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Jan 22.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA.....PLAINTIFF.

AND

THE CANADIAN PACIFIC RAILWAY COMPANY.....DEFENDANT.

Principal and Agent—Customs—Power of Attorney under secs. 132 and 133 of R. S., 1906, c. 48—Fraud—Misappropriation of funds supplied to agent to pay customs duties—Action by Crown to obtain payment of duties—Onus of proof of payment.

H. was appointed agent of the defendant company for the purpose of passing goods imported by the company into Canada through the customs at the port of Montreal. The power of attorney from the company to *H.* was the usual one furnished by the customs authorities and was framed in conformity with the provisions of sections 157 and 158, R.S., 1886, c. 32 [now secs. 132 and 133 of R.S., 1906, c. 48]. By this instrument *H.* was empowered "to transact all busi-"ness which we may have with the collector of the port of Montreal, or relating "to the Department of Customs of the said port, and to execute sign, seal and "deliver for us and in our name all bonds, entries and other instruments in "writing relating to any such business as aforesaid, hereby ratifying and con-"firming all that our said attorney and agent shall do in the behalf aforesaid."

Held, that under the provisions of the above instrument *H.* was empowered to do everything necessary to the effective passing of the goods through the customs. He could not only pay over the exact amount of duty collectible on any particular entry, but in case he had a cheque of the defendant larger in amount than the duty actually payable he had authority to receive for the defendant a refund, *i.e.*, the difference in change, from the customs authorities.

2. *H.* was guilty of fraud both upon the defendant and the Customs authorities in that after obtaining a cheque from his principal for the proper amount of duties payable upon an importation at a given date he would, in respect of some of the goods, fraudulently declare a smaller quantity of dutiable goods, or by sight entries would understate the value of the goods, and, in respect of some other goods, would fraudulently procure part of them to be passed as free, and so obtain a refund from the Customs authorities of the difference between the amount of the cheque payable to the Crown for the true duty and the amount actually payable on such fraudulent representations. In the result the duties were not paid on a large quantity of goods imported by the defendant company into Canada.

Held, that inasmuch as the defendant by choosing *H.* as its agent, and by entrusting him with authority which enabled him to perpetrate the frauds in

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question, it should answer for the loss arising upon such frauds rather than that the same should fall upon the plaintiff.

3. That the onus of proving that the duties upon the goods so passed through the Customs were paid was upon the defendant under the provisions of sec, 167 of the Customs Act, (R.S., 1886., c. 32, now sec. 264 of R.S., 1906, c. 48), and such proof not having been adduced, the plaintiff was entitled to judgment for the amount of the duties so remaining unpaid.

4. The principal is civilly liable for fraud committed by his agent while acting within the scope and the ordinary course of his employment whether the result is or is not for the benefit of the principal.

THIS was an information to recover the amount of certain customs duties alleged to be due and owing by the defendant company to the Crown.

The facts of the case are, briefly, as follows:—

One Hobbs was appointed agent of the defendant company for customs purposes, under a power of attorney in the usual form provided by the Customs authorities, in conformity with the provisions of R. S., 1886, c. 32, sec. 157 et seq. Armed with this authority Hobbs entered upon a career of fraud and deception whereby he succeeded in converting to his own use a large sum of moneys entrusted to him by the defendant company for the purpose of paying customs duties upon goods imported into Canada. Upon discovery of the frauds Hobbs was prosecuted, convicted and sentenced to the penitentiary. The Crown then sought payment of the duties which were payable on the goods improperly passed through the Customs by means of the fraud of Hobbs.

The plan adopted by Hobbs was simple in the extreme. As Customs agent for the defendant company he was in possession of the invoices which had to be entered from time to time; and as required he obtained cheques for the duties payable on the invoices from the treasurer of the defendant. As a rule, he had to obtain a cheque for each invoice. He apparently saw, that if by the production and payment of the

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duties on one invoice he could pass the goods covered by two invoices, and cancel the manifest for the goods covered by the two invoices, that he would be in possession of a cheque for which all apparent liability on the part of the defendant to the Crown had disappeared and which he could, therefore, turn to his profit." The manifest having been cancelled, the Crown no longer had any claim for duties on the goods so far as its records would show. So far as the records of the Crown would show, the claim would have disappeared.

That appears to have been seen by Hobbs—and as he was acting as customs attorney at this time for other importers, from whom he received remittances to pay duties, and as he found it possible to obtain refunds in cash, it is quite clear that it was a profitable system to him that he put in force.

His plan was, as the evidences shows, so far as the goods on Schedule "A" are concerned, to prepare an entry covering a definite number of packages, and purporting to cancel a definite manifest for those packages; and then to attach to the entry an invoice for the amount stated in the entry, as the value of the goods covered by the entry, but which in reality covered only a part of the goods contained in the packages entered, and to suppress the invoices for the balance of the goods. In that way he would have in his possession the cheques obtained from the defendant company for the duties payable on the other goods, and he could get these goods through without disclosing their existence in any way to the customs officers. The customs officers would be ignorant of any liability with respect to the duty on the goods, and it would be possible for him to use the cheques for his own profit.

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In regard to Schedule "B," the method adopted by Hobbs was somewhat different. Under sections 29 et seq. of the Customs Act, if an importer wishes to enter goods, and he has not the invoice in his possession, he is permitted on making an affidavit to that effect that he has not the invoice, to make a sight entry declaring the value of the dutiable goods and on payment of the amount of duty according to that declaration, the goods may be obtained.

As regards the goods shown on Schedule "B," Hobbs apparently took advantage of the provisions of these sections and made affidavits that the invoices were not in the possession of the defendant, and so passed the goods on sight entries. As a matter of fact the affidavits were false, because it was proved that at the time the affidavits were made the invoices were in the possession of the defendant.

The sight entries understated the dutiable value of the goods. The representation made by Hobbs with respect to the value in those sight entries was apparently accepted by the officers of the customs as the value of the goods, they were apparently accepted after the representation he made in the entries—and as appears in the cash book the amount shown in the sight entries was the amount on which duty was collected. As a matter of fact Hobbs had obtained from the defendant a cheque for the duties payable on the real value, as shown by the invoices. He therefore had in his possession a very much larger amount than he had represented to be payable to the Crown—but he used it for some other purpose.

As regards the items on Schedule "C", the method adopted by Hobbs was again different. With regard to those goods, Hobbs did not conceal the fact of their importation or their value; but he concealed the

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fact that they were dutiable. It was a little variation. He represented that they were not subject to duties, and the entries show that they were passed as free goods. The entries are free entries, and they appear in the customs' cash book as free entries also.

The case having been referred to Mr. Justice Audette, for enquiry and report whilst he was Registrar of the Court, after his appointment to the Bench was continued before him in his judicial capacity under the provisions of Chapter 21 of the Statutes of Canada, 1912. (2 Geo. V, ch. 21.)

December 19th, 1912.

This case was argued at Ottawa.

E. L. Newcombe, K.C., and *A. Wainwright, K.C.*, for the plaintiff.

E. Lafleur, K.C., and J. J. *Creelman*, for the defendant.

Mr. *Wainwright*:—The issue between the parties in the present case is a vey simple and direct one. The defendant admits the importation of the goods; the importation of all goods shown in the three schedules. It admits their dutiable character and dutiable value, as alleged by the plaintiff; but it says that all of the duties payable on these goods were in fact paid —so that the issue between the parties is a very simple one. Were the duties in fact paid by the defendant as required by law? The defendant relies entirely upon the allegation that the duties were paid, as required by law—upon all the goods referred to in the three schedules—and whether payment was or was not made is the only question the court has to decide.

In dealing with that question, I wish at the outset to refer to a principle which I submit underlies the

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whole case, and that principle is, that it was for the defendant to establish that the duties payable on these goods had been properly paid as required by law, and that all the formalities required by law with respect to their passage through the Customs had been complied with. In other words, the onus of proof throughout was on the defendant. That principle is laid down in sec. 264 of the *Customs Act*. The rule is laid down in unmistakable terms. In all cases where a question arises whether the duties have been paid, or the formalities not complied with, the onus of proof is always on the importer to show that the duties were paid and that all the formalities complied with, and not on the Crown. It is true in the present case, the defendant attempted to make a distinction between a case where the goods imported are still in the possession of the Customs officers, and a case such as the present one where the goods are in fact in the possession of the importer; but I submit there is clearly no ground whatever for making a distinction of that kind. There is nothing in the law that would authorize it, and the Court cannot read it into the statutes. It would be particularly unreasonable and unfair to make a distinction of that kind, in the present case, where the importer was the carrier of the goods—where it was open to the importer to bring the goods in and take possession as it saw fit, and where it was impossible for the Crown to know anything about their importation except insofar as information was received from the defendant, the importer, and, at the same time, the carrier of the goods.

But apart from that, there is absolutely no warrant, I submit, for a distinction such as I have referred to being made. The object of the rule, which requires

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the importer to prove the payment of the duties required by law, is obviously to protect the Crown in its revenue; and even if in certain cases it may work a hardship on the importer of goods, that cannot be taken into consideration. The rule as laid down in the law must be strictly applied in all cases, and in this case as in any other. I submit, therefore, that throughout this case that rule must be applied,—and if any doubt arises, it must always be resolved in favour of the Crown, and in favour of the view that these duties have not been paid as required by law and are still due and owing to the Crown.

Although I rely upon that principle, I submit that in the present case, not only has the defendant failed to establish payment of the duties payable on the goods in question, but the Crown has in fact, although it was not obliged to do so, established the fact that the duties have not all been paid. Not only has the defendant completely failed to discharge the onus imposed upon it by law, but the plaintiff has in fact proved the contrary of the defendant's contention. And that is the question that I propose to discuss in the course of my argument. The only question the court has to consider, and the only question I have to deal with is, what proof was made of the payment of these duties by the defendant?

Before dealing with that question, it will be necessary for me to refer briefly to the evidence in order that what I am about to say with regard to the question of payment may be intelligible. I wish to refer to the evidence made in the case, particularly to the evidence with respect to the custom or practice followed at the Montreal Custom House during the period of the frauds in question here, and the custom followed by the defendant with respect to the payment of duties.

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The first point that impresses me is with respect to the way in which the Crown is notified of the importation of dutiable goods. It is quite clear that it is absolutely essential that there must be some way in which the Crown should be notified of the importation of dutiable goods, otherwise the Crown would obviously be exposed to fraud and consequently to loss.

The method adopted is the manifesting system, to which considerable reference was made in the course of the evidence. That was the means or principal means adopted of conveying to the customs officers the information, that dutiable goods—goods on which duties are payable to the Crown—have been brought into the country. As was shown in the course of the evidence, and it is a matter of law in the Customs Act, all goods coming into Canada by land or sea from abroad, must be manifested and the manifest must be filed at the proper port of entry with the Customs officers; and all carriers are under heavy bonds to see these provisions of the law are complied with.

These manifests give notice to the Customs officers that the goods have been brought into the country, and puts them on their guard with respect to the payment of duties—they are then on the watch to see the goods are properly passed and the duties paid. So far as the actual physical possession of the goods are concerned, the Crown may perhaps never have them. Where the importer is the carrier of the goods, it frequently happens the Crown never has the actual physical possession. There is no doubt that in the majority of instances, in the present case, the Crown never had the actual physical possession of the goods. Possession was taken of the goods by the defendant immediately on their arrival in Canada. However,

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the requirements of the law with respect to manifesting the goods are complied with, and entries are made by the importers, if the parties are strictly honest, even although the Crown never had the physical possession of the goods there would be no danger of loss. That was shown in the course of the evidence.

It was proved conclusively, that the representations in a particular entry as to the manifests which it was intended to cancel, and that the goods which the entry purported to cover, were the goods on a certain invoice produced with that entry, came from the importer.

[THE COURT:—They had to satisfy the landing waiter that they were goods of that nature ?]

Of that general nature. But those representations came entirely from the importer—and my point is that those representations by the importer were checked by the customs officers under the system prevailing during the period of this case, merely by the documents produced by the importer. It was a question of checking up the documents,—and no one officer of the customs saw all the documents. If for example the manifest clerk received an entry and landing warrant purporting to apply to a certain manifest, and apparently covering or entering the number of packages shown on that manifest, he accepted that representation made by the importer and cancelled the manifest—that ended the matter as far as he was concerned. He only was concerned with the number of packages covered by the manifest, and that the number of those packages corresponded with the representations made on the entry. Payment of duty on the other hand was made to the customs cashier, and he accepted, with respect to the amount of duty, the checking of the checking clerk who did not see the manifest,—who saw only the bill of entry

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and the invoices produced with it, and who checked the statement made in the entry by the manifest produced with it. If he found that these statements agreed, he would certify the entry,—the cashier would then accept the amount of duty shown to be payable, and would then certify the entry, and it could be taken to the manifest clerk who cancelled the manifest by it. All that the checking clerk who examined the invoices had to ascertain was that the documents tallied. That if an entry was made purporting to pass goods of a certain value, that an invoice had to be attached covering goods of that value—if he found that, he would be satisfied and would certify the entry. What I had in mind was that the whole system of checking was by documents, and if a dishonest importer falsified all of his documents in one particular so that they tallied, there was absolutely no way by which the fraud could be detected by the officers of the customs under the system followed at that time. That is the point I make now. The customs officers were absolutely dependent on the representations made by the importer, and were absolutely dependent on the honesty of the importers and the customs attorneys appointed by them.

And it may be said that the system was a defective one, but I submit there was no effective way in which fraud could be guarded against. There was only one way perhaps, and that would be by opening every package brought in and making an examination of the contents. That obviously is not practicable.

I doubt if any perfect method could be devised to guard against fraud. The system of course was one which made fraud possible, being purely one of checking by documents and there being no comparison by anybody of the documents with the goods themselves,

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as long as the documents tallied everybody appeared to have been perfectly satisfied.

Now the facilities that the system offered for fraudulent practices were seen and taken advantage of by Hobbs, the customs attorney of the defendant company.

The *Customs Act* prescribes the formalities that must be followed in making payment of duties, in very clear terms. Section 25 provides that a person entering any goods inward, must deliver to the Collector of Customs a bill of entry accompanied by an invoice giving certain particulars.

Section 26, provides that the quantity and value shall be stated in the bill of entry, and that it must be accompanied by the invoice.

Section 27 refers to the payment of the duty.

"Unless the goods are to be warehoused in the man-"ner by this Act provided, the importer shall, at the "time of entry pay down, or cause to be so paid, "all duties upon all goods entered inwards; and the "collector or other proper officer shall, immediately "thereupon, grant his warrant for the unlading of "such goods, and grant a permit for the conveyance "of such goods further into Canada, if so required "by the importer."

Section 32 refers again to the bill of entry and an invoice in proper form being produced by the importer.

I submit to the court in the first place, that an importer pretending to have paid his duties, must show that he has followed the procedure laid down in the Act. I submit it is not open to the importer who has brought into Canada dutiable goods, to say to the Crown: I have made no entry of those goods, I produced no invoice, I disregarded the Act; but a sufficient sum to cover the duties on the goods passed

from me into your possession and therefore these duties are paid. I submit that cannot be said unless every provision of the Customs Act is absolutely disregarded. And yet that would be the position in the present case if it can be held that there may have been payment of duties. Because, as I said a moment ago, it cannot be contended in this case that the goods were entered or declared or any invoices produced. All of the provisions of the *Customs Act* were violated.

If it is held that there might be evidence under those circumstances to show a payment of duties, it can only be because it is held there may be a payment of duty merely by the passing of money from the importer to the Crown: and without complying with the law, and I consider that would be a very dangerous principle to lay down. It would mean that the Crown would be absolutely exposed to frauds of all kinds.

I submit that in view of the terms of the law the court should hold in any event with respect to the failure to comply with the Act, that there could have been no payment of duties. Before passing from that point, I propose to refer to another one which is connected with it, and is also connected with other points in the case with which I will deal later, and that is this—it may be stated or suggested that the failure to comply with the requirements of the Act was due altogether to the dishonesty on the part of the defendant's customs attorney, and that the defendant cannot be held liable for it, for such failure. That was suggested several times by counsel for the defendant in the course of the present case. But I think that that suggestion is due altogether to a misapprehension of the exact situation of this case.

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It seems to me that it is quite clear that whatever the defendant's intention may have been, the failure of its customs agent to comply with the law, means that the defendant also failed to comply with the law. The contention advanced by the defendant of non-responsibility for the acts and omissions of their agent Hobbs, might possibly be maintained in a case where the defendant was being sued for penalties, and where the question might arise as to its responsibility for the acts and omissions of its agent, but there is no such question as that in the present case. Here it is a question whether they did something they were obliged to do. They were permitted to do it by an agent. They were permitted to appoint an agent to perform it. If the agent failed to perform it, it is not open to them to say they did perform it. It is a question whether something was done; if Hobbs did not do it, then the defendant did not do it. If Hobbs failed to comply with the requirements of the law with respect to the entry and declaration of these goods, then the defendant failed to do so. There is no getting away from that point of view. It may be that in certain cases a principal may claim exemption from responsibility for the agent's acts, but defendant certainly cannot claim the benefit of things not done by their agent, merely because they had instructed their agent to do them.

It might be arguable that an importer was not responsible for the criminal acts of his agent. That does not arise here. We say you had to enter your goods and pay your duties. You appointed an agent to do it, and he did not do it, therefore you did not do it. It was not done by him, therefore it was not done by you. Any act or duty in connection with the passing of these goods that was not done by Hobbs was

not done or performed by the defendant, and defendant cannot say now that it was.

I now go on to my second point. I submit that the evidence even if relevant and legal does not show a payment of duties but shows the contrary. As the Court knows, the defendant relies entirely upon the production of certain cheques corresponding in amounts, in the majority of cases, with the various amounts claimed in these proceedings. These cheques it has been admitted were used to buy drafts for the Receiver-General. The defendant relies for its proof of payment upon the production of these cheques. In its statement of defence reference was also made to certain vouchers and receipts. The defendant claimed that it held receipts and vouchers for the various amounts claimed in this action, but I think those vouchers and receipts may now be disregarded. There was no attempt made to prove them or identify them in any way. Mr. Langridge said that the vouchers and receipts attached to the cheques were pinned to them by him. He got the vouchers and cheques from the different records and pinned them together before producing them in court. And we also heard Meunier say that when the cheques were handed in there were no vouchers or receipts attached to them. We are left entirely with these cancelled cheques which the defendant relies upon as evidence of the payment of the various duties payable herein.

[THE COURT: There is no doubt the cheques were handed over the counter?]

Yes. It is quite obvious, however, that whatever became of the cheques they could not have been used in connection with the payment of any duties in this case. I say they were not so used; and I say they could

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not have been possibly so used. It does not matter what became of them.

The defendant urges that these cheques should be held to constitute payment of the duties in the present proceedings, because in drawing those cheques the defendant's officer who drew them had the intention that they should be used for the purpose of paying the duties. It is not necessary for me to point out that it makes no difference what performance or intention the defendant had in drawing those cheques,—that is absolutely immaterial to the present case. The only question is what were the cheques used for. So far as the cheques are concerned, the defendant had appointed Hobbs its agent for that purpose—he was entrusted with the duty of making and using those cheques at the Customs and delivering them—they were left in his hands to use them as he found necessary. And I might say at this point that it is quite clear that he used them as he saw fit. It is quite clear that although the defendant attempted to establish that a separate cheque had been drawn for each invoice,—the cheques handed to Hobbs were not used by him for the payment of the duties for which they were drawn.

It is quite clear from the evidence of Meunier that the cheques were used by Hobbs as he saw fit. He did not by any means use a particular cheque with the entry of the goods the duties of which it had been drawn to cover. As a matter of fact it would have been impossible for him to have done so in a great many cases. A great many cheques covered several invoices, of goods coming in at different times. It was not possible for Hobbs to use a cheque for the invoice for which it was drawn. And it was shown in one or two cases that goods were entered before

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the cheque was drawn, so that it is quite clear that the cheques were not drawn for each invoice and earmarked to that extent,—that contention cannot be sustained. It may have been their intention that Hobbs should do that, but that is not material. It is not a question of intention, but what Hobbs actually did. He used them as he found necessary. Hobbs acted as Customs agent, for other importers with the knowledge of the defendant.

He did not always consider whether a C.P.R. cheque was being used for C.P.R. goods; and it is quite clear that that procedure on the part of Hobbs was not open to criticism by the customs officials, although it may be contended that it was. It was obviously none of Meunier's business what Hobbs did. Meunier was there for the purpose of collecting the proper amount of the duties on the entries put through. So long as he got that he was perfectly satisfied. These duties are supposed to be paid in cash, but as a matter of courtesy it was allowed to pay by accepted cheques—as long as Meunier received the proper amount it was none of his business. It was none of his business whether it was signed by the C.P.R., John Jones or anyone else, especially as it was customary for a carrier to act as Customs agent for the customer's goods—and in the present case, and in most of the other cases, they were made on C.P.R. forms. In any event I would have the right to go to the Customs with an accepted C.P.R. cheque and ask them to take it in payment of duties on my goods. And if the cashier criticized that course, he would be going outside of his duty. It would be none of his business. And that was the method followed by Hobbs in dealing with these cheques. It is quite clear that we are not brought anywhere by the produc-

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tion of a cheque drawn by the defendant to pay duties on certain goods. It does not create a presumption, it does not create an inference, of any kind as to the use made of that cheque. It is essential that evidence should be made that the cheque was actually used and accepted for the purposes for which it was drawn. But in view of the way that Hobbs mixed all the cheques up, the mere fact that it was drawn for a particular purpose does not create any presumption that it was used for that purpose.

[THE COURT:—I think the C.P.R. had the intention of paying.]

I am speaking now of the intention with which that cheque was handed over at the customs. We are not suing for penalties. They say certain cheques went to pay that debt. I say they did not pay that debt. They were not paid to us for that debt, and they were not received by us for that debt. There seems to be a certain amount of confusion owing to the use of the cheques.

Whatever they were received for they would not have been received for the duties in question herein. For the simple reason that one party had concealed the existence of the goods and the other party was not aware of the existence of any liability for the duties. Hobbs, who was the man charged with the making of the payment, suppressed entirely the fact that any liability existed, and in that way it would be absurd to contend that he intended to pay that liability, or that the customs cashier accepted it in payment. I say in the first place he did not have the intention of paying it; and if the customs cashier did not have the intention of receiving it, there could not have been any payment.

I submit that if an importer appoints an agent and gives him a cheque to pay duties, and that agent destroys any evidence of the existence of the liability for those duties, and goes to the customs house and gets the cash for the cheque, it is impossible for the importer later on to contend that that cheque went to pay the duties.

So far as the question of the responsibility of the Crown is concerned for any acts of Meunier, that point is so elementary that I do not propose to put in any authority on it, unless it is referred to by the counsel for the defendant. There is one authority, however, I would like to cite on the question of appropriation of these cheques, and that is the case of *Hendricks* vs. *Schmidt.* (1). The principle laid down in this case hardly needs authority, it seems to me to be a matter of common sense. It was held that to constitute a payment upon any particular consignment of goods, there must be an intent, both on the part of the importers and of the Collector, to apply the money to that consignment. And the Court said:—

"Granting that the plaintiffs had this intent in "drawing the cheque, no such intent was ever conveyed "to the Collector. Plaintiffs entrusted the cheque "to an employee with instructions to pay the duty "upon the 50 cases and thereby made him their "agent for that purpose. Exactly what he did with "the cheque does not appear, but it does clearly "appear that it was never made use of for that purpose; "that the Collector when he received it, was not "informed that it was not intended for duties upon "that importation; and that he in fact applied it "to a different importation. Under such circumstances, "there was obviously no such meeting of minds as

(1) 68 Fed. Rep. 425.

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"constituted an agreement on one part to pay the "duties and on the other part to receive the money "for that purpose."

That is a case in which the principle I have been endeavouring to support was given full application. That is a case which involved the same principle which is involved in the present case.

It seems to me, therefore quite clear, that not only has the defendant failed to establish that it has paid the duties claimed by the present action, but that the evidence shows that these duties have never been paid,—that the defendant relying as it does entirely upon these cheques as constituting evidence of the payment of the duties, was bound to prove that they were used by its agent for that purpose—but the evidence shows they were used and appropriated for a totally different purpose. I think it quite clear therefore that the defendant has failed to discharge the onus upon it of showing the payment of the duties, and that the Crown has in fact proved that the duties have never been paid, and I would submit, therefore, that the Crown is entitled to judgment for the amount claimed. The parties have agreed to submit the case on the items with regard to which evidence has been made on both sides; and with regard to those items, the defendant has failed to prove the payment of the duties.

In addition to the case I have already cited, I would cite the *Cliquot Champagne Case* (1), as follows:—

"Revenue laws are not penal laws in the sense that "requires them to be construed with great strictness "in favour of the defendant. They are rather to be "regarded as remedial in their character, and intended "to prevent fraud, suppress public wrong, and promote

(1) 3 Wall. 140.

"the public good. They should be so construed as "to carry out the intention of the legislature."

I have already referred to the section of the Act which sets up that the duties constitute a debt.

[THE COURT:—You are suing for a debt now?]

I should imagine that the wording of that section would mean, that even in the absence of special provision with respect to the onus of proof, the onus of proof would be on the importer. It is for the debtor to prove the payment—the onus is always on him.

MR. *Creelman* was then heard for the defendant:—Our whole defence rests upon that which we consider a proven fact, viz., that the duties have been paid; and we draw no distinction whatever as regards the various informalities.

It has been admitted by both parties in the consent that every cheque did reach the cashier, that every cheque was endorsed by the Collector of Customs, and that the proceeds of every cheque went to the credit of the Receiver-General.

Our point, to put it very briefly, is that Hobbs was our agent up to the point when he delivered the cheque, but that he was not our agent when he received the refunds.

If Meunier paid him over money improperly that is the Crown's loss. He should have been on his guard and been on inquiry in a case of that kind, much more so when Hobbs presented a cheque in favour of someone else's duties?

Meunier has admitted that there was both a written order and a verbal order issued by the Controller of Customs, Mr. White, ordering the cashiers not to make refunds on cheques in excess of fifty cents. Mr. White has gone into the box and has sworn that this rule was issued, that it was a written order. True

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enough the actual copy of the written order was never produced. I presume that Mr. White was unable to find it, but it is in evidence in many places that such an order was in existence, and Mr. White swears that Meunier must have known of it as he acted under it for many years. Meunier admits there was such an order, and says he does not remember to have refunded money to the agents of any other importers.

I wish to call the attention of the court to one fallacy in my learned friend's argument, that is that there can be no payment if there is no intention to pay, or that a person cannot receive payment unless he intends to receive it. It is extremely difficult to see the connection between the intention in the making of a payment or between the receipt and the intention to receive.

[THE COURT:—The question is not an academic one. It is simply a question of fact—were the duties actually paid?]

Mr. *Lafleur* followed for the defendant:—

There is no conflict of evidence. The question is, what is the inference to be drawn from the facts? The first observation I would like to make is this:—Assuming that there had been no refunds made by Meunier to Hobbs, could there be any doubt that this action should be dismissed? It is not contended that the Customs department was defrauded out of any other money except those that were refunded by Meunier to Hobbs—that is the amount of the shortage which totals up to some $70,000. Hobbs was not entrusted with money but with cheques. It was impossible for Hobbs to cash the cheques unless he forged the signature of the Collector of Customs. When it is endorsed and not until then is it in a position to be cashed. The first person who receives it,

and is in a position to cash it, is the Collector of Customs. What does he do, not only with all the C.P.R. cheques, but with all the cheques received at the custom house? He puts them into the Bank of Montreal and gets credit for them, and buys a draft on the Receiver-General with the money.

The Cashier passed the cheques on to the Collector of Customs.

Meunier does not say he cashed any particular cheque for any particular sum for Hobbs. He says that he refunded him the excess over the amount that was handed to him to pay the duty for a particular purpose. That is the evidence,—and that is the only inference that should be drawn from the facts. It is perfectly unreasonable to infer that the appropriation of the cheques—the use that was made of the cheques to pay other duties—was made by Hobbs to pay the duties for A, B and C, that was the act of Meunier. Hobbs gave cheques sufficient to pay the C.P.R. duties. All of the C.P.R. duties were represented by cheques which found their way into the hands of the Collector of Customs, and ultimately to the Receiver-General.

Under his power of attorney, Hobbs had not the power to receive any money from the Customs. His powers were limited.

[THE COURT:—There is no distinction as far as the scope of the agency goes.]

Surely we were not authorizing Hobbs to do anything beyond what his power of attorney gave him power to do.

Unless it is specifically mentioned he has not the power to do more than pay the duties. This contemplates our agent going and making entries, and paying for those entries in the way authorized—by cheques to

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order—that is the only authority ever given him. He was not even entrusted with money to pay, but only with cheques payable to order—and how can it be contended that that man had authority to receive money on our account from the Customs ?

[THE COURT:—He was your agent ?]

He was the agent for what purpose ?

[THE COURT:—For passing goods through the Customs.]

Does the passing of goods through the custom house involve any payment back to us?

[THE COURT:—But you gave him too much money in your cheques for the payment of the duty?]

We gave him the right amount on each and every occasion.

We gave him the cheques to order, and we gave him no money. We gave him no authority or anything that could be implied to receive moneys from the Customs for us. At the moment he put in the entry and cheque his authority ceased. He could make all proper entries and could make payment by our cheques; but could not receive moneys for us. (Cites *City Bank* vs *The Harbour Commissioners Montreal,*) (1)

That was a case of the plaintiff's paying-teller receiving a cheque from the defendant's messenger and by mistake gave him a sum in cash, which was asserted to have exceeded the sum of £25. The messenger gave the money he received to Browne, the defendants wharfinger, who paid it away to their labourers, without carefully counting it. Browne was charged by the defendants with the amount of the cheque, and accounted for that sum only; and it was proved that he kept a separate cash book for his department

(1) 1 L. C. J. 288.

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of the defendant's business, for the balance shown by which he was liable to them. The only evidence connecting the defendants with the receipt of the money was the testimony of two of the bank clerks to the effect that they had represented the matter to the Hon. John Young, the President of the Board, and he had promised to have it looked "into". The testimony as to there having been any over payment was conflicting, but that question did not enter into the motives of the decision of the court. Mr. Justice Day delivered the judgment.

There it was the case of a man entrusted with a particular duty, just as in this case so far as the conveyance of money to the customs is concerned. Hobbs was a mere messenger, we never entrusted him with a cent. He was only a messenger insofar as to make entries and sign proper documents for passing the goods at the Customs. His authority with respect to money was absolutely limited by the giving of the cheque payable to order.

[THE COURT:—His power of attorney gives him full power. You may control his power by issuing the cheque to order, but you do not change his authority.]

Where is the authority in that power of attorney giving him authority to handle any money?

[THE COURT:—Does the authority prevent him from handling it? You could have given him the money as well as a cheque.]

The authority of an agent is derived from the document appointing him—and when that document is silent with respect to receiving payments on our account, you cannot infer it. The business itself did not involve it.

[THE COURT:—He has under that power of attorney all the necessary powers to pass the goods through

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Customs, and also the power to pay the duties. There is nothing in that which says you must give him a cheque payable to the order of the Collector—you could have given him money—and he could have gone there with money in his pocket, and he could have paid it and brought you back the change. There is nothing in conflict with that.]

He certainly could not recieve money under that power of attorney, because it is no part of that business.

[THE COURT:—He can do anything in connection with the passing of the goods.]

What does the passing of entries at the Customs involve? It involves signing the proper documents, and the payment of the proper duties. Not the receiving of moneys from the Customs. The powers under a power of attorney cannot be extended beyond its terms, or beyond the nature of the business stated in it—the nature of that business does not include the payment of any moneys to him.

It is so entirely disconnected with it, that the rule of the Custom House is, that all payments made for refunds shall be made by cheque. There is nothing in the business of the customs, in the passing of customs duties, that involves the payment of money back to the importer. It is all the other way. The business of the Customs involves the payment by the importer to the Customs, and I submit the moment this man received any money from Meunier that was the reception of money by an utter stranger—he was no more our agent for that purpose than a man in the street. Therefore the whole loss being due to the payment of refunds made by Meunier to Hobbs, the loss should remain where it happens to be at the time. We have paid all the duties called for, and the other import-

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ers have paid the duties called for, upon the goods that came into this port—and the only amount that is missing is the amount that was refunded by Meunier to Hobbs; and I say that is a payment made by Meunier to an utter stranger, not our agent for that purpose.

(Cites *Erb* v. *The Great Western Railway Co. of Canada* (1), *Lloyd* v. *Grace Smith & Co.* (2)

So far as the evidence goes we never entrusted Hobbs with money. When we did not entrust him with money to make a payment, how can you infer he could be entrusted with money to be paid back. It is no part of this business that the customs agent should receive money for the principal; and the customs department as an internal rule makes it incumbent upon their officers that all money should be paid by cheque.

[MR. *Wainwright:* That is not the rule to-day.]

It was then. I cannot see how under that power of attorney Hobbs could assert the right to receive any money at all on account of the C.P.R.

[THE COURT: You go further and say either pay or receive?]

I go further, but I do not need to go that far. If it authorized him to make payments it would not authorize him to receive money.

The principle applicable to a power of attorney is not that the attorney can do anything but what he is prohibited from doing—the principle is that he can only do those things which by the instrument he is expressly or by implication authorized to do.

There was daily notice to the customs that this man was only a messenger carrying cheques there, so far as the handling of any money was concerned. You

(1) 5 S.C.R., 179. (2) 80 L.J.Q.B., 959.

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could not come to the conclusion that he was our agent for the reception of moneys from the customs.

[THE COURT:—He was the agent of the C.P.R. to pass these goods. He was the one who made those affidavits on behalf of the C.P.R. to pass the goods. He was more than a messenger.]

I said so far as the handling of any money was concerned, they were careful not to make him anything more than a messenger. I may have an agent to sell, and another who is my agent to buy. Saying that he is my agent is not illuminating. He is my agent with the power set out to be performed in that power of attorney. Does that power expressly or by implication make him my agent to receive money from the Customs?

If it does not by implication involve the reception of money's for the company then you cannot possibly say it is a part of his duty.

We have the articles of the Civil Code. By Art. 1703, "the mandate may be either special, for a "particular business, or general, for all of the affairs "of the mandator. When general it includes only "acts of administration."

Here it is not a general power to act for the C.P.R. in everything, it is only authority to do their customs business. That cannot possibly involve any claims the C.P.R. may have against the Customs.

If I am right in saying that this man Hobbs was not our agent to receive moneys, then the whole mischief having been caused by, and the whole loss having resulted from, these refunds, I submit that the action of the Crown cannot be maintained; because they have actually received all the moneys they were entitled to under all the entries that have been made.

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My learned friend Mr. Wainwright argued that there had been no payment because in order to constitute a payment of duties upon any particular consignment of goods, there must be an intent on the part of the importer to pay, and an intent on the part of the Collector to apply, the payment to that consignment. He cited the case of *Hendricks* v. *Schmidt* (1). That was a very different case from the present one. There it was the importer who was suing the government for conversion of the goods, because they retained them against him, alleging that he had not paid the particular duty on the goods. And the Court held there that instead of suing for the conversion of the goods, he should have sued for conversion of the cheque; but they admitted the principle that the Government must account for the cheque they misapplied, and it was only the case of an action wrongly taken. In that case Brown, J said;—

"It is quite clear that the plaintiffs mistook their "remedy, and, if they have any cause of action at all, "it is against the Collector for a conversion of the "cheque, and not for a conversion of the champagne."

(Cites Arts. 1701, 1704, 1720 C.C.)

The authorities are clear that when a mandatary exceeds his authority, the act is to be considered, insofar as the principal is concerned, as non-existent. As *Laurent* puts it, it is not merely a nullity, the act is absolutely non-existent.

MR. *Newcombe* was heard for the plaintiff, in reply:—
I will not detain your lordship very long. I think my learned friends have put their case very tersely, and have eliminated a great many things that are not here for discussion. The real position of the case is very plain. In the first place it is a Customs

(1) 68 Fed. Rep., 425.

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case. It is an action brought by the Crown to recover customs duties which have not been paid, and are, if not paid, admittedly a debt due by the defendant company to the Crown. My learned friends contend that they are paid, and that the evidence which they produce here establishes payment. Whether payment was made or not is to be determined. Apart from the question of payment, there is no doubt about the indebtedness. There is no doubt about this also, that Parliament in its provisions, as contained in the Customs Act, for the protection of the revenue, has devised a very elaborate scheme of legislation with respect to the collection of customs duties and the method of payment. Goods have to be imported in conformity with the statute. There have to be manifests, and entries, and landing warrants, and all sorts of things which are required by the statute—not as mere matters of form, but as matters of substance for the protection of the revenue—for the purpose of checking the importer, to see that he does not smuggle goods—for the purpose of checking the customs officer, to see that he does not fraudulently collude with the importer, and thereby defraud the revenue. It is common ground in this case, that all of these statutory requirements were set aside and disregarded in fact by the defendant company and that compliance with the statute would have made these frauds impossible; and it is part of the defendant's case here to contend that he escaped all obligation, although the duties are not in fact satisfied and none of these statutory requirements have been complied with, by reason of the facts in evidence here, which I do not propose to detain your lordship by quoting, as my learned friend, Mr. Wainwright, has gone into them to considerable extent in his opening. I submit it would

strike one as rather extraordinary if that could be the result, if these duties are paid without the country receiving any benefit—it would seem to be a most remarkable thing.

Now, the Act imposes certain obligations upon the importer, but it also enables the importer to do his business with the Customs through an agent, because by section 132, it is enacted:—

"Any act or thing done or performed by a duly "authorized agent shall be binding upon the person "by or on behalf of whom the same has been done or "performed as fully as if the act or thing had been "done or performed by the principal, but, whenever "any person makes application to an officer of the "customs to transact any business on behalf of any "other person, such officer may require the person "so applying to produce a written authority from "the person on whose behalf the application is made, "and in default of the production of such authority "may refuse to transact such business."

Now, the company availed themselves of that provision, and gave a written authority to this man Hobbs — who has got them into all the trouble — and this is the authority in the form prescribed by the Minister under the statute. It is the ordinary form and, as one would expect to find it, very broad in its terms.

"Know all men by these Presents that we have "appointed and do hereby appoint David Hobbs of "Montreal to be our true and lawful attorney and "agent for us and in our name, to transact all business "which we may have with the Collector of the Port "of Montreal or relating to the Department of Customs "of the said Port, and to execute, sign, seal and deliver "for us and in our name, all bonds, entries and other

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"instruments in writing relating to any such business "as aforesaid, hereby ratifying and confirming all "that our said attorney and agent shall do in the "behalf aforesaid. In witness whereof we have signed "these Presents, and sealed and delivered the same "as Act and Deeds at Montreal, in the said Dominion, "this eighth day of April, one thousand nine hundred "and three."

You will observe that it says "to transact all business "which we may have with the Collector of the Port "of Montreal." That is authority in the very broadest terms.

[THE COURT:—That is the way it strikes me.]

My learned friend, Mr. Lafleur, says that while Hobbs could transact all other business he couldn't take any change. If he pays too much, he cannot get the difference back.

It appears in the evidence that the custom of the C.P.R. was to issue cheques for the exact amount of the duties, as they understood them. They might have had a different system. They might have had a system, for instance, of issuing cheques in the nature of advances to Hobbs payable to the Collector; or they might have issued cheques in respect of a particular invoice which was in excess of the amount of the duties, and instead of correcting it they might have said to Hobbs get the change when you go down to the Collector's office.

According to my learned friend, he would have Meunier say to Hobbs, "I am very sorry I can't give you any change back, your power of attorney is not broad enough." Would it not be absurd for him to say that? Hobbs is to transact all business and enter into bonds and sign all entries, and generally

do all the business which the company have to do at the Customs.

Now, one thing they have to do, and that is to pay the duties—and Hobbs is charged with the paying of the duties, with appropriating the money which is given to him, or the cheque, or whatever it might be, when he goes to the Collector's office, and applying it to this that or the other invoice as the case may be. That surely is within the scope of his authority. And the refund when it is made is just as much a refund to the C.P.R. as if the C.P.R. had been a private individual importing these goods, and instead of having an agent had gone down there himself—as if an individual had gone down and put in his cheque and got his refund without any power of attorney. It is precisely the same. This happened in the execution of the business of the Company. And although the refunds were taken in view of the manipulation of the invoices and misappropriated, none the less they were refunds to the C.P.R. under the authority of the case recently decided, and to which we have referred. I would like to read a few passages from that case, because it is a decision of the ultimate authority and reviews the previous cases, reconciles and overrules some. It has crept into the text books generally that the principal is not responsible for the fraud or malicious or wilful act of his agent unless done for the benefit of the principal.

The case of *Lloyd* v. *Grace Smith & Co.* (1) clears up a great deal of misstatement which has crept in, not only into the text books, but into the mouths of some of the judges, with regard to the limitation of liability of the principal for the unauthorized and fraudulent act of his agent. So I think that is ample

(1) 1912 A. C., 712.

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authority, decisive authority, for my submission that these refunds were refunds to the C.P.R. although the C.P.R. never got the benefit of them by reason of the fraud of Hobbs.

Now, it is said that these duties are paid, and I would like to know when they were paid. I would like my learned friends to tell us when this obligation which the C.P.R. incurred to pay these duties—the moment they imported the goods into the country the Act makes the duty a debt—when it was they discharged that obligation? Was it when they wrote out the cheque for the amount and gave it to Hobbs? Surely it was still in their hands. He was not our agent in any sense. He was the agent of the company. So the mere writing out of this cheque and the giving of it to Hobbs with the true invoice did not constitute payment.

THE COURT:—I suppose they will go further and say when it was handed over.

Mr. NEWCOMBE:—Well, Hobbs brings it to the office of the Collector of Customs, and my learned friend says that he got a refund, but that he did not get a refund of C.P.R. money, that he got a refund of some one else's money, and therefore that you must hold that all of this money went to the Crown, and that the Crown got the benefit of it. But I say that if there was never any refund at all the duties were not paid in view of the fact that they never made any entry of the goods or appropriation for payment of the duties, and moreover we must look at the substance of the transaction—and what is the substance of it,? If he went down with a cheque for $500. to the Custom House, and gave it to the cashier and got $200 back, the substance of the transaction

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is that the Crown got $300 and Hobbs got $200, and there was no payment except to the extent of $300.

I have shown that the defendant company are responsible for what Hobbs did. Certainly they are bound by his acts—they must take the consequences of the failure to do what Hobbs omitted to do—and Hobbs no matter what his instructions were did not pay the duties on these goods; he never entered the goods or appropriated a penny towards the payment of the duties. If my learned friend says that we have these cheques in our hands, and that we are responsible for the moneys that were refunded to Hobbs, then I say we are responsible for them upon grounds that are not the subject of enquiry in this case at all. The question here is the simple question of payment. They owe us the money. They say they have paid it. We never received payment, they never made or appropriated any payment in respect of these items upon which we claim duties.

AUDETTE, J. now (January 22nd, 1913) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby, *inter alia*, it is sought to recover, from the defendant, certain Customs duties alleged to be payable upon goods imported by them at the Port of Montreal, between the month of January, 1904, and the month of November, 1905.

Set out in Schedule "A" to the information is a list of the goods alleged to have been imported into Canada by the defendant ,during the above mentioned period, without entry and without the payment of duties.

In Schedule "B" to the said information is a list of dutiable goods alleged to have been imported and

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entered, during the same period, under certain fraudulent "Sight Entries," accepted by the Customs authorities upon the false representation that the invoices for the said goods could not be produced, resulting in a case of undervaluation.

In Schedule "C" to the said information is a list of the goods alleged to have been imported by the defendant, during the same period, and entered free, under the false representation by the defendant's agent, that they were goods of "Canadian Origin," or goods imported for "Manufacturing Purposes."

The defendant, by its plea, admits, subject to certain modifications therein mentioned, the importation of the said goods mentioned in Schedules "A," "B" and "C." With respect to Schedule "A," defendant says it has imported and entered these goods and issued cheques to the order of the Collector of Customs, representing the true duty thereon. These cheques the defendant alleges were handed to its Customs Agent for payment, and that they have found their way into the hands of the Crown, having thereby discharged all liability on the part of the defendant. The defendant further denies any fraud and fraudulent representation with respect to Schedules "B" and "C." With its plea the defendant has also paid into court a certain amount to cover the duty on the bridge material, less the amount of the cheque already issued under circumstances which will be hereafter referred to.

The question of the claim under the bonds has been removed from controversy.

Evidence has been adduced on behalf of both parties with respect to the several transactions above mentioned. The defendant having, after some dis-

cussion, which is set out in the record of the proceedings, assumed the burden of proof.

Inasmuch as Schedule "A" was composed of a great number of items, evidence was restricted to a comparatively small number of them, sufficient to determine the question of liability involved in the case.

The parties at this stage of the case, realizing that there was spread on the record ample evidence to establish in a general way the various classes of fraud involved in the several items of Schedule "A," and that such evidence also adequately disclosed the method pursued by the defendant's Customs agent in his fraudulent dealing with the documents and cheques handed to him by the railway company, filed the following consent:—

"Inasmuch as the items of the schedule as to which "the evidence has been taken and completed are "thought to be sufficiently representative of the "remaining items so far as concerns any question "affecting liability, the case shall now proceed to "argument and final judgment, subject to appeal, "as to defendant's liability with respect to such items, "the items as to which proof has not been made to be "subsequently adjusted as between the parties upon "the principles of liability determined by the ultimate "judgment, with the right of further reference to "the court in case of difference, and judgment of the "court for the total amount, of the defendant's liabil-"ity as so adjusted or found."

With the commendable object of still further shortening the evidence, the following admission by and between the parties was filed:—

"The parties admit for the purposes of this case "only, under reserve of all objections as to the relev-

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"ancy of the facts submitted, that the defendant "issued to its agent, Hobbs, cheques payable to the "order of the Collector of Customs sufficient to cover "all the duties payable by the defendant during "the period covered by this action, except as to the "amounts which have been paid to plaintiff or into "Court by the defendant herein. These cheques were "used in the Bank of Montreal with moneys received "for Customs duties to buy drafts for the Receiver-"General representing the amounts of customs duties "actually received from day to day from all sources "according to the entries made at the Montreal Custom "House, but certain of the entries made by or on be-"half of defendant at Customs during said period, as "a result of manipulation and alteration of documents, "such as disclosed by the evidence of record, represented "the amounts payable for Customs duties by defend-"ant during said period to be less in the aggregate "than the total amount of the said cheques or of the "duties actually payable.

"The further testimony which might be adduced "before the referee if proceeded with would be similiar "in character to that which has already been given "as to the way in which the entries, cheques and goods "and the clearance of the goods were dealt with, "prepared, appropriated or effected."

While the facts of the case, as a whole, are manifold and complex, yet the law of the case falls wholly within the well settled domain of principal and agent. For a proper understanding of the material facts upon which a decision as to the liability of the defendant must be based, it will be well to examine with some detail the method of operation of the defendant's agent, Hobbs, in passing the goods in question through the Customs.

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The moment goods belonging to the defendants had arrived at the Port of Montreal, some of the defendant's employees would prepare the entries and all the necessary papers to pass the goods through the Customs, and make a cheque for the true amount of the duty payable thereon. When completed these documents and cheques were handed over to the Custom's agent, David Hobbs, to enable him to pass the goods through the Customs, pay the duties and secure the delivery of the goods by means of a landing warrant, in the usual and ordinary way.

It was not disputed at Bar that Hobbs was the customs officer of the defendant charged with passing the goods through the customs and paying the duties thereon.

His appointment was made under the provisions of Sections 157 and 158 of the Revised Statutes of 1886, Ch. 32 (now Sec. 132 and 133 of the R.S., 1906, 48) in force at the time of the importation in question in this case. These two sections read as follows:

"157. Whenever any person makes application "to an officer of the Customs to transact any business "on behalf of any other person, such officer may require "the person so applying to produce a written authority "from the person on whose behalf the application "is made, and in default of the production of such "authority, may refuse to transact such business; "and any act or thing done or performed by such "agent, shall be binding upon the person by or on "behalf of whom the same is done or performed, to "all intents and purposes, as fully as if the act or thing "had been done or performed by the principal."

"158. Any attorney and agent duly thereunto "authorized by a written instrument, which he shall "deliver to and leave with the collector, may, in

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"his said quality, validly make any entry, or execute "any bond or other instrument required by this "Act, and shall thereby bind his principal as effectually "as if such principal had himself made such entry "or executed such bond or other instrument, and may "take the oath hereby required of a consignee or agent "if he is cognizant of the facts therein averred; and "any instrument appointing such attorney and agent "shall be valid if it is in the form prescribed by the "Minister of Customs."

The power of attorney under which Hobbs acted all through these transactions is filed herein as Exhibit No. 1, and Robert S. White, the Collector of Customs of the Port of Montreal, testified at p. 48 of his evidence, that it is the ordinary power of attorney used in such cases, printed forms of which are kept in his office and supplied to importers.

The power of attorney reads as follows:

10,000–7–1902.

DOMINION OF CANADA.

Appointment of an Attorney or Agent.

"Know all men by these presents that we have "appointed and do hereby appoint David Hobbs "of Montreal to be our true and lawful attorney and "agent for us and in our name, to transact all business "which we may have with the Collector of the port of "Montreal or relating to the Department of the Cus-"toms of the said port, and to execute, sign, seal and "deliver for us and in our name, all bonds, entries and "other instruments in writing relating to any such "business as aforesaid, hereby ratifying and confirming "all that our said attorney and agent shall do in the "behalf aforesaid.

"In witness whereof we have signed these presents "and sealed and delivered the same as . . . . Act and Deed "at Montreal in the said Dominion, this eighth day "of April, one thousand nine hundred and three.

"Signed and sealed in presence of

(Sgd.)"J. W. NICOLL, (Sgd.) JOHN CORBETT (L.S.)
"B. BARBER, *Foreign Freight Agent, for Canadian Pacific Ry.*"

Now Hobbs, when receiving these documents and cheques, would go to the Custom House and would, in some instances, deposit the cheques with the cashier before entering any goods. In some cases he deposited cheques to an amount covering as large a sum as $15,000. The cashier would keep a memo. of these cheques on separate lists or slips and hold them for safe keeping, not depositing them with his cash. In the meantime Hobbs, having in his possession several invoices, would alter them to suit his fraudulent purpose. For instance if he had three cars of machinery, with an invoice for each car representing $5,000— in all $15,000— he would alter the invoice for car No. 1, by showing that the machinery mentioned in the invoice for that car instead of being contained only in car No. 1, was contained in cars Nos., 1, 2 and 3, and would pass and enter the goods mentioned in the three cars as of the value contained in only one car, and a sum equal to that amount of the duties would be taken out of the total amount of cheques in the hands of the cashier to satisfy the duties apparently due thereon. Later on in the course of the day he would go to the cashier and ask him for cash, to be accounted for against the several cheques in his (the cashier's) possession,—*i.e.* the balance of the amount represented by the cheques; or, in other instances, he would ask for a sum of $200 or $300 as

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the case may be, which in both of these cases he would pocket and keep for himself.

Now Hobbs was also acting as Customs Agent for other commercial firms. He would at times pass and enter their goods, paying the duties thereon with some of the defendant's cheques in the hands of the cashier, as already mentioned, and retain for himself the amount of the duties handed to him by these commercial firms. Meunier even says that sometimes he would pay the defendant's customs duties with the cheques of some Toronto firms, and *vice versa*. (P. 353).

His fraudulent devices were numerous and complex. It is pertinent to mention in dealing with these other firms he was able to pocket money, without obtaining change from the Custom House cashier. He would simply retain the moneys paid over by them for the purpose of passing their goods through the Customs and use the defendant's cheques for paying the duties.

Therefore, of the amount of the company's cheques issued to pay the duties, it is obvious that the Crown only obtained and deposited to its credit the amount of the duties upon the goods actually entered. For the goods mentioned in the information, which were never declared or entered at the Custom House it is equally obvious it was impossible for any amount to be credited to the Crown in the absence of any entry. It was impossible to make a remittance to the Crown unless there was an entry to cover the remittance, and it cannot be maintained that the Crown received the full benefit of these cheques.

In the case of Schedule "B" Hobbs, availing himself of the provisions of Sec. 39, R.S., 1886, Ch. 32, would falsely represent that for want of the invoices, or for some other reasons, he had to pass the goods on a bill

of sight, he having authority to make, and making, the declaration required by the statute, whereby he would undervalue the goods and pay only part of the duty.

With respect to the items of Schedule "C" Hobbs, adopted a different method. Disclosing the nature of the goods, he would conceal the fact that they were dutiable. Take for instance the item representing fire-brick,—he would falsely represent that they were for manufacturing purposes and thus enter them free. The bridge material, he would represent as scrap iron and also enter it free.

At the request of the Court, Mr. Blair, a Customs Officer, heard as a witness in the present case, prepared a summary showing cases illustrating some of the methods adopted by Hobbs, as the defendant's Custom's attorney or agent. As this statement contains specific references to the evidence and exhibits, and conveys a clear idea of the frauds involved in the case, it was thought advisable to embody it herein. It reads as follows, viz:

"Summary showing representative cases illus-
"trating the methods adopted by the C.P.R. Cus-
"toms attorney, D. Hobbs.

"Schedule "A" of Statement of Claim.

"Iron fittings from the Gold Car Heat & Light Co.,
"New York, value $1,875.00, duty $562.50, copy of
"invoice dated December 31st, 1904, with Exhibit 44,
"Manifest No. 27499 covering this shipment was
"cancelled by Entry No. 17650A (Entry 17650A
"Exhibit 44). The warrant and entry by which
"these goods were passed and delivery of them obtained
"apparently covered the number of packages shown
"on the manifest, but neither the goods nor their
"value were mentioned or referred to in any way in

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"the warrant or entry nor was any invoice for them "annexed to the entry. Other invoices for other "goods from the same exporters really covered by "the entry, which invoices do not show the number "of the packages shipped, were apparently repres- "sented as referring to and covering the value of all "the goods contained in all the packages covered "by the manifest, cancelled by said entry 17650A, "thus enabling the importer to pass all these packages "and get possession of all the goods contained in them "without declaring or paying duty on all these goods."

"Hydraulic punch from the Niles-Bennett Pond "Co. of New York, value $2,900, duty $725. The "invoice produced at Customs with entry 114,773 "exhibit 77, purports to cover the value of the goods "contained in two cars numbered respectively 7,784 "and 52,065 covered by manifest 38,267, exhibit 78, "and 38,272, exhibit 76. These two manifests 38,267 "and 38,272 were cancelled by this entry 114,773 "which represents the total value of the goods contained "in these two cars to be $2,400. An invoice for this "amount viz., $2,400, was produced with the entry "and contains the two car numbers in question, so that "the documents as produced at Customs tallied."

"Exhibit UA, viz.—the duplicate original of this "invoice obtained from the defendant's records shows "that it in reality covered the contents of the car "only, viz., 7,784, and that car 52,065 must therefore "have been added to the duplicate produced at Cus- "toms with entry 114,773. By adding a car number "in this way it proved possible to cancel manifest "of car No. 52,065 as well as 7,784 and obtain delivery "of the goods contained in both cars upon the produc- "tion of an entry and invoice which in reality "described and stated the value of the goods contained

"in one car only. The contents of car 52,065 not "having been declared to the custom officers, they "were not aware that such goods had come in or that "any duties were payable upon them.

"Closets, from the Dayton Mfg. Co., Dayton, Ohio.

"Invoices for $483.00 at 30%=$144.90; $207.00 "at 30%=$62.10.

"Referring to the invoice as produced at Customs "with entry No. 122,450 (Exhibit 112) from the Dayton "Mfg. Co. dated March 28th, 1904, for $241.50, it "will be seen that it apparently calls for 31 packages, "the number entered.

"The duplicate original of this invoice exhibit "U. 19, shows the number of packages covered by it "to be in reality only 7 crates and 1 box, or eight "packages in all.

"Exhibit U. 17 and U. 18, the exhibits containing "the invoices not entered at Customs, viz.—two "invoices for $483.00 and $207.00 respectively call "for 23 packages.

"It will be seen that invoice from the Dayton Mfg. "Co. as produced at Customs by Hobbs with entry "122,450 has been altered by placing the figure 2 in "front of 7, making the reading 27 and by changing "the figure 1 into figure 4, making the reading 4 crates. "The total reading 31 instead of as originally 8, "enabling the C.P.R. agent to obtain delivery of the "23 packages covered by the two invoices for items "numbered 21 and 22 in claim, without declaring "the goods covered by them and without payment "of duty thereon.

"Lathe from the Niles-Bement Pond Co., value "$7,725, duty $1,931.25.

"Entry No. 9,303, exhibit 145, purports to cover "the value of the goods contained in two cars, viz.,

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"1,519 and 509 of a total represented value of $2,015.00. "An invoice is attached showing no marks and num- "bers, but purporting to cover machinery of a total "value of said amount, $2,015.00, so that the docu- "ments as produced at Customs tally.

"The duplicate original of the invoice for this item "No. 32 produced by defendants from its records, "viz., exhibit U. 26, shows that cars 1,519 and 509 "really contained this lathe and that its value was "$7,725.00. The duplicate original produced by defen- "dants from its records of the invoice produced at "Customs with entry 9,303 shows that there were "marks and numbers thereon and that the duplicate "produced at Customs had evidently been cut in "two and pasted together again with the result of "eliminating these. (Exhibit U. 27).

"It was thus possible to make the invoice produced "at Customs with entry 9,303 apparently cover any "number of cars or packages.

"Tarpaulins from J. H. Peck & Co., Wigan, G.B., "$719.00, duty $119.83.

"These goods were shipped on the SS. *Lake Mani- "toba* as appears from the original invoice, exhibit "152. They do not appear, however, on the ship's "manifest, exhibit 151, as required by law. No "entry was ever made for these goods nor any invoice "therefor ever produced at Customs. The cheque "alleged to have been issued for the duties on these "goods was used to pay duty on the goods of F. D. "Lawrence (see exhibits), for whom Hobbs acted as "Customs broker.

"As a result of the failure to place these goods in "the ship's manifest, the Customs officers had no "knowledge of their importation and it was thus

"possible to take possession of them without entry "or payment of any kind."

"Angle plates $1,155.00, duty $115.50
" " 1,162.00, " 116.20

$231.70

"The above angle plates were shipped in cars 10,837 "and 11,352 (manifests filed as exhibits 11 and 12), "in November 1904, manifested as rails. A large "importation of rails on which no duty was payable "had been made at this time by the C. P. R. and these "angle bars were included as rails in a free entry "(exhibit 13, entry No. 3,816—entry No. 26,415). "The cheque for $231.70 alleged to have been drawn "to cover the duty on these angle plates was made "out at the rate of 10% instead of $8.00 per ton, "was not drawn until the 23rd of May, 1905, and was "deposited in the Bank of Montreal on July 8th, 1905. "This cheque was apparently cashed at the Custom "House by Hobbs, as no entries were passed by him "on the day that the cheque was entered on the "bordereau deposit slip.

"Couplers from the National Malleable Castings "Co. of Cleveland, Ohio, value $625.00 duty $187.50.

"The manifest, exhibit 175, shows 125 drawbars "loaded in car 61,340.

"Exhibit 176 shows 135 drawbars above transferred "to Unclaimed List and marked, i.e, Unclaimed Book. "Referring to the Unclaimed Book it will be seen "that 25 drawbars were entered on the 21st October, "1905, by Mr. Blenerhasset, entry No. 23623, exhibits "172–3–4. It will be seen by the invoice produced "with this entry that these 25 drawbars were loaded "on car 61340, the invoice being dated August 26th, "1905. Upon reference to exhibit 171 it will be seen

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"that an invoice in duplicate found in Hobb's desk "covered 100 other drawbars shipped in the same car "61340, the invoice being also dated August 26th, "1905. The cheque in question for $187.50 was drawn "by the C.P.R treasurer to pay the duty on this in voice. "No entry, however, was ever made and in consequence "the manifest still remains uncancelled. The cheque "for $187.50 was apparently used to pay the duty "on goods covered by entries included in exhibits "177 to 181.

"Bridge Material.

"Bridges removed by the C.P.R. from Maine to "Canada, dutiable at 35% in July, 1905, cheque "for $385,00 dated Sept. 4th, 1905, exhibit WI, "issued by C.P.R. treasurer to pay duty on this bridge "material as scrap iron at the duty of $1.00 per ton. "Exhibit 14 shows entry 13668A dated Sept. 5th, "1905, Canadian Pacific Railway with pro forma "invoice attached declaring goods to be scrap iron "and certificate also attached declaring goods to "be of Canadian origin entitling them to free entry. "Exhibit 14 also shows the warrant for the delivery "of 34 cars containing these goods."

"This cheque for $385.00 was applied on the 7th "Sept., 1975 in payment of the duty on the entries "shown in exhibits 168–169–170, covering other "goods for the C.P.R.

"Since the commencement of this action the defend- "ants admit the bridge material to be dutiable and have "paid duty at the rate of 35% on a valuation of $20.00 "per ton, less the amount of above noted cheque "for $385.00.

Schedule "B" Sight Entries.

"Marquetry from G. H Jones, New York, value "$3,069.00, duty $767.25.

"Bill of Sight entry No. 4290A dated November "3rd, 1904, stamped at Customs November 7th "1904 (exhibit 4) shows these goods to have been "passed by C.P.R Agent at a valuation of $300.00, "duty $75.00, and this is the amount debited the "C.P.R. on the entry in the cash book.

"It was shown on page 746 of the evidence that "the invoice for these goods was received by C.P.R. "on the first of November, and a cheque for $767.25 "handed to their Customs attorney to pay the duty. "Although the invoice was in possession of the "Company, it was represented that no invoice had "been received, and upon a declaration to that effect "being made by the C.P.R agent, permission was "obtained to make the sight entry, which was made "out at a false valuation. The cheque for $767.25 "was used the same day, November 7th, 1904, and "went to pay the duty on the several C.P.R. entries "shown in exhibits 192 to 199, among these being "an entry No. 4453 covering goods for Miss Hosmer, "duty $114.45.

Schedule "C."

"Fire brick from—Pennsylvania Fire Brick Co., "$104.00, Harbison Walker Refractories Co., 307.00, "Hall & Son, $376.00.

"Exhibit No. 8 shows entry 5381A dated November "10th, 1904, made by the C.P.R. agent, passing "above goods as free on the false representation "that they were for manufacturing purposes in Canada.

"Exhibit X4 shows a cheque drawn by John Corbett "dated November 14, 1904, for $159.54, which it "is alleged was intended to pay the duty on above fire "brick.

"It will be seen upon reference to exhibits 208 to "212 that the C.P.R. Agent made five entries on the

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"16th November, 1904, for other goods including "dutiable goods for M. & L. Benjamin and used this "cheque for $159.54 as part payment of the duty "thereon.

"It is clearly evident therefore that the C.P.R. "agent defrauded the Customs out of the duty on "above fire brick by making a free entry of same and "used the cheque to pay the duty on other goods."

Schedule "A."

"Shading and Heading Machine from the Ajax "Mfg. Co., Cleveland, Ohio, value $6,865.00 duty "$1,716.25.

"This machine apparently came in without manifest. "A cheque for $1,716.25 drawn by the C.P.R. treasurer "dated April 25th, 1904, alleged to have been issued to "cover the duties on these goods was applied on the "12th of May, 1904, in part payment of the duties on "entries shown in exhibits 107 to 111. Two of the "entries Nos. 131472 and 131473, covered goods for "W. F. Knowlton of Toronto for whom Hobbs acted "as Customs agent. Knowlton issued cheques to "pay duties and wharfage on the goods covered by "above entries. The cheques were for the sums of "$672.91 and $891.28. Upon reference to exhibit "216 it will be seen that one of these cheques, $891.28, "was used for payment of wharfage. Entry 131471 "covered goods for F. D. Lawrence for whom Hobbs "also acted as agent. The amount of duty on this "entry was $31.40. It would appear therefore that the "C.P.R. cheque for $1,716.25 went to pay Lawrence's "duties as well as the duties on part of Knowlton's "goods also duties on C.P.R. entries 131243 and "131244, these two latter entries amounting to $583.75.

The effect of this lucid statement of the transactions of Hobbs with his principals and the Customs autho-

rities, is to brand the transactions with ineradicable fraud. On the other hand it is established beyond controversy that the Canadian Pacific Railway Company as a body never had the remotest idea of passing any of these goods through the Customs without paying the proper duties thereon,—there is no suggestion of a dishonouring or disparaging kind made against them. Hence the question of liability must be approached upon that basis. Upon that basis too it must be inferred, that the Crown by its information is not asking for any penalties. The Company, on the receipt of the invoices, prepared the necessary cheques for duty and handed them over to their agent for payment, but he managed to pocket part of the duties. There is no evidence that the defendant did, at any time, pay the duties otherwise than by cheque, but there was nothing in the law or in the power of attorney to prevent them paying in cash. However, the goods could not be passed without paying the duties, and Hobbs was specially authorized to pay the same.

What is the substantial result of all of these Customs transactions conducted by Hobbs? Is it not obvious that through Hobbs' false and fraudulent dealings, offences for which he was convicted and condemned to the penitentiary, the duties in question have not been paid to the Customs but found their way into that convict's pocket? The duties not having been paid, the indebtedness to the Crown remains unsatisfied.

The refunds to Hobbs are just as much refunds to the Company as if the Company had been a private individual importing goods, who, instead of paying an agent, had gone to the Customs personally and paid his money or cheque and received his refund without any power of attorney. And these refunds must be

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a matter of every day occurence at the Customs, as few persons making entries would present the exact sum payable, hence the necessity for a certain amount of change being handed back to them by the Customs people.

Under the circumstance, who is to bear the loss? That is the only question to be decided in the ultimate analysis of the case.

Let us first enquire what was Hobbs' authority under the power of attorney already referred to.

The trite maxim and rule of law for deciding whether a principal is civilly liable for the fraud of his agent is clearly laid down in such text-books as *Bowstead's Law of Agency* (1) and *Story on Agency*, (2). The principal is civilly liable for fraud committed by his agent while acting within the scope and the ordinary course of his employment whether the result is or is not for the benefit of the principal.

The same principle is recognized in the case recently decided by the House of Lords, in re *Lloyd* v. *Grace*, (B) (3) wherein Lord Macnaghten says:

"Lord Blackburn's view of the judgment in Bar-
"wick's case requires no explanation. It is clear
"enough. After referring to Barwick's case (L. R.
"2 Ex. 259) he expresses himself as follows (5 App.
"Cas. at p. 339): 'I may here observe that one point
"there decided was that, in the old forms of English
"pleading, the fraud of the agent was described as the
"fraud of the principal, though innocent. This, no
"doubt, was a very technical question;' and then
comes these important words: 'The substantial point
"decided was, as I think, that an innocent principal
"was civilly responsible for the fraud of his auth-

(1) (4th Ed.) 332-338. (2) (9th Ed.) s.s. 17, 18, 452 and 456.
(3) (1912) A.C. 735.

"orized agent, acting within his authority, to the same "extent as if it was his own fraud.'

"That, my Lords, I think is the true principle. It "is, I think, a mistake to qualify it by saying that it "only applies when the principal has profited by the "fraud. I think, too, that the expressions, 'acting "within his authority,' 'acting in the course of his "employment,' and the expression, 'acting within the "scope of his agency' (which Story uses), as applied "to an agent, speaking broadly, mean one and the "same thing. What is meant by these expressions "is not easy to define with exactitude. To the cir- "cumstances of a particular case one may be more "appropriate than the other. Whichever expression "is used it must be construed liberally. In the case "of Udell v. Atherton (7 H. & N., p. 180), Martin, B., "stated the question to be, 'Was his (the agent's) "situation such as to bring the representation he made "within the scope of his authority?' In those pas- "sages the true principle is, I think, to be found."

It is quite clear in this case that the defendant did not authorize the fraudulent acts in question, but solemnly appointed Hobbs as its agent, and it must be answerable for the manner in which the agent has conducted himself in doing the business which it entrusted him to perform. The agent was empowered to enter these goods through the Customs, and he did so, but in a fraudulent manner, which resulted in depriving the Dominion Exchequer of its duties which are still remaining unsatisfied. Can it be reasonably contended that because the cheques were handed by the principal to their agent to discharge the liability, that the Crown must lose the amount of the duties which, under the provisions of sec. 7 of R.S., 1886, Ch. 32, constitute a debt due to His

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Majesty? In the Revenue Case of Cliquot's Champagne (1) it was also held that:—

"Whatever is done by an agent, in reference to the "business in which he is at the time employed, and "within the scope of his authority, is said or done by "the principal, and may be proved as well in a criminal "as a civil case, in all respects, as if the principal were "the actor and the speaker."

On the other hand, can it be contended that the agent in passing the goods through the Customs—with or without fraud—would be acting beyond the scope of his power of attorney? The answer must obviously be in the negative. He was doing the "class of acts" for which he had a mandate.

Of course principals do not authorize their agents to act wrongfully, and consequently frauds are beyond the scope of the agent's authority in the narrowest sense of which the expression admits. But so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses or incurring liabilities on account of them, and would be opposed as much to justice as to authority. A wider construction has been put upon the words. The best definition of it is found in Barwick v. *English Joint Stock Bank* (2) where it is stated that in all cases it may be said, as it was said here, that the principal had not authorized the act. It is true he had 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 that agent has conducted himself in doing the business which it was the act of the principal to place him in. (3)

(1) 3 Wall., p. 115 (2) L.R. 2 Ex. 259.
(3) Lloyd v. Grace (1912) A.C. 733.

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It will be observed that the power of attorney gave Hobbs power "to transact all business which we (the "defendants) may have with the Collector of the "Port of Montreal or relating to the Department of "Customs of the said Port, and to execute, sign, seal, "and deliver for us (the defendants), and in our name "all Bonds, *Entries* and other instruments in writing "relating to any such business as aforesaid." The language of this document is broad enough to cover all power and authority respecting the entry of the goods through the Customs. The power of the agent covered the power to pay and the power to receive moneys relating to the business in question. The relation of principal and agent for the purpose of passing goods through the Customs is recognized in the Customs Act, and the power of acting therein is in the form prescribed by the Act. Under the Interpretation Act, R.S., 1906, Ch. 1, Sec. 31, the word "Power" is defined as follows:—

"Whenever power is given to any person, officer or "functionary, to do or enforce the doing of any act "or thing, all such powers shall be understood to be "also given as are necessary to enable such persons, "officer or functionary to do or enforce the doing of "such act or thing."

Taking the matter at its worst, it has been proven and admitted by both sides that Meunier, the Cashier, had power to give change not exceeding the sum of fifty cents. Can it be contended that Hobbs had no power to take change to that amount or to any amount? The giving and taking of change must be a daily occurence at the Custom House.

In *Story on Agency*, the learned author considers the nature and extent of the authority which may be delegated to an agent. He observes:

(1) 9th Ed., secs. 17-18.

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"It is commonly divided into two sorts; (1) a "special agency; (2) a general agency. A special "agency properly exists when there is a delegation "of authority to do a single act; a general agency "properly exists where there is a delegation to do all "acts connected with a particular trade, business or "employment. Thus, a person, who is authorized "by his principal to execute a particular deed, or to "sign a particular contract, or to purchase a particular "parcel of merchandise, is a special agent. But a "person who is authorized by his principal to execute "all deeds, sign all contracts, or purchase all goods "required in a particular trade, business or employ- "ment, is a general agent in that trade, business or "employment.

"18. A person is sometimes (although perhaps not "with entire accuracy) called a general agent, who is "not appointed with powers so general, as those above "mentioned; but who has a general authority in "regard to a particular object or thing, as, for example, "to buy and sell a particular parcel of goods, or to "negotiate a particular note or bill; his agency not "being limited in the buying or selling such goods, "or negotiating such note or bill, to any particular "mode of doing it."

Does not the power of attorney in question in this case come within Judge Story's definition of a general agency as applied to a particular business? Hobbs was vested with general power and authority respecting anything to be done at the Customs for the entry of the defendant's goods.

Of course in doing what he did fraudulently the agent was not following the instructions of his principal, but he was doing acts within the course of his employment; and the authorities go as far as to say that

even if a specific prohibition of the very act had been made and that the agent had transgressed it, the principal must be held liable. (1) The case of *Collen* v. *Gardner* (2) is also authority for the principle, that where a general authority is given to an agent, this implies a right to do all subordinate acts incident to, and necessary for, the execution of that authority, and if notice be not given that the authority is specially limited, the principal is bound.

Hobbs committed frauds in carrying out one of the "class of acts" which he was employed by his principal to do; and the fact that the principal reaps no benefit from the agent's fraud has no effect on the principal's liability. The true principle is that the principal has put the agent in his stead and place and he is acting for him.

In *Story on Agency*, the learned author states, in s. 452:

"It is a general doctrine of law that the principal "is liable to third persons in a civil suit for frauds, "deceits, concealments, misrepresentations, torts, neg- "ligences, and other malfeasances or misfeasances "or omissions of duty, of his agent, *in the course of* "*his employment*, although the principal did not author- "ize, or justify, or participate, in or indeed know of "such misconduct, or even if he forbade the acts, or "disapproved of them."

And again in s. 456:

"But although the principal is thus liable for the torts "and negligences of his agent; yet we are to understand "the doctrine with its just limitations, that the tort "of negligence occurs in the course of the agency."

The defendant further contends that its agent had no power to receive money in change as he did, and

(1) Story on Agency, s. 452. (2) 21 Beavan's R. C., 540.

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that the Custom House cashier had only the power to give change up to the sum of fifty cents. We find in the Collector's (Mr. White's) evidence that there existed at no time departmental regulations forbidding the cashier from handing back the change; but that from January 1902 to 1907, he (Mr. White) had issued instructions in the Custom House at Montreal, forbidding the return of change over the counter in any amount exceeding fifty cents—any larger refund having to be made the following day by a cheque to the importer. That was a matter of internal administration in the Custom House and was subsequently reformed by the Department at Ottawa. There was no statutory power for it. The practice prevailing now since 1907, is to give over the counter whatever change is due. In view of these facts can it be seriously contended by the defendant that the frauds of their agent was assisted and facilitated by an officer of the Crown, namely the cashier of the Custom House, who was exceeding his power and authority in making refunds to Hobbs? The question was mooted at Bar that the Customs cashier was an accomplice in the frauds perpetrated by Hobbs, but the evidence failed to disclosed this fact, and as fraud is not to be presumed, it cannot be considered. The violation of this rule of internal administration in the Custom House would not amount to such a breach of duty as would give rise to any liability on the part of the Crown, particularly in view of the law of the prerogative that the Crown is not bound by the laches of it officers. And so far as the defendant is concerned, Hobbs had power to receive fifty cents in change, surely the scope of his power and authority would allow him also to receive one dollar, or any amount on behalf of the defendant. Then the refunds are really refunds made

to the defendant although the company never received any benefit from them by reason of the fraud of its agent. The money refunded was money that belonged to the Crown and taken from the Customs' till. The substantial result being that the amount of the accepted cheque, which eventually went to the credit of the Crown, was made equal to the amount of the duty due upon the goods actually declared, by reducing the amount of that cheque by the amount of the refund, made in actual cash, belonging to the Crown.

Let us suppose the company, instead of paying by accepted cheques, had given its agents bank notes, can it seriously be contended that, with the power of attorney above referred to, the agent had no power to receive any change? Had the agent given a bank note of $100 in payment of $50.75 of duties, could it be successfully contended that he had no power to receive the difference in change, *i.e.*, $49.25? Putting the question is to answer it. The agent had full power to transact and do "all business" respecting the entries at the Customs.

Hobbs was given all the necessary documents to pass and enter the company's goods through the Customs, including the accepted cheques to pay the duties, and it is with these documents that he approaches the Customs official. Thus he was entrusted by the defendant with full *indicia* of title enabling him so to act. The principal cannot be heard to say there is limit to the authority given. If the *indicia* of title are apparently co-extensive with the authority claimed there *is nothing to suggest any limit.* *Fry* vs. *Smellie* (1).

The Custom House cashier believed Hobbs' statement (and his evidence did not disclose any participa-

(1) (1912) 3 K.B. Div. 295.

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tion by him in these frauds) and he acted accordinly, returning balances of cheques on the faith of Hobbs' representations, treating and believing him as having full authority to deal with such moneys.

If the company has entrusted Hobbs with such *indicia* of title, enabling him to deal with these Customs entries, then it cannot be heard to say that there is a limit on the authority so given. (1) The Company is estopped from saying that while their agent had authority to pass the entries and to pay the duties, he had none to receive change if any there was. It is so estopped by representation as referred to in *Whitechurch* vs. *Cavanagh* (2) wherein Lord Macnaghten says that "is a very old head of equity." See also *Low* vs. *Bouverie.* (3)

Then this is a case arising in the Province of Quebec. What is the law of agency in that Province? We find the principles of the law of agency very clearly defined in the iron framework of the Civil Code of the Province, and the provisions pertinent to the questions arising herein are set out in the following Articles.

"Art. 1704. The mandatary can do nothing beyond "the authority given or implied by the mandate. He "may do all *acts which are incidental to such authority* "*and necessary for* the execution of the mandate."

"Art. 1715. The mandatary acting in the name of "the mandator and within the bounds of the mandate "is not personally liable to third persons with whom he "contracts. * * * * *

And again Art. 1727—"The *mandator* is bound in "favour of third persons for all the acts of his mandat- "ary, done in the execution and within the powers of "the mandate."

(1) Fry vs. Smellie (1912) 3 K.B. p. 295. (2) 1902 A.C. at p. 130.
(3) 1891 3 Ch. 82.

The doctrine embodied in the above Articles of the Code was also recently reviewed by the House of Lords in *Lloyd* vs. *Grace, Smith & Co.* (1) That court expressed the opinion that the language of Mr. Justice Willes in *Barwick* vs. *English Joint Stock Bank* (2) had been misunderstood, and that that case was not an authority for the proposition that a master was not liable for the wrong of his servant or agent committed in the course of his service, if it were not committed for the master's benefit. They stated the true principle to be that a principal is liable for the act of his agent in the course of his employment, whether he is acting for the benefit of his principal or not. In this they dissented from the *dicta* of Lord Bowen in *British Mutual Banking Company* v. *Charnwood Forest Ry. Co.* (3) (4) and of Lord Davey in *Ruben* v. *Great Fingall Consolidated* (6).

This decision of the House of Lords in the case of *Lloyd* vs. *Grace, Smith & Co.* (ubi supra) affirms the view taken by Mr. Justice Quain of the decision in *Barwick* v. *London Joint Stock Bank* (ubi supra) in *Swift* vs. *Winterbottom*—(4) that is to say, provided that the agent's fraud is committed in carrying out one of the "class of acts" which his principal employs him to do, the principal is liable; and the fact that the principal reaps no benefit from the agent's fraud has no effect on the liability.

"The only difference in my opinion," says Lord Macnaghten, in *Lloyd* vs *Grace* (5) "between "the case where the principal receives the benefit of "the fraud, and the case where he does not, is that in

(1) 1912 A. C. 716.
(2) 16 L. T. Rep.; 41 L. R. 2 Ex. 259.
(3) 57 L. T. R. 833 18 Q. B. Div. 714.
(4) 28 L. T. R. 339; L. R. 8 Q. B. 244.
(5) 1912 A. C. 738.
(6) 95 L. T. Rep. 214; (1906) A. C. 439).

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"the latter case the principal is liable for the wrong "done to the person defrauded by his agent acting "within the scope of his agency; in the former case he "is liable on that ground and also on the ground that "by taking the benefit he has adopted the act of his "agent; he cannot approbate and reprobate."

The English law and the law of the Province of Quebec are practically identical upon the question of agency or mandate.

Is not also, in the result, the present case an instance of the application of the rule that when one of two innocent persons must suffer, the person who renders it possible for the wrong-doer to do the wrong, by reason of the trust he reposed in the wrong-doer, must suffer rather than the person who suffers from the agent having that opportunity. The person who, by trusting the agent, makes his fraud possible, is to suffer rather than the person who has no relation to the agent. See Lord Macnaghten's judgment in *Brocklesby* vs. *Temperance Permanent Building Society*, (1) and *Fry* vs. *Smellie* (ubi supra).

The Crown, relying on sec. 167, ch. 32, R. S., 1886, as amended by 51 Vic. C. 14, sec. 43, and 52 Vic. C. 14, sec. 13 (now sec. 264, R. S., 1906, ch. 48) contends rightly that the burden of proof that the proper duties payable upon the goods mentioned in the information have been paid and that all the requirements of the Customs Act with regard to the entry of these goods have been complied with and fulfilled—lies upon the defendant company whose duty it was to comply with and fulfil the same.

It is found for the purpose of this case, that the duties claimed upon the goods in question herein, with the exception of the payments made since the beginning

(1) 1895 A. C. 173.

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of the action, which will be adjusted after the question of liability has been finally determined, have not been paid or satisfied.

On this branch of the case it is contended, that it is not a question of agency, as to whether a principal directed his agent to do a given thing which the latter did not do; but the question is that the goods of the defendant were passed through the Customs without being entered or declared, and the defendant, whether it had an agent to do this class of work or not, is liable for the duties remaining actually unpaid upon the goods which were so fraudulently passed through the Customs. The onus is upon the defendant to show the duties were paid; failing to do so it is liable under the above mentioned Section 167.

The plaintiff cited in support of this contention the case of *Hendricks vs. Schmidt* (1) wherein the head note reads as follows:—

"In respect to a single consignment of goods covered "by a single entry, the lien of the government for "payment of the whole duties attaches to each and "every part thereof; and where the whole consign- "ment is warehoused under bond, and parts of it "are fraudulently withdrawn without payment of dut- "ies, the Collector is entitled to hold the remainder "until the duties on the entire consignment are paid, "and is not bound to surrender the same upon tender "of the amount of duties payable upon that part "alone.

"To constitute a payment of duties upon any "particular consignment of goods, there must be an "intent, both on the part of the importers and of the "collector, to apply the money to that consignment.

(1) 68 Fed. Rep. 425.

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"*Held*, therefore, that where a check was given by "the importers to an employee with directions to "pay the duties upon a particular consignment, but "he absconded with the same, and it afterwards came "into the hands of the Collector, and was applied "by him to the payment of duties upon a different "importation, this was not a payment of the duties "upon the former consignment."

The defendant cited, on the question of agency, the case of *Erb. vs G.W.Ry. Co.* (1); but this case must be distinguished from the present one, inasmuch as the fraud was comitted by a member of the firm benefiting by the fraud. This is what Ritchie, C. J. says at page 189 of that case:—

"I fail to see how such wilful fraud committed by "T. Brown & Co. through their partner Carruthers, "on plaintiffs, with whom they were dealing, can be "considered an act within Carruther's agency."

The defendants further cited the case of the City Bank vs. Harbour Commrs. of Montreal (2) but there is hardly any analogy between that case and the present one. However, as has already been said, the authorities upon this subject have been recently clearly and ably disentangled and reviewed up to the present date by the House of Lords, the highest tribunal in the kingdom, in the leading case of *Lloyd vs. Grace Smith & Co.* (ubi supra), and this court is bound to follow that case.

There will be judgment in favour of the plaintiff for the amount of the duties due upon the goods mentioned in the information herein, subject, however, to the payments made on account since the institution of the action. Failing to agree in the adjustment of the amount actually recoverable against the defendants,

(1) 5 S.C.R. 179. (2) 1 L.C.J. 288.

the parties will have leave to apply to the Court for further directions upon these matters. The whole with costs in favour of the plaintiff.

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Judgment accordingly.

Solicitor for plaintif: *E. L. Newcombe.*

Solicitors for defendant: *A. R. Creelman.*