

THE LIABILITY OF STATUTORY CORPORATIONS FOR *ULTRA VIRES* TORTS.

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THE opinion has frequently been advanced that the liability of a statutory corporation, in tort, as in contract, is limited to those functions which it has been expressly empowered to exercise. Perhaps the ablest and most lucid exposition of this view that a company cannot be liable for an *ultra vires* tort is to be found in Professor A. L. Goodhart's essay, "Corporate Liability in Tort and the Doctrine of *Ultra Vires*."¹

Professor Goodhart appears to base his contention on two main grounds:—

(1) That liability for an *ultra vires* tort would involve liability for an *ultra vires* contract of service.

(2) That, in addition, a corporation cannot authorize persons to engage in *ultra vires* activities, and, consequently, such persons are agents of the particular officers of the corporation who engage them and not of the corporation itself.

*The Effect of the Decision in Ashbury Railway Carriage Co. v. Riche.*²

Since a corporation can only act by means of agents it cannot itself commit a tort. Therefore the tortious liability of corporations must be vicarious. Now the legal relationship between a corporation and its agents is that of master and servant.³ It is undoubtedly the law that a statutory corporation cannot be held liable for an *ultra vires* contract.⁴ What, then, is to be said of the contract of employment by which a corporation purports to employ servants for the execution of *ultra vires* undertakings?

Professor Goodhart contends that any such person is not a servant of the corporation, and accordingly the corporation is not liable for his torts. He says that if a corporation is not authorized to run trams and nevertheless purports to run them there can be no valid contract of employment between the corporation and any of the tram drivers. As a result, however negligent the drivers of the trams may be, such negligence cannot be imputed to the corporation.

In answer to this contention it is submitted that the vicarious liability of a master for the torts of his servants depends not so much on the validity of the contract of employment as on the fact of control by the master.⁵ Certainly the authorities on this point are concerned with situations where no attempt was made to create a contractual

1. A. L. Goodhart: *Essays in Jurisprudence and the Common Law*, pp. 91-109.

2. L.R. 7 H.L. 653.

3. *Citizens Life Assurance Co. v. Brown* [1904], A.C. at 426.

4. *Ashbury Railway Carriage & Iron Co. v. Riche*, L.R. 7 H.L., 653.

5. *Samson v. Aitchison* [1912] A.C. 844; *Reichardt v. Shard* 31 T.L.R. 24; *Pratt v. Patrick* [1924] 1 K.B. 488; *Wheatley v. Patrick*, 2 M & W. 650; *Booth v. Mister* 7 C & P. 66.

relationship; but there is no reason to suppose that the law is any different where there is a void contract, for in both cases the result is the same.

Under Whose Authority is the Tortfeasor?

However, Professor Goodhart's thesis does not necessarily stand or fall with the argument which has just been discussed. If it be held that the doctrine of *Ashbury Railway Carriage and Iron Co. v. Riche*⁶ does not prevent the relationship of master and servant subsisting between a corporation and those of its agents who are engaged in *ultra vires* undertakings, the learned author is not left without an answer.

He says, "A without authority engages B to be the servant of C. Is C liable for the torts of B committed in the course of his supposed employment? Clearly not."⁷ Professor Goodhart's position is that actually the corporation lacks capacity to control agents engaged for *ultra vires* purposes. When, therefore, those who manage a company's affairs purport so to employ agents, such are not agents of the company, but of the party who engaged or instructed them.

This is an extreme application of the fiction theory of corporate personality. While English law does hold corporations to be legal fictions,⁸ it must be remembered that all legal personality is the gift of the State, and the tendency of English law is to treat the artificial corporate person as nearly as possible in the same manner as other legal persons.⁹

If the law were logically to adhere to the strict fiction theory it would make it impossible for corporations to be liable for any torts at all. As Avory J. has said in *Campbell v. Paddington Corporation*,¹⁰ "To say that, because the borough council had no legal right to erect it, therefore the corporation cannot be sued, is to say that no corporation can ever be sued for any tort or wrong."

Street¹¹ and Goodhart, as pointed out by Stallybrass¹² in allowing corporate liability for some torts, go further than the logical limits of the fiction theory, without adhering to the general tendency of English law to treat corporations like other legal persons. In addition, in one sense, a crime must of necessity be *ultra vires*, yet the field of corporate liability for crime is increasing rather than diminishing. Once we admit exceptions the argument based on lack of capacity necessarily breaks down.

But even if there is no incapacity preventing a corporation from controlling agents who perform functions outside the powers granted to it, how are we to know that, for instance, a resolution of a town council has not been passed for the benefit of the councillors themselves, if they have acted without statutory authority? Lush J. in

6. L.R. 7 H.L. 653.

7. A. L. Goodhart: *Essays in Jurisprudence and the Common Law*, p. 95.

8. *Salamon v. Salamon* [1897] A.C. 22.

9. Holdsworth: *History of English Law*, Vol. IX, p. 70.

10. [1911] 1 K.B. 869.

11. Street on *Ultra vires* p. 265.

12. *Journal of Comparative Legislation*, 1931, pp. 142-3.

Campbell v. Paddington Corporation,¹³ has attempted to meet this argument, but merely begs the question.

It is submitted that the correct approach to this problem is that made by Mr. C. R. V. Winn, who, in discussing corporate liability for crime, distinguishes a corporation's primary representatives from the remainder of its agents.¹⁴ The policy of a corporation can only be seen in the decisions of its directors or other similar officers. When purporting to act for the corporation, those primary representatives who alone can give voice to its policy and exercise its powers are so closely associated with its corporate existence as to represent it to all intents and purposes.

To this it may be added that if a corporation purports to engage agents to do work which it is not empowered to do, all profits are credited to the corporation, and all the facilities that the corporation possesses are used for that purpose. When that work has been undertaken by authority of the primary representatives of the corporation it is submitted that it is the work of the corporation and not of any of its agents.

Poulton's Case.

As is pointed out by the late Sir John Salmond,¹⁵ *Poulton v. London and South Western Railway*¹⁶ is sometimes cited as an authority that corporations cannot be liable for *ultra vires* torts. However, this case merely decides that the *implied* authority of an employee of a corporation does not extend to acts which are *ultra vires*.¹⁷

It is frequently urged that certain dicta go much further than this, the words usually relied upon in support of this contention being, "The railway company having no power themselves, they cannot give the stationmaster any power to do the act."¹⁸ However this dictum of Blackburn J. when carefully construed will be seen to do no more than state that the stationmaster's act was *ultra vires*—the words being used to show that it would have been improper for the company to have authorized the stationmaster to have acted as he did. Blackburn J. nowhere suggests that the company could not have authorized the stationmaster so to act.

In support of this view, we have the House of Lords decision in *Doolan v. Midland Railway Company*.¹⁹ Admittedly this case is not very satisfactory, and Lord Blackburn's speech, where he deals with *ultra vires* torts, is rather confused. One thing is clear, however, his opinion was that a corporation could be liable for such, and as he was one of the judges who decided *Poulton's Case* this should remove any doubts as to the *ratio decidendi* there.

13. [1911] 1 K.B. 869.

14. 3 Camb. L.J., at 406.

15. Salmond on Torts, 8th ed, p. 58.

16. L.R. 2 Q.B. 534.

17. *Campbell v. Paddington Corporation* [1911] 1 K.B. 869; *Ormiston v. Great Western Railway* [1917], 1, K.B. 598, at 603.

18. L.R. 2 Q.B. at 540; Clerk & Lindsell on Torts, 8th ed, at p. 54.

19. 2 A.C. 792.