MASTER AND SERVANT—OSTENSIBLE AUTHORITY—FORGERY.

Uxbridge Permanent Benefit Building Society v. Pickard[1]

Recent cases on vicarious liability have shown a tendency toward a liberal interpretation of the phrases "course of employment" and "scope of real or ostensible authority" and a reluctance to designate a servant's acts a "frolic of his own."[2] The present case contains a discussion of these terms and neatly illustrates the application of the test of ostensible authority. The defendant's clerk obtained advances from the plaintiff by producing a forged deed. The defendant contended (*inter alia*) that he was not liable for the clerk's fraudulent acts where the fraud involved forgery. In support of this argument he relied on the dictum of Wright J. (as he then was) in *Slingsby v. District Bank Ltd.*,[3] "an act of forgery is a nullity and outside any actual or ostensible authority, and outside the principle of *Lloyd v. Grace Smith & Co.*[4]" Both the trial judge, Atkinson J.,[5] and the Court of Appeal[6] were of opinion that this dictum should not be taken literally and that if it did bear the meaning contended for by the defendant it was not good law. It was held that fraud involving forgery is no different from any other case of fraud; the liability for such a fraud falls to be determined by exactly the same principles as govern other types of fraud. "Forgery is just like any other fraud. If it is committed within the ostensible authority of the agent, the principal is liable."[7] The suggestion that forgery lay outside the doctrine of *Lloyd v. Grace Smith & Co.* arose from a series of cases dealing with the liability of companies for the acts of their servants where it was held that a company is not responsible for the issue by its secretary of forged share certificates.[8] It is pointed out that this class of case depends on special circumstances. Thus Mackinnon L.J., says:[9] "Similarly the actual authority and, therefore, the ostensible authority of a secretary of a company can only be to sign documents which he is in fact authorised by the directors to sign and there again the limitation of an ostensible authority puts on inquiry a person dealing with him." The practical difficulty with this doctrine however is that the essential facts which give the Company's agent his authority and as to which third persons are put on inquiry are peculiarly within the knowledge of the agent and are also the facts as to which the fraud occurs.[10] Moreover could it not be said with apparently equal force that persons dealing with a solicitor's clerk must know that his real authority would be limited to raising money on genuine documents, and that if the ostensible authority of a solicitor's

1. (1939) 2 All E.R. 344 (C.A.).
2. E.g., *Aitchison v. Page Motors* 52 T.L.R. 137.
3. (1931) 2 K.B. 588 at p. 605.
4. (1912) A.C. 716.
5. (1938) 4 All E.R. at p. 329.
6. *Per* Sir Wilfrid Greene M.R. at p. 350.
7. *Per* Atkinson J. (1938) 4 All E.R. at 329. See also *per* Sir Wilfrid Greene M.R. (1939) 2 All E.R. at 349.
8. E.g., *Ruben & Ladenburg v. Great Fingall Consol.* (1906) A.C. 439. See also *Kreditbank Cassel v. Schenkers* (1927) 1 K.B. 826 and *Slingsby v. District Bank Ltd.* (1931) 2 K.B. 588, affd. (1932) 1 K.B. 544.
9. At p. 357.
10. See Prof. Paton's article in 1 *Res Judicatae* (1936) 85 espec. at 87-8.

clerk extends to transactions involving documents apparently genuine and in order though in fact not so, then so also should a company secretary's ostensible authority extend to transactions involving apparently genuine though in fact forged documents?

Pickard's case further illustrates the tendency in cases *of wilful* wrongdoing by a servant to use the test of "real or ostensible authority" rather than that of the "course of employment." Thus, in rejecting the contention of the defence that the clerk in committing this fraud was engaged on a "frolic of his own," so that his master would not be liable for his acts, Sir Wilfrid Greene M.R., said,[11] "With all respect to that argument, I cannot accept it. It appears to me to draw an analogy where no analogy exists, because, in the case of a servant who goes off on a frolic of his own, no question arises of any actual or ostensible authority upon the faith of which some third person is going to change his position. The very essence of the present case is that the actual authority and the ostensible authority to Conway were of a kind which, in the ordinary course of an every day transaction, was going to lead to third persons, on the faith of it, changing their position . . . It is totally different in the case of a servant driving a motor car, or in cases of that kind where there is no question of the action of third parties being affected in the least degree by any apparent authority on the part of the servant." The effect of this appears to be that the test of "real or ostensible authority" is to be applied in cases where there has been a reliance by the plaintiff on the ostensible authority of the servant so that the plaintiff has changed his position on the faith of that ostensible authority, thinking it the real authority; *i.e.*, to cases where there has been, to employ the expression used in the leading case of *Lloyd v. Grace Smith & Co.*, a "holding out," and the test of the "course of employment" is to be used only in cases where there has been no such reliance on the ostensible authority but the damage to the plaintiff has been caused in some other way, *e.g.*, in a motor accident caused by the servant's negligence.[12] The distinction however is not one which is in all cases easily applied and some of the cases are not very readily reconciled with it.

—K. A. AICKIN.

11. At p. 348.
12. See however *Aitchison v. Page Motors* 52 T.L.R. 137 where Atkinson J. applied the "real or ostensible authority" test to a motor accident case where the plaintiff was the owner of a car left with the defendant for repairs and damaged through the negligence of defendant's servant when driving the car on an unauthorised journey. The plaintiff there succeeded but the position might well have been different had the plaintiff been a stranger to the master, *e.g.*, a pedestrian injured in the car smash. See also, on the difficulties of the relation between the two tests, Prof. Paton 1 *Res Judicatae* (1936) 85.

PRIVILEGE-COMMUNICATIONS BETWEEN SPOUSES.

Shenton v. Tyler[1]

In this case the Court of Appeal (Sir Wilfrid Greene M.R., Finlay & Luxmore, L.JJ.) made an interesting and exhaustive research into the law of privileged communications between spouses. The plaintiff sought leave to administer interrogatories to the defendant, a widow,

1. (1939) 1 All E.R. 827.