1916
*Nov. 6, 7, 8.
1917
*Feb. 6.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT).. } APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Principal and Agent—Power of attorney—Construction—Excess of authority—Fraud—Evidence—Onus probandi—"Customs Act," R.S.C. 1886, *c.* 32, *ss.* 157, 158 *and* 167, *now R.S.C.* 1906, *c.* 48, *ss.* 132, 133 *and* 264.

The appellant company, pursuant to the requirements of section 157 of the "Customs Act," R.S.C. 1886, c. 32 (now R.S.C. 1906, c. 48, s. 132), gave to one Hobbs, customs broker, a power of attorney "to transact all business which" the appellant "may have with the Collector of the Port of Montreal or relating to the Department of Customs of the said Port * * * , ratifying and confirming all that * * * said attorney and agent shall do * * *." Cheques to the order of the Collector of Customs were given to Hobbs on his requisition for the payment of duties on goods imported by the appellant, these cheques being made by the latter for fixed amounts corresponding to the invoices. Afterwards, through fraudulent devices, Hobbs, having succeeded in passing entries for much smaller sums than the quantity of goods required, induced the Customs House cashier to take the cheques thus issued by the appellant for a higher amount than the one apparently due and either to apply the surplus in payment of duties owing by third parties or to reimburse him in cash. The frauds having been discovered, the respondent sued the appellant for the amount of duties unpaid through the criminal method of Hobbs.

Held, affirming the judgment of the Exchequer Court of Canada (14 Ex. C.R. 150), the court being equally divided, that, upon the facts in evidence, the appellant company had failed to prove that the customs duties claimed from it had been paid to or received by the Crown, *per* Anglin J., the appellant having failed to discharge the burden placed upon it by the "Customs Act," R.S.C. 1906, c. 48, s. 264.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

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Per Fitzpatrick C.J., Duff, Anglin and Brodeur JJ.—It was within the scope of the power of attorney given to Hobbs by the appellant company that he should receive for it, in cash. from the Customs officials, balances of cheques delivered by him to them, after deducting the duties payable in respect of entries made by Hobbs on behalf of the company appellant.

Per Fitzpatrick C.J. and Duff J.—It was not within the scope of the power of attorney that he should direct the application of balances of the company's cheques in payment of duties owing by Hobbs' other customers; and such unreturned balances remained in the hands of the Crown the property of the company notwithstanding such direction by Hobbs and the pretended application of the moneys accordingly.

APPEAL from the judgment of the Exchequer Court of Canada (1), maintaining plaintiff's action with costs.

The circumstances of the case and the questions of law are fully stated in the above head-note and in the judgments now reported.

Eug. Lafleur K.C. and *W. N. Tilley K.C.* for the the appellant.

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

THE CHIEF JUSTICE.—I agree with Mr. Justice Duff.

DAVIES J.—I think this appeal must fail.

The conclusions of fact I have drawn from reading the evidence after the argument at bar are that the customs duties sought to be recovered by the Crown in this action never were paid to or received by the Crown. The monies to pay them were no doubt paid over by the Railway Company to its agent in good faith for the purpose of paying these duties; but

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the latter misappropriated the monies and applied them to his own use or to purposes other than those they were entrusted to him for. It may well be that this fraudulent agent was enabled to carry out his fraud alike in obtaining possession of the goods and in misappropriating the monies entrusted to him to pay these duties by some remissness or negligence on the part of some of the Customs officers. It seemed to me not that these officers were partners in the frauds perpetrated by the company's agent but that they too were deceived by him. Be that as it may, I cannot see how the Crown can be held liable for the remissness or neglect of its officers, if any such there was.

The controlling fact is that the duties on these goods now sued for have not been paid to the Crown; but were misappropriated and embezzled by the Company's agent, who received them to pay the duties.

Under these circumstances, I hold that as between two innocent parties, the Company and the Crown, the former must suffer because the wrongful misappropriation was made by its agent.

The appeal should be dismissed with costs.

IDINGTON J.—The respondent sued in the Exchequer Court and recovered judgment against appellant for alleged unpaid duties on goods imported into Canada between January, 1904, and November, 1905.

The parties in the course of the trial by their respective counsel signed the following admission:—

> The parties admit for the purposes of this case only under reserve of all objections as to the relevancy 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 deposited to the credit of the Receiver-General and used in the Bank of Montreal with monies 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 Customs House, but certain of the entries made by, or on behalf 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 defendant during said period to be less in the aggregate than the total amount of said cheques or of said duties actually payable.

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

Ottawa, 19th December, 1912.

The man Hobbs therein referred to was a customs broker at Montreal to whom the appellant, pursuant to the requirements of section 157 of the Revised Statutes of Canada, ch. 32, had given the necessary written authority in the following terms:—

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 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 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 Act and Deed at Montreal in the said Dominion, this eighth day of April, one thousand nine hundred and three.

Signed and sealed in the presence of
J. W. NICOLL.
B. BARBER.

JOHN CORBETT (Seal).
Foreign Freight Agent for
Canadian Pacific Railway.

The course of business adopted by the appellant for the purpose of passing its importation of goods

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through the Montreal Customs was of that methodical and rigourous business character which left no loose ends or possible opening for perpetration of the frauds now in question by Hobbs by the means he adopted unless by the connivance of someone in respondent's employment at the Customs House, or such employee being so ignorant and incompetent that he applied appellant's cheques clearly intended to pay the duties claimed in ways quite unjustifiable.

Each cheque issued by the appellant to the respondent's Collector of Customs to pay duties had thereon when given Hobbs not only the usual numbering of cheques, but a special number thereon by which it was possible to trace the parcel or shipment and invoice referred to in the way that has been done compelling the admission above quoted that in fact the duties thereon had been paid—not to Hobbs, but to the respondent's collector.

This is an action to enforce the payment of same duties a second time.

The method adopted by Hobbs was to induce the Customs House clerk to take the cheques issued by appellant to the order of the Customs Collector and safeguarded from any such misapplication in every way that long experience had dictated as possible, and to apply them in payment of duties owing by third parties and thereby enable Hobbs to use the moneys or proceeds of cheques given to him by such third parties; or applying part of a cheque to pay appellant's customs duties and handing over balance of the amount of the cheque to Hobbs under the pretence that he was only making change. These third parties probably had not taken the same care as appellant to guard against possible fraud on his part.

The observance of common honesty or the slightest

business intelligence, or both, on the part of him receiving on respondent's behalf the appellant's cheques, would have frustrated any such practices as these adopted. Indeed the collector had laid down a rule for this man's guidance forbidding the making of change beyond a few cents in any case, yet he repeatedly violated it, and thereby helped the man Hobbs to misappropriate in part as well as misapply entirely such cheques. How could any one imagine that the appellant who had taken such care to reduce Hobbs, so far as his cheques were concerned, to nothing but an errand boy, had become seized with such repeated and unprecedented fits of generosity?

How could any one for months and months handle such cheques and having thus an opportunity of comparing appellant's rigorous and guarded business methods with possibly loose methods of others, fail to inquire why it had thus strangely departed from its usual businesslike methods?

Since when had it dawned upon any one that appellant had suddenly become a distributor of promiscuous charity or bounties for no consideration, and no apparent cause?

Whether the man employed by respondent, and who overlooked all such curious features presented to him from day to day, was an accomplice of Hobbs, or was merely a misplaced incompetent when trusted by respondent with the duty to avert such possible thefts, does not seem to me to matter.

The argument that would relieve the respondent from all responsibility for the consequences of mere stupidity of such a servant in a position of trust needing intelligence to discharge it, would equally relieve respondent in case that servant appointed to receive,

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and receiving, the cheques was a criminal accomplice of Hobbs.

I fail to see how any legal distinction can be drawn between these two possible ways of viewing this claim so far as dependent upon palpable misappropriation of appellant's cheques in the way I have referred to. And I submit that the proposition that a debtor of the Crown can, after handing the servant thereof, duly appointed to receive it, a cheque to discharge the debt, be sued for such debt because that servant and someone else stole the cheque, or misappropriated the proceeds, after it was handed in, is untenable.

Yet that seems less flagrant in substance than what is claimed by respondent. For what it claims from appellant was in truth paid by appellant, and all it had to do with the theft was that its cheques, which could not be readily converted, were misplaced in the accounts of an untrustworthy servant of respondent, and put to the credit of someone else.

It is said that misplacing was on the suggestion of Hobbs who had acted as I suggest as errand boy to deliver them. It is said that making entries was part of his duties and that in some cases he made false entries. But how did that justify the respondent's servant in misappropriating the appellant's cheques? As appellant well knew, and he was entitled to have the rule observed, if its cheque did not fit the entry it should be returned and no risk was run. The cheques were made to the order of the collector, and appellant left no excuse for any one doing anything with them except to apply them in payment for duties payable by appellant not by someone else, or if in any case an error to return the cheque evidently issued in error.

I fail to understand how that sort of wrongdoing on the part of the customs clerk can fall within the

ambit of the ostensible authority given the customs broker as such, or as presented in the power of attorney above quoted.

The section 157 requiring that power of attorney is followed by section 158 which defined in more specific language than section 157, what things the agent so appointed is expected to be able to do in relation to business with respondent, and is as follows:—

158. Any attorney and agent duly thereunto authorized by a written instrument, which he shall deliver to and leave with the Collector, may, in his said quality, validly make an 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.

How can these things which a broker is expected to be able to do extend to the misapplication of a cheque given for some such purpose limited on its face, to him who chooses to read it inquiringly and understand its contents, to one thing which the appellant was concerned in, and not a multitude of other things which other parties were concerned in.

I cannot find in the cases, as I read them, cited by respondent's counsel, anything to support such a contention as set up relative to this branch of the case.

Indeed, the cases so cited in principle render respondent responsible for the misapplication made by its servants of the appellant's cheques entrusted to them for the purposes indicated and nothing else. Not only was appellant's delivery thereof to them within the range of their ostensible but also of their express authority.

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The authority to make an entry or execute a bond or other instrument required by the "Customs Act," or to take an oath, did not justify anyone in respondent's service in supposing, if he ever did suppose, that the man carrying a cheque made to the order of respondent's collector, could properly hand it over to someone else to pay his customs duties, or cash it and pocket some of the proceeds. So far as the claim depends on any such like dealing, the appeal should be allowed.

The schedule "A" I imagine, falls entirely under this.

The broker, Hobbs, acting within his apparent authority, seems to have betrayed his trust in other ways.

He had occasion to pass material which he represented was either non-dutiable when dutiable, or dutiable at a lower rate than it actually should have borne.

In misleading the Customs House officers in any such regard, he was thereby acting in such apparent discharge of his authority as to render appellant liable for his fraudulent conduct. If any goods thereby escaped payment of duty, the appellant is liable.

Whether the total of these items exceed the amount paid into court, I cannot say.

The schedules "B" and "C," I imagine, fall within this latter expression of opinion.

The appeal should be allowed accordingly. Even if the majority of the court should reach the same conclusion I doubt if it is a case for costs.

The agent of appellant seems to have acted improperly in many cases falling within the apparent scope of his authority in dealing with items in schedule "A."

Though I cannot find any justification in law for respondent seeking to recover what through its own servant was diverted to other uses than intended by appellant, I doubt if the latter's agent was not the original corrupter of the service. When apparently acting within the scope of his authority, he was playing false to both.

DUFF J.—The decision in this case turns, in my judgment, upon the effect of the power of attorney which is in the following words:—

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 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 our behalf aforesaid.

and of the statute, secs. 157 & 158 Revised Statutes of Canada, 1886, ch. 32.

Sec. 157. Whenever any person makes an 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 done had been performed by the principal.

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

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The rule for construing powers of attorney is stated at p. 177 in *Bryant* v. *La Banque du Peuple* (1):

> Nor was it disputed that powers of attorney were to be construed strictly—that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by that power, it is necessary to shew that on a fair construction of the whole instrument the authority on question is to be found within the four corners of the instrument, either in express terms or by necessary implication. It was pointed out, indeed, that the decisions on which the learned counsel for the appellant mainly relied in support of these propositions were decisions of English judges, but it was not shewn that there is any difference in this respect between the law of Canada and the law of England. The provisions of the Civil Code of Lower Canada, and the Canadian authorities which were cited to their Lordships, appear to be in harmony with English law and English authorities,

and at p. 180:—

> The law appears to their Lordships to be very well stated in the Court of Appeal of the State of New York, in *President &c., of the Westfield Bank* v. *Cornen* (2), cited by Andrews J. in his judgment in another case brought by the Quebec Bank against the company. The passage referred to is as follows:—
>
> Whenever the very act of the agent is authorized by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent, as to all persons dealing in good faith with the agent; such persons are not bound to enquire into the facts *aliunde*. The apparent authority is the real authority.

Applying this principle to the circumstances of the case before us it seems to follow that as regards the moneys paid by Meunier to Hobbs in cash as balances of cheques delivered to him by Meunier after deducting the duties payable in respect of entries made by Hobbs on behalf of the appellant company Hobbs must be taken as between the appellant company and the Crown as having been acting within his authority. Adverting to the language of the power of attorney, it seems clear that *primâ facie* "all business which we may have with the collector of the Port of Montreal

(1) [1893] A.C. 170. (2) 37 N.Y. 320.

or relating to the Department of the Customs of the said Port," would embrace the "business" of receiving payment of such balances; and applying the words of the statute it seems equally clear that the acts of Hobbs in receiving such balances are such acts as by section 157 are declared to be

> binding upon the person by or on behalf of whom the same are "done or performed" as fully as if they had been done or performed by the principal.

In the situation as on the facts known to him it presented itself to Meunier, these balances were payable to the appellant company and the receipt of them, therefore, being part of the "business" which the appellant company had to transact with the Collector of the Port of Montreal or the Department of Customs was an act "warranted by the terms used" in the power of attorney and an act made binding upon the appellant company by section 157.

A very different question, however, arises in relation to those moneys, residues of the appellant company's cheques, after deducting payment of the duties payable by the appellant company in respect of goods entered by Hobbs on behalf of the appellant company which by direction of Hobbs were applied by the Department itself in payment of duties payable in respect of goods entered by Hobbs on behalf of principals other than the appellant company. These acts of Hobbs cannot by any ingenuity be brought within the language of either the power of attorney or the statute. The entry of goods by Hobbs on behalf of other principals of his does not fall within the words of the power of attorney "business which we may have with the Collector of the Port of Montreal or relating to the Department of Customs of the said Port," nor does

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the payment of duties payable in respect of such goods. Nor can the language of the statute be given the effect of making such acts binding on the appellant company as the acts of the appellant company for the short reason that they are not done "by or on behalf of" the appellant company.

For such acts Hobbs had neither actual authority nor ostensible authority. To make the doctrine of ostensible authority applicable "*the act done by the agent*" to quote from the judgment of the Judicial Committee delivered by Lord Atkinson in *Russo-Chinese Bank* v. *Li Yau Sam* (1), at p. 184,

> and relied upon to bind the principal, must be an act of that particular class of acts which the agent is held out as having a general authority on behalf of his principal to do; and, of course, the party prejudiced must have believed in the existence of that general authority and been thereby misled.

Paying duties on behalf of other principals payable in respect of goods entered on behalf of such principals did not belong to the particular class of acts which Hobbs was represented by the appellant company as having authority to do so.

The direction by which in any particular case Hobbs procured the appropriation of part of the proceeds of one of the appellant company's cheques in payment of duties payable in respect of an entry made by him on behalf of another principal may, no doubt, be conceived as in one aspect a receipt by Hobbs of moneys owing to the appellant company; but in fact the appropriation under Hobbs' direction was a single indivisible act incapable of being divided into two distinct acts, a receipt by Hobbs on behalf of the appellant company and a wrongful misappropriation of moneys so received for the benefit of another prin-

(1) [1910] A.C. 174.

cipal. For the purpose of deciding the legal question upon which we have to pass this single indivisible act must be looked at as a concrete fact and when regarded in that way it is quite impossible to bring it within the category of "business" that the appellant company had with the Customs Department or within the category of acts "done or performed" either really or apparently "on behalf of" the appellant company.

These directions given by Hobbs to Meunier, to apply the residues of the company's cheques from time to time in payment of goods which he was entering on behalf of other customers, being directions not only beyond the scope of his actual authority but beyond the scope of his apparent authority, unless there was something in the conduct of the appellant company disentitling it to insist upon its strict rights, it follows either that up to the amount of monies so appropriated the duties sued for have been paid or that these monies are still in the hands of the Crown subject either to application by the Crown in payment of some obligation by the appellant company to the Crown or subject to the direction of the appellant company itself.

I think there is nothing in the conduct of the appellant company to modify or affect its *primâ facie* rights. It is perfectly true that the beginning of the train of events and incidents which led to the loss, if loss there is to be, was in certain acts of Hobbs, fraudulent as against his principals, but "within the scope of his employment" according to the accepted meaning of that perhaps not very happy phrase. But if there is to be loss it must result from the fact that the Crown cannot now recover from Hobbs' principals the duties which he professed to pay by appropriation of the appellant company's balances, and of these acts it

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cannot be affirmed that in relation to such loss they were *fraus dans locum injuriae*. Two subsequently operative causes—first, the irregular conduct of Meunier, the Crown's own servant, secondly, the concurrence of Meunier with Hobbs in the final act which (and this is the decisive point) was an act beyond Hobbs' actual as well as his ostensible authority, as above pointed out, by which or in consequence of which the residues were appropriated in payment of duties owing by these other customers of Hobbs'—these were the effective causes of the loss, if such loss there is to be.

Whether strictly in contemplation of law there has or has not been payment to the extent mentioned may be an arguable question, but it is, I think, immaterial. Assuming that, in point of law, the duties must be considered to be unpaid but that the Crown has in its hands moneys of the appellant company which the appellant company intended to be applied in payment of the duties, and which from a time anterior to the commencement of the action down to the present moment, the appellant company has been insisting ought to have been and ought to be applied in payment of them; it is abundantly evident that the Crown could not, while retaining such moneys, maintain an action for the payment of the duties—for the short reason that the Crown declining to appropriate the moneys, the appellant company is entitled to direct the appropriation of them; and through the conduct of the appellant company, beginning with the sending of the cheques themselves, the Crown even before the commencement of the action had notice of the company's intention so to appropriate them.

The result is that, in my opinion, the appeal should

be allowed as regards the moneys wrongfully applied by Hobbs in the manner above indicated, and that there should be a reference to ascertain the amount.

ANGLIN J.—Upon the facts in evidence the only possible conclusion is that the defendant company has failed to discharge the burden placed upon it by the "Customs Act" (R.S.C., ch. 48, sec. 264), of proving that the customs duties claimed from it in this proceeding had already been paid to the Crown. It is admitted that delivery of the goods in respect of which those duties were payable was obtained for the defendant company through fraudulent devices practised by its customs broker without proper entries of them having been made. There was never an appropriation to these duties of any moneys in the hands of the Crown. No request or direction for such an appropriation was ever made or given to the officials of the Crown. Whatever other defence or ground of counterclaim (if any) the circumstances may present, they do not sustain the plea of payment of the duties in question.

Nor do I think that in respect of the moneys embezzled by its broker the defendant company could have successfully maintained a counterclaim against the Crown for moneys had and received to its use.

Collusion between the fraudulent broker and the Customs House cashier who paid out to him, or by his direction appropriated to other purposes, portions of the proceeds of C.P.R. cheques issued to the order of the Collector of Customs and intended to be used for payment of customs duties on C.P.R. importations has not been found by the learned trial judge; and, highly suspicious as some of the circumstances undoubtedly are, I am not prepared to make such a

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finding. I am not to be understood as implying that proof of such collusion would necessarily involve responsibility of the Crown.

That there was gross carelessness and neglect of duty on the part of the Customs House cashier, which made the success of the broker's fraudulent scheme possible, is abundantly apparent. But, apart from statutory provision therefor, the Crown is not answerable for the consequences of laches or negligence on the part of its servants.

Ex facie it was within the scope of the power of attorney given to its broker by the defendant company that he should receive for it from the Customs officials moneys in their hands paid by it in excess of the amount of duties payable on goods entered on its behalf. I find nothing in the evidence to warrant a finding that any restriction on the scope of this apparent authority was ever brought to the notice of the Customs officials. The circumstance that all moneys paid by the C.P.R. for customs duties were paid by certified cheques did not amount to such notice. Though each cheque was intended when issued to cover duties upon a particular invoice, the cheque itself was not so earmarked and there was nothing to bring notice of that fact to the customs officers. I would therefore not be prepared to hold that the receipt by its broker of moneys of the C.P.R. Company from time to time in the hands of the Customs officials in excess of the amount of customs duties for which entries made on its behalf shewed the company to be liable was beyond the scope of his apparent authority. While the appropriation from time to time of a portion of these moneys in the hands of the Customs officers to payment of duties owing by another of the broker's clients would, at first blush, appear to have been

clearly beyond the scope of his authority from the C.P.R. Company, such a transaction may be regarded as having taken place merely as a convenient method of avoiding a roundabout process whereby the broker would receive a sum of money by way of refund upon C.P.R. account and would thereupon immediately hand over to the Customs cashier a like sum belonging to another client in payment of the duties of such other client—the net result being the same. A similar observation may be made as to the payments by direction of the broker to Customs officers, presumably as gratuities, of small sums taken from C.P.R. moneys in the hands of the Customs cashier.

The hardship to which the success of the Crown's claim subjects the appellant company is apparent. But we cannot for that reason afford it relief to which we are not convinced that it is legally entitled.

The appeal fails and should be dismissed with costs.

BRODEUR J.—This is an action for unpaid customs duty. Defendant (appellant) pleaded that it had paid the full amount of duty and was in fact in possession of cancelled cheques payable to the order of the Collector of Customs and of vouchers establishing such payment.

It appears that one David Hobbs was given by the C.P.R. Company a power of attorney reading thus:—

> 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 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.

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Hobbs as such agent received and had charge of the invoices for all goods imported by the company and on his requisition cheques were issued to the order of the Collector of Customs for payment of duty. These cheques were made for fixed amounts corresponding to the invoices.

But instead of making his entries regularly with those invoices he concealed from the Customs authorities the quantities and values entered from day to day. He altered in some cases the documents on which the entries were to be made and his usual procedure was to prepare an entry for a definite number of cars and to attach to this entry an invoice which really covered a part only of the goods contained in the cars and in that way he succeeded in passing entries for much smaller sums than the quantity of goods required.

From time to time he was presenting to one of the cashiers of the customs some of the cheques which he was getting from the company. Sometimes those cheques were covering a larger amount than the entry passed and he was on his request reimbursed the difference by the cashiers and he misappropriated then the amount of the cheques which had been entrusted to him. Those cheques after being received by the cashier and the change given as I have said were handed over to the Collector of Customs by whom they were entered in the usual way and deposited to the credit of the Receiver-General.

There is no evidence that the Customs cashier benefitted by those transactions and so far the only man who seems to have benefitted from those frauds is Hobbs, the agent of the company.

In some cases the surplus cheques were applied in

payment of the duties due by other importers for whom Hobbs acted as customs agent.

Those frauds having been discovered, Hobbs was arrested, convicted of forgery of invoices and sent to the penitentiary. But it remains to be decided whether this loss of money should be supported by the Crown or by the Company.

The Company, as I have said, relies on the cancellation of the cheques and on the receipts which they have in their possession to prove their payment. There is no formal evidence as to whether the receipts which they have in their possession have been duly given by the cashier. They are stamped receipts which could have been very easily forged and the circumstances of the case lead me to believe that Hobbs got a stamp made up which he used on the document which he handed back to the C.P.R. authorities to show that the duties had been properly paid.

On the other hand, the official documents on which the official receipt appears would have been kept in his hands and would not have been, of course, handed over to the C.P.R. authorities; because if they had been handed over the fraud would have been easily detected and put an end to.

The terms of the power of attorney are as broad as possible. They gave authority to Hobbs to transact all business which the company might have with the Collector of the Port of Montreal and it is wide enough to cover all transactions in connection with the entry and payment of duties. He had power to make payments. He must have had power to receive change when necessary, such power being necessarily implied.

It is a well settled principle that the principal is responsible for the fraud committed by his agent

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while acting in the ordinary course of his employment, whether the result is or is not for the benefit of the principal.

In *Lloyd* v. *Grace* (1), the House of Lords applied that principle.

I will refer also to Story on Agency 9th ed., who says, (p. 374)

> In respect to the acts and declaration and representations of public agents, it would seem that the same rule does not prevail, which ordinarily governs in relation to mere private agents. As to the latter (as we have seen), the principals are in many cases bound, where they have not authorized the declarations and representations to be made. But, in cases of public agents, the Government, or other public authority, is not bound, unless it manifestly appears that the agent is acting within the scope of his authority, or he is held out as having authority to do the act * * * Indeed, this rule seems indispensable, in order to guard the public against losses and injuries arising from the fraud or mistake, or rashness and indiscretion of their agents.

In the circumstances of the case, it seems to me only fair that in a case of that kind the principals should be responsible for the misdeeds of their agents unless there is negligence on the part of the other party or unless the party has by words or conduct made a representation of facts either with a knowledge of its falsehood or with the intention that it should be acted upon. Those elements cannot be found here.

In these circumstances, I am of opinion that the company has failed to prove that it has paid the customs duties in question and the judgment which condemned it to pay them should be confirmed with costs.

Appeal dismissed on equal division.

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Solicitors for the respondent: *Davidson & Wainwright.*

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