HISTORY OF THE RULE IN ROYAL BRITISH BANK v. TURQUAND

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This article is based upon part of the writer's Ph.D. thesis entitled "The Sources and Some Aspects of the Historical Development of the Law Governing Contracts by Registered Companies". A close historical analysis of *Turquand's* case[1] is crucial to a proper understanding of this area of law and will shed light on what has been until recently a very murky area. What is presented in this article is, in fact, the essence of Chapters V and VI of the seven chapters comprised in the thesis.

I have summarized the conclusions reached in the first four chapters of the thesis but I hope that their significance for and relationship to the theme of Chapters V and VI will not be underestimated.

There has been a shift from the early view of the *Turquand* rule, viz. that the outsider was entitled to presume that a *soi-disant* agent or organ had all the authority or power which he purported to have and *might*, consistently with the public documents, have had, to a modern view (growing from the Court of Appeal reversals of Wright J. in *J.C. Houghton & Co.* v. *Nothard, Lowe & Wills Ltd*[2] and *Kreditbank Cassel (GmbH)* v. *Schenkers*[3] in the 1920s and finally established in 1964 in *Freeman and Lockyer* v. *Buckhurst Park Properties (Mangal) Ltd*[4]); viz. that constructive notice operates only negatively to reduce or destroy an apparent authority and never positively to create it and that a presumption of internal regularity only has scope for operation once there is an appearance to the outsider arising *aliunde* that "the company" has become contractually bound.[5]

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1 *Royal British Bank* v. *Turquand* (1856) 6 E. & B. 327; 119 E.R. 886 affirming (1855) 5 E. & B. 248; 119 E.R. 474.

2 [1927] 1 K.B. 246 (C.A.) ("*Houghton*").

3 [1927] 1 K.B. 826 (C.A.) reversing [1926] 2 K.B. 450 ("*Kreditbank*").

4 [1964] 2 Q.B. 480 (C.A.) ("*Freeman and Lockyer*").

5 In addition to the invaluable judgment of the Court of Appeal in *Freeman and Lockyer* [especially that of Diplock L.J.] that of Slade J. in *Rama Corporation Ltd* v. *Proved Tin & General Investments Ltd* [1952] 1 All E.R. 554 should be noted. For the voluminous periodical literature on this development see Sir Arthur Stiebel, "The Ostensible Powers of Directors" (1933) 49 L.Q.R. 350; J. L. Montrose, "The Apparent Authority of an Agent of a Company" (1934) 50 L.Q.R. 224; Andrew R. Thompson, "Company Law Doctrines and Authority

It is now clear that most contracts which purport to bind companies will be governed by ordinary principles of agency law. But this leaves unanswered the question whether there are still special principles of company law which will overcome the effect of internal irregularity on what appear to be regular corporate acts and if so, their true nature.[6]

PART I—THE COMMON LAW GOVERNING CONTRACTS BY BODIES CORPORATE[7]

When one reads the early cases involving contracts by registered companies, one finds that the judges did express the indoor management rule in the sweeping terms given earlier in this article, viz. that an outsider dealing with a person who purported to bind a registered company was entitled to succeed against the company if that person might, consistently with the company's public documents, have had the authority which he purported to have. In view of this, one is forced to ask whether there were special circumstances operating in the early cases which were not referred to in the early statements of the rule but the existence of which those statements may have presupposed. In fact in *Turquand's* case and the earliest cases in which it was applied, the appearance of contractual assent present was the common seal of the company. Moreover, the cases cited against the company in *Turquand's* case were cases in which chartered and statutory companies were held liable on the appearance of their seal notwithstanding precedent internal irregularity. The point is that the joint stock company was made a "body corporate" by registration in 1844[8] and the law governing its contracts was derived from two or three centuries of legal development concerning the contracts of chartered and statutory companies. This calls for some consideration of the law affecting contracts by chartered and statutory companies as it had developed prior to *Turquand's* case.

to Contract" (1956) 11 Univ. of Toronto L.J. 248; I. D. Campbell, "Contracts with Companies" (1959) 75 L.Q.R. 469 and (1960) 76 L.Q.R. 115; R. S. Nock, "The Irrelevance of the Rule of Indoor Management" (1966) 30 The Conveyancer (N.S.) 123; J. L. Montrose, "The Apparent Authority of an Agent of a Company" (1965) 7 Malaya Law Rev., 253; M. J. Trebilcock, "Company Contracts" (1966) 2 Adelaide Law Rev. 310: And for monographs see Daniel D. Prentice, "The Indoor Management Rule" in *Studies in Canadian Company Law* (ed. Jacob S. Ziegel, Toronto: Butterworths, 1967), Ch. 10; *Palmer's Company Law* (21st ed. by C. M. Schmitthoff and James H. Thompson, London: Stevens & Sons Ltd, 1968), Ch. 27, at pp. 242-252; L.C.B. Gower, *The Principles of Modern Company Law* (3rd ed., London: Stevens & Sons, 1969) Ch. 8 at pp. 150-169; Robert R. Pennington, *The Principles of Company Law* (London: Butterworth & Co., 1959) Ch. 5, pp. 82-99.

[6] Involved in the making of any contract are legal capacity to become bound by the contract; the formulation of contractual assent; and the expression of contractual assent. The emphasis of this article is on the last two.

[7] This Part of the article is based upon Chapters I, II and III of the thesis.

[8] By the *Joint Stock Companies Act* 1844 (7 & 8 Vict. c. 110)—"the 1844 Act".

Formulation of Corporate Contractual Assent

A body corporate may acquire certain rights and come under certain duties and liabilities without any act on its part; e.g. a right not to suffer a tort, a duty not to be guilty of a tort of omission, a statutory duty, a criminal liability for non-feasance.[9] But contractual engagement always involves an expression of will and assent. How might the body corporate's will and assent be ascertained? Since contracts by bodies corporate are governed by the general law of contract, and that law was devised to govern contracts by individuals, one might inquire what are the corporate counterparts for the individual's contracting equipment, viz. an effective mind to formulate assent, and a mouth, a hand and a seal to express assent. Only human minds give assents and the corporate mind and formulation of corporate contractual assent must be defined somehow in terms of certain human minds and other facts and procedures.

Expression of Corporate Contractual Assent

Since the formulation of corporate contractual assent is inherently a more complex legal matter than the formulation of the individual's assent, it might be expected that a similar contrast would exist in respect of the modes of expressing assent. But the simple rule at common law was that the only recognized mode of external corporate expression was the common seal. The question "How is the body corporate's will to be known?" involved two questions: "What is the body corporate's will?" and "How is it to be recognized?" The common law's answer to the second question resided in formalism. The peculiar significance of the common seal as the external physical symbol of a mental act of the body corporate itself (a corporate act) has been overlooked.[10] That the common seal alone signified such an act is herein called the "corporate seal rule". The common seal was thus the counterpart of the individual's mouth, signature and seal. The common seal rule had two aspects: a positive and a negative aspect. The positive aspect was that, subject to minor exceptions, where the seal appeared the corporation's assent was conclusively proved and it was bound. The negative aspect was that without the appearance of the seal the corporation's assent could not be proved and it was not bound. The two aspects of the corporate seal rule are herein referred to as "the positive corporate seal rule" (or briefly, "the positive rule") and "the negative corporate seal rule" (or briefly, "the negative rule").[11] These two rules and

[9] E.g. see *R.* v. *Birmingham & Gloucester Ry Co.* (1841) 10 L.J. M.C. 136 (criminal liability for non-feasance doubted); *R.* v. *Great North of England Ry Co.* (1846) 9 Q.B. 315 (corporate criminal liability for misfeasance established); and *Tilson* v. *Town of Warwick Gas-Light Co.* (1826) 4 L.J. K.B. 53 (statutory liability in debt).

[10] In this article an "act" of the body corporate is a synonym for a "decision" or a "mental act" of the body corporate and does not presuppose communication or expression thereof to an outsider.

[11] For a treatment of the former rule see the writer's article, "The Positive Corporate

the minor exceptions to them[12] together comprised and still encapsule nearly all the decisions at common law governing contractual acts by bodies corporate. The common law's insistence on these rules pre-empted any concern with the law governing the *formulation* of corporate assent.

PART II—CONTRACTS BY UNINCORPORATED JOINT STOCK COMPANIES[13]

The law governing contracts by corporations was not the only source of law to govern the first companies incorporated by registration: there was also a body of law which had developed to govern contracts by unincorporated joint stock companies. After all, what the first *Companies Act* in 1844 made into a body corporate was a "joint stock company" completely registered thereunder. Although defined in the Act[14] the joint stock company was of course a genus already known to the law. In spite of the setback which it sustained by the fresh application[15] of the provisions of the *Bubble Act*[16] the unincorporated joint stock company flourished in the early part of the nineteenth century.[17]

The unincorporated joint stock company was a large partnership in which shares were freely transferable and whose deed of settlement vested authority to manage the business in a small group of "managing partners" called "directors".

In spite of certain similarities between the unincorporated joint stock company and the corporation, the unincorporated company was not corporate. The unincorporated company *was* its members, and its contracts were those of its members.

On the precedent question of which contracts were those of the company, there could again be no direct analogy with corporate theory. For one thing, the unincorporated company had no common seal to symbolize

Seal Rule and Exceptions Thereto and the Rule in *Turquand's* case" (1973) 9 M.U.L.R. 192 and for a treatment of the latter rule see the writer's article, "The Negative Corporate Seal Rule and the Exceptions Thereto" (1974) 9 M.U.L.R. 411.

12 An exception to the negative rule which began to assume importance about the middle of the nineteenth century was the ordinary trading contracts of trading companies. This and other exceptions to the negative rule are discussed in the second of the writer's articles referred to in the preceding footnote.

13 This Part of the article is based upon Chapter IV of the thesis.

14 (1844) 7 & 8 Vict. 110, s. 2.

15 In *R.* v. *Dodd* (1808) 9 East 516; *Buck* v. *Buck* (1808) 1 Camp. 547 and *R.* v. *Stratton* (1809) 1 Camp. 549n.

16 (1720) 6 Geo. 1, C. 18.

17 On the history of the joint stock company see especially A. B. Du Bois, *The English Business Company After the Bubble Act 1720-1800* (New York, 1938) especially Part III, "The Unincorporated Business Company", pp. 215-280; B. C. Hunt, *The Development of the Business Corporation in England 1800-1867* (Harvard Economic Studies, 1936); and A. B. Levy, *Private Corporations and Their Control* (2 vols., London: Routledge & Kegan Paul Ltd., 1950), Vol. 1, Part I. And for one of Lord Eldon L.C.'s unfavourable comments on that history see *Van Sandau* v. *Moore* (1826) 1 Russ. 441, at p. 458 *et seq*, and p. 470 *et seq*.

either a *persona* or a group unity[18] and so formalism had no application to the mode of contracting of the unincorporated company. Whereas the contracting powers of corporations were vested by their charters or statutes in constitutional organs; the power to bind the members of the unincorporated company must depend on agency principles of delegation of authority. The former was a question of corporate-constitutional law affecting one public or quasi-public legal person; the latter arose from a consensus (if not a contract) between a large number of private individuals and a smaller number. The former arose unilaterally; the latter bilaterally. The contents of the charter or statute were a matter for the state; the contents of the deed of settlement were a matter for the shareholders.

Formulation of Contractual Assent on Behalf of the Joint Stock Companies

Unlike a partner in an ordinary partnership, a partner in a joint stock company had no power at common law to bind the others at least where there were directors of the company.[19] On the other hand it was acknowledged in a number of cases that the directors as a group had ostensible authority to make ordinary trading contracts for their company. Thus, their contractual assent within that ostensible authority was an appearance which would bind their company and against which the "agency secret restriction and limitation rule"[20] had scope for operation and against which the negative doctrine of constructive notice of the first registered companies' deed of settlement, later to develop, would have scope for operation.

It may be noted at this point that the irregularities which might render defective a purported contractual act by the directors of any company incorporated or unincorporated, fall into two categories. The first is that the directors have not become seized of actual authority to make the contract because some "preliminary" or "prerequisite" stipulated in the

18 The Carron Iron Co. in its petition for a charter of incorporation recited the difficulty of dealing with property without "an incorporation and common seal": *Inventories of Warranties*, Bundle No. 65, 1872, Register House of Edinburgh, *cit.* by Du Bois, *op. cit.*, p. 142, n. 28.

19 *Per* Parke B. *in arguendo* in *Hallett* v. *Dowdall* (1852) 21 L.J. (N.S.) Q.B. 98, 105. And although there appears to be no decided case in relation to an unincorporated company it was held in 1859 that an *individual director* of a chartered company had no authority to bind his company and the same general principle must surely have applied to the unincorporated company. The case of 1859 referred to was *Nicol's* case (1859) 28 L.J. (N.S.) Ch. 257: ". . . however much the shareholders are to be bound by the representations of their directors, they surely cannot be responsible for the acts of one another. Whatever authority is given by the shareholders to their directors is given to them as a body, not to each of them; . . ." (ibid., *per* Turner L.J., 271). The same principle has been followed subsequently; e.g. see *Heiton* v. *Waverley Hydropathic Co.* (1877) S.C. 4 R. 830.

20 I use this expression to refer to the rule of agency law that a person who deals with an agent within the scope of his apparent or ostensible authority and who does not know of and is not put on inquiry as to the agent's lack of actual authority, will not be affected by any restriction or limitation on the agent's actual authority operating as between the principal and the agent.

deed of settlement (e.g. the prior sanction of shareholders) has not been complied with. Since the directors of an unincorporated joint stock company had ostensible authority to make ordinary contracts, an outsider dealing with them would not be affected by an absence of actual authority arising from such a cause. This is a straightforward application of the agency secret restriction and limitation rule. The second kind of defect relates to the question "What will constitute an act by 'the directors' as a group entity?" In an ordinary partnership no such question arises because it is an individual who possesses the actual or apparent authority in question. But in an unincorporated company, a "group agent" is substituted for the individual partner or managing partner and a group agent is by the terms of its appointment to act only in conformity with a number of manner and form requirements.

Although the question in the context of the unincorporated company lost its practical significance once the Companies legislation made incorporation mandatory, it is profitable to seek to resolve this question from general principle. A third party intending to contract with an unincorporated company had no means of knowing the deed of settlement's requirements as to manner and form in the functioning of the directors or whether the individuals with whom he dealt were all or even a majority of the directors,[21] or, of course, whether the manner and form requirements had been complied with. Clearly he was at great risk. Yet it is thought, in the absence of authority,[22] that in order to prove a contractual act by "the directors" of an unincorporated company, a third party would have had to prove either that the act had been performed by *all* of them or that it had been performed by *a lesser number acting strictly in accordance with the deed's manner and form requirements*. The reason is that a third party would be justified, notwithstanding his lack of information, only in dealing with that number of directors which would have authority to act in right of "the directors" if the deed of settlement were silent on the question, and that number, it is submitted, is no less than all of them. There appears to be no support in agency law for a proposition that in the absence of procedural regularity, a principal should be bound by a contractual act in which some members only of a group-agent to which he has delegated authority, participate. This is not to deny, of course, that even one director might bind the company where he has been held out say as manager by "the directors", but it is to deny that in the absence of compliance with manner and form, the holding out might be by less than all.

Expression of Contractual Assent of the Unincorporated Company

No greater formal requirements applied to the *expression* of contractual

[21] Cf. the outsider dealing with the directors of a modern registered company whose articles of association may or may not specify the number of its directors.

[22] Though cf. Turner L.J. in *Nicol's* case (1859) 28 L.J. (N.S.) Ch. 257, 271 quoted in fn. 19 *ante*.

assent by the unincorporated company than to that by an individual or partnership. Furthermore (and it is a separate point) the unincorporated company had no common seal.[23] Its absence could be cited as evidence to show that a company had not purported to act as a corporation.[24] Although there were external "appearances" of assent which bound the unincorporated company and gave occasion for the agency secret restriction or limitation rule to apply, yet those appearances were of a different order from a common seal. They consisted, like the internal irregularities themselves, of human action. The only conceivable counterpart to the common seal in the context of the unincorporated company was an expression of assent by all shareholders, for that alone was an "act of the unincorporated company itself". The lack of a common seal meant that there was no symbol of a group act to overcome the difficulty of identifying a contractual act by an unincorporated group.

PART III—CONTRACTS BY COMPANIES REGISTERED UNDER THE FIRST *COMPANIES ACT*[25]

The effect of the principles of corporation law and unincorporated company law[26] outlined in Parts I and II of this article, on the contracts of the first form of registered company must now be considered, for the first *Companies Act*, in broad terms, converted certain large private partnerships into bodies corporate. If this new species of legal person were to be seen as a corporation, then prima facie it would be dealt with in terms of corporate-constitutional law; its power of contracting should be seen as vested by the State in its directors; and the positive and negative corporate seal rules and the exceptions thereto might be expected to govern its contracts.[27] On the other hand it might be said that the registered company should still be treated as essentially a large private partnership acting through managing partners whose authority was *delegated* to them

[23] Du Bois's researches reveal an unincorporated society which had a common seal (viz., the West New Jersey Society) but since it had existed since 1692 it was not subject to the *Bubble Act* (though Attorney-General Ryder thought the legality of the practice questionable); cf. Du Bois *op. cit.*, pp. 66-67, fn. 146.

[24] Cf. the example of the Massachusetts Bay banking companies cited by Du Bois, *op. cit.*, p. 25. And especially *Harrison* v. *Heathorn* (1843) 6 M. & G. 81: "The having a common seal has always been held one incident to a corporation; Co. Litt. 306; and the power of doing no act except under such common seal, another. But in this case, there has been no assumption of any seal, nor was any act whatever done except in the individual names of agents or directors." (ibid., *per* Tindal C.J., 139).

[25] This Part is based on Chapter V of the thesis.

[26] Which will be referred to simply as "partnership law".

[27] An exception to the negative rule which would be most important would be the one in respect of the "ordinary trading contracts of trading corporations" since most registered companies would be engaged in business; cf., the defendant's argument in *Ridley* v. *Plymouth etc Co.* (1848) 2 Exch. 711, 716. Not all were; cf. the company formed to establish a corn exchange in *In Re Worcester Corn Exchange Co.* (1853) 3 De G.M. & G. 180. And on the exceptions to the negative rule see the second article referred to in fn. 11.

by the shareholders and that its contracts should be governed by agency principles and, for example, should be subject to no special formal requirements.

These respective approaches may be referred to briefly as the "corporate view" and the "partnership view" respectively.

Nature and Legal Contractual Capacity of the First Registered Companies

It has been presupposed in the foregoing discussion that "contracts of the company" means contracts *either* of a body corporate *or* of a partnership; that the corporate and partnership views are mutually exclusive and that a choice must be made. To the modern lawyer this is so and it is well acknowledged that the partnership view prevailed for some time after companies were first incorporated by registration. A reading of the cases decided under the first Act with their constant references to the registered company as a "partnership" and use of the plural number give a strong impression that this is correct. In a number of judgments the "company" seems to *be* the shareholders: the corporate veil does not seem to exist.[28] Any attempt to describe the nature of the first registered company must give full weight to this strong impression.

Terminology of the Incorporation Section of the 1844 Act and the Doctrine of Ultra Vires

The provisions of the 1844 Act and particularly the incorporation section must be paramount in a consideration of the law governing contracts by the companies incorporated under it. The preamble recites that "it is expedient to invest joint stock companies, after registration, with the qualities and incidents of corporations, with some modifications and subject to certain conditions and regulations; . . ." This is not very informative, though, if anything, it indicates a presupposition that "company" still means no more than a kind of association of individuals.

The contents of the deed of settlement are left to the corporators though certain minimal matters must be provided for[29] and the deed must be registered. Section 25 provides

> "that upon complete registration[30] of any company, being certified by the registrar of joint stock companies such company and the then shareholders therein, and all the succeeding shareholders, whilst shareholders, shall be and are hereby incorporated as from the date of such certificate

[28] Cf. *Ridley* v. *Plymouth etc Co.* (1848) 2 Exch. 711 especially Parke B., 716 and *Spackman* v. *Evans* (1868) L.R. 3 H.L. 171 especially Lord Cranworth L.C., 190-191.

[29] Under ss. 6 and 7 and Schedule A; e.g. the company's name, objects, particulars of directors, the duties and qualifications of officers, "For determining whether the Directors may contract Debts in conducting the Affairs of the Company, and if so, whether to any definite Extent"; "For determining whether and to what extent the Directors may make or issue Promissory Notes"; etc: Sched. A.

[30] The Act also provided for a preliminary registration giving rise to a provisional certificate of registration (ss. 4 and 5).

by the name of the company as set forth in the deed of settlement, and for the purposes of carrying on the trade or business for which the company was formed but only according to the provisions of this Act, and of such deed as aforesaid, and for the purpose of suing and being sued, and of taking and enjoying the property and effects of the said company; . . ."

The word "incorporated" invokes clearly the notion of legal personality but this is not conclusive for in section 25, paragraph 12, the registered company is called a "partnership". That the section preserves shareholder liability for the company's debts "as if . . . the company had not been incorporated" may be thought to support a partnership view but the very necessity of such a provision may rather suggest that "company" means "body corporate".[31]

Formulation of the Contractual Assent of the First Registered Companies

The first registered companies because of their dualistic nature and because of the unlimited liability of their shareholders, were conceived of as equivalent to "the shareholders". Without any distinction between the shareholders as general constitutional organ and as principals in their own right, they were seen as principals of the directors in the cases decided under the Act. The directors, prima facie, had the authority to make ordinary trading contracts which their predecessors in the unincorporated company had had.[32] In spite of the construction of the incorporation section offered earlier, in fact the deed of settlement was seen as no more than a contract between the directors and the other members which could be varied;[33] and the shareholders were considered to have power as principals to ratify excesses and irregularities on the part of the directors.[34]

This indiscriminate view of the shareholders as principals would seem to involve the proposition that for an effective ratification they must have been competent principals both at the time of contract and at the time

[31] The effect of the words "for the purpose of carrying on the trade or business for which the company was formed" may be thought to indicate legislative imposition of the doctrine of *ultra vires* which would be quite inconsistent with the partnership view. Similarly restrictive are the words "but only according to the provisions of this act and of such deed". The fact is that no cases arose in which the issue of *ultra vires* under the Act of 1844 had to be decided.

[32] Cf. Wilde C.J. in *Smith* v. *Hull Glass Co.* (1849) 8 C.B. 668, 678 and Maule J. in the same case on appeal at (1852) 11 C.B. 897, 928. It is interesting to note that this was in effect the extent of the power to bind by parol contracts possessed by the directors of the chartered or statutory trading corporation as an exception to the negative corporate seal rule (see (1974) 9 M.U.L.R. 411, 424-429).

[33] Cf. *Spackman* v. *Evans* (1868) L.R. 3 H.L. 171 *per* Lord Cranworth, 193; *per* Lord St. Leonards, 197-198; *per* Lord Chelmsford, 237; and *Evans* v. *Smallcombe*, ibid., 249 *per* Lord Cairns L.C., 257.

[34] E.g. see *Spackman* v. *Evans, ante cit., passim* but especially Lord Cranworth, 190-191, 193-194; Lord St. Leonards, 200-201; Lord Chelmsford, 233-234, 236; Lord Romilly, 244-245; and Lord Colonsay, 246, 248; *Evans* v. *Smallcombe*, ibid., *passim*, but especially Lord Cairns L.C., 253, 256-257; Lord Chelmsford, 259, 260-261; and *Houldsworth* v. *Evans*, ibid., 263, *passim*, but especially Lord Cranworth, 276-277, 280-281; and Lord Chelmsford, 282.

of ratification.[35] In the light of this it is interesting to recall that the Act expressly prohibited management by shareholders as such,[36] though doubtless this would have been interpreted not as precluding a partnership view, but merely as a prohibition against management by *individual* shareholders.

All of this was quite foreign to strict corporate theory. Not that ultimate shareholder control *per se* necessarily contravened that theory. Indeed, in the *Companies Clauses Consolidation Act 1845*, it was expressly provided that the exercise of the powers of management of the directors of statutory companies should be "subject also to the control and regulation of any general meeting specially convened for the purpose".[37] But shareholder control was there provided for expressly. Protagonists for the partnership view of the first registered company might contend that shareholder control was spelled out explicitly in the *Clauses Act* and not in the 1844 Act because (1) the statutory company had a closer affinity with the common law corporation whereas the draftsman of the 1844 Act could rely on the registered company's affinity with the unincorporated company;[38] and (2) the contents of a registered company's deed of settlement were within the making of at least the original subscribers, so that they had it in their own hands to reserve ultimate control to the shareholders if they so wished. Against this, a protagonist for the corporate view could argue that the reason why Parliament reserved ultimate control of the statutory company to the larger number of individuals comprising the general meeting, was that the purpose of such a company was distinctly "public", and that this approach had no application to the registered company.

The undiscriminating view of the shareholders as principals of the directors bears out Hunt's assertion that

> "Hoary ideas of partnership continued to confuse thinking with regard to corporate enterprise. Partnership law, hammered out of common experience by the courts and riveted to the legal mind by a long line of decisions, was a barrier to a clear view of the essential change which had taken place in the position of the investor."[39]

In other words, the relative position of shareholders and directors was not conceived of judicially as having been changed by the Act.

35 Cf. Wright J. in *Firth* v. *Staines* [1897] 2 Q.B. 70.
36 Section 27.
37 8 & 9 Vict. c. 16, s. 90. It was under that Act that the decision in *Isle of Wight Ry Co.* v. *Tahourdin* (1884) 25 Ch. D. 320 was given, a decision which seem to have led, without reference to the express provision in s. 90, to the general view that the boards of *all* companies (including registered companies) were subject to control by the general meeting.
38 Though it must be conceded that although in *Foss* v. *Harbottle* (1843) 2 Hare 461 (the *locus classicus* of the principle of majority shareholder control), the company was incorporated by private Act, the terms of that Act do not appear to have reserved control to the shareholders.
39 Hunt, *op. cit.*, pp. 129-130.

Expression of the Contractual Assent of the First Registered Companies

That a partnership view of the first registered companies prevailed might have led one to expect that no special formal requirements would govern the expression of their contractual assent, though some account would have to be taken of their common seal. On a proper construction of the 1844 Act these companies can be described only in such equivocal terms as "partnerships bearing a corporate veil for the purposes of the trade or business for which they were formed but not otherwise". The consequence of this construction of the Act would be that prima facie the corporate seal rules and exceptions thereto would apply to the company's expression of assent when it was acting for those purposes and that partnership principles would apply outside them. But "contracts essential to the achievement of the purposes of incorporation" and "trading contracts of trading corporations" were common law exceptions to the negative rule. The result would be that the area within which these companies bore a corporate *persona* and within which a common seal would therefore have been relevant, was precisely the area which constituted an exception to the negative rule and which was therefore to be governed by the principles (or lack of principle) on which cases falling within exceptions to the negative rule were decided.[40]

If the Act had said no more, it may well have forced a development of principles governing the definition of corporate assent because of the sheer number of registered company contract cases which were bound to arise. But the Act did not leave them to be governed entirely by the hybrid and paradoxical nature of its progeny. Like the common law, the Act's contracting sections provided certain formal modes of external expression of assent, thereby enabling the questions of the nature of that assent and of the registered company to be overlooked where those external forms appeared. But unlike the common law, the Act provided an alternative possibility; viz. that of proving that a contract had been made "on behalf of the company", and this alternative was relevant not only to "ordinary" contracts of trading companies, but to *all* contracts of *any* company registered under the Act.

The Contracting Sections of the 1844 Act

The provisions of the contracting sections are crucial in the contract cases decided under the Act. Section 44 provided that every substantial contract[41] *shall* be in writing, signed by at least two directors and sealed

[40] On the other hand, if the company were a body corporate for *all* purposes, including purposes outside that area, then the negative rule would apply to such "extraordinary" contracts.

[41] Any contract except a contract for purchase of an article where the price does not exceed fifty pounds or a contract for any service the period of which did not exceed six months and the consideration for which did not exceed fifty pounds.

or signed by an officer "thereunto expressly authorized by some minute or resolution of the board of directors applying to the particular case". On the partnership view such a requirement was an unnatural impediment designed to identify the collective will of the partners. On the corporate view it was a mitigation of the negative corporate seal rule. These *modes of expressing* the company's will were concerned with form—an appropriate concern of a body corporate. But neither lessened the need, indeed they emphasized the need, for the corporate "mind" to have assented. This is borne out by the section's further provision that "in the absence of such requisites or any of them any such contract shall be void and ineffectual *except as against the company on whose behalf the same shall have been made*".[42] In other words, by not furnishing the outsider with the statutory indicia of the corporate will (indications that it was acting in the matter as a corporate body), the company could not enforce the contract against him; but the outsider, if he could, otherwise than by pointing to corporate indicia, show that the contract had in fact been made "on behalf of" the company, could enforce it against the company. He had the choice of proving one of the appearances designated in section 44,[43] or of proving what might be more difficult; viz. that his contract had been made "on behalf of" the company. In corporate terms the outsider's choice was between *mode* or *form* on the one hand and *mind* or *substance* on the other.

The situation seems to be well put (and perhaps related to the submission made earlier that the company was a body corporate for certain purposes only) in a dictum by Maule J. *in arguendo* in *Smith* v. *Hull Glass Co.*[44] where he states the effect of counsel's argument

> "You say, that, if the company wish to clothe themselves with certain rights in respect of such contracts, they must observe the required formalities, but that if they, who know the proper form, neglect to adopt it, though they may lose certain advantages, they do not thereby become absolved from the liability to perform the contracts?"[45]

The same idea could be expressed by saying that if the shareholders wished to obtain contractual rights as a body corporate and sue on them as such, they must supply the formal appearances designated in the Act as appropriate to their corporate personality; but if they did not do this, whilst

The excepted contracts are referred to as "small" contracts in this paper. The Act's distinction is based on the substantiality of a contract, not its ordinary or extraordinary nature with reference to the purpose of incorporation.

[42] Emphasis supplied.

[43] And he could know by search who were the directors. He could not, however, determine by search whether an individual was a "company officer thereunto expressly authorized by a minute or resolution of the board applying to the particular case".

[44] (1852) 11 C.B. 897.

[45] Ibid., 920.

they could obtain no rights, they could incur liabilities and those liabilities would be enforced against them *via* their corporate person.

It is not difficult to recognize the possibility of liability without form in relation to section 44 in view of the express proviso therein. Apart from this however, it appears that a statute which empowers a corporation to express its will in one way does not necessarily impliedly prohibit the expression of that will in another, if that other way would have been effective apart from the statute; e.g. under one of the exceptions to the negative rule.[46]

Before the cases decided on the foregoing provisions as to substantial contracts are examined, the Act's provisions governing small contracts and negotiable instruments must also be noted. Section 44 provided that small contracts "may" be made by "any officer authorized by a general bye-law in that behalf".[47] This provision differs from the earlier one. First, it is certainly permissive rather than mandatory or directory.[48] This fact seems to confirm that the corporate seal rule was the background against which this concession was allowed. Second, it not only permits a further *mode of expressing* corporate assent; it permits the decision to contract to be taken by an agent (though admittedly an agent authorized by by-law made by the shareholders).

Section 45 runs somewhat parallel to section 44. It deals with the "mode of making, accepting or indorsing" bills of exchange and promissory notes. It is provided that they *shall be made or accepted by* and in the names of two directors on behalf of the company and countersigned by the secretary or other appointed officer. This is mandatory or directory, not merely permissive, but on either view relates only to *mode* not *mind.* Taken alone this provision would not relieve the directors of the need to authorize the making or accepting of bills or notes. The next provision that bills *may be indorsed* in the company's name by "any officer authorized by deed of settlement or by-law in that behalf" is clearly permissive. It too relates only to mode not mind. The board must authorize the indorsing. But section 45 concludes by providing that

> "every such company on whose behalf or account any bill of exchange or promissory note shall be made, accepted, or indorsed, in manner and form aforesaid, shall and may sue and be sued thereon, as fully

[46] *Obiter dicta* of Turner L.J. in *Wilson* v. *West Hartlepool Ry Co.* (1865) 2 De G.J. & S. 475 and cf. the defendant's argument in *Ridley* v. *Plymouth etc Co.* (1848) 2 Exch. 711. Though without the express proviso, the first part of s. 44 might well have been interpreted as mandatory.

[47] Section 25, para. 11 gave the company power to make by-laws. Since by-laws had to be registered under s. 47 the outsider could know whether the person with whom he was dealing was authorized.

[48] If it had not been passed, even such a small contract, on the corporate view, must have been not only made by the directors but also expressed under seal unless (as was admittedly likely) it fell within the "small contracts" exception to the negative rule (see 9 M.U.L.R. 411, 416).

and effectually, and in the same manner, as in the case of any contract made and entered into under their common seal."

Compliance with the statutory mode was thereby made equivalent to sealing and could be repudiated by the company only by evidence which would be sufficient to sustain a plea of *non est factum* by a corporation seeking to disown the appearance of its seal. An outsider who had procured a document which complied with the statute could not be in a stronger position. If he had not done that, but could nonetheless prove the board's assent, the Act would defeat him in the case of "making or accepting" only if the section were interpreted as mandatory, but would not defeat him in the case of an "indorsing".[49]

Contract Cases Decided Under the 1844 Act

The contract cases under the 1844 Act may be classified as "form cases" and "non-form cases". The former embraced cases where either the seal or the statutory alternative form (signature of an officer specially authorized by the board) appeared.[50] Form cases were decided on the principle of the first corporate seal rule. But in non-form cases the outsider had to prove by virtue of section 44 that the contract was made "on behalf" of the company. The precise nature of this statutory exception to the negative corporate seal rule would have to be judicially defined. Since the exception lay in corporate law, one might have expected an early development of corporate-constitutional organic theory. On the other hand "the company" was still conceived of as "the shareholders". Perhaps the outsider might only need to show that the directors had contracted with him within the scope of their apparent authority in which case the "agency secret restriction or limitation rule" would have scope for operation.

Non-Form Contract Cases Decided Under the 1844 Act

The non-form cases may be considered first. These were *Kingsbridge*

49 Another provision of the 1844 Act which should be considered in the context of company contracts is the section validating defective or erroneous appointments of persons as directors (s. 30). Similar "validating sections" and "validating articles" have become a feature of company law (cf. s. 119 of the uniform Companies Acts of the Australian States and art. 89 in Table A thereto). A detailed treatment of them is not relevant to the subject of this paper. They have a limited scope of application (cf. *Mahony* v. *East Holyford Mining Co.* (1875) L.R. 7 H.L. 869 and especially *Morris* v. *Kanssen* [1946] A.C. 459 (H.L.) though they may assist where the invalidation is due to lack of share qualification: *Dawson* v. *African Consolidated Land & Trading Co.* [1898] 1 Ch. 6 (C.A.). The validating section or article will rarely help an outsider who is unable to rely on a corporate indoor management rule and usually both the section or article and "the rule in *Turquand's* case" will be cited as reasons why the company should be held bound [for a recent illustration, see *Albert Gardens (Manly) Pty Ltd* v. *Mercantile Credits Ltd* (1973) 47 A.L.J.R. 745].

50 Since no cases occurred in which the alternative form appeared, reference will henceforth be made only to the seal though similar principles would apply in such other cases.

Flour Mill Co. v. *Plymouth etc Co.*,[51] *Ridley* v. *Plymouth etc Co.*[52] and *Smith* v. *Hull Glass Co.*[53] In *Kingsbridge* a company secretary ordered flour which was delivered to the company's premises and consumed in the course of its business. A meeting of directors attended by less than the quorum prescribed in the company's deed of settlement acknowledged the order. This was certainly a contract in the ordinary course of a company's business which the directors of an unincorporated company would have had ostensible authority to make. Further, as an ordinary trading contract of a trading company it would have been even at common law an exception to the negative corporate seal rule. The judgment is short

> "You cannot make persons liable as contracting parties without showing that they directly or indirectly authorized the contract."[54]

This tantalizingly brief statement seems to exclude any possibility that the registered company might be bound otherwise than by actual authority or, in corporate terms, otherwise than by an entirely regular corporate act of contracting.

The next day in *Ridley*, the same company was sued by its lessee on an indemnity covenant in respect of a distress by the company's own lessor against the plaintiff's goods. The sub-lease was signed by *de facto* officers of the company but not sealed. The sub-lease had been produced subsequently at a meeting of directors attended by less than a quorum.

The first fact to be noted about the case is that it did not concern a contract in the ordinary course of business.[55] Accordingly, as counsel for the defendant argued, the indemnity covenant was not within the relevant exception to the negative rule.[56] He contended that for this reason the plaintiff must prove either form or at least *actual* authority from the shareholders, which, he said, was the only alternative possibility allowed by the words "on behalf of" in section 44 of the Act. He implied that if the contract had been "ordinary" neither form nor actual authority would have been essential.

Of course the extraordinary nature of this contract would also have put it outside the ostensible authority of the directors viewed as managing partners, so that on partnership principles too actual authority would have

51 (1848) 2 Exch. 711 ("*Kingsbridge*").

52 (1848) 2 Exch. 711 ("*Ridley*").

53 (1849) 8 C.B. 668 and (1852) 11 C.B. 897. *Greenwood's* case (1854) 3 De G.M. & G. 459 is a case where the contract was admitted to be that of the company, the only issue being as to the consequent liability of the shareholders.

54 (1848) 2 Exch. 711, *per* Parke B., 718-719. Presumably acceptance of the benefit of the executed contract (not dealt with in the judgment) was also precluded by the fact that a quorum of directors had not directly or indirectly accepted that benefit. Another contemporary case where it was held that actual authority must be proved by a plaintiff suing a statutory company on a contract made by its secretary was *Williams* v. *Chester & Holyhead Ry Co.* (1851) 15 Jur. 828.

55 As the company put it, the lease was not a "matter connected with the business for which the company was incorporated". ((1848) 2 Exch. 711, 716.)

56 The "ordinary trading contracts of a trading company" exception.

had to be proved. Yet, surprisingly, it is in this case that the first reference (admittedly an oblique one) is made to a possible doctrine of constructive notice of the registered deed of settlement and particulars of directors.[57] The purpose of the reference was to justify the admission of the deed in evidence against the outsider in order to prove the quorum requirement. The deed is not to be regarded as an internal record[58] but is rather like the special Act of a statutory company. "Constructive notice" has an operation quite independent of agency principles and represents a transfer of the deed from the area of private partnership law to public constitutional law.

In his judgment Parke B. agreed with counsel's submission that the expression "on behalf of the company" in section 44 meant "with the actual authority of the shareholders"

> "This case fails, because it is not shown that the persons who entered into the contract, that is, the directors present at the board meeting when there was some evidence of their sanctioning the agreement, were competent to bind the Company."[59]

The insistence on proof of actual authority (or a regular corporate act of contracting) in these two cases, *Kingsbridge* involving an ordinary, and *Ridley* an extraordinary contract, seems to have arisen from the fact that the outsider could, after all, have protected himself by insisting on a formal expression appropriate to the company's registered corporate character, i.e. either a sealing or the alternative provided by statute. By not doing so, he bore a heavy onus of proving the authority of all the "partners". If he chose not to rely on form, the words "on behalf of" must be construed against him.[60] It seems to be by virtue of the juxtaposition of those words in section 44 with formal modes of expression appropriate to a body corporate that they were interpreted in these cases to exclude the possibility of even that degree of apparent authority in directors which had developed in the cases on unincorporated joint stock companies.

But a remarkable development occurred in *Smith* v. *Hull Glass Co.*[61] where the facts were similar to those in *Kingsbridge*. Goods had been ordered by a company secretary and working manager, delivered to the company's premises and consumed in its trade. Counsel for the plaintiff argued successfully that the contract was within an exception to the negative rule and, for the first time in such a case, there is a statement of

[57] Such a reference might have been apposite in the context of ostensible authority in *Kingsbridge* the previous day.
[58] Cf. *Hill* v. *Manchester & Salford Waterworks Co.* (1833) 5 B. & Ad. 866.
[59] (1848) 2 Exch. 711, 717. There were eleven directors and a quorum fixed by the deed of five, but only four attended.
[60] Platt B. observed appositely, "Had there been a contract under seal, it might have been taken for granted that the persons who caused the seal to be impressed on the particular instrument had authority to bind the company". Ibid., 718.
[61] (1849) 8 C.B. 668 on appeal at (1852) 11 C.B. 897.

the principles to be applied to determine whether the contract is that of "the company". But those principles are distinctly those of partnership and of the "implied authority" of managing partners[62]—principles which could be seen to be applicable to the registered company because of its ancestry in partnership, but not necessarily to the chartered or statutory company.

The company argued that under section 44 the power of the board must be proved by production of the deed of settlement or other evidence of delegation of authority by the shareholders. In the Court of Common Pleas Wilde C.J. concluded that "the directors" of a registered company had the power of partners at common law unless restrained by the Act or deed. He thus postulated actual authority (and commensurate ostensible authority) on the partnership view, the onus being on a person setting up a restriction on that authority to prove it by producing the deed.[63] Since that evidence was not forthcoming from a production of the deed he found for the plaintiff. On appeal[64] counsel for the plaintiff argued again that the contract was within an exception to the negative rule; that the intention of section 44 was that if a registered company wished to take advantage of its corporate form it must comply with the statutory forms but if it did not do so, it might nonetheless be liable;[65] and that the Act itself vested a contracting power in the directors which was effective except to the extent that it was proved to have been taken away by the deed. Counsel for the company accepted that it could be liable in the absence of its seal, not by reference to an exception to the negative rule, but by virtue of section 44 itself, and thereunder only on proof of actual authority, which involved, according to him, total directorial compliance with the deed.

In the judgments, the court makes no reference to the negative corporate seal rule or to section 44. The judgments might just as well have been delivered in a case concerning an unincorporated joint stock company except for some references to the publicity given to the deed.[66] The

62 (1849) 8 C.B. 668 *per* Wilde C.J., 677-678.

63 Does Wilde C.J. mean that the prima facie position is that "the directors" acting individually can bind just as a partner could do, or that "the directors" acting collectively could bind the shareholders? He seems to mean the former for he distinguishes *Kingsbridge* on the ground that the fact that at least five directors must act, was proved there. The suggestion is therefore tentatively now made not only that the directors as a whole have ostensible authority to bind the company as to ordinary business contracts (he distinguished *Ridley* on the basis that the contract there was extraordinary) but that even a single director has an ostensible authority to do so which must be rebutted by evidence! The proposition that an individual director had ostensible authority is odd and was soon clearly rejected; cf. *Nicol's* case (1859) 28 L.J. Ch. 257.

64 (1852) 11 C.B. 897.

65 Presumably as partnership, not as a corporation attained *via* an exception to the negative rule. This is not spelled out.

66 These are the seeds of an "indoor management rule" cf. Jervis C.J., 926 and Maule J., 927-928 ibid.

emphasis is on the partnership aspect of the company;[67] actual authority is no longer necessary to render the company liable even in the absence of form; the "agency secret restriction and limitation rule" operates not only on contracts made by the managing partners but on those made by their agents.[68] Maule J. expresses the general principle operating in terms which, like those used in so many of the cases falling within exceptions to the negative corporate seal rule, omit close legal analysis in favour of a pragmatic view of the unity of "the business" and of the facts of management

> "This is the simple case of an individual, or a body corporate, carrying on business in the ordinary way, by the agency of persons apparently authorized by him or them, and acting with his or their knowledge. The case differs in no respect from the ordinary one of dealings at a shop or counting-house: the customer is not called upon to prove the character or authority of the shopman or clerk with whom he deals; if he is acting without or contrary to the authority conferred upon him by his employers, it is their own fault."[69]

It is difficult to summarize the non-form cases under the 1844 Act. The heterogenous suggestions drawn from the law surrounding the common seal and partnership combined with section 44 as it applied to a body which was corporate only for some purposes, is to say the least confusing. It may be said however that the first registered company was never distinguished sharply from its unincorporated predecessor; that early suggestions that its directors had no ostensible authority[70] had a short life;[71] that the words "on behalf of the company" in section 44 were interpreted to require proof of actual authority or, in corporate terms, a totally regular corporate act where the contract was extraordinary,[72] but that they would not exclude liability on the footing of ostensible authority where it was "ordinary";[73] that a factor which contributed to the initial

[67] In *Ernest* v. *Nicholls* (1857) 6 H.L.C. 401, 420 Lord Wensleydale doubted the correctness of the strong partnership view taken in *Smith* v. *Hull Glass Co.* His was an isolated and half-hearted challenge to the prevailing partnership view.

[68] The references to the ostensible authority of the company manager are the first references to the ostensible authority of company officers below the level of directors.

[69] (1852) 11 C.B. 897, 928. Shortly after this case, the partnership view received strong indorsement in *Greenwood's* case (1854) 3 De G.M. & G. 459, this time in the context of the liability of shareholders on a winding-up rather than that of authority to contract. It was held that a clause in a deed of settlement limiting the liability of shareholders was ineffective against outsiders and that the contrary proposition "militates against all the principles of partnership as hitherto understood in this country". Ibid., 475.

[70] Notably in *Kingsbridge* but also in *Ridley*.

[71] Their ostensible authority was the basis of the second decision in *Smith* v. *Hull Glass Co.* and the correctness of the approach in *Kingsbridge* was expressly doubted by the Lord Chancellor in *Greenwood's* case (1854) 3 De G.M. & G. 459.

[72] As in *Ridley*.

[73] As in the second decision in *Smith* v. *Hull Glass Co.*

strict construction of the phrase "on behalf of the company" was the context in which it occurred in section 44.[74]

Form Cases Under the 1844 Act

Prior to *Turquand's* case, two other form cases were decided under the 1844 Act. They were both actions on negotiable instruments. The first was *Thomas* v. *Universal Salvage Co.*[75] A promissory note complied with the statutory form prescribed in section 45 but the declaration was defective. It alleged that the signatory directors had given "their note" and did not allege facts (in particular authority given in the deed) making the note that of the defendant company. In upholding the company's demurrer the Court held that compliance with statutory form was no substitute for an allegation of authority; i.e. an allegation in effect that the note was the company's note.

This cannot be objected to. It is thought that since section 45 made compliance with form equivalent to sealing, an averment that "the company" had given the note would have thrown the onus of proving *non est factum* on the company. To do this it would have had to prove "illegality" or "fraud".[76] The insistence on averments showing actual authority can also be explained on the ground that the note was not issued as part of the ordinary course of trading. The case is no authority against (on the partnership view) the existence of some ostensible authority in directors or against (on the corporate view) the applicability of some kind of indoor management rule when a statutory form equivalent to the seal appears.

The other case referred to is *Thompson* v. *Wesleyan Newspaper Association.*[77] A company's deed empowered the directors to give a promissory note for £1,000. This they did. The payee, not being able to negotiate a note of that amount, asked them to give him in lieu of it, bills of exchange for several smaller sums amounting together to the sum of £1,000 and interest which had accrued and would accrue until the bills were to become due. The only issue on the hearing of the rule concerned the authority of the directors.[78] The company argued that the authority of the directors was special and limited. But although the issue of the note and bills was "extraordinary" and could be repudiated by mere proof of a lack of actual authority, yet the court was not disposed to construe the deed so strictly

[74] This is borne out by their being distinguished in some of the form cases next to be discussed, especially *Prince of Wales Assurance Co.* v. *Harding* (1858) E1. B1. & E1. 183 noted at p. 37 *post.*

[75] (1848) 1 Ex. 694.

[76] A question would then arise as to the effect in this context of public registration of the deed.

[77] (1849) 8 C.B. 849.

[78] There had been an issue, whether the statutory form had in fact been complied with but this was abandoned.

> "It cannot, we think, be regarded as a mere authority, to be exercised by the very terms in which it is given; for, it is, in fact, an arrangement between partners as to the mode in which a certain number of them shall conduct the business in which they have a common interest."[79]

Form would not necessarily prevail over a lack of actual authority, but this approach to *measuring* or *defining* actual authority was a further endorsement of the partnership view.[80]

The culmination of the contract cases under the 1844 Act is *Turquand's* case. It was a form case, indeed a seal case. It was in the line of such statutory company cases as *Hill* v. *Manchester & Salford Waterworks Co.*[81] and *Horton* v. *Westminster Improvement Commissioners.*[82]

The directors of a coal and railway company borrowed £2,000 on bond under the seal of the company without first obtaining shareholder sanction as required by the company's deed of settlement. What has been generally overlooked in the treatments of *Turquand* is that the appearance on which the outsider relied was that of the common seal—the common law symbol of a corporate act.

Would the company have been bound in the absence of the seal? The borrowing would probably not have been within a common law exception to the negative rule. But would it have been within the ostensible authority of the directors viewed as managing partners,[83] or would it be considered so extraordinary as to necessitate either form or actual authority like the indemnity covenant in *Ridley*? Probably the borrowing was within the ostensible authority of the directors[84] but the decision does not seem to have turned on this. The only judge who dealt with the issue was Lord Campbell C.J. at first instance. He came close to saying that the directors of the company might have been taken by the bank to have had authority to borrow[85] though he was not explicit on the point and may have meant no more than that the outsider was not put on inquiry by the nature of the transaction. In the Exchequer Chamber no reference was made to apparent authority. The judgment there presupposes an expression of assent by the body corporate itself under its common seal.

In sum, what was "apparent" to the bank in *Turquand's* case was not authority in agents but the sealed assent of the body corporate itself. The

[79] Ibid., *per* Cresswell J. for the Court, 861.
[80] But such an approach would be permissible only in cases concerning trading companies; cf. *In Re Worcester Corn Exchange Co.* (1853) 3 De G.M. & G. 180.
[81] (1833) 5 B. & Ad. 866.
[82] (1852) 7 Ex. 911.
[83] As they had become again regarded by 1852 in *Smith* v. *Hull Glass Co.* (1852) 7 Ex. 780. There is admittedly difficulty in saying that an act can be within that ostensible authority, yet not within the "ordinary trading contracts of trading corporations" exception to the negative rule since the test applicable in each case seems to be the same.
[84] Cf. *Australian Auxiliary Steam Clipper Co.* v. *Mounsey* (1858) 4 K. & J. 733.
[85] (1855) 5 E. & B. 248, 260-261.

liquidator's contention that the bank must prove actual authority failed. The plaintiff could rely on that formalism which had always been peculiarly appropriate to corporate personality and which had received legislative endorsement in section 44.

Having proved external form, the plaintiff cast on the liquidator the onus of proving not only non-compliance with an internal preliminary but also actual or constructive knowledge thereof in the outsider.[86] This is what the court meant by holding that the company must allege and prove "illegality". On appeal,[87] the liquidator contended that the plea was a "kind of *non est factum*" and that it should turn on the question of actual authority like *Ridley* and *Kingsbridge*. Reverting unnecessarily to the partnership analogy he argued constructive notice of the contents of the deed. In the *locus classicus* of "the indoor management rule" Jervis C.J. said

> "We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have the right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done."[88]

What does this passage mean? Whilst expressed in partnership terms, the rule was enunciated in a case where the appearance of assent was one impossible for a partnership. What appeared "on the face of the document" here was the common seal. The passage must be read in the context of that appearance; i.e. of the symbol of an original corporate act. That was taken for granted by Jervis C.J. His partnership terminology, reflecting the contemporary view of the company, does not go to the appearance but to the internal preliminaries. This can be not only explained as a loose usage of the word "authority" but even justified by the dualism in the character of the first registered company. Expressed in corporate terms, *Turquand* means that where the seal or a statutory alternative symbolizing a corporate act appears, then by virtue of both the common law and section 44, the company is not permitted to repudiate it on the ground of a constitutional irregularity which would not be evident to the outsider.

86 The Court of Queen's Bench pointed out that on the pleadings the bond was admitted to be that of the company. This seems to have been treated as an admission (1) that the directors had conditional power to affix the seal; (2) that "the directors" had affixed it. If that admission had not been made perhaps the plaintiff would have been required to prove the conditional power by putting in the deed as part of *its* case.

87 (1856) 6 E. & B. 327.

88 Ibid., 332.

The decision says nothing directly as to the principles to be applied in non-form cases.

The next form case under the Act was *Ernest* v. *Nicholls*,[89] the case which, it is usually said, authoritatively established the doctrine of constructive notice.[90] Before the decision is examined for purposes more immediately relevant, it may be noted that Lord Wensleydale did not express the doctrine unequivocally as a negative one. Rather he seemed merely to say that directors could bind the company only upon total compliance with the deed.[91] Like other judges before him[92] he notes the public availability of the deed merely as supporting or justifying this position, and after his judgment it is still possible for a judge to say hesitantly "*if* it be established that all the world must be presumed to have notice of all the contents . . .".[93] It is not until two cases in 1859[94] that the doctrine is expressed unequivocally as a negative one. And it is this doctrine which is then said to mark the difference between the registered company and the partnership!

In *Ernest* v. *Nicholls* the contract was by one company for the acquisition of another company's goodwill; it was sealed and attested by two directors; the company had four directors and its deed specified the quorum of directors as three; it was said and inferred at first instance that three had authorized the sealing; one of those had an "interest" in the contract (though he did not authenticate the sealing) and section 29 of the Act provided that in these circumstances (1) he should not vote on the matter; and (2) if he did, the contract should have no effect till confirmed by the shareholders.[95] Leaving aside the latter provision, it would seem clear that if the interpretation of *Turquand* suggested earlier is correct, the principle of that case would apply in *Ernest* v. *Nicholls*. On the other hand, if *Turquand* stands for nothing other than the old agency secret restriction or limitation rule, this principle would not be applicable

89 (1857) 6 H.L. Cas. 401.

90 Cf. Gower, *op. cit.* p. 153, fn. 65.

91 "The stipulations of the deed, which restrict and regulate their [the directors'] authority, are obligatory on those who deal with the company; and the directors can make no contract so as to bind the whole body of shareholders, for whose protection the rules are made, unless they are strictly complied with." ((1857) 6 H.L.C. 401, 419.)

92 Cf. Parke B. in *Ridley*; Jervis C.J. in *Smith* v. *Hull Glass Co.* (1852) 11 C.B. 897, 926 and in *Royal British Bank* v. *Turquand* (1856) 6 E. & B. 327, 332.

93 *Per* Lord Campbell C.J. in *Agar* v. *Athenaeum* (1858) 3 C.B. (N.S.) 725, 757 (emphasis supplied).

94 *Balfour* v. *Ernest* (1859) 5 C.B. (N.S.) 601 and *Nicol's* case (1859) 28 L.J. Ch. 257 especially Chelmsford L.C., 266. And see the liquidator's argument not contraverted in *In Re The Cefn Cilcen Mining Co.* (1869) 38 L.J. Ch. 78.

95 The precise wording of this section, insofar as relevant, was as follows: ". . . if any director . . . be directly or indirectly concerned or interested in any contract proposed to be made by or on behalf of the company . . . he shall . . . be precluded from voting or otherwise acting as a director; and if any contract or dealing . . . shall be entered into in which any director shall be interested, then the terms of such a contract or dealing shall be submitted to the next general or special meeting of the shareholders to be summoned for that purpose, and no such contract shall have force until approved and confirmed by the majority of votes of the shareholders present at such meeting."

in *Ernest* v. *Nicholls* (because the transaction was certainly extraordinary) and indeed it would never be applicable except to ordinary trading contracts.[96] *Ernest* v. *Nicholls* calls for close examination.

The Lord Chancellor noted that the transaction was extraordinary, and one which a company could not be presumed to have power to enter into, but that the deed of settlement expressly authorized the transaction and that it was not necessary to determine whether the interested director was present when the sealing was authorized, for

> "If he was not present, the deed would be invalid upon another ground; but supposing he was present, he would be a party interested, and being a party interested, it would not be competent to him by his presence to give validity to the transaction."[97]

The dictum assumes simply that if it had to be admitted that less than a quorum had authorized the sealing the deed would not bind.[98] It is submitted that this would not be so even if the company had only the three directors so that it *could not* have obtained a quorum on the matter,[99] and therefore *could not* have sealed the deed regularly.[100]

Lord Wensleydale begins his judgment with a short statement that the deed cannot be allowed to bind because of section 29. This is unobjectionable, at least if the reference is to the latter provision in the section. But then he proceeds at length to define "the principles of law upon which the liability against joint stock companies is to be decided, as far as is necessary, for the decision of this case".[101] He notes that public registration of the company's deed has the effect that outsiders can know who the directors are and must bear the loss if they give credit to unauthorized persons, but he passes quickly from this proposition to the generalization that the shareholders are not bound unless the deed is complied with and for this proposition he cites *Ridley* and *Kingsbridge.*

But *Smith* v. *Hull Glass Co.* presents difficulty since there a company was held bound in the absence of actual authority (or a regular corporate act). After making some observations on that case[102] he distinguishes it on

96 *Turquand* was not referred to in the judgments in *Ernest* v. *Nicholls* though counsel for the company argued that it should be distinguished on the ground that the borrowing there was within the director's ostensible authority.

97 Ibid., 416.

98 Though apparently if the contract had been ordinary, some less stringent rule might apply.

99 Only directors entitled to vote can be counted towards a quorum: *Re Greymouth —Point Elizabeth Ry Co.* [1904] 1 Ch. 32.

100 Cf. *Owen & Ashworth's Claim* [1901] 1 Ch. 115 (C.A.) where a company had less than the minimum number of directors permissible under its articles and they sealed debentures which were held to be effective.

101 (1857) 6 H.L.C. 401, 417. The latter words might indicate that the decisive factor in his mind is to be not those general principles but the section already adverted to.

102 He noted that a registered company, being a corporation, was bound only by its common seal or according to the Act but said nothing as to what the Act demanded by the words "on behalf of", though he questioned whether anything less than proof that all the directors or a "board" saw and sanctioned the purchase of each article in *Smith* v. *Hull Glass Co.*, should have sufficed, unless

the ground that it concerned "ordinary" contracts whereas the instant one was "extraordinary", and

> "Such a contract clearly does not bind, unless it is authorized by the deed, and it is made strictly according to its provisions. Therefore it was required to be made by all the directors of the Appellant company, or by a board where three being present the majority approves, and therefore binds the others."[103]

He observes that one of the three directors who were said to have participated was prohibited by section 29 from voting. He thus reaches the Lord Chancellor's conclusion after a reluctant and ill-defined concession in favour of "ordinary" contracts. It is ill-defined because, if his Lordship would insist that such contracts be made (authorized actually or apparently, or ratified) by all the directors or by a board, he would be insisting on a regular act by a constitutional organ and would exclude the possibility of any corporate indoor management rule, at least in all cases except where a contract was both *ordinary* and *sealed*.[104]

(as had been suggested by Maule J. in that case), directors were permitted, like ordinary partners, to allow employees to act for them.

[103] (1857) 6 H.L.C. 401, 421.

[104] The concepts of an "extraordinary contract", an act "outside the ostensible authority of an agent", and circumstances "putting an outsider on inquiry" are closely related but must be distinguished. An extraordinary contract is one outside the total range of contracts which would ordinarily be made as part of carrying on a particular business. Ostensible authority is that which appears to an outsider to be the authority of a particular agent or group-agent by virtue of a representation by the company. In the typical case it arises from a bare holding out of an individual as filling a certain office and the measure of it will be the usual authority associated with that office in that kind of company and that kind of business. Since the directors were, by 1844, recognized as a group-agent with ostensible authority to manage and carry on the business of their company, their ostensible authority did extend to making all ordinary contracts. Lesser officers however, would, at most, have ostensible authority to make a more restricted range of ordinary contracts.

But a company may make extraordinary contracts; e.g. for the sale or mortgage of its undertaking or the purchase of that of another company. There is no ostensible authority in even "the directors" to make such a contract. It must be made by *the company itself* or by agents with actual authority or the directors seized of actual power and functioning regularly. But what the seal signifies is an act *of the company itself*, so when it appears, even on an extraordinary contract, the first corporate indoor management rule should apply unless the outsider is or should be "put on inquiry".

An outsider may be "put on inquiry" although he is making an ordinary contract and although it is within the ostensible authority of the agent with whom he is dealing. Where a contract is beyond an agent's apparent authority or where it is extraordinary it is tempting to say that the outsider is put on inquiry but it is preferable to say in the first case that there is no ostensible authority as to the act in question, and in the second case, that there is no ostensible authority in the directors to contract by parol and that the contract must be made under seal. Similarly it is tempting to interpret a statement that in a particular situation there was nothing to arouse an outsider's suspicions as a statement that a contract was ordinary or that ostensible authority existed. (It was suggested earlier (see p. 32 *ante*) that in *Turquand*, Lord Campbell C.J.'s dictum that the bank might have presumed the directors to have had authority to borrow the £2,000 on bond is probably best construed as a statement that there was nothing to put the bank on inquiry). Indeed, if a course of unsuspicious transactions developed an ostensible authority would doubtless arise.

In *Ernest* v. *Nicholls* Lord Wensleydale concludes that where a contract is extraordinary, then even though it be sealed, only total regularity preceding the sealing will render it binding. It is submitted that this is wrong and that the first corporate indoor management rule applies in such a case. It is believed that such a situation is precisely within the *Turquand* principle on the narrowest view of it. Cancel the interested director's participation and what is left?—a sealing, apparently regular, but proved to have been authorized by less than a quorum. In precisely such circumstances *Turquand* was applied subsequently.[105] Indeed, generally the common seal may be expected to be used only in extraordinary transactions and if *Turquand* were not to be available in such cases there would be little scope for it to save an irregular sealing.[106]

The judgments in *Ernest* v. *Nicholls* overlook the presence of the seal and the positive corporate seal rule. They conceive of the contract as one made by the directors as group-agent and even if *some* ostensible authority in the directors is consistent with the judgments (a doubtful proposition), the only rule which, consistently with them, could assist the outsider is the "agency secret restriction or limitation rule". It is submitted that the only grounds on which the decision itself can be justified are that the latter part of section 29 was an independent mandatory provision prohibiting the deed from becoming effective,[107] or (and this was not mentioned in argument or in the judgments) that the outsider was put on inquiry (particularly by the circumstance that it had a common director with the company). This after all had always been an exception to the positive corporate seal rule.[108]

Turquand's case was applied in several seal cases decided under the 1844 Act. These were *Agar* v. *Athenaeum Life Assurance Society*[109] (want of shareholder sanction to a sealed borrowing), *Prince of Wales Assurance Co.* v. *Athenaeum Life Assurance Co.*[110] and *Prince of Wales etc Assurance Co.* v. *Harding*[111] (both sealings of policies not authorized by order of three

105 Cf. *County of Gloucester Bank* v. *Rudry Merthyr etc Co.* [1895] 1 Ch. 629 (C.A.); *Owen & Ashworth's Claim* [1901] 1 Ch. 115 (C.A.).

106 One class of company which sealed documents in the ordinary course of its business was the insurance company and it must be conceded that many of the earliest applications of *Turquand* were in cases involving such companies—see fns. 109-111 *post.*

107 Both judges gave this as an alternative ground for their decision and it seems to be clearly correct.

108 See the writer's article first mentioned in fn. 11 *ante.* The strict language of Lord Wensleydale emphasising (what is obvious enough) the irregularity, and virtually ignoring the seal, like similar language in *D'Arcy* v. *Tamar etc Ry Co.* (1867) L.R. 2 Exch. 158, caused difficulty in later cases; cf. Williams J. in *Agar* v. *Athenaeum* (1858) 3 C.B. (N.S.) 725, 755.

109 (1858) 3 C.B. (N.S.) 725.

110 (1858) 3 C.B. (N.S.) 756n.

111 (1858) E1. B1. & E1. 183. *Turquand* was distinguished where a sealed document was manifestly imperfect when compared with the registered deed: *Re Athenaeum Society; ex parte Eagle Insurance Co.* (1858) 4 K. & J. 549.

directors and manager as required by deed). The importance of the common seal and of the provisions of section 44 of the 1844 Act to a proper understanding of *Turquand* is well borne out by dicta in several contemporary cases[112] but nowhere better than in the judgment of Lord Campbell C.J. in *Prince of Wales etc Assurance Co.* v. *Harding.*[113] His Lordship makes the following points: (1) that the *Turquand* principle must be understood in the light of section 44;[114] (2) that the deed's requirements are construed as directory rather than mandatory because the company's internal records, which alone show whether they have been complied with, are not available to the outsider;[115] (3) that the appearance of the common seal is all important and that, for example, *Ridley* (an extraordinary contract case) would have been decided otherwise if the covenanter's seal had appeared.[116] Lord Campbell's judgment is all the more significant when it is recalled that he alone of the judges in *Turquand* might have been considered to have restricted the rule there laid down to cases of "ordinary" contracts.

Conclusion to Part III of the Article

The first registered company was conceived of generally as a form of partnership like its unincorporated predecessor. Incorporation under the 1844 Act, perhaps because it was expressed to be effective only for certain purposes, proved to be such a thin veil that it was virtually ignored.

But it could not be ignored when the common seal appeared. The courts then could and did draw on the law which had been developed in relation to statutory companies and in particular, upon the positive corporate seal rule. Expressed in the context and terms of that law, the decision in *Turquand* simply meant that insofar as compliance or non-compliance could not be known to the outsider, the requirements of the deed of settlement must be construed as directory only. In the light of the presence of the common seal, *Turquand* is not an application of an agency or partnership rule but an application of the positive corporate seal rule to the first registered company.

112 Cf. Martin B. in *Peddell* v. *Gwyn* (1857) 1 H. & N. 590.
113 (1858) E1. B1. & E1. 183.
114 Ibid., 218-219.
115 Ibid., 216, 220. And cf. the similar reasoning applied in the construction of statutes noted in the writer's article first mentioned in fn. 11 *ante* at (1973) 9 M.U.L.R. 192, 203-205. Even Lord Wensleydale in *Ernest* v. *Nicholls* (1857) 6 H.L.C. 401 conceded that *some* stipulations in the deed might be only directory: ibid., 419.
116 In fact he goes so far as to say that where the seal or a statutory alternative appears, then even if the deed is obviously contravened, the seal binds. He illustrates by saying that if a deed required all policies to be effected on vellum, a policy effected otherwise would bind. [(1858) E1. B1. & E1. 183, 220.] It is believed that this is an extreme illustration of a clause which would be construed as directory and that this possibility could not often be safely relied upon.

PART IV—EFFECT OF THE COMPANIES LEGISLATION ON CONTRACTS BY COMPANIES REGISTERED UNDER THE 1856 AND LATER ACTS[117]

Introduction

The legislation touching on the formulation and expression of contractual assent by the registered company has not changed since the *Joint Stock Companies Act* 1856,[118] and the general principles governing contracts registered under the 1856 and later Acts may therefore be dealt with together in this Part.

The inquiry into the "true nature" of the registered company begun in Part II must now be resumed in respect of companies registered under the 1856 Act. The law governing company contracts will be determined *inter alia* according to whether a corporate or partnership view prevails. Whilst it is too easy to draw a general conclusion from a finding of one corporate or partnership feature, it may be safely generalized that the company continued to be treated as a partnership for the purpose of internal matters and disputes,[119] and was treated as a body corporate for the purpose of dealings and disputes with outsiders.

The Exercise of the Legal Contractual Capacity of Companies Registered Under the 1856 and Later Acts

Unlike the 1844 Act,[120] the Acts of 1856 and later years did not vest the exercise of the company's capacity in directors, but like that Act, the optional set of articles in Table B (and in Tables in the Schedules to later Acts) vested in the directors all the company's powers (except any required by the Act or articles to be exercised by the company in general meeting) but subject to the Act, the Articles and to such regulations as might be prescribed by the company in general meeting not inconsistent with the Act or articles.[121] If Table B did not apply, the nature and extent of the vesting of power in the directors was clearly to be determined exclusively by a construction of the registered articles.

A series of decisions in the first decade of the twentieth century established that the directors are not the agents of the shareholders and that the extent of power vested in them is to be determined by reference to the articles of association alone.[122] These cases emphasize that the wording of

[117] This Part is based on Chapter VI of the thesis.
[118] 19 & 20 Vict., c. 47 ("the 1856 Act").
[119] And even this ceases to be true in the first decade of the twentieth century—see the next section of the text.
[120] Section 27 thereof.
[121] Table B, art. 46—see fn. 124 *post*.
[122] *Automatic Self-Cleansing Filter Syndicate Co. Ltd.* v. *Cunninghame* [1906] 2 Ch. 34 (C.A.) especially *per* Collins M.R., 42-43 (distinguishing *Tahourdin's* case as turning on the wording of s. 90 of the *Clauses Act*); *Gramophone and Type-*

the company's constitution is paramount and this approach has characterized recent cases.[123] If the underlying assumption of shareholder control of the directors is thought to represent a partnership view of the company then what must be said is that that view was decisively rejected in those decisions and that a corporate view is now dominant.

Because the type of article used to vest power in the directors almost invariably follows the same form,[124] it is proper to say that a characteristic of the modern registered company is an exclusive vesting of, at the very least, the power of management (and therefore of contracting in the course of management) in the directors. The shareholders may "control the company" only by determining who the directors for the time being shall be[125] (in which control, the statutory power of removal of directors of public companies may play an important part)[126] or by first altering the articles by special resolution.[127]

It is submitted that even if articles clearly made the exercise of directorial power subject to shareholder control, an exercise of that control would

writer Ltd v. *Stanley* [1908] 2 K.B. 89 (C.A.) especially *per* Fletcher Moulton L.J., 98 and Buckley L.J., 105-106; *Salmon* v. *Quin & Axtens Ltd* [1909] 1 Ch. 311 (C.A.) and [1909] A.C. 442 (H.L.). The decision of Neville J. in *Marshall's Valve Gear Co. Ltd* v. *Manning Wardle & Co. Ltd* [1909] 1 Ch. 267 in favour of shareholder control may be taken to have been overruled. And certain *obiter dicta* of Warrington J. in *Thos Logan Ltd* v. *Davis* (1911) 104 L.T. 914 tending in the same direction can scarcely be safely relied upon. It is thought, contrary to Harvey J. in *Dowse* v. *Marks* (1913) 13 S.R. (N.S.W.) 332, that a distinction cannot be made on the basis that the articles in the English cases were interpreted as making the exercise of the directors' powers subject to a "regulation" in the sense of an article, whereas articles which clearly made the exercise of the directors' powers subject to control by an ordinary resolution of a general meeting would be effective to make the directors agents of the shareholders.

123 Cf. *John Shaw & Sons (Salford) Ltd* v. *Shaw* [1935] 2 K.B. 113 (C.A.) (see especially Greer L.J., 134); *Scott* v. *Scott* [1943] 1 All E.R. 582.

124 "The business of the company shall be managed by the directors, who . . . may exercise all such powers of the company as are not, by the Act or by these regulations, required to be exercised by the company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the Act, *and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting . . .*" (art. 80 of Table A to the U.K. Act, 1948; art. 73 in Table A to the Australian States' Acts 1961-1962—emphasis supplied). The word "regulations" where used the first, second and fourth times clearly means "articles". The result of the cases is that whatever meaning is attributed to the third use of the word, the final phrase in the article has been deprived of meaning by the cases decided on this form of article. Such a phrase could be effective if the earlier wording were altered; e.g. so as to vest in the directors a power reduced to an extent dependent upon the will of the general meeting from time to time.

125 Cf. *I.R.C.* v. *Bibby* [1945] 1 All E.R. 667; *British American Tobacco Co. Ltd* v. *I.R.C.* [1943] A.C. 335; *Barclays Bank Ltd* v. *I.R.C.* [1961] A.C. 509.

126 Possible by special resolution under art. 62 in Table B in the Schedule to the 1856 Act and now by ordinary resolution on "special notice" under s. 148 of the 1948 Act (U.K.) and s. 120 of the uniform Companies Acts of the Australian States.

127 That the general meeting cannot direct the board to institute legal proceedings is seen to affect the rule in *Foss* v. *Harbottle*; cf. Wedderburn, "Shareholders' Rights and the Rule in *Foss* v. *Harbottle*" [1957] Camb. L.J. 194; [1958] Camb. L.J. 93; Gower, *op. cit.*, pp. 136-138.

not affect an outsider contracting with the directors. Indeed, in *Turquand* itself the directors had only conditional power to borrow—power conditional upon their first having obtained general meeting sanction. In "presumption" terminology the outsider was entitled to presume, in the face of the common seal, that the approval had been given, and the directors had become seized of unconditional power. Since the function of the seal is merely to identify a corporate act, where it can be said, whether by virtue of its appearance or otherwise, that the directors have exercised a constitutional power which was subject to shareholder control, the company will not be allowed to set up the fact that it was exercised contrary to the shareholders' prohibition for that prohibition is an internal matter of which the outsider is unaware.[128]

The Expression of the Contractual Assent of Companies Registered Under the 1856 and Later Acts

Section 41 of the 1856 Act included the now familiar provisions that those contracts which, if made by private persons, would be by law required to be made under seal, may be made "under the common seal of the company"; that those contracts which if made by private persons would be required by law to be in writing, may be made by the company "in writing signed by any person acting under the express or implied authority of the company"; and that those contracts which if made between private persons might validly be made by parol and not reduced to writing, may be made "by parol by any person acting under the express or implied authority" of the company; and that "contracts so made shall be effectual in law and binding on the company".[129] Consistently with the legislature's more liberal policy towards the expression of contractual assent, the Act similarly provided[130] that bills of exchange and promissory notes should be deemed to have been made, accepted or endorsed on behalf of a company if made, accepted or endorsed in the name of the company or by or on behalf of a company by "any person acting under the express or implied

128 It is significant that the cases in which the issue of shareholder control has been contested, have all concerned "internal" or "domestic" disputes.

129 A comparable section has appeared in all later Acts excepting that of 1862; cf. s. 37 of the 1867 Act; s. 76 of the 1908 Act; s. 29 of the 1929 Act; and s. 32 of the 1948 Act. The New South Wales sections have been s. 68 of the 1874 Act; s. 241 of the 1899 Act; s. 348 of the 1936 Act; and s. 35 of the 1961 Act. Section 37 of the 1867 U.K. Act was applied in *Beer* v. *London and Paris Hotel Co.* (1875) L.R. 20 Eq. 412; s. 68 of the 1874 N.S.W. Act in *Gale* v. *Wingello Coal Mining Co. Ltd* (1890) 11 L.R. (N.S.W.) 79 (L.); s. 29(10)(b) of the 1929 Act in *Re British Games Ltd* [1938] Ch. 240; and s. 348 of the 1936 N.S.W. Act in *Richardson* v. *Landecker* (1950) 50 S.R. (N.S.W.) 250. The suggestion is made by R.-W. in "Contracts of Companies Not Under Seal" (1957) 107 The Law Journal, 469 that the section leaves uncovered the commonest contract of all, *viz.* the contract which, whilst not *required* by law to be written, is in fact reduced to writing. A reply is made by A. H. Hudson in "Contracts Made by Parol" (1957) 21 Conv. 465.

130 In s. 43.

authority of the company".[131] It will have been noted that the word "authority" does not appear in the section in the context of sealed contracts. This is proper since, as ever, a sealing signifies an original act of the body corporate itself.

The use of the phrase "express or implied authority" in the context of parol contracts[132] suggests the question whether a contract within the apparent authority of an agent but beyond his actual authority could bind the company. It will be recalled that apparent authority had scarcely come to satisfy the expression "on behalf of the company" in the contracting section of the 1844 Act.[133] But in fact under the 1856 and later Acts absence of actual authority did not defeat the outsider in two written contracts cases (*Mahony* v. *East Holyford Mining Co.*[134] and *Biggerstaff* v. *Rowatt's Wharf Ltd*[135]) and in one bill of exchange case (*Re:Land Credit Co. of Ireland*[136]) before the question of interpreting the phrase with reference to apparent authority arose directly in 1909 in *Premier Industrial Bank Ltd* v. *Carlton Manufacturing Co. Ltd and Crabtree Ltd.*[137] Pickford J. there held that a director accepting a bill on behalf of his company but without actual authority was not "a person acting under the authority of the company" within section 47 of the 1862 Act. But in 1921 in *Dey* v. *Pullinger Engineering Co.*[138] a Divisional Court held that "authority" meant "express, implied or *apparent* authority"[139] and overruled *Premier*.

Even granting that the single word "authority" may refer to "apparent authority" (a doubtful proposition), it must be asked whether the word

131 A comparable section (but omitting the words "express or implied") has appeared in all later consolidating statutes; cf. s. 47 of the 1862 Act; s. 77 of the 1908 Act; s. 30 of the 1929 Act; and s. 33 of the 1948 Act. The New South Wales sections (which have always omitted the words "express or implied") have been s. 79 of the 1874 Act; s. 244 of the 1899 Act; and s. 349 of the 1936 Act. There is no comparable section in the 1961 Act and it has been questioned whether such a section would be *intra vires* the legislative power of an Australian State: Wallace and Young, *Australian Company Law and Practice* (Sydney: The Law Book Co. Ltd, 1965), p. 135; and note ss. 27, 28, 30 and 31 of the *Bills of Exchange Act* 1909-1958 (Commonwealth). On the meaning of "express or implied authority" see *post*. But as to "apparent authority" in this section specifically, note *B. Liggett (Liverpool)* v. *Barclays Bank* [1928] 1 K.B. 48 and *Kreditbank Cassel GmbH* v. *Schenkers Ltd* [1927] 1 K.B. 826 (C.A.). Whether a particular signature is a "signature of the company" may arise under this section as under the general contracting section; see *ante* and *Electrical Equipment of Aust. Ltd* v. *Peters* (1957) 57 S.R. (N.S.W.) 361.

132 The expression "parol contracts" is used in the paper to signify both written and oral contracts and this is thought to be a proper usage; cf. Skinner L.C.B. in *Rann* v. *Hughes* (1778) 4 Bro. P.C. 27 and Lord Denman C.J. in *Gibson* v. *Kirk* (1841) 1 Q.B. 850, 856 but on the meaning of "parol" as used in the contracting sections see the notes by R.-W. and by A. H. Hudson *ante cit.*

133 See Part III at pp. 26-31 *ante*.

134 (1875) L.R. 7 H.L. 869.

135 [1896] 2 Ch. 93 (C.A.).

136 (1869) 4 Ch. App. 460.

137 [1909] 1 K.B. 106. ("*Premier*").

138 [1921] 1 K.B. 77.

139 Emphasis supplied—the "natural and ordinary" meaning of the word according to Bray J.

can fairly bear that meaning in the phrase in the contracting section, "express or implied" authority? Certainly apparent authority is not express authority and it is submitted that it is not implied authority. If this view had prevailed, the "agency secret restriction and limitation rule" would have had no role to play in the context of company contracts.

The wish to bring the apparent authority of company agents within the section was understandable for a number of reasons. First, the general tenor of the section was to enable companies to contract in the same way as individuals. Second, various offices within the company were becoming an accepted part of commercial life and providing a basis for speaking of usual authority which in turn would provide a delineation of apparent authority in cases of holding out. Third, the statutory permission for companies to contract by authorized agents was not expressed as an optional alternative to formal modes of contracting as it had been in section 44 of the 1844 Act. Fourth, the legislative change of 1856 occurred with remarkable coincidence with a number of cases[140] in which trading companies were held liable, on no distinct principles, on parol contracts within their purposes of incorporation as exceptions to the negative corporate seal rule. Perhaps the legislative change received impetus from the facts that the ordinary trading contracts of registered trading companies would be similarly excepted from the negative rule; that the vast majority of registered companies would be of that type; and that it was better that their contracts should be governed by the entire ready-made body of principles offered by agency law than by none at all.[141]

It may be thought that if the sections had not been interpreted to embrace "apparent" authority they would have had no effect. This is not so, for without statutory provision, the general rule applicable to the registered company, as to any other body corporate, was that it could not contract except under seal. Indeed it is believed that the intention of Parliament was to do no more than to provide that the company might contract in the *same modes* as an individual. It would have been better if the legislature had dealt only with *modes* of expression and had not introduced questions of authority.[142] If it had been enacted merely that

[140] Cf. *The Australian Royal Mail Steam Navigation Co.* v. *Marzetti* (1855) 11 Ex. 228; *Henderson* v. *The Australian Royal Mail Steam Navigation Co.* (1855) 5 E1. & B1. 409; *Reuter* v. *The Electric Telegraph Co.* (1856) 6 E1. & B1. 341.

[141] Section 41 and its successors have, of course, applied uniformly to the contracts of *all* registered companies, whether trading or not!

[142] Cf. ss. 144 and 145 and comments thereon in the Draft Companies Code Bill being Appendix 1 to the *Final Report of the Commission of Enquiry into the Working and Administration of the Present Company Law of Ghana*, 1961, p. 112. Professor Gower there notes the possibility that "authority express or implied" might well have been construed as referring only to actual authority. He suggests the expressions "in writing signed in the name or on behalf of the company" and "by parol on behalf of the company". Unfortunately s. 1 of *The Corporate Bodies' Contracts Act* 1960 (8 & 9 Eliz. 11, c. 46) and s. 31A of the *Instruments Act* 1958 (Vic.) retain the "authority express or implied" terminology.

a company might contract in the same modes as an individual, the company's contracts, like those of any individual principal, would have been immediately seen to be subject *inter alia* to all the agency principles relating to actual and apparent authority. The only points of special interest would have been that a particular contractual act might be beyond the legal capacity of the body corporate itself; the effect of the doctrine of constructive notice; and the task of defining a parol contractual act by a body corporate. By virtue of the judicial interpretation of the expression "express or implied authority" to include apparent authority, and modern appreciation of the fact that apparent authority cannot be constructed out of the doctrine of constructive notice, the same position has now been achieved.

It was not by the use of the word "authority" that the shift to agency principles in the context of company contracts was made possible, for under the kind of legislation hypothesized earlier the same result would have ensued. The important point in the contracting section is that, as interpreted, its effect was simply to exempt the registered company from the negative corporate seal rule. Where that rule applies, contracts must be made by the body corporate *itself*; where it does not apply then prima facie all the general principles of agency become operative.

A fortiori the de-formalization of the contracting section was not an endorsement of a partnership view of the company. It must be borne in mind that this de-formalization was and is made possible only by virtue of statute and is to be seen against a background of corporate personality, and although prima facie the common seal was now to fulfil no function beyond that served by the seal of an individual, it was nonetheless the company's "common" seal and it was still the primary mode of expressing corporate assent. Far more importantly, although parol contracts might now be made by a company's "agents" they were to be the agents of a body corporate. What would be regarded as acts of delegation or of holding out by such a body in view of the fact that the peculiar vulnerability thereof on the basis of non-compliance with prerequisite or manner and form would virtually never be "covered" by the appearance of the common seal? There would, in this context, be ample scope for the operation of further "*corporate* presumptions of internal regularity" or "*corporate* indoor management rules" of one kind or another.[143]

[143] To avoid repetitiveness and since the unincorporated company has previously been dealt with and the company is now clearly a body corporate, the word "corporate" may be omitted from these expressions henceforth.

The task of defining what will suffice to constitute a parol act of a body corporate relevant to contracting (acts of contracting, delegation, representation or holding out and ratification or acquiescence) and the role, if any, to be played by an indoor management rule where any such act is affected by irregularity and the extent of appearance of regularity which will need to be proved in order to activate any such rule were the subject of Chapter VII of the thesis and will form the subject of an article to be published in the future.

The Application of Turquand in Form Cases Decided Under the 1856 and Later Acts

Human beings may effectively bind the company registered under the 1856 and later Acts as its constitutional organs or as its agents.[144] A contractual act by the former is an act of the company itself. The strongest evidence of such an act continued to be the appearance of the common seal. Although the negative corporate seal rule was abolished by the 1856 Act, the appearance of the common seal might still be expected to have at least the same evidentiary force as that possessed by the appearance of an individual's seal.

It will be recalled that sealed contracts of companies registered under the 1844 Act were treated specially because of (1) the positive corporate seal rule, and (2) the peculiar contracting provisions in section 44 of the Act. Under the 1856 and later Acts the latter ground was gone but it might be expected that the former would remain effective. In fact the seal was the appearance of assent which dominated the early cases decided under those Acts in which *Turquand* was applied just as it had been under the 1844 Act. What was being applied was therefore the positive corporate seal rule. The cases referred to, together with more recent cases in which the seal has appeared and the rule has been applied, are *Re County Life Assurance Co.*;[145] *County of Gloucester Bank* v. *Rudry Merthyr etc Co.*;[146] *London Freehold Land Co.* v. *Suffield*;[147] *Duck* v. *Tower Galvanizing Co.*;[148] *Owen and Ashworth's Claim*;[149] *Fawcett* v. *Johnson*;[150] *Cox* v. *Dublin City Distillery (No. 2)*;[151] *Gillies* v. *Craighton Garage Co.*;[152] and

144 The company's functional organs should, it is submitted, be treated as agents in the contractual context.

145 (1870) L.R. 5 Ch. App. 288 (insurance policy sealed and signed by the *de facto* directors and countersigned by secretary).

146 [1895] 1 Ch. 629 (C.A.) (mortgage sealed on authority of and authenticated by two directors and secretary where quorum of directors (fixed by the board) was three).

147 [1897] 2 Ch. 608 (C.A.) (mortgage sealed and authenticated by two directors and company secretary, the directors' understanding that it would not take effect until the advance was received by the company's solicitor-banker-manager being treated as a matter of internal management. *Quaere* whether a principle other than the first corporate indoor management rule was applicable here).

148 [1901] 2 K.B. 314 (sealed debenture signed by two of seven "subscribers deemed directors" one of whom was *de facto* managing director or even *de facto* owner of the business).

149 [1901] 1 Ch. 115 (C.A.) (constitutional minimum number of directors was three and when number of incumbents fell to two they issued debentures under common seal).

150 (1914) 31 W.N. (N.S.W.) 160 (guarantee bond sealed and attested by company's manager but sealing not authorized by the directors or by a director as required by the articles).

151 [1915] 1 I.R. 345 (C.A.) (sealed debentures issued on authority of meetings of directors at which, by reason of directors' interests, no quorum was present, held valid in favour of innocent outsiders though not in favour of the directors themselves).

152 [1935] S.C. 423 (mortgage without requisite authority of shareholders).

Albert Gardens (Manly) Pty Ltd v. *Mercantile Credits Ltd.*[153] In other cases the seal prevailed over internal irregularity though *Turquand* was apparently not referred to.[154]

One case which presents difficulty is *Re:Pooley Hall Colliery Co.*[155] Articles empowered directors to incur debts and to borrow on mortgage to an amount not exceeding £8,000. A borrowing might exceed that figure only with the prior consent of a general meeting. The directors issued debentures without that sanction at a time when the company's liabilities already exceeded £8,000. The report does not say but presumably the debentures were sealed. Lord Romilly held them to be absolutely void. *Turquand* was neither cited in argument nor referred to in the judgment. *Turquand* is believed to have covered the matter precisely and the case is thought to have been wrongly decided.[156]

Notwithstanding the anomalous decision in *Pooley Hall*, in many of the early cases there is a distinct emphasis upon the sealed (though the words "or written" are sometimes added) appearance of corporate obligation. In *Duck* v. *Tower Galvanizing Co.*[157] for example, Lord Alverstone C.J. observes

> "From the case of *Royal British Bank* v. *Turquand* down to *Mahony* v. *East Holyford Mining Co.* in the House of Lords, it has always been held that it is not incumbent on the holder of such a document purporting to be issued by a company to inquire whether the persons pretending to sign as directors have been duly appointed. Those cases were followed by the Court of Appeal in *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.*; so that there has been ample authority to show that no informality will alter the rights possessed by a bona fide holder for value upon a document that purports to be in order. In this case the seal of the company was affixed, and the debenture purports to be signed by two directors."[158]

Predictably in these cases where the first indoor management rule was applied it continued to be said that the outsider was entitled to presume that (1) *de facto* directors affixing the seal were *de jure* directors; (2) that

153 (1973) 47 A.L.J.R. 745 (sealed debentures issued on the authority of directors and authenticated by them where they had not possessed necessary share qualification when appointed).

154 Cf. *Re The Hansard Publishing Union Ltd* (1892) 8 T.L.R. 280 (C.A.) (sealing not authorized by directors' resolution as required by articles); and *Re Hapytoz Pty Ltd (in liq.)* [1937] V.L.R. 40 (guarantee sealed by managing director without actual authority).

155 (1869) 21 L.T.R. 690.

156 It is not thought that *Turquand* can be distinguished on the ground that there the deed vested borrowing power subject to prior approval whereas in the instant case the articles prohibited a borrowing without prior approval.

157 [1901] 2 K.B. 314.

158 Ibid., 318. And for a similar emphasis cf. *Fountaine* v. *Carmarthen Ry Co.* (1868) L.R. 5 Eq. 316 *per* Wood V.-C., 321-322 and *Re London, Hamburg, & Continental Exchange Bank, Zulueta's Claim* (1870) 5 Ch. App. 444 *per* Gifford L.J., 451-452.

the directors were seized of the power[159] which they purported to exercise; and (3) that the directors had functioned in accordance with constitutional requirements. Since the first of these seems itself to be founded on a representation by holding out by the company the two classes of internal irregularity affecting a purported corporate act which may be said to be "covered" by the seal and by the first indoor management rule are "non-seizure of power" and "irregularity of functioning".

Turquand and Non-Form Cases Decided Under the 1856 and Later Acts

So long as *Turquand* was applied only in seal cases (and seal cases were now the only "form" cases) there was little difficulty. The appearance of the common seal was not only the strongest possible evidence that the company was bound but it signified unequivocally that the contractual act in question was *an act of the body corporate itself*; that it was a "corporate act"; that the *Turquand* rule was a part of corporate-constitutional law. Where the common seal appeared it did not much matter if the judges erroneously used agency terminology by referring to "presumptions that the persons affixing it were *authorized*" or "presumptions that persons who might, consistently with the articles have had *authority* to affix it, had *actual authority* to do so", because such statements presupposed that the common seal appeared to indicate a corporate act.

But when the 1856 Act abolished the negative corporate seal rule and made it possible for the company to contract subject to no greater formality than the individual, difficulties arose. Where the negative corporate seal has not applied, whether by virtue of an exception at common law or of a statutory provision like section 41 of the 1856 Act, the opportunity has arisen for the courts to do two things: first, to state the corporate-constitutional law principles which will identify a parol corporate contractual act; and secondly, to confirm that agency principles of actual authority, apparent authority and ratification were also operative in the context of company contracts. But neither in the cases falling within common law exceptions to the negative rule nor in cases under the Companies Acts was this opportunity seized.

What did happen in the latter class of case and caused much confusion was that the courts purported to apply the decision in *Turquand* in agency situations. Whereas the seal necessarily signified a corporate act, written and verbal contracts did not do so. Although theoretically it was possible to have a written or verbal contract made by the company itself (acting in the form of its constitutional contracting organ), and therefore there was *scope* for the application of *some* corporate-constitutional law principle to help define a corporate act in the absence of the seal, the courts seemed ready to apply *Turquand* indiscriminately as a reason for holding

[159] Usually the word "authority" was used.

the company liable for the acts of humans, whether agents or members of constitutional organs. The "authority" terminology used by judges with reference to "the directors" facilitated the transfer of a corporate rule to agency situations.[160] In fact in all the parol contract cases decided, the contracts in question purported to be made by agents rather than by "the directors".

It was only when cases arose in the 1920s[161] where the agent's contractual act was such that either the outsider was put on inquiry or the act lay outside the ostensible authority of the agent in question, that the relevance of the entire framework of agency law to company contracts began to become obvious, and that the applicability of *Turquand* within that framework was questioned. Since the decision in *Freeman and Lockyer* v. *Buckhurst Park Properties (Mangal) Ltd*[162] it is clear that the rule that an outsider dealing with a company's agent within his ostensible authority is not affected by the fact that his actual authority is not so extensive, is only the old agency secret restriction and limitation rule and is not the *Turquand* rule at all.[163]

CONCLUSION

As it was originally conceived and conceived of, the rule in *Turquand's* case was an application to the registered company of a well established principle of corporate-constitutional law that in the presence (apparently regular) of a body corporate's common seal, an outsider was entitled to assume that he was faced with a corporate act and that internal management had been regular. This "positive corporate seal rule" we may call, for reasons appearing below, the "first indoor management rule". Moreover, it is now clear that an outsider who has relied on an appearance of authority in a company's agent is entitled, in accordance with and subject to normal principles of agency law, to invoke the agency secret restriction and limitation rule. What has not yet been explored either in the cases or in legal literature, is the question whether there are further indoor management rules. Is there a second indoor management rule to be invoked by the outsider where he has relied upon what is admittedly a parol act of

160 Although the error has been observed, exposed and corrected, the same unfortunate terminology persists today.

161 *J. C. Houghton & Co.* v. *Nothard Lowe & Wills Ltd* [1927] 1 K.B. 246 (C.A.) and *Kreditbank Cassel (GmbH)* v. *Schenkers* [1927] 1 K.B. 826 (C.A.).

162 [1964] 2 Q.B. 480 (C.A.).

163 At this point in the thesis the case *Totterdell* v. *Fareham Brick & Tile Co.* (1866) L.R. 1 C.P. 674 was examined in detail as an illustration of the distorted development just referred to. This case was in fact the first of the non-seal cases in which *Turquand* was applied (or misapplied).

Some special aspects of the company as principal were examined at this point in the thesis, *viz.* the effect of a representation by an agent as to the existence and extent of his own authority; the effect of the absence of an express power of delegation in the company's articles of association; the relationship between the doctrine of constructive notice and the doctrine of *ultra vires*.

a constitutional organ where that organ had not become seized of the necessary power to do the act because of non-compliance with an internal prerequisite?[164] Is there a third indoor management rule to be invoked by an outsider where he has relied upon some indicia of an act by a corporate constitutional organ but which, it transpires, was not a regular act because of non-compliance with an internal manner and form requirement?[165] It is believed that such further rules of corporate constitutional law do exist but their nature and the difficult question of how much apparent regularity the outsider must prove he relied upon before he will be entitled to invoke their aid will have to be examined at another time.

164 Non-seizure of power by reason of non-compliance with an internal prerequisite is dealt with by s. 9(1) of the *European Communities Act* 1972 (U.K.) which provides as follows:

> "In favour of a person dealing with a company in good faith, any transaction decided on by the directors shall be deemed to be one which is within the capacity of the company to enter into, and the power of the directors to bind the company shall be deemed to be free of any limitation under the memorandum or articles of association; and a party to a transaction so decided on shall not be bound to enquire as to the capacity of the company to enter into it or as to any such limitation on the powers of the directors, and shall be presumed to have acted in good faith unless the contrary is proved."

165 This question is not dealt with by any legislation which refers simply to acts or decisions of "the board" or "the directors"; cf. s. 9(1) of the *European Communities Act* 1972 (U.K.) *supra*. And see D. D. Prentice, "Section 9 of the European Communities Act" (1973) 89 L.Q.R. 518 for other limitations inherent in the section.