APPELLATE CIVIL.

Before Mookerjee and Roe JJ.

SHERJAN KHAN

v.

ALIMUDDI.*

1915

July 13

Principal and Agent—Liability of principal for fraudulent conduct of the agent—Scope of the agent's or servant's employment—Unauthorised acts —Tort—Scope of Agency.

The principal is liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligence and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment although the principal did not authorise or justify or participate in, or, indeed, know of such misconduct or even if he forbade the acts or disapproved of them. The principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency unless he has expressly authorised them to be done, or he has subsequently adopted them for his own use and benefit.

McGowan v. *Dyer* (1), *Hern* v. *Nichols* (2), *National Exchange Company* v. *Drew* (3), *Brocklesby* v. *Temperance P. B. Society* (4), *Pearson* v. *Dublin Corporation* (5), *Citizens Life Assurance Company* v. *Brown* (6), *Glasgow Corporation* v. *Lorimer* (7), *Bowles* v. *Stewart* (8), *Fitz Simons* v. *Duncan* (9), *Subjan Bibi* v. *Sariatulla* (10), *Morrison* v. *Verschoyle* (11), *Iswar Chunder* v. *Satish Chunder* (12), *Gopal Chandra* v. *Secretary of State* (13), *Motilal* v.

* Appeal from Appellate Decree, No. 1468 of 1913, against the decree of Ramesh Chandra Sen, Subordinate Judge, Backergunj, dated Jan. 31, 1913, affirming the decree of Jadunath Majumdar, Munsif of Barisal dated June 26, 1912.

(1) (1873) L. R. 8 Q. B. D. 141, 145.
(2) (1708) 1 Salkeld 289.
(3) (1885) 2 Macq. H. L. 103.
(4) [1895] A. C. 173.
(5) [1907] A. C. 851.
(6) [1904] A. C. 423.
(7) [1911] A. C. 209.
(8) (1803) 1 Sch. & Lef. 209.
(9) (1905) 2. I. R 483.
(10) (1869) 3 B. L. R. 413.
(11) (1901) 6 C. W. N. 429.
(12) (1902) I. L. R. 30 Calc. 207.
(13) (1909) I. L. R. 36 Calc. 647.

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Govindram (1), *British M. B. Co.* v. *Charnwood Forest Ry. Company* (2), *Mackay* v. *Commercial Bank* (3), *Swire* v. *Francis* (4), *Houldsworth* v. *City of Glasgow* (5) referred to.

Lloyd v. *Grace* (6) and *Rubens* v. *Great Fingall* (7) followed.

Barwick v. *English Joint Stock Bank* (8) and *Burma Trading Corporation* v. *Mirza Mahomed Ally* (9) explained.

Acts of fraud by the agent, committed in the course and scope of his employment, form no exception to the rule whereby the principal is held liable for the torts of his agent even though he did not in fact authorise the commission of the fraudulent Act.

This rule of liability is based upon grounds of public policy. It seems more reasonable that where one of the two innocent persons must suffer from the wrongful act of a third person the principal who has employed and retained a dishonest agent and has placed him in a position of trust and confidence should suffer for his misdeed rather than a stranger.

SECOND APPEAL by Sherjan Khan and another, the defendants.

This appeal arises out of a decree for damages passed against the decree-holders for illegal attachment and sale of the cattle of the respondent, Alimuddi.

The facts are shortly these. Two persons, Sherjan Khan and Faizuddin, obtained a decree against four brothers—Jegerulla, Alimuddi, Salimuddi and Azmatulla. The decree was sought to be executed against Azmatullah alone by the attachment of his moveables. Warrant of attachment was ordered to be issued on the 4th July 1911 and on the 16th of July 1911, according to the allegation of both the parties, 3 heads of cattle were attached by the peon Asvini Kumar Das upon the identification of one Tomejuddi, Naib, with whom the judgment-debtors had been on terms of enmity and, indeed, and at a time when the judgment-

(1) (1905) I. L. R. 30 Bom. 83.
(2) (1887) 18 Q. B. D. 714, 718.
(3) (1874) L. R. 5 P. C. 394.
(4) (1877) 3 A. C. 106.
(5) (1880) 5 A. C. 317.
(6) [1912] A. C. 716.
(7) [1906] A. C. 439, 465.
(8) (1867) L. R. 2 Ex. 259
(9) (1878) I L. R. 4. Calc. 116.

debtors were away from home. The judgment-debtors maintained that the attached heads of cattle belonged to Alimuddi and were worth Rs. 210. The other party contended that the attached heads of cattle belonged to Azmatullah and were old and infirm and were suffering at the time from what is known as *khura* and were on that account sold at the low price of Rs. 13 only.

Hence the suit for damages for illegal attachment and sale of the cattle of the respondent Alimuddi.

The learned Munsif held that there was an abuse of process, and passed a decree for damages. On appeal by the defendants, the learned Subordinate Judge dismissed the appeal. Hence this Second Appeal.

Babu Abinash Chandra Guha, for the appellants.

Babu Asitaranjan Chatterjee, for the respondent.

Cur. adv. vult.

MOOKERJEE J. This is an appeal by the defendants in an action for recovery of damages for illegal attachment and sale of movable property in execution of a decree for money. The facts found by the Courts below lie in a narrow compass. Two persons, who may be called X and Y, obtained a decree for money against four brothers A, B, C and D. The decree-holders applied for execution against D alone by attachment and sale of his movables. The warrant of attachment was issued in due course, but the peon, on the identification of P, the agent of the decree-holders, attached three heads of cattle which belonged to B. B protested and tendered the decretal amount, but the peon who was in collusion with P, had the cattle sold for an insignificant sum. It has been established that P acted in this manner on account of ill feeling which he bore towards the judgment-

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debtors. The judgment-debtors claimed damages from the decree-holders on account of illegal attachment and sale. The Courts below have concurrently decreed the suit. It cannot be disputed that the attachment was illegal; when execution had been taken out against D alone, the property of B could not be attached; besides, when the judgment-debtors offered to satisfy the decretal debt, their property could not be lawfully sold. It is obvious, consequently, that there was illegal attachment and sale of the movable property of the plaintiffs. The sole question in controversy is, whether the defendants are liable for the fraudulent conduct of their agent who, in collusion with the peon, has fraudulently brought about this result. The Courts below have answered this question in the affirmative. There can be no doubt that both upon principle and authority this view should be sustained.

It has not been disputed that under the law of England, 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. This is definitively laid down by the House of Lords in *Lloyd* v. *Grace* (1), which overrules the dicta to the contrary by Lord Bowen in *British M. B. Co.* v. *Charnwood Forest Railway Co.* (2) and by Lord Davey in *Rubens* v. *Great Fingall* (3). But it has been argued on behalf of the appellant that a contrary rule was enunciated in *Barwick* v. *English Joint Stock Bank* (4) and was adopted by the Judicial Committee in *Burma Trading Corporation* v. *Mirza Mahomed Ally* (5). There is no foundation, however, for this

(1) [1912] A. C. 716.
(2) (1887) 18 Q. B. D. 714, 718.
(3) [1906] A. C. 439, 465.
(4) (1867) L. R. 2 Ex. 259.
(5) (1878) I. L. R. 4 Calc. 116.

contention. In the first place, as explained by the House of Lords in *Lloyd* v. *Grace* (1), the decision in *Barwick* v. *English Joint Stock Bank* (2) is not an authority for the proposition that a principal is not liable for the fraud of his agent, unless committed for the benefit of the principal. In the second place, it is extremely unlikely that Sir Montague Smith, who was a party to the decision in *Barwick* v. *English Joint Stock Bank* (2), should have misunderstood its effect and misapplied it in *Burma Trading Corporation* v. *Mirza Mahomed Ally* (3), the judgment wherein was pronounced with his concurrence by Sir Robert Collier. In the third place, the decision of the Judicial Committee was based on the ground that the acts of the alleged agent could not be treated as the wrongful acts of a servant or agent committed in the course of his service, for the plain reason that at the time it was not shown that he was a servant or an agent for the purpose of working in the forest on behalf of the company or of doing any class of acts analogous to those complained of. Consequently, no question could arise whether the liability of the principal depended on the circumstance whether the wrong had been committed by the servant for the benefit of the master. On the other hand, Sir Robert Collier quotes with approval the observation of Willes J: "in all these cases it may be said that the master had not authorised the act. It is true he has not authorised 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 that agent has conducted himself in doing the business which it was the act of his master to place him in." The true meaning and effect of the ruling of Willes J. in *Barwick*

(1) [1912] A. C. 716. (2) (1867) L. R. 2 Ex. 259.

(3) (1878) I. L. R. 4 Calc. 116.

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v. *English Joint Stock Bank* (1) which was approved by the Judicial Committee in *Bombay-Burma Trading Corporation* v. *Mirza Mahomed Ally* (2), may also be ascertained from the opinion of the Judicial Committee in two other cases, *Mackay* v. *Commercial Bank* (3) and *Swire* v. *Francis* (4), the judgments wherein were delivered by Sir Montague Smith and Sir Robert Collier, respectively. Reference may further be made to the decision of the House of Lords in *Houldsworth* v. *City of Glasgow Bank*(5) where *Barwick* v. *English Joint Stock Bank, Ld.* (1), *Mackay* v. *Commercial Bank* (3) and *Swire* v. *Francis* (4) are examined and explained. Lord Selborne observes that the principle, on which those cases were decided was a principle, not of the law of torts or of fraud or deceit, but of the law of agency, and adds: "the decisions in all these cases 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* v. *Joint Stock Bank* (1), with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." Lord Blackburn is equally explicit: "the substantial point decided was that an innocent principal was civilly responsible for the fraud of his authorised agent acting within his authority, to the same extent as if it was his own fraud." To the same effect is the exposition by Story in his classical work on Agency (sections 452, 456) where that distinguished lawyer states: "the principal is liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other

(1) (1867) L. R. 2 Ex. 259.
(2) (1878) I. L. R. 4 Calc. 116.
(3) (1874) L. R. 5 P. C. 394.
(4) (1877) L. R. 3 A. C. 106.
(5) (1880) L. R. 5 A. C. 317.

malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorise or justify or participate in, or, indeed, know of such misconduct or even if he forbade the acts or disapproved of them." The learned author adds: " the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorised them to be done or he has subsequently adopted them for his own use and benefit." This statement of the law was accepted by Blackburn J. in *McGowan* v. *Dyer* (1) and had been foreshadowed nearly two centuries earlier when Holt C.J. held in *Hern* v. *Nichols* (2), that a merchant was accountable for the deceit of his factors, though not criminaliter, yet civiliter, "for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger." This position is well illustrated by the decisions in *National Exchange Company* v. *Drew* (3), *Brocklesby* v. *Temperance P. B. Society* (4), *Pearson* v. *Dublin Corporation* (5), *Citizens' Life Assurance Co.* v. *Brown* (6), *Glasgow Corporation* v. *Lorimer* (7), *Bowles* v. *Stewart*(8) and *Fitz Simons* v. *Duncan* (9). It may be observed that the rule as formulated by Story is in accord with a long line of authorities in the Courts of the United States, where an instructive attempt has been repeatedly made to justify the doctrine on principle. Thus, in *Higgins* v. *Watervliet* (10) Mr. Justice Andrews observed :—" Every person is bound to use due

(1) (1873) L. R. 8 Q. B. 141, 145.
(2) (1708) 1 Salkeld 289.
(3) (1885) 2 Macq., H. L. 103.
(4) [1895] A. C. 173.
(5) [1907] A. C. 351.
(6) [1904] A. C. 423.
(7) [1911] A. C. 209.
(8) (1803) 1 Sch and Lef. 209.
(9) (1908) 2 I. R. 483.
(10) (1871) 46 N. Y 24; 7 Am. Rep. 293.

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care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed. The omission of such care by the latter is the omission by the principal, and for injury resulting therefrom to others, the principal is justly held liable. If he employs incompetent or untrustworthy agents, it is his fault; and whether the injury to third persons is caused by the negligence or positive misfeasance of the agent, the maxim *respondeat superior* applies, provided only that the agent was acting at the time for the principal and within the scope of the business." Again, in *Jackson* v. *American Telephone Co.*(1) Mr. Justice Walker observed:—"Whoever commits a wrong is liable for it, and it is immaterial whether it is done by him in person or by another acting by his authority, express or implied. *Qui facit per alium, facit per se.* Upon this maxim of the law is founded the doctrine that the principal is liable for the tort of his agent, and the master for the tort of his servant. If the wrongful act is done by express command of the master, or even if he has afterwards made it his own by adoption, there is no difficulty in applying the rule; but it is otherwise when the liability must proceed only from an implied authority. Where the servant does a wrong to a third person, the rule of *respondeat superior* applies, and the master must answer for the tort if it was committed in the course and scope of the servant's employment and in furtherance of the master's business." In *Alger* v. *Anderson* (2), the Court observed that the doctrine broadly stated is rested upon the ground "that the principal having held the agent out as having authority and having clothed him with power to act in a particular

(1) (1905) 139 N. C. 347; 51 S. E. 1017; 70 L. R. A. 738.

(2) (1897) 78 Fed. 729, 735.

matter, as between two innocent persons, should suffer as having given occasion for the loss." The truth is that this rule of liability is based upon grounds of public policy; it seems more reasonable that where one of two innocent persons must suffer from the wrongful act of a third person, the principal who has employed and retained a dishonest agent and has placed him in a position of trust and confidence should suffer for his misdeeds rather than a stranger: *Philadelphia Railway Co.* v. *Derby* (1), *Washington Gas Light Co.* v. *Lansden* (2), *MacIntire* v. *Pryor* (3) *Foster* v. *Essex Bank* (4), *Reynolds* v. *Witte* (5) *Andrews* v. *Solomon*, (6), *Milburn* v. *Wilson* (7).

Reference may also be made to the decisions in *Subjan* v. *Sariatulla* (8), *Morrison* v. *Verschoyle* (9), *Iswar Chunder* v. *Satish Chunder* (10), *Gopal Chandra* v. *Secretary of State* (11) and *Motilal* v. *Govindram* (12). These cases recognise the doctrine that acts of fraud by the agent, committed in the course and scope of his employment, form no exception to the rule whereby the principal is held liable for the torts of his agent, even though he did not in fact authorise the commission of the fraudulent act. There are, no doubt, *dicta* in some of these cases, based apparently upon a misapprehension of the rule enunciated by Willes J. in *Barwick* v. *English Joint Stock Bank* (13), and particularly of the expression "for the master's benefit." The true meaning and scope of the rule, however, has now

(1) (1852) 14 Howard 480.
(2) (1898) 172 U. S. 534.
(3) (1898) 173 U. S. 38.
(4) (1821) 17 Mass. 508; 9 Am. Dec. 68.
(5) (1879) 13 S. C. 5; 36 A. M. Rep. 678.
(6) (1816) Peter. C. C. 360; 1 Fed. Cas. 378.
(7) (1901) 31 Can. Sup. Court 481.
(8) (1869) 3 B. L. R. 413.
(9) (1901) 6 C. W. N. 429.
(10) (1902) I L. R. 30 Calc. 207.
(11) (1909) I. L. R. 36 Calc. 647.
(12) (1905) I. L. R. 30 Bom. 83, 87.
(13) (1867) L. R. 2 Ex. Ch. 259.

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been settled beyond controversy by the decision of the House of Lords in *Lloyd* v. *Grace* (1). The principle expounded there is based, as we have seen, on 'justice equity and good conscience', and no conceivable reason has been suggested, why it should be held inapplicable to this country.

The result is that the decree of the Subordinate Judge is affirmed, and this appeal dismissed with costs.

ROE J. Negligence and malice, mistake and fraud are so closely allied that they are often not to be distinguished. It could never be, and never was, a good defence to an action upon a tort done by a servant or by an agent, to plead that the tort was done, not by accident but on purpose.

My learned brother has so fully traced to its source and exposed the fallacy that to render the master liable, the act of the servant must be for the master's benefit, that there remains nothing for me to add. The sole test is the scope of the agent's authority. In the case before us, the act done by the agent was clearly within the scope of his authority.

I agree that the principal is liable, and that the appeal be dismissed with costs.

S. K. B. *Appeal dismissed.*

(1) [1912] A. C. 716.