[HIGH COURT OF AUSTRALIA.]

COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LIMITED . . . . . DEFENDANT, } APPELLANT;

AND

THE PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE COMPANY OF AUSTRALIA LIMITED. . . . PLAINTIFF, } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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MELBOURNE, *Oct.* 27, 28.

SYDNEY, *Dec.* 23.

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

Defamation—Vicarious responsibility—Principal and agent—Master and servant—Slander—Published by agent or canvasser of assurance company—Liability of company for slander of agent.

The appellant, an assurance company, at all material times employed R. as a canvasser and agent under an agreement, one of the terms of which provided "That the agent will not in any circumstances whatsoever use language or write anything respecting any person or institution which may have the effect of reflecting upon the character, integrity or conduct of such person or institution, or which may tend to bring the same into disrepute or discredit." The agent, while attempting to obtain assurance business, made defamatory statements concerning the respondent, another assurance company. In an action for slander by the respondent,

Held, by *Gavan Duffy* C.J., *Rich*, *Starke* and *Dixon* JJ. (*Evatt* and *McTiernan* JJ. dissenting), that R., in performing these services for the appellant, was not acting independently, but as a representative of the appellant company, which accordingly must be considered as conducting the negotiation in his person, and that the appellant was therefore liable for the slanders uttered by him.

Decision of the Supreme Court of South Australia (*Murray* C.J.): *Producers and Citizens Co-operative Assurance Co. of Australia Ltd.* v. *Colonial Mutual Life Assurance Society Ltd.*, (1931) S.A.S.R. 244, affirmed.

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APPEAL from the Supreme Court of South Australia.

The Producers and Citizens Co-operative Assurance Co. of Australia Limited brought an action for slander against the Colonial Mutual Life Assurance Society and Herbert Charles Ridley claiming £3,000 damages and an injunction to restrain the defendants and the servants or agents of the defendant Company from publishing or further publishing the words complained of or any similar words or any libels or slanders concerning the plaintiff.

The plaintiff was a company carrying on the business of an assurance company in the States of New South Wales and of South Australia. The defendant Company carried on the business of an assurance company in the States of Victoria and of South Australia. It was alleged in the statement of claim that the defendant Ridley was at all material times a canvasser and agent employed in South Australia by the defendant Company, and that on various dates during the period from August to November 1930 the defendant Ridley, as the servant and agent of and during and in the course of his employment by the defendant Company, falsely and maliciously spoke and published of the plaintiff and of the plaintiff in the way of its trade or business as an assurance company to various persons named in the statement of claim words imputing, in effect, that the plaintiff Company was in an insolvent condition. Evidence was given that the alleged slanders were spoken by the defendant Ridley to persons whom he was endeavouring to induce to take out life insurance policies with the defendant Company at a time when the agreement between Ridley and the defendant Company was still in force.

From the answers to interrogatories made by the defendant Company it appeared that the defendant Ridley was acting under the terms of an agreement made between him and the defendant Company. The terms of this agreement were as follows:—"(1) That the agent will not in any circumstances whatsoever use language or write anything respecting any person or institution which may have the effect of reflecting upon the character, integrity or conduct of such person or institution, or which may tend to bring the same into disrepute or discredit. That the agent will not, directly or indirectly pledge the credit of the Society for anything whatsoever

without express written authority signed by the Resident Secretary. (2) That the agent will pay in full to the Society all moneys received by him on its behalf within forty-eight hours of receipt, and will render a detailed statement of such receipts. (3) That the agent will never pay a premium (or portion of a premium) for a policy-holder except that policy-holder be a member of his own family. (4) That any advances made to the agent at any time against commissions to be earned, constitute a debt by the agent to the Society which the Society may call upon him to pay at any time, and which the agent undertakes to pay when called upon so to do. (5) That all deferred commissions or bonuses or other remuneration hereinafter agreed to be paid by the Society to the agent shall cease to be payable immediately on this agreement being terminated from any cause whatsoever. (6) That all moneys due under this agreement are payable in the capital city of the State or Dominion in which the agent is located. That no suit at law or in equity against the Society relating to this agreement shall be maintainable until fourteen days have expired after service on the Resident Secretary of the Society for such State or Dominion of a written statement giving particulars and amount of claim against the Society. (7) That the duties of the agent under this agreement may be performed either by his clerks or servants or by himself personally, and nothing herein shall be construed to prevent the agent from engaging in any other business or occupation during the continuance of his agency, provided that during the continuance of the agency the agent shall not directly or indirectly act for any other life assurance or accident insurance society or company. (8) That this agreement, or any part thereof, may be terminated by either party giving seven days' notice in writing. And these articles further witness that in pursuance of this agreement, and in consideration of the covenants on the part of the agent hereinbefore contained, the Society doth hereby covenant and agree to pay to the agent such sum or sums to which he may be from time to time entitled in accordance with the scales of commission on back hereof, on proposals bearing his signature as introducing agent, such payment to be held to include and cover all charges and expenses for postage, or any other account whatever." On the back of the agreement were set out the scales

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of commission for "ordinary" business, namely, life insurance business, and for "accident" business.

Ridley had been either an agent, representative or employee of the plaintiff Company from 1921 until August 1929, when he was dismissed by the plaintiff Company. Later he procured the above-mentioned agency agreement dated 20th November 1930 with the defendant Company.

The action was tried without a jury, and *Murray* C.J., who tried the action, decided that the defendant Company, by the mouth of Ridley, published three of the slanders alleged, imputing insolvency to the plaintiff Company in or about the months of September and November 1930, and judgment was entered for £1,000 damages against him and the defendant Company: *Producers and Citizens Co-operative Assurance Co. of Australia Ltd.* v. *Colonial Mutual Life Assurance Society Ltd.* (1).

Ridley did not appeal against this judgment, but the defendant Company now appealed against it to the High Court.

Thomson K.C. (with him *E. L. Stevens*), for the appellant. In this case no special damage was proved. Express malice on the part of Ridley should not have been attributed to the defendant Company. Exemplary damages should not have been given. Ridley was not a servant of the Company but an independent agent. The liability of a principal to third parties for the acts of his representative arises only if the relation of master and servant exists between employer and employee, and this depends on the right of control; and upon the act being within the scope of the employment. There is also a class of case where a principle is liable for the acts of his agent who is not his servant, but this exists only where the cause of action arises *ex contractu*. The basis of this obligation is a holding out, or is a development of the principle that he who gets the benefit must bear the burden. In law, a person who is working for another but not as his servant is treated as an independent contractor and, except in special cases, the law does not impose a liability in tort upon that other person. [Counsel referred to *Colonial Mutual Life Assurance Society* v. *McDonald* (2); *Crichton* v. *Noll* (3); *Performing Right Society Ltd.*

(1) (1931) S.A.S.R. 244.
(2) (1931) E.D.L. (S. C. of South Africa), not yet reported.
(3) (1929) S.A.S.R. 346.

v. *Mitchell and Booker (Palais de Dance) Ltd.* (1); *Haupt* v. *Haupt* (2); *Sadler* v. *Henlock* (3); *Steel* v. *South-Eastern Railway Co.* (4); *Reedie* v. *London and North-Western Railway* (5); *A. H. Bull & Co.* v. *West African Shipping Agency and Lighterage Co.* (6); *Story on Agency*, 9th ed., p. 556, note (1), par. 4540; *Clerk and Lindsell* on *Torts*, 8th ed., p. 87; *Salmond on Torts*, 7th ed., p. 137; *Harley* v. *Sargent* (7); *Lloyd* v. *Grace Smith & Co.* (8); *Barwick* v. *English Joint Stock Bank* (9); *Houldsworth* v. *City of Glasgow Bank* (10). As to the measure of damages counsel referred to *Mutch* v. *Sleeman*, (11); *Odgers* on *Libel and Slander*, 5th ed. p. 392; and *Sleeman* v. *Mutch* (12).]

[DIXON J. referred to *Herald and Weekly Times Ltd.* v. *McGregor* (13).]

Cleland K.C. (with him *F. G. Hicks*), for the respondent. The written agreement does not profess to set out the whole of the contract between Ridley and the defendant Company; so it is not necessary to go into the question of law raised. Responsibility of the principal for the acts of his agent does not depend entirely on the power of control.

[DIXON J. referred to *Monaghan* v. *Taylor* (14).

[EVATT J. referred to *Citizens' Life Assurance Co.* v. *Brown* (15).]

Thomson K.C., in reply.

Cur. adv. vult.

The following written judgments were delivered:— Dec. 23.

GAVAN DUFFY C.J. AND STARKE J. This was an action for slander wherein judgment has been entered for the plaintiff, the Producers and Citizens Co-operative Assurance Co. of Australia Ltd., for £1,000 damages. An appeal has been brought to this Court

(1) (1924) 1 K.B. 762.
(2) (1929) S.A.L.R. 393.
(3) (1855) 4 E. & B. 570; 119 E.R. 209.
(4) (1855) 16 C.B. 550; 139 E.R. 875.
(5) (1849) 20 L.J. Ex. 65.
(6) (1927) A.C. 686.
(7) (1907) 7 S.R. (N.S.W.) 741, at p. 745.
(8) (1911) 2 K.B. 489; (1912) A.C. 716.
(9) (1867) L.R. 2 Ex. 259.
(10) (1880) 5 App. Cas. 317.
(11) (1929) 29 S.R. (N.S.W.) 125.
(12) (1929) 2 A.L.J. 403.
(13) (1928) 41 C.L.R. 254.
(14) (1886) 2 T.L.R. 246, 685.
(15) (1904) A.C. 423.

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by the defendant, the Colonial Mutual Life Assurance Society Ltd. The question for determination is whether the defendant is liable for defamatory statements made by one Charles Ridley. It is undisputed that Ridley was employed by the defendant to secure proposals for insurance for it; he is what is known as a canvasser: his business was to visit members of the public and persuade them, in the usual manner, by arguments and statements, to effect insurances with the defendant. He had a written agreement with the defendant fixing the scale of his commission on business obtained, and providing that he would "not in any circumstances whatsoever use language or write anything respecting any person or institution which may have the effect of reflecting upon the character, integrity or conduct of such person or institution, or which may tend to bring the same into disrepute or discredit." But he did not observe this stipulation, and made defamatory statements of and concerning the plaintiff, for which the defendant has been held responsible. It was said that the defendant reserved to itself no power of controlling or directing Ridley in the execution of the work he was employed to do or of dismissing him for disobedience of orders: in short, that Ridley was an agent of the defendant in the nature of an independent contractor, and not the servant of the defendant for whose tort in the course of his employment the defendant would be responsible. The nature of Ridley's employment, however, gave the defendant a good deal more power of controlling and directing his action than was conceded by the argument addressed to us. Nothing in the agreement or the position of the parties denied the right of the plaintiff to control and direct Ridley when, where and whom he should canvass. In our opinion the judgment of the Judicial Committee in *Citizens' Life Assurance Co.* v. *Brown* (1) really concludes the present case. But if it does not, still we apprehend that one is liable for another's tortious act "if he expressly directs him to do it or if he employs that other person as his agent and the act complained of is within the scope of the agent's authority." It is not necessary that the particular act should have been authorized: it is enough that the agent should have been put in a position to do the class of acts complained of (*Barwick* v. *English Joint Stock Bank* (2);

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

(2) (1867) L.R. 2 Ex. 259.

Lloyd v. *Grace Smith & Co.* (1)). And if an unlawful act done by an agent be within the scope of his authority, it is immaterial that the principal directed the agent not to do it. (Cf. *Limpus* v. *London General Omnibus Co.* (2).) The class of acts which Ridley was employed to do necessarily involved the use of arguments and statements for the purpose of persuading the public to effect policies of insurance with the defendant, and in pursuing that purpose he was authorized to speak, and in fact spoke, with the voice of the defendant. Consequently the defendant is liable for defamatory statements made by Ridley in the course of his canvass, though contrary to its direction.

The appeal should be dismissed.

RICH J. I have read the judgment of my brother *Dixon* and agree with it.

DIXON J. Before *Murray* C.J., from whose judgment this appeal is brought, the respondent, a life insurance company, recovered from the appellant, another life insurance company, £1,000 damages in respect of three slanders found to have been published of and concerning the respondent in the way of its business, without justification, by an "agent" of the appellant in the course of his agency. Although the appellant complained of the amount of the damages awarded, it did not appear that the assessment had proceeded upon any erroneous principle, and the judgment must stand unless the remaining ground of the appeal is well founded, namely, that the appellant is not vicariously liable for the defamatory statements published by the "agent."

The slanders were uttered in the course of attempting to induce persons who had insured with the respondent to make proposals for life insurance with the appellant on occasions when the "agent" interviewed these persons "during," as the appellant's admission runs, "the course of carrying out the terms of" his written agreement with the appellant. In the written agreement he is called "the agent," and the appellant Company agrees to pay to him on proposals, bearing his signature as introducing

(1) (1912) A.C., at p. 733. (2) (1862) 1 H. & C. 526; 158 E.R. 993.

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agent, commission at specified rates in respect of completed and accepted business. His duties are not defined, but the agreement expressly allows him to perform them either by his clerks and servants or personally. It provides that he may engage in any other business or occupation during the continuance of the agency, except that he may not directly or indirectly act for any other life or accident insurance company. It contemplates the receipt by him of moneys on behalf of the appellant, and stipulates for prompt payment over and a statement of the receipts. It expressly prohibits him from using language which may reflect upon the character or conduct of any person or institution, or tend to bring it into disrepute or discredit.

Little evidence was given of the relations which in fact subsisted between him and the appellant in the actual conduct of his agency; and, I think, no sufficient reason appears for supposing that the appellant assumed such a control over the manner in which he executed his work as to constitute him its servant. In my opinion, the liability of a master for the torts committed by his servant in the course of his employment is not imposed upon the appellant by the agency agreement, but I do not think that it follows that the appellant incurs no responsibility for the defamation published by the " agent " in the course of his attempts to obtain proposals.

In most cases in which a tort is committed in the course of the performance of work for the benefit of another person, he cannot be vicariously responsible if the actual tortfeasor is not his servant and he has not directly authorized the doing of the act which amounts to a tort. The work, although done at his request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance. The independent contractor carries out his work, not as a representative but as a principal. But a difficulty arises when the function entrusted is that of representing the person who requests its performance in a transaction with others, so that the very service to be performed consists in standing in his place and assuming to act in his right and not in an independent

capacity. In this very case the "agent" has authority to obtain proposals for and on behalf of the appellant; and he has, I have no doubt, authority to accept premiums. When a proposal is made and a premium paid to him, the Company then and there receives them, because it has put him in its place for the purpose. This does not mean that he may conclude a contract of insurance which binds the Company. It may be, and probably is, outside his province to go beyond soliciting and obtaining proposals and receiving premiums; but I think that in performing these services for the Company, he does not act independently, but as a representative of the Company, which accordingly must be considered as itself conducting the negotiation in his person. The rule which imposes liability upon a master for the wrongs of his servant committed in the course of his employment is commonly regarded as part of the law of agency: indeed, in our case-law the terms principal and agent are employed more often than not although the matter in hand arises upon the relation of master and servant. But there is, I believe, no case which distinctly decides that a principal is liable generally for wrongful acts which he did not directly authorize, committed in the course of carrying out his agency by an agent who is not the principal's servant or partner, except, perhaps, in some special relations, such as solicitor and client, and then within limitations. A learned writer who is disposed to impugn the course that authority has taken in widening the liability for the wrongs of others, concludes a discussion of the responsibility arising from agency with the statement:—"Principals have been held liable in cases substantially of contract. Principals have been held liable in cases of tort where the agent was also a servant. Principals have been held liable for the wrongs of their agents which they told them to commit. But, fortunately, there seems to be no occasion in which a mere agent has been held to have had 'implied authority' to commit wrongs or to be negligent. The danger that such a proposition may be laid down is nevertheless imminent" (Dr. *Baty*, *Vicarious Liability*, at p. 44, a work criticized by Sir *F. Pollock*, 32 *Law Quarterly Review* (1916), p. 226. See also *Salmond*, *Law of Torts*, 7th ed., ch. II., sec. 26, par. 1; *Holmes*, *Common Law*, pp. 229-233, and *Collected Legal Papers*, *sub* "Agency," at pp. 101-109).

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Some of the difficulties of the subject arise from the many senses in which the word "agent" is employed. "No word is more commonly and constantly abused than the word 'agent.' A person may be spoken of as an 'agent' and no doubt in the popular sense of the word may properly be said to be an 'agent,' although when it is attempted to suggest that he is an 'agent' under such circumstances as create the legal obligations attaching to agency that use of the word is only misleading" (per Lord *Herschell* in *Kennedy* v. *De Trafford* (1)). Unfortunately, too, the expressions "for," "on behalf of," "for the benefit of" and even "authorize" are often used in relation to services which, although done for the advantage of a person who requests them, involve no representation.

If the view be right which I have already expressed, that the "agent" represented the Company in soliciting proposals so that he was acting in right of the Company with its authority, it follows that the Company in confiding to his judgment, within the limits of relevance and of reasonableness, the choice of inducements and arguments, authorized him on its behalf to address to prospective proponents such observations as appeared to him appropriate. The undertaking contained in his contract not to disparage other institutions is not a limitation of his authority but a promise as to the manner of its exercise. In these circumstances, I do not think it is any extension of principle to hold the Company liable for the slanders which he thought proper to include in his apparatus of persuasion.

The wrong committed arose from the mistaken or erroneous manner in which the actual authority committed to him was exercised when acting as a true agent representing his principal in dealing with third persons.

I do not think a distinction can be maintained between breaches of duty towards third persons with whom the agent is authorized to deal and breaches of duty towards strangers, committed in exercising that authority. If what he does is done as the representative of his principal, it cannot matter, apart from questions of estoppel and of apparent as opposed to real authority, whether the injury which it inflicts is a wrong to one rather than another person.

The appeal should be dismissed.

(1) (1897) A.C. 180, at p. 188.

EVATT J. The appellant is an assurance company long established in Australia. The respondent Company was also engaged in the business of life assurance. The Supreme Court of South Australia (*Murray* C.J.) decided that the appellant, by the mouth of one Ridley, published three slanders imputing insolvency to the respondent Company, one to A. E. Post and O. F. Post about the month of September 1930, the second to J. H. Lehmann about November 1930 and the third to E. W. Pearson about November 1930. As to Ridley's personal liability there is no dispute on this appeal. He uttered the three slanders to the persons mentioned, and he has not appealed against the judgment entered for £1,000 damages against him and the appellant Company. The action was tried without a jury.

There is little dispute as to the main facts. The evidence shows that for a period of several months in 1930 Ridley was engaged in a systematic attempt to seduce policy-holders of the plaintiff Company away from it. It was in three instances only (Post, Pearson and Lehmann) that actionable slanders were found to have been published. But it is important to understand the circumstances under which these publications were made.

Ridley had been either an agent, representative or employee of the plaintiff Company from 1921 until August 1929. During part of that time he "wrote business" in the State of South Australia, in the Eudunda district with one L. T. Duldig, and in the Murray Bridge district with one J. H. Lehmann.

In August 1929 the plaintiff Company dismissed Ridley. Ridley had been collecting or receiving moneys on the Company's account. When he was cross-examined about these transactions during the course of the present trial he declined to answer on the grounds that the answers might tend to incriminate him. But the letter of August 3rd, 1929, which was written by Ridley to the plaintiff at the time of his dismissal, admits that he had withheld moneys received by him on its account. That his action was dishonest appears certain. He gave as security for the payment of the moneys a promissory note indorsed by a person named Doyle. Doyle was a barman in a hotel at Wagga, New South Wales. When the promissory note became due and Ridley did not meet it, Doyle

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had conveniently disappeared. Ridley was not long in finding an opportunity of wreaking his vengeance upon the plaintiff Company for its treatment of him.

He procured an agency agreement from the defendant Company. He did not inform it that he had been representing the plaintiff Company. He started his agency work for the defendant in New South Wales. In July 1930 he came to South Australia. It was natural that the Eudunda district should again attract his attentions. His old associate, L. T. Duldig, was in business at Eudunda as the agent or representative of the Farmers' Union, which, at the time, held the agency of the plaintiff Company in South Australia. Ridley and Duldig had some conferences. As to these the only evidence given was that elicited from Ridley. L. T. Duldig was in Court during the trial, but was not called as a witness. The following facts, however, were clearly shown :—

(A) Ridley and Duldig agreed to go around the Eudunda district and attack the plaintiff's solvency and stability in order to induce its policy-holders, first to surrender their policies or obtain loans from the plaintiff upon such security, and then to sign proposals for new policies in the defendant Company.

(B) Ridley offered to Duldig "an agency with the Colonial Mutual." Ridley had no authority to do this except pursuant to to his own agency agreement, clause 7 of which enabled him to employ clerks or servants for the purpose of conducting his agency.

(C) Ridley agreed to pay Duldig 20 per cent on the first year's premiums paid by the proponents, so that, when payment was made, Ridley would share his commission of 65 per cent of the premium, retaining only 45 per cent of it for himself.

(D) At the time when Ridley made this arrangement with Duldig the latter was unfavourably disposed to the plaintiff Company upon grounds personal to himself. But there still existed a fiduciary relationship between Duldig and the plaintiff. One witness (C. E. Duldig, his brother) says that during the relevant period Duldig was "agent for the Producers and Citizens." But L. T. Duldig had some personal grudge against the plaintiff which he was willing to satisfy by betraying its interests if, at the same time, he could obtain a share of the spoils from Ridley.

(E) L. T. Duldig must have resumed some sort of allegiance to the plaintiff Company after the campaign of attacking the plaintiff's solvency got well on its way. When the plaintiff's inspector hurried to the district Duldig appears to have tried to throw all the blame of the affair upon Ridley. In the statement of claim the plaintiff alleged that Ridley said to Duldig:—"You should cancel your policy with the Producers and Citizens and come around with me to all their policy-holders in *your* district and we will tell them that the Company is going insolvent and they should get out now while they have the chance. The Company is in an extremely bad position and I left them because I could see the end of the Company was near." It is obvious that the statement upon which this allegation was based was furnished by Duldig to the plaintiff. The reason why the plaintiff made no attempt to prove this particular slander at the trial is also reasonably clear. It would have required Duldig's being called as a witness.

Duldig was *particeps criminis* with Ridley in the publication of the various attacks upon the plaintiff in the Eudunda district. Duldig was acquainted with all the persons who were interviewed. Most, if not all of them, had obtained their policies from the plaintiff through the agency of Ridley or Duldig. These two were both using the special knowledge they possessed by virtue of their positions as representatives of the plaintiff, partly for the purpose of injuring it and partly for their own personal gain. It is true that if the proposals to the defendant had resulted in new policies, the latter would also have gained. But neither Ridley nor Duldig cared a jot for the interests of the defendant, and they were both engaged in promoting their own. Whether this makes any difference to the legal liability of the defendant is another question. But a short summary of the exploits of these two persons is revealing:—

(1) The first man seen by the pair was P. H. C. Pfitzner. This was on July 18th, 1930. Pfitzner then held a policy with the plaintiff for £500, which Ridley had induced him to take out in the year 1923. When Duldig and Ridley saw him, the interview lasted for two hours. Pfitzner was induced to sign a proposal form addressed to the defendant Company.

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(2) On July 24th, 1930, Ridley and Duldig saw J. H. Jenke. He also had a policy in the plaintiff Company, which Ridley and Duldig had induced him to take out in the year 1922. A document was prepared by Duldig, and Jenke signed it. It was an application addressed to "The Secretary" (that is of the plaintiff Company) applying for the "loan value" of Jenke's then policy with the plaintiff. Jenke also signed a proposal for a new policy with the defendant. He visited Duldig at the office of the Farmers' Union in Eudunda. The defendant Company issued no policy on Jenke's proposal.

(3) The next person seen by the pair in July was L. S. Diener. He also had a policy with the plaintiff for £1,000, which Ridley had effected in 1922. "Duldig," says Diener, "sort of apologized for getting me to join up with such a firm as the Producers and Citizens. Duldig did not say what company Ridley then represented, Ridley could not speak worse about the Producers and Citizens—said that the biggest part of the men in it weren't of much account, and so on. Ridley told me he got out of the Producers and Citizens in New South Wales, and he reckoned that the Producers and Citizens were likely to go insolvent, and said it was best to get out whilst one could get anything out of it, and he said it was best to join up with the Colonial."

The impudent method of canvassing adopted by Duldig and Ridley soon reached the ears of the plaintiff Company. On September 9th, the Adelaide resident secretary, Mr. J. Lavett, wrote to Diener as follows:—"With further reference to my recent call on you, I would now advise having written to Head Office requesting duplicate bonus certificate. Immediately this is received I will again communicate with you. I trust that the two representatives of another company who recently visited you, have not given you any further bother. If so, do not forget to write me as soon as possible. I might mention that after seeing you I visited several districts up to Eudunda, and found that the same misrepresentation had been made to many other policy-holders. However, the matter has been adjusted in every case, and we are pleased to see that you all now hold the P. & C. in continued high esteem."

Lavett's visit to Diener was followed up by another from Ridley. He then induced Diener to sign a proposal to the defendant Company, but Diener paid no premium with it.

It is interesting to observe that the plaintiff did not at this time regard the defendant Company as being legally responsible for the statements of Duldig and Ridley. It is inconceivable that, had they done so, they would not have taken immediate action in the matter.

(4) The next holder of a "P. & C." policy visited by Ridley and Duldig, in July, was J. C. A. Weis. The visitors spent about three hours at Weis's farm. They made two further visits, and on the third occasion Weis signed two pieces of paper which they had prepared for him. One was an application for a loan from the plaintiff, the other a printed application form to the defendant Company for a new policy. The letter from the plaintiff, which enclosed the loan cheque, was actually brought to Weis's farm by Duldig and Ridley. Weis was induced to pay a premium to the defendant out of the loan money. He left all the arrangements to Duldig and Ridley.

(5) The next victim selected was Mark Rice. Ridley and Duldig used the names of Diener and Weis in order to induce Rice to get a loan from the plaintiff so as to be free to propose a policy with the defendant. On August 12th Rice saw Duldig alone and the latter prepared a letter for Rice to sign applying for the loan from the plaintiff. Lavett, however, arrived on the scene, and Rice did not give up his policy with the plaintiff.

(6) The pair next saw H. A. Pfitzner, a cousin of the Pfitzner previously mentioned. The date of the visit was August 12th, 1930. Ridley gave him a form to enable him to obtain the surrender value of his policy with the plaintiff. Pfitzner signed it and gave it to Ridley. He also signed a proposal with the defendant but no premium was paid on it by Pfitzner and no policy issued. Lavett soon came to Pfitzner's rescue and correspondence took place between the latter and the plaintiff. Pfitzner was persuaded not to desert from the ranks of policy-holders.

(7) About this time Ridley and Duldig also saw W. H. Hage, and endeavoured to induce him to transfer from the plaintiff to the defendant Company. From Ridley's evidence it appears that the main interview took place at Duldig's office in the town of Eudunda. It also appears that Ridley and Duldig were acting in very close

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co-operation. Hage agreed to apply for a loan on his policy, and the necessary document was signed at Duldig's office. Hage also signed a proposal to the defendant but paid no premium and got no policy. Lavett was quickly on the trail and Ridley and Duldig were unsuccessful.

(8) The next instance is important. The policy-holder seen was A. E. Post. This is one of the three occasions where the Supreme Court found that an actionable slander of the plaintiff was published by Ridley. Ridley and Duldig saw the Posts, father and son, at Eudunda in September. Post was minded to drop his policy with the plaintiff. But, as a result of the arrival of Lavett, and (soon after) of certain bonus certificates, he was persuaded to retain his policy. The same system was adopted in this case as in the others Ridley and Duldig suggesting that a loan on the existing policy should be obtained from the plaintiff. A. E. Post said in evidence that " There was a branch of the Producers and Citizens at Eudunda. Mr. Duldig had that branch, at the Farmers' Union Office."

(9) The last Eudunda policy-holder of the plaintiff seen by Ridley and Duldig was J. H. Niemz. He was induced to sign a proposal to the defendant Company. But Niemz was financially embarrassed and could not pay the necessary premium. He was, therefore, brought to Duldig's office at Eudunda, where an application for a loan from the plaintiff on the existing policy was applied for. Niemz was interviewed in September 1930. During the course of the interview he asked Duldig for a balance-sheet of the plaintiff Company. " I asked Duldig for it," said Niemz, " . . . because Duldig had been representing the Producers and Citizens and I thought he was then." Not long afterwards Lavett, faint but pursuing, visited Niemz. The two slanderers were again put to rout.

The scene of Ridley's adventurous career now changes to the Murray Bridge district. As he had endeavoured to carry out his scheme at Eudunda with a confederate's assistance, he followed the same method in the new district. He had been associated with one J. H. Lehmann of Murray Bridge as a district agent for the plaintiff in 1924-1925. Lehmann had also been a " representative " of other insurance companies. In November 1930 Lehmann held

a policy with the plaintiff. Ridley saw Lehmann and old friendships were renewed. He "strongly advised Jack to surrender" his policy and transfer to the defendant Company. Ridley imputed insolvency to the plaintiff, and asked for Lehmann's assistance in undeceiving the other policy-holders of the plaintiff in the Murray Bridge district. Lehmann undertook to find a man named Brook to assist if Ridley could satisfy him as to the truth of his reflections on the plaintiff. Ridley told him that he had left the plaintiff, and made a number of slanders upon the personnel of the plaintiff's management. He induced Lehmann to sign a letter to help him (Ridley) with his office. It was as follows :—

Mr. H. Ridley, 13th November, 1930.

Colonial Mutual Office, Adelaide, S.A.

Dear Sir,—Following our conversation of a few days ago with reference to the probate policy I have with the Producers and Citizens, I have made certain investigations and find that according to the last report contained in the N.S. Wales *Government Gazette* that there is little or no prospect of this company paying a bonus for quite a number of years and probably not at all.

I would therefore be pleased if you would give me a call on your next visit to Murray Bridge with the object of transferring the policy I hold with the Producers and Citizens to the company you are now representing.

Thanking you for your attention to this matter,

I am yours truly,

J. H. Lehmann.

Stopping here, it is well to observe that Lehmann's statements made in this letter were quite false. His "investigations" had been limited to a perusal of an old New South Wales *Government Gazette* which, according to his own evidence, was not what he wanted in order to discover the plaintiff's true position. Lehmann signed the original letter and retained a carbon copy for himself. Such an act is indicative of deliberation. He was urged by Ridley to join with him and induce "the people with whom we did business when I was here before" to transfer their insurance business to the defendant. Lehmann says that he gave no final answer. While he does not admit that he agreed to co-operate in Ridley's venture, it is significant that on November 7th Lehmann signed a proposal form with the defendant Company which bears his own name as Ridley's agent. Lehmann's story is also inconsistent with his letter to the defendant dated November 18th in which he applied to be appointed its agent for the Murray Bridge district, stating that he

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anticipated obtaining business worth £5,000 per year. Between November 18th, when he signed this application, and November 21st Lehmann was seen by one of the plaintiff's inspectors. On the latter date he sent the following letter to Ridley :—

Murray Bridge, Nov. 21st, 1930.

Mr. H. C. Ridley,

Dear Sir,—I very much regret having to advise that I have deemed it advisable to refrain from giving you any assistance in your endeavours in this district, and must request you to immediately return without delay all documents you may have bearing my signature. I ask you to do this for old associations sake, otherwise I shall have to take steps to protect my interests.

May I also advise that unhealthy conditions have developed in this district since I saw you last. Thanking you for your prompt attention to my request,

Yours truly,

J. H. Lehmann.

In the course of these interviews with Lehmann, Ridley slandered the plaintiff, and the Supreme Court has held the defendant Company liable for such publication. But Lehmann himself says that he treated the signed proposal for insurance with the defendant as not intended to be forwarded for acceptance. "I didn't," he said in evidence, "recognize the (defendant) Company up to then." What Lehmann in his letter of November 21st was demanding was his lying letter of November 13th and the proposal he had signed. I think there is little doubt but that he intended to empower Ridley to use both for the purpose of decoying other policy-holders of the plaintiff. He was agreeable to taking the risk involved, in consideration of the commission which he hoped to obtain upon an appointment as agent of the defendant. After the plaintiff's inspector saw him he endeavoured to retrace his steps and try to recover from Ridley the damaging documents. "I could not remember," Lehmann says, "whether it was on the suggestion of the Producers and Citizens that I wrote to Ridley or was entirely my own idea." The only reasonable inference from the evidence is that Lehmann became frightened of the danger threatening him from the direction of the plaintiff and that when he wrote to Ridley, it was at the suggestion of the plaintiff's inspector.

I have dealt in some detail with the transactions between Ridley and Lehmann, not only because it was to Lehmann that one of the three slanders deemed actionable was published but also because

they show that Lehmann regarded Ridley as engaged in an enterprise of his own. In this, Lehmann was willing at first to join. His signature on one of the proposal forms of the defendant Company was not that of an ordinary proponent. He lent his name so as to assist in Ridley's attempt to stampede the policy-holders of the plaintiff.

In the meantime Ridley had commenced his Murray Bridge offensive. The first man he saw was C. E. Duldig, a brother of his coadventurer at Eudunda. L. T. Duldig had written to C. E. Duldig saying that Ridley would visit him. Ridley induced Duldig to make an application to the plaintiff for the surrender value in cash of his existing policy. Duldig forwarded this application to the plaintiff, signed a proposal form of the defendant's and gave the letter to Ridley. A few days later Mr. Lavett, the resident secretary of the plaintiff, arrived. C. E. Duldig was persuaded to change his mind, and he kept his policy with the plaintiff. No policy was issued to him by the defendant, nor did he pay any premium in respect of his proposal.

The last person seen by Ridley before his disappearance from the Murray Bridge district was E. W. Pearson. The appellant Company has also been adjudged responsible for a slander uttered to Pearson by Ridley in November 1930. Pearson had a £1,000 policy with the plaintiff which Ridley and Lehmann had effected some years before. Ridley showed him a list of policy-holders in the Eudunda district who were "leaving" the plaintiff. The names of Pfitzner and Duldig were on the list. He also showed him the untrue letter from Lehmann to which I have already referred. Pearson's faith in the plaintiff was shaken by Ridley. But Lavett and Lehmann, who was a personal friend of Pearson, appeared on the scene and Ridley was again checkmated.

The plaintiff Company says that the defendant is responsible in law for the three actionable slanders published by Ridley to Post, Lehmann and Pearson, in the circumstances described. The defendant does not dispute that Ridley did obtain and use its proposal forms, and, in answer to interrogatories, it also admitted that when Ridley "interviewed" the policy-holders of the plaintiff in the Eudunda and Murray Bridge districts, he did so "in the

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course of carrying out" an agreement to which reference will be made. The plaintiff also relies strongly on the following part of Ridley's cross-examination :—

Q. Wasn't it a part of your employment to secure proposals for insurance with the Colonial Mutual ?

A. Yes—that was pretty well my whole duty. When I went around to see the various witnesses that have appeared in Court I went round to see them in the course of my employment and for that purpose.

Q. Was, whatever it was you said to them, said in the course of your employment ?

Mr. *Thompson* objects. Question not pressed.

It was in order to secure insurance business for the Colonial Mutual that I interviewed those people.

Q. Everything you said to them was to gain those ends—that is, to get them to take up policies with the Colonial Mutual ?

A. Yes.

Q. As long as you did it fairly would you make comparisons glorifying your own Company and belittling your competitors ?

A. Yes—make a comparison ; for the purpose of securing business for my Company.

But none of the answers thus extracted from Ridley conclude the question of the defendant's responsibility for the three slanders. What matters is what Ridley said and the circumstances and the capacity in which he spoke ; not the mere fact that he "interviewed" the plaintiff's policy-holders in the performance of a certain agreement, and, still less, Ridley's own opinion of the authority he was then exercising. Were his criticisms of the plaintiff uttered in the course of an employment of him by the defendant ? Did the defendant slander the plaintiff by the agency or instrumentality of a person sufficiently invested with its authority ? Was the voice to which the Posts listened in the streets of Eudunda and which Lehmann and Pearson heard at Murray Bridge the voice of the defendant Company ?

It is said that the decision of the Judicial Committee in *Citizens' Life Assurance Co.* v. *Brown* (1) determines the question of liability against the defendant. That was an action of libel in which an assurance company was held responsible for the publication of a circular letter to certain persons insured with it. The circular was sent by a man named Fitzpatrick. A canvasser named Brown, while in the service of a rival insurance company, visited the

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

defendant company's policy-holders and made statements derogatory to it. Fitzpatrick was the company's "Superintendent of Agencies." He had to devote his whole time to furthering the company's business. He was paid £5 a week and also commission on all policies procured by him. There was evidence that his authority extended "to secure business and save business and to visit policy-holders whose policies have lapsed or are likely to lapse." The jury was held to be entitled to consider "the necessities of the case arising from the size and nature of the district placed under Fitzpatrick's supervision, and what would naturally be done in the colony by a person in his position" (1). Fitzpatrick was not authorized to write libels or "to do anything legally wrong," but this was held not to exempt the master from liability "if the act is done in the course of employment which is authorized" (2).

In these circumstances the Privy Council refused to disturb the implied finding of the jury that it was "within the scope of Fitzpatrick's authority and employment" (per Lord *Lindley* (3)) "to write to policy-holders in order to counteract the mischief which Brown was doing to the business of the company."

But no new principle of law was decided in *Brown's Case* (4). Liability in respect of a servant's committing the tort of libel was imputed to the master because the circumstances were capable of supporting the inference that the libel was published in the course of the servant's employment, and the jury drew such inference of fact. Fitzpatrick's position was of a special character. That occupied by Ridley in the present case did not resemble Fitzpatrick's. Ridley's position is much more akin to that of the canvasser Brown in the *Citizens' Life Assurance Co.* v. *Brown*. But the Citizens' Life Assurance Company never attempted to proceed against the rival assurance company for damages in respect of Brown's slanders. And it is noticeable that *Stephen* J., whose judgment in the Court below (5) met with the approval of the Privy Council, said of Fitzpatrick:—"I do not agree with the jury that he was put in the position to do that class of act. But they found that he was, and I do not think that we can disturb their finding. Possibly the jury might have inferred

(1) (1904) A.C., at p. 427.
(2) (1904) A.C., at pp. 427-428.
(3) (1904) A.C., at p. 428.
(4) (1904) A.C. 423.
(5) (1902) 2 S.R. (N.S.W.) 202.

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from the fact that Fitzpatrick was the superintendent of agencies, he had authority to do this class of act " (1).

That *Citizens' Life Assurance Co.* v. *Brown* (2) merely illustrates a general principle is shown by the case of *Glasgow Corporation* v. *Lorimer* (3). There the House of Lords decided that the corporation was not liable for certain slanders uttered by one of its tax collectors. The duties of the collector included the collection of the assessment payable by the pursuer's husband and the granting of receipts therefor. When the pursuer tendered payment of a sum of money as the balance due to the corporation, the collector demanded previous receipts. These the pursuer produced. The collector called again and charged the pursuer with having fraudulently altered the receipt and repeated the slander in the home of a neighbour. Lord *Loreburn* L.C. said :—" I do not think it is good law to say that the corporation is bound by anything said by one of its servants which is connected with the business of that servant. The question is whether or not there is any authority to communicate on behalf of the corporation any comment or statement of opinion at all " (4).

The facts of the present case show that in making his slanderous statements Ridley was largely pursuing his own ends and gratifying his own spleen against the Company which had dismissed him. But it is contended that these facts are entirely irrelevant to the question of the defendant Company's liability. It is true that *Lloyd* v. *Grace Smith & Co.* (5) determines that a principal or master may be responsible for the tort of his agents or servants if they are acting within the course of their agency or service, although in committing the tort they are acting for the benefit of themselves and not for the benefit of their principal or master. That decision of the House of Lords affirmed the responsibility of a solicitor for the fraud of a person who was left " in supreme command " of one department of the business. It did not decide that in cases of torts like defamation and assault the motive of the servant or agent may not be a factor of considerable importance in ascertaining the master's liability.

(1) (1902) 2 S.R. (N.S.W.), at p. 214.
(2) (1904) A.C. 423.
(3) (1911) A.C. 209.
(4) (1911) A.C., at p. 215.
(5) (1912) A.C. 716.

What was emphasized in *Lloyd's Case* (1) was that a principal or master is not absolved from liability "whenever his agent intended to appropriate for himself the proceeds of his fraud" (per Earl *Loreburn* (2)). Lord *Macnaghten* expressly approved the doctrine laid down by *Willes* J. in *Barwick's Case* (3) that responsibility attaches to the master "for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit . . . ." (4). Lord *Macnaghten* added that "it is a very different proposition to say that the master is not answerable for the wrong of the servant or agent, committed in the course of the service, if it be not committed for the master's benefit. *Willes* J. does not, I think, say anything of the kind" (5). It is also "a very different proposition" to declare that the object or motive of a servant in committing a tort cannot be a relevant factor in determining his master's liability for such tort.

In the later case of *Percy* v. *Glasgow Corporation* (6) the action was for damages for the "wrongous detention" of the plaintiff by a conductor and inspector employed in the defendant's tramway service. Viscount *Finlay* said :—"The classical passage with regard to questions of this kind is to be found in a judgment given by *Willes* J. in *Bayley* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (7) which is quoted in *Pollock's Law of Torts*, 11th ed., p. 91, and was read in the course of the argument. It is this : 'A person who puts another in his place to do a class of acts in his absence, necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done ; and consequently he is held answerable for the wrong of the person so entrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done ; provided that what was done was done, not from any caprice of the servant, but in the course of the employment'" (8).

The last sentence of *Willes* J.'s statement shows that in certain cases the fact that an act is done from a servant's caprice may prove that it is not done in the course of his employment.

(1) (1912) A.C. 716.
(2) (1912) A.C., at p. 725.
(3) (1867) L.R. 2 Ex. 259.
(4) (1867) L.R. 2 Ex., at p. 265.
(5) (1912) A.C., at p. 732.
(6) (1922) 2 A.C. 299.
(7) (1872) L.R. 7 C.P. 415, at p. 420.
(8) (1922) 2 A.C., at pp. 307-308.

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In *Limpus* v. *London General Omnibus Co.* (1) the question of a servant's motive in doing a tortious act was discussed by *Blackburn* J. (as he then was). He was dealing with the suggestion that the defendant omnibus company was not liable for driving its omnibus across the road in front of the rival omnibus of the plaintiff and overturning the latter. Speaking of the trial Judge's summing-up, he said (2):—"He points out that, if the jury were of opinion 'that the true character of the act of the defendants' servant was that it was an act of his own and in order to effect a purpose of his own, the defendants were not responsible.' That meets the case which I have already alluded to. If the jury should come to the conclusion that he did the act, not to further his masters' interest or in the course of his employment, but from private spite, and with the object of injuring his enemy, the defendants were not responsible. That removes all objection, and meets the suggestion that the jury may have been misled by the previous part of the summing-up."

In my opinion it is open to the tribunal which has to determine the question of fact whether a servant's publication of a libel or slander took place in the course of his employment to pay regard to all the surrounding circumstances of the case, by no means excluding the motive of the servant in defaming the third party. If the defamation is published for the purpose of gratifying the personal or private ill will of the servant, that is a circumstance which tells against a finding that the publication was in the course of the servant's employment. In *Aiken* v. *Caledonian Railway Co.* (3) Lord *Salvesen* pointed out, in reference to the *Citizens' Life Assurance Co.* v. *Brown* (4), that, "the writer of the letter had no object of his own to serve. His purpose was to counteract the mischief which the plaintiff, a former employee, was doing to the business of the company" (5).

Of course the presence of malice in the servant does not, of itself, operate to free the master from liability. And if, notwithstanding such malice, it is found that the servant has defamed in the course of the employment, the established fact of malice may in certain

(1) (1862) 1 H. & C. 526; 158 E.R. 993.
(2) (1862) 1 H. & C., at p. 543; 158 E.R., at p. 1000.
(3) (1913) S.C. (Ct. of Sess.) 66.
(4) (1904) A.C. 423.
(5) (1913) S.C. (Ct. of Sess.), at p. 76.

circumstances operate to make the master responsible in a sense not merely for the publication itself but also for his servant's malice. An illustration of this further point is *Citizens' Life Assurance Co.* v. *Brown* (1) itself, for Fitzpatrick's express malice against Brown was deemed sufficient to rebut the defence of qualified privilege (2). But before the master can be held responsible for the malicious tort of a servant the question whether the act was in law that of the master, whether the master performed it (to use the phrase of the common law pleading) "by himself, his servants and agents" must first be determined. For such purpose, the motive of the servant will often be of importance.

The relationship existing between Ridley and the appellant at the time of the slanderous publications was that specified in a written agreement. It is dated November 20th, 1930. It is said to be in common form. Although some, if not all, of the slanderous statements were made by Ridley before November 20th, both parties have accepted the position that the agreement was in force during the whole of the relevant period.

The agreement described Ridley as the appellant's "agent." The Company agreed to pay him certain scheduled rates of commission, "on proposals bearing his signature as introducing agent, such payment to be held to include and cover all charges and expenses for postage, or any other account whatever." The agent was entitled to receive moneys on behalf of the Society (clause 7). He was bound to pay them over to the Society within 48 hours of their receipt (clause 2). The duties of the agent could be performed either by himself personally or "by his clerks or servants," and the agent was entitled to engage in any other business or occupation except that of acting "directly or indirectly" for any other life assurance society (clause 7). The agency was terminable by either party upon the giving of seven days' written notice (clause 8). The agent was prohibited from pledging the Society's credit without express written authority, and he undertook that he would not "in any circumstances whatsoever use language or write anything respecting any person or institution which may have the effect of reflecting on the character, integrity or conduct of such person or

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

(2) (1904) A.C., at p. 426.

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institution or which may tend to bring the same into disrepute or discredit" (clause 1).

This last stipulation is of considerable importance. At first glance it may suggest that the agent is free to criticize other persons or institutions so long as he keeps within the bounds of the law of libel and slander. If so, an inference may readily be drawn that the stipulation impliedly allows, and even authorizes, the agent to criticize the relative stability of rival assurance companies and to comment upon their methods of management, so long as he does not make untrue statements or unfair comment. The next step of the argument is that libellous or slanderous statements or comments belong to the same kind or class of statements and comments as those the publication of which is authorized. *Barwick* v. *English Joint Stock Bank* (1) and *Limpus* v. *London General Omnibus Co.* (2) are then invoked in order to show that a prohibition like clause 1 is of no avail to protect the master or principal against actions of defamation at the suit of a third party in respect of the defamatory publications of his servant or agent.

The first answer to this chain of argument is that the undertaking of the agent which is contained in clause 1 is by no means limited to the publication of libels or slanders. The words and writings he agrees not to publish are those which "may," not merely those which do, reflect upon character, integrity or conduct; those which "may," not merely those which do, injure reputation or credit. The agent is not even allowed to attack a rival institution upon occasions when a defence of his principal is or seems to him to be called for. The prohibition operates "in any circumstances whatsoever." There is little or no criticism of another institution of which it cannot be said that it "may" convey some injurious reflection or "may" have a tendency to discredit it in the opinion of readers or listeners. Even if observations of a critical character can be legally justified as fair comment, such defence assumes that the publication to which it relates is defamatory of the plaintiff.

The fair intendment of the clause is that the agent is forbidden from publishing any criticisms of other persons or institutions. May he compare the solvency or stability of his principal with that

(1) (1867) L.R. 2 Ex. 259. (2) (1862) 1 H. & C. 526; 158 E.R. 993.

of other societies? No, because such comparison may impute to the rival insolvency or instability or something closely akin thereto. May he state disparaging facts about the rival if they are true? No; in some States of the Commonwealth truth is a defence to an action for defamation, but disparagement whether true or false is forbidden. Must the words or writings which the agent may not publish be such as would, if published, support an action? No, because the prohibition is designed to prevent the publication of anything that can possibly be regarded as reflecting on individuals or corporations. The slightest comparison between the benefits offered by rival societies and by the principal brings in the subject of the relative security of the societies. To say that the security afforded by the assets of the rival is "not as good" is an implied criticism. To say that "the security of Company A B is not as good" is close to saying "Company A B is relatively insecure." The policy seeker's first requirement is "assurance" or security. It is possible—theoretically—for an agent to praise the rival company and praise his own principal more. But to praise faintly may be to damn. The reasonable construction of clause 1 is that no criticisms of any kind are to be made upon rival companies. The practical result is to prevent the agent from indulging in comparisons.

But it is also said that Ridley was authorized by the agreement to use all methods of "persuasion" adapted or calculated to induce persons to effect policies of insurance with the defendant, and that such "class of acts" necessarily included the making of business comparisons between the defendant and other insurance companies. Concurrently with this is advanced the argument that no prohibition of specified acts within the class of authorized acts can exempt a master from liability for the tort of slander if the servant ignores the prohibition.

The questions of "authorized class of acts" and "effective prohibitions" are related. It is difficult to suppose that a master who puts another in his place to do a class of act in his absence can never define or delimit such "class of act." Indeed the very first question that arises in applying the "classical passage" of *Willes* J. is: What is the authorized class of acts? It is fallacious

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to assert that, as a matter of law and despite everything contained in his contract of service, every person who is sent out to prospective customers to procure orders for his master's goods, is empowered to utter criticisms upon the goods and the business methods of those who are in competition with his master. Why is it that liability has so seldom been visited upon an employer for slanders published by a person who is employed to "canvass" for orders? Criticism of rival trading interests which comes from such a source is not often regarded as the publication of defamatory matter by the master. Often it consists of mere puffing comparisons. But if it assumes a more serious character, the person listening usually regards what is said as a comment of the canvasser's own. It is one thing to affirm liability of the master to the person canvassed for representations sufficiently related to the proposed contract. It is a very different thing to hold the master responsible to third persons in respect of defamatory comments made by a canvasser in reference to B upon the occasion of his negotiating a proposed contract with A. What the canvasser is then doing is more accurately described as dissuasion by means of defamation, than as persuasion by means of laudation.

In my opinion the employment of a canvasser may be limited to the performance of a class of acts which excludes the utterance of any criticism upon his master's business rivals. The obvious method of limiting such employment is to insert in the contract some such clause as that contained in clause 1 of Ridley's agreement. The prohibition must do more than forbid the servant from publishing libels or slanders. The class of acts excluded should be stated more broadly so as to include in the prohibition all criticism of third parties by the servant.

Limpus's Case (1) is not inconsistent with this view. The directions contained in the card handed by the master to the omnibus driver were treated, not as effectually limiting the employment to a separate class of acts but merely as requiring that, in the course of the employment, there should be no negligence or reckless driving. "The act of driving as he did," said *Willes* J., "is not inconsistent with his employment, when explained by his desire to get before the other

(1) (1862) 1 H. & C. 526; 158 E.R. 993.

omnibus" (1). *Jenks* has observed that the prohibition considered in *Limpus's Case* rather suggested the analogy of "Don't nail his ears to the pump" (*Book of English Law*, p. 416).

There is a distinction between the condition attached to clause 1 of Ridley's agreement and a command by an employer to a servant that he must not commit a tortious act by defaming or assaulting or driving negligently. Clause 1 was a genuine prohibition, and in my opinion it operated to prevent the coming into existence of any authority on Ridley's part to speak or write any criticisms or disparagement of others, whether defamatory or not and whether actionable or not.

So far I have dealt with this case upon the basis that Ridley was a servant of the defendant. There is little or no evidence that he was a servant. He seems to have had a very free hand. The contract describes him as an "agent." The more reasonable inference from the contract and all the surrounding circumstances is that Ridley, although authorized by the defendant to procure offers for insurance from members of the public, was engaged in the business of insurance agent on his own account. If so, it was in the course of his own business that he spoke the slanders deemed actionable.

I have reached the conclusion that the appellant is not liable for the three slanders published by Ridley, even on the assumption that Ridley's relation to the appellant was that of servant to master. It was within his province to interview and negotiate. But criticism of other companies was "put outside the range of his service by a genuine prohibition." (Cf. *Barnes* v. *Nunnery Colliery Co.* (2); *Plumb* v. *Cobden Flour Mills Co.* (3).) He not only criticized, but systematically defamed and slandered. What he did was "different in kind from anything he was required or expected to do." (Cf. *Barnes's Case*; *Plumb's Case*.)

I also think that Ridley acted from spite and malice when he combined with Duldig at Eudunda and attempted to combine with Lehmann at Murray Bridge in order to seduce policy-holders away

(1) (1862) 1 H. & C., at pp. 539-540; 158 E.R., at p. 998.
(2) (1912) A.C. 44, at p. 47.
(3) (1914) A.C. 62, at p. 67.

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from their allegiance to the plaintiff. I think that he was acting on his own account and for his own benefit. Even if the prohibition of clause 1 had not been in the contract, the proper inference of fact is that when Ridley slandered the plaintiff he was not acting in the course of any employment, although one result of his scheme of defamation would or might have been to benefit the defendant. And if, as I also consider, Ridley was not a servant of the appellant Company, the same conclusion follows. Either he was pursuing his own agency business or he was acting outside any authority conferred upon him by the defendant.

The appeal should be allowed and the judgment for £1,000 damages set aside, and judgment entered for the appellant.

McTIERNAN J. I agree with my brother *Evatt* that the appeal should be allowed.

The agreement which was entered into between the appellant and Ridley describes him as "the agent," but it does not expressly define the things which he was authorized to perform as the agent of the appellant. In my opinion it is not consistent with the terms of the agreement to say that the word "agent" in the agreement signifies only that Ridley is a person conducting the business of an insurance agent on his own account, and does not signify the existence of the relationship of principal and agent between the appellant and him. The evidence, moreover, does not warrant the inference that Ridley was in the position of a servant of the appellant. In saying this I do not imply, if such were his position, that upon the facts of this case, which have been reviewed by my brother *Evatt* and his examination of the nature of the prohibition contained in the first clause of the agreement, the appellant would be liable for the slanders which were uttered by Ridley.

It is clear that the appellant did not expressly authorize Ridley to slander the respondent or any other company or person. In fact, it made the prohibition which has been discussed in the judgment of my brother *Evatt*, a term of its agreement with Ridley. Despite the absence of any express authorization to do the act by which the respondent is aggrieved and the presence of the prohibition which

includes that act within its scope, the appellant would be liable for the publication by Ridley of the slanders, which he has been proved to have published, if that act were done in exercising the authority with which Ridley was entrusted by the appellant. The fact that it was an abuse of that authority would not relieve the appellant of liability. What was that authority? It was not, of course, to do everything which the appellant itself could do or might have authorized to be done in its name. It was a limited authority. The effect of the agreement, in my opinion, was that Ridley became the agent of the appellant, by whom it would find persons who wanted to insure with it, and by whom the appellant would solicit persons to become willing to insure with it and would obtain proposals from such persons for acceptance or rejection by the appellant. It follows that Ridley would be acting within the scope of his authority, for example, when, in search of proponents for insurance, he spoke to people of the appellant Company, its business and its policies. He would be acting in the course of that authority if he made any false statement about those matters or said anything concerning them, which he was not expressly authorized to say or was forbidden to say. But I do not agree in the view that in defaming the respondent he was exercising the authority which he held as the representative of the appellant. To hold that a person in the position of Ridley was acting in the course of the authority with which he was entrusted by the appellant when he published any one of the slanders, which the learned Judge found, would involve the result that a person authorized by an insurance company to obtain business for it, has authority to persuade persons from whom he is seeking proposals for insurance to make them by criticizing the soundness of any other insurance company. In my view such an agent has authority to rely upon the merits of the company which he represents, but has no authority to criticize any other company for the purpose of obtaining business for his own company. There is nothing in the agreement which leads me to the conclusion that the criticism of any other company was a function pertaining to the canvasser Ridley, as the representative of the appellant. Speaking of the scope of the authority of the tax collector for whose slanders it was sought to make the corporation liable, Lord *Shaw of Dunfermline*

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said, in *Glasgow Corporation* v. *Lorimer* (1): "If, however, it were to be held that persons in the ordinary and comparatively humble position of this officer were within the scope of their employment in expressing opinions as to the conduct of those with whom they have dealings in the course of doing their work, the consequences might be of the most serious character, and the essential justice which underlies the maxim *qui facit per alium facit per se* would disappear."

The sense and reason of this statement, in my opinion, tends towards the rejection of the view that criticism of other companies was one of the instruments which the appellant had authorized Ridley to employ for the purpose of getting business for it. In uttering these slanders, I do not think he was merely abusing an authority with which he was invested. My conception of his authority leads me to the conclusion that he spoke as Ridley, not as Ridley the representative of the appellant. The facts of this case are quite different from the facts in *Citizens' Life Assurance Co.* v. *Brown* (2). The publication of the slanders, though not capable of being referred, in my view, as a matter of law, to the exercise by Ridley of the authority with which he was entrusted, can be explained by the facts which have been so thoroughly reviewed by my brother *Evatt*. These facts reinforce the view that Ridley did not speak in his right as the representative of the appellant when he defamed the respondent.

Appeal dismissed with costs.

Solicitors for the appellant, *Browne, Rymill, Stevens & Mathew.*
Solicitor for the respondent, *F. G. Hicks.*

H. D. W.

(1) (1911) A.C., at p. 216.

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