THE LIABILITY OF A MASTER FOR THE TORTS OF HIS SERVANT.

AITCHISON v. PAGE MOTORS LTD.

By G. W. PATON, B.A., B.C.L. (Oxon.); M.A. (Melb.), Professor of Jurisprudence in the University of Melbourne.

THE influence of the theory that there should be no liability without fault has been such that many minds have been rather startled at the spectre of vicarious liability. The present law as to a master's liability for the torts of his servant is the result of a compromise: on the one hand it seemed unjust that an innocent third party should suffer from the activities of a servant which brought profit to the master: on the other hand too severe a burden would be placed on industry if the master were made liable for every tort of a servant. In spite of the fact that the simplicity of the language in the text-books leads to the view that the only difficulty arises in the application of clear principles to complicated facts, a little analysis reveals that there are two strands of authority which have never been quite reconciled. One line of cases speaks of the course of employment, of the master's responsibility for the acts of a servant in a situation where he was placed by the master; another of the doctrine of real or ostensible authority. The first tends to decisions which increase, the latter to cases which narrow the master's liability. This statement is not hazarded as a result of deduction from the respective meanings of "scope of authority" and "course of employment" (two very difficult phrases to define), but is suggested by an examination of the cases. As a matter of theory we might suspect that the two terms were inextricably bound together, but there is a minority view which rejects this thesis for the view that the course of employment covers a much wider area than the scope of authority.[1]

(A) Let us first consider cases of wilful wrongdoing taking the decision in *Lloyd* v. *Grace Smith & Co.*[2] as the starting point. The facts and the decision are well known, but it is a little difficult to phrase the ratio decidendi in exact terms that will not conflict with other decisions of the House of Lords. For *Lloyd's* case cannot be taken as laying down the broad principle that if a servant does dishonestly what he is employed to do honestly the master is liable, for such an interpretation conflicts with many other decisions. In *Cheshire* v. *Bailey*[3] plaintiff hired from defendant a brougham and coachman in order that the plaintiff's traveller might sell his wares. Defendant was aware that the traveller, in the course of his business, would leave the brougham and supplies in charge of the coachman. The latter made an arrangement with certain thieves, and in the absence of the traveller drove the brougham to a place where the wares were stolen. The decision was that the criminal act of the servant was outside the scope of employment. It seems at first sight as if this decision is overruled by *Lloyd's* case, but in his speech Lord

1. E.g. Isaacs J., *Bugge* v. *Brown* 26 C.L.R., at 116.
2. [1912] A.C., 716.
3. [1905] 1 K.B. 237.

Shaw[4] refers to *Cheshire* v. *Bailey* with approval. Moreover, in 1920 *Mintz* v. *Silverton*[5] follows it. It has been suggested that it is hard to see why the coachman in *Cheshire's* case did not make his master liable by analogy with *Lloyd's* case, for in both cases the dishonesty seems to be in the very thing that the servant was employed to do. If we use the language of "course of employment," it is perhaps difficult, but recent cases have used the test of "real or ostensible authority," and the difference between the decisions is explained as depending on a difference of fact. A solicitor's clerk has ostensible authority to engage in legal business with clients, and he is "held out" by his master as a person fit to be trusted—and to-day it seems the decision in *Lloyd's* case must be confined to situations analogous to this. It therefore does not apply to *Cheshire's* case, where the coachman was not "held out" by his master as an honest man. "If the agent commits the fraud, purporting to act in the course of business such as he was authorized to transact on behalf of his principal, then the latter may be held liable for it."[6] But the test of "authority" applies more readily to some cases than others. If the coachman in *Cheshire's* case was "held out" by his master, it was as a careful driver, and not as an honest bailee. But other cases show that in some respects a coachman is "held out" as a bailee, for though his master is not responsible for a direct theft by the coachman, if the latter innocently but negligently leaves the vehicle, and thus gives an opportunity to strangers to steal the goods, that constitutes negligence in the course of employment, for which the master is liable. But it seems rather a specious rationalization to say that the coachman is held out as a careful driver and a vigilant bailee, but not as an honest bailee. Hanbury[7] makes the interesting suggestion that *Cheshire* v. *Bailey* and *Mintz* v. *Silverton* were cases on bailment, while *Lloyd's* case was not. "Is it still too late to say that cases of bailment fall outside the general principle of vicarious liability laid down in *Lloyd* v. *Grace Smith and Co.*?" As the learned author himself hints, it seems that the day is now past when this can be done by the Courts. At any rate recent cases make no point of this distinction.

Many decisions support a narrow interpretation of *Lloyd's* case, using the language of "real or ostensible authority." Scrutton L.J. understands *Lloyd's* case to be one where "a servant or agent using ostensible authority to do a certain class of acts for his employer .... acts for his own benefit, with no notice to the person injured of his wrongful action."[8] This may seem a reasonable explanation, but the danger is that if the doctrine of authority be pushed too far, it cuts down the master's liability too greatly, and leads to decisions which are at first sight hard to reconcile with *Lloyd's* case itself.

Let us consider *Cavanagh's* case.[9] It is the duty of the secretary

4. [1912] A.C., at 741.
5. (1920) 36 T.L.R. 399
6. *per* Earl Loreburn at 725.
7. Essays in Equity, pp. 151-2.
8. *Slingsby* v. *District Bank Ltd.* [1932] 1 K.B. at 560-561.
9. *Geo. Whitechurch Ltd.* v. *Cavanagh* [1902] A.C. 117.

of a company to issue certificates of transfer when shares have been lodged in the office. The House of Lords decided that the company was not liable if the secretary fraudulently issued a certificate for shares which had not been lodged. At first sight the facts of this case are analogous to *Lloyd's* case, but Lord Macnaghten said that liability must depend on the authority that the secretary had or was held out as having. And the facts showed that the secretary's authority was limited to certifying transfers only where shares actually had been lodged. The difficulty for a third party, however, is that the fact which gives authority to the agent—the lodging of the shares —is a matter peculiarly within the knowledge of the agent, and, while it would be possible for a third party to demand to see the shares, this is not usually done as a matter of business custom. What then is the difference between this case and *Lloyd's* case? It appears to be merely a difference of fact: a solicitor's clerk has ostensible authority to conduct any kind of legal business, whereas a company secretary has ostensible authority to certify transfers only where shares have actually been lodged. *Cavanagh's* case was decided ten years before *Lloyd's* case, but it has been frequently applied since. Lord Russell[10] in 1934 approved Lord Macnaghten's dictum. Stallybrass[11] asks whether, in such a case as *Cavanagh's,* the company would be liable if its secretary had acted negligently instead of fraudulently. If the test of ostensible authority be used, surely it matters not which the act be. Authority was held to depend on factor (a), and if that factor be absent, surely negligence cannot create liability. Yet, as we shall see, the general tendency to speak of course of employment, where the act is negligent, has led to decisions which are wider than the doctrine of authority would justify.

Again it has been held that an act of forgery is outside the sphere of ostensible authority.[12] If a secretary forges a share certificate, the company is not bound, for the duty of the secretary is the ministerial one of delivering share certificates duly signed by the directors. The secretary, therefore, is not held out as having authority to issue certificates—but only to issue valid certificates. This view is supported by Wright J. (as he then was) in a recent case.[13] The test of liability is to discover the scope of agency, real or ostensible, and compare it with the act of fraud. To make the master liable the servant must have authority "express or implied to engage in the transaction in the course of which the wrongful act is committed." An executor was held not liable for the fraudulent act of a solicitor who, after changing an endorsement of a cheque signed by the executor, paid the money into his own account.

The doctrine of authority can thus be used to reconcile these cases, but in each of them the victim was misled into thinking that there was ostensible authority, because the fraud of the agent affected the very

10. *Kleinwort, Sons & Co.* v. *Assoc. Automatic Machine Corp. Ltd.* (1934) 50 T.L.R. 244.
11. Salmond, Torts, 102.
12. *Ruben* v. *Gt. Fingall Consolidated* [1906] A.C. 439, esp. per Lord Loreburn, at 443.
13. *Slingsby* v. *District Bank* [1931] 2 K.B. at 603.

fact on which the existence of ostensible authority depended. In all these cases the dishonesty of the servant was dishonesty in the very thing he was employed to do honestly. Nevertheless it seems to be accepted to-day that a wilful act of wrongdoing on the part of the servant will not make the master liable unless it is within the scope of real or ostensible authority. Some suggest that another condition may create liability—where the act is for the master's benefit. Surely, however, in normal cases, an act that was for the master's benefit would at least be covered by the doctrine of ostensible authority—if it were not it is submitted that a gratuitous tort committed by the servant would not fall within the course of employment. Smith and Jones are two rival contractors, and a servant of the latter imprisons Smith so that his tender will be late. This would be an act to Jones' benefit, but what Court would hold Jones liable if the servant acted on his own initiative? Whatever the rule may be, to say that the master is liable where the act is for his benefit is too sweeping.

Many of the cases dealing with the liability of corporations for the torts of servants committed in the course of undertakings which are beyond the power of the corporation are most easily explained upon the basis of lack of capacity to give authority. Goodhart[14] maintains that even if all the directors and shareholders gave an order to a servant to perform an act that was *ultra vires* the company, and the servant was guilty of a tort in carrying out these instructions, the company would not be liable, for there was a lack of capacity to give authority. There being no real or ostensible authority, the company escapes. This view is logical, and applies the same principles of agency both in contract and in tort, but it has not been followed in all cases,[15] on the ground that, whatever theory may dictate, it is inconvenient and unjust that a corporation should escape liability in tort to innocent third parties on a merely technical plea. Such an argument, however, means that we must reject "authority" as the sole determining factor in the course of employment, for since the lack of capacity of a corporation would be clear to third parties with very little examination, it is hard to see how the doctrine of ostensible authority could be applied.

There is much criticism of *Cavanagh's* case on the ground that it unduly narrows the liability of the master; it is this argument that is developed by Professor Wright[16] in an interesting note on the *Kleinwort* case.[17] "As a matter of logic on the question of *authority*, the decision is impeccable": but the test of *authority* is too narrow. Liability has been imposed on the master even where he has specifically forbidden the act in question.[18] Professor Wright argues that

14. Essays in Jurisprudence 90.
15. E.g. *Campbell* v. *Paddington Corporation* [1911] 1 K.B. 869
16. 13 Canadian Bar Review 116.
17. *Supra.* The facts of *Kleinwort's* case are very similar to those of *Cavanagh's* case.
18. E.g. the well-known case of *Limpus* v. *L.G.O. Co.* (1862) 1 H. & C. 526. For a recent example see *Col. Mut. Life Assur. Ltd.* v. *Producers, etc.* (1931) 46 C.L.R. 41.

there is no *authority* in *Lloyd's* case, for the clerk "was employed to act for his master, not for himself." It is true there was no real authority, but there was ostensible authority.[19] Is ostensible authority to be limited by the condition that third parties should be aware of the fact that a servant's authority extends only to honest actions? Logically this would be a possible doctrine, but *Lloyd's* case decided that "honesty" was not the determining factor—the bounds of ostensible authority can be discovered only by examining all the circumstances of each particular case.

Nevertheless Professor Wright is not alone in his criticism, for he cites the view of Isaacs J.: "It is more just to make the person who has entrusted his servant with the power of acting in his business responsible for injury occasioned to another in the course of so acting, than that the other and entirely innocent party should be left to bear the loss."[20] "The responsibility of a master does not depend merely on the question of authority express or implied. He may be liable even though the act be beyond any authority actually given by him. . . . . Nor does his responsibility rest on any doctrine of ostensible authority."[21] These words are not *obiter dicta,* for the decision appealed against depended on the doctrine that, since authority was limited, the course of employment was correspondingly limited. The facts were that defendant was a grazier, and as part of his contract with the station hands he was bound to supply them with food. On the particular day in question Winter was given uncooked meat, and ordered to cook it at an old house on the estate, but to save time Winter lighted the fire somewhere else, and was guilty of negligence in looking after it, with the result that it caused damage to the plaintiff. Since the master was bound by the contract to supply cooked food, it was reasonable to hold that Winter's cooking of the food was within the course of employment. The facts of this case, however, relate to an act of negligence, not a wilful act of wrongdoing, for while there was a breach of the master's instructions, there was no deliberate intention to harm another. It is, therefore, more conveniently considered under the next head.

(B) *Negligent Acts of the Servant.*—Here it is submitted that it is on the whole more convenient to use the term *course of employment.* In running down cases, it is true that the chauffeur had authority to drive, and that the accident arose as a result. But the actual authority of the chauffeur was limited to careful driving, and while we may introduce the doctrine of ostensible authority and say that he is necessarily held out to users of the highway as a careful driver, it is simpler to say that the accident happened during the course of employment, although in determining the latter the authority given to the servant will be a most important factor. For example where a chauffeur borrows his master's car without permis-

19. As Prof. Wright recognizes, but he does not seem to agree that this is the only possible basis of distinction.
20. *Bugge* v. *Brown* (1919) 26 C.L.R. at 117.
21. *Ibid,* at 116.

sion, he has no authority to drive, and therefore any injury he may inflict is not within the course of employment. But it is in this class of case that the doctrine of authority if pushed too far may become very limiting. If the authority of the servant exists only when he carries out his master's instructions in precise detail, then cases of liability would be comparatively rare. But this is certainly not the doctrine of English law for as has been pointed out the master in *Lloyd's* case could not escape on the ground that authority was limited to honest acts. "The law is not so futile as to allow a master, by giving secret instructions to his servant to discharge himself from liability. . . Suppose a master told his servant not to break the law, would that exempt the master from responsibility for an unlawful act done by his servant in the course of employment."[22] Most cases of reckless or negligent driving are contrary to specific instructions of the master. A mere breach by the servant of the detailed conditions laid down by the master as to the mode in which his instructions are to be carried out does not necessarily free the master from liability. Whether the servant's act is within the course of employment or not is a complex question of fact, and some of the cases are hard to distinguish. If a conductor drives a bus that is an act outside the scope of his employment; but if the driver is present while the conductor tries his hand, the master is liable, for it is negligence in the course of employment for the driver to allow an incompetent person to be in charge of the vehicle. The distinction between a negligent mode of carrying out the master's instructions and an act that is foreign to his employment is one that is difficult to apply. It is submitted that the decision of Isaacs J., in *Bugge* v. *Brown* (*supra*) was correct, for the servant was definitely instructed to light a fire—his disobedience merely related to the mode in which he carried out his master's instructions.

With this preamble, let us discuss *Aitchison* v. *Page Motors Ltd.*[23] Defendants, motor dealers and garage proprietors, received for repair at their garage the plaintiff's motor car. They sent the car to the manufacturer's works and Q., the defendants' service manager at the garage, called for it when it was ready. Instead of returning it at once to the garage Q. used it for his own purposes, and was killed while taking a corner at high speed. The car was wrecked beyond repair, and plaintiff claimed for its value, alleging that the accident had been caused by the negligence of defendants' servant. The defendants pleaded, *inter alia*, that Q. was not using the car in the course of emplayment, but Magnaghten J. held the defendants liable. Q. had actual or at least ostensible authority to take delivery of the car, but the difficulty is that when the accident occurred he was "on a frolic of his own." "In one sense of the words he obviously was not acting within the scope of his authority when he used the car for his own private purpose, but . . . the expression 'acting within the scope of authority' must not be construed in too narrow a sense,

22. *Limpus* v. *L.G.O. Co.*, 1 H. & C., 526, at 539 *per* Willes J.
23. (1935) 52 T.L.R. 137.

since in a narrow sense a wrongful act of a servant could hardly ever be within the scope of authority." The defendants authorized Q. to fetch the car, and it was held that they were answerable to the plaintiff for the manner in which he conducted himself in performing that service. This case is interesting as showing a certain impatience with the doctrine of authority.

If the judgment be regarded merely as a decision of the fact that although Q. deviated from his master's journey, the deviation was not sufficient to take Q.'s driving outside the course of employment, then there is little to be said: this is merely a question of weighing facts and thus interpreted the decision can be reconciled with other cases. Again the decision might be justified on the ground that Q. was "held out" by his master as a careful bailee of the car: if this be true, theft by Q. would make the master liable, and *a fortiori* mere negligence. What is unsatisfactory in the judgment is that the real points of difficulty are not discussed, the learned judge relying on the dictum of Willes J.: "For all these cases it may be said . . . that the master 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 the agent has conducted himself in doing the business which it was the act of his master to place him in."[24] This is, no doubt, a dictum which is an excellent introduction to an analysis of the cases, but in the light of the conflict in the cases one would expect more discussion of the real difficulties that arise. It is respectfully submitted, that although the decision may be justified on the grounds mentioned above, the judgment itself is likely to cause confusion. Little attempt is made to deal with the line of cases deciding that where a servant uses a car without authority for his own purposes the master is not liable for any injury he may inflict.

Conclusion.—It will now be apparent what was meant when it was claimed that there were two strands of doctrine. Where the act of the servant is one of wilful wrongdoing, the doctrine of "real or ostensible" authority seems to be the popular test. Where the act is one of mere negligence, many judgments prefer the term "course of employment," and are rather scornful of arguments proceeding from the premises of "authority." The explanation of this is that in case of wilful wrongdoing the narrow effects of the doctrine of actual authority may be avoided by the introduction of the theory of ostensible authority, while in cases of negligence *authority* is too often taken to mean actual authority, and in this form the test is rightly rejected. But this has the result that it is extremely difficult to reconcile the reasoning in cases illustrating the two points of view.

24. *Barwick* v. *Eng. J. S. Bk.*, L.R. 2 Ex. at 266.