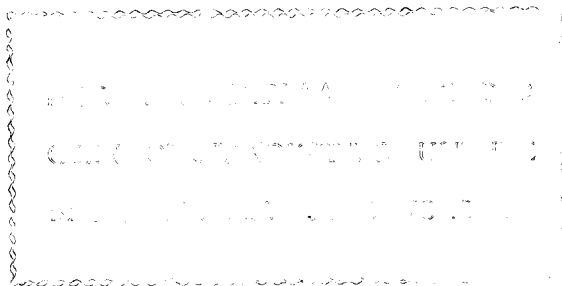




THE APPLICATION OF THE RULE IN TURQUAND'S  
CASE IN PRESENT DAY COMPANY LAW.

- by -

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This dissertation was handed in  
in 1964 towards partial fulfilment  
of the requirements of the degree  
LL.B. of the University of the  
Orange Free State.

Examiner: Mr. S.J. Naude.

UOVS - SASOL-BIBLIOTEK



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1.

INTRODUCTION.

A third party, in his dealing with a company, is protected in the following three manners:

1. By the protection afforded by Section 69 of the Companies Act, Act 46 of 1926;<sup>1)</sup>

2. By the rule formulated in the case Royal British Bank vs. Turquand;<sup>2)</sup>

3. By the personal liability of directors.

Directors do not, as a general rule, incur personal liability as against third parties on contracts entered into by them in the name and on behalf of their companies.<sup>3) 4)</sup>

What is of importance for the subject of

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1) Section 69: Validity of Acts of Director - The acts of a director or manager shall be valid, notwithstanding any defect that may afterwards be discovered in his appointment or qualification.

2) 1856 E. & B. 327 : 119 E3 886.

3) Ferguson vs. Wilson 1866(2) Ch. App. 77. According to Hahlo, Company Law Through The Cases, they may be personally liable on 4 grounds:

(1) on the ground of breach of warranty of authority, when they acted ultra vires the company or outside their own powers;

(2) where they acted fraudulently as against the other contracting party;

(3) where they pledged their personal credit as well as the credit of the company;

(4) where they failed to use the word 'limited' as part of the name of the company.

4) This is according to the law of agency.

this dissertation is the precept contained in the second basis of protection enumerated above, namely, the Rule formulated in the case of Royal British Bank vs. Turquand.

Being a persona, a company's liabilities are not the liabilities of the members of the company, but its own. Being a persona ficta, however, the company's acts can only be performed by natural persons. These are the directors of the company. Their capacities are determined by the Articles of Association. The Articles of Association govern the domestic affairs of the company. Together with the Memorandum of Association, the Articles, when registered, form the public documents of the company. These public documents, on registration, create an objective right for a defined community, that is, the company and all the shareholders.

Persons dealing with a director have these "public documents" to guide them as to whether the directors are acting within their granted powers, or not.

If an outsider, therefore, deals with a director, who in terms of the Articles is empowered to perform the particular act, the outsider has no way of knowing whether the internal arrangements necessary for the authorisation of that director's act have actually taken place. As far as he is concerned, the act is intra vires the Articles of

/Association.....

Association. If, however, the director has not in fact the necessary authority, and the outsider's act would be to his detriment if the ordinary principles of ultra vires acts applied, the company may nevertheless be bound as a result of the rule formulated in Turquand's case.

The purpose of this dissertation then, is not to deal in particular with the common principles of agency, or with the vicarious liability of a company for the acts of its officials, agents or servants, but to outline and illustrate the present day application of this rule.

In what follows, therefore, we shall deal with the following aspects: a short history of the rule, the actual, usual and ostensible authority of directors and agents of the company, the difference which exists between estoppel and the Turquand Rule, the recommendations contained in the Cohen and Jenkins Committees' company law commissions, and a review of cases in which the rule has been applied or discussed.

Finally we shall submit certain conclusions to which we have come with regard to the rule and its future in this branch of our law.

CHAPTER I.

THE HISTORY OF THE RULE.

In the middle ages, trading on joint account took place by means of the partnership, of which various types were known. These, however, were never companies.<sup>1)</sup> The first organisation known as a company was what was known as a "Regulated Company".<sup>2)</sup> These were, however, merely an extension of the guilds, which were forced to enter the international scene because of extensive trading in the New World. That these were merely extensions of the guilds was shewn by the fact that the members each traded on their own account. Thus on the bankruptcy of one, or on the default of payment by one, it did not affect the other members of the "company" at all. The individual was merely required to subject himself to the rules of the "company", but this was to obtain equality of opportunity for all the members. Most of these "companies" were, however, established by Royal Charter. This tied up with the practice of Royal monopolies.

The partnership idea, however, insinuated itself into the regulated companies which became joint endeavours, for which the entire patrimonies of the partners were liable on contracts entered

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1) Gower 1st edition p. 22.

2) Ibid. 23.

into with third parties.

Occasionally, a company worked in both ways. There was a joint stock, as well as individual trading by the members. The liability to third parties was split in accordance. From this developed the further precept that private enterprise under protection of the company was forbidden, and only joint stock enterprise remained. Eventually the regulated company disappeared, and there remained the joint stock company.

Gower says:<sup>3)</sup>

"Many joint stock companies were originally formed as partnerships under seal, providing for the division of the undertaking into shares which were transferable by the original partners with greater or less freedom according to the terms of the partnership."

On contracts with thirds, the whole company was liable.

The advantages of incorporation were many. Limited liability was not recognized as the greatest benefit at that stage though. At first it was appreciated because it protected the assets of the company from attachment for the private debts of the members. At this stage also, there was no "Company Law".

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3) Gower "Modern Company Law" p. 24.



The first attempt at a "Company Law" was a resolution of the House of Commons in 1720. This was followed by the so-called "Bubble Act", later in 1720, which was intended to control the illegal practice of acting under obsolete or non-existent Charters, and the practice of freely transferring shares. The pitfalls for a person dealing with a company practising under an obsolete Charter are obvious. The wording of the Act itself, however, was vague. This Act, however, in bringing about the collapse of the South Sea Company, and by means of the resultant panic and scandal, succeeded in making the authorities chary of granting further Charters. For at least the following hundred years, incorporation was granted only to banking companies, fire and marine insurance concerns, canal building bodies, and utility concerns.<sup>4)</sup>

The natural result was a terrific impetus to the number of unincorporated companies. The great English legal figure of the trust was brought into play. A deed of settlement was drawn up with certain specified stock as the trust goods. The trustees would then correspond to the directors. This type of company was used in every conceivable line of business. The disadvantages inherent in these unincorporated companies only became evident at the commencement of the nineteenth century, when there was a terrific growth in speculation due to

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4) Adam Smith "Wealth of Nations" V. Chapter I Part III Article 1.

the fact that wars at that time could be turned into highly profitable ventures, and also owing to the phenomenal development in railways.

One difficulty was the lack of power to sue or to be sued.<sup>5)</sup> In law, these companies were still partnerships. But even the law could not remain oblivious to the numerous and noteworthy differences between large companies and simple partnerships. A shareholder in the former could manifestly not bind the company as a partner could the partnership; those people dealing with the company would be deemed to know that powers of management were restricted to the directors. It is here that we can first detect the seed which blossomed in the later Rule in Turquand's case.

Legal personality was undeveloped and litigation could not be instituted in the name of the company. The converse held true also, for an action would have to be brought against all the "partners".

In 1825, therefore, the Bubble Act was repealed. After this, reports, acts and repeals followed one another in short order, and it is unnecessary to enumerate them here. Worthy of mention is, however, the legislation in 1844 and 1845.<sup>6)</sup>

The 1844 Act laid down principles which

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5) Gower op. cit. p. 34.

6) 7 & 8 Vict. c 110  
8 & 9 Vict. c 16.

have remained the basis of English Company Law ever since.

Now Section 25 of this Act limited the powers of a company to the acts which were authorised by the deed of settlement. The interpretation of this section was argued in the case of The Royal British Bank vs. Turquand<sup>7)</sup> in 1856.

One Turquand, the official manager<sup>8)</sup> of the Cameron's Coalbrook Steam, Coal and Swansea and London Railway Company, a company registered under 7 & 8 Vict. c 110 was sued by the Royal British Bank on a bond, signed by two directors, under the seal of the company, whereby the company acknowledged itself to be bound to the Royal British Bank in the amount of £2000. Under the deed of settlement of the Company (Hahlo refers to it as "the constitution" of the company: *Company Law Through The Cases* p. 243), the directors might borrow on bond, such sums as should from time to time, by a general resolution of the company, be authorised to be borrowed.

The Plaintiff's declaration alleged that the company did, before the defendant became official manager, namely on the 6th March, 1850, by their writing obligatory sealed with their common seal,

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7) 6 EL & BL 328

8) Under the Joint Stock Companies Winding Up Acts

9 & 10 Vict. c 28  
11 & 12 Vict. c 45  
12 & 13 Vict. c 108

acknowledge themselves to be bound to the plaintiffs in £2000, to be paid to the plaintiffs on request. This undertaking was to bind themselves and their successors. The said sum, or any part thereof, was not paid.

The plea set out the conditions for securing the plaintiff in an amount of £1000 on the balance of the current account. The plea further set out the relevant clauses of the registered deed of settlement from which the powers of directors described above are summarized, and averred that no such resolution of authority had been adopted and that the bond had been given without the consent of the shareholders. The replication set out the deed of settlement further, enumerating the purposes of the company, and alleged that at a general meeting of the company it was resolved

"that the directors of the said Company should be, and they were thereby, authorized to borrow on mortgage, bond or otherwise, such sums for such periods and at such rates of interest as they might deem expedient, in accordance with the provisions of the deed of settlement and Act of Parliament. And the said resolution and determination has thence and hitherto remained unrescinded."

It then went on to allege that afterwards, in accordance with the authority granted them in

/general.....

general meeting, the directors entered into the bond, which bond the plaintiffs took "in full faith and belief of the validity of the said resolutions, and that the said bond was authorized by, and would be valid and binding security upon the said Company." They also demurred to the plea. The defendants demurred to the replication. Judgment was given for the plaintiffs in the Court of Queens Bench. The defendant after this suggested error in the Court of Exchequer Chamber. It was argued that the plea answered the declaration as it amounted to a special non est factum. Reference was here made to Section 25 of the Statute 7 & 8 Vict. c 110 which limited the powers of the company to the acts which are authorised by the deed of settlement. Counsel argued that the bond was not that of the company and that the replication did not satisfy the condition imposed by the deed of settlement, inasmuch as the resolution as set forth, did not specify the sum to be borrowed. The judges decided that this question did not arise.

Jervis C.J., in delivering his judgment, then formulated what is now known as the Rule in Turquand's case, as follows:

"We may now take for granted that the dealings with these companies are not like the dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the

/deed.....

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 a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done."

The Court of Exchequer Chamber thus affirmed the judgment of the Queen's Bench, and the Turquand Rule came into being.

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CHAPTER II.

OSTENSIBLE, IMPLIED AND ACTUAL AUTHORITY OF AN  
AGENT OF THE COMPANY, AND THE DIFFERENCE BETWEEN  
THE TURQUAND RULE AND ESTOPPEL.

In his discussions on the application of the Turquand Rule, Gower<sup>1)</sup> has evolved six propositions in which the scope of the present day law on this point is contained. His fourth and fifth propositions deal with estoppel as though this is an integral part of the Rule. As Benade remarks in his article, "Opmerkings oor die Turquand-reël"<sup>2)</sup>:

"Dit sal tot meer suiwerheid en helderheid lei indien hierdie twee begrippe afsonderlik van mekaar gehou word, al is dit nodig om die feite van 'n besondere geval aan albei te toets."

In his fourth proposition, Gower says:

"If the official is purporting to exercise an authority which that sort of official would not usually have, the outsider will not be protected if the official exceeds

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1) Op. cit. 154 et seq.

2) T.H.R.H.R. 3. August 1962 p. 194 at 195.

his actual authority unless the company has held him out as having authority to act in the matter and the outsider has relied thereon, that is, unless the company is estopped...."

In this, Gower is referring to his previous proposition which deals with the usual authority of certain officials of the Company. In the case of Wolpert vs. Uitzigt Properties (Pty.) Ltd.,<sup>3)</sup> the Court listed the following apparent agencies of a company through whom a third party can effectively contract with the company:

- (a) The board of directors.
- (b) The managing director.
- (c) The chairman of the board.
- (d) Any person who has express or implied authority.

As a legal persona the company can appoint **agents** as can any natural person, subject to the rules which govern all contracts of agency. When I use the term "apparent agencies" above, however, it is used in a wider sense than "agency" applied to a specific contract. Certain organs are necessary for the function of the com-

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3) S.A.L.R. 1961(2) 257.



pany, and these are the "apparent agencies". The question is, when does this apparent or ostensible authority (to employ the more customary term) arise?

To begin with, there can be two types of ostensible authority for the purposes of the Turquand Rule, namely, ostensible authority ex the articles of association, and secondly ostensible authority quite apart from the articles. In either case, however, the company may be bound by the Rule. Can a person, however, who is not aware of the contents of the articles of association set up the ostensible authority in the articles? Montrose<sup>4)</sup> answers this question in the negative, unless one accepts the doctrine of constructive notice as a positive doctrine.

If there is a provision in the articles extending the authority of an agent of the company beyond that which it is usual to give to such an agent, and he performs an act without the due authorisation, then, if we are to accept the doctrine of constructive notice at all, would it not be equitable to give the third party the relief contemplated by the Rule? Conversely, a company can undoubtedly set up a clause in the articles

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4) Law Quarterly Review 50 224  
"Apparent Authority of an Agent of a Company"  
at 235.

expressly limiting the authority of an officer to something less than what would be his ostensible authority. His ultra vires act then could never bind the company. Why then should an outsider be expected to have actual knowledge of the articles if he contracts with an agent of the company who exceeds what would in the circumstances be that agent's ostensible authority?

We have above repeatedly employed a term which at this stage needs be further elaborated, namely constructive notice. This doctrine is to the effect that persons dealing with a company are deemed to have knowledge of its public documents. There is nothing in the legislation of 1844 which provided that Registration would constitute notice, nor was there anything in any succeeding act to that effect, and ergo, nothing in the South African legislation. We have already quoted the words of Jervis<sup>5)</sup> in the Turquand case, and wish to add the words of Lord Campbell C.J. in the Court of the Queen's Bench:

"If the plaintiffs must be presumed to have had notice of the contents

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5) "..... 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....."

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."

Therefore, although Jervis said that the parties were bound to read the deed of settlement, there is nothing in his judgment from which an intention to presumption of knowledge of the contents of the deed can be inferred. So too, Campbell's "..... If the plaintiffs must be presumed....."<sup>6)</sup> does not lend itself to an interpretation conducive to the implication of knowledge by construction but rather to a grudging concession to an hypothesis.

However, in the year following Turquand's case,<sup>7)</sup> the House of Lords decided, in the case of Ernest vs. Nicholls,<sup>8)</sup> that registration would constitute notice. In the words of Lord Wensleydale:<sup>9)</sup>

"The Legislature then devised the plan of incorporating these com-

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6) In this connection Montrose says: "Turquand's case is therefore not a precedent in favour of a positive doctrine of constructive notice.

7) i.e. 1857.

8) (1857) 6. H.L.C. 401 (Clarke's reprints used) 4 on 419.

panies in a manner unknown to the common law, with special powers of management and liabilities, providing at the same time that all the world should have notice who were the persons authorised to bind all the shareholders by requiring the co-partnership deed to be registered, certified by the directors, and made accessible to all, and besides including some clauses as to the management, as in the Act 7 & 8 Vict. c 110 S7 etc. All persons therefore must take notice of the deed and provisions of the Act. If they do not choose to acquaint themselves with the powers of the directors, it is their own fault, and if they give credit to any unauthorized persons they must be content to look to them only, and not to the company at large. The stipulations of the Deed which restrict and regulate their 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."

It can thus be seen that Lord Wensleydale overlooked the possibility of there being any irregularity in internal matters which ex facie appear to be perfectly in order to outsiders. The case, however, firmly entrenched the doctrine  
/to which.....

to which so many problems are due. In the case of Kredietbank Cassel G.M.B.H. vs. Schenkers<sup>10)</sup> Wright, J. treated the Turquand Rule as embodying the doctrine of constructive notice.

"The memorandum and articles of association are public documents and everyone dealing in such matters with a limited company is taken in law to be acquainted with their terms..... I do not find it laid down as a condition that the persons so dealing must have actually examined the articles of association. In business he would seldom or never do so, but take the risk. He is bound by the articles if they are adverse to his claim; it seems that if the articles are in his favour he should be entitled to benefit by their terms."

The judge therefore advocates the positive basis for the doctrine. This case is, however, one of the exceptions. For the doctrine is a negative one, and a person is unable to rely on an extension of powers not authorised as constituting ostensible authority when he was in ignorance of such extension when contracting.<sup>11)</sup>

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10) (1927) 1 K.B. 826.

11) Cf. the judgment of Sargant L.J. in Houghton & Co. vs. Northard, Lowe & Wills, Ltd. (1927) 1 K.B. 246.

This, however, only holds good for constructive notice. If there is actual knowledge of a clause in the articles of association by which there is an extension of the usual powers granted to a particular agent or officer of a company, then ostensible authority of such an agent, as against the third contracting with such agent or officer, will bring the transaction within the ambit of the Rule.

For the purpose of the doctrine, Public Documents in South Africa would be the memorandum and the articles of association, as well as any special resolutions which are filed with the Registrar of Companies. Each Deeds Registry also has copies of those documents pertaining to Companies which have an interest in registrable documents filed in that Registry.

A difference which must be recorded is that which exists between ostensible authority and implied authority. Implied authority is that authority which is, although not given in express terms, actual authority, while ostensible authority in fact never existed at all. In the case of Wolpert vs. Uitzigt Properties (Pty.) Ltd,<sup>12)</sup> Claassen J., at 266, says:

"Such implied authority can be

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12) Supra.

inferred when the official of the company purports to exercise an authority which that type of official usually has, even though the official is exceeding his actual authority."

Now implied authority is nevertheless actual authority, although given tacitly<sup>13)</sup> and it is difficult to see what the judge means here unless he is using the words "implied authority" in a different sense to their ordinary sense in agency. Ostensible authority, however, is used by the judge to base estoppel. We have seen, however, that a person can be afforded protection by the Rule in Turquand's case when relying on ostensible authority, quite apart from estoppel. If a person is relying on the ostensible authority of an official of a company either ex the articles of association, that is to say on actual knowledge, or if he only has constructive notice of the articles, can it be said that the company held him out to be authorised? I do not think so. It is of course possible that a reliance on estoppel can be coincident with setting up the rule in Turquand's case, but they are separate concepts and should be kept separate. It is possible that the articles empower a certain act by a certain

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13) de Villiers & McIntosh 2nd ed. p. 214 et seq.

officer. In that case there can be an estoppel, but then the third party would have to prove knowledge of and reliance on the articles. Necessary for an estoppel is a representation by the company and the reliance on that representation to his detriment by a third party. Now if I read in the articles of association of a company that a certain director, after compliance with certain internal arrangements may perform a certain transaction, and I am approached to enter into such a transaction, I may be entitled to assume that the internal arrangements were complied with, and I will be, in the absence of any suspicious circumstances which should have put me on enquiry, protected by the Rule in Turquand's case. There could only be a question of estoppel if the company had represented to me that all the internal arrangements had been complied with, and I had acted on such a representation to my prejudice. In such a case there is no question of ostensible authority.

In the case of Insurance Trust and Investments (Pty.) Ltd. vs. Mudalair,<sup>14)</sup> Broome, J. expressed the requirements for an estoppel succinctly:

".....If the matter is looked at in this light, all difficulty in regard to the Plaintiff's knowledge

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14) 1943 N.P.D. 45.



or want of knowledge of the contents of the articles disappears. It is for the plaintiff to plead and prove the estoppel he relies on. If he relies on the contents of the articles as constituting a representation, he must prove that he knew the contents. But he may rely on quite a different representation, for instance, that the company held out a particular officer as having authority. In every case he must, of course, prove, not only the representation, but that he acted upon it to his prejudice."

Ostensible authority outside the articles is constituted by "usual authority". That is the authority which an official or agent of that type usually has. And the company will be bound except if<sup>15)</sup>

(a) the third party knows that the official or agent has no actual authority;

(b) the circumstances are such as to put him on enquiry; or

(c) the public documents make it clear that the official has no actual authority, or could not have authority unless a resolution had been passed which requires filing as a public document, and no such document has been filed.

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15) Cf. Gower's 3rd proposition.

On the question of what is usual authority, it must be remembered that depending on a person's relation to the company, he is likely to have certain powers.

It is usual that the very widest powers are conferred upon the managing director, and the outsider dealing with him will usually be safe, as too when he deals with the board as a whole. So too, if he were dealing with a sales director, within the scope of such a person's usual powers, he will be safe, but an individual director is not usually endowed with wide powers of management. The powers of secretaries and managers are also usually very restricted, and the outsider will only be safe in dealings with this class of agent within the scope of their usually restricted functions.

It should be noted that there is a distinction between the liability of the company when the director or other official acts on an authority which he might have had, and the case where the company performs some act which does not fall within the ambit of its objects. In the latter case, by virtue of the doctrine of ultra vires, the company is not bound because the company lacks the capacity to bind itself in that respect. Once again we come up against the problem of constructive notice.

A company only has power to perform

/those acts.....

those acts which are embodied in the objects set out in the memorandum, and acts incidental thereto.<sup>16)</sup> An act which is ultra vires can not be ratified ex post facto by the company. "An ultra vires agreement cannot become intra vires by reason of estoppel, lapse of time, ratification, acquiescence or delay."<sup>17)</sup> It will thus be realised what a dangerous precept this is, conducive as it is to such injustice and inequitable consequences. We shall see later the means by which the Cohen Commission sought to remedy this.

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16) Deuchar vs. Gas Light and Coke Co. (1925) A.C. 691.

17) Re Jon Beauforte (London) Ltd. (1953) 1 Ch. 131.

CHAPTER III.

THE RECOMMENDATIONS OF THE COHEN AND JENKINS COMPANY  
LAW COMMISSIONS, IN RELATION TO THE TURQUAND RULE.

While these commissions did not deal with the Rule in particular terms, there were however certain recommendations made which, if implemented, would have an effect on the future and application of the Rule.

In the recommendations contained in the Cohen commission's report regarding the doctrine of ultra vires, we find the first which would have an effect on the Rule. The commission came to the conclusion that the doctrine is an

"illusory protection for the shareholders, and yet may be a pitfall for third parties dealing with the company."

The proposed solution for this state of affairs was that

"Every Company..... should, notwithstanding anything omitted from its memorandum of association, have as regards third parties, the same powers as an individual."

/The Cohen Commission.....

The Cohen commission thus recommended the fullest implementation of the organic theory, that the Company be endowed with all the powers of a natural person. The provisions in the memorandum with regard to the powers exercisable by the directors would then serve purely as a contract between the company and the shareholders. In this respect a company would be placed on the same footing as a partnership, with the inevitable result that the company would be bound in all instances. The company would then be obliged to look to the director or other agent for recourse. The remaining limitation would then be the objects' clause in the memorandum.

This was not followed in the subsequent legislation which gave effect to certain other recommendations of the commission. The Board of Trade gave the following reason for its omission:

"..... A third party might find himself unable to enforce a contract against a company either on the ground that it was outside the scope of the company's objects, or on the ground that it was beyond the authority of the directors. In both cases he would be affected with notice of the limits imposed by the objects clause of the company's memorandum, which is a public document. Merely to abrogate the ultra vires rule in relation to the company would in practice leave the third

/party.....

party no better off..... To give effect to the suggestion of the Cohen Committee it would therefore be necessary to modify, if not to abrogate, the rule that the memorandum is a public document, of which third parties dealing with the company are deemed to have notice."

This then formed the basis from which the Jenkins committee proceeded. In their re-statement of the problems involved,<sup>1)</sup> the Committee pointed out that, even if the attributes of a natural person are granted to a company, the company remains a fictitious person which can only act through directors or other agents exercising powers delegated to them by the company. The Committee then posed a question which is of great importance to the Rule, namely, what is the extent of this delegation to be? To this the Committee raise what is, on the face of it, a justifiable criticism. It would result in an omnibus delegation of the powers of the company to the directors, which would be a definitely retrograde step.

If it is accepted that some limit of the directors' powers be constituted, the Committee asks how this is to be done. It then criticizes the Cohen Commission's plan to leave the objects clause to modify and define these powers. This

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1) Para. 39.

brings us back to the question of notice by construction as far as the third party is concerned. The committee points out that as far as the outsider is concerned, he would be little better off under the new law than he was under the old. Thus, says the committee, to give complete protection to the third party it would be necessary to absolve him not only from constructive notice but also from actual notice. They point out the undesirability of such an expedient. They go on to say that the best course would be to provide protection to third parties contracting with companies "by abrogating the rule, already mitigated by the decision in Royal British Bank v. Turquand (1855) E & B 248, (1856) E & B 327, that third parties are fixed with constructive notice of the contents of the company's memorandum and articles of association."<sup>2)</sup>

In their recommendations then, the company recommended that:<sup>3)</sup>

"..... in entering into any such contract the other party should be entitled to assume without investigation that the company is in fact possessed of the necessary power; and should not by reason of his omission so to investigate

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2) Para. 41

3) Para. 42(b).

be deemed not to have acted in good faith or be deprived of his right to enforce the contract on the ground that at the time of entering into it he had constructive notice of any limitations on the powers of the company or on the powers of any director or other person, to act on the company's behalf, imposed by its memorandum or articles of association."

The Committee then make the following far reaching recommendation: 4)

"..... the other party should not be deprived of his right to enforce the contract on the ground that he had actual knowledge of the contents of the memorandum and articles at the time of entering into the contract if he honestly and reasonably failed to appreciate that they had the effect of precluding the company (or any director or other person on its behalf) from entering into the contract in question."

Thus to qualify actual knowledge as recommended here by honest and reasonable misunderstanding would, in my opinion, be a dangerous step, and open to too many abuses by the third party having actual knowledge to enable us to endorse the recommendation, with any confidence.

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4) Par. 42(c).



Let us, however, examine the criticism offered on the Cohen report by the Jenkins Commission.

The mere fact that the Cohen Committee made no mention of the "constructive notice" doctrine does not lead to the necessary implication that they overlooked it. In my opinion they intended a continuation of the Turquand Rule. The fact that existing terms of the articles would in the future only operate as a contract between the company and its shareholders would consequently result in a stricter control being exercised over the directors. Protection of the shareholders against directors who render the company liable by means of acts which fall within the ambit of the Turquand rule, would, in certain circumstances, be afforded by the rule formulated in Foss vs.  
5)  
Harbottle.

It will be seen therefore that the criticism to which I referred above as being justifiable on the face of it, is not justified.

We come then to the Jenkins Committee's recommendations with regard to the abrogation of

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5) (1843) 2 Hare 461 and cf. Gower pg. 482 et seq. According to the rule formulated here the company has the capacity to proceed against those who have defaulted in their duty to the company. The rule has, however, developed to include all cases where there has been an irregularity in the so-called "domestic" affairs of the company.

the constructive notice doctrine. As we have seen, the commission recommended the total abrogation of the doctrine. The implementation of this recommendation would result in the Turquand Rule being almost unnecessary, as, if the company would be bound in any event, there would never arise a need for the reliance on the Rule.

What then if the third party had actual knowledge of some clause in the articles which limited the power of a director or other agent of the company? In terms of the Jenkins Committee's recommendations, if he "honestly and reasonably" failed to appreciate that the contents precluded the person contracting with him, then the company would be bound. But what if he finds not a prohibition but permission to do something? Here I think the Rule would still be applicable if the domestic arrangements had not been properly carried out, and there was no suspicious circumstance which should have put the outsider on enquiry. He is still entitled to assume that everything is above board and in order, and the Rule will protect him in his assumption.

CHAPTER IV.

CASE HISTORY.

As the number of cases in which the Rule in Turquand's case has been applied is legion, I have chosen the following cases because they illustrate in which instances a reliance on the Rule has been upheld or because they highlight some requirement for or element of the Rule.

One of the first cases in which the Turquand Rule was applied after the Turquand case itself, and one which was extremely important in the development of the Rule, was the often cited Mahony vs. East Holyford Mining Company, which was heard in 1875.<sup>1)</sup> This case was important in establishing the Rule. The facts of the case were briefly the following:

A mining company was founded by one Wadge and certain friends of his. The company was registered and subscriptions were obtained from the people who wished to acquire shares in the company. These moneys were paid into the company's bank. The bank was notified by a person calling himself the secretary of the company, that a resolution had been passed that the bank was to pay out cheques signed by "any

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1) (1875) L.R. 7 H.L. 869.

two of the following three directors" (Wadge, McNally and Hoare) and countersigned by himself. The bank thereafter honoured the cheques so signed. When the funds in the bank were almost exhausted, the company was wound up. It transpired that no meeting of shareholders had ever been held, and no secretary or directors had been appointed. Wadge and his friends had simply held themselves out to be directors and secretary, and had appropriated the subscription moneys. The liquidator of the company then sought to recover the amounts paid out from the bank. It was held that he could not recover these amounts, which had in the circumstances been paid out in good faith. In his judgment, Kelly, C.B., said:

"..... A banker dealing with a company must be taken to be acquainted with the manner in which, under the articles of association, the moneys of the company may be drawn out of his bank for the purposes of the company..... And the bankers must also be taken to have had knowledge, from the articles, of the duties of the directors and the mode in which the directors were to be appointed. But, after that, when there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, then those so dealing with them, externally, are not to

/be.....

be affected by any irregularities which may take place in the internal management of the company..."

Kelly here emphasises two of the elements of the Rule. Firstly the requirement of constructive notice of the articles of association, and secondly, the presumption that anything seemingly done in accordance with these articles has in fact been done, guaranteed against any internal irregularities. Later in his judgment, he adds a qualification of which no mention was made in the Turquand case itself, namely, "..... the case is open to any observation arising from gross negligence...." This qualification has become, as we have seen, an integral part of the Rule, couched in a different form. Negligence could be attributed to anyone who became acquainted with some suspicious circumstance and was "put on inquiry", but did not take the trouble to investigate. Proof that there was some such circumstance which should have put a person on inquiry would be a valid rebuttal of a reliance on the rule.

A case in which an attempt was made to invoke the protection of the Turquand Rule, and which failed because the party dealing with the managing director knew that the latter was contracting to serve his own ends, was the Transvaal Supreme Court case, Paddon and Brock Ltd. vs. Nathan,<sup>2)</sup>

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2) 1906 T.S. 158.

an appeal from the Magistrate's Court.

The managing director, G.W. Paddon, being desirous of raising money for his personal purposes, requested the respondent to advance him the amount required against a promissory note. This request was refused unless the endorsement of the company was obtained as further security. Paddon endorsed the note with the name of the company. Upon being questioned as to whether he was authorised to sign on behalf of the company, he replied "You must be a fool to ask that, because I am boss of the whole concern." This apparently satisfied Nathan, for he raised and advanced the money. In due course the note was presented for payment, and dishonoured. Paddon was sued in his personal capacity on the note, and judgment was obtained. Judgment was subsequently obtained against the appellant company as indorser. The magistrate held that in terms of clause 56 of the articles of association, Paddon was authorised to bind the company by indorsement. Clause 56 read as follows: "The directors shall have the power by the signature of the managing director to draw, accept, make or indorse bills of exchange and promissory notes on behalf and for the purposes of the Company."

On appeal, Smith, J.,<sup>3)</sup> held that as

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3) On 160.

Nathan knew that the money was for Paddon's private purposes, and in view of the suspicious answer which he received when querying Paddon's right to bind the company, he was put on inquiry, and must therefore fail.

Nathan should, therefore, have investigated whether Paddon was authorised to bind the Company as surety for his personal debts. A reliance on Paddon's ostensible authority in view of clause 56 would also have failed, because Nathan knew that Paddon required the money for himself, and clause 56 speaks only of "... on behalf and for the purposes of the company."

Another case dealing with ostensible authority of the managing director, is another Transvaal one, S.A. Securities Ltd. v. Nicholas.<sup>4)</sup>

The facts of this case are not material as there is much extraneous matter which is irrelevant. However, the following words of Wessels, J.<sup>5)</sup> **strongly** substantiate the principle of ostensible authority being assumed in the case of a managing director.

"..... All that it is necessary that a person dealing with a managing director should do is to refer to those outside documents

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4) 1911 T.P.D. 450.

5) On 458.

of the company, and to see from them whether the managing director might or might not have such powers as he alleges that he has. If it is found that the managing director might have such powers, then a person is entitled to deal with him on the footing that he possesses them....."

Bristowe, J. in the same case puts it even more strongly : 6)

"It seems to me that the mere fact of appointing a man as managing director gives him prima facie, certain powers....."

Implicit in these utterances are two basic elements of the Rule, namely:

1. That a person may rely on the ostensible authority of a managing director of the company as set out in the public documents, and,
2. That it is not necessary to inquire into the domestic affairs of the company to establish whether that authority was in fact constituted in accordance with the articles.

Judge Bristowe's remark also emphasises the existence of usual authority in the case of a managing director. This case illustrates a

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6) On 461.



step in the development of the Rule, as all the propositions quoted above are today an integral part of the Rule.

A case to which we have referred above, and in which the plaintiffs wished to hold the company liable under both the Turquand Rule and estoppel, was the English case of Houghton & Co. vs. Nothard Lowe & Wills, Ltd.<sup>7)</sup>

A director of the company, without the necessary authorisation of the Board, entered into an agreement with the Plaintiff, on behalf of the Company. The question of estoppel, on the ground that the agreement was known to the company through two of its directors, was kept separate from the question of the applicability of the rule in Turquand's case, and we need therefore not consider it. However, both the Court of Appeal and the House of Lords held that the Plaintiffs could not succeed on either ground.

In terms of the articles the management of the company was in the hands of the board as such, and there had been no delegation of its powers to the director concerned, Lowe. Also in the articles of association was the power of the Board to delegate any of its powers, and the plaintiff sought to rely on such power of de-

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7) House of Lords (1928) A.C. 1 (affirming (1927) 1 KB246).

legation to bring the case within the ambit of the Rule. However, and this was an important consideration in the judgment by Sargant L.J., at the time of entering into the contract, the Plaintiff had no knowledge of this power, and only subsequently became aware of its existence, whereupon it sought to rely upon it. This reliance was ill founded. As they had no knowledge of the power, and did not rely on it, the judge held that they could not succeed. He pointed out, however, that if in fact there had been delegation, they could have relied on it, whether or not they had been aware of it, or alternatively, if they had been aware of the power to delegate, they could have relied on it, to infer that there had in fact been delegation. Sargant therefore negates any pretension to a positive doctrine of constructive notice. As we have pointed out above, this is, in our opinion at least, an inequitable limitation of the doctrine of constructive notice. Surely if a person is denied relief on the ground that he had constructive notice of a limitation on the power of some director or agent, then he should, conversely, be granted relief if he had constructive notice of some extension of a power. Bear in mind that these remarks are relevant to the general terms employed by the judge, and with the principle qua principle, not with the above case where the power of the board to delegate was not couched in terms which could reasonably lead a third party

/to believe.....

to believe that a particular person, director or agent might have such a power. It would indeed be interesting to conjecture as to the result of the appeal if the director in question had been the managing director. I have no doubt that it would be in accordance with the ostensible power of a managing director to be invested with delegated powers of the Board.

This principle was stated in unequivocal terms by Slade J., in the comparatively recent case of Rama Corporation Limited vs. Proved Tin and General Investments, Ltd.<sup>8)</sup>

"..... and by the same authority (i.e. Houghton & Co. vs. Nothard, Lowe & Wills, Ltd.) I am constrained to hold that the doctrine of constructive notice, that is to say, the doctrine of constructive notice of a company's registered document .... does not operate against a company, but only in its favour. Put in the converse way, the doctrine of constructive notice operates against the person who has failed to enquire, but does not operate in his favour. There is no positive doctrine of constructive notice; it is a purely negative one."

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8) (1952) 2 Q.B. 147 (1952 All England Reports, 554)

We can thus observe how the limitations on the Rule have developed to an extent certainly not contemplated by Lord Jervis when he originally formulated the Rule.

Of late, the Rule has been subject to attention in numerous cases. The case of The Christian Coloured Vigilance Council vs. Groenewald<sup>9)</sup> illustrated the element of the rule that an attempt to invoke the Rule would fail in the presence of suspicious circumstances which should put the outsider on his guard. One Reddy, the then secretary of the appellant association, had approached Respondent, allegedly on behalf of the association, for a loan of £150. This was at all times unauthorised and appellant (defendant) had no knowledge of the loan, until Reddy was convicted of theft. Reddy had approached Attorney G. with a document, written in longhand and containing certain grammatical errors. Realising that the document in his possession would not be accepted by the Registrar of Deeds, Attorney G. drafted another document, differing substantially from the first, and returned it. It was certified by the Secretary and returned to Attorney G., who then negotiated the loan. This draft contained what G. had thought happened at the meeting.

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9) 1961 P.H. E 3. (c)

This case is unfortunately rather badly reported and certain facts have evidently not been reported.

However, relying on the Rule, the Magistrate's Court granted judgment in Groenewald's favour. On appeal it was decided that he had been put on enquiry, and that

"Whatever the scope of the rule in Turquand's case might be..... it was clear that it could never be relied upon by a person who had been put on enquiry,"

and

"In my view the facts should have raised doubt regarding the existence of the power to mortgage and should have cast suspicion on the propriety of Attorney G. continuing with the transaction without making further inquiries."

We come now to the recent case in which the Rule has been most fully canvassed, namely Wolpert vs. Uitzigt Properties (Pty.) Ltd., and Others.<sup>10)</sup>

The appellant's action was one for provisional sentence against the respondent company as maker of a series of promissory notes. On the face of the notes, the respondent was the maker.

The signature consisted of the name of the company rubber stamped, followed by the written signature, "T. McAlpine" (who was one of the directors of respondent company), qualified by the word "Director". A document purporting to authorise McAlpine to make promissory notes for the company was found to be invalid because, although article 22 of the articles of association was to the effect that a resolution signed by all the directors would be as valid as a resolution adopted at a properly constituted meeting, the resolution on which plaintiff relied was not signed by all the directors. The judge decided that it was clear that McAlpine was an ordinary director of the Company, that it was not contended that he had ostensible authority, that on his findings he did not have express authority, that implied authority could not be inferred and that the mere fact of his having access to the rubber stamp of the company was of no import. Provisional sentence was therefore refused.

With respect I wish to submit that there are several possible criticisms which one can level against this judgment. The judgment purports to enumerate the instances in which the Turquand Rule can be applied. In connection herewith, two questions are posed:

- (a) When does one deal or contract with a company?
- (b) Who are the apparent agents of a company?

/In answer.....

In answer to these questions the judge lists four instances through which it can be said a person deals with the company. In dealing with the question of ostensible authority, above, we listed these instances and indeed the first three need no elaboration. However, the inclusion of estoppel in the fourth instance as being an integral part of the Rule, is one of the demerits of the judgment. Ostensible authority is interwoven with representation, and although the judge mentions the requirements for an estoppel, that is, the representation and the reliance thereon to the prejudice of the third party, my objection is to the inclusion of estoppel as an integral part of the Rule. I would have had no objection to the separation of the two, and the citation of estoppel as a distinct ground on which liability could be founded.

My other criticism is against the use of the term "implied authority". In my mind this is drawing a distinction which is not necessary in this case. This should, here, be included under ostensible authority. If a person has ostensibly the authority to perform an act, then that authority is implicit in whatever ground there may be, either the articles in the case of actual knowledge or the position of the agent, servant or director in the case of constructive notice for assuming the ostensible authority. Apart from

/these.....

these demerits, however, the case is a strong one.

In another case in which Uitzigt Properties was concerned in the same year, namely, Majola Investments (Pty.) Ltd. vs. Uitzigt Properties (Pty.) Ltd.,<sup>11)</sup> which was also an application for provisional sentence, no comment was offered on the exposition of the Turquand Rule in the former case. However, in this case more evidence was available and the court found that the resolution was taken at a properly constituted meeting of the Board, and the resolution was therefore not one in terms of Article 22, to which is referred above. Provisional sentence was therefore granted.

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11) 1961(4) S.A. 705 (T).



CHAPTER V.

CONCLUSION.

In conclusion I just wish to offer a few remarks on the future application of the Rule in today's company law.

In the first place I feel that a clearer distinction should be drawn between the Rule on the one hand, and estoppel on the other. As I pointed out above, it is possible that both remedies may be coincident in certain circumstances, but this is no reason why they should be treated as synonymous principles. This equation of the two can inevitably lead only to confusion as to the actual content of the Rule, and to undesirable extensions or limitations of it, which will result in the original idea behind the Rule, a simple equitable principle, being lost sight of.

Secondly, I think that, if constructive notice is to be attributed to an outsider, then the doctrine must be extended to have a positive, as well as a negative, effect. The Rule loses much of its efficacy because of the artificial limitation annexed to what is already a fiction. I can see no reason why constructive notice should not operate against a company as well as in its favour.

/Thirdly.....

Thirdly, I wish to endorse the opinion contained in the Jenkins Commission's report with regard to the abrogation of the doctrine of constructive notice. This is an alternative to my second recommendation above. Such abrogation will, of course, have the result of making the Turquand Rule almost redundant, as I pointed out above, as the Company will then be bound in any event, but from a point of view of protection for the third party dealing with the company, it will be far better, as he will then not have to run the risk of his claim floundering on any of the limitations placed on the operation of the Rule in its subsequent development.

I can not, however, endorse their recommendation with regard to actual knowledge. A person who has actual knowledge of the articles should not be able to hold the company liable even although he did not honestly and reasonably believe that they had the effect of precluding the company or the agent of the company with whom he was dealing from performing that specific act.

I therefore think that as long as the doctrine of constructive notice exists in its present form, the Rule in Turquand's case fulfils a very necessary function. For greater efficacy, however, I feel it should be shorn of its trimmings, and can say with Gower:

/"If.....

"If this branch of the law is ever codified, the draftsman will be well advised to ignore all case law of the present century and to go back to first principles and judgments of the founding fathers of our modern company law."<sup>12)</sup>

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12) Op. cit. 157.

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