 179.
(3) (1907) A.C. 351.
(4) (1907) A.C., at p. 354.
(5) (1907) A.C., at p. 359.

H. C. OF A. 1928. WEBB v. BLOCH. Isaacs J.

the plaintiff's company was one " (per Lord *James of Hereford* (1)). Of course, this connotes that the corporation had itself " approved " of the plans before it issued them. If fraud of an employee can be imputed in an action of deceit, where the *factum* creating the contractual relations is that of the principal and not of the employee, there is no room for the argument of differentiation in this case. The principle enunciated is general, and applies to what Mr. *Spencer Bower*, at p. 265, calls " the composite entity " of principal and agent in a case like the present (see *Fitzsimons* v. *Duncan and Kemp & Co.* (2)). *Smith* v. *Streatfeild* (3) is a case following the *Pearson* principle. And, it needs scarcely be added, the identification of A and B as principals affects A by reason of B's acts and state of mind, as much when A is sued alone, as when A and B are sued jointly.

3. *Justification.*—The defendants plead that their statements in their " ordinary significance are true in substance and in fact." The statement of claim includes innuendoes. But they are really only statements, and incomplete statements, of the natural and primary effect of the words, as these could be understood in their context by the persons to whom they were addressed. There is no secondary meaning. The innuendoes do not " enlarge the sense of the words " (see per *Parke* B. in *Barrett* v. *Long* (4)). What I have stated under the head of " Defamation " as their effect is nothing but the effect the statements complained of would naturally have upon the recipients giving to the words in their collocation their ordinary signification. That they are untrue seems to be indisputable. It was sought before us to justify the third step in its " literal " sense. If we were to understand the word " literal " in the most limited way, the words, in my opinion, are untrue. But it is trite law that justification must be truth " in substance and effect " (*Weaver* v. *Lloyd* (5)). The proof in defence fails unless it " meets the sting " of the libel (per *Burrough* J. in *Edwards* v. *Bell* (6)). And in determining whether it does or not meet the sting of the words complained of, the Court or jury, as the case may be,

(1) (1907) A.C., at p. 361.
(2) (1908) 2 I.R. 483, at pp. 496-498, per *Palles* C.B.
(3) (1913) 3 K.B. 764.
(4) (1851) 3 H.L.C. 395, at p. 412.
(5) (1824) 2 B. & C. 678, at p. 679.
(6) (1824) 1 Bing. 403, at p. 409.

"cannot understand them differently in Court from what they would do out of Court" (per *Le Blanc* J. in *Woolnoth* v. *Meadows* (1)).

Now, in the present case, none of the recipients reading the circular "out of Court" would dream of putting on any of the language any technical or specialized meaning, but would understand its import broadly. For instance, the third step would naturally be taken as it stands to mean that Webb had made the bargain with the Attorney-General secretly and surreptitiously, and without any prior notification or warning to his solicitors, or the Victorian Committee, or the growers. The omission of relevant events that would have placed a different complexion on the matter of the discontinuance is fatal to the defence. Lord *Macnaghten* said in *Gluckstein* v. *Barnes* (2): "Everybody knows that sometimes half a truth is no better than a downright falsehood." Communications that took place between the beginning of September and December were omitted. If they had been included they would have vitally altered the aspect of the latter event. Their omission made the emphasized narration of that event, to use Lord *Blackburn's* expression in *Smith* v. *Chadwick* (3), "lie *like* truth." There may be some occult exculpatory reason—at present unimaginable—which, if Norman or Bloch had chosen to divulge it, would have absolved them, and with them the other defendants. If so, they can only blame their own silence if the non-existence of any such reason is held to be established. (See *Blatch* v. *Archer* (4); *Hibbs* v. *Ross* (5); *General Accident, Fire and Life Assurance Corporation* v. *Robertson* (6), and *Stephen's Digest of the Law of Evidence*, art. 96.) (See also per Lord *Shaw of Dunfermline* in *Lionel Barber & Co.* v. *Deutsche Bank* (*Berlin*) *London Agency* (7).)

Starke J. says generally: "The circular distorts the facts and gives them a colour decidedly unfair to the plaintiff." I agree cordially with that; but if such is the case it is useless to talk of "literal" truth of the actual words used. His Honor found against justification, and, in my opinion most properly.

(1) (1804) 5 East 463, at p. 473.
(2) (1900) A.C. 240, at pp. 250-251.
(3) (1884) 9 App. Cas. 187, at p. 201.
(4) (1774) 1 Cowp. 63, at p. 65.
(5) (1866) L.R. 1 Q.B. 534, at p. 543.
(6) (1909) A.C. 404.
(7) (1919) A.C., at p. 329.

H. C. OF A. 1928. WEBB v. BLOCH. Isaacs J.

The failure of this defence will be better seen when the facts are stated as to privilege.

4. *Privilege.*—In my opinion this defence fails utterly. It fails because Norman, the defendant's agent to compose the circular for publication, on the evidence as it stands, did not believe what he caused to be published in collaboration with the defendants, and because Bloch, with the information before him that he undoubtedly had, did not believe the statements. They must both of them have known the statements were grossly misleading. If the facts support that position as to either Norman or Bloch, the defendants in my opinion are liable. I may say at once that I am not prepared to assent, without fuller consideration, to the contention that there is nothing foreign or irrelevant to the privileged occasion which common interest undoubtedly created. If necessary, I should have to make up my mind whether some of the imputations were not, having regard to all the circumstances, outside all fair limits of the occasion. (See per Earl *Loreburn* in *London Association for Protection of Trade* v. *Greenlands Ltd.* (1), a passage quoted by *Duff* J. in *Halls* v. *Mitchell* (2) in a judgment concurred in by *Anglin* C.J.) But this is unnecessary, because as to malice it appears to me no serious doubt can exist. I mean by that "what the law calls actual malice" (per Lord *Penzance* in *Capital and Counties Bank* v. *Henty* (3)). From *Toogood* v. *Spyring* (4) to *Greenlands' Case* (5) and *Adam* v. *Ward* (6), it has been held that "honesty," that is, a genuine belief in the truth of the defamatory statement, is essential to protection, even when the occasion is privileged, and is made use of for the permitted purpose. The latter condition is also essential even where a genuine belief exists. The absence of either is fatal to the defence of privilege. In *Salmond* on *Torts*, 6th ed., at p. 519, the learned author says: "The absence of any genuine belief in the truth of the statement is conclusive evidence of malice, for the defendant cannot have had a proper motive in saying what he did not believe to be true." That, of course, is apart from exceptional cases where there is a duty to communicate in any event. There is added to

(1) (1916) 2 A.C. 15, at p. 28.
(2) (1928) 2 D.L.R. 110.
(3) (1882) 7 App. Cas. 741, at p. 756.
(4) (1834) 1 Cr. M. & R. 181.
(5) (1916) 2 A.C., at p. 22.
(6) (1917) A.C. 309.

that an observation that the second element must be present. I assent to the contention that ultimately the proper question as to belief is not whether the defendant reasonably, but whether he honestly, that is, genuinely, believed what he published of the plaintiff (*Collins* v. *Cooper* (1)). But there must be "good faith" (per Lord *Herschell* in *Allen* v. *Flood* (2)), for, as the same learned Lord says (3), the test of malice is whether the means used and the disregard of one's neighbour "are such as no honest and fair-minded man ought to resort to." In *Hart* v. *Gumpach* (4) Sir *Montague Smith* for the Judicial Committee says that limited privilege requires the statements to be made "honestly, and in a belief of their truth," though the burden is on the plaintiff to prove they were not so made. It need scarcely be added that the weight of that burden varies with the circumstances, and the burden of *proof*, as distinguished from the burden of the issue, though undoubtedly resting in the first instance on the plaintiff, may be thrown back on the defendant. That is the case here. In his valuable judgment in *Derry* v. *Peek* (5) there are observations by Lord *Herschell* of high importance in this case. The learned Lord says that (1) "to prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth"; (2) "when a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration"; (3) "the ground upon which an alleged belief was founded is a most important test of its reality"; (4) "if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false." Then his Lordship proceeds to consider the case of defendants who give direct evidence of their actual belief, and whose demeanour induces the primary tribunal to give credence to their sworn testimony —a feature noticeably absent here, so far as Bloch and Norman are concerned, and they are the central figures.

(1) (1902) 19 T.L.R. 118.
(2) (1898) A.C. 1, at p. 126.
(3) (1898) A.C., at pp. 118, 119.
(4) (1872) L.R. 4 P.C. 439, at pp. 458-459.
(5) (1889) 14 App. Cas. 337, at pp. 374-376.

H. C. OF A. 1928.

WEBB v. BLOCH.

Isaacs J.

There is abundant evidence of quarrelling between Webb and Norman, and sufficient undue severity of imputation to justify a finding of actual malice on the part of Norman. My own view is that Norman was imbued with great dislike to Webb, and used his opportunity of publishing the circular to exercise it, perhaps over-estimating the protective power of the occasion. No other reasonable ground suggests itself for the undue personal attack on Webb, *singling him out*. If necessary, I am prepared so to hold, since Norman gave no evidence, and the state of his mind is only directly known to himself. I place no stress on his being "obsessed," because in my view the discontinuance that took place was so largely on his own advice. But, apart from that, on the facts patently before the Court an unquestionable case of want of genuine belief by Norman, to begin with, exists, and may be easily demonstrated. As far back as 31st August 1925 Norman, aware that Welden would not give an irrevocable retainer, objected to Sloan buying Webb's scrip until the position became clearer, and *himself suggested that a fresh action be started by a new plaintiff*, preferably a recently certificated bankrupt to whom a few scrip certificates might be given. This was really the genesis of the discontinuance. On 5th September 1925 Norman was made aware that the Adelaide *Committee* had resolved to abandon the Welden action, if that could be done without any undue liability for costs falling on Welden. On this he advised as to the probable amount of costs payable. On 8th September he informed the Adelaide Committee that Welden's action was not ripe for trial, owing (not to Webb's obstruction) but to "the Government's refusal to give discovery." At the same time he said *he preferred Griffin's action should be abandoned before Welden's*. No word of expostulation or objection and no suggestion to consult the growers or the Melbourne Committee came from him. The intimation on 2nd October by the Adelaide Committee that they would not be liable for future costs in the Welden and Griffin actions was made—not to the Victorian Committee, but to Norman. But the first all-important communication presenting an insuperable difficulty in the way of accepting in the circumstances Norman's honest belief in the story he told in the circular, is the letter dated 15th October 1925 and addressed by his firm to Alford as secretary.

It is lengthy and touches the matter at many points. The effect of it is: (1) The heading, "*Re* Wheat Case," indicates the whole existing litigation; (2) it represents itself as a deliberate legal opinion; (3) it anticipates an adverse judgment of this Court in *Griffin's Case*, which means no discovery of the inspector's reports; (4) *it shows that the Victorian Committee had been in conference with him* (and presumably he had acquainted them with all he knew as to the Adelaide Committee's intentions), and that Committee and he had arrived at certain conclusions; (5) *the discontinuance of Griffin's action was one of them* (this is one of the heavily-typed facts which I had in mind when referring to the statement in the circular that, on an appeal to the Privy Council, production of reports, counsel advised, would have been ordered); (6) interrogatories for the examination of the chairman of the Wheat Scheme were advisable, but could not be got in *Welden's Case*, which besides was *impracticable to go on with* unless *he* (Welden) were indemnified (this was another conclusion arrived at); (7) *therefore he advised starting a fresh action by a Victorian having nothing to lose*; (8) he specifically *asked* for instructions whether the Committee was *willing to discontinue Griffin's action* if decision adverse; (9) he mentioned that *possibly the Statute of Limitations might bar any future action*—though inclined to think otherwise. Upon this letter the Adelaide Committee acted on 20th October 1925 in passing what I may call the fundamental resolution of discontinuance. Obviously, as discontinuance in Griffin's case was definitely suggested, both by Norman and the Victorian Committee, and Welden's was thought to be useless, and a fresh action by a Victorian was advised, the last mentioned would suffice for everything. Naturally Welden's action, it was thought, was to be abandoned too. And so the Adelaide Committee thought, as inspection of the minutes of 20th October 1925 shows, relying on Norman's letter. The same day Alford communicated the resolution of discontinuance to Norman, and asked him frankly to send it on to Ulbrich and Bloch, of course to bring it before the Melbourne Committee. On 21st October Norman sent to Bloch a letter enclosing a copy of Alford's letter. He also in his letter told Bloch he thought Griffin's action should be discontinued immediately. On 23rd October Bloch acknowledged the

H. C. OF A. 1928.

WEBB v. BLOCH.

Isaacs J.

receipt of the letter and contents. Bloch asked Norman to arrange with "the South Australian Committee" to defer action until counsel's opinion was received. He said, *inter alia*, the Victorian Committee wished to know "what is the best step to take should we decide to drop both these cases?" On 24th October Norman replied that the matter could not stand over beyond 31st October, and, unless money was provided, notice of discontinuance in Griffin's action would be given. *That was clearly to be without notice to the growers.* On 27th October Norman informed Alford that he had submitted the proposal of 20th October to Melbourne, but "we . . . have not yet had their reply." He adds that unless his firm receives £50 "next Saturday" (which would be 31st October) they would give notice to the other side that they proposed to *discontinue Griffin's action.* A gap then occurs in the evidence until 17th November 1925, when *Alford informed Norman that Gray and Anthoney favour abandonment, while Webb is more optimistic, though uncertain.* Norman on 19th November writes to Crocker stating his belief as to the reason for the Committee's anxiety to abandon. It is that "they fear that they may be liable under the indemnities they have signed." He also tells Crocker that Webb has approached the Attorney-General and "will be having a conference with him to-day." He adds: "We believe the object of the conference is really to endeavour to abandon all proceedings upon the Government making no claim for costs." He says further: "We have not been consulted in regard to the matter and have only received the information through the secretary." It does not appear whether Norman acquainted the Melbourne Committee with the text of the letter he had sent to the Adelaide Committee on 15th October, and on which that Committee was acting. But the conclusions at the conference mentioned in the letter were clearly for communication, and that they were being acted on by the Adelaide Committee was apparent from the letter of 21st October sent to Bloch. The statement of Norman to Crocker about not being consulted was at least ambiguous. In the circumstances it only meant, I think, that the interviews were conducted personally and not by the intermediation of solicitors. In any case, having regard to the letter of 21st October, there was

really nothing new in the information given to Crocker. On 21st November Alford writes to Norman informing him of the *Committee's* resolution to accept the Government's terms, and asking Norman so to inform the Attorney-General. It also stated that Webb and Anthoney both agreed with the Attorney-General on the occasion; and that the Committee undertook to inform the growers. On 1st December, at a meeting of the Adelaide Committee, Norman was present, as a grower apparently, and Pratt also was present. It was arranged that before Webb went to the Attorney-General to close the bargain, the Melbourne Committee should have a fortnight to consider what they would do. The knowledge of the intended discontinuance was fully and absolutely known to Norman and to the Victorian Committee. An unfortunate circumstance intervened, which prevented communication to the growers. Welden had been supposed to be penniless, and this naturally influenced the Government. Suddenly Welden told Webb that a trooper had come to him to ascertain how much cash he had and what he was worth. This alarmed the Committee lest the Attorney-General should withdraw his consent, which up to then had not become a definite bargain. Alford at once, 5th December, informed Bloch of the "sudden development," and that, unless influenced otherwise by the Melbourne Committee by telegram on Tuesday afternoon, 8th December, it was intended to discontinue both cases on 9th December. Alford's letter would reach Bloch on Monday morning, 7th December. No telegram or other communication came, and no complaint has ever been made as to the shortness of time. Then clearly, for the sake of the growers generally, as well as for that of the Committee, as Norman must have known, the South Australian Committee acted. They offered, and the Government accepted their offer, to end the litigation without costs. There remains one further document which perhaps has not received its proper share of recognition. What has been already stated indicates an utter want of honest belief on the part of Norman and Bloch at least, of the truth of the charges against Webb, and I am prepared to rest my judgment solely on the evidence so far referred to and dealt with. But the further document, though superfluous regarding the result,

H. C. OF A. 1928.

WEBB v. BLOCH.

Isaacs J.

clinches the matter, it seems to me, as regards Norman, and to some extent is evidence against Pratt when we remember his plea of justification. I refer to the minutes of the final meeting of the South Australian Committee on 25th February 1926. They had called a meeting of the growers for the purpose of presenting their report and financial statement. About seventy growers were present. Norman was present and took an active part. From his presence and activities on 1st December 1925 and 25th February 1926, I assume he was a grower. The report was adopted after discussion, and apparently without dissent. So was the financial statement. Norman moved two financial proposals which were seconded and carried. But the point is that the report related the history of the litigation and of the discontinuance. The story of the discontinuance and its reasons is a point-blank contradiction of the defamatory relation in the circular as to Webb's participation. Which story did Norman believe ? And be it remembered that 25th February 1926 was practically synchronous with the distribution of the circulars. Pratt got one only on the 23rd. The appellant appeared to have been in possession of one on the 25th. But there is no lapse of time to account for any change of belief on Norman's part. Pratt was, as I have said, present at the meeting. Having read the circular, having heard the report at the meeting, having heard Webb complain about the circular, Pratt pleaded justification. He says he formed no opinion as to the truth of the circular, as he had not been acquainted with the facts stated. But Pratt's attitude was only typical of all the defendants, except that Bloch was much better informed of the real truth as matters went along. It thus, with or without that document, appears clearly that Norman and Bloch not only had no material to " believe " what was said in the circular and that they had means of information readily accessible before making such accusations, but they had the best reasons for disbelieving them. Add to this their studious silence and the irresistible conclusion, applying Lord *Herschell's* observations, is *that they did not believe it.*

The defendants are all, in my opinion, liable.

I agree with the order proposed by the learned Chief Justice.

H. C. OF A. 1928.

WEBB v. BLOCH.

GAVAN DUFFY J. I am of opinion that the appeal should be dismissed.

Appeal allowed. Judgment for the defendants set aside and judgment entered for the plaintiff for £500 damages with costs of the action (including the additional costs reasonably incurred by the plaintiff by reason of the trial of the action in Melbourne instead of in Adelaide) and of the appeal.

Solicitors for the appellant, *Genders, Wilson & Pellew.*

Solicitors for the respondents, *Cook & McCallum*; *Pavey, Wilson & Cohen.*

C. C. B.

[HIGH COURT OF AUSTRALIA.]

ABBOTT . . . . . APPELLANT;
DEFENDANT,

AND

THE UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED AND OTHERS } RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1928.

SYDNEY, *Nov.* 15; *Dec.* 3.

KNOX C.J., ISAACS, HIGGINS, GAVAN DUFFY AND STARKE JJ.

Will—Option to purchase—Death of donee of option—Exercise of option by personal representative—Whether personal to donee himself—Testator's intention.

The question whether an option given under a will is personal to the donee or otherwise must be answered by ascertaining the intention of the testator as expressed in the will.

Throughout a will and codicil all references to the donee of the option were in a distinctly personal way, no reference being made to successors or others.