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.

designed to show that her late husband had imposed on her a secret trust in plaintiff's favour. The defendant objected on the ground that her answer would disclose communications between herself and her husband. Simonds J. upheld the objection but his decision was reversed by the Court of Appeal.

Their Lordships distinguished clearly between the two rules of evidence, confusion of which had led to the uncertain state of the law. At common law it was the rule that spouses were not *competent* to give evidence for or against their spouses. Various reasons, ranging from interest to the desirability of maintaining marital peace, have been given, but at any rate it was a rule of *competency* of the witness and did not depend on the nature of the evidence to be given. This rule was extended to exclude the evidence of a former wife against her divorced husband in *Monroe v. Twisleton*[2] and that of a widow against her deceased husband's executors in *O'Connor v. Marjoribanks*.[3] It was stated however that the rule only applied to evidence of matters occurring during the coverture, thus introducing the question of the nature of the evidence and causing confusion with the second rule. This protects communication between husband and wife from disclosure in a court of law and is a rule of *privilege*, more limited than the rule of competency in that it only applies to communications between spouses but wider in that it applies in all cases whether either spouse is a party or not. While the first rule endured the second, if it then existed, could only become relevant where neither spouse was a party, so that it is not surprising that their Lordships failed to find any satisfactory evidence of its existence.

The Evidence Amendment Act 1853 sec. 1 (now included in the Victorian Evidence Act 1928 sec. 24) did away with the first rule and made husbands and wives of parties competent and compellable witnesses except in criminal proceedings or proceedings in consequence of adultery. Section 3 (now section 27 of the Victorian Act) however provided that: "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage." Their Lordships came to the conclusion that this was not the preservation of a pre-existing rule but the sole origin of the rule of privileged communications between husband and wife.

That being so they declined to treat the word "wife" in the section as including "widow," and allowed the interrogatories. The decisions in *Monroe v. Twisleton* and *O'Connor v. Marjoribanks* extending the old rule of competency to divorced persons and widows do not therefore apply to the statutory rule of compellability or privilege. In this respect the decision is contrary to that of the full Court of New South Wales in *Moore v. Whyte* (No. 2)[4] where a section similar to that here in question except that the word "competent" is substituted for "compellable" was held to exclude evidence by a widow who was seeking to

2. (1802) Peake Add. Cas. 219.
3. (1842) 4 Man. & G. 435.
4. (1922) S.R., N.S.W. 570.

prove a trust against her husband's executors. It is contrary also to the view expressed in Halsbury.[5]

No doubt the words "husband" and "wife" do not strictly speaking include "widower" and "widow," but the result is unfortunate. If the object of the section is to encourage unreserved confidence between spouses by preserving communications between them from disclosure in a court of law—and this would seem to be so although the privilege is that of the witness alone and not of the other spouse—then whether the disclosure is to occur during or after the termination of the marriage is irrelevant. Another curious result of the decision is this. The words "husband" and "wife" presumably have the same meaning in sec. 1 of the Evidence Amendment Act 1853 as in sec. 3, and therefore the rule in *O'Connor v. Marjoribanks* that a divorced wife or widow is not competent to give evidence for or against the divorced husband or the husband's estate was not abolished along with its parent rule that a wife is not competent for or against her husband. If it has been abolished at all it must be by virtue of the general provisions of the Evidence Act 1843 (sec. 22 of the Victorian Act) which provides that no person shall be excluded by reason of incapacity from crime or interest, but it is doubtful whether interest can have been the sole reason for an exclusion which prevailed whether the evidence was for or against the husband.

The judgments are however concerned mainly with the Common Law, tracing it from the days of Coke to the present time and are models of industry and learning.

—J. G. MANN.

5. Hailsham Edition, p. 728 (n.).

THE BENEFIT OF RESTRICTIVE COVENANTS.

Marquess of Zetland v. Driver[1]

"The law relating to covenants restricting the use of land," Bennett J. observed in a fairly recent case,[2] "entered into by persons who do not stand towards one another in the relationship of landlord and tenant is of modern origin and is still in course of development." That such is the case is well illustrated by the questions raised in *Marquess of Zetland v. Driver.*[1]

It is well established law that a purchaser who acquires only a part of the land which the restrictive covenant is intended to benefit, cannot acquire the benefit of the covenant, unless it appears on the interpretation of the covenant that the benefit was intended to run with the parts as well as with the whole of the land. But in *re Ballard's Conveyance*[3] a further refinement was added to the law.

In that case, W. bought a few acres, part of a large estate, and entered into restrictive covenants for the benefit of the remainder of

1. (1939) 1 Ch. 1.
2. *In re Union of London & Smith's Bank Ltd.'s Conveyance* (1933) Ch. 611.
3. (1937) 1 Ch. 473.