

COMPANY CONTRACTS

BY M. J. TREBILCOCK*

The circumstances in which a company will be bound by the acts of its agents pose one of the most vexed questions in company law. The importance of this question needs no emphasis: as a company must, by its nature, always act through the instrumentality of agents any question of a company's contractual liability will invariably involve a preliminary question as to the authority of the relevant agent to bind the company. This article is an attempt at an elucidation of the rules governing the capacity of agents to bind a company.

The Rule in Turquand's Case

The so-called *Rule in Turquand's Case*¹ is of course central to this discussion. The nature of this rule has long been the subject of debate. There seems little doubt now that its effect has changed considerably since its first formulation. As originally formulated and certainly as interpreted and applied in early cases, it seems clear enough that the *Rule in Turquand's Case* was once a special rule of company law, that is, that third parties dealing with a person purporting to have authority to bind the company in respect of the transaction in question will be entitled to hold the company bound on contracts so made if that person under the company's articles might have had the necessary authority. The *Rule in Turquand's Case* can be found so stated in many early cases.² Attempts have been made by later courts³ and commentators⁴ to read down these statements of the rule by spelling out of the cases in which they were made an acknowledgement that the party dealing with the company had actual knowledge of and relied on the provision in the articles under which the 'agent' could have received the necessary authority thus raising some sort of estoppel against the company. However, any examination of these cases shows

* LL.B. (N.Z.), LL.M. (Adel.), Lecturer in Law, University of Adelaide.

1. *Royal British Bank v. Turquand* (1856) 6 E. & B. 327; 119 E.R. 886.
2. E.g., *Totterdell v. Fareham Brick Co. Ltd.* (1866) L.R. 1 C.P. 674, 677, 678; *In Re Land Credit Co. of Ireland* (1869) L.R. 4 Ch. App. 460, 469; *In Re County Life Assurance Co.* (1870) L.R. 5 Ch. App. 288, 293; *County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Co.* [1895] 1 Ch. 629, 633, 636; *Duck v. Tower Galvanizing Co. Ltd.* [1901] 2 K.B. 314, 318; *Prince of Wales Assurance Society v. Athenaeum Insurance Society* (1858) 3 C.B. (N.S.) 756n; *Mahony v. East Holyford Mining Co.* (1875) L.R. 7 H.L. 869, 883, 893ff, 900; *Fountaine v. Carmarthen Railway Co.* (1868) L.R. 5 Eq. 316, 322.
3. See in particular *Slade J. in Rama Corporation v. Proved Tin and General Investments Ltd.* [1952] 2 Q.B. 147.
4. See in particular *Montrose* (1934) 50 L.Q.R. 224.

quite clearly that in none of them has the requirement of knowledge of the articles ever been explicitly laid down as an element of the *Rule in Turquand's Case* and moreover that in none of them has this even been considered a relevant inquiry. Indeed in *Turquand's* case itself, Lord Campbell C.J. at first instance said (and nothing was said subsequently in the case to derogate from this view):

If the plaintiffs *must be presumed to have had notice* of the contents of the registered deed of settlement, there is nothing there to show that the directors might not have had authority to execute the bond as they asserted.⁵

In *Houghton v. Nothard, Lowe and Wills*,⁶ Sargant L.J. took the view that knowledge of the articles was generally necessary (at least in the absence of some independent representation of authority) before the *Rule in Turquand's Case* could be invoked in a third party's favour. The doubt expressed by Scrutton L.J. in *Kreditbank Cassel v. Schenkens*⁷ as to the consistency of this view with the early cases laying down the *Rule in Turquand's Case* seems a real one:

I hope it is not disrespectful to express the wish that Sargant L.J. who is thoroughly conversant with this branch of the law had explained to those not equally familiar with it, how this fits in with the doctrine enunciated in a line of cases of which *Mahony v. East Holyford Mining Co.*⁸ is an instance, that a person is deemed to know of the company's articles of association.

Australian courts have felt a similar doubt. In the decision of the Victorian Supreme Court in *In Re Hapytoz*,⁹ Martin J. considered that to require either knowledge of the articles or that the agent in question be acting within his usual authority (requirements said to be justified in particular by the judgment of Sargant L.J. in *Houghton's* case) would be to create illegitimate refinements to the *Rule in Turquand's Case*. To the extent that *Houghton's* case suggested these refinements, it was not to be followed.¹⁰ Again in the decision of the New South Wales Supreme Court in *Re Scottish Loan and Finance Company Ltd.*,¹¹ Nicholas C.J. said¹² that if Sargant L.J. in *Houghton's* case was suggesting any requirement of knowledge of the articles, this was inconsistent with *inter alia* the judgments of the House of Lords in *Mahony v. East Holyford Mining Co.*

5. (1855) 5 E. & B. 248, 262; 119 E.R. 474, 479 (italics added).

6. [1927] 1 K.B. 246 (C.A.).

7. [1927] 1 K.B. 826 (C.A.), 840.

8. (1875) L.R. 7 H.L. 869.

9. [1937] V.L.R. 40.

10. *Id* at 45 ff.

11. (1944) 44 S.R. (N.S.W.) 461.

12. *Id* at 465.

It seems, therefore, that the original *Rule in Turquand's Case* was one peculiar to company law, extending considerably beyond ordinary agency principles in regard to the circumstances in which a company as principal could be bound by the unauthorised acts of its agents.

However, as has already been indicated, the decision of the Court of Appeal in *Houghton's* case marks a divergence from the original *Rule*. This divergence has grown and developed in succeeding decisions in such a way as to justify the conclusion that the whole nature of the *Rule* has now changed. It will be suggested in this article that the *Rule* now means no more than that ordinary agency principles determine when a company will be bound by the unauthorised acts of its agents.

In *Houghton's* case, Sargant L.J. (with whom Atkin L.J. agreed) took the view that the basis of the *Rule in Turquand's Case* was agency by holding-out. He held that a person dealing with a company cannot plead a provision in the company's articles under which the agent with whom he dealt could have had authority unless at the time of the transaction he was aware of the existence of the provision and had in fact relied upon it. However, Sargant L.J. added the further requirement that even if a party dealing with a company has knowledge of such provision, this will not suffice unless the transaction in question is within the usual authority of the agent purporting to bind the company. This was not to say, however, that knowledge of the articles is always necessary; Sargant L.J. conceded that in the type of situation which arose in *Biggerstaff v. Rowatt's Wharf Ltd.*¹³ this would be unnecessary. There the agent whose authority was relied on had been acting to the knowledge of the directors as a managing director, and the act done was one within the ordinary ambit of the powers of a managing director in the transaction of the company's affairs.¹⁴ Thus, on the views expressed by Sargant L.J. in *Houghton's* case, a third party will only be able to hold a company bound by the unauthorised acts of its agent if, firstly, there has been a holding-out of authority whether in the form of a provision in the articles which is known to the third party and upon which he has relied or in the form of a representation of authority independently of the articles (as in *Biggerstaff v. Rowatt's Wharf*) and, secondly, the contract in question is within the usual authority of the agent transacting it.

13. [1896] 2 Ch. 93 (C.A.).

14. [1927] 1 K.B. 246 (C.A.), 267.

The decision of the Court of Appeal in *Houghton's* case was followed almost immediately in *Kreditbank Cassel v. Schenkers*¹⁵ where again the third party had not read the company's articles and where the transaction was held to be outside the usual authority of the agent in question.

The case of *British Thomson-Houston Ltd. v. Federated European Bank*¹⁶ decided by the Court of Appeal some four or five years after the two preceding decisions represents the next major refinement to the original *Rule in Turquand's Case* and also to the propositions enunciated by the Court in *Houghton's* case and applied in *Kreditbank Cassel v. Schenkers*. In this case the party dealing with the company again had no knowledge of the articles. There was further no independent holding-out of the agent as having authority to enter into the transaction in question, as in *Biggerstaff v. Rowatt's Wharf*. Nevertheless, both Scrutton and Slesser L.JJ., relying in particular upon *dicta* of Atkin L.J. in *Kreditbank Cassel v. Schenkers*,¹⁷ held that both knowledge of the articles and any independent representation of authority were unnecessary where the company's agent was acting within the sphere of authority usually associated with his particular office in a company of the kind concerned, that is, no holding-out of any kind was necessary, usual authority being a sufficient ground of liability. Greer L.J., on the other hand, preferred to say that in the circumstances of the case the agent had effectively held himself out as having the necessary authority to enter into the transaction in question.¹⁸

The view taken by Slesser and Scrutton L.JJ. in *British Thomson-Houston v. Federated European Bank* received trenchant criticism from Slade J. in his controversial judgment in *Rama Corporation v. Proved Tin and General Investments Ltd.*¹⁹ There the learned judge held himself bound by the decision of the Court of Appeal in *Houghton's* case and was emphatic that the *dicta* of Atkin L.J. in *Kreditbank Cassel v. Schenkers* upon which Slesser and Scrutton L.JJ. relied in *British Thomson-Houston v. Federated European Bank* did not support the propositions extracted from them. Slade J. said that Atkin L.J. was merely reiterating the views expressed by Sargant L.J. in *Houghton's* case and that in addition to the party dealing with the company showing that the agent was acting within his usual authority, he must also be able to show either knowledge of the articles or a holding-out independently of the articles. In other words,

15. [1927] 1 K.B. 826 (C.A.).
16. [1932] 2 K.B. 176 (C.A.).
17. [1927] 1 K.B. 826 (C.A.), 844.
18. [1932] 2 K.B. 176 (C.A.), 182.
19. [1952] 2 Q.B. 147.

a holding-out of some sort is always necessary; usual authority by itself is not a ground for liability.

It must be admitted that the construction placed by Slade J. on Atkin L.J.'s *dicta* in *Kreditbank Cassel v. Schenkers* seems more likely to represent what was intended by those remarks than the construction of them adopted by the majority in *British Thomson-Houston v. Federated European Bank*. It seems clear enough that Atkin L.J. was only applying the decision of Sargant L.J. in *Houghton's* case. Certainly a full reading of his judgment strongly suggests that he intended the two conditions in question, that is, a holding-out and usual authority, to be concurrent and not alternatives. On the other hand, the view taken by the majority in the *British Thomson-Houston* case is much more in accord with ordinary agency principles: a principal will be bound by the act of his agent if the latter has acted within his actual, usual or ostensible (that is, represented) authority.

The most recent decision in this line of cases is that of the Court of Appeal in 1964 in *Freeman and Lockyer v. Buckhurst Park Properties Ltd.*²⁰ In this case, the Court was unanimous that Slade J. was mistaken in his view of what was decided by *Houghton's* case and in his view that *British Thomson-Houston v. Federated European Bank* was in conflict with it. The Court was apparently prepared to adopt a similar interpretation of Atkin L.J.'s remarks in *Kreditbank Cassel v. Schenkers* to that of the majority in the *British Thomson-Houston* case, that is, that usual authority was itself a sufficient basis for liability. Diplock L.J. went so far as to say²¹ that if he was wrong in the view he took of *Houghton's* case and *Kreditbank Cassel v. Schenkers*, and these cases were in fact in conflict with *British Thomson-Houston v. Federated European Bank*, he would prefer to follow the latter decision as he was entitled to do under the rule in *Young v. The Bristol Aeroplane Co. Ltd.*²² The Court explained *Biggerstaff v. Rowatt's Wharf* and *British Thomson-Houston v. Federated European Bank* as instances where the agent had acted within his usual authority and *Houghton's* case and *Kreditbank Cassel v. Schenkers* as instances where the agent had acted outside any usual or ostensible authority.

The Court, while holding that usual authority without any holding-out may be a sufficient ground for liability, of course recognised that there are circumstances where a conjunction of both elements will

20. [1964] 2 W.L.R. 618 (C.A.).

21. *Id* at 640.

22. [1944] K.B. 718 (C.A.).

be necessary for a company to be bound. For example, where a company has held out a person as occupying a certain office, for example, managing director (as in *Biggerstaff v. Rowatt's Wharf* and *Freeman's* case itself) when in fact he has not been so appointed, but has not specifically held him out as having the authority to enter into the particular transaction in question, the person dealing with the agent will have to show that the transaction in question is within the authority usually associated with the office which the agent has been held out as occupying.

As regards knowledge of a company's articles, the Court was agreed that in no circumstances was this a precondition to liability on the part of the company. Indeed, such a contention was dismissed peremptorily. Pearson L.J. shortly remarked: 'Such a requirement would be an absurd example of legal pettifoggery.'²³ This view must be taken in conjunction with that expressed by Sargant L.J. in *Houghton's* case that even where there is actual knowledge of the articles, this will rarely of itself be sufficient to enable a party dealing with a company to hold it bound.²⁴ This latter proposition makes obvious sense. A provision in the articles of a company simply providing for the possibility of a conferment of authority on a given agent or agents cannot conceivably be construed as a positive representation that such agent or agents actually have authority. Indeed, once it is recognised that knowledge of the articles is relevant only to the question of whether there is an estoppel by holding-out, it becomes difficult to conceive of circumstances where knowledge of a company's articles will help a third party's case at all. Thus it seems now to be the case that in most circumstances, knowledge of a company's articles will be both unnecessary and unhelpful.

In the light, then, of *Freeman and Lockyer v. Buckhurst Park Properties*, it seems that the position envisaged by Slessor and Scrutton L.JJ. in *British Thomson-Houston v. Federated European Bank* has come about and a complete adoption of ordinary agency principles occurred. An agent will bind his company if:

- (a) he has actual authority to do so; or
- (b) he has been held out by his company as having authority to do so; or
- (c) the transaction is within the authority usually associated with the office he holds in the company or has been held out as holding.

23. [1964] 2 W.L.R. 618 (C.A.), 633.

24. [1927] 1 K.B. 246 (C.A.), 266.

If this view is correct, the *Rule in Turquand's Case* has lost whatever significance it may once have had as a special rule of company law.²⁵

Who Can Hold Out on Behalf of a Company?

In the confusion which has surrounded the principles governing company contracts, a question of considerable importance has been largely overlooked: who can make a representation of authority on behalf of a company so as to bind the company?

In *Freeman and Lockyer v. Buckhurst Park Properties*, Pearson L.J. pointed out²⁶ that shareholders, directors, and others such as secretaries, have all in the past been held able to hold out on behalf of a company. It is proposed now to examine the circumstances in which such a holding-out is possible.

(i) *Holding-Out by Shareholders*

This situation has not arisen frequently and generally only in the case of small companies where shareholders have taken an active part in the management of the company.

In *Mahony v. East Holyford Mining Co.*,²⁷ the articles of the company provided that 'the first seven persons who sign these articles, or a majority of them, shall appoint the first directors'. The directors in turn were to appoint the secretary. No appointments were ever made. Nevertheless, a person acting as secretary of the company

25. It has never been explained how this whole body of law squares with the Companies Act 1962-1964, s. 35 (S.A.):

'(1) Contracts on behalf of a company may be made as follows:

(a) . . .

(b) a contract which, if made between private persons, would be by law required to be in writing signed by the parties to be charged therewith may be made on behalf of the company in writing signed by any person acting under its authority *express or implied*;

(c) a contract which, if made between private persons, would by law be valid although made by parol only (and not reduced into writing) may be made by parol on behalf of the company by any person acting under its authority *express or implied*,

and any contract so made shall be effectual in law and shall bind the company and its successors and all other parties thereto and may be varied or discharged in the manner in which it is authorised to be made.'

Implied authority is usually regarded as a form of actual authority, being authority which by implication is embodied in an express grant of authority. If implied authority were to have this meaning in section 35, a company would only be bound by agents acting within their actual authority. However, provisions similar to section 35 have existed in Companies Acts for many years, and it can only be assumed that the courts have regarded implied authority in this context as extending (on the present law) to usual and ostensible authority.

26. [1964] 2 W.L.R. 618 (C.A.), 632.

27. (1875) L.R. 7 H.L. 869.

forwarded to the appellant bank a notice setting out a resolution purportedly passed by the initial subscribers appointing certain persons directors and authorising them and himself as secretary to draw on the company's bank account. While such a resolution had never been passed, a majority of the initial subscribers acquiesced in the assumption by these persons of the offices concerned.

The House of Lords held *inter alia* that the shareholders had permitted the persons in question to act as directors and that therefore the company was bound by the drawings.

The basis of this holding appears clearly to have been that while there had been no formal meeting together of, or formal appointment by, a majority of these subscribers, the proper inference from the facts was that there was a *de facto* appointment of the directors by reason of the informal assent of the majority.²⁸

It therefore appears that any representation of authority by such a number of shareholders as under their company's articles could have in fact conferred the authority in question will bind the company. It would seem to follow that where under the articles, shareholders have not this power (as, for example, where it has been delegated exclusively to the board of directors²⁹), any representation of authority by them would be ineffective.

As regards the position of the secretary in *Mahony's* case, it was held that once the directors could be said to have been 'appointed' by the holding-out of the shareholders, it was then possible for the former to make an 'appointment' by similar means. Thus the position arose of A etc. (the shareholders) holding out B etc. (the directors) and B etc. holding out C (the secretary).

While not strictly relevant to the present discussion, a feature of the decision in *Mahony's* case which warrants greater attention than it has hitherto received is the interpretation the Court there attached to a defective appointments clause in the articles. Clause 88 provided:

All acts done by the board or by a committee of directors shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors, or persons acting as aforesaid, or that they or any of them were or was disqualified, be as valid as if every such person had been duly appointed, and was qualified to be a director.

28. So stated by Kelly C.B. in the Exchequer Chamber, *id* at 883; affirmed unanimously in the House of Lords.

29. As in *Shaw & Sons Ltd. v. Shaw* [1935] 2 K.B. 113 (C.A.), and *Scott v. Scott* [1943] 1 All E.R. 582.

The House of Lords was unanimous that this clause extended to the situation with which they were faced where strictly neither the directors nor the secretary had been appointed at all. The wording of this clause in the articles is very similar to the Companies Act 1962-1964, s. 119 (S.A.): 'The acts of a director or manager or secretary shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.' Both the House of Lords, in *Morriss v. Kanssen*,³⁰ and the Australian High Court, in *Grant v. John Grant and Sons Pty. Ltd.*,³¹ have held that this section only applies to cases where directors, etc., have been regularly appointed in substance. It was held in both cases that the only defect in appointment which the section will cure is a mere procedural slip; it will not extend to cases where there has not been any appointment at all. Significantly, in neither case was the decision in *Mahony v. East Holyford Mining Co.* on this point either cited or considered.

The only other reported case in which a company has been held liable through a holding-out by its shareholders is the decision of the Full Court of New South Wales in *City Bank v. The Australian Paper Co.*³² In this case, the articles of the company vested all powers of management of the company in the board of directors exclusively. The directors proceeded to obtain credit from the company's bank. At two successive general meetings of the shareholders, the indebtedness of the company to the bank was brought to their notice and no dissent was expressed. The company subsequently purported to repudiate the debt. The Court held that even if the directors had no power to borrow (which was not decided), the action of the shareholders amounted to acquiescence in the loan: 'It was in effect an acknowledgment by them that their directors had power to borrow and that the company was liable for the debt.'³³ It was said that if the shareholders considered the company was not liable, they ought to have objected to the transaction at the earliest opportunity.

The conclusion reached in this case and the reasoning advanced therefor (such as it is) are probably equally consistent with the view that the conduct of the shareholders amounted to a ratification of the contract in question as with the view that their conduct raised an estoppel against the company. On either view, probably the only persons who in the circumstances could have acted so as to bind the company were the shareholders in general meeting. The significance

30. [1946] A.C. 459.

31. (1950) 82 C.L.R. 1; see especially Williams J., *ibid* at 34.

32. (1871) 10 S.C.R. (N.S.W.) 235.

33. *Id* at 243, *per* Stephens C.J.

of the distinction between ratification and estoppel by subsequent acquiescence will be adverted to later.

In the present context, a statement by Parke B. in the case of *Ridley v. The Plymouth Grinding and Bakery Co.*³⁴ must be disposed of. He said in this case:

I perfectly agree that the liability of the company may be shown without producing the original deed, or a copy of it, provided it be shown that all persons who formed the company had sanctioned any particular individuals entering into contracts to bind them; if there were any proof of such authority, no doubt the company would be bound.³⁵

If this statement was intended to mean that a company will always be bound whenever there is a holding-out by the shareholders whatever the provisions of the articles, it would have to be rejected as unsound. This would enable a company to hold out in contradiction of limitations on an agent's authority contained in its articles. Such a position would be a denial of the doctrine of constructive notice: it would enable a person dealing with a company to rely upon a representation of authority when he is deemed to know that such authority does not exist. Further, it would enable the shareholders to depart from the articles when under the Companies Act 1962-1964 (S.A.) they are, at least to some extent, bound by them.³⁶ Finally, it would enable shareholders to alter a company's articles (retrospectively) by a procedure other than that contemplated by the Act.³⁷

(ii) *Holding-Out by Directors*

Numerous statements can be found in the cases to the effect that a representation of authority in an agent by directors of a company will bind the company in respect of contracts transacted within the scope of that authority. However, the nature of the circumstances in which directors may make an effective representation of authority is not entirely clear. Two problems in particular arise: firstly, may directors only make a representation of authority if, under the articles, they could actually invest the agent in question with the authority which they represent he possesses? In other words, must the requirement which apparently obtains in the case of a holding-out by shareholders also be met in the case of a holding-out by directors? Secondly, in any event, how many directors must be party to the holding-out for it to bind the company?

34. (1848) 2 Ex. 711; (1848) 154 E.R. 676.

35. (1848) 154 E.R. 676, 679.

36. See section 33.

37. *I.e.*, under section 31.

As regards the first question, it must be conceded that generally where a representation of authority by directors has been held to bind their company, it lay within their power to make an appointment to the office that the agent had assumed or, as the case may be, to delegate the powers to the officer of the company which he had assumed.³⁸ Obviously with the modern trend in the drafting of articles towards the delegation of very wide powers to the board and the managing director, a representation of authority by directors will generally occur in either of the above circumstances. However, this need not necessarily be so. For example, where the relevant power has not been delegated to the directors at all or where the power has been delegated to the directors but no power to sub-delegate given, any representation of authority by the directors would not be consistent with any power that they themselves possess to confer an actual authority equivalent to that held out. In these circumstances the power to confer actual authority on an agent would rest with the company in general meeting. Here the question arises whether a representation of authority by the directors would bind the company. This question can only be answered by considering the general basis on which a representation of authority by directors should be regarded as binding a company. The most explicit and authoritative statement of this is to be found in the judgments of the House of Lords in *Houghton's case*.³⁹ Curiously enough, the decision of the House of Lords in this case has been almost entirely neglected by both courts and commentators, who have been much more concerned with the decision of the Court of Appeal in the same case.⁴⁰ In the House of Lords, Viscount Dunedin said:

The person who is sought to be estopped is here a company, an abstract conception, not a being who has eyes and ears. The knowledge of the company can only be the knowledge of persons who are entitled to represent the company. It may be assumed that the knowledge of the directors is in ordinary circumstances the knowledge of the company.⁴¹

Viscount Sumner said:

Has knowledge then been brought home to the respondent company on which to found the alleged standing by? In the case of a natural person, if information is intelligibly conveyed to and received by him, its source, whether a servant

38. *E.g., Mahony v. East Holyford Mining Company* (1875) L.R. 7 H.L. 869; *Biggerstaff v. Rowatt's Wharf* [1896] 2 Ch. 93 (C.A.); *Smith v. Hull Glass Co.* (1852) 11 C.B. 897; (1852) 138 E.R. 729.

39. [1928] A.C. 1.

40. In his treatment of this topic, Professor Gower dismisses the decision of the House of Lords in a footnote as 'affirmed on other grounds' (*Modern Company Law* (2nd ed. 1957), 147).

41. [1928] A.C. 1, 14.

or a stranger, whether he is high or low, matters little, if at all. With an artificial incorporated person it must necessarily be otherwise, for an impersonal corporation cannot read or hear except by the eyes and ears of others. Who are to be the organs⁴² by which it receives knowledge so as to affect its rights may be specially determined by the articles of its constitution, but otherwise, in a matter where knowledge may lead to a modification of the company's rights according as it is or is not followed by action, the knowledge, which is relevant, is that of the directors themselves, since it is their board that deals with the company's rights. The mind, so to speak, of a company is not reached or affected by information merely possessed by its clerks, nor is it deemed automatically to know everything that appears in its ledgers. What a director knows or ought in the course of his duty to know may be the knowledge of the company, for it may be deemed to have been duly used so as to lead to the action, which a fully informed corporation would proceed to take on the strength of it.⁴³

Diplock L.J. in *Freeman and Lockyer v. Buckhurst Park Properties*⁴⁴ made a statement to a similar effect to the foregoing. In summarising the conditions which a person dealing with a company must satisfy to hold it bound, he said that 'he (*i.e.*, the person dealing with the company) can rely upon a representation by a person or persons who have actual authority to manage or conduct that part of the business of the corporation to which the contract relates.'⁴⁵

The basis in policy for treating representations of authority by directors as binding a company which emerges from the above observations obviously is that a director's duties normally involve him in a close acquaintance with the affairs and activities of a company and in particular with such questions as the appointment of agents and the delegation of authority to them. Thus an outsider receiving a representation from a director as to the authority of an agent of the company would normally be entitled to believe that this representation was accurate and would therefore be justified in relying upon it.

It is accordingly submitted that, in the absence of circumstances putting the outsider on inquiry, the directors of a company will always be in a position to make a representation as to the authority of an agent of their company.⁴⁶ This conclusion is consistent with the policy consideration upon which the original *Rule in Turquand's*

42. This is a term of which Professor Gower would no doubt enthusiastically approve.

43. [1928] A.C. 1, 18.

44. [1964] 2 W.L.R. 618 (C.A.).

45. *Id* at 638.

46. One circumstance which might put an outsider on inquiry is where the representation is to his knowledge made by a 'nominal' director who has no real acquaintance with the company's affairs.

Case was based — that an outsider is neither able nor entitled to inquire into matters concerning the internal management of a company and must necessarily be satisfied by representations made by officers of the company apparently occupying positions qualifying them to make such representations.

The second question which arises in relation to representations of authority by directors, that is, how many directors must be party to a holding-out, can be answered by reference to considerations similar to those applying to the first question. Once it is accepted that the basis for holding that a representation of authority by directors binds their company is not that such representation is a *de facto* exercise of a *de jure* power of appointment or delegation, there is then no legal necessity for requiring the representation to be by the number of directors required to exercise any *de jure* power. It is submitted that there are several considerations favouring the conclusion that *any* director can make an effective representation of authority. First, such a proposition finds support in the decision of the House of Lords in *Houghton's case*.⁴⁷ In this case, one of the four directors of a company in complicity with his brother, another director, but without the knowledge of the other two, entered into a contract on behalf of his company which involved meeting the debts of another company. This transaction was held to be beyond both his actual authority and also any authority which would usually be associated with his office. The appellants, however, sought to render the company liable on the basis that some or all of the directors had acquiesced in the transaction either at the time it occurred or subsequently when, in the case of the two innocent directors, it was discovered. The House of Lords held that the acquiescence of the director who had actually negotiated the transaction and his brother, who was party to the negotiations, could not bind the company as both directors were *participes criminis* in the sense of being 'artificers of the infringement'.⁴⁸ Their Lordships would, however, have been prepared to hold the company bound if it could have been shown that one or both of the remaining two directors had become aware of the transaction and yet had done nothing to disaffirm it as soon as possible. In the event it was held that as soon as these directors had become aware of the transaction, they had taken steps to disaffirm it and that there was therefore no acquiescence such as to bind the company. It is significant that the House of Lords took the view that the acquiescence of either of the two innocent directors could have bound the company notwithstanding that, under the articles, a

47. [1928] A.C. 1.

48. *Id* at 14, *per* Viscount Dunedin.

delegation of any of the board's powers to one of their number required the assent of a majority of the directors (in this case, three).

Apart from authority, the view that *any* director can make an effective representation of authority must be supported on practical grounds. To require an outsider to go beyond the representations of a single director would be virtually to require him to convene a meeting of the company's board of directors. Apart from being absurd, this is clearly beyond his legal competence. Practically, he can do little else but accept the representations of a director as true. Again this seems in accord with the policy considerations given effect to in the original *Rule in Turquand's Case*.

It is accordingly submitted that a representation of authority by any director of a company will bind the company subject, of course, to two obvious qualifications, that the representation is not contradicted by the articles, and that the circumstances of the transaction in question are not so unusual as to render any reliance by the outsider on the representation unreasonable.

(iii) *Holding-Out by Secretary*

That the secretary of a company may in some circumstances make an effective representation of authority on behalf of the company is now well established.

Indeed, in *Mahony's case*⁴⁹ itself, two of the five judges expressly treated the bank's reliance on the certificate of the secretary as being a material factor in the bank's favour.⁵⁰ This decision was followed by the New South Wales Supreme Court in *Re Scottish Loan and Finance Co.*⁵¹ where a representation by the secretary of a company in correspondence that a certain person was the managing director of the company was held to bind the company.

The position of the secretary of a company was adverted to by the House of Lords in *Houghton's case*. Viscount Dunedin stated that: 'the knowledge of a mere official like the secretary would only be the knowledge of the company if the thing of which knowledge is predicated was a thing within the ordinary domain of the secretary's duties'.⁵² It would seem clear enough that Viscount Dunedin did not mean by this that merely because knowledge of the transaction in question would be likely to occur in the ordinary course of an employee's duties, the company would be fixed with that knowledge.

49. (1875) L.R. 7 H.L. 869.

50. See Lord Chelmsford, *id* at 892, and Lord Penzance, *id* at 902.

51. (1944) 44 S.R. (N.S.W.) 461.

52. [1928] A.C. 1, 14.

If this were so, knowledge on the part of some inferior employee such as, for example, a foreman or even the traditional case of the office boy, could conceivably bind the company. What his Lordship must have meant was that if the officer would normally have knowledge of all the circumstances of a transaction such as the one in question *including* the fact of whether the officer had been authorised to act or not, then the company would be bound. While it was actually held on the facts in *Houghton's* case that the secretary had no sort of authority to bind the company, this holding is entirely consistent with the above proposition, because in this case the secretary had attempted to enter into the transaction in question himself on behalf of the company, and not simply represented that someone else had authority to do so.

The basis on which a secretary can make a representation of authority binding his company would seem to be that generally a secretary will be acquainted with the internal administration of the company including such matters as resolutions appointing agents, etc.; he is also the person with whom outsiders will usually communicate for information on these matters. In line with the policy that an outsider cannot be required to go 'indoors', reliance on any statement by the secretary on these matters will generally be justified.⁵³

This justification of a secretary's position is, of course, such as not to be restricted to that office alone. In *British Thomson-Houston v. Federated European Bank*,⁵⁴ Greer L.J. remarked:

. . . Some-one must represent the company for the purpose of conducting correspondence; it may be a secretary, or the managing director, or some other officer; and he must have authority to bind the company by letters written on its behalf. The person chosen by the defendants for this purpose was the chairman of the board, and the defendants have represented by their chairman that the plaintiffs could rely on the guarantee of the defendants as the act of the defendants and are responsible for those acts which they have held him out as having authority to perform.⁵⁵

Later cases have taken this statement to mean not that simply because a person of the kind described is authorised to conduct correspondence on behalf of a company, he can therefore himself enter into any contract he cares to on behalf of the company, but

53. An instance where reliance on such a statement might not be justified is where the secretary is an 'outsider', such as a public accountant, who has no real acquaintance with the company's affairs.

54. [1932] 2 K.B. 176 (C.A.).

55. *Id* at 182.

rather that such a person may make a representation as to an agent's authority which will bind the company.⁵⁶

However, an aspect of Greer L.J.'s statement in the *British Thomson-Houston* case which creates real difficulty is the suggestion (which he himself applied in that case) that an agent may make an effective representation as to his own authority, that is, hold himself out. This proposition was cited with approval by Slade J. in *Rama Corporation v. Proved Tin and General Investments*,⁵⁷ and with apparent approval by Pearson L.J. in *Freeman and Lockyer v. Buckhurst Park Properties*,⁵⁸ and was also applied by the Supreme Court of Ontario in the recent case of *Walton v. Bank of Nova Scotia*.⁵⁹ In this latter case, the managing director of a company purported to execute a security on behalf of his company in favour of a bank. This was done without the delegation of authority from the board required by the articles. Apart from representing directly to the bank that he himself had the necessary authority, the managing director held out a person as being the secretary of the company when in fact she was not (the real secretary was on holiday) and she in turn certified to the bank that the board had passed the appropriate authorising resolutions. The Court held that both the managing director's own representation to the bank, and also the secretary's certificate, bound the company. This, of course, amounts to holding that an agent may hold out himself. In effect, this is so even as regards the secretary's certificate: A (the managing director in this case) holds out B (here the secretary) who in turn holds out A. A has indirectly held out himself.

The validity of the proposition that an agent may make an effective representation as to his own authority must be regarded as open to serious doubt. It will be recalled that the House of Lords in *Houghton's* case held that a representation of authority cannot be made by 'the artificer of the infringement', that is, the agent acting without authority. Indeed, the decision of the House of Lords in this case turns entirely on the principle that an agent cannot hold out himself. Diplock L.J. in *Freeman and Lockyer v. Buckhurst Park Properties* also adopted this view:

It follows that where the agent upon whose 'apparent' authority the contractor relies has no 'actual' authority from the corporation to enter into a particular kind of contract with the contractor on behalf of the corporation, the contractor

56. See the cases cited *infra*, nn. 57-59.

57. [1952] 2 Q.B., 147, 170.

58. [1964] 2 W.L.R. 618 (C.A.), 632.

59. (1964) 43 D.L.R. 611.

cannot rely upon the agent's own representation as to his actual authority.⁶⁰

Powell states,⁶¹ as is, of course, obvious, that where a principal has expressly or impliedly authorised his agent to make a representation as to his own authority, the principal is bound. However, Powell further contends that, on principle, if the agent's representation is within his usual or apparent authority, the principal should again be bound simply on the basis that any act (such term presumably including representations) done by an agent within his usual or apparent authority normally binds his principal. Powell, however, concedes that the present tendency of the law both in England and the United States appears to be against this view and seems to require that the representation be by the principal himself (or in the case of companies, by any of the classes of persons who can hold out on behalf of a company *other than* the agent himself).

The preponderance of authority therefore seems to favour the view that an agent of a company cannot make a representation as to his own authority which will bind the company. Thus, for example, any attempt to support the decision in *British Thomson-Houston v. Federated European Bank*⁶² on the ground suggested by Greer L.J. in that case would have to be rejected. As earlier suggested, the decision should be regarded simply as a case of an agent acting within his usual authority.

(iv) Summary

In *Freeman and Lockyer v. Buckhurst Park Properties*, Diplock L.J. attempted to formulate a general proposition in answer to the question, who can hold out on behalf of a company? He said that 'in order to create an estoppel between the corporation and the contractor, the representation as to the authority of the agent which creates his "apparent" authority must be made by some person or persons who have "actual" authority from the corporation to make the representation'.⁶³ The learned judge said later in his judgment, by way of a summary of his views, that the contractor 'can rely only upon a representation by a person or persons who have actual authority to manage or conduct that part of the business of the company either generally or in respect of those matters to which the contract relates'.⁶⁴ While Diplock L.J. seems to have considered this second

60. [1964] 2 W.L.R. 618 (C.A.), 637.

61. *Law of Agency* (2nd ed. 1961), 57 ff.

62. [1932] 2 K.B. 176 (C.A.).

63. [1964] 2 W.L.R. 618 (C.A.), 637.

64. *Id.*, at 638.

proposition to be merely a paraphrasing of the first, almost certainly it is not. However, be that as it may, neither proposition accommodates all the situations in which a representation of authority has been held to bind a company. For example, it is difficult to say that the shareholders of a company will ever have actual authority to make a representation of authority. Furthermore, in most cases it will be difficult to say that they are managing or conducting any part of the business of the company. Again, with directors, it seems to be straining language to say, in many circumstances, that they will have actual authority from any one to make representations of authority. Further, it is impossible to say of the secretary of a company, that he has actual authority to manage or conduct any part of the business of the company.

It is suggested that the only element common to all the classes of persons who, on the existing law, can make representations of authority binding their company, is that in each case the persons who make the representation know or ought to know whether the agent concerned has been regularly appointed or, as the case may be, regularly invested with authority. Their position in the company is such that an outsider receiving any representation from them will, in the absence of circumstances putting him on inquiry, be entitled to assume that the representation is in accordance with the actual internal state of affairs of the company with which they can only be assumed to be acquainted. To this extent, the *Rule of Turquand's Case*, while having ceased to exist as a special rule of company law, still carries legitimate influence, as embodying a policy consideration.

What Form May an Estoppel Take?

The commonest form of estoppel will, of course, be a representation as to the authority of an agent either positively or by acquiescence at the time the transaction in question takes place.

However, a less common form of estoppel may sometimes arise. If any of the classes of persons described earlier discover after a transaction has been entered into that it has been entered into without authority and fail to notify the third party as soon as possible of that fact and the third party is allowed to proceed upon the basis of a binding contract with the company, then an estoppel by subsequent acquiescence will be raised against the company.

The case of *City Bank v. The Australian Paper Co.*⁶⁵ probably provides an example of estoppel by the subsequent acquiescence of shareholders.

65. (1871) 10 S.C.R. (N.S.W.) 235.

Houghton's case,⁶⁶ as considered by the House of Lords, provides an example of the type of situation where subsequent acquiescence on the part of directors will bind the company (although for the reasons given earlier, acquiescence was not made out in the circumstances of that case).

*Walton v. Bank of Nova Scotia*⁶⁷ provides an example of a case where subsequent acquiescence by the secretary can bind a company. Here the real secretary, on his return from holidays, discovered the transaction in question but took no steps to have it repudiated. It was held⁶⁸ that he was under a duty to notify the bank that the granting of the security had not been duly authorised and that his silence and inaction amounted to a representation to the bank that the granting of the security had been validly authorised by the company.

Thus, it can be stated as a general principle that those persons who can estop a company by prior representations or acquiescence can also estop the company by subsequent acquiescence.

It is now opportune to examine the distinction, mentioned earlier, between estoppel by subsequent acquiescence and ratification. The consequence produced by an estoppel and by ratification is, of course, precisely the same: the company becomes bound on the contract. However, differences exist as to what amounts to each. First, a third party relying on an estoppel must generally prove that he has acted to his detriment in reliance on the estoppel, whereas this is not necessary for ratification. In fact, however, this distinction seems more theoretical than real in the case of estoppel by acquiescence, at any rate in the context of company contracts. Here, the courts have been content to require only that the party seeking to set up the estoppel continue in the belief that he has a binding contract with the company without that belief being dispelled.

A more significant distinction arises from the question of who can ratify, as opposed to who can hold out, on behalf of a company. As a matter of general principle, the person on whose behalf a contract has been entered into must ratify it.⁶⁹ In the case of a contract entered into on behalf of a company, this, of course, begs the question. Obviously the company cannot itself ratify but must in the nature of things do so through an instrumentality. With a company, the nearest one can approach the usual principle of ratification is to say

66. [1928] A.C. 1.

67. (1964) 43 D.L.R. 611. See *supra*, 325.

68. *Id.*, at 625.

69. See Powell: *Law of Agency* (2nd ed. 1961), 124.

that whoever could have authorised the agent to enter into the contract in question can ratify it on behalf of the company. This would, for example, be the board of directors where they have a power of appointment or delegation under the articles. Where they do not have such a power, then the company in general meeting would have to ratify. Where the company in general meeting has not delegated the relevant power to the directors exclusively but has reserved power to appoint, etc., concurrently within the same field,⁷⁰ then presumably either the board or the company in general meeting could ratify. Where the relevant power has been delegated to the directors exclusively but without a power of subdelegation, it would seem to follow that nobody could ratify on behalf of the company and a new contract would have to be concluded. However, it seems at least arguable that the proposition, whoever could have authorised the agent in question can ratify his acts, may not in fact apply. In *Ridley v. The Plymouth Grinding and Baking Co.*,⁷¹ the defendant company had sublet premises to the plaintiff by an agreement pursuant to which the company undertook to keep the plaintiff indemnified against any liability to the head lessor. The lessor distrained on goods of the plaintiff as a result of which the plaintiff sought to be indemnified in terms of the agreement. The company denied that it was bound by the agreement. The articles of the company required contracts to be authorised by resolution of the board of directors comprising at least five of the eleven directors. The directors were given no power of subdelegation. At a subsequent meeting of the board at which four directors were present, the agreement was purportedly ratified. Parke B. held that the agreement 'was clearly entered into on behalf of the company, and if it had been sanctioned by the number of directors sufficient to enter into contracts, it would have bound the company. But it appears to have been sanctioned at a board meeting at which the requisite number of directors were not present; and consequently the defendant company is not bound by it.'⁷²

This case thus appears to provide authority for the wider proposition, that whoever has power to enter into the contract in question can ratify it. This would mean, for example, that where the board of directors possesses power to enter into a contract on behalf of their company but is not authorised to subdelegate that power, they will be able to ratify a contract entered into by an agent without authority notwithstanding that they could not have authorised the

70. As in *Mercantile Bank of India v. Chartered Bank of India* [1937] 1 All E.R. 231.

71. (1848) 154 E.R. 676.

72. *Id.*, at 679.

transaction in advance. At first sight this seems an infringement of the principle *delegatus non potest delegare*. It is perhaps arguable that in the above example any ratification by the directors would amount to a retrospective and unauthorised subdelegation of authority. This objection can be at least partly met. The policy behind the rule against subdelegation is presumably that the delegate should not abdicate to another his function of deciding personally whether a particular transaction, etc., should be entered into on behalf of his principal. Where ratification by the directors of a company takes place in the circumstances envisaged, this does not occur. The agent cannot bind the company by his own decision. Whether the company will be bound will depend upon the decision of the directors to ratify or not. Thus the company retains the benefit of the collective consideration of the board. In this sense at least, the present situation does not constitute a breach of the rule against subdelegation. To the extent that it is a breach the special nature of a company's structure probably renders it desirable that an exception be made to the rule.

Relating ratification now to estoppel by subsequent acquiescence, it seems to be the case that the requirements governing who can ratify are stricter than those governing who can create an estoppel. While this might seem anomalous in view of the fact that the consequence is in each case exactly the same, analytically the differences are explicable on the ground that the two doctrines are concerned with different questions: ratification is concerned with the retrospective conferment of actual authority, estoppel is concerned with the creation of an apparent authority. That the distinction between ratification and estoppel by subsequent acquiescence has not always been sufficiently appreciated is illustrated by *Ridley's* case itself. On the facts of that case, it would seem to have been perfectly arguable that the subsequent acquiescence by the directors in the agreement while not constituting ratification nevertheless raised an estoppel against the company. Similarly, in *In Re Hapytoz*,⁷³ where the four directors were the only shareholders, the fact that a majority of shareholders *cum* directors had not acquiesced in the managing director's assumption of authority, while fatal to a claim that ratification had occurred, should not also (as was held) have prevented an estoppel arising based on the acquiescence of *any* of the directors.

The final form of estoppel to be considered is estoppel by negligence. It will be recalled that Viscount Sumner said in *Houghton's* case that 'what a director knows or ought in the course of his duty to

73. [1937] V.L.R. 40.

know may be the knowledge of the company.⁷⁴ Viscount Dunedin said in the same case:

It only remains to consider whether negligence on the part of the unincriminated directors can found an estoppel against the company. I am of opinion that it cannot. It is no part of a director's duty to inspect accounts every day. There was nothing in the circumstances to arouse the suspicions of the two directors as to the existence of any such agreement. As soon as they were all at home, the whole thing was found out and the arrangement stopped.⁷⁵

While thus it was not established in this case that non-discovery of the transaction resulted from negligence on the part of the directors, it was nevertheless recognised that if negligence had been made out, the company would have been estopped from denying the regularity of the transaction.

The soundness of any separate doctrine of estoppel by negligence has been vigorously challenged by Spencer Bower.⁷⁶ He asserts that the expression is misleading because it implies that negligence in one's own interests will of itself raise an estoppel whereas every estoppel requires a representation. While he, of course, concedes that silence or inaction can amount to a representation by acquiescence, he considers that the representor must actually know of the circumstance that his acquiescence prevents him from denying. Thus, on this view, presumably acquiescence in a transaction through ignorance of its existence, although such ignorance is produced by negligence, will not raise an estoppel against a company. Admittedly the leading cases on what is commonly described as estoppel by negligence do not concern the circumstances envisaged in *Houghton's* case.⁷⁷ However, if failure to undeceive where directors have knowledge of the deception raises an estoppel against the company (as apparently it does), it seems a very short step to the proposition that failure to undeceive in respect of deceptions of which directors ought to know also raises an estoppel. Again, approaching the question in the light of the policy consideration given effect to in the original *Rule in Turquand's Case*, a third party can reasonably assume that where directors, etc., do not object to a transaction to which the former is a party and of which the latter would normally be aware in the course of their duties, they accept the transaction as being binding on their company.

74. [1928] A.C. 1, 19 (italics added).

75. *Id.*, at 15.

76. *Estoppel by Representation* (1923), 84 ff.

77. See cases cited by Cross: *Evidence* (2nd ed. 1963), 287; these concern the negligent issue of documents etc.

It is therefore submitted that acquiescence by any of the classes of person, a holding-out by whom can bind the company, in a transaction of which in the course of their duties they ought to know, will raise an estoppel against the company.

The Doctrine of Constructive Notice

The one rule governing company contracts which remains peculiar to this field of contract law is the doctrine of constructive notice: outsiders are deemed to have notice of a company's public documents including limitations on the authority of agents contained therein. This doctrine finds no support in any provision of the Companies Act but appears to derive from the decision of the House of Lords in *Ernest v. Nicholls*.⁷⁸ In this case Lord Wensleydale appeared to take the view⁷⁹ that in the absence of such a doctrine, the rules of partnership law would apply enabling each shareholder to bind the company, at least within the scope of the company's business. While his remarks are not entirely clear, he seems to have considered that it was to avoid this result that the legislature saw fit to require a company to register articles and so to make available to the world information as to 'who were the persons authorised to bind the shareholders'.

These views warrant comment. First, Lord Wensleydale's suggestion that, without a doctrine of constructive notice partnership principles would apply, seems to betray a lack of appreciation of the true nature of a company. He seems to have considered that the question with which he was concerned was, who are the persons authorised to bind the *shareholders*, and then drawn the analogy with a partnership, rather than who are the persons authorised to bind *the company*. In any event, even if the analogy with partnership is justified, a partner will generally only bind the partnership within the sphere of his usual authority.⁸⁰ Obviously, it will not be within the authority usually deriving from simple membership of a company for a shareholder to enter into contracts on behalf of his company. Secondly, the assumption that a person dealing with a company can, simply by consulting the articles, ascertain 'who are the persons authorised to bind all the shareholders' (that is, the company) and, by implication, who cannot, is entirely misconceived. Neither at the time of the decision in *Ernest v. Nicholls* nor subsequently has the legislature ever required a company to state exhaustively in the articles who can bind it. There is no reason in law why

78. (1857) L.R. 6 H.L. 401; (1857) 10 E.R. 1351.

79. (1857) 10 E.R. 1351, 1358.

80. Partnership Act 1891-1935, s. 5 (S.A.).

articles should not be entirely silent on this question. In this case, the company in general meeting could appoint whom it liked as agents and delegate what powers it liked to them. Even where power has been delegated to persons under articles but not to them exclusively, it has been held that a further and concurrent delegation of the same power outside the articles is possible.⁸¹ That the articles of a company will necessarily be informative on the question of who can and who cannot bind the company is therefore an entirely mistaken assumption.

It is submitted that just as the legislature has now seen fit to ensure that in general third parties are not affected by limitations on a company's power set out in its memorandum of association,⁸² so should it abrogate the rule in respect of limitations on agent's powers contained in its articles. If a requirement of knowledge of a company's articles so as to render the company liable is so unreasonable as to amount to 'an absurd example of legal pettifoggery,'⁸³ then any rule of constructive knowledge of the articles operating to exonerate the company from liability is equally unreasonable and equally amounts to legal pettifoggery. Most doctrines of constructive notice proceed from the premise that the exercise of reasonable care would ensure actual knowledge of the matters of which notice will otherwise be deemed. In the present circumstances, it seems entirely unreasonable to expect a person contemplating dealing with a company to search its articles every time he has a dealing with it. This view finds formidable support in some observations of one of English law's great commercial lawyers, Lindley L.J., in *Manchester Trust v. Furness*:⁸⁴

As regards the extension of the equitable doctrines of constructive notice to commercial transactions, the courts have always set their faces resolutely against it. The equitable doctrines of constructive notice are common enough in dealing with land and estates, with which the Court is familiar; but there have been repeated protests against the introduction into commercial transactions of anything like an extension of those doctrines, and the protest is founded on perfect good sense. In dealing with estates in land, title is everything, and it can be leisurely investigated; in commercial transactions possession is everything and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions, we should be doing infinite mischief and paralyzing the trade of the country.

81. *Mercantile Bank of India v. Chartered Bank of India* [1937] 1 All E.R. 231.

82. Companies Act 1962-1964, s. 20 (S.A.).

83. *Freeman and Lockyer v. Buckhurst Park Properties* [1964] 2 W.L.R. 618 (C.A.), 633, per Pearson L.J.

84. [1895] 2 Q.B. 539 (C.A.), 545.

Lord Denning has been even more categorical in stating his adherence to this view:

These constructive doctrines always lead to trouble. Take the doctrines of constructive malice and constructive notice: they are discredited nowadays because they have a way of getting out of bounds; they lead in time to the law attributing to a man — quite falsely — a state of mind which he never possessed.⁸⁵

Gower in his draft Companies Bill for Ghana recommends that registration of a company's articles (*inter alia*) should not of itself constitute notice of their contents.⁸⁶ He proceeds then to recommend that the acts of certain 'organs' of a company (that is, the company in general meeting, the board of directors, and the managing director) should be deemed the acts of the company itself unless the party dealing with these organs knew or ought to have known of any lack of authority on their part.⁸⁷ Gower also recommends that a third party should be entitled to make certain assumptions when dealing with a company, for example, that the persons described as director, managing director and secretary in the registered particulars of officers have been duly appointed and have the authority usually associated with the relevant office in the particular type of company concerned.⁸⁸ These assumptions again will not operate in a third party's favour if he knew or ought to have known of any lack of authority.

It is suggested that these recommendations would achieve little that the present law, certainly as contended for in this article, does not already achieve. Additionally, they carry the disadvantage that they create a whole new body of rules governing company contracts, which, because of their generality and indeed novelty, might well in practice give rise to almost as many problems as they solve. On the other hand, present principles have had the advantage (perhaps doubtful) of a long process of pragmatic development.

A provision along the lines of Gower's initial recommendation — that registration of a company's articles should not itself constitute notice of their contents — seems all that is required. With such a provision where the transaction in question is so unusual as to put the party dealing with the company on inquiry, one inquiry which he can make, and which he might reasonably be expected to make short of going 'indoors', is as to whether the transaction is consistent

85. *Hosegood v. Hosegood* (1950) 66 T.L.R. 735 (C.A.), 737.

86. Clause 141.

87. Clause 139.

88. Clause 142.

with the company's articles. Only in these circumstances is it envisaged that a party should be affected with notice of the articles.

The abrogation of the doctrine of constructive notice would be the consummation of a commendable trend discernible in latest case law towards introducing not only a degree of intelligibility but also a degree of business reality into a field in which in the past both elements have been singularly lacking.