retain the ship's contribution towards the cost of it; and though it is true that the charter-parties create no privity as between plaintiff and the defendant, their terms, which are in common use in the trade, serve to throw light upon the meaning to be put on the words "cost of stevedoring" as used in the contract of sale.

The question is more one of fact than of law, and their Lordships do not think it right to interfere with the finding of the courts below. They will therefore advise His Majesty that the appeal should be dismissed. The appellant will pay the costs.

Appeal dismissed.

Counsel for the Appellant—Bailhache, K.C. — D. C. Leck. Agents — Wm. A. Crump & Son, Solicitors.

Counsel for the Respondent — Sir R. Finlay, K.C.—Austen Cartmell. Agents—Light & Fulton, Solicitors.

HOUSE OF LORDS.

Friday, July 19, 1912.

(Before Earl Loreburn, the Earl of Halsbury, Lords Macnaghten, Atkinson, Shaw, and Robson.)

LLOYD *v.* GRACE, SMITH, & COMPANY.

(On Appeal from the Court of Appeal in England.)

Principal and Agent — Responsibility of Principal—Fraud of Agent.

A principal is liable in damages for the fraud of his agent, whether benefited thereby or not, provided the agent is acting within the scope of his employment. In a case where a clerk, purporting to act on behalf of his employer a solicitor, obtained control of and embezzled the property of a client, *held* that the fact that the clerk was apparently invested by his employer with power to act for him was sufficient to make the employer responsible for his fraud.

Barwick v. *English Joint Stock Bank* (1867, L.R. 2 Ex. 259), *commented on* and *explained.*

This was an appeal from a judgment of the Court of Appeal (Farwell and Kennedy, L.JJ., Vaughan Williams, L.J., *dissenting*), reported 1911, 2 K.B. 489, reversing a judgment of Scrutton, J.

The *facts* of the case appear from their Lordships' considered judgment, which was delivered as follows:—

Earl Loreburn (*a*)—I think that the facts of this case, except in immaterial points, are quite clear and undisputed.

The appellant Mrs Lloyd had bought some property, and thus had come to know of the defendant, a solicitor. She had doubts about having got her money's worth, and went to the defendant's office to inquire. When there she saw one Sandles, the defendant's managing clerk, and was induced by him to give him instructions to sell or realise this property, and for that purpose to give him the deeds and to sign two documents which she neither read nor knew the tenor of, but they put into Sandles' possession her interest therein. She gave him the deeds as the defendant's representative. Having got them and the signed documents, he dishonestly disposed of this lady's property and pocketed the proceeds. That is the whole story as it is now either found or admitted, because it is incontestable.

It is clear, to my mind, upon these simple facts, that the jury ought to have been directed, if they believed them, to find for the plaintiff. The managing clerk was authorised to receive deeds and carry through sales and conveyances and to give notices on the defendant's behalf. He was instructed by the plaintiff, as the representative of the defendant's firm—and she so treated him throughout—to realise her property. He took advantage of the opportunity so afforded him as the defendant's representative to get her to sign away all that she possessed and put the proceeds into his own pocket. In my opinion there is an end of the case. It was a breach by the defendant's agent of a contract made by him as defendant's agent to apply diligence and honesty in carrying through a business within his delegated powers and entrusted to him in that capacity. It was also a tortious act committed by the clerk in conducting business which he had a right to conduct honestly, and was instructed to conduct, on behalf of his principal.

At the hearing the learned Judge, no doubt with a view to avoiding the risk of a new trial in so small a case, appears to have been prevailed upon to put no less than six questions with sub-divisions, making in all ten questions, to the jury. Some of them were quite immaterial. Others were framed in order to raise a point of law supposed to be affirmed by Willes, J., in the case of *Barwick* v. *English Joint Stock Bank* (L.R., 2 Ex. 259), in a passage which admitted of more than one meaning. The meaning of the answers depends upon how the jury understood the questions, and we were not told how they were explained to the jury. That Sandles committed this fraud in order to steal the money for himself is obvious, and any jury must so find. That he did it in the sense in which Willes (J.) means the word "benefit" is not true upon the admitted facts. Willes (J.) cannot have meant that the principal is absolved whenever his agent intended to appropriate for himself the proceeds of his fraud. Nearly every rogue intends to do that. As to the case of *Barwick* v. *English Joint Stock Bank*, I entirely concur in the opinion about to

---

(*a*) Between the date of the argument of the case and the delivery of the reasons for their Lordships' judgment, Earl Loreburn had resigned the office of Lord Chancellor, and his judgment was read by Viscount Haldane, L.C. Lord Robson, who was present during the argument, and assented to the judgment, was prevented by ill-health from giving his reasons.

be delivered by Lord Macnaghten, which I have had the advantage of reading. If the agent commits the fraud purporting to act in the course of business such as he was authorised, or held out as authorised, to transact on account of his principal, then the latter may be held liable for it, and if the whole judgment of Willes (J.) be looked at instead of one sentence alone, he does not say otherwise.

EARL OF HALSBURY—I, in common I believe with all your Lordships, think that this appeal must be allowed and that judgment must be entered for the plaintiff, and but for what appears to be a singular misapprehension I should not have thought it necessary to add anything to Scrutton, J.'s, very careful and very accurate judgment; but I think that the judgment in *Barwick* v. *English Joint Stock Bank* has been misunderstood, and as it is certainly a judgment of very high authority it is desirable to examine it carefully and to see what it really did decide, since it has been several times referred to as deciding what it certainly did not decide.

It was a decision of the Exchequer Chamber delivered by Willes (J.), the Court consisting of Blackburn, Keating, Mellor, Montague Smith, and Lush (JJ.), as well as the learned Judge who probably, though not certainly, wrote the judgment, with whom all the Judges concurred—a judgment, therefore, of the very highest authority, and one which I think it would be impossible to suppose that we are saying anything to shake. The actual decision of the Court was that Martin (B.) was wrong in non-suiting the plaintiff and ordering a new trial; and I think that one source of the misapprehension to which I have referred is the care with which the learned Judges avoided deciding the question or assuming how it was to be decided by the jury in the new trial which was then ordered. So far from giving any authority for the proposition in favour of which it is quoted, the Court went out of its way to disclaim the existence of any doubt about the principle that the principal is answerable for the act of his agent in the course of his master's business, and the words added "and for his benefit" obviously mean that it is something in the master's business; and the judgment in question says that the question was settled as early as Lord Holt's time—a tolerably strong indication that the Judges thought that there was not much doubt about what the law is now.

Lord Holt, who for more than twenty years presided over the Court of King's Bench with the confidence of all parties at a somewhat stormy point of our history, and has been described as a perfect master of the common law, speaks in the case referred to—*Hern* v. *Nichols* (1 Salk. 288)—with no uncertain voice upon the subject, and his view was confirmed and adopted by such a court as I have described after more than two centuries. The case was this—An action on the case for a deceit was brought by one Hern against a merchant named Nichols. The reporter seems to have had some difficulty in making out what the particular kind of silk was, for he has left its description blank; but enough of the pleadings are given to indicate very clearly what the complaint was. The plaintiff found out that one kind of silk was represented as being sold and another and an inferior sort of silk was supplied. Upon trial, says the report, not guilty pleaded, it appeared there was no actual deceit by the defendant, but it was by his factor beyond sea, and the doubt was whether this should charge the merchant, and Holt (C.J.) was of opinion "that the merchant was answerable for the deceit of his factor, though not *criminaliter* yet *civiliter;* for, seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust in and confidence in the deceiver should be a loser than a stranger."

I should be very sorry to see a principle which appears to me of very great value shaken by any authority, and no treatise on agency that I have ever come across has ever shaken it, and it would be strange indeed if it should be shaken by the decision in the case of *Barwick* v. *English Joint Stock Bank*, since that case appears to me a strong authority confirming and strengthening the accuracy of that principle.

LORD MACNAGHTEN—In the office of Grace, Smith, & Co., a firm of solicitors in Liverpool of long standing and good repute, the appellant Emily Lloyd, a widow woman in humble circumstances, was robbed of her property. It was not much—a mortgage for £450 bequeathed to her by her late husband, and two freehold cottages at Ellesmere Port which she bought herself without legal assistance for £540 after her husband's death. But it was all she had; and after the order of the Court of Appeal reversing a decision in her favour pronounced by Scrutton (J.), who tried the case with a special jury, she was compelled to appeal to this House as a pauper.

At the date of the transaction which gave rise to this litigation Mr Frederick Smith was the sole member of the firm of Grace, Smith, & Co. He was a gentleman "devoted," as he says, "to public work," meaning by that, I suppose, that his proper business as a solicitor was a matter of secondary consideration with him. There is no imputation or reflection on the honour of the firm or on the honesty or honour of Mr Frederick Smith. The fraud of which Mrs Lloyd complained was committed by his accredited representative, a clerk in the office—one Sandles—in the course of the business which Mrs Lloyd had put into the hands of the firm, which was undoubtedly a solicitor's legitimate business. Mrs Lloyd thought that Sandles was a member of the firm. He was really conveyancing manager and managing clerk. He conducted the conveyancing business of the firm without supervision. Mr Smith admits that Sandles was "practically second in command." But in his own department he was in supreme command. He represented the firm to all

intents and purposes just as much as if he had been a partner. Mr Smith says that he never gave away his own authority. In proof of this statement, or in connection with it, Mr Smith adds, "I was supposed to be told by Sandles." What he was told or supposed to be told does not appear from the learned Judge's notes. The fraud was committed in January 1910. It was not discovered until the following April, when Mr Smith dismissed Sandles for some irregularity, and Mrs Lloyd's deeds, for which she held a receipt in the name of the firm, were not to be found.

The story of the fraud is this: On the 11th January 1910 Mrs Lloyd called at the office of Grace, Smith, & Co. It was her second visit on the business about which she wanted the firm's advice. She had called in the preceding November to make some inquiries about her property; and once before that, when the purchase of the Ellesmere Cottages was completed, she had been to the office to get her deeds from Grace, Smith, & Co., who were the vendor's solicitors. That was all she knew of the firm. On the 11th January 1910 she saw Sandles. She was dissatisfied with the return which she got from her property. Sandles advised her to call in the mortgage and to sell the Ellesmere Port property. He asked her to come the next day and bring her deeds with her. On the 12th she brought her deeds and gave the instructions which Sandles had suggested. After some conversation Sandles left the room, taking the deeds with him. He returned in about twenty minutes with one of the clerks and put before her two documents, which he told her to sign. He did not tell her what they were. She did not read them. She signed both without demur or question, believing them, she says, to be something which she "had to sign before the houses were sold." It turned out that one was a transfer of the mortgage to Sandles himself, expressed to be in consideration of £450 paid to Mrs Lloyd. The other was an absolute conveyance to Sandles of the Ellesmere Port property with a receipt for purchase money in the body of the deed. At the same time he gave her a receipt for her deeds in his own name. She showed the receipt to a friend, who said that it was in an odd form and that she ought to have a receipt in the name of the firm. On the 14th she wrote to say that she had changed her mind and wished to cancel her instructions. She went back to the office on the 17th and asked for a receipt for her deeds in the name of the firm. Sandles gave her the receipt which she asked for at once. Armed with the two deeds, executed by Mrs Lloyd and witnessed by one of the clerks of the firm, Sandles promptly called in the mortgage, transferred it, and disposed of the proceeds in payment of a debt of his own. The conveyance of the Ellesmere property he pledged with a bank to which he was indebted. At the trial the learned Judge put a series of questions to the jury. In answer to the first question the jury stated that "in receiving the deeds and taking instructions to sell the property and call in the mortgage debt Sandles professed to act as conveyancing manager to Messrs Grace, Smith, & Co." The other questions were framed to meet a view of the meaning and effect of the well-known decision in *Barwick* v. *English Joint Stock Bank* which no doubt has obtained currency of late, but which, I think, is erroneous. The answers to these questions are not of much assistance in deciding the real question at issue. Then the jury added a rider that they were of opinion that "throughout the whole history of the transaction Mrs Lloyd believed that she was dealing with Messrs Grace, Smith, & Company."

It was agreed by the parties that any supplementary finding of fact which it became necessary to decide should be made by the learned Judge. Under that agreement the learned Judge, as he says, "found as facts that it was within the scope of Sandles' employment to advise clients who came to the firm to sell property as to the best legal way to do it and the necessary documents to execute; that the client did rely on the representations of Sandles professing to act on behalf of the firm that the documents in question were necessary to facilitate and carry out the sale of the land for her; that she did not know that she was signing conveyances to Sandles outside the scope of his employment, and that she was justified in relying on the representation of Sandles without reading and trying to understand the documents tendered to her." That seems to me to be a clear finding that the fraud was committed in the course of Sandles' employment and not beyond the scope of his agency. The learned Judge thereupon, after consideration, gave judgment for the plaintiff. His decision was reversed by the Court of Appeal (Vaughan Williams, L.J., dissenting).

The first line of defence set up by Mr Smith was that Mrs Lloyd was not a client of the firm at all, but a personal friend of Sandles, and that the transaction was a private deal between Mrs Lloyd and Sandles. It is enough to say that there is no foundation for this defence. It was negatived by the jury in their answer to the first question and in the rider which they added to their special verdict. Sandles no doubt was playing a double game. To Mrs Lloyd he was Grace, Smith, & Company; to the clerks in the office Mrs Lloyd's visits were the private visits of a personal friend.

The other line of defence which found favour with the Court of Appeal requires more consideration. It was rested on the fact that the fraud was committed not for the benefit of the firm but for the benefit of Sandles himself. It was contended that *Barwick's* case is an authority for the proposition that a principal is not liable for the fraud of his agent unless the fraud is committed for the benefit of the principal. *Barwick* v. *English Joint Stock Bank* is no doubt a case of the highest authority. It was decided in the Exchequer Chamber, and the judgment was delivered by Willes, J. But I agree with Lord

Halsbury that the case has been misunderstood in late years, and that it does not decide any such proposition as that for which it was cited in the Court of Appeal. It decided two things. It decided that the learned trial Judge was wrong in nonsuiting the plaintiff. It also decided that if on a new trial the jury should come to the conclusion that the agent of the bank had in fact committed the fraud which in the pleadings was charged as the fraud of the bank, then the principal, though innocent, having received the proceeds of the fraud, must be held liable to the party defrauded; and I think it follows from the decision, and the ground on which it is based, that in the opinion of the Court a principal must be liable for the fraud of his agent committed in the course of his agent's employment and not beyond the scope of his agency, whether the fraud be committed for the principal's benefit or not.

It must be remembered that in 1867, when that case was decided, there was some difference of judicial opinion on the question whether an innocent principal was liable for the fraud of his agent even when he had received the benefit of the fraud. In *Barwick's* case the agent committed the alleged fraud, if he did commit it, for the benefit of his principal. It may be that he was indirectly acting for his own benefit. He may have wished to recommend himself to his principals by astuteness and zeal in their service, or he may have intended to make amends for over-confidence in an impecunious customer, but the direct pecuniary benefit was the benefit of the principals. It must also be remembered that in the then recent case of *Udell* v. *Atherton* (1861, 7 H. & N. 172), by an equal division of the members of the Court an innocent principal succeeded in retaining the benefit of a fraud committed by his agent. Possibly that case in some measure turned, as *Cornfoot* v. *Fowke* (1840, 6 M. & W. 358) is said to have turned, on a question of pleading; but certainly one of the learned Judges, who was in favour of the defendant, though he held strongly that an innocent principal was not liable in an action of deceit for the fraud of his agent even though he had profited by it, expressed an opinion that there was no form of action in which liability for vicarious fraud could be established against an innocent principal. It was, I think, in reference to the facts of the particular case under review, where the fraud, if committed, must have been committed for the benefit of the principal, that Willes, J., expressed himself in the language which has been misunderstood. What he said was this—"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." To that statement of the law no objection of any sort can be taken. But it is a very different proposition to say that the master is not answerable for the wrong of the servant or agent, committed in the course of the service, if it be not committed for the master's benefit. Willes, J., does not, I think, say anything of the kind. In a sentence immediately preceding the sentence which I have quoted he observes that the question whether the principal is answerable for the act of an agent was settled as early as Lord Holt's time—a general observation not confined to the case where the principal is a gainer by the fraud. The question as to the meaning and effect of the ruling of Willes, J., may, I think, be best ascertained by reference to a few cases in which some of the learned Judges who took part in the decision in *Barwick's* case delivered opinions. Of the Judges who were concerned in *Barwick's* case none were more eminent than Montague Smith and Blackburn, JJ. They were second only—if they were second—to Willes, J., himself, and their views at least are on record.

The first important case in which the ruling in *Barwick's* case was discussed was the case of *Mackay* v. *Commercial Bank of New Brunswick* (1874, L.R. 5 P.C. 394). In that case the Judicial Committee reaffirmed the ruling of Willes, J. There the fraud was committed for the benefit of the principal. But it was argued by Mr Benjamin, Q.C., that the appellants in the Privy Council would be entitled to retain the verdict if they had sustained damage from the fraudulent representation of an agent made within the scope of his authority even though the principal had not profited thereby. The judgment was delivered by Sir Montague Smith. He observed that their Lordships regarded 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." He discussed at some length what meaning was to be attached to the expression "the scope of the agent's authority." "There are," says Sir Montague Smith, "some cases to be found apparently at variance as to the interpretation and the adaptation to circumstances of this doctrine . . . it may be generally assumed that in mercantile transactions principals do not authorise 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 authorised 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." Then Sir Montague Smith says—"The best definition of it is to be found in the case of *Barwick* v. *English Joint Stock Bank*," and he quotes the words of Willes,

J., who, after enumerating instances where the principle has been applied, proceeded as follows—"In all these cases it may be said, as it was said here, that the master had not authorised the act. It is true that he had not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in." At the conclusion of the judgment, in reference to Mr Benjamin's argument, his Lordship expresses himself as follows—"It is not necessary to determine whether or not the plaintiffs could have maintained their verdict if they had proved only that 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." It is difficult to imagine that Sir Montague Smith would have expressed himself in this manner if he had supposed that the question which he reserves had been already determined in the case of *Barwick* v. *English Joint Stock Bank*.

Mackay v. *Commercial Bank of New Brunswick* was decided in 1874; it was followed in 1877 by *Swire* v. *Francis* (3 App. Cas. 106)—a case also in the Privy Council. That was a case in which the principal was held liable for the fraud of his agent, though it was committed for the benefit of the agent himself and not for the benefit of the principal. The judgment was delivered by Sir Robert Collier, but Sir Montague Smith was a party to the judgment.

The only other case with which I will venture to trouble your Lordships is the case of *Houldsworth* v. *City of Glasgow Bank* (7 R. (H.L.) 53, 5 App. Cas. 317, 17 S.L.R. 510) decided in 1880. In that case *Barwick* v. *English Joint Stock Bank*, *Mackay* v. *Commercial Bank of New Brunswick*, and *Swire* v. *Francis* are referred to at some length, both by Lord Selborne and by Lord Blackburn. Lord Selborne observes, as has been observed in other cases, that the principle on which those cases were decided was a principle, not of the law of torts or of fraud or deceit, but of the law of agency. "The decisions in all these cases proceeded," he said, "not on the ground of any imputation of vicarious fraud to the principal, but because (as it was well put by Willes, J., in *Barwick's* case) 'with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong.'"

Here I must ask your Lordships' particular attention to the fact that in the passage which Lord Selborne quotes from the judgment of Willes, J., as explaining the true ground of decision in *Swire* v. *Francis*, as well as in *Barwick's* case and in *Mackay* v. *Commercial Bank of New Brunswick*, the words "and for his master's benefit" are omitted. In the original they follow the words "in the course of his master's business." Unfortunately in the report in 5 App. Cas., though the passage is printed as a quotation with inverted commas, the omission is not denoted in the usual way of by asterisks, and it seems to have escaped observation. But it is most significant. No one who calls to mind Lord Selborne's extreme accuracy in such matters can doubt that the omission was intentional. If the words omitted had been left standing the passage would not have been applicable to *Swire* v. *Francis*. In *Barwick's* case the words are appropriate. In a general statement of the law they are out of place. That this was Lord Selborne's own opinion is evident. On the words as occurring in *Barwick's* case Lord Selborne makes no comment. When he comes across the same expression in Lord Cranworth's judgment in *Western Bank of Scotland* v. *Addie*, 1867 (L.R. 1 H.L. Sc. 145, 5 M. (H.L.) 80) he gives a note of warning. There it is made part of a general proposition; and Lord Selborne says that the words "may perhaps require some enlargement or explanation." That is quite enough to show that Lord Selborne was not prepared to accept them as an integral part of the proposition which he considered the true ground of decision in *Barwick's* case and the two cases which followed it without some qualification.

Lord Blackburn's view of the judgment in *Barwick's* case requires no explanation. It is clear enough. After referring to *Barwick's* case he expresses himself as follows—"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 come these important words—"The substantial point decided was, as I think, that an innocent principal was civilly responsible for the fraud of his authorised agent acting within his authority to the same extent as if it was his own fraud."

That, 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 frauds. 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 those expressions is not easy to define with exactitude. To the circumstances of a particular case one may be more appropriate than the other. Whichever expression is used it must be construed liberally, and probably, as Sir Montague Smith observed, the explanation given by Willes, J., is the best that can be given.

In the case of *Udell* v. *Atherton*, Wilde, B., afterwards Lord Penzance, in his admirable judgment makes the following observation—"It is said that a man who is himself innocent cannot be sued for a deceit in which he took no part, and this whether the deceit was by his agent or a stranger. To this as a general proposition I agree.

All deceits and frauds practised by persons who stand in the relation of agents, general or particular, do not fall upon their principals. For unless the fraud itself falls within the actual or the implied authority of the agent it is not necessarily the fraud of the principal." In the same case, in a passage which was approved apparently by the Court in *Mackay* v. *Commercial Bank of New Brunswick*, Martin, B., stated the question to be, "Was the agent's situation such as to bring the representation he made within the scope of his authority?" In those passages the true principle is, I think, to be found.

The principle as stated by Lord Blackburn is in accordance with the opinion expressed by Story, J. I venture to quote Story's opinion, not only because it is the considered opinion of a most distinguished lawyer, but also because it is cited apparently with approval in the Court of Queen's Bench, consisting of Cockburn, C.J., Blackburn, Mellor, and Lush, J.J., by Blackburn, J., himself in a case which occurred in the interval between the date of *Barwick's* case and the decision in *Houldsworth* v. *City of Glasgow Bank*. The passage in the judgment of Blackburn, J., in *McGowan and Co.* v. *Dyer* (1873, L.R., 8 Q.B. 141) is as follows—"In Story on Agency the learned author states, in section 452, the general rule that the principal is liable to third persons in a civil suit 'for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent *in the course of his employment*, although the principal did not authorise, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts or disapproved of them.' He then proceeds in section 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 or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorised them to be done or he has subsequently adopted them for his own use and benefit."

I may observe in passing that although Lord Bramwell held strongly the view that for the fraud of an agent committed for the principal's benefit the principal is not answerable, either in an action of deceit or in any other form of action, yet he seems to think that it follows (as indeed it must follow logically) that if liable in that case the principal must be liable in all cases. For he suggests in *Weir* v. *Bell*, (1878, L.R. 3 Ex. Div. 238) that, instead of imputing vicarious frauds to the principal, such cases as *Barwick* v. *English Joint Stock Bank* might be decided on the ground that "every person who authorises another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract." With the most profound respect for Lord Bowen and Lord Davey, I cannot think that the opinions expressed by Lord Bowen in *British Mutual Banking Company* v. *Charnwood Forest Railway* (1887, L.R., 18 Q.B.D. 714), and by Lord Davey in *Ruben* v. *Great Fingall Consolidated* (1906 A.C. 439), in reference to the question under discussion, can be supported either on principle or on authority. In neither case were the opinions so expressed necessary for the decision, and I dissent most respectfully from both. The only difference in my opinion between the case where the principal receives the benefit of the fraud and the case where he does not, is that in 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.

So much for the case as it stands upon the authorities. But, putting aside the authorities altogether, I must say that it would be absolutely shocking to my mind if Mr Smith were not held liable for the fraud of his agent in the present case. When Mrs Lloyd put herself in the hands of the firm, how was she to know what the exact position of Sandles was? Mr Smith carries on business under a style or firm which implies that unnamed persons are, or may be, included in its members. Sandles speaks and acts as if he were one of the firm. He points to the deed boxes in the room and tells her that her deeds are quite safe in "our" hands. Naturally enough she signs the documents which he puts before her without trying to understand what they were. Who is to suffer for this man's fraud? The person who relied on Mr Smith's accredited representative, or Mr Smith who put this rogue in his place and clothed him with his authority. If Sandles had been a partner in fact, Mr Smith would have been liable for the fraud of Sandles as his agent. It is a hardship to be liable for the fraud of your partner, but that is the law under the Partnership Act. It is less a hardship for a principal to be held liable for the fraud of his agent or confidential servant. You can hardly ask your partner for a guarantee of his honesty, but there are such things as fidelity policies. You can insure the honesty of the person whom you employ in a confidential situation, or you can make your confidential agent obtain a fidelity policy.

With all respect to the learned Judges of the Court of Appeal, I think that the decision appealed from is wrong. I think that they are in error as regards the law, and I think that they have not taken the correct view of the facts. They look at the execution of the deeds by which Sandles cheated Mrs Lloyd out of her property as if it were an isolated transaction—as a thing standing by itself—whereas the trick was so cunningly contrived as to seem to the victim of the fraud a mere matter

of course—a trifling incident in the business about which the firm was being employed.

In the result I am of opinion that Mr Frederick Smith was clearly liable for the fraud of his agent.

LORD ATKINSON—I concur. I agree with every sentence in my noble and learned friend's exhaustive judgment.

LORD SHAW—The defendants, against whom personally no suggestion of a dishonouring kind is made, plead that they are not responsible in law for the conduct of Sandles, which was nefarious, and that in the transactions Sandles acted for his own benefit. Lord Macnaghten has, in the opinion just delivered, narrated the material facts in the suit, and it is quite unnecessary to resume them. With that opinion I entirely agree.

The case is in one aspect the not infrequent one of a situation in which each of two parties has been betrayed or injured by the fraudulent conduct of a third. I look upon it as a familiar doctrine, as well as a safe general rule, and one making for security instead of uncertainty and insecurity in mercantile dealings, that the loss occasioned by the fault of a third person in such circumstances ought to fall upon the one of the two parties who clothed that third person as agent with the authority by which he was enabled to commit the fraud. Nor do I think it doubtful that it would be quite unsound in law if this result could be avoided by an investigation of the private motives—in the direction of his own as distinguished from his master's benefit—which animated an agent in entering into a particular transaction within the scope of his employment. The bulk of mercantile dealings are not direct, but are conducted through agents vested with an ostensible authority to act for their employers. When the authority is of a limited kind, the person dealing with such an agent is bound to assure himself that the limits are not exceeded, a familiar instance of which is the case of bills signed *per procurationem*. But when the authority does ostensibly include within its scope transactions of a particular character, then *quoad* a third party dealing in good faith with such an agent the apparent authority is, as is well settled, equivalent to the real authority and binds the principal.

It is not difficult to discover the legal source of much of the language employed in this case and appearing even in the questions put to the jury. It sprang from two sentences in the judgment of Willes, J., in *Barwick* v. *London Joint Stock Bank*, a case in which it is too often forgotten that the bank was in the position of having had and received, and of maintaining its right to retain, money paid to it in consequence of a misrepresentation by its agent. For the purpose of the present question the outstanding fact is the very one which is apt to be forgotten, namely, that the representation was made, and was admitted to have been made, in the interests of the bank as well as by its agent. These two things were conjoined in fact. This being so, in the course of his judgment Willes, J., used the words—"But 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 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 learned Judge was not in this language setting up the necessity for a conjunction of these two things, but was dealing with a case in which admittedly the conjunction had occurred. I am aware of the approval given to this language in subsequent cases, as, for instance, in *Ruben* v. *Great Fingall Consolidated, Limited*, by Lord Davey, and in *British Mutual Bank* v. *Charnwood Railway*, by Lord Bowen. If I may respectfully do so, I tender my entire concurrence with the opinion just delivered upon the dicta of Lord Davey and Lord Bowen in these cases. But I do so subject to this, that I cannot bring myself to think that it was ever distinctly meant to be announced or suggested as law that, on the assumption that a person deals with an agent in good faith, and that the conduct of the agent is fully within the scope of his authority, then the principal of that agent is not responsible for the agent's fraud, by reason of the fact that the agent did not mean to benefit his principal by the fraud, but to benefit himself. That in my opinion is not the law. On the contrary, the principal is in such circumstances legally responsible for his agent's conduct. I incline to the view that in most, if not all, of the cases cited in argument it will be found upon investigation that the transaction which was in question was in fact not merely for the agent's own benefit, but a piece of conduct beyond the scope of his employment. It was so in the instances cited, and a late and clear instance of this (much founded on at your Lordships' Bar) is *Cheshire* v. *Bailey* (1905, 1 K.B. 237).

I refer to the analysis of the decisions in the judgment of Scrutton, J., and I add a reference to a somewhat similar analysis in the case of *Hambro* v. *Burnand* (1904, 2 K.B. 10) by the late Lord Collins, then Master of the Rolls. I respectfully give my adhesion, without a further statement on my own part, to the views expressed in these judgments.

There are two sentences in the judgment of Lord Herschell, L.C., in *Thorne* v. *Heard & Marsh* (1895 A.C. 495) which I venture to cite as in my opinion applicable to the present case, namely—"It appears to me perfectly clear that in order to charge any person with a fraud which has not been personally committed by him, the agent who has committed the fraud must have committed it while acting within the scope of his authority—while doing some-

thing and purporting to do something on behalf of the principal. If the person is doing something within the scope of his authority, and purporting to do it for his principal, although in doing it he commits a wrong which his principal neither sanctioned nor intended, the principal may be liable. But if the person, although he has been employed as agent, is not, in the transaction which is the wrongful act, acting for, or purporting to be acting for, the principal, it seems to me impossible to treat that as a fraud of the principal."

In the present case, as I have said, it has been clearly found that the fraud was committed in the course of, and within the scope of, the duties with which the defendants had entrusted Sandles as their managing clerk. In my opinion they must in these circumstances stand answerable in law for their agent's misconduct.

I think that the appeal should be allowed and that the action should be disposed of in the same sense as in the judgment of Scrutton, J., where the treatment of the whole case, both in law and in fact, appears to me to have been correct, and with his opinion I also respectfully agree.

Judgment appealed from reversed, and judgment of Scrutton, J., restored with costs.

Counsel for the Appellant—Tobin, K.C.—J. A. Johnston. Agent—Walter C. Broadbridge, Solicitor.

Counsel for the Respondents—Greer, K.C.—F. Cuthbert Smith. Agent—G. Thatcher, for Grace, Smith, & Company, Liverpool, Solicitors.

HOUSE OF LORDS.

Friday, July 19, 1912.

(Before the Lord Chancellor (Viscount Haldane), the Earl of Halsbury, Lords Macnaghten and Atkinson.)

WATKINS *v.* NAVAL COLLIERY COMPANY LIMITED.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Reparation—Master and Servant—Negligence—Statutory Duty—Management of Mine—Responsibilities of Owners—Coal Mines Regulation Act 1887 (50 *and* 51 *Vict. cap.* 58), *sec.* 16.

The Coal Mines Regulation Act 1887 enacts—Section 16 (1)—"The owner . . . of a mine shall not employ any person in the mine or permit any person to be in the mine for the purpose of employment therein unless the following conditions respecting shafts or outlets are complied with, that is to say (*c*)—Proper apparatus for raising and lowering persons at each shaft or outlet shall be kept on the works belonging to the mine; and such apparatus, if not in actual use at the shafts or outlets, shall be constantly available for use."

A miner, while being lowered in a cage with twenty-six others, was killed by an accident caused by the defective condition of a spanner bar, the snapping of which caused the reversing gear of the winding engine to break down, which in turn caused the brake to give way and precipitated the cage to the bottom. Two months before the accident the manager of the mine had increased the complement of the cage from twenty to twenty-six men. In an action brought by the widow against the owners of the colliery a jury found that the accident was due to the inadequacy of the brake for this larger complement of men, combined with the defective condition of the spanner bar, and that the respondents had used reasonable care in selecting competent officials to whose neglect to provide adequate machinery the accident was due. *Held* that section 16 of the Coal Mines Regulation Act 1887 imposed on the respondents an absolute statutory duty to provide adequate machinery at the shaft, and in consequence of their failure to do so the respondents were liable in damages.

Britannic Merthyr Coal Company v. *David* (1910 A.C. 74) *distinguished.*

Appeal from a judgment of the Court of Appeal (VAUGHAN WILLIAMS, FARWELL, and KENNEDY, L.JJ.), reported 1911, 2 K.B. 162, reversing that in favour of the appellant given by PICKFORD, J., with a special jury.

The *facts* of the case appear from their Lordships' judgment, which was delivered as follows:—

LORD CHANCELLOR (HALDANE) — The action which gives rise to this appeal was brought by the appellant on behalf of herself and her infant children. The claim was based on a breach of statutory duty by the respondents, who are a Colliery Company carrying on business subject to the provisions of the Coal Mines Regulation Act 1887. It was also framed alternatively as an action at common law for negligence. It is agreed that the claim is not one which the Employers' Liability Act 1880 covered.

The action was brought on account of a fatal accident which happened to Albert Watkins, the husband of the appellant, on the 27th August 1909. He was one of twenty-six workmen who were being lowered on that day down a coal pit in a cage provided by the Colliery Company for the purpose. Until June 1909 the cage in question had been used for lowering and raising a load not exceeding twenty men at a time, and for such a load the brake on the winding engine was adequate. In June 1909 Mr Hollister, who had become manager of the colliery a short time previously, increased the number of men authorised to be lowered or raised at one time to twenty-six. On the occasion of the accident the reversing gear of the winding engine sud-