

# THE POSITIVE CORPORATE SEAL RULE AND EXCEPTIONS THERETO AND THE RULE IN TURQUAND'S CASE

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*[This article is primarily a statement and illustration of the principle that the appearance of a corporate seal will be taken as conclusive evidence of corporate assent, and of the exceptions to that general principle. Professor Lindgren refers to the historical rule that a corporation's seal was the sole mode of expressing its contractual assent as the 'corporate seal rule'. The positive aspect of this rule was that where the seal appeared the corporation's assent was proved and it was bound. A discussion of the nature of this rule and the exceptions to it lead the author to conclude that the common seal is an original expression of corporate assent which operates independently of the human acts of affixation and that an appreciation of this principle will illuminate the rule in Turquand's case and the several cases on forged company contracts.]*

## INTRODUCTION

Contracts by corporations are regulated by the normal general law of contract devised to govern contracts by individuals. Therefore corporations must have notional counterparts for the individual's contracting equipment; viz, an effective mind, a mouth, a hand and a seal. The first gave the individual power of decision; the last three were legally recognized modes of expressing decision. Because of the fiction theory and of the corporate seal rule shortly to be discussed, more early cases were concerned with how a corporation's decision was *expressed* than with how it was *made* and the inquiry to be pursued in this article is concerned with the common law mode of expressing corporate contractual assent rather than with how it was formulated.

After much debate<sup>1</sup> as to whether there was a 'positive doctrine of

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<sup>1</sup> In addition to the invaluable judgment of the Court of Appeal in *Freeman and Lockyer* [1964] 2 Q.B. 480, esp. that of Diplock L.J., that of Slade J. in *Rama Corporation Ltd v. Proved Tin and General Investments Ltd* [1952] 1 All E.R. 554 should be noted. For the voluminous periodical literature on this development see Sir

constructive notice' and as to whether an outsider must have read the registered company's public documents before he could rely on the rule in *Royal British Bank v. Turquand*<sup>2</sup> it is now generally said that there must be an appearance to the outsider that the company is contractually bound before either the doctrine or the rule have scope for operation. Cases where a company has been held not bound<sup>3</sup> are explained by the related propositions that there was no apparent authority as to the act in question or that the outsider was put on inquiry by what did appear to him. The indoor management rule is now thought of as a clog or limitation or qualification on the negative doctrine (the only doctrine) of constructive notice of the registered company's public documents.<sup>4</sup> This modern view followed a distorted view according to which the rule was conceived of as an element in the very *appearance* of corporate contractual assent or *creation* of ostensible authority. The typical way in which the rule was expressed in the old case (a way which gave rise to the distorted view) was by a statement that an outsider dealing with individuals who purported to commit a company in contract was entitled to presume that they had the power or authority which they purported to have, if they *might* have had it consistently with the company's public documents—that their potential authority was their actual authority.<sup>5</sup>

If the actual decisions in the early cases are to stand with the modern view there must, for the rule to operate, be found in them an appearance of

Arthur Stiebel, 'The Ostensible Power of Directors' (1933) 49 *Law Quarterly Review* 350; J. L. Montrose, 'The Apparent Authority of an Agent of a Company' (1934) 50 *Law Quarterly Review* 224; Andrew R. Thompson, 'Company Law Doctrines and Authority to Contract' (1956) 11 *University of Toronto Law Journal* 248; I. D. Campbell, 'Contracts with Companies' (1959) 75 *Law Quarterly Review* 469 and (1960) 76 *Law Quarterly Review* 115; R. G. Nock, 'The Irrelevance of the Rule of Indoor Management' (1966) 30 *The Conveyancer (N.S.)*, 123; J. L. Montrose, 'The Apparent Authority of an Agent of a Company' (1965) 7 *Malaya Law Review* 253; M. J. Trebilcock, 'Company Contracts' (1965) 2 *Adelaide Law Review* 310; And for monographs see Daniel D. Prentice, 'The Indoor Management Rule', *Studies in Canadian Company Law* (ed. Jacob S. Ziegel, 1967) Ch. 10; *Palmer's Company Law* (21st ed. by C. M. Schmitthoff and James H. Thompson, 1968), Ch. 27, 242-52; L. C. B. Gower, *The Principles of Modern Company Law* (3rd ed. 1969) Ch. 8, 150-69; Robert R. Pennington, *The Principles of Company Law* (2nd ed. 1967) Ch. 5 105-118.

<sup>2</sup> *Royal British Bank v. Turquand* (1855) 5 E.L. & B.L. 248, (1856) 6 E.L. & B.L. 327.

<sup>3</sup> E.g. *Kreditbank Cassel (G.m.b.H.) v. Schenkers* [1927] 1 K.B. 826 (C.A.), *J. C. Houghton & Co. v. Nothard Lowe & Wills Ltd* [1927] 1 K.B. 246 (C.A.); *Rama Corporation v. Proved Tin etc.* [1952] 1 All E.R. 554.

<sup>4</sup> Even such a statement of the modern approach might be improved upon for what is meant is that the rule does not modify the doctrine but endorses what is inherent in the doctrine itself; viz that it is only the *public documents* which are constructively known.

<sup>5</sup> Cf. *Biggerstaff v. Rowatt's Wharf Ltd* [1896] 2 Ch. 93 (C.A.): Sankey J. in *Dey v. Pullinger Engineering Co.* [1921] 1 K.B. 77; perhaps Lord Hatherley in *Mahony v. East Holyford Mining Co.*, (1875) L.R. 7 H.L. 869, 894; and esp. per Wright J. in *Kreditbank Cassel v. Schenkers* [1926] 2 K.B. 450 and in *Houghton & Co. v. Nothard Lowe & Wills Ltd* [1927] 1 K.B. 246, 247-51. The cases were reviewed in great detail by Slade J. in *Rama Corporation v. Proved Tin etc.* [1952] 1 All E.R. 554 and the position clarified in *Freeman and Lockyer v. Buckhurst Park* [1964] 2 Q.B. 480. And see the literature noted n. 1 *supra*.

assent or authority other than the constructive appearance referred to. Yet a reading of *Turquand's* case<sup>2</sup> and other cases decided at about the same time on companies registered under the 1844 Act will reveal two things: first, that they provide some warrant for the 'presumption of regularity' emphasis, which gained hold; and second, that it was said in some cases that the directors of a registered company had no power to bind their company in the absence of total compliance with the company's deed of settlement.

It is submitted that the key to explaining the early cases lies in two factors which have been overlooked. The first is the peculiar significance of the common seal as the external physical symbol of an act of the body corporate itself—a corporate act.<sup>6</sup> Its appearance *per se* was always *some external evidence of corporate assent* and provided a basis from which the courts could legitimately speak of presumptions of antecedent *internal* regularity. The second factor is the special contracting provisions of the 1844 Act which provided not only formalistic modes of expressing contractual assent (an approach taken at common law in respect to corporations), but as an alternative, the possibility of proving, what was at first limited to actual authority in the individuals who contracted on behalf of the company. This article is concerned only with the first of these factors.

#### GENERAL OBSERVATIONS ON THE COMMON SEAL AS THE ONLY AND PRIMARY EXPRESSION OF CORPORATE CONTRACTUAL ASSENT AT COMMON LAW

Even for the individual, the seal had greater significance in early times than today:

In England, owing to the generally prevailing illiteracy, the use of the seal became the ordinary way of indicating the maker of a charter. The practice, apparently, was not the result of a desire for peculiar solemnity, but merely for identification. The use and object of a corporate seal may be assumed to have been the same as of an individual's seal.<sup>7</sup>

But in addition to the anthropomorphic parallel, there seem to have been three special advantages of a *corporate* seal. First, the seal seemed to be a device specially appropriate to represent an abstraction. Second, the common seal distinguished a corporate act from an act of a member or officer of the corporation. Third, although developed under the influence of the fiction theory, the special significance accorded to the common seal was

<sup>6</sup> In this article an 'act' of the body corporate is a synonym for a 'decision' or a 'mental' act of the body corporate and does not presuppose communication or expression thereof to an outsider.

<sup>7</sup> Williston, 'History of the Law of Business Corporations before 1800' *Harvard Law Review* 105, 118 cited in *Stevens on Corporations* (1949) 287-8. On the historical origin of sealing by individuals see C. T. Carr, *The General Principles of the Law of Corporations* (1905) 55 n. 1.

also justifiable without the corporate veil, as being, *by consent of the members of the corporation*, the only true indication that *they* were bound.<sup>8</sup> To this extent even the common seal could be equivocal as an indicator of corporate personality and an unincorporated body could have a common seal.<sup>9</sup>

Indeed it may well be desirable that a symbol should indicate the act of an unincorporated group. Little difficulty has arisen in the context of the ordinary partnership since each partner can bind all and an act of an individual can be recognized, but where only a group act can bind (as in the case of the unincorporated club or company) there is inevitable difficulty of definition and identification.

For an unincorporated group to have a common seal was, to say the least, exceptional<sup>10</sup> and it is noteworthy, for example, that 'the truly corporate character of a borough appeared with the use of a common seal in transactions of the borough. The seal was an 'outward and visible' sign of the borough's unity.'<sup>11</sup>

The common law's answer to the problem of identifying corporate contractual assent resided in formalism—the common seal was the only mode of expressing corporate contractual assent. Indeed, the common seal was so important that it may have been once considered a *sine qua non* of corporate character. But such a proposition would beg important questions about the very early history of corporations in England, the diversity of which make it unlikely that one quintessential feature will characterize them all.<sup>12</sup> At least by 1612 the common seal became recognized as a necessary incident, though not an essential pre-requisite, of corporate personality:

[W]hen a corporation is duly created all other incidents are *tacite* annexed . . . and, therefore, divers clauses subsequent in the charter are not of necessity but only declaratory, and might well have been left out. As

1. . . .

2. . . .

3. To have a seal, etc.; that is also declaratory, for when they are incorporated they may make or use what seal they will.<sup>13</sup>

In a number of early nineteenth century cases the absence of a corporate seal was given as evidence that an unincorporated joint stock company

<sup>8</sup> Cf. Rolfe B. in *Ludlow Corporation v. Charlton* (1840) 6 M. & W. 815, 823 and *Grant's Law of Corporations*, 58 n. (a).

<sup>9</sup> *Frend v. Dennett* (1958) 4 C.B. (N.S.) 576.

<sup>10</sup> Cf. the cases on unincorporated joint stock companies noted in n. 14 *infra*.

<sup>11</sup> S. C. Bagchi, *Principles of the Law of Corporations* (1928) 44-5.

<sup>12</sup> Cf. Pollock and Maitland, *History of English Law* (2 Vols, 2nd ed. 1952) Vol. 1, 487.

<sup>13</sup> *Sutton's Hospital Case* (1612) 10 Co. Rep. 1a, 30b and see Blackburn J.'s interpretation of Coke in *Riche v. Ashbury Railway Carriage Co.* (1874) L.R. 9 Ex. 224, 263. A perusal of the Selden Society's *Charters of Select Trading Companies A.D. 1530-1707* shows that in practice the power to have and use a common seal was expressly given to the chartered corporation.

had not 'acted or presumed to act as a corporate body' contrary to the prohibition in the Bubble Act.<sup>14</sup>

The special significance of the common seal for a corporation defined as a juristic person has often been noted. Bagchi says neatly, '[t]he seal is the sign manual of the invisible body and it can be dispensed with only when the exigencies of practice require,'<sup>15</sup> and Cooke notes both the distinctness of its purposes and of its personality as the reasons for the importance of the seal:

The idea that the corporate will in action must be thus attested by solemn formality followed from the separation of corporate purpose from the individualities of the members. It was part of the complete adoption by English law of the conception of corporate personality as a separate legal individuality from the sum of its members . . .<sup>16</sup>

When literacy became more common and the individual's signature became his usual contracting symbol in place of his seal, the comparison commonly made was one between the corporate seal and the individual's signature. It was said for example, that the seal of a corporation was 'for all contracting purposes the same thing as the signature of an ordinary individual'<sup>17</sup> and where a common seal was affixed to a document fraudulently and without authority, a comparison with a forged signature was drawn.<sup>18</sup>

The similarity between the corporate seal and the individual's seal was total since both were symbols external to both the legal and natural persons. But the comparison of the corporate seal with an individual's signature was not perfect since the individual's signature, hand and mind are organically connected, whereas the hand which affixes the corporation's

<sup>14</sup> (1720) 6 Geo. 1 c. 18. In *Garrard v. Hardey* (1843) 5 Man. & G. 471 it was said that association in large numbers was not *per se* a nuisance at common law and that 'The plea states no illegal mode or means by which they pretended to act as a company, as, by usurping a common seal, or the like; . . .' (per Tindal C.J. at 483) and in *Harrison v. Heathorn* (1843) 6 Man. & G. 81, 139 Tindal C.J. for the Court of Common Pleas noted that 'The having a common seal has always been held one incident to a corporation; Co. Litt. 30b; and the power of doing no act except under such common seal, another. But in this case there has been no assumption of any seal, nor was any act whatever done except in the individual names of agents or directors'.

<sup>15</sup> Bagchi, *op. cit.* 142.

<sup>16</sup> C. A. Cooke, *Corporation Trust and Company* (1950) 68; cf. the passage from Williston quoted *infra*, see text at n. 7.

<sup>17</sup> Per Pollock C.B. in *Dartford Union Guardians v. Trickett* (1888) 59 L.T.R. (N.S.) 754, 757.

<sup>18</sup> Per Stirling L.J. in *Ruben v. Great Fingall Consolidated* (1904) 2 K.B. 712, 729. Perhaps the common seal is even stronger evidence than a signature: 'It is not necessary to prove the seal of a corporation in the same manner as the signature of an individual by producing the witness who saw the seal affixed: but when an instrument having a seal affixed to it, purporting to be a corporate seal, is produced in evidence, it is necessary to prove that it is the seal of the corporation, if there be any doubt about it; otherwise any instrument with a seal to it might be produced in Court as an instrument sealed by the corporation'. (per Lawrence J. in *Moises v. Thornton* (1798) 8 Term Rep. 303, 307).

seal is not organically related either to a corporate hand or mind.<sup>19</sup> If the individual's signature rather than his seal is to serve as an analogy at all a better and more sophisticated version of it for the purpose of comparison with the common seal would be that of a facsimile signature engraved on a rubber stamp.<sup>20</sup>

# THE CORPORATE SEAL RULE—ITS TWO ASPECTS: THE 'POSITIVE CORPORATE SEAL RULE' AND THE 'NEGATIVE CORPORATE SEAL RULE'

At common law, the corporate seal was the counterpart of the individual's mouth, signature and seal. That the corporation's seal was thus the sole mode of expressing its contractual assent is herein referred to as the 'corporate seal rule'. That rule has positive and negative aspects. The positive aspect was that, for reasons shortly to be noted, where the seal appeared, the corporation's assent was proved and it was bound. The negative aspect was that without the appearance of the seal, the corporation's assent could not be proved and it was not bound. These two aspects of the corporate seal rule will be referred to as 'the positive corporate seal rule' (or briefly the 'positive rule') and the 'negative corporate seal rule' (or briefly the 'negative rule').

The positive rule and the exceptions thereto which would support a plea of *non est factum* by the corporation are treated in the remainder of this article. The negative rule and the exceptions thereto (which seem to have constituted a more significant and problematical area) are dealt with in later parts of the writer's thesis, which are not published herewith.

## THE POSITIVE CORPORATE SEAL RULE

In the nature of things the very functioning of any organ of a corporation aggregate involves a measure of expression; for example the spoken words of the individuals who comprise the organ or, more importantly, the recording of decisions in minutes.<sup>21</sup> In this respect the formulation of corporate assent differs from the formulation of an individual's assent.

<sup>19</sup> An exception would be the case of a corporation sole and possibly a corporation aggregate having a head.

<sup>20</sup> This device has raised its own problems. Cf. *Jenkins v. Gaisford & Thring* (1863) 3 Sw. & T. 93; *Bennett v. Brumfitt* (1867) L.R. 3 C.P. 28; *R. v. Cowper* (1890) 24 Q.B.D. 533; and esp. *Goodman v. J. E. Eban Ltd* [1954] 1 Q.B. 550. In the last case Denning L.J. dissented from the decision that a solicitor's stamped facsimile signature affixed by him to a bill of costs rendered it 'signed' by him. His Lordship understandably did not hesitate in a later case to hold that a stamped printed name of a company was not the signature of the company: *Lazarus Estates Ltd v. Beasley* [1956] 1 Q.B. 702 (C.A.).

<sup>21</sup> Cf. *Warwick R.D.C. v. Miller-Mead* [1962] Ch. 441 (C.A.) esp. per Lord Evershed M.R. and Willmer L.J.

Some corporate decisions are only internal.<sup>22</sup> But contractual assent must, by virtue of the general law of contract, be expressed externally.

Although the seal was only an external manifestation of the corporate mind, this made it the closest thing to a physical appearance of the *persona ficta*. Carr describes the seal as 'one of the few tangible attributes of the body corporate'.<sup>23</sup> It was a dangerous instrument to be carefully guarded for when it appeared, *prima facie*, it appeared as a result of either a regular formulation of assent or the carelessness of the persons in charge of the corporation's affairs. In either case it bound the corporation in favour of an outsider acting *bona fide* and without notice of any irregularity in the affixing of the seal. This principle was recognized in many cases, concerning heterogeneous types of body corporate other than registered companies, decided both before and after *Turquand's* case,<sup>24</sup> as well as in many registered company cases;<sup>25</sup> and even where the seal did not prevail over an irregularity, its *prima facie* binding character would be noted.<sup>26</sup> It is the writer's contention that *Turquand's* case is to be regarded in its historical context as the application of this common law principle to the registered company.

It is sometimes said that the corporation was estopped by the appearance of its seal<sup>27</sup> and this seems an appropriate way of expressing the position. In an American case the appearance of the seal was said to raise a presumption that it had been affixed with the authority of the corporation.<sup>28</sup> The commercial rationale underlying the primacy and relative invulnerability accorded to the common seal has been expressed in many

<sup>22</sup> Cf. the election of a chaplain to a church in *A-G v. Davey* (1741) 2 Atk. 212, or for that matter a simple election of directors or the holding of an opinion as in *Warwick R.D.C. v. Miller-Mead*, [1962] Ch. 441 (C.A.).

<sup>23</sup> Carr, *op. cit.* 55.

<sup>24</sup> *Royal British Bank v. Turquand* (1856) 6 El. & Bl. 327. Examples are *Clarke v. Imperial Gas Light & Coke Co. Ltd* (1832) 4 B. & Ad. 315; *Hill v. Manchester & Salford Waterworks Co.* (1833) 5 B. & Ad. 866; *Horton v. Westminster Improvement Commissioners* (1852) 7 Exch. 780; *Nowell v. Worcester Corporation* (1854) 9 Exch. Rep. 457; *Bill v. Darenth Railway Co.* (1856) 1 H. & N. 305.

<sup>25</sup> E.g. *Turquand's Case* itself (1856) 6 El. & Bl. 327; *Agar v. Athenaeum Life Assurance Society* (1858) 3 C.B. (N.S.) 725; *Prince of Wales Assurance Society v. Athenaeum Life Assurance Society* (1858) 3 C.B. (N.S.) 756 n; *Prince of Wales etc. Assurance Co. v. Harding* (1858) El. Bl. & El. 183; *County of Gloucester Bank v. Rudry Merthyr etc. Co.* [1895] 1 Ch. 629 (C.A.); *Owen and Ashworth's Claim, Whitworth's Claim* [1901] 1 Ch. 115 (C.A.); *Duck v. Tower Galvanizing Co.* [1901] 2 K.B. 314; *Re Standard Rotary Machine Co.* (1906) 95 L.T.R. 829; *Cox v. Dublin City Distillery (No. 2)* [1915] 1 I.R. 345 (C.A.); *Bank of Ottawa v. Hamilton Stove & Heater Co.* (1919) 46 D.L.R. 706; *James Richardson & Sons Ltd v. McCarthy & Sons Co. Ltd* (1921) 59 D.L.R. 513; *Canadian Bank of Commerce v. Pioneer Farm Co. Ltd* [1927] 4 D.L.R. 772; *Re: W. N. McEachren & Sons Ltd* [1933] 2 D.L.R. 558.

<sup>26</sup> E.g., *per* Bramwell and Channell BB. in *D'Arcy v. Tamar, Kit Hill and Calington Railway Co.* (1867) L.R. 2 Exch. 158.

<sup>27</sup> As in *Horton v. Westminster Improvement Commissioners* (1852) 7 Exch. 780 and *In re Bahia & San Francisco Ry* (1868) L.R. 3 Q.B. 584.

<sup>28</sup> *American Employers' Insurance Co. Ltd v. H. G. Christman & Bros. Co.* (1938) 284 Mich. 36, 278 N.W. 750 cited by John E. Kennedy in 'Powers—Ultra Vires—Problems remaining after Legislative and Judicial Modification of the Doctrine' (1958) 34 *Notre Dame Lawyer* 99, 105.

cases; for example, by Mr Justice Davis of the Ontario Court of Appeal in *McEachren's* case.<sup>29</sup>

There is a sanctity and force to the use of the common seal of a company that is not to be lightly disregarded if the commercial community is to be protected in its dealings with joint stock companies. To break in upon this rule of indoor management would put unnecessary obstacles in the way of the transaction or ordinary business.

The positive rule as it applied to statutory companies is well stated in another Canadian judgment.

All deeds executed under the corporate seal of an incorporated company which is irregularly affixed are binding on the company unless it appear by the express provisions of some statute creating or affecting the company, or by necessary or reasonable interference from the enactments or such statute, that the legislature meant that such deed should not be executed: and the directors of the company have authority to affix the seal of the company to all such deeds not so, as above, forbidden by the legislature to be executed, unless they are by the express provisions of, or by necessary or reasonable inference from the enactment of such statute forbidden to affix the seal of the company to the particular deed for the time being under consideration without compliance with some condition precedent prescribed as being essential to the validity of such deed, and which condition precedent has not been complied with.<sup>30</sup>

In other words, the common seal was at least as conclusive against a corporation as the individual's seal was against him and in order for the common seal to be successfully repudiated on special grounds not available to an individual there must be a statutory intention that the seal should not bind in the circumstances proved.

Admittedly the mere fact that the corporate seal was at common law the only mode of expressing contractual assent should not alone compel a conclusion from the appearance of the seal that the corporation had acted. It is thought that the positive rule may be said to be derived from the following:

- (1) those principles which made it difficult for an individual to resist the inference of assent arising from the appearance of his seal or signature.<sup>31</sup>
- (2) the fact that it would be all too easy to find internal irregularities as reasons why a *persona ficta* should not be bound.
- (3) the fact that a seal, being a mechanical symbol, was specially

<sup>29</sup> [1933] 2 D.L.R. 558, 574.

<sup>30</sup> *Per* Gwynne J. in *Hovey v. Whiting* (1887) 14 Can S.C.R. 515, 531-2, purporting to re-state with approval the rule laid down in the dissenting judgments of the Blackburn and Wells JJ. in *Taylor v. Chichester and Midhurst Railway Co.* (1867) L.R. 2 Ex 356, 379 ff.

<sup>31</sup> 'But corporations, which are creations of law, are, when the seal is properly affixed, bound just as individuals are by their own contracts, and as much as all the members of a partnership would be by a contract in which all concurred.' (*per* Parke B. in *South Yorkshire Ry. Co. v. G.N. Ry. Co.* (1853) 9 Ex. 55 (a case on *ultra vires* and hence the use of 'properly') at p. 84).

- appropriate to represent and be conclusive against a *persona ficta*;
- (4) the fact that the corporate seal had to serve for the seal, signature and mouth of the individual. The common seal was the only and a primary or original mode of corporate expression.<sup>32</sup> Its appearance signified not an act of corporate agents but an act of the body corporate itself.

#### THE PLEA NON EST FACTUM AND COMMON LAW CORPORATE THEORY

The necessities of ordinary business are also given as reasons for holding an individual bound by his signature or seal as against extending the availability of the plea *non est factum*.<sup>33</sup> But just as the individual's seal and signature, although (like his spoken words) primary expressions of his contractual assent, had to yield in appropriate circumstances to evidence that they did not symbolize what they purported to symbolize (*viz.* his mental assent), so the common seal had to yield to evidence in appropriate circumstances that it was not accompanied by the mind of the corporation.

The earliest circumstances in which an individual could disown his seal's appearance, fell into two classes: cases where he himself had affixed it under duress or mistake; and cases where another had affixed it without his authority.<sup>34</sup> Both classes of case may be described as situations where the mind did not accompany the seal otherwise than through the individual's negligence. But there was always the distinction between the signature of an individual and the seal of a corporation that the latter could not, in the nature of things, be affixed by the *persona ficta*; it had to be affixed by human instrumentality.<sup>35</sup> Therefore the ancient cases where an individual had entrusted his seal to another (an act which seems to have been regarded *per se* as negligence) were not applicable to corporations whose seals must perforce be entrusted to someone.<sup>36</sup>

<sup>32</sup> That there was no other means of ascertaining the corporate mind led to an early doubt that the efficacy of a document under the common seal could depend on the corporation's 'intention to deliver' and that the law relating to escrows could apply to such documents see *Norton on Deeds* (1906) 9-11. One way of illustrating the necessary primacy of the seal is to ask: How, ultimately, can an outsider verify that he has engaged the corporate mind otherwise than by relying upon a sealing?

<sup>33</sup> Cf. *Gallie v. Lee* [1969] 2 Ch. 17; affirmed on appeal *sub nom. Saunders v. Anglia Building Society* [1970] 3 All E.R. 961; [1970] 3 W.L.R. 1078 (H.L.).

<sup>34</sup> The modern development of the plea has been concerned with the former class and particularly with defining (1) the class of signers to whom the plea is available; and (2) the degree of misunderstanding as to the nature of the document necessary to support the plea. Cf. *Gallie v. Lee*, *ibid.* where Lord Denning was of opinion that the plea should be available only to individuals whose physical or mental disabilities oblige them to rely on another's explanation of a document (and that persons of full competence should always be estopped by their seal or signature). This is interesting in view of the company's similar need to rely on its officers in the affixing of the common seal.

<sup>35</sup> Cf. 'As a corporation they can do no act, not even affix their corporate seal to a deed, but through the instrumentality and agency of others: . . . ' *per* Lord Ellenborough C.J., in *Yarborough Corporation v. Bank of England* (1812) 16 East 6, 7.

<sup>36</sup> *Per* Wills J. in *Mayor of the Staple v. The Bank of England* (1888) 21 Q.B.D. 160, 167.

It would appear then that the plea *non est factum*<sup>37</sup> would be available to the corporation in two situations:

- (1) in at least the same circumstances where it would serve an individual; that is, where it could be said that the corporation had affixed its seal but under the influence of duress or mistake,<sup>38</sup> or that it had been affixed without the authority or negligence of the body corporate;
- (2) in the case of statutory and registered companies, where there was a parliamentary intention that the company should not make the contract in question.

The latter explains the non-liability of companies on *ultra vires* contracts. These two areas interact because at least statutory and registered companies are bodies corporate whose 'minds' are created and defined by statute. There is a clear analogy between the hand which affixes the individual's seal and the hand which affixes the corporate seal since *qui facit per alium facit per se*, so class (1) again raises the question, what is "the corporation" or "the mind" of the corporation for the purpose of the plea?

Tentatively the corporate mind has been taken to be that constitutional organ (being commonly a group of individuals) in which power to contract is vested by the charter or statute. But this might be too simple. Contracting power may be conditional. In the first place, power to contract may be vested in the directors subject to control by a general meeting. This was the express provision of section 90 of the Companies Clauses Consolidation Act 1845.<sup>39</sup> In the second place, power to contract may be vested in a governing body but its exercise made subject to their first obtaining the sanction of a general resolution as in *Hill v. Manchester & Salford Waterworks Co.*<sup>40</sup> and of course, *Turquand's* case.<sup>41</sup> In all these cases neither the directors nor the shareholders can be called the corporate mind without qualification, since neither has unqualified power to contract. In the former, the power is conditional upon a general meeting's not having negated it. In the latter, the power is subject to a general meeting's having affirmed it. It was in the context of the second type of case that the *Turquand* principle developed, and the function of the indoor management rule in *Turquand's* case<sup>41</sup> was, in corporate and constitutional law terms, to fill out the conditional power by raising, in the face of the seal, a presumption in favour of the outsider, that the necessary positive condition was satisfied. One would expect

<sup>37</sup> The plea is a sufficient plea where it is to be argued that the common seal does not bind for some reason: *Clarke v. Imperial Gas-Light & Coke Co. Ltd* (1832) 4 B. & Ad. 315 and *D'Arcy v. The Tamar, Kit Hill & Callington Ry. Co.* (1867) L.R. 2 Ex. 158, 162 (*per* Channell B.).

<sup>38</sup> There appear to have been no decided cases on this class of situation.

<sup>39</sup> Hereinafter referred to as the *Clauses Act*.

<sup>40</sup> (1833) 5 B. & Ad. 866.

<sup>41</sup> (1856) 6 E.L. & B.L. 327.

that the same principle would apply to the first type of case; that is, entitling the outsider to assume that the derogatory or negative condition does not exist.<sup>42</sup> In either case the effect of the presumption or rule operating in favour of the outsider is that he is not to be affected by the fact that the constitutional organ affixing the seal had not become seized of absolute power to affix it. Not only might there be a question as to whether the directors (treated as a unit) have become seized of absolute power to affix the seal, but there might be a question as to whether it can be said that the directors have affixed it because of an absence of total regularity of manner and form in the functioning of that constitutional organ.<sup>43</sup> It is contended that there is a general rule that a company cannot disown its seal on either ground.

VIRTUAL UNAVAILABILITY OF THE PLEA NON EST FACTUM TO  
DEFEAT THE POSITIVE CORPORATE SEAL RULE IN DECIDED CASES  
INVOLVING CHARTERED AND STATUTORY COMPANIES

Whether a constitutional organ of a body corporate is to be defined as a certain group of individuals *simpliciter* or as that group functioning in strict accordance with constitutional pre-requisites and with constitutional manner and form might depend upon a construction of its statute, charter or deed.<sup>44</sup> This in turn might be governed by the Court's concept of the *raison d'être* of the corporation; for example, whether it was a public institution, receiving incorporation as a privilege, and permitted to prosecute some public purpose; or whether it was essentially a private partnership, incorporated as a matter of course, designed to further the private interests of the partners. The early chartered company was of the former class; the statutory company lay somewhere between the two although closer to the former; the registered company was of the latter class.

It might be expected that the courts would more readily hold a registered company bound by its irregularly affixed seal than the other two classes of company. The cases in relation to statutory companies cited in *Turquand's* case<sup>45</sup> show however, that there was in relation to them also

<sup>42</sup> In the particular instance cited (*i.e. Clauses Act*, s. 90) the section does provide that the shareholders' control shall not 'render invalid any act done by the directors prior to any resolution passed by such general meeting', the implication being that a prior resolution will invalidate. But application of the *Turquand* rule would mean that even if the shareholders' resolution has been passed prior to the directors' act, it would not affect an outsider to whom it was unknown.

<sup>43</sup> It is doubtful whether a pre-requisite of a seizure of power of the type discussed earlier can properly be described as a 'manner and form' requirement in the *constitution or functioning* of an organ so the separate terminology 'pre-requisite' (or 'preliminary') and 'manner and form' is maintained throughout this article.

<sup>44</sup> The deed of settlement was a feature of some statutory companies as well as of the registered company; *c.f., Hill v. Manchester & Salford Waterworks Co.* (1833) 5 B. & Ad. 866.

<sup>45</sup> (1855) 5 E1. & B1. 248 and on appeal (1856) 6 E1. & B1. 327. In the Court of Queen's Bench Campbell L.J. acknowledged that those cases supported him whilst in the Court of Exchequer Chamber Jervis C.J. made no reference to them.

a presumption of internal regularity when their seal appeared. These cases and some others not cited there warrant examination.

In *Slark v. Highgate Archway Co.*<sup>46</sup> an innocent indorsee of a promissory note sealed by a corporation was held unaffected by 'a matter of which he must necessarily be ignorant', viz the intention as to the ultimate use to which the funds obtained by the issue of the note would be put. In *Clarke v. Imperial Gas Light & Coke Co. Ltd*<sup>47</sup> the seal was held to bind but the reason given was simply that the alleged irregularity (improper calling of meeting) had not been conclusively proved.<sup>48</sup> *Hill v. Manchester & Salford Waterworks Co.*<sup>49</sup> which was cited in *Turquand's* case<sup>52</sup> is similarly equivocal. Denman C.J. thinks that evidence of an absence of a sanction of the sealing by a general meeting as required by the company's deed of settlement, would be admissible to prove *non est factum* since there was no power to affix the seal otherwise than strictly in accord with the enactments. Literally, and in such general terms, this amounts to saying that although the company had power to seal the bond yet it could do so only via a constitutional organ acting in compliance with pre-requisites, and that where an organ did not so comply, it had not become seized of its constitutional power. Yet Denman C.J. was able to hold the corporation bound on the evidentiary ground that the company's internal records were not admissible against the plaintiff to prove the irregularity!<sup>50</sup> In *Horton v. Westminster Improvement Commissioners*,<sup>51</sup> the other case cited in *Turquand's* case,<sup>52</sup> the Commissioners' plea was held bad for not alleging facts which would render the sealing *ultra vires*. Counsel for the plaintiff argued that the estoppel arising from the appearance of the seal could be defeated only by statutory provision or by knowledge of internal irregularity in the outsider.<sup>53</sup>

<sup>46</sup> (1814) 5 Taunt. 792.

<sup>47</sup> (1832) 4 B. & Ad. 315.

<sup>48</sup> But the length to which the court went in order to hold the company bound was interesting and significant. The court held that although it might be proved that the authorization immediately in question was irregular, it could not be presumed that there was not some regular authorization at some other meeting. To substantiate the plea, the corporation would have to prove that no regular authorization had ever been given from the time of incorporation up to the time of sealing.

<sup>49</sup> (1833) 5 B. & Ad. 866.

<sup>50</sup> He distinguished the admissibility of partnership records against a partner on the ground that they were kept under the control and supervision of partners whereas it could not be said that company records were kept under the control of shareholders. (The plaintiff was a shareholder). *A fortiori* the same principle would apply to outsiders unconnected with the company. The rule of evidence which underlay *Hill's* case *ibid.* was the forerunner of the indoor management rule stated four years later in *Turquand's* case, (1856) 6 E1. & B1. 327.

<sup>51</sup> (1852) 7 Exch. 780.

<sup>52</sup> (1856) 6 E1. & B1. 327.

<sup>53</sup> For which he cited *Doe d. Levy v. Horne* (1842) 3 Q.B. 757 (a case concerning a mortgage by turnpike trustees in which the outsider was held to have had constructive notice of the statute under which they functioned but not of an earlier mortgage which they had given and so succeeded on the principle of non-derogation from grant).

Of course parliamentary intent was paramount. But the very fact that an irregularity could not be known to an outsider was given in many cases as a sufficient indication that a statutory pre-requisite was to be construed as directory only and not as mandatory.<sup>54</sup> Conversely, if an outsider could know whether the requirement had been complied with, the intention to be inferred was that the requirement was mandatory.<sup>55</sup> If the pre-requisite were mandatory then the corporation would not be bound without compliance; if directory, then the constitutional organ had exceeded its power and the consequences would have to be looked into (for example, the organ would presumably be liable to the corporation for misapplication of corporate funds) but nonetheless had legal power to bind it in favour of an innocent outsider.<sup>56</sup> The foregoing approach led to the anomaly that the same statutory requirement might in one set of circumstances be construed as mandatory and in another as directory.<sup>57</sup> That this might have been anomalous was not observed. The directory-mandatory dichotomy seems to have been the commonest framework within which irregularities were explained to be ineffective where the outsider could point to the appearance of the common seal.<sup>58</sup>

The seal is by its nature external; it presents the united corporate facade to the outside world. Where an outsider dealing with the company can point to it, and is told that irregularity touched its affixation, he can rightly reply that those matters are internal, unless they are, like the company's special Act, as public and visible as the seal itself. In that case,

<sup>54</sup> Cf. *Slark v. Highgate Archway Co.* (1814) 5 Taunt 792; *Cole v. Green* (1843) 6 Man. & G. 872 (contract signed by a road surveyor was held to bind the Birkenhead Paving Commissioners though statute directed that their contracts be signed by the Commissioners or any three of them or their clerk); *Nowell v. Worcester Corporation* (1854) 9 Ex. 457 (Board of Health executed contract without first obtaining cost estimate from its surveyor as required by statute).

<sup>55</sup> *Frend v. Dennett* (1858) 4 C.B. (N.S.) 576 per Williams J., *Liverpool Borough Bank v. Turner* (1861) 2 De G.F. & J. 502; *Fountaine v. Carmarthen Ry Co.* (1868) L.R. 5 Eq. 316 where Wood V.C. noted that the unavailability of internal information underlay the decision in *Turquand's case* (1856) 6 E1. & B1. 327.

<sup>56</sup> This reasoning seems inconsistent with the dogmatic generalization in *Hill's case* (1833) 5 B. & Ad. 866 to the effect that manner and form are a part of a statutory contracting power (unless that *dictum* itself is read down to refer only to mandatory manner and form).

<sup>57</sup> Cf. *Fountaine v. Carmarthen Ry. Co.* (1868) L.R. 5 Eq. 316 (statutory requirement of shareholder sanction seen as mandatory in respect of a fresh borrowing and directory in respect of a borrowing substituted for a loan paid off).

<sup>58</sup> The directory-mandatory dichotomy in the construction of statutes was, of course, well established in non-corporate contexts too. As early as 1750, in a decree of the Lord Chancellor that twenty-five members of a parish were to present and elect a minister within four months of the death of the previous incumbent, the stipulation as to time was held to be merely directory: *A-G v. Scott* (1750) 1 Ves Sen. 413; And cf. *R. v. Sparrow* (3 Geo 11) 2 Strange 1123; *Tilson v. Town of Warwick Gas Light Co.* (1826) 4 B. & C. 962; *R. v. Inhabitants of Gravesend* (1832) 3 B. & Ad. 240; *Pearse v. Morrice* (1834) 2 Ad. & E.84; *Thames Haven Dock & Rail Co. v. Rose* (1842) 4 Man. & G. 552; *Steward v. Dunn* (1844) 12 M. & W. 655; *Kirk v. Bell* (1854) 9 Ex. 457 and the several cases decided under *Public Health Act, 1875* (U.K.) s. 174. For an examination of mandatory and directory provisions in Canadian companies legislation see Daniel D. Prentice, 'The Indoor Management Rule', *Studies in Canadian Company Law* (ed. by Jacob S. Ziegel, 1967), 316-20.

whilst it is true that the Act operates unilaterally (that is, as to the exercise of contractual capacity as well as in the prescription thereof), yet whether the Act has been complied with may be a matter which can be known only from the company's internal records and this fact was taken as a reason why such special Acts should be construed as directory in such a case. The need to make this contrast explains the bizarre references in some cases to constructive notice of a company's constitutive legislation.<sup>59</sup> It is proper to speak of a presumption of *internal* regularity where there is an external appearance of corporate assent such as was constituted by the common seal.<sup>60</sup> But *ipso facto* such a presumption may not be used to create such an appearance.

Chronologically, the next development is the decision in *Turquand's* case itself. It suffices for present purposes to say that *Turquand's* case must be seen as a body corporate case in which the positive corporate seal rule was, for the first time, applied to a registered company. In the words of Lord Campbell C.J.: '[t]he bond being under the seal of the Company the gist of the defence must be illegality'.<sup>61</sup> The submission here made is supported by the cases cited for the bank in *Turquand's* case; by the immediate application of *Turquand's* case in seal cases;<sup>62</sup> and by the strong impression given in *Turquand's* case and its early applications that *dicta* (that the outsider had a duty to read the Act and the public documents but a right to presume internal regularity) presupposed when they were uttered, not an appearance of authority in an agent, but an appearance of the common seal itself.

The argument here made is not seen to be affected by the fact that in *Bill v. The Darenth Ry Co.*,<sup>63</sup> the first *non est factum* case after *Turquand's* case involving a statutory company, the rejection of the plea is not expressed in corporate constitutional terms (for example, the directory—mandatory distinction) but in those of partnership—agency.

<sup>59</sup> Cf. Lord Wensleydale in *Ernest v. Nicholls* (1857) 6 H.L.C. 401, 419 Jervis C.J. in *Turquand's* case (1855) 5 E1. & B1. 248, 322; Wood V.-C. in *Fountaine v. Carmarthen Ry Co.* (1868) L.R. 5 Eq. 316, 322; and Sir G. M. Giffard L.J. in *Re County Life Assurance Co. Ltd* (1870) L.R. 5 Ch. App. 288, 293.

<sup>60</sup> The 'external' role played by the seal also lent support to the early view that 'insiders' could never rely on a presumption of internal regularity.

<sup>61</sup> (1855) 5 E1. & B1. 248, 261.

<sup>62</sup> It was applied in the following seal cases under the 1844 Act: *Agar v. Athenaeum Life Assurance Society* (1858) 3 C.B. (N.S.) 725 (want of shareholder sanction to a sealed borrowing), *Prince of Wales Assurance Co. v. Athenaeum Life Assurance Society* (1858) 3 C.B. (N.S.) 756 n, and *Prince of Wales etc. Assurance Co. v. Harding* (1858) E1. B1. & E. 183 (both sealings of policies not authorized by order of three directors and manager as required by deed). It was also applied in the following seal cases under subsequent Acts *Re County Life Assurance Co.* (1870) L.R. 5 Ch. App. 288, *County of Gloucester Bank v. Rudry Merthyr etc. Co.* [1895] 1 Ch. 629 (C.A.), *London Freehold Land Co. v. Suffield* [1897] 2 Ch. 608 (C.A.), *Duck v. Tower Galvanizing Co.* [1901] 2 K.B. 314; *Cox v. Dublin City Distillery (No. 2)* [1915] 1 I.R. 345 (C.A.), *Owen and Ashworth's Claim* [1901] 1 Ch. 115 (C.A.) *Fawcett v. Johnson* (1914) 31 W.N. (N.S.W.) 160.

<sup>63</sup> (1856) 1 H. & N. 305.

These acts of parliament are construed as if they were partnership deeds. To violate them may be a breach of trust as between the directors and the shareholders; but acts not according to them may bind the company.<sup>64</sup>

Where the common seal appears, it must be difficult for a partnership view of the company to succeed. This *dictum* therefore shows, but it shows no more than, the strength and pervasiveness of the partnership view of the new registered company, a view which was a legacy of the era of the unincorporated joint stock company.

In all registered company cases, except two, the positive corporate seal rule has overcome internal irregularity.<sup>65</sup> Since the internal prerequisites and manner and form requirements were in such cases fixed not by statute but by the registered constitution, the *Turquand* rule may be expressed in directory-mandatory terms by saying that under the Companies Act, such privately devised requirements are permitted to be only directory.<sup>66</sup> No distinction was drawn between one irregularity and another. Two strong cases are *County of Gloucester Bank v. Rudry Merthyr etc. Colliery Co.*<sup>67</sup> and *Owen and Ashworth's Claim*.<sup>68</sup> In the former, a quorum as fixed by the board did not authorize the sealing; in the latter there was no board at all. Such cases emphasize that this positive corporate seal rule is not activated only by or dependent only upon a regular act of a constitutional organ (for example, the directors meeting as a board).

In the cases noted, the Court, by various lines of reasoning, affirmed the primacy of the common seal. The one case which may seem to complicate this line of authority is the Court of Exchequer decision ten years after *Turquand's* case in *D'Arcy v. The Tamar, Kit Hill and Calington Ry Co.*<sup>69</sup> In that case a statutory railway company was held not bound by a bond to which its seal had been affixed by the secretary (the proper person to affix it under the statute) because the affixing had not been authorized by a quorum of three directors as prescribed by the company's special Act. The court merely emphasized that the Act required, and vested power only in a meeting attended by at least three directors and that this had not been complied with.

This can be readily admitted. It can also be admitted that a mandatory

<sup>64</sup> *Ibid.* 306 *per* Bramwell B. (with whom Alderson and Martin BB. concurred). Perhaps under the influence of an increased number of public purpose statutory companies and the introduction of incorporation as of right upon registration for other companies, the two classes were becoming assimilated.

<sup>65</sup> Those two cases are *Ernest v. Nicholls* (1857) 6 H.L.C. 401 and *Re Pooley Hall Colliery Co.* (1869) 21 L.T.R. 690.

<sup>66</sup> Cf. Lord Wensleydale in *Ernest v. Nicholls* (1857) 6 H.L.C. 401, 419. Of course, as ever, if the outsider knew of, suspected or should have suspected a non-compliance, he could not succeed for there was an equity as between him and the shareholders which defeated his reliance on the formal legal appearance.

<sup>67</sup> [1895] 1 Ch. 629 (C.A.).

<sup>68</sup> [1901] 1 Ch. 115 (C.A.).

<sup>69</sup> (1867) L.R. 2 Exch. 158.

statutory requirement will prevail over an irregular sealing. But the judgments do not pass on to deal with the crucial constitutional law question of why manner and form provisions are treated as mandatory here rather than directory as, for example, the purpose of the promissory note was treated in *Slark v. Highgate Archway Co.*;<sup>70</sup> or as the pre-requisite surveyor's estimate was treated in *Nowell v. Worcester Corporation*;<sup>71</sup> or as a matter of internal management as the pre-requisite shareholder sanction was treated in both *Hill v. Manchester*<sup>72</sup> and *Royal British Bank v. Turquand*.<sup>73</sup> Was a statutory requirement applicable to a railway company to be treated differently from a deed of settlement requirement applicable to a registered coal and railway company?<sup>74</sup> Did the decision turn on the wording of the particular statute? Was the distinction that *D'Arcy's case*<sup>75</sup> concerned a manner and form requirement *in the constitution and functioning of the contracting organ itself* whereas *Turquand's case*<sup>73</sup> concerned a pre-requisite *external to that organ*? These questions are not answered in the case.

It may be noted here that in *D'Arcy's case*<sup>75</sup> the quorum was fixed by the constitutive document—the statute. With this may be contrasted the *County of Gloucester Bank case*<sup>76</sup> where the directors fixed their own quorum pursuant to a power in the deed. *D'Arcy's case*<sup>75</sup> was there distinguished as involving a quorum specified by statute. Yet this explanation *per se* is unsatisfactory since the *non-compliance* in both cases was an internal matter not known to the outsider and it is the non-compliance, not the requirement, which counts. Further, in *Owen and Ashworth's Claim*<sup>77</sup> the minimum number of individuals who could constitute a board was constructively known. Pennington's solution to the difficulty presented by *D'Arcy's case*<sup>75</sup> is to say that it was wrongly decided<sup>78</sup> while Campbell says '[i]n principle, it cannot be reconciled with *Turquand's case*, but it has been distinguished out of existence.'<sup>79</sup> It is believed that the only possible solution is an explanation of *D'Arcy's case*<sup>75</sup> based on a mandatory statutory intention of prohibiting a sealing without the authority of a quorum

<sup>70</sup> (1814) 5 Taunt 792.

<sup>71</sup> (1854) 9 Exch. Rep. 457.

<sup>72</sup> (1833) 5 B. & Ad. 866.

<sup>73</sup> *Turquand's case* (1856) 6 E.L. & B.L. 327 was cited in argument in *D'Arcy's case* (1867) L.R. 2 Exch. 158 but the judgments (which are tantalizingly brief), do not refer to it or to any other decided case.

<sup>74</sup> This can scarcely be maintained as a general principle since *Turquand's case* (1856) 6 E.L. & B.L. 327 had been applied in *Bill v. Darenth Valley Ry Co.* (1856) 1 H. & N. 305.

<sup>75</sup> (1867) L.R. 2 Exch. 158.

<sup>76</sup> (1895) 1 Ch. 629 (C.A.).

<sup>77</sup> [1901] 1 Ch. 115 (C.A.).

<sup>78</sup> Robert R. Pennington, *The Principles of Company Law* (2nd ed. 1967) Ch. 5, 111.

<sup>79</sup> Campbell, *op. cit.* 122, n. 26 *supra*; *D'Arcy's case* (1867) L.R. 1 Exch. 158 was distinguished in *In re Bonelli's Telegraph Co. : Collie's Claim* (1871) L.R. 12 Eq. 246; and in *Re Great Northern Salt & Chemical Works; ex parte Kennedy* (1890) 44 Ch. D. 472, 481-2 as well as in *County of Gloucester Bank* [1895] 1 Ch. 629 (C.A.).

but it must be confessed that it is difficult to be satisfied with that explanation.

#### NATURE OF THE POSITIVE CORPORATE SEAL RULE

Although the cases examined may not display uniform reasoning, yet their effect seems to be that *non est factum* will be supported on the ground of an irregular sealing only if:

- (1) compliance with a pre-requisite is necessary to put the contract in question within the capacity of the body corporate itself.<sup>80</sup>
- (2) the requirement not complied with is imposed by statute and construed as mandatory (as happened, perhaps wrongly in *D'Arcy's* case.<sup>75</sup>). Subject to these exceptions, *non est factum* will not succeed where non-compliance is regarded as an internal irregularity, by which is meant a non-compliance which the outsider could not reasonably be expected to know about.

It is a question whether the principle being discussed (and as well the presumption that the outsider knows the contents of the registered company's public documents) is better described as a presumption or as a rule of substantive law. Campbell supports the presumption terminology in order to accommodate the company law principles within the law of agency.<sup>81</sup> But the common seal does not symbolize an act of an agent: it is an original expression of corporate assent. The terminology 'positive corporate seal rule' or 'original corporate indoor management rule' is therefore believed preferable, though 'presumption' terminology is well established both in regard to acts of the body corporate itself and those of its agents and both terminologies will be used in this article.

The positive corporate seal rule (or the original corporate indoor management rule or the original corporate presumption of internal regularity as it may be described) was clearly not established in *Turquand's* case<sup>82</sup> but was applied there to the company incorporated by registration. The rule made the formalism of the seal a forceful weapon in the armoury of the outsider who proceeded against the registered company.

#### EXCEPTIONS TO THE POSITIVE CORPORATE SEAL RULE

There have always been some well acknowledged circumstances where the common seal did not bind.

<sup>80</sup> Cf. *Chambers v. Manchester & Milford Ry. Co.* (1864) 5 B. & S. 588; *Commercial Bank of Canada v. G.W. Ry. of Canada* [1865] 3 Moo P.C. (N.S.) 295; *Pacific Coast Coal Mines Ltd. v. Arbuthnot* [1917] A.C. 607, 616. (P.C.) esp. per Viscount Haldane:

<sup>81</sup> Campbell, *op. cit.* p. 479.

<sup>82</sup> (1856) 6 E1. & B1. 327.

## ESCROWS

First, it did not bind where the document was an escrow.<sup>83</sup>

## OUTSIDER PUT ON INQUIRY

Second, as ever, the company was not bound where the outsider knew or must be taken to have known that the seal had been improperly affixed.<sup>84</sup> In such cases the outsider's knowledge is all-important. In the several cases where it was said that only evidence of fraud or illegality would substantiate a plea of *non est factum*, one factual situation which was thereby denoted was that of impropriety known to the outsider.<sup>85</sup> And the outsider must be taken to know of an irregularity if the circumstances are such as to put him on inquiry and he fails to inquire.<sup>86</sup> It may be thought that if an outsider correctly construes a statutory requirement as directory only, he should succeed against the company although he knows that it has not been complied with. But if the reason why the requirement would be judicially construed as directory was the common one; (*viz.*, that outsiders could not know if it had been complied with) the reason would not exist in the circumstances hypothesized and the outsider would fail.

There might be circumstances surrounding the actual manner of appearance of the seal which would put an outsider on inquiry. For example, although attestation of a sealing is not necessary to its validity<sup>87</sup> it is thought that a total absence of authenticating signatures would arouse suspicion. In *Doe v. Chambers*<sup>88</sup> a corporation's secretary's signature accompanied the seal and the court observed that without it, the seal, though valid, would not have been in the usual form.<sup>89</sup> In *South London Greyhound Racecourses Ltd v. Wake*<sup>90</sup> Clauson J. said that '[i]t is within common experience that the affixing of the seal is a matter with which the board deals

<sup>83</sup> Acknowledged in relation to corporations in *Derby Canal Co. v. Wilmot* (1808) 9 East. 360 and *Liverpool Borough Bank v. Eccles* (1859) 4 H. & N. 139. Also on corporate escrows see *Xenos v. Wickham* (1867) L.R. 2 H.L. 296; *Mowatt v. Castle Steel etc. Co.* (1887) 34 Ch. D. 58 (a case of doubtful authority); *Roberts v. Security Co.* [1897] 1 Q.B. 111; and *London Freehold Land Co. v. Suffield* [1897] 2 Ch. 608 (C.A.).

<sup>84</sup> E.g. see *dicta* in *Wandsworth & Putney Gas-Light & Coke Co. v. Wright* (1870) 22 L.T.R. (N.S.) 404; *Transvaal Lands Co. v. New Belgium (Transvaal) Land and Development Co.* [1914] 2 Ch. 488; *E.B.M. Co. Ltd v. Dominion Bank* [1937] 3 All E.R. 555 (P.C.).

<sup>85</sup> E.g. see Campbell C.J. in *Turquand's case* (1855) 5 E.L. & B.L. 248; Willes J. in *Agar v. Athenaeum Life Assurance Society* (1858) 3 C.B.N.S. 725.

<sup>86</sup> E.g. see *In re Efron's Tie & Knitting Mills Pty Ltd* [1932] V.L.R. 8. It is thought that this form of constructive notice would have had little application in respect of the individual's seal though one could imagine a careless entrusting thereof to a person whose authority to affix it was suspected by the third party.

<sup>87</sup> Co. Litt. 6a, 7a, 7b; B.L. Comm. Bk. 11, c.20; *Goddard's case* (1583) 2 Rep. 4b, 5a; *Garrett v. Lister* (1662) 1 Lev. 25.

<sup>88</sup> (1836) 4 Ad. & E.L. 410.

<sup>89</sup> It is noteworthy that directors in whose presence a common seal is affixed as required by a corporation's regulations, are not witnesses but sign as part of the operation of sealing: *Shears v. Jacob* (1866) L.R. 1 C.P. 513; *Deffel v. White* (1866) L.R. 2 C.P. 144.

<sup>90</sup> [1931] 1 Ch. 496.

and not a director', and so an outsider failed where he had relied without further inquiry upon a sealing fraudulently authenticated by the signatures of one director and the secretary.<sup>91</sup> There is no decision or judicial *dicta* as to whose or how many authenticating signatures might, in the absence of some independent holding out of the sealing as authentic by the constitutional contracting organ, be safely relied upon by an outsider. On general principle, those of a majority of its members would surely suffice since the outsider would be entitled to infer that a resolution of the governing body had been passed, and probably a lesser number of their signatures would suffice according to what was usual.

#### ULTRA VIRES

A third situation in which the seal does not bind relates specifically to companies incorporated by statute (including registered companies) and has previously been adverted to. The limited capacity, at least of these companies, means that they are not bound by a deed which is *ultra vires* their legal capacity irrespective of how regularly or otherwise it has been sealed. The company's non-liability does not depend on any ground of notice actual or constructive of its incapacity in the outsider, but on that incapacity arising unilaterally as part of the law<sup>92</sup> though the outsider's actual knowledge of a company's purpose in contracting may be relevant where a contract is otherwise *ex facie intra vires*.<sup>93</sup> The company's *ultra vires* purpose is treated as an internal irregularity so far as the outsider is concerned: if the outsider in fact knows of it, it will defeat him; without that knowledge he can successfully rely on the seal.

Of particular interest amongst *ultra vires* cases are those where a statute makes an act or contract *intra vires* a particular body corporate only if a condition precedent is satisfied. If it is not satisfied the company is not bound.<sup>94</sup>

<sup>91</sup> That the outsider was put on inquiry seems to be the only possible explanation of this decision but it is thought to be unsatisfactory.

<sup>92</sup> Cf. *Fairtitle d. Mytton v. Gilbert* (1787) 2 T.R. 169. This is so whether one reasons that the seal cannot operate to estop the corporation from repudiating a contract which the corporation is not permitted by its constitution to enter into or that since the conferring of authority to affix the seal is itself an act of the corporation the capacity to do which is regulated by its constitution, the corporation cannot be estopped from denying that it has authorized the sealing where it is incapable of doing that; cf. Diplock L.J. in *Freeman and Lockyear* [1964] 2 Q.B. 480, 504. [Recent legislation modifying the doctrine of *ultra vires* in respect of registered companies is not of present concern.]

<sup>93</sup> Cf. *Doe d. Levy v. Horne* (1842) 3 Q.B. 757 (a non-corporate case) and *Re David Payne & Co. Ltd; Young v. David Payne & Co. Ltd* [1904] 2 Ch. 608 (C.A.); *Re John Beauforte (London) Ltd* [1953] Ch. 131. It appears worthwhile to maintain the distinction between acts illegal under the general law and acts *ultra vires* the current legal capacity of a corporation, though a case might be made for using 'illegal' to describe acts which are *ultra vires* the statute of a statutory company strictly so called (as in *East Anglian Railway Co. v. Eastern Counties Ry. Co.* (1851) 11 C.B. 775).

<sup>94</sup> Cf. *Chambers v. Manchester & Milford Ry. Co.* (1864) 5 B. & S. 588; *Commercial Bank of Canada v. G.W. Ry. of Canada* [1865] 3 Moo P.C. (N.S.) 295 and *Pacific Coast Coal Mines Ltd v. Arbuthnot* [1917] A.C. 607 (P.C.).

## FORGERY

A final exception to the positive corporate seal rule consists in certain cases of forgery. When it is said that a forgery is not cured by the indoor management rule, what is meant is that a forgery is such an inherently infirm appearance of assent that it cannot be allowed to bind the body corporate no matter how regular it may appear to be. Accordingly, this class of case, however it may be defined, is distinct from that discussed earlier where the manner of appearance of the seal is such as to put the outsider on inquiry.

That a forgery of the individual's signature is ineffective against him is too clear to warrant illustration.<sup>95</sup> An obvious illustration involving the corporate seal is the situation where it is stolen and affixed by the thief. But the classes of case in which the word forgery might conceivably be applied to a documentary appearance of corporate assent, are numerous and varied. They may be classified as follows:

## COMMON SEAL CASES

- (1) the common seal may be affixed innocently and accompanied by genuine signatures but without constitutional power. These are the class of case already examined which were said, in the absence of a mandatory statutory provision, to be covered by the original corporate indoor management rule.<sup>96</sup>
- (2) (rarely) the common seal may be affixed fraudulently by one person but accompanied by genuine signatures innocently affixed by other persons.<sup>97</sup>
- (3) the common seal may be affixed fraudulently accompanied by genuine signatures of participants in the fraud.<sup>98</sup>
- (4) the common seal may be affixed fraudulently accompanied by counterfeited signatures.<sup>99</sup>

## NON-SEAL OR 'MERE SIGNATURE' CASES

- (5) a genuine signature may purport to bind the company where innocently affixed but without actual authority.<sup>1</sup> This class of case corresponds with Class (1).

<sup>95</sup> Nonetheless some illustrative cases are *Cottam v. Eastern Counties Ry. Co.* (1861) 1 J. & H. 243; *Midland Ry. Co. v. Taylor* (1862) 8 H.L.C. 751; *Muir's Executors v. Craig* [1913] S.C. 349; *Farquharson Bros. v. King* [1902] A.C. 325 (H.L.); *Sloman v. Bank of England* (1845) 14 Sim. 475.

<sup>96</sup> *Slark v. Highgate Archway Co.* (1814) 5 Taunt 792; *Clarke v. Imperial* (1832) 4 B. & Ad. 315; *Hill v. Manchester* (1833) 5 B. & Ad. 866; *Horton v. Westminster* (1852) 7 Exch. 780; *Nowell v. Worcester Corporation* (1854) 9 Exch. Rep. 457 and of course *Turquand's case* (1856) 6 E1. & B1. 327, and see generally n. 24.

<sup>97</sup> *Bank of Ireland v. Evans' Trustees* (1885) 5 H.L. Cas 389; *Mayor of the Staple v. Bank of England* (1887) 21 Q.B.D. 160 (C.A.).

<sup>98</sup> *South London Greyhound Racecourses Ltd. v. Wake* [1931] 1 Ch. 496.

<sup>99</sup> *Shaw v. Port Phillip Gold Mining Co.* (1884) 13 Q.B.D. 103; *Ruben v. Great Fingall Consolidated* [1906] A.C. 439 (H.L.).

<sup>1</sup> *Mahony's case* (1875) L.R. 7 H.L. 869; *Biggerstaff's case* [1896] 2 Ch. 93; *Houghton's case* [1928] A.C. 1; *British Thompson-Houston Co. v. Federal Euro-*

- (6) (rarely) a document may be fraudulently presented to a company agent to which he innocently (albeit carelessly) affixes his signature. This class corresponds with Class (2).
- (7) a genuine signature may purport to bind the company where fraudulently affixed without authority.<sup>2</sup> This class corresponds to Class (3).
- (8) a counterfeited signature may purport to bind the company. This class corresponds with Class (4).

It will be found that the important classes (those other than (2) and (6)) may be conveniently re-classified into genuine and innocent acts (Classes (1) and (5)); genuine but fraudulent acts (Classes (3) and (7)); and counterfeitings (Classes (4) and (8)).

At common law Classes (5)-(8) presented no difficulty. Because of the negative corporate seal rule, even if the signatures of all the individuals constituting the corporation's contracting organ were genuinely affixed, the body corporate was not bound in the absence of the common seal. It is only when corporate contracts are allowed to be made by parol that these classes can become relevant. Therefore in this article only the first four classes should strictly be of concern. But it is convenient to deal with all classes here.

It has been authoritatively said that a forgery is a pure nullity and that a rule of indoor management 'cannot apply to a forgery'.<sup>3</sup> But if the term forgery is taken to include all eight classes of case listed, then this simple proposition would always exclude the application of any such rule where a document shown to be irregular purports to bind a body corporate, including any case where the appearance of assent was the common seal. Yet, as has been seen, this was the appearance in face of which such a rule first developed.

The difficulty surrounding forgery cases has been examined elsewhere.<sup>4</sup> There seem to have been two sources of difficulty. First, there is the failure to make the general law distinction between a counterfeiting of a signature on the one hand and a genuine though fraudulent signature on the other. Lord Loreburn's *dictum* occurred in a case of counterfeiting (Classes (4) and (8)). It is believed that he had in mind only that narrow and popular conception of forgery.<sup>5</sup> But the word forgery has also been

*pean Bank Ltd* [1932] 2 K.B. 176 (C.A.); *Hely-Hutchinson v. Brayhead Ltd* [1967] 2 All E.R. 14 (Roskill J.).

<sup>2</sup> *Kreditbank Cassel* [1927] 1 K.B. 826 *Algemeene Bankvereeniging v. Langton* (1935) 40 Com. Cas. 247 (C.A.); *Mercantile Finance Corporation v. Francis & Taylor Ltd* [1929] N.Z.L.R. 731.

<sup>3</sup> *Per* Lord Loreburn in *Ruben v. Great Fingall Consolidated* [1906] A.C. 439 (H.L.), 443.

<sup>4</sup> Cf. Stiebel (1933) 49 *Law Quarterly Review* 350, 355-8; Thompson (1956) 11 *University of Toronto Law Journal* 248, 273-8; Campbell (1960) 76 *Law Quarterly Review* 115, 130-6; Gower, *op. cit.* 166-8; Pennington, *op. cit.* 111-3.

<sup>5</sup> *In Re: W. N. McEachren & Sons Ltd* [1933] 2 D.L.R. 558 (C.A.), Davis J.A. distinguished *Ruben's* case [1906] A.C. 439 (H.L.) as being concerned with such cases, or at least with those and also with the genuine though fraudulent class of case.

used to describe both genuine and innocent cases (Classes (1) and (5)) and genuine but fraudulent cases (Classes (3) and (7)).<sup>6</sup> If it is too late to restrict the use of the word to cases of counterfeiting or at least to those cases and genuine though fraudulent cases, one must simply resort to distinguishing between different classes of forgery.

This in fact has happened. On this distinction as it applies to signatures of individuals, Campbell is worth quoting at length.

In the common case where signatures are counterfeited there is no representation to anyone that the forger is acting in the matter as an agent, or that he is acting in the matter at all. The person whose name has been so forged could not later "ratify" the transaction, for there can be no ratification unless the person whose act is to be ratified purported to act as agent.<sup>[7]</sup>

On the other hand, when a person without authority signs a contract as agent for another the latter may if he wishes ratify and adopt the contract. The rule in *Turquand's* case cannot apply to a forgery if the person who executed the document did not purport to act as an agent, e.g., where he forged the name of a director. There is no scope for the application of the rule unless the person who actually signed the document appeared himself in the role of an agent of the company.<sup>8</sup>

Thompson and Campbell agree (and one can agree with them) that an indoor management rule of one kind or another can apply to genuine and innocent forgeries and even to genuine though fraudulent forgeries since both are representative acts but not to counterfeit forgeries as in *Ruben v. Great Fingall Consolidated*.<sup>9</sup> Accordingly one can agree that *dicta* to the contrary in *Ruben's* case<sup>9</sup> and the *ratio* to the contrary in *Kreditbank Cassell v. G.m.b.H. Schenkers Ltd*<sup>10</sup> and *South London Greyhound Racecourses' case*<sup>11</sup> should not be followed.

<sup>6</sup> Stiebel and Campbell both use the term 'forgery' in this more liberal sense. They view, for example, the *de facto* secretary's notice to the bank in *Mahony's* case (1875) L.R. 7 H.L. 869 as a forgery (even though Lord Hatherley there rejected arguments based on *Bank of Ireland's* case (1885) 5 H.L. Cas. 389 and *D'Arcy's* case (1867) L.R. 2 Exch. 158 as irrelevant because those were 'simply cases of forgery'). Campbell defines a forged document as one 'which purports to be made by or on behalf of a person who did not make it or authorize its making'. (Campbell, *op. cit.* 131.) The word was used by all three members of the Court of Appeal in *Kreditbank* [1927] 1 K.B. 826 to describe a branch manager's genuine though fraudulent signature on bills of exchange and Scrutton L.J. thought that the *dicta* in *Ruben* of Stirling L.J. ([1904] 2 K.B. 712 (C.A.), 729) and of Lord Loreburn ([1906] A.C. 439 (H.L.), 443) were sufficient to dispose of the case.

<sup>7</sup> For which Campbell *op. cit.* 132, properly cites *Brook v. Hook* (1871) L.R. 6 Ex. 89 and *Imperial Bank of Canada v. Begley* [1936] 2 All E.R. 367 (P.C.). In some cases it has been said loosely that an individual may adopt or 'ratify' a forgery of his signature but such statements should be construed as references to conduct by him giving rise to an estoppel; cf. *Wilkinson v. Stoney* (1839) 7 Jeff. & S. 509 (IR); *Marsh v. Joseph* [1897] 1 Ch. 213 (C.A.). (On this kind of estoppel see *infra*.) The rule that a forgery cannot be ratified as not being a representative act, though logical, may not be a good one. As to ratification of a counterfeited sealing see *infra*.

<sup>8</sup> (1960) 76 *Law Quarterly Review* 115, 132.

<sup>9</sup> [1904] 2 K.B. 712 (C.A.).

<sup>10</sup> [1927] 1 K.B. 826.

<sup>11</sup> [1931] 1 Ch. 496.

This is all reasonably simple so long as only the *signatures* of corporate agents are being considered. A counterfeited signature is a nullity and may be rendered operative only by reason of an estoppel against asserting it arising independently. But as indicated earlier there is a second difficulty. This occurs where the seal appears and arises from the paradoxical position of the common seal as a primary or original or necessarily non-counterfeit mode of corporate expression which must, nonetheless, always be affixed by human instrumentality.<sup>12</sup> How can there be a counterfeit common seal?<sup>13</sup> By virtue of the nature of the *persona ficta*, its seal is always affixed and known to be affixed by agents. By its nature the common seal always signifies both a primary or original expression of assent and yet a representative act: it is necessarily both the genuine signature of the body corporate and counterfeit in the sense that it is affixed by another.

The truth is that such terminology cannot fully be applied to the common seal in the way in which it is applied to the signatures of individuals. Does the outsider, confronted with the impression of a common seal, rely upon *it* (that is, the imprint) as the signature of the body corporate itself, or does he look behind what appears on paper and rely upon the *affixing* as the act of agents? If the latter, it is the *affixing* and *authenticating* which are all important and the historical significance attached to the appearance of the common seal disappears.

This seems to be the logical result of the approach taken by Thompson, for example:

An instrument which is genuine, apart from some irregularity of indoor management, not only appears to be genuine, but also appears to be genuine because of representations made by the company. But the genuine appearance of a forged instrument is not due to a representation by the company. An appearance of regularity made apparent by the company and consistent with constitutional limitations either actually or constructively known by the outsider must have been relied upon before the indoor management rule can be invoked. Accordingly, the rule can never be invoked in respect of a forged instrument.<sup>14</sup>

Campbell criticizes Thompson's position in some detail.<sup>15</sup> He correctly notes *inter alia* that the transaction in *Turquand's* case,<sup>16</sup>

is sustained under the operation of the rule, not because the company has

<sup>12</sup> This area of difficulty has not been examined though Campbell did observe in another connection that in *Ruben's* case [1906] A.C. 439 (H.L.) the appearance of assent was the seal on the one hand and the counterfeit signatures on the other (Campbell, *op. cit.* 133). It is noteworthy too that it is only in seal cases that it can be possibly said that the signature of the body corporate itself has been counterfeited (though it will not be denied that a presumption of internal regularity will equally not apply to counterfeit signatures of individuals who are corporate organs or agents).

<sup>13</sup> Of course excluded from consideration is the fraudulent making and using of a facsimile.

<sup>14</sup> Thompson, *op. cit.* 274-5.

<sup>15</sup> Campbell, *op. cit.* 134-6.

<sup>16</sup> (1856) 6 E1. & B1. 327.

represented that the transaction is regular but because the outsider is permitted to draw the inference of authority from the unauthorized actions of the directors in conjunction with the provision in the articles.<sup>17</sup>

and, one would add, 'from the appearance of the common seal'. Whilst Thompson is correct in stating that a company may be estopped by a holding out from repudiating a document (even a counterfeit forgery), this does not explain the positive corporate seal rule. Thompson's approach may satisfactorily explain such anomalous seal cases as the *Bank of Ireland v. Evans' Trustees*<sup>18</sup> and the *Mayor of the Staple* case<sup>19</sup> where persons innocently attested a fraudulent affixation (as distinct from the position where authentication is by the officers who fraudulently affixed it), or cases involving the counterfeiting of an individual's signature, but it will not explain all cases, particularly in the absence of a definition of company for the purpose.

One is forced again to consider the equivocal nature of the common seal. It will be found that in this area of forgery as in the area of the original corporate presumption of internal regularity itself, what has been overlooked is the peculiar position of the common seal. The seal is not only the company's signature but it also symbolizes the act of affixation. That irregular affixation, whether innocent or fraudulent, is necessarily a representative act. Therefore it can always be ratified<sup>20</sup> (notwithstanding the frequent general assertion that a counterfeiting cannot be ratified<sup>21</sup>) *unless, being fraudulently affixed, the seal can, on some basis, be categorized with the counterfeited signature of an individual*. It is submitted that this in fact is the result of a counterfeiting of the authenticating signatures as in *Ruben's* case<sup>22</sup> itself; that the counterfeiting of the signatures colours the affixing of the seal so that it too must be regarded as an act of counterfeiting rather than as a mere fraudulent affixing. On this view, the composite appearance of both seal and signatures in *Ruben's* case<sup>22</sup> were properly called a forgery in the popular and narrow sense of the word. In summary, the appearance of the corporate seal is always some evidence of corporate assent except where it can be described as counterfeit and it will be so described where the authenticating signatures are counterfeited. Such an appearance can then be revived and rendered

<sup>17</sup> Campbell, *op. cit.* 136.

<sup>18</sup> (1885) 5 H.L. Cas. 389.

<sup>19</sup> (1887) 21 Q.B.D. 160 (C.A.).

<sup>20</sup> Cf. *Bank of Ireland v. Evans Trustees*, (1855) 5 H.L. Cas. 389.

<sup>21</sup> Cf. Wright J. in *Slingsby v. District Bank Ltd* [1931] 2 K.B. 588, 605 'Though a man may be estopped by conduct from denying that a forgery is his signature, yet as a forgery is a crime he cannot authorize it in advance (if indeed it is not a contradiction in terms to authorize a forgery) without being an accessory before the fact. Nor can he agree to be bound by it subsequently, so as to shield or compound a felony. Hence an act of forgery is a nullity and outside any actual or ostensible authority, and outside the principle of *Lloyd v. Grace Smith & Co.*' And cf. Thompson and Campbell *op. cit.*

<sup>22</sup> [1906] A.C. 439 (H.C.).

operative only by a holding out of the counterfeit appearance as genuine.<sup>23</sup>

Since authenticating signatures must be either genuine or counterfeit, the foregoing leaves unexplained only the situation where the seal appears without any or with obviously insufficient or inadequate authenticating signatures.<sup>24</sup> As suggested earlier, this would almost certainly be held to have put the outsider on inquiry and so he would be prevented from relying upon the seal by the operation of a principle not connected with forgery.<sup>25</sup> But if a seal were known to have been affixed by persons who might reasonably be expected to have had authority to affix it, though they be only, say, two out of nine directors, it would presumably bind the company (and fraudulent use of a power or an authority would not affect the innocent outsider<sup>26</sup>). If in *Turquand's* case,<sup>27</sup> for example, the two directors who authenticated the sealing had done so fraudulently, well knowing that they should first have obtained shareholder sanction, can it be suggested that the bank would not have succeeded?

Such rare cases as *Bank of Ireland*<sup>28</sup> and *Mayor of the Staple*,<sup>29</sup> like *Ruben's* case,<sup>30</sup> involved an appearance of the seal otherwise than through the negligence of any constitutional organ of the body corporate. The appearance of authenticity given by the attesting signatures of the innocent witnesses was something for which the companies were in no way responsible.

Estoppel against asserting a forgery has been mentioned. An individual is liable on a forgery of his signature where he is estopped from setting up the forgery, as where he has represented that the document binds him and another person acts on the representation to his detriment. The onus of proving the representation, reliance and detriment clearly rests on that person and mere silence or even carelessness of the former, without more, is not enough.<sup>31</sup> The conduct or acquiescence giving rise to the

<sup>23</sup> As in *Shaw v. Port Phillip Gold Mining Co.* (1884) 13 Q.B.D. 103 and see text following n. 32 *infra*.

<sup>24</sup> Where only one or some of the authenticating signatures are counterfeit, it is believed that the total composite appearance of seal and signatures will be considered counterfeit; cf. *Shaw v. Port Phillip Gold Mining Co.* (1884) 13 Q.B.D. 103.

<sup>25</sup> See text following n. 76 *infra*. This was a ground for decision in *South London Greyhound Racecourses* [1931] 1 Ch. 496 (see n. 39 *infra* and is believed to be the only one, on which it can be justified).

<sup>26</sup> *Lloyd v. Grace Smith & Co.* [1912] A.C. 716 (H.L.).

<sup>27</sup> (1856) 6 E.L. & B.L. 327.

<sup>28</sup> (1855) 5 H.L. Cas. 389. In this case the secretary of a statutory charitable corporation, who was custodian of its common seal, fraudulently affixed it to transfers of stock and had the affixing attested by innocent but careless witnesses.

<sup>29</sup> (1887) 21 Q.B.D. 160 (C.A.). In this case the clerk of an ancient chartered corporation, who was custodian of its common seal, fraudulently affixed it to powers of attorney before two innocent but careless attesting witnesses pursuant to which certain stock owned by the corporation was sold.

<sup>30</sup> [1906] A.C. 439 (H.L.).

<sup>31</sup> Cf. *Davis v. Bank of England* (1824) 2 Bing. 393; *McKenzie v. British Linen Co.* (1881) 6 App. Cas. 82 (H.L.); *Ogilvie v. West Australian Mortgage & Agency Corporation* [1896] A.C. 257 (P.C.); *William Ewing & Co. v. Dominion Bank* [1904] A.C. 806 (P.C.); *Welch v. Bank of England* [1955] Ch. 508.

representation from which the estoppel arises is, of course, something in addition to or independent of the forged signature itself.<sup>32</sup> There is no reason why these general principles should not apply to forgeries of the corporation's signature but there are certain complications. First, at common law there was the difficulty that the representation itself would have to be sealed.<sup>33</sup> But even at common law, exceptions were allowed to this application of the negative corporate seal rule and those exceptions would embrace certain cases of corporate acquiescence.<sup>34</sup> In the case of registered companies, the representation or warranty of genuineness may clearly be made by parol and has in fact proved important.

The possibility that a parol representation might bind the company involves a second anomaly; viz that a company officer who effects a counterfeiting may be the very agent who has power, by virtue of his ostensible authority, to bind the company by such a representation. The leading case is *Shaw v. Port Phillip Gold Mining Co.*<sup>35</sup> where a company secretary affixed the seal and his own signature to a share certificate and counterfeited that of a director, and issued the certificate to the plaintiff whose application monies he misappropriated. Matthew J. observed that:

[t]he secretary is held out by the company as their agent to warrant the genuineness of the certificate. It was argued by the counsel for the defendants that the fact that the certificate was a forgery prevented their being liable for the act of their agent, but he failed, as it appeared to me, to establish any difference for this purpose between a fraud carried out by means of a forgery and any other fraud.<sup>36</sup>

Whether or not one agrees that the secretary should have been held to have had the ostensible authority stated, the principle is clear. In *London Freehold Land Co. v. Suffield*<sup>37</sup> a registered company's fraudulent solicitor-banker-manager bound his company by a representation to certain would-be mortgagees that a mortgage executed under the company's seal was delivered and not an escrow. The principle of estoppel was further recognized by Lord Loreburn in *Ruben v. Great Fingall Consolidated*.<sup>38</sup> A case in which it should have been applied was *South London Greyhound Racecourses v. Wake*<sup>39</sup> where the forgery was not even a counterfeit but of the genuine though fraudulent class. A managing director and secretary

<sup>32</sup> For case of estoppel against pleading the forgery of an individual's signature see *Coles v. The Bank of England* (1839) 10 Ad. & E. 437; *Greenwood v. Martin's Bank Ltd* [1933] A.C. 51; *Fung Kai Sun v. Chan Fui Hing* [1951] A.C. 489 (P.C.).

<sup>33</sup> E.g. see argument in *Edwards v. Grand Junction Ry. Co.* (1836) S.C. 1 My. & Cr. 650 that even a corporate ratification must be sealed.

<sup>34</sup> In fact in *Bank of Ireland's* case (1855) 5 H.L. Cas. 389, it was said that the statutory charitable corporation there, might in appropriate circumstances, have been estopped.

<sup>35</sup> (1884) 13 Q.B.D. 103.

<sup>36</sup> *Ibid.* 108-9.

<sup>37</sup> [1897] 2 Ch. 608 (C.A.).

<sup>38</sup> [1906] A.C. 439, 443.

<sup>39</sup> [1931] 1 Ch. 496.

fraudulently affixed and authenticated the seal. Surely the company should have been held bound on two grounds. First, the sealing was genuine (because the authenticating signatures were genuine) though fraudulent, and a genuine sealing is not contemplated by Lord Loreburn's *dictum* in *Ruben's* case.<sup>38</sup> Second, even if considered a forgery within the *Ruben* principle, the appearance was warranted as genuine by the company through its managing director and secretary and an estoppel against asserting the forgery should have arisen.

The representation of genuineness may be part and parcel of the fraudulent or counterfeit sealing or signing. *Lloyd v. Grace Smith & Co.*<sup>40</sup> and *Uxbridge Permanent Benefit Building Society v. Pickard*<sup>41</sup> make it clear that an agent's improper motive will not nullify the effect of his ostensible authority.<sup>42</sup> The converse, which was one ground for the decision in *British Mutual Banking Co. v. The Charnwood Forest Ry Co.*<sup>43</sup> (secretary fraudulently certifying validity of debenture stock), is therefore no longer the law. And it may be that the earlier view that company secretaries (who have been the officers most often implicated in forged sealings) had virtually no ostensible authority to bind their company<sup>44</sup> may be yielding to a more liberal, and it is suggested more realistic view, at least where the secretary is a full-time secretary.<sup>45</sup>

Professor Gower's conclusion in relation to registered company forgery cases of both the seal and non-seal types decided *to date* is acceptable. 'All the decisions can be explained on the ground either that the forged document was not put forward as genuine by an official acting within his usual or apparent authority, or that the outsider was put on inquiry.'<sup>46</sup> But it is appropriate to summarize the decisions. Classes (1) and (5) (genuine and innocent) and (3) and (7) (genuine and fraudulent) will bind the body corporate unless the outsider is put on inquiry. Classes (4) and (8) will not bind without a representation of genuineness giving rise to an estoppel against the company. In all circumstances, the company succeeds if the outsider is put on inquiry.

<sup>40</sup> [1912] A.C. 716 (H.L.).

<sup>41</sup> [1939] 2 K.B. 248 (C.A.).

<sup>42</sup> Cf. *per* Greene M.R. in *Uxbridge's* case *ibid.* 256. 'I can find no justification . . . for the suggestion that a forgery, if in other respects it comes within the scope of ostensible authority, in any case prevents that doctrine from applying'. And cf. Stiebel (1933) 49 *Law Quarterly Review* 350, 357 to similar effect on this point.

<sup>43</sup> (1887) 18 Q.B.D. 713 (C.A.).

<sup>44</sup> Cf. Lord Esher M.R. in *Barnett v. South London Tramways Co.* (1887) 18 Q.B.D. 815; *George Whitechurch Ltd v. Cavanagh* [1902] A.C. 117 (H.L.); *Kleinwort, Sons & Co. v. Associated Automatic Machine Corporation* (1934) 50 T.L.R. 244 (H.L.) (though *contra* *Shaw v. Port Phillip Gold Mining Co.* (1884) 13 Q.B.D. 103).

<sup>45</sup> Cf. *Panorama Developments (Guildford) v. Fidelis Furnishing Fabrics* [1971] 3 W.L.R. 440; [1971] 3 All E.R. 16 (C.A.). The secretary in *Kleinwort's* case (1934) 50 T.L.R. 244 (H.L.) was a part-time secretary only.

<sup>46</sup> Gower, *op. cit.* 168.

## CONCLUSION

An attributive process is necessary to constitute a human act a contractual act of the incorporated company itself, because, unlike the individual, it lacks physiological contracting equipment totally corresponding with its legal personality. But its seal does totally correspond. The corporate seal rules pre-empted a concern with the formulation of corporate contractual assent by chartered and statutory companies, and may, in the absence of special factors, be expected to do the same in relation to the registered company.

The seal alone is the unequivocal and original external expression of the body corporate itself. When it appears, there is some evidence, independently of human action, of a corporate mental act. It is the common seal which provides the first basis for saying, in relation to the early registered companies, that an outsider is entitled to infer internal regularity—to presume that that was regularly done, which might, consistently with certain public documents, have been regularly done. Historically, it was the positive corporate seal rule at common law which was applied to the registered company in *Turquand's* case.<sup>47</sup>

The evidentiary force of the common seal as an original expression of corporate assent operating independently of the human acts of affixation is further demonstrated in the problems which have existed in defining forgery of a company's signature.

Whereas the common law's formalistic approach to corporate contracts helped the outsider when the seal appeared, it could work against him when it did not appear, that is, when he relied only on human action. The negative corporate seal rule and its exceptions will also be found to demonstrate the important role of the seal and to complete the background for a consideration of the contracts of registered companies.

<sup>47</sup> (1856) 6 E1. & B1. 327.