SERVANT'S OWN PRIVATE ENDS.

By D. A. MacRae, Ph.D.; Dean of the Faculty of Law, Dalhousie University.

During the last half of the nineteenth century a doctrine appeared and found expression in a number of cases that if a servant was found to have committed a wrongful act "for his own private ends," this at once relieved the master of liability. Since the decision in *Lloyd* v. *Grace, Smith & Co.* (1912), A. C. 716, the question may be asked how far this doctrine, there abrogated as regards frauds committed by an agent in the course of his employment, still applies to torts other than fraud.

It will be convenient first to refer to the cases in which the doctrine itself was propounded. In *Limpus* v. *London General Omnibus Co.*[1] (1862) Blackburn, J., said: "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 for private spite,* and with the object of injuring his enemy, the defendants were not responsible." Again in *Allen* v. *London & S. W. Ry. Co.*[2] (1870), a case where a clerk had wrongfully procured the arrest of the plaintiff, the same judge left it to the jury to say "whether the clerk *acted for his own ends, and out of spite,* because he had not succeeded in forcing the French coin on the plaintiff, in which case the defendants would not be liable for his act, or whether he acted *in furtherance, as he supposed, of his employers' interest to protect their property.*"

The same doctrine is at least suggested by the rule as given by Willes, J. in *Barwick's Case*[3] in the Exchequer Chamber (1867). "The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course

[1] H. & C. p. 543.
[2] L. R. 6 Q. B. 65.
[3] L. R. 2 Ex. 259.

of the service *and for the master's benefit,* though no express command or privity of the master be proved." But after giving instances of the application of this rule, Willes adds: "In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in." This seems to imply that it is only the 'class of acts' and not the particular act complained of that must be 'for the master's benefit.' *Barwick's Case* did not, however, decide that the wrongful act *must* be for the master's benefit. The actual decision does not cover the case of an act done for the servant's private ends and not for the master's benefit, because the wrongful act there charged was in fact for the benefit of the master.

The same is true of the *MacKay Case*[4] in the Privy Council in 1874. There also the fraud was committed for the benefit of the principal, and it was not necessary to decide what would be the result if the wrongful act had been committed for the agent's private ends. Indeed Sir Montague Smith, who delivered the judgment, says at the end thereof that it is not necessary to decide whether the plaintiffs could have succeeded "if they had proved only they had sustained damage from the fraudulent representation of the agent of the Defendants made within the scope of his authority, without proof of the Defendants having profited thereby." In this reservation there was, acording to Lord Macnaghten[5], an implication that the question had not been determined in *Barwick's Case.*

In *Swire* v. *Francis*[6] the facts as given by the stated case were susceptible of two interpretations:

[4] L. R. 5 P. C. 394.
[5] 1912 A. C. at p. 734.
[6] (1887) 3 App. Cas. 106.

(1) That the agent had misappropriated his principal's money and then by means of a fraudulent draft had procured from the plaintiffs an amount to cover the sum he had misappropriated; (2) That the agent had misappropriated the proceeds of the draft itself. In the former view of the facts it is possible to say that there would be a 'benefit to the master' in the making up of the defalcation. In the latter view there would be no 'benefit to the master.' The wrongful act would be wholly for the agent's 'private ends.' Dealing with this latter view of the facts Sir Robert Collier, who delivered the judgment holding the principal liable, said: "Even if it be assumed that *Shaw* (the agent) appropriated only the proceeds of the bill . . still it appears to their Lordships that no substantial difference would arise in the legal bearings of the case. The bill was drawn by him in pursuance of a general authority which he had to draw on behalf of Francis & Co. (defendants) . . . . The proceeds of this bill belonged to *Francis & Co.*, and the case comes to this, that 5,800 taels were paid to *Francis & Co.* by the Plaintiffs without any consideration whatever, and that Shaw fraudulently misappropriated the money." Although there is here no discussion of 'private ends' or 'master's benefit,' the statement that the proceeds of the bill *belonged to* the principal seems to involve that the principal was to be accountable for the receipt of the money notwithstanding that it was received by the agent for his own private ends.

In *Houldsworth* v. *City of Glasgow Bank*[7] Lord Selborne states that "the decisions in all these cases (*Barwick's Case, Mackay's Case, Swire* v. *Francis* and several cases in the House of Lords) proceeded, not on the ground of any imputation of vicarious fraud to the principal, but because (as it was well put by Mr. Justice Willes in *Barwick's Case*), 'with respect to the question whether a principal is answerable for the act of his agent in the course of his mas-

[7] (1880), App. Cas. at p. 326-7.

ter's business [here he leaves out the words 'and for his master's benefit' which appear in the original], no sensible distinction can be drawn between the case of fraud and the case of any other wrong.' " Lord Macnaghten[8] thinks that the omission of the above words is intentional and signifies that Lord Selborne thought that in a general statement of the law the words 'for the master's benefit' are out of place.

That an act committed by the servant for his own private ends does not make the master liable, even if the act be within the scope of his employment, was the view of the Court of Appeal in *British Mutual* v. *Charwood*[9] (1887). There the secretary of a company had answered questions which were put to him as secretary regarding the validity of certain debenture stock of the company. The answers were untrue and were fraudulently made by the secretary for his own private purposes. The jury found that the secretary was held out by the company as a person to answer such inquiries on its behalf, a finding which implied that he was acting within his scope. But notwithstanding this finding, the Court of Appeal (Esher, M.R., Bowen and Fry, L.JJ.) seemed clearly of opinion that the private purpose of the secretary prevented the company from being liable, even if the act of the secretary were not *ultra vires* of the company.

In *Bryant, Powis & Bryant, Ltd.* v. *Quebec Bank*[10] a power of attorney 'in terms authorized the attorney to indorse bills of exchange.' The Privy Council, Lord Macnaghten delivering the judgment, held that "the fact that the attorney abused his authority and betrayed his trust (using it to obtain money on the credit of his principal for his own private purposes) cannot affect bonâ fide holders for value of negotiable instruments indorsed by him apparently in accordance with his authority."

[8] 1912 A. C. at p. 735.
[9] 18 Q. B. D. 714.
[10] (1893) A. C. 170.

In *Thorne* v. *Heard*[11] the House of Lords held that the fraud of a solicitor who sold property for the first mortgagees and failed to pay the second mortgagee out of the balance of the proceeds remaining after satisfying the first mortgage, was not a fraud to which the first mortgagees were 'party or privy' so as to take the case out of the Statute of Limitations (Trustee Act, 1888, s. 8). Lord Herschell's judgment seems to turn chiefly on the fact that the first mortgagees 'were never aware down to the time of the sale that any second mortgage existed at all.' And though the solicitor knew of the second mortgage, that knowledge came to him not while acting as solicitor for the first mortgagees but while acting as solicitor for the mortgagor. Nevertheless in Lord Herschell's judgment there is a suggestion of the 'private ends' doctrine, in the following passage: "It appears to me perfectly clear that in order to charge any person with a fraud which has not been personally committed by him the agent who has committed the fraud must have committed it while acting within the scope of his authority, while doing something and *purporting to do something on behalf of the principal*, it seems to me impossible to treat that as the fraud of the principal."

In *Hatch* v. *London & N. W. Ry.*[12] the Court of Appeal held there was no evidence to go to the jury where a carman in charge of a delivery van, instead of returning to the station after emptying the van, drove to his home, some two-and-a-half miles away, to get some money to pay for his dinner. This was held to be "a separate journey undertaken by the carman for his own purposes and not for the business of his employers."

In *Sanderson* v. *Collins*[13], the Court of Appeal held that the master was not liable where his coachman had taken out a carriage which had been loaned to his master by the plaintiff and damaged it. "It

[11] (1895) A. C. 495.
[12] (1899) 15 Times L. Rep. 246.
[13] (1904) 1 K. B. 628.

was taken out by the coachman absolutely for his own purposes, and on a frolic of his own.[14] He took some friends with him and drove about to see the illuminations. They all appear to have got drunk, and a collision with a tramcar occurred, and the carriage was injured . . . If the servant in doing any act breaks the connection of service between himself and his master, the act done under those circumstances is not that of the master." (Collins, M.R.)

In the same year in *Hambro* v. *Burnand*[15] the same court held that the principal was not relieved from liability on a guarantee merely because the agent, acting under a written authority to make such guarantees, acted in making the guarantee in his own interests, and not in those of his principal. It was ruled that "where a written authority given to an agent covers the thing done by him on behalf of his principal, no inquiry is admissible into the *motives* upon which the agent acted." It was ruled that it was not open to a principal who has given express authority in writing[16], to make such a contract, to say that 'nevertheless, if it appears, on inquiring into the motives which existed in the agent's mind, that he intended in making the contract, to misuse *for his own ends* the opportunity given to him by his authority, and apply it to a purpose, which, if the principal had known of it, he would not have sanctioned, then, because the agent was so influenced by improper motives, the principal is not liable upon the contract made by him." The reason for the ruling was based on expediency rather than logic. "It would be impossible for the business of a mercantile community to be carried on, if a person dealing with an agent was bound to go behind the authority of the agent in each case, and inquire whether his motives did or did not involve the application of the authority for his own private purposes." (Collins, M.R.)

[14] A phrase used by Baron Parke in *Joel* v. *Morison* (1834) 6 C. & P. 503, and frequently quoted.

[15] (1904) 2 K. B. 10.

[16] Why should not the same rule apply in the case of express authority given by word of mouth?

The persons dealing with the agent, it may be added, had not seen or asked for the written authority. So it was not a case for an estoppel.

Romer, L.J., would confine the rule to the case of express authority. "I think," he says, "the cases cited for the defendants which concerned the relation of master and servant are not applicable to the present case. In those cases the sole question was as to the authority *by implication* conferred by a master upon his servant. They have nothing to do with a case where there is express authority in writing."

In *Ruben* v. *Great Fingal Consolidated*[17] where a secretary of a company had issued a share certificate with the signature of two directors forged thereon, it was held that the company was not bound thereby. It was in the course of the secretary's employment to *deliver* certificates but not to represent or warrant that the certificate was genuine. "He had not, nor was he held out as having, authority to make any such representation or to give any such warranty. And certainly no such authority arises from the simple fact that he held the office of secretary and was a proper person to deliver certificates." (Lord Loreburn, L.C.) But while this may be taken as the main ground for the decision, there is nevertheless in the judgments of Lord Loreburn and Lord Davey indications that they relied on the 'private ends' doctrine. In setting out the facts Lord Loreburn said: "It (the certificate) purported to be signed by two directors; the seal was affixed to it and it was countersigned by Rowe himself as secretary. In fact the names of the two directors were forged by Rowe, and the company's seal was affixed by Rowe fraudulently, *and not for or on behalf of or for the benefit of the defendant company, but solely for himself and for his own private purposes and advantage.*" Lord Davey after saying that he cannot imply, from the mere fact that Rowe was secretary or the proper person to *deliver* documents, that Rowe had any duty

[17] (1906) A. C. 439.

or power to warrant on behalf of the company the genuineness of the documents he delivered, goes on to say: "I agree with the learned judges in the Court of Appeal that *every part* of the legal proposition stated by Willes, J. in his well-known judgment in *Barwick* v. *English Joint Stock Bank* is of the essence of it. Willes, J.'s words are these: "The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit.' Where, therefore (as in the present case), the secretary is acting fraudulently for his own illegal purposes, no representation by him relating to the matter will bind his employers. . . . The reason for the qualification is that a representation made under such circumstances, whether express or implied, is also part of the same fraud, and cannot rightly be considered to be made by the servant as agent or on behalf of his master."

Finally, in the case of *Lloyd* v. *Grace, Smith & Co.*,[18] the 'private ends' doctrine came up for consideration before the House of Lords, with the result that, so far at least as the tort of fraud is concerned, the doctrine was definitely rejected. It was ruled that (to quote the headnote to the case):

> "A principal is liable for the fraud of his agent acting within the scope of his authority, *whether the fraud is committed for the benefit of the principal or for the benefit of the agent.*"

The doctrine of *Barwick's Case* was fully considered. Lord Macnaghten upon a critical examination of the doctrine of that case and a review of later decisions in which it was applied, declared, with the concurrence of all the other Lords, that *Barwick's Case* did not, when rightly understood, support the proposition that a principal is not liable for the fraud of his agent unless committed for the benefit of the principal. The dicta of Lord Bowen (then Bowen,

[18] (1912) A. C. 716.

L.J.) in *British Mutual Banking Co.* v. *Charnwood* and of Lord Davey in *Ruben* v. *Great Fingall Consolidated* were overruled.

* * *

How far is the doctrine of *Lloyd* v. *Grace, Smith & Co.* applicable to torts other than fraud? Is it still material, in running down cases and the like, whether the servant is on a 'joy-ride' or 'on a frolic of his own?'

Dealing with this question in his latest edition of The Law of Torts (1920) Sir Frederick Pollock says (p. 76):

> "It is clear that actual benefit need not be shown to have accrued to the master. But it is not so clear *in what cases* it is material that the servant *intended* the master's benefit."

Conceding that in many cases it certainly is not material that the servant intended the master's benefit, he goes on to point out the considerable distinction between two classes of cases, viz.:

(*a*) the case of a person wronged while dealing with an agent as representing the principal in the way of his business and in reliance on the agent's ostensible authority, and

(*b*) the case of a *stranger* who happens to be injured by the servant's want of care in doing something attended with more or less risk to the public.

> "In the former class of cases it is now held that even if the agent has abused his authority for his own purposes in a transaction of an authorized class, the principal is bound. A solicitor is liable to a client from whom his managing clerk has fraudulently taken a conveyance to himself, under the pretence of effecting a sale advised by himself for that very purpose." *Lloyd* v. *Grace, Smith & Co.*[19]

[19] (1912) A. C. 716.

"Under the other head, where the injury is, as regards the sufferer, merely casual, it is evident that so long as the act complained of was done in the usual course of employment the servant's intention is immaterial. Probably he had no specific intention and was thinking mainly, if at all, of his own interest in getting through the work. But we shall meet presently with a somewhat rare class of cases in which the manifest facts are ambiguous, and there is a question whether the servant was acting from misguided zeal for the business or some extraneous motive of his own. *Here the intention, being found as a fact, will turn the scale.* Nothing in the recent authorities appears to affect this, nor does it seem inconsistent with the rule established for more normal cases."

On page 94 he repeats the following statement contained in previous editions:

"A master may be liable even for wilful and deliberate wrongs committed by the servant, provided they be done on the master's account and for his purposes, and (it would seem) are such acts as might in some circumstances be within the lawful course of employment: and this, no less than in other cases, although the servant's conduct is of a kind actually forbidden by the master. Sometimes it has been said that a master is not liable for the 'wilful and malicious' wrong of his servant. If 'malicious' means 'committed exclusively for the servant's private ends,' or 'malice' means 'private spite,' this is a correct statement; otherwise it is contrary to modern authority. The only material question of intention is whether the servant intended to act in the master's interest."

To this he adds, in the last edition, the following new matter:

"That question (the question of the servant's intention) it will be observed, does not arise in the distinct class of cases we have already mentioned,

where an agent, under colour of a real authority to do similar acts in a due course of business, *fraudulently abuses that authority for his own gain.* There the ground of the principal's liability is the apparent authority on which the third person is entitled to rely; whereas in the case immediately before us it is only the servant's misdirected zeal for the master's interest that prevents his act from being a merely collateral trespass."

In *Joseph Rand, Ltd.* v. *Craig*[20] Neville, J. drew a similar distinction. There carters were employed by the day by a contractor to take rubbish from certain works to his dump and to tip it there. Some of the carters, without the knowledge of the contractor, and in contravention of their orders to tip the rubbish in a particular place, took it to a piece of unfenced land belonging to the plaintiffs and tipped it there for a purpose of their own. It was held by Neville, J., and affirmed in the Court of Appeal, that the carters were not acting within the scope of their employment and that consequently the contractor was not liable.

Dealing with the application of the doctrine of *Lloyd* v. *Grace, Smith & Co.* Neville, J. said:

"I think the analogy between cases of this class and *Ruben* v. *Great Fingall Consolidated* and *Lloyd* v. *Grace, Smith & Co.* is not perfect. There seems to me to be a natural distinction between a case where a man directs another to do a particular act and a case where a man in business appoints an agent for the purpose of carrying on the business and *holds out* that person as the person to whom the public are to apply if they do business with him. I do not think the cases in the House of Lords in any way affect the present case, having regard to the view I take of the facts . . . What I have to consider here is whether what was done was done in the course of their employment by the carters of the defendant. To put it in

[20] (1919) 1 Ch. 1.

another way, was the true character of the acts of the defendant's servants that they were *acts of their own, and in order to effect a purpose of their own*—in which case the principal would not be responsible—or were the acts of the carters all done in the course of their employment, obeying the defendant's instructions? The employment was to load up at certain premises with rubbish and to carry that rubbish to a particular destination and there discharge it. Instead of doing that, what some of these carters did was entirely for their own benefit and without any regard to or intention of carrying out the job for which they had been employed by the master, namely, to take this rubbish off to the nearest place where they could get rid of it and throw it down there and make off. Were these acts within the scope of the employment of the carters? In my opinion they were not. It appears to me that they come expressly within the terms of *an act of their own*, and in order to effect a purpose of their own. Instead of carrying out the job which the employer had given them, they did something totally different, and in order to enable them, without fulfilling their employment at all, to obtain payment from their employer for their hire."

In the Court of Appeal, Swinfen Eady, M.R., said:

"They (the carters) were to go with their load of rubbish and the ticket to the premises of the person who issued the ticket, and by virtue of the ticket they had a right to shoot their load of rubbish on the premises owned or occupied by that person. That was the whole of their employment, and their duty was to convey from the premises where they loaded to the premises where they discharged three loads a day, and they were paid a fixed day's wage for that work. It was suggested that they were employed generally to cart rubbish, and only had instructions as to where they were to put it. But the evidence negatived that. They were employed to cart rubbish from, and to,

defined premises, and they were given authorized permits that enabled them to shoot there the rubbish they so carted. Now it is proved and accepted by the learned judge that in certain cases persons in the employ of the defendant, for their own purposes, and deliberately, instead of taking their loads of rubbish to the premises on which the tickets enabled them to unload, took them to the plaintiff's premises and shot the rubbish there. The acts for which they were guilty were acts done deliberately of their own choice and to effect a purpose of their own, and in opposition to the express instructions of their employer. The purpose of their own suggested was probably either to indulge their laziness or to give them an opportunity of spending an extra time in the public house, but any rate it was entirely a purpose of their own. The acts of which they were guilty were their own deliberate acts. It is not a case of carelessness or negligence in the course of their employment. In my judgment it is a case, on the facts proved, of departing from the course of employment, and for their own purposes deliberately committing the acts in question."

In *Curley* v. *Latreille*,[21] a case of a joy-riding chauffeur from the Province of Quebec and decided in the Supreme Court of Canada on the "plain letter and express provision" of the Quebec Civil Code, the view of the judges of the Supreme Court, and especially of Anglin J., as to the doctrine of the common law appears to be in accord with the *Rand Case*. They do not, indeed, apply common law principles to interpret the Quebec Code. But Anglin, J., who makes a very complete review and comparison of the law of England and of France on the question of the master's liability, adopts an interpretation of the Quebec Code which is nearer to the "more reasonable view" of the common law than to the doctrines of stricter liability to be found in modern decisions of the *Cour de Cassation* of France and in French text writers.

* * *

[21] 60 S. C. R. 131.

On the whole, then, as regards the application of the doctrine of *Lloyd* v. *Grace, Smith & Co.* to torts other than fraud, we may venture to summarize the present position of the authorities as follows:—

(a) If the servant is clearly acting within the scope of his employment, the fact that he is acting for a purpose of his own will not exonerate the master; but

(b) If there is something in the facts themselves to show a "departure" from the sphere of the servant's employment, the fact that the servant acted for a purpose of his own may be used as evidence of that departure; or

(c) If the manifest facts are ambiguous and there is a question whether the servant was acting from misguided zeal for his master's interest or from some extraneous motive of his own, then the intention of the servant being found as a fact will, as Sir Frederick Pollock puts it, "turn the scale" and relieve the master of liability.