Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mackay and another v. *The Commercial Bank of New Brunswick and others, from the Supreme Court of New Brunswick; delivered 14th March,* 1874.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THE most material facts in this case may be thus stated:—

Mr. Lingley, a timber merchant, of St. John's, New Brunswick, had for some years before June 1868 been in the habit of consigning cargoes of deals to the Messrs. Mackay (the Plaintiffs), who are timber brokers in Liverpool, and of drawing bills upon them, which he indorsed to the Defendants, who are an Incorporated Bank, carrying on business at St. John's; he also from time to time drew upon the Plaintiffs bills for the accommodation of the Bank, for the payment of which the Bank sometimes gave guarantees to the Plaintiffs.

On the 16th of June, 1868, Lingley advised the Plaintiffs of several bills which he had drawn upon them, of which two of 1,000*l.* each, falling due on the 2nd September, 1868, were guaranteed by the Bank, who were to transmit funds to meet them before their maturity. In this state of circumstances Lingley wrote to the Plaintiffs on the 11th August, 1868, advising them of several fresh bills, due on the 26th November, which he *had* drawn upon them and indorsed to the Bank to the amount of 7,750*l.*, all of them, as he stated, against cargoes, but of which two, of 1,250*l.*

and 300*l.* respectively, were not, in fact, drawn against cargoes. This letter of Lingley's was received by the Plaintiffs on the 24th August, 1868, whereupon they sent to Lingley the following telegram:—

"Mackays, Liverpool, to Lingley, St. John's, New Brunswick.—If not remitted guarantee two due 2nd September will refuse all advised, eleventh, Reply quickly."

The message arrived at St. John's on the same day. Lingley had then absconded, having, on the 18th August, executed a deed conveying all his property to trustees, to which deed releasing Lingley from all liabilities to the Bank the President and Cashier of the Bank were parties, The telegram was taken to the Bank by Lingley's brother, whereupon Sancton, the Cashier, answered it in these terms:—

"To Mackays, Liverpool.—Sent last mail. Lingley."

It must be assumed that neither the President of the Bank, nor its Directors instructed Sancton to send this telegram, or knew of its having been sent till long afterwards. The Plaintiffs' case was that, although the statement "sent last mail" (which must be taken to mean that remittances had been sent to meet the guaranteed bills falling due on the 2nd September) was true, yet that the telegram was fraudulently sent in the name of Lingley, and conveyed, and was intended to convey, to them a false representation that Lingley was still in St. John's, and carrying on his business, whereas he had become insolvent and had absconded; that, acting on the faith of this representation, they accepted the bills, which they would not have done had they known the truth; that they had to pay the bills, of which payment the Bank, who endorsed and remitted them to Messrs. Glyn on their own account, obtained the benefit. The action was what is commonly called an action of deceit, in which the Plaintiffs stated the false representation as that of the Bank; and there was an allegation of special damage in the shape of injury to their credit, coupled, however, with an allegation of general damage, under which it would be open for them to claim as damage payment of the bills. Two of the Directors of the Bank,

Seeley and Vernon, were joined as Defendants, but as they obtained a verdict, no question as to them arises. The Defendants pleaded not guilty.

The case was tried before Mr. Justice Weldon and a jury. It appeared by the evidence of the President of the Bank, the Defendants' witness, (referred to in his summing up by Mr. Justice Weldon,) that Sancton had a far wider authority than a Cashier would be presumed to have in this country. The President says:—"He kept the books, conducted the correspondence, and prepared the telegrams. . . . . Sancton would give directions to pay for telegrams sent for the Bank. . . . . Sancton was the man who arranged the financial matters of the Bank; he was the 'wind-raiser.' As a Director, I knew of this mode of raising money before I became President. It would not be for the benefit of the Bank to be known. All was done through Sancton. I did not ordinarily give directions. All persons throughout the Bank took their orders from Sancton."

Mr. Justice Weldon must be taken to have directed the jury that the sending of the telegram was within the scope of the authority of Sancton: by his note it appears that he directed them further to this effect: "The question which I submit for your consideration is this: Was the telegram to Mackays, purporting to come from Lingley, and delivered by the messenger of the Bank to the telegraph office in August 24, 1868, sent by the Cashier or President to Mackays with the intention of inducing them to accept the bills advised in the letter of August 11, and were these bills accepted by Mackay's in consequence of that telegram? If you find this in the affirmative it was a fraud in law, that is for you to find—you find the fact. The question of the intention is found by you, and I pronounce in law the fact so found by you to be a fraud, a legal fraud which renders the Bank liable. As to damages, if you find for the Plaintiffs, I am of opinion that the bills for the 1,250*l.* and 350*l.* (a mistake for 300*l.*), which they accepted, and for which they received no payment, are the measure of damages."

The jury found a verdict for the Plaintiff for the full amount of the Bills.

A motion was made for a non-suit, in pursuance

of leave reserved, or for a new trial. A rule for the latter was granted and made absolute by the Supreme Court, consisting of Mr. Justice Allen, Mr. Justice Fisher, and Mr. Justice Weldon, Mr. Justice Weldon, however, adhering to the view which he had expressed at the trial. Mr. Justice Allen, who gave judgment on behalf of Mr. Justice Fisher and himself, thus states the grounds on which the rule was made absolute—"on the ground of misdirection as to the matter being within the scope of the Cashier's duties, and in not leaving to the jury whether Sancton was authorized by the directors to send the telegram."

It has been contended at their Lordships' bar, that there are other grounds on which a new trial should have been directed, or judgment given for the Plaintiffs, viz., (1) that the Plaintiffs have not proved that they paid the bills, and (2) that if they did pay them they paid them voluntarily with knowledge of the fraud, in which case they cannot recover.

Their Lordships have carefully examined the somewhat full note taken by Mr. Justice Weldon of the points raised at the trial, and can find no trace of any such points; nor do the numerous "reasons" which have been prepared in the Colony on behalf of the Respondents contain any reference to the second point, or indeed to the first, beyond a general complaint of the Judge's ruling on the question of damages. Mr. Justice Allen, in giving the judgment of the High Court, thus expresses himself:—"For two of the bills, one for 300*l.* and the other for 1,250*l.*, no cargoes were sent, and the Plaintiffs *were obliged to pay them:*" thus treating the payment of them by the Plaintiffs under compulsion as an unquestioned fact, instead of sending it to be re-tried, as he presumably would have done, if there had been a misdirection or an unsatisfactory finding upon it. Their Lordships are always extremely loath to send a case for re-trial, much more to decide it upon points which appear to have been raised for the first time at their bar, and which possibly may have been treated as agreed upon or too clear for argument by the Court below. It is enough to say that the Supreme Court having assumed (without apparently a controversy on the subject) that the Plaintiffs were compelled to pay

the bills, their Lordships are not satisfied that this assumption was unwarrantable. Their Lordships further assume, as appears to have been assumed in the Court below, that the Defendants obtained the benefit of these payments in their account with the Messrs. Glyn.

This being so, the points for consideration are confined to those stated by the judgment of the Supreme Court as the grounds on which the new trial was directed.

The Court appear to treat the question whether or not Sancton was acting within the scope of his authority, (there being no conflicting evidence as to the general nature of his authority,) as a question of law, and hold that Mr. Justice Weldon, instead of directing the jury that the sending of the telegram was within the scope of Sancton's authority, ought to have directed them that it was not. The only question of fact which they direct to be submitted to the jury is, whether or not the sending it was sanctioned by the Directors?

Their Lordships regard it as settled law that a principal is answerable where he has received a benefit from the fraud of his agent, acting within the scope of his authority. This doctrine has been laid down by Lord Holt in Hern *v.* Nicholls (1 Salkeld, 289), by Lord Ellenborough in Alexander *v.* Gibson (2 Camp., 555), by Parke B. in Cornfoot *v.* Fowke (6 M. and W., 273, although, under the peculiar circumstances of that case, he held the Defendant not liable); also by Parke B. in Moens *v.* Heyworth (10 M. and W., 157); by Tindal C. J. delivering the judgment of the Exchequer Chamber in Wilson *v.* Fuller (3 Q. B. 77); and again by the Court of Exchequer in Udal *v.* Atherton where, it is true, the Court was divided in its judgment, but where Baron Martin, who held that the Plaintiff had not proved his case, stated the question to be "Was the agent's situation such as to bring the representation he made within the scope of his authority."

There are, however, some cases to be found apparently at variance as to the interpretation and the adaptation to circumstances of this doctrine. It is seldom possible to prove that the fraudulent act complained of was committed by the express authority of the principal, or that he gave his

agent general authority to commit wrongs or frauds. Indeed it may be generally assumed that, in mercantile transactions, principals do not authorize their agents to act wrongfully, and consequently that 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. Principals have been held liable for frauds when it has not been proved that they authorized the particular fraud complained of or gave a general authority to commit frauds: at the same time, it is not easy to define with precision the extent to which this liability has been carried. The best definition of it, in their Lordship's judgment, is to be found in the case of Barwick *v.* the English Joint Stock Bank (2 Law Reports, Ex. 258), when the judgment of the Exchequer Chamber was delivered by one of the most learned Judges who ever sat in Westminster Hall. In that case the Plaintiff was induced to continue to supply oats to a customer of the Bank, a contractor with the Government, on a guarantee from its manager to the effect that the customer's cheque in the Plaintiff's favour, in payment for the oats supplied, should be paid on receipt of the Government money, in priority to any other payment "except to this bank." The manager fraudulently concealed from the Plaintiff that the customer was indebted to the bank in 12,000*l.*: the result was that the Plaintiff was induced to advance money to the customer on a guarantee which turned out to be worthless, and which the manager must have known to have been worthless when he gave it. The declaration contained, among other counts, one for deceit, in which the fraud of the manager was laid as the fraud of the Bank, on which count alone the judgment is based. Baron Martin having directed a nonsuit, *a venire de novo*, was ordered by the Exchequer Chamber, whose judgment was delivered by Mr. Justice Willes. He expressed himself as follows:—"With respect to the question whether a principal is answerable for the act of his agent in the course of

his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express *command or* privity of the master be proved. The principle is acted upon every day in running-down cases. It has been applied also to direct trespass to goods." After enumerating other instances of its application he proceeds:—"In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in."

He further lays down, "If a man is answerable for the wrong of another, whether it be fraud or other wrong, it may be described in pleading as the fraud of the person who is sought to be made answerable in the action."

This doctrine was acted upon lately by the Court of Queen's Bench, in Swift *v.* Winterbotham (6 Law Reports, Q. B., p. 244), where they held a Banking Company liable in respect of a fraudulent guarantee by their manager of the solvency of a person, although the bank derived no benefit from this representation. This Judgment was, indeed, reversed in the Exchequer Chamber, on the ground that the signature of the manager was not the signature of the Company within the words of the 9th Geo. IV, cap. 14, sec. 6, and that the representation was made by the manager only in his individual capacity; but, Lord Coleridge, in delivering the Judgment observes, "This does not at all conflict with the case of Barwick *v.* the English Joint Stock Bank and cases of that description, because there can be no doubt that where an agent of a Corporation, or a Joint Stock Company, in conducting its business does something of which the Joint Stock Company take advantage and by which they profit, or by which they may profit, and it turns out that the act which is so done by their agent is a fraudulent act,

justice points out, and authority supports justice in maintaining, that they cannot afterwards repudiate the agency, and say that the act which has been done by the agent is not an act for which they are liable."

It has been contended, however, that Addie *v.* Western Bank of Scotland decided in the House of Lords about the same time (1 Law Reports, Scotch Appeals, p. 145) is at variance with Barwick *v.* the English Joint Stock Bank. Their Lordships. however do not so regard it.

Mr. Addie alleged that he had been induced to take shares in the Western Bank of Scotland by fraudulent representations of its Directors, and claimed to recover the value of his shares, or to be reimbursed the damages which he had sustained. After his purchase of the shares and before he instituted his suit, the bank, which had been an unincorporated Company under 7 Geo. IV, c. 67, was with his concurrenc incorporated and registered under the " Joint Stock Company's Act, 1856," for the purpose of being wound up. Upon these facts it was decided that Mr. Addie had no remedy against the new Corporation which had been formed. Lord Cranworth observes, " He was a party to a proceeding whereby the Company from which the purchase was made was put an end to—it ceased to be an unincorporated, and became an incorporated Company, with many statutable incidents connected with it, which did not exist before the incorporation. The new Company is now in the course of being wound up. . . . . He comes too late, the Appellants are not the persons who were guilty of the fraud, and although the incorporated Company is by the express provisions under which it was incorporated, made liable for the debts and liabilities incurred before the incorporation, I cannot read the Statute as transferring to the incorporated Company a liability to be sued for frauds or other wrongful acts committed by the Directors before incorporation."

The case was therefore decided upon a point which did not arise in the case of Barwick *v.* the English Joint Stock Bank.

But some expressions used by Lord Chelmsford and Lord Cranworth to the effect that an action of

deceit is not maintainable against a Corporation in respect of frauds of its agents, have been strongly relied upon on behalf of the Respondents. With all respect for everything falling from authority so high, their Lordships cannot regard these *dicta*, relating as they do to English forms of action, as necessary to the decision of Addie *v.* the Western Bank of Scotland. Lord Cranworth, indeed, admits that, "if by the fraud of its (*i.e.*, an incorporated Company's) Agents third persons have been defrauded, the Corporation may be made responsible to the extent to which its funds have profited by these frauds."

Upon this it may be observed that, if the fraud by which the Corporation benefited consisted of a misrepresentation not forming part of or leading to a contract with it, it is difficult to see how, in many cases, they could be made responsible, except in an action for deceit. If it be suggested that an action for money had and received might lie, it may be answered that even if that were so, the question to be tried would be in substance the same, and the evidence the same, and that the time has passed when much importance was attached to mere forms of action. If the benefit received by the Corporation happened to be in the shape of a specific chattel instead of money, it is difficult to see what better title they would have to retain it, but in that case the action for money had and received would not lie, and some form of action of tort would have to be resorted to. Lord Cranworth further observes, in explanation of some observations which fell from him in Ranger *v.* the Great Western Railway Company (5 House of Lords, p. 86), "the allegation of Ranger was that by the fraud of Mr. Brunel, the Company's engineer, he had been induced to contract to do and had done works for them at a price grossly below their real cost, say for 20,000*l.* instead of 40,000*l.* The Company got the full benefit of what he had so done, and in what I said I merely wished to guard against its being supposed that I assented to the argument that there would be no means of reaching the Company, if the fact of the fraud had been established. By what particular proceedings relief could have been obtained is a matter on which I did not intend to express, and indeed had not formed,

any opinion." Unless the remedy against a Company in respect of the fraud of its agent, is to be confined to cases where the fraud is part of a contract, and the contract can be rescinded so as to place the parties in *statu quo*—a doctrine much narrower than that laid down by Lord Cranworth—it appears to their Lordships to follow that an action of deceit is maintainable, wherein, as laid down by the Exchequer Chamber, the fraud of the agent may be treated for purposes of pleading as the fraud of the principal. Nor do they see any valid reason for exempting incorporated more than unincorporated companies from this action. In their opinion, Lord Cranworth stated the law on this subject correctly in Ranger *v.* the Great Western Railway, when he observed "strictly speaking, a Corporation cannot of itself be guilty of a fraud. But where a Corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished by the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a Corporation."

It remains to apply the principles of law which have been stated to the facts of this case.

If there had been any serious conflict of evidence as to the duties and authority of Sancton, it would have been proper to direct this question to be retried. But their Lordships are satisfied to take, as Mr. Justice Weldon did, the statement of the Defendant's witness, the President of the Bank, on this subject. Had the message been sent to the Bank it can scarcely be questioned that it would have been the duty of Sancton to answer it with a view to obtaining the acceptance of the Plaintiffs to the effect that funds had been provided for the previous bills, and if, with the same object, he had added to this a statement that Lingley was carrying on his business at St. John's, although, of course, it would not have been his duty to state a falsehood, still the sending of the telegram with the false statement would have been "within the scope of his authority," as that expression has been explained. But, it has

been urged, the telegram was sent not to the Bank but to Lingley, and was answered on behalf of Lingley, not of the Bank. The position, however, of Lingley and of the Bank must be borne in mind. Lingley had been released from all his obligations, and was no longer interested in the acceptance of the bills: the Bank was deeply and solely interested in their acceptance. Under these circumstances, on the telegram being brought to the Bank, their Lordships think that it was still, in the usual course of the business intrusted to Sancton to answer it, and that when he did answer it in the Bank's interest in such a manner as to convey what was false together with what was true, he was still acting "within the scope of his authority."

For these reasons their Lordships are of opinion that Mr. Justice Weldon was right in directing the Jury that the sending of the telegram was within the scope of Sancton's authority. This being so, the question whether or not Sancton was authorized to send it by the Directors becomes immaterial.

It is not necessary to determine whether or not the Plaintiffs could have maintained their verdict if they had proved only they had sustained damage from the fraudulent representation of an agent of the Defendants made within the scope of his authority, without proof of the Defendants having profited thereby: nor whether they could have maintained it, if they had not proved the representation of Sancton to be within the scope of his authority, but had proved that the Defendants accepted the benefit of it, with notice of the fraud, —propositions which have been contended for at their Lordships' Bar. It is enough in this case to decide that the Plaintiffs, having established that they have suffered damage and that the Defendants commensurately profited by the fraudulent representation of Sancton made within the scope of his authority, are entitled to maintain their verdict.

For these reasons their Lordships will humbly recommend Her Majesty that the judgment of the Supreme Court be reversed, and the order directing a new trial be discharged.

The Appellants will have their costs in the Courts below and of this Appeal.

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