CHAPTER-5

CONSEQUENCES OF ULTRA VIRES TRANSACTIONS/ACTIONS

1. BOARD OF DIRECTORS

The board of directors is synonymous to the management of the company. Section 291 of the companies Act 1956 provides for the general powers of the board of directors, which is as follows:

Subject to the provision of the Act, the board of directors of a company shall be entitled to exercise all such powers, and do all such acts and things as the company is authorized to exercise and do. However the board cannot exercise any power or do any act or thing which is directed or required, whether by the Companies Act or any other Act or by the memorandum or articles of association of the company or otherwise, to be exercised or done by the company in general meeting. In exercising the aforesaid powers or doing any of the aforesaid acts or things, the board will be subject to the provisions contained in that behalf in the company Act or any other Act, or in the memorandum or articles of the company, or in any regulations not inconsistent therewith and duly made there-under, including regulations made by the company in general meeting. 533

Thus, the board may exercise all powers of the company and can do all such acts and things that the company can do except those which are specifically provided to be exercised or done by the company in general meeting. But the exercise of such powers of the board shall be in conformity with the provisions of the company’s act or any other Act and memorandum, articles and resolutions of the company passed in general meeting. It is therefore clear that the powers of a company in respect of all matters are to be exercised by the board of directors except where these are reserved for exercise by company in general meeting.

533 Taxmann’s Company Law & Practice By Majumdar A.K. 1995 Ed. Page 555
In *Nibro Ltd V National Insurance Co. Ltd.*\(^{534}\), the Delhi High Court observed as follows:-

“It is well settled that under section 291 except where express provision is made that the powers of a company in respect of a particular matter are to be exercised by the company in general meeting; in all other cases the board of directors is entitled to exercise all its powers”.

Here the question arises whether the shareholders have right to intervene in to any matter? Hence the shareholders, by amending the articles may restrict the powers of the board. But such amendment cannot be made retrospectively and a meeting of shareholders cannot therefore invalidate any act validly done by the board. In *Jagdish Prasad V Pt. Paras Ram*\(^{535}\), it was observed that it is a first and elementary principle of company law that, when powers are vested in a board of directors by the articles of association of a company, they cannot be interfered with by the shareholders as such. If the shareholders are dissatisfied with what the directors do, their remedy is to remove them in the manner provided by the articles or the Act. But so long as a board of directors exists and particular powers are vested in it by the articles, the board is entitled to exercise those powers without interference by the shareholders and it is irrelevant whether the shareholders approved of what the directors have done or not. However there are certain exceptions to it.

**EXCEPTIONS**

However, in the following cases, the general meeting of the shareholders is competent to intervene and act in respect of a matter delegated to the board of directors.\(^{536}\)

**I. DIRECTORS ACTING MALA-FIDE** - where the directors of the company act for their own personal interest in complete disregard to the interests of the company or where the personal interests of directors clashes with their duties towards the company, or when they try to avoid taking steps for the redressing

\(^{534}\) (1991) 70 Comp Case 338 (Delhi)
\(^{535}\) (1942) 12 Comp Case 21 (All)
\(^{536}\) Supra Note 533 Page 556
of wrong done to the company, the majority shareholders may act to redress the wrong.

II. DIRECTORS THEMSELVES WRONG DOERS:- Where the directors who are the only persons to conduct litigation in the name of the company, are themselves the wrong doers and have acted mala-fide, the shareholders can take steps to redress the wrong.

III. INCOMPETENCY OF THE BOARD:- When the board of directors has become incompetent to act, e.g. where all the directors constituting the board are interested in a dealing or where none of the directors was validly appointed, the majority of shareholders may exercise powers in a general meeting of the company.

IV. DEADLOCK IN MANAGEMENT:- When there is a deadlock in the management so that directors cannot exercise some of their powers the majority shareholders may exercise the powers in a general meeting of the company. In Barron V Potter537, the articles of a company gave the board of director power to appoint additional directors, but owing to differences between the directors, no meeting could be held for the purpose. The articles also did not confer any power on the shareholders to increase the number of directors. Held, the company retained the power to appoint additional directors in a general meeting.

V. POWERS OF INDIVIDUAL DIRECTOR:- Section 291 provides for general powers of the board of directors. In other words, it is the collective wisdom of the directors which has been conferred the privilege of managing the affairs of the company. However, unless the Act or the articles otherwise provide, the individual director do not have any general powers. They shall have only such powers as are vested in them by the memorandum and articles. Thus unless a power to institute suit is specifically conferred on a particular director, he has no authority to institute a suit on behalf of the company.538

537 (1914) 1 Ch. 895
538 Supra Note 533 page 556
2. POSITION OF DIRECTORS

A. DIRECTOR AS TRUSTEE

If we treat directors as trustee than legally by virtue of the trust imposed upon them they are bound to hold the property of the company in trust and further bound to account the same to the beneficiaries connected therewith. However certain critics say that Directors do not hold the property of the company in trust, since company who is the legal owner is a separate legal entity. In this sense they may not be trustee, still they are considered as trustee since day-to-day management is given in their hands.

Although the directors are not properly speaking trustees, yet they have always been considered and treated as trustees of the money which comes to their hands or which is actually in their control; and ever since joint stock companies were invented and directors have been held liable to make good the loss, which they have misapplied upon the same footings as if they were trustee. The directors of a company are trustee for the company, and with reference to their power of applying funds of the company and for misuse of power they could be rendered liable as trustee and on their death, the cause of action survives against their legal representatives.\(^{539}\)

Another reason why directors have been described as trustee is the peculiar nature of their office. The directors are the persons which are selected to manage the affair of the company for the benefit of the shareholders. It is an office of trust, which if they undertake, it is their duty to perform fully and entirely. Some of their duties to the company are of same nature as those of trustees. For example, they, like trustees, occupy a fiduciary capacity and position. Moreover, almost all the power of directors are powers held in trust, such as power to make calls, to forfeit shares, to issue further capitals, the general power of management and the power to accept or refuse a transfer of shares, are all the powers in trust which have to be exercised in good faith for the benefit of the company as a whole.\(^{540}\)

The directors are yet not trustees in the real sense of the word. There is nothing in common between director and a trustee of a will or a marriage settlement. Moreover a trustee is the legal owner of the trust property and contracts in his own name. A director on the other hand is a paid agent or officer of the company and

\(^{539}\) Sankaram Nambiar V kottayam Bank AIR 1946 Mad 304
\(^{540}\) Singh Avtar on company Law 15th Ed. 2007 page 267
contracts for the company. The real truth of the matter is that the directors are commercial men managing a trading concern for the benefit of themselves and of all the shareholders in it. However their position is that of a constructive trustee.  

B. DIRECTOR AS AGENT

It is clearly recognized as early as 1866 in *Ferguson V Wilson* that directors are in the eyes of law, agents of the company. The court said: The company has no person; it can only act through directors and the case is, as regards those directors, merely the ordinary case of principal and agent.

The general principle of agency, therefore govern the relations of directors with the company and of persons dealing with the company through its directors. Where the directors contract in the name, and on behalf of the company, it is the company which is liable on it and not the directors. Thus where the plaintiff supplied certain goods to a company through its chairman, who promised to issue him a debenture for the price, but never did so and the company went into liquidation, he was held not liable to the plaintiff.

Similarly, where the directors allotted certain shares the plaintiff, they were held not liable when the company, exhausted its shares, failed to give effect to the allotment. Just as notice to an agent in the course of business amounts to notice to the principal so it is true of directors in relation to the company.

But the notice to a director will amount to notice to the company only if the director is, like an agent, bound in the course of his duty to receive the notice and to communicate it to the company.

It was held in *Hampshire Land Co., Re* that where one person is an officer of two companies, his personal knowledge is not necessarily the knowledge of both the companies unless he is under a duty to receive the notice and to communicate it to the other. Like agents, they have to disclose their personal interest, if any, in any transaction of the company. It should, however, be remembered that they are the

541 Ibid
542 (1866) 2 Ch. App 77
543 Kuriakos V PKV Group Industries, (2002) 111 Comp Case 826 Ker
544 Ibid
545 Section 229 of Indian Contract Act 1872
546 (1896) 2 Ch. 743
agents of an institution and not of its individual members except when that relationship arises due to the special facts of a case.  

For a loan taken by a company, the directors, who had not given any personal guarantee to the creditor, could not be made liable merely because they were directors. The articles of association empowered the managing director to represent the company in legal proceedings. It was held that a further authorization was not necessary to enable him to file a complaint for dishonor of a cheque under section 138 of Negotiable instrument Act.

C. DIRECTOR AS ORGAN

There was a time when corporation played a very minor part in our business affairs. But now they play the chief part and most men are the servants of corporation. There is scarcely any business pursued requiring the expenditure of large capital, or the union of large numbers that is not carried on by the corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. This gives the company and its executive an enormous power to affect the lives of labors and consumers and share-holders. Every position of power implies responsibilities. But it often became difficult to hold a company to its responsibilities in view of the artificial nature of its personality. There was a time when a company could not be held responsible for any wrong involving mental element. But today the range of corporate responsibility almost corresponds with that of an individual as the offending corporation cannot escape from the consequences which would follow in the case of an individual by saying that they are a corporation.

The transformation has been brought about under the influence of the organic theory of corporate life, “a theory which treats certain officials as organs of the company, for whose action the company is to be held liable just as natural person is for the action of his limbs”. Thus the modern directors are something more than the

547 Supra Note 540 Page 265
550 Gopal Khaitan V State AIR 1969 Cal 132 Page 138
mere agents or trustees. The board is also correctly recognized to be a primary organ of the Company, As NEVILLE J. put it in *Bath V Standard Land Co.*

“The Board of directors is the brain and the only brain of the company, which is the body and the company can and does act only through them. When the brain functions the corporation is said to function.”

**D. POSITION OF DIRECTORS IN INDIA**

A company is an artificial person. It has neither a mind nor a body of its own. However a living person has mind as well as the body who has knowledge as well the capacity to do any kind of work Therefore, the company has to act through human agency. Therefore the persons through whom a company functions are known as directors.

Section 2(13) of the Act defines director which is as under:

That director includes any person occupying the position of director, by whatever name called. Hence it is not the personal name by which the director is called, but by the position which he occupies and the function he discharges in a particular kind of company. For example, Whole Time Director, Managing Director, Technical director, Finance Director etc.

Section 252 of the Act, therefore requires that every public company shall have at least three directors and every private company should have at least two directors. Further by virtue of the amendment of 2000, it has been provided that a public company having a paid up share capital of rupees 5 Crores or more and one thousand or more small share-holders, should have a director elected by small shareholders. The manner of such election is to be prescribed. A small shareholder for this purpose means having shares of the nominal value of twenty thousand rupees or less in a public company.

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551 (1910) 2 Ch 408, 416
552 Companies Act 1956
553 Ibid
554 Supra Note 540 Page 263
E. POSITION OF DIRECTORS IN UNITED KINGDOM

Although the English companies act 1985\(^{555}\) requires all the companies to have directors. It leaves the determination of the functions of the board very largely to the company’s constitution, which is, of course under the control of the shareholders. Table A, in fact, supposes that the board will be allocated a very significant role, for it provides in Art. 70\(^{556}\), that subject to certain exceptions “the business of the company shall be managed by the directors who may exercise all the power of the company”. However this provision may be altered or excluded in the Articles of any particular company and often so in private companies.

Under the English Companies act 1985, the appointment of directors is made on the initial registration of the company because the company must send to the registrar of companies the particulars of the first director with their signed written consent to act. Thereafter he must be sent particulars of any changes with signed consent to act by any new directors. The registrar must cause receipt of these notifications to be officially notified in the official Gazette. The company must also maintain a register giving particulars of its directors. Hence public can obtain information about who the directors are, either from companies House or from the company’s registered office.\(^{557}\)

Hence with the above provisions of the companies Act of both the countries we can conclude that directors are not only the officers of the company, but they are also the Trustees and Agents of the company. They also stand in the fiduciary position in regard to the relation of the company by virtue of the position they hold in the company, but they are not in the fiduciary position to each individual shareholder where they buy or sell shares and do similar transaction with them.

F. LIABILITY OF DIRECTORS UNDER ENGLISH LAW

The protection conferred on third parties by section 35A of English companies Act 1985 does not apply fully or perhaps at all to directors who enters in to transaction with their company. Section 322A renders such transaction voidable by

\(^{555}\) Section 282
\(^{556}\) Of Table A
\(^{557}\) Gower & Davies Principles of Modern Company Law 7th Ed. 2003 (By Sweet & Maxwell) Page 307
the company and exposes the director to various forms of liability to the company, in short the director is not a third party as far as section 35A is concerned. A somewhat similar restriction applies to the *Turquand* doctrine, though its scope is less clear. In early cases namely *Harvard V Patent Ivory Manufacturing Co*\(^{558}\) seemed simply to exclude directors from the benefit of the rule, so that the common law would apply unqualified by *Turquand*, thus rendering the transaction not bonding the companies and the directors, potentially in breach of duty to the company for having entered in to transaction in breach of authority.\(^{559}\)

However, in *Hely-HutchinsonV Breyhead Ltd*\(^{560}\), Roskill J. interpreted the exclusion more narrowly; a director was an insider only if the transaction with the company was so intimately connected with his position as a director as to make it impossible for him not to be treated as knowing of the limitations on the powers of the officers through whom he dealt.\(^{561}\)

It will therefore be seen that protection afforded to a third party who has dealt with an employee is considerably less than that afforded to one who has dealt with the board of directors, or someone actually authorized by the Board. The statutory reforms have improved his position by the modification of *ultra vires* and constructive notice, but section 35A helps him only to the extent that he may safely assume that the board had powers to delegate to that employee. That will not protect him unless the board has actually done so or is stopped

From denying that it has or has ratified what he did. If he has not, he will be unprotected unless the employee has acted within his apparent authority; and he will loose that protection not only if he has not acted in good faith but also if he negligently failed to make proper enquiries or if he actually knew or ought to have known that the officer has exceeded his authority.\(^{562}\)

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558 (1888) 38 Ch. D
559 Supra Note 557, page 164
560 (1968) 1 QB 549
561 Supra note 557 page 164
562 ibid
3. CONSEQUENCES OF ULTRA VIRES TRANSACTIONS

After having seen the position of directors of the companies in India and in England as well the Board of Directors and having discussed about their various positions as the Trustees, Organs and Agents as well Officers of the respective companies in which they occupy the responsible post, they should be made liable for making any ultra vires transactions by the companies and the following remedies will be available against the Company and as well against the erring directors, namely.

A. INJUNCTION

In the first place, that the members are entitled to hold a registered company to its registered objects has been recognized long since. Hence whenever an ultra vires act has been or is about to be undertaken, any member of the company can get an injunction to restrain it from proceeding with it.\(^{563}\) In this case the House of Lords observed that the doctrine of ultra vires, as it was explained in the Ashbury’s case, should be maintained. But it ought to be reasonably and not unreasonably understood and applied and that whatever may fairly be regarded as incidental to the objects authorized ought not to be held ultra vires, unless it is expressly prohibited.

Accordingly in London County Council V Attorney General\(^{564}\), the council having statutory power to work tramways was restrained from running omnibus in connection with tramways. The court found that the omnibus business was in no way incidental to the business of working tramways, and therefore, could not be undertaken although it might have materially contributed to the success of the council’s tramways.

B. PERSONAL LIABILITY OF DIRECTOR

It is one of the duties of the directors to see that the corporate capital is used only for the legitimate business of the company. If any part of it has been diverted to purpose foreign to the company’s memorandum, the directors will be personally liable

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563 ATTORNEY General V Great Eastern Rly Co (1880) 5 AC 473 Cited from Supra Note 540 Page 68
564 (1902) AC 165
to replace it. Thus for example, Bombay High Court in *Jehangir R. Modi V Shamji Ladha*\(^{565}\) held that a shareholder can maintain an action against the directors to compel them to restore to the company, the funds of the company that have been employed in transactions that they have no authority to enter in to, without making the company a party to the suit.

Similarly in another Indian case of *A Laksmanaswami Mudaliar V L.I.C.*\(^{566}\), the United India Life Insurance Co. Ltd. was an incorporated company having the principal objects of carrying of life insurance business. In 1956, the business of the company was taken over by the Life Insurance Corporation of India. In December 1955, shortly before the acquisition, the directors of company in terms of power vested in the objects clause supported by the resolution of shareholders made payment of two Lac rupees as a donation to a trust formed with the object of promoting technical or business knowledge, including knowledge in insurance.

It was held by the Apex Court that the donation of rupees two Lac was *ultra vires* and resultantly, the directors were held personally liable to refund the amount paid to the trust. In instant case, the court observed that:-

“As office bearers of the company are responsible for passing the resolution *ultra vires* the company, they will be personally liable to make good the amount belonging to the company which was unlawfully disbursed in pursuance of the resolution.”

In the same way in *Aviling Barford Ltd. V Perion Ltd.*\(^{567}\), wherein it was held that the directors who spent money on unauthorized objects were personally liable to restore it

**C. BREACH OF WARRANTY AND AUTHORITY**

It is the duty of an agent to act within the scope of his authority. For, if he goes beyond, he will be personally liable to the third party for breach of warranty of authority. The directors of a company are its agents. As such it is their duty to keep within the limits of company’s powers. If they induce, however innocently, an

\(^{565}\) (1866-67) 4 Bom HCR 185  
\(^{566}\) AIR 1963 S.C. 1185  
\(^{567}\) (1989) BCLC 626 Ch. D
outsider to contract with the company in a matter in which the company does not have the power to act, they will be personally liable to him for his loss. It is well settled that an agent is under legal obligation to act within the scope of his authority and if they act beyond the authority given to them by the company, then the directors or the so-called agents may be held liable on account of breach of warranty or authority. A clean illustration on this point is given in the following case - In Weeks v Propert.\textsuperscript{568}

A railway company invited proposals for a loan on debentures. At the time, the advertisement was published, the company had issued debentures of the amount of 60,000 pounds, being the full amount which it was by its constitution authorized to issue. It had thus exhausted its borrowing powers. The plaintiff offered a loan of 500 pounds upon the footing of that advertisement. The directors accepted it and issued to him a debenture of the company. The loan being \textit{ultra vires} was held to be void. In an action by plaintiff against directors, it was held that the directors by inserting the advertisement had warranted that they had the power to borrow which they did not in fact possess. Their warranty consequently broken and they were personally liable.

It must however, be remembered that the representation of authority which the directors hold out must be a representation of facts and not of law. For example, whether a company is authorized by its memorandum to borrow is a question of law which every man dealing with the company is supposed to know. But where, the memorandum authorizes a company to borrow whether that power has been fully exercised or not becomes a question of fact. A misrepresentation of the former will not, but that of the latter will, give a cause of action against the directors.\textsuperscript{569}

4. CONSEQUENCES OF ULTRA VIRES BORROWINGS

A company cannot borrow money unless it is so authorized by its memorandum. In the case of a trading company, it is not, however, necessary that the objects clause of its memorandum should expressly authorize it to borrow. As borrowing is included in trading, such a company has implied power to borrow. Other companies must have a borrowing power clearly specified in memorandum. Borrowing without express or implied authority is \textit{ultra vires}. A borrowing beyond

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\textsuperscript{568} (1873) LR 8 CP 427
\textsuperscript{569} Supra Note 540, Page 70
the powers of the company rather beyond the objects clause of the memorandum of
association of the company is *ultra vires*. However, in England under the provisions
of the European Communities Act 1972, there exists provision that such borrowings
can be enforced by third party against the company if he has acted in good faith and
the borrowing has been decided on by the directors of the company. In India there is
no such legislation like the European Community Act 1972, and as a result of which
all *ultra vires* borrowings are void and cannot be ratified by the company and the
lender is not entitled to sue the company for the return of the loan. However the courts
have developed certain principles in the interest of justice to protect such lenders. The
consequences of such a borrowing as worked out in various cases are as follows.\textsuperscript{570}

**A. NO LOAN**

In the first place, an *ultra vires* lender has no legal or equitable debt against
the company. Consequently he can not sue the company to recover his loan. *Ultra
vires* borrowings are forbidden on the ground of public policy. To allow such
borrowing to be recovered would be an evasion of that policy.\textsuperscript{571}

**B. INJUNCTION**

But if the money advanced to the company has not been spent, the lender may
by means of an injunction restrain the company from parting with it. The reason for
this rule is that the loan is *ultra vires*, the company, therefore, does not become the
owner of that money. The lender continues to be the owner and he has the right to
take back the property in specie.\textsuperscript{572}

**C. SUBROGATION**

Where the money of an *ultra vires* lender has been used to pay off lawful
debts of the company, he would be subrogated to the position of the debtor paid off
and to that extent would have the right to recover his loan from the company.
Subrogation is allowed for the simple reason that when a lawful debt has been paid

\textsuperscript{570} Ibid page 470
\textsuperscript{571} Sinclair V Brougham (1914) AC 398
\textsuperscript{572} Supra Note 540 page 470
off with an *ultra vires* loan, the total indebtedness of the company remains the same. By subrogation the *ultra vires* lender, the courts are able to protect him from loss, while the debt burden of the company is in no way increased. But the subrogated creditor will not enjoy the priority of the original creditor. The best illustration is *Wrexham Mold & Connah’s Rly. Co. Ltd. Re*\(^5\) 

A company had borrowed to the full extent of its powers by issuing three different series of debentures, A, B and C. A debenture had priority over B and B over C. The company took a fresh *ultra vires* loan from the plaintiff to pay interest on A’s debentures. It was held that to the extent to which the plaintiff’s money was used to pay off legal debts, he became a legal creditor, but he was not entitled to the priority of A’s debentures.

**D. IDENTIFICATION AND TRACING**

Fourthly, as long as the money of the lender is in the hands of the company in its original form or its products are still capable of identification, he may claim that money or its products. But the problem is much more difficult when the lender’s money and that of company have been mixed up. There is only a common fund composed of the lender’s money and the company’s money, but no part of it is traceable as belonging to one or the other. In such a case the lender may perhaps be helpless. But in the winding up of the company he may claim *pari-pasu* distribution of the assets with the shareholders. This was done in the complicated case of *Sinclair V Brougham*.\(^4\)

A building society started banking business which was *ultra vires* the society. On its winding up the assets appeared to have been composed partly of the shareholders money and partly of the depositor’s money. But it was not possible to trace which part of the mixed fund belonged to the shareholders or the creditors. Nor were the assets sufficient to pay both in full. It was therefore, held that the entire remaining amount should be apportioned between the depositors and the shareholders in proportion to the amount paid by them, respectively. Nearest approach practicable to substantial justice would be done.

\(^5\) (1899) 1 Ch. D. 440  
\(^4\) (1914) AC 398
5. ULTRA VIRES ACQUIRED PROPERTY

If a company’s money has been spent *ultra vires* in purchasing some property, the company’s right over the property must be held secure. For, that asset, though wrongly acquired, represents the corporate capital. Thus for example, the Madras High Court\(^5\) allowed a company to sue on a mortgage to recover the money lent inspite of the fact that the transaction was beyond powers of the company. The court relied upon the following observation of Brice on doctrine of *ultra vires*: “Property legally and by formal transfer or conveyance transferred to a corporation is in law duly vested in such corporation even though the corporation was not empowered to acquire such property.”\(^6\)

Where the funds of a company are applied in purchasing some property, the company’s right over that property will be protected even though the expenditure on such purchasing has been *ultra vires*.\(^7\) Properly and legally and by formal transfer or conveyance transferred to a corporation is in law duly vested in such corporation even though the corporation was not empowered to acquire such property.

Similarly in *Selangor United Rubber Estates V Crackdock (NO.)*\(^8\), it was held that “the fact that the company’s Act makes it unlawful for a company to give any financial assistance for anyone to purchase any of its shares does not prevent such a person from being held a constructive trustee for the company such of its money as is unlawfully provided for such purpose”.\(^9\) A Canadian court allowed recovery of *ultra vires* payments 43 years after they were made.\(^10\)

6. ULTRA VIRES CONTRACTS

A contract of corporation as observed by Justice Gray “which is *ultra vires*, that is to say, outside the objects as defined by memorandum of association is wholly void and of no legal effect.”\(^11\) The objection to an *ultra vires* contract is, not merely that the

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5\ Ad Sait V Bank of Mysore (1930) 59 MLJR 28
6\ Ibid
7\ Ayers V South Australian Banking Co. (1871) LR 3 PC 548
8\ (1968) 2 All ER 1073
9\ Great Eastern Railway Co. V Turner (1872) 8 Ch
10\ Canada Trust Co. V Lloyd, (1968) 66 DLR (2d) 722
11\ Central Transportation Co V Pullman’s Car Co. (1890) 139 US 24
corporation ought not to have made it, but that it could not make it. The question is not as to the legality of the contract; the question is as to the competency and power of the company to make it. “An ultra vires contract, being void- ab initio, cannot become intra vires by reason of estoppels, lapse of time, ratification, acquiescence or delay. No performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it. This incapacity of a company occasionally results in manifest injustice.

The contract entered in to by a company beyond the objects clause is void and such contracts are not enforceable. To put it in other words, that ultra vires contract is void and without any legal effect, which may cause hardship to innocent persons who are unaware with the capacity of the company to enter in to such contract. The observation made in the historical example of the famous case of Ashbury Railway Carriage & Iron Co. V Riche\(^{582}\), concluded that an ultra vires contract being void- ab initio which cannot become intra vires by reason of estoppels, lapse of time, delay or acquiescence.

The incapacity of the company to make contract sometimes caused great injustice and hardships to the person who had no knowledge of such incapacity of the company. For example, in Beauforte (Jon) London, Ltd. Re: \(^{583}\)

The company, Jon Beauforte Ltd., was authorized by its memorandum of association to carry on business of costumers, gown, robe, dress and mantle makers, tailors and other activities of allied nature. But later the directors of the company decided to carry on the business of manufacturing veneered panels, which was admittedly ultra vires the objects of the company. For this purpose the company erected a factory. A firm of builders who constructed the factory had brought an action claiming 2078 pounds. Another firm supplied veneer to the company and had a claim of 1011 pounds. A firm sought to prove for a simple contract debt of 107 pounds in respect of fuel supplied to the factory. The builders of the factory had obtained a consent judgment in the nature of compromise, but it was obviously arrived at on the footing that the contract was ultra vires.

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\(^{582}\) (1875) LR 7 HL 653
\(^{583}\) (1953) Ch 131
ISSUE INVOLVED

Whether the company was liable for payment of debts incurred for the *ultra vires* acts?

DECISION

Memorandum of association is a constructive notice of the public. If a debt is beyond the objects of the company, it is not liable to pay for that. In the present case, the business of veneered panels was admittedly *ultra vires* the objects of the company. Thus the company was held not liable for any debts incurred to carry on such business.

Deciding the question of consent judgment, the court held that “in the case of *ultra vires* contract, no judgment founded on it is inviolable unless it embodies a decision of a court on the issue of *ultra vires* or a compromise of that issue”. The court further observed that “if the act is beyond the power of the company to do or ratify, no judgment obtained by the consent of the company treating it as authorized can remove its invalidity, for the virtue of such judgment rests merely on the agreements of the parties and the incapacity to do act involves the incapacity to consent that it be treated valid”. Thus it is quiet clear that a company can not do what is beyond its legal power by simply going in to court and consenting to a decree which orders that the thing shall be done. A company cannot do what is beyond its large powers, by simply going in to the court and consenting to a decree which orders that the thing shall be done.

All the three applications were dismissed.

The reason being very clear that any one who deals, with the company is supposed to know its powers. In India there is an even earlier authority on this point. 584

A company purchased and operated a rice mill beyond its powers. The rice was consigned to certain persons who had paid the price. The consignees had to sell the rice, owing to its inferior quality, at considerable loss. The company gave them drafts promising to pay for the loss. The company went in to liquidation and the question about the enforceability of the drafts arose. The court held that trading in rice

584 Port Canning & Land Investment Co. Re (1871) 7 Beng LR 583
was a transaction *ultra vires* the company; the directors, therefore, could not bind the company, and the consignees could not recover.

There is yet another problem concerning *ultra vires* contracts. “Who can plead that a contract is *ultra vires*? This question has gained importance since the decision of the Queen’s Bench in **Anglo-Overseas Agencies Ltd. V Green**\(^{585}\) where the defense of *ultra vires* was set up against a company. But the point was not decided as the court found that the contract in question was not *ultra vires*.

The same question again rose in **Bell Houses Ltd. V City Wall Properties Ltd.**\(^ {586}\)

The plaintiff company’s principal business was the acquisition of vacant sites and erection thereon of housing estates. In the course of the transacting the business, the chairman acquired knowledge of sources of finance for property development. The company introduced the financier to the defendant company and claimed the agreed fee of 20,000 pounds for the same.

The trial judge held that the contract was *ultra vires* the plaintiff company and, therefore, void. But this was reversed in appeal. The court of appeal relied on the clause in the memorandum which authorized the company “to carry on any other trade or business whatsoever which can, in the opinion of the board of directors, be advantageously carried on by the company in connection with its general business”, and held that since the directors honestly believed that the transaction could be advantageously carried on as ancillary to the company’s main objects, it is not *ultra vires*.\(^ {587}\)

Thus the question whether the defense of *ultra vires* can be set up against a company remains open. But SALMON L.J. observed:

It seems strange that third parties could take advantage of the doctrine, manifestly for the protection the shareholders, in order to deprive the company of the money which in justice should be paid to it by third party.\(^ {588}\)

\(^{585}\) (1961) 1 QB 1  
\(^{586}\) (1966) 2 WLR 1323  
\(^{587}\) This decision has been appreciated in 1966 JBL 346  
\(^{588}\) Supra Note 540 Page 72
However under the UK Act, a company may only state that its objects are commercial. This minimizes the problem of *ultra vires* contract. The problem may only arise when the contract in question is proved to be non commercial.\(^{589}\)

In India, there is no such legislation like that in U.K. and therefore, there is no specific statutory provision under which an innocent third party making the contract with the company may be protected. Thus, in India if the doctrine of *ultra vires* is strictly applied, where the contract entered into by a third party with a company is found *ultra vires* the company, it will be void and cannot be ratified by the company and neither the company can enforce it against the third party nor the third party can enforce it against the company. However, it is to be noted that even in India the courts have evolved certain principles to reduce the rigors of the doctrine of *ultra vires*. The following principles may be deduced from the judicial decisions.\(^{590}\)

1. If the *ultra vires* contract is fully executed on both sides, the contract is effective and the courts will not interfere to deprive either party of what has been acquired under it.
2. If contract is executor on both sides, as a rule, neither party can maintain an action for its non-performance. Such a contract cannot be enforced by either party to the contract.
3. If the contract is executor on one side (i.e. one party has not performed the contract) and the other party has fully performed the contract, the court differ as to whether an action will be on the contract against the party who has received benefits. However, the majority of the courts appear to be in favor of requiring the party who has taken the benefit either to perform his part of the contract or to return the benefit.

7. **ULTRA VIRES TORTS**

As we are aware that civil wrongs are called torts in the eyes of law, and the rule of constructive notice says that anyone dealing with the company must have notice of the memorandum and articles of association of the company. That’s why a company is not liable for an *ultra vires* contract however it does solve the problem of

\(^{589}\) Ibid
injustice caused. On the other hand the company is made liable for the tort committed by its servant while acting *ultra vires* the company. Thus any one dealing with the company is expected to be acquainted with the memorandum of association and articles of association of the company. There is no measurement as to the limit to which a company may be held liable for damages caused from its *ultra vires* acts. But the modern company law makes a company liable in torts if it is proved that—

1. The activity in course of which the alleged tort has been committed falls within the ambit of memorandum of the company; and
2. The tort was committed by the servant within the scope of his employment. \(^{591}\)

**A. TORT AND LIMITED LIABILITY**

Two principles jostled against each other in common law corporate doctrine in the nineteenth century. One was the problem of how to allocate responsibility to a corporation, its directors, its agents, servants and shareholders for tortuous harms inflicted through actions associated with the corporation. The doctrine of respondeat superior and vicarious liability, as inherited from agency and master-servant law, had to be adapted to cope up with the mass tort landscapes opened up by modern corporate transport, finance and industry. Tort doctrine could attribute both actions and liability arising from those actions from the directors and agents of the company to the corporate person; or in a variation, could effect attribution from one group of persons within the company to another. The doctrine of attribution could thus disturb the limited liability veils separating corporate directors, agents and employees from each other and from the corporate person and corporate fund. Ultimately this meant that shareholders could share risk with company personnel and the corporate person to a level going beyond their limited stake in corporate capital; limited liability was designed to contain voluntary creditor liabilities and was less suited to controlling involuntary tort relationships, as modern scholars have observed. There is evidence that nineteenth century law had resources to address this issue. Through calls on nominal capital and mandatory use of non-limited corporate forms, nineteenth-century investors could find that they had staked not only their paid-up investment capital but their wider fortunes against corporate misfeasance affecting third parties. Here it is

\(^{591}\) Dr. Tripathi S.C. on Modern Company Law 2nd Ed. 2006 Page 61
important to distinguish between trespassory corporate torts involving infliction of externalities (un-bargained effects outside privity) by industrial, commercial and corporate servants by corporate constitution, has been shaved right back.  

The Royal British Bank scandal of 1856, called for government regulation and reserve support. Sanctioning destructive conduct by *ex ante* private law rules provided an alternative method of control. As limited liability and corporatization took deeper hold at the end of 19th century, and as entrepreneurial energy and financial fragility intensified, rules for attribution of liability to the corporation and related parties had to be clarified. For a corporation to be liable for some transaction the corporate act had to be *intra vires* the company constitution; the action had to be authorized in some sense by the directors or the board so as to be attributable to the corporate person as a primary act of the company (sometimes described as the organic act of the company); or else the corporation as principal/employer could authorize acts to be made on its behalf through agents/servants.

These rules of attribution pertained chiefly to contract; on the tort side an employee acting within the course of his/ her employment that is on some corporate mission, could arouse a vicarious liability strictly binding the corporate person, such that employer and employee and possibly directors as well could be joint tortfeasors. However the asset partitioning affected by separate corporate personality and limited liability shielded shareholders from individual liability for contractual or tortuous acts except in exceptional circumstances, as with closely-held corporations involving an identity of directors and shareholders, or where fraud demanded veil-piercing. The injustice and inefficiency of allowing shareholders (and debenture holders too as constructive equity owners), to reap the profits of risky enterprises imposing costs on third parties, yet evade any tort responsibility beyond direct or reflected losses reducing their limited investments, excited fierce debate from the inception of industrial capitalism. The debate over shareholder liability has intensified in the last generation as society has been confronted with seismic environmental torts, and as a corporations use corporate groups, subsidiaries and subcontracting to divide off legal

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593 Ibid
risk from profit opportunities. The longstanding protection of shareholders interests against tort victims by legal system may ultimately reflect nothing more complicated than the relative political influence of these groups in the lawmaking process.  

**B. VICARIOUS LIABILITY IN TORTS**

The detailed techniques of attribution, notably vicarious liability of the corporation for its employees and agents, generated an enormous body of case law in the 19th century, as did the reverse problem of directors, agents or employees personal liability as joint tort-feasors for acts done pursuant to corporate purposes. There was also much law dealing with shield of Crown for public corporations and moreover all corporations enjoyed protection through the notorious private defenses of volenti non-fit injuria, common act or contributory fault.

When investigating *ultra vires* as a tort ‘control device’, we must hold in mind the wider surrounding legal landscape; *ultra vires* was only one of many doctrines controlling attribution of liability to corporations. *Ultra vires* as a capacity issue, the precise doctrinal problem facing the English courts during industrialization was this: when could a corporation with limited capacity and constrained by an operating doctrine of *ultra vires*, commit a tort? The shareholders through the corporate constitution may authorize a company to pursue acts through agents and employees that might be committed in a tortuous manner. The question arises whether the tortuous performance of these acts take them outside the capacity of the company, as well as beyond the authority of the agent. The law came to say, there was corporate vicarious liability which was strict; the tortuous quality of the act does not negate attribution of the act to the company. But what if the tortuous acts fell well outside the corporate objects? Such acts could purportedly be authorized by the company directors but fall outside the corporate capacity *ab-initio*, and hence fall foul of the *ultra vires* rule:  

The history of *ultra vires* is thus a huge subject. The capacity of a corporation to commit torts rather than to engage in contracts forms an analytical subset of that

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595 Supra Note 594 Ibid
mass. The shift in focus from contract to tort helps us see in fresh light how the doctrine of *ultra vires* changed from its origins in the time of Cock down to the post-Judicature Act system after 1875. The ebb and flow of capacity to commit corporate torts through *ultra vires* act is interesting in itself, but it may also offer new angles on the historical growth of the using mandamus in the court of King’s Bench to enforce a corporate act by a college, due to inability to bring a contempt proceeding in Chancery against the college. Lord Mansfield also held that the visitorial jurisdiction could not be applied where the matter in issue concerned the governing body acting in trust over the corporate estate.596

The following doctrine emerged in the wake of *Sutton’s Hospital’s case*. Corporations could be sole or aggregate, it was a maxim of the law that ‘to the existence of all corporations the King’s consent is absolutely necessary’; it was tantamount to constitutional principle that such subordinate polities must be authorized by the Crown. Many of the early corporations would have been formed by prerogative charter, typically by grant under letters patent, and would have enjoyed the fullest capacity as a presumption of the plenitude of Crown grant. Arguably the same plenitude would have applied to those companies formed not by overt act of the crown but by prescription, which appear to have meant here a theory of lost grant from the Crown evidenced by long usage. This principle arguably was in tension with the doctrine that one could not prescribe against Crown. Prescriptive corporations could alternatively have been conceptualized as based on Act of Parliament where the statute had been lost.

Many 18th and 19th century trading, infrastructure and finance companies were neither chartered nor registered but given a bespoke statutory incorporation by private or special legislation; these would be statutory companies and lack Sutton-style full capacity. In statutory corporations or hybrids involving a statutory basis for or regulation of a chartered entity, the extent of capacity was always a question of parliamentary intent found through statutory interpretation. To incorporation by statute, parliament or prescription, Sutton’s case added the fourth category of incorporation by common law, ‘As the King Himself’, by which Coke may have been reporting (or making) the political claim that the Crown as a corporation sole is

596 Supra Note 592 Ibid
created by or identified by the background legal order of common law - and not that the common law is the creature of the Crown’s prerogative of Justice. Such common law corporations would seem to escape from the requirement of Crown consent. What then of registered companies formed under modern company’s legislation, which have comprised the great bulk of trading corporations over the past one hundred and fifty years? These are created by force of a facilitating statute and hence do not fall under the Sutton Rule. If chartered and common law corporations had an inherent capacity approximating a natural person, it was equally clear that Parliament (in distinction to the crown) enjoyed the sovereign authority expressly to cut back a statutory corporation’s power and render certain acts void as beyond capacity.\textsuperscript{597}

Moreover there is an interesting reverse traffic. As the Victorian economy was increasingly organized on corporate principles, the courts had to grapple with ascription of tort responsibilities to deep pocketed abstract entities. It may be that the institution of statutory limited liability, by encouraging the rise of a corporate economy, actually encouraged torts claims against corporations and so massively increased the overall frequency of tort litigation. Large scale corporate enterprises caused more and greater harms in industrial workplace and in consumer and investor markets; and such enterprise also presented a morally appropriate target for tort litigation, being impersonal capital pools dedicated to profit, rather than employers or producers or tradesman or professionals engaged in long-term relationships with customers, investors, and employees.\textsuperscript{598}

Further David Ibbotson has suggested that this de-individualization of negligence brought major changes to the basic fault principle in tort law involving a shift from moral blame to social standard of care. In the corporate context, we can describe a two-way traffic; corporate activity may have excited tort litigation, but tort liability had to be fitted into basic corporate conceptions. The linked doctrine of \textit{ultra vires}, separate corporate personality and limited liability were all control devices that inhibited the expansive reach of tort liability. Corporate persons, limited liability and attribution from the start of 19\textsuperscript{th} century statutory forms of limited liability were instituted to protect investors from the full extent of debts of the companies they

\textsuperscript{597} A treatise on Corporations (2 Vols. 1793-4) downloaded from website at Supra Note 592
\textsuperscript{598} Kostal R.W., Law and English Railway Capitalism 1825-1875 (1994), cited from Supra Note 592
placed their money in. This reform was justified by the need to encourage the pooling of capital in. There was an outburst of interest in this subject in 1925-26, treated jurisprudentially rather than historically.\textsuperscript{599}

Shortly after the \textit{Ashbury’s case} which was decided in the year 1875, Mr. Seward Brice in his monumental treatise\textsuperscript{600}, on corporate capacity could write: perhaps indeed the law of corporations may be considered for most practical purpose as in reality only the application and development of the doctrine of \textit{ultra vires}. The doctrine of \textit{ultra vires} was disruptive because it made for an infinite variation of legal statutes in English law. Every private and public corporation might have a different constitution limiting its capacity in a unique fashion. Hence there could be no numerous clauses, no standard range of types of corporate person, and this complexity of persons in turn had a profound impact on the law of things and action. Similar problems applied to legal categorization of natural persons, with foreigners, married woman, children, persons with physical, mental and emotional disabilities and persons subject to undue influence each having variant capacities to own property, make contracts or commit torts and crimes; but the variations were not so infinite as with artificial persons (let us not even mention slavery in common law lands across the ocean, which generated enormous legal complexities).\textsuperscript{601}

The position today regarding the significance of \textit{ultra vires} in company law has shifted to the opposite extreme to that held in late Victorian Times. Modern sentiments were summed up by the Canadian Supreme Court in 1991.\textsuperscript{602}

Although, historically, the doctrine of \textit{ultra vires} has strictly limited the contractual liability of a company, neither it nor the fact that the act was an unlawful one for the company has operated to relieve the company of tortuous liability arising out of \textit{ultra vires} or unlawful acts.\textsuperscript{603} This is not surprising. Under the \textit{ultra vires} theory of the common law, those contracting with the company could protect themselves by reading the object clause. Those who suffer from tortuous or criminal acts of a company’s agent may be in no position to take this step, for example, where

\textsuperscript{599} Warren E. H., Torts by Corporations in Ultra vires Undertakings (1925), 2 Cambridge Law Journal 350-364
\textsuperscript{600} A Treatise on the Doctrine of Ultra vires 2nd Ed. (1877)
\textsuperscript{601} Ibid
\textsuperscript{602} Communities Economic Development Fund v Canadian Pickles Corp. (1991) 3 SCR 388
\textsuperscript{603} Campbell v Paddington Corp. (1911) 1 KB 869
a pedestrian is knocked down by a van recklessly driven by an employee engaged in company’s *ultra vires* business. In the case of illegal acts, it would seem perverse to give the company an advantage (escape from the doctrine of vicarious liability) which it would not have, had it conducted its business in lawful way.604

Where the employee or other agent has acted outside the scope of the authority conferred upon him or her, but not outside the capacity of the company, the argument that the company should not be liable is stronger. Since the basis of the company’s vicarious liability is that the tort has been committed in the course of employee or agent’s employment, it is not possible to suggest that the company, by defining the scope of the agent’s authority, can determine the scope of that employment. Some early cases seem to take that view.605

However, the arguments against allowing the company or any employer to determine the scope of its vicarious liability simply by means of private instructions to its agents are also clearly strong, if the purpose of the doctrine is to allocate to the business the risk which its activities generate. For this reason, the courts have been unwilling to confine the scope of the company’s vicarious liability to those action actually authorized by the company. Thus it has been clear for sometime that a company or other employer does not escape vicarious liability simply because the agent has done an act which the agent or the employee has been prohibited from doing or even because the agent has done a deliberate act for his own benefit which has prejudiced the employer.606

This led to the famous (but unclear) dichotomy between doing an unauthorized act (no vicarious liability). In its most recent decision on the doctrine, The House of lord has moved beyond that distinction and imposed vicarious liability when there was a sufficiently close connection between the wrongful acts of the agents or employees and the activities which those persons were employed to under take. The fact that the wrongful acts were clearly unauthorized and not for the employer’s benefit would not prevent the imposition of liability, if this test was satisfied.607

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604 Supra note 557 page 165
605 Poulton V London & South Western Railway Co. (1867) L.R. 2 QB 534
606 Lloyd V Grace Smith & Co. (1912)AC 716 HL
607 Supra note 557 page 166
C. ULTRA VIRES TORTS AND CRIMES

As regards the extent to which the *ultra vires* rules applied to torts and crimes, the law is not well settled. The following views may be mentioned in this regard:

1. The company is allowed to do only those acts which are stated in the objects clause of its memorandum and, therefore, an act beyond the objects clause is not considered as an act of the company. Since the objects clause can never include the commission of wrongs, a company can never be liable in torts or crimes. In other words, a wrong committed by the servants or agents of the company ostensibly on its behalf cannot be binding on the company because their acts are beyond the powers of the company. However, this is not the present law on this point and in practice companies are made liable in torts and also convicted of crimes.  

2. The second view is that the doctrine of *ultra vires* applies only to contract and property and never applies to tortuous or criminal liability.

3. The third view is that a company may be held liable in torts or crimes provided they are committed in the course of an activity which is warranted by the objects clause of its memorandum. In other words, an act of the company’s servants or agents beyond the objects clause is not an act of company and, therefore, the company cannot be held liable for the wrongs committed by its servants or agents in respect of an activity which is not covered by the objects clause of its memorandum. This view has been adopted by several academic authorities and it is most consistent with the decided cases. In principle this seems to be the soundest view.

Hence the correct rule is that a company may be liable for torts or crimes committed in pursuance of its stated objects but should not be liable for acts entirely outside its objects. For example the objects of the company is to run tramways, the company will be liable for anything which its officers do with the actual or usual scope of their authority in connection with or ancillary to running trams but it will not be liable for a tort or crimes committed by its officers in connection with some

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609 Ibid
entirely different business. Thus a company may be held liable for any tort or crime if:

a. The tort or crime has been committed by the officers (or agents as director) or servants of the company within the course of his employment, and

b. The tort or crime has been committed in respect of or in pursuance of an activity which falls within the scope of the objects clause of its memorandum.

It is to be noted that whether or not the company is liable for ultra vires torts or crimes, the officers or servants committing the act will no doubt be personally liable therefore.\textsuperscript{610}

\section*{D. DOCTRINE OF SUFFICIENTLY CLOSE CONNECTION IN TORTS}

At a general level, the doctrine of a “sufficiently close connection” in tort and of ostensible authority in the law of agency perform a similar role, i.e. the protection of the legitimate interests of third parties coming in to contact with businesses. However, they are not identical doctrine; agency law depends upon a holding out by the principal of the agent to the third party. Whereas the tortuous doctrine does not depend upon what the third party understood to be the agent’s connection with the company, but upon an objective assessment of the relationship between the agent’s actions and the company’s activities. Furthermore, as we have already noted, there is a crucial difference between agency law and vicarious liability in torts that the former produces a contractual relationship which normally exist only between third party and the company liable in tort. Since the law of contract is designed to facilitate transactions and the law of tort to deter wrongdoing or provide compensation for it, the difference in approach is not in itself surprising.\textsuperscript{611}

The rule of constructive notice of memorandum and articles explains why a company is not liable for an ultra vires contract, but that does not solve the problem of injustice involved. Moreover, the rule altogether fails to hold ground when a company is sought to be made liable for a tort committed by a servant of the company.
while acting beyond the company’s powers. Any one, dealing with the company may, at the pain of losing the bargain, be required to acquaint himself with the company’s memorandum of association.

But that can hardly be expected of a person who has been the victim of an *ultra vires* tort. For example, a company is operating omnibus - a venture entirely alien to its objects as described in the memorandum of association. The driver of the bus negligently injures the plaintiff who sues the company for action in law of torts. It can no doubt be contended against him that the driver was not a servant of the company. The company, having no existence outside its corporate sphere, could not have appointed him. But can it be said that the plaintiff ought to have known that fact. Doubtless the plaintiff deserves to be compensated. But the law has not yet clearly declared the justice of his demand.\(^\text{612}\) As the law seems to stand at present, to make a company liable for any tort, it must be shown that:-

1. That the activity in the course of which it has been committed falls within the scope of memorandum, and
2. That the servant committed the tort within the course of his employment.\(^\text{613}\)

Turning back to the tort liability of the company, none of the doctrine which have caused problems in relation to the application of the rules of agency to companies have had a significant impact upon the rules of vicarious liability which are the bedrock of the law in the tort area. Rather than the issue of corporate liability, the main area of debate has been whether the liability of the individual acting on behalf of the company (on which the doctrine of vicarious liability depends) operates to undermine another central feature of the company law, that of limited liability. So far, the requirement of an assumption of responsibility in the law of negligence has operated so as to avoid serious clashes between the contractual and tortuous rules, though the requirement has not been applied generally to the tort liability of directors, for example, not in the area of liability arising out of authorization or procurement by directors of the commission of torts by officers.

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613 Supra note 540 page 73
E. COMPANY LAW REVIEW ON TORT AND THE DOCTRINE

We have just seen above that the vicarious liability provides the bedrock upon which companies are held liable in tort, though it is not the only basis upon which the tortuous liability is attributed. In criminal law, by contrast, the vicarious liability is shunned by the common law. Consequently criminal law has had to work out a different set of starting points for the imposition of liability on companies. Two main source have emerged: 614

Firstly- The courts have treated some regulatory statutory offences as imposing liability directly on the company, albeit that the acts which put the company in breach of its duty are the acts of its employee or agents.

Secondly- The company law has developed a basis for attributing liability to companies (the “identification” doctrine) which is narrower than the vicarious liability but which nevertheless go beyond providing that the company be liable only for criminal acts authorized or endorsed by board of directors or the shareholders in general meeting.

Of course, parliament may override the presumption against vicarious criminal liability and it is therefore a matter of construction of the statutory offence in question whether Parliament intended to do so. In the case of regulatory offences based on strict liability, it will be relatively easy to convince the court that this is indeed what parliament intended. Doctrinally, this result is achieved by viewing the statute as imposing a non-delegable duty on the company (rather than by treating the company as vicariously liable for the agent’s crime), but as far the company is concerned the result is similar. In an important decision the court of Appeal was prepared to go further and apply this approach in the case of a hybrid offence, where the strict liability was qualified by a “reasonably practical defense”. 615

In this case it was not a defense for the company that the senior management had taken all reasonable care to avoid a breach of the statutory duty; it was necessary that those actually in charge of the dangerous operation should have done so. Where liability is imposed, then on usual principles the fact that the employees were acting

614 Supra Note 557 Page 171
615 R V British Steel Plc (1995) I.C.R. 586, CA
contrary to their instructions does not necessarily provide the company with a defense.

F. DOCTRINE OF IDENTIFICATION AND RULES OF ATTRIBUTION IN TORTS

If the crime clearly does require mens- rea on the part of the company, the courts will not attribute the necessary guilty state of mind to the company by using the doctrine of vicarious liability or non-delegable duty.\textsuperscript{616} Similar issues may arise under statutes dealing with civil law matters, a fruitful source of legislation having been attempts to limit liability under the merchant shipping legislation where this was possible only if the damage was caused without “actual fault or privity” on the part of the person seeking to limit liability and it is pertinent to mention here that these wordings have been used in the appropriate statute.\textsuperscript{617}

If vicarious liability is not to be used, what rules of attribution are available? It is always possible to look at what was known to the company’s organ, especially its board of directors. Rules of attribution derived from the company’s own constitution have been referred to, indeed as the company “primary” rules of attribution. However, if the company’s knowledge were to be confined to what its organs knew, the operation of many rules of law, not least in criminal sphere, would be unacceptably narrow in their relation to the companies.\textsuperscript{618}

In consequences, from the beginning of the century onwards, the courts began to develop rules of attribution which in appropriate cases “identify” the acts and knowledge of those in control of the company as those of company. Developed first in the era of civil law,\textsuperscript{619} in the period after the Second World War the same idea was applied in the criminal law.\textsuperscript{620} The effect of this development was to create a set of rules of attribution which operated more broadly than the primary rules but more narrowly than the rules based upon the general notions of agency and vicarious. The

\begin{itemize}
\item \textsuperscript{616} Law Commission, Legislating the criminal Code; Involuntary Manslaughter, Law Com No. 237, H.C. 171, 1996 Para 7.28
\item \textsuperscript{617} Merchant shipping Act 1894
\item \textsuperscript{618} Meridian Global Funds management Asia Ltd. V Securities Commission (1995) 2 AC 500 at 506, PC
\item \textsuperscript{619} Lennard’s Carrying Co. Ltd. V Asiatic Petroleum Co. Ltd. (1915) A.C. 705, HL
\item \textsuperscript{620} DPP V Kent & Sussex Contractors Ltd. (1944) K.B. 146
\end{itemize}
crucial question is, precisely where in the gap between the primary and the general rules are the rules of identification intended to operate or, in other words, what is the theory behind the idea of identification?

It is possible to find in the cases varying formulations of the under-lying principle, and the most recent definitions suggest that the courts are prepared today to give the rules of attribution based on identification a somewhat broader scope. In the original formulation in the Lennard’s Carrying Company’s case, Lord Haldane based identification on a person “who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation”. Recently, however, such an approach has been castigated by the Privy Council through Lord Hoffmann in the Meridian Global Case as a misleading “general metaphysic of companies”. The true question in each case was who, as a matter of construction of the statute in question, or presumably other rule of law, is to be regarded as the controller of the company for the purpose of the identification rule. In appropriate cases, that might be a person who was less elevated in the corporate structure than those Lord Haldane had in mind.

In Meridian itself, where the question was whether the company was in breach of the New Zealand laws requiring disclosure of substantial shareholdings knowingly held by an investor, the controllers were held to be two senior investment managers who were not even members of the company’s board. Given the purpose of the statute-speedy disclosure of shareholdings- it was appropriate to treat those in charge of dealing in the markets on behalf of the company as its “controllers” in this respect.

G. MANSLAUGHTER AND CORPORATE KILLINGS

In reference to the matter discussed above, the court of Appeal has refused either to apply the “personal duty” notion or to extend the more generous Meridian approach to identification to the common law crime of manslaughter by gross negligence. Accordingly, for this important common law crime a company can be convicted only if an identifiable human being can be shown to have committed that

621 (1995) 2 AC 500
622 Ibid
crime and that individual meets the strict common law test for the identification of that person with the company (i.e. the “directing mind and will” test).623 Consequently, it continues to be the case that it is difficult to secure the conviction of anything other than small companies where serious fatalities occur in the course of the company’s business, because the gross negligence required can rarely be located sufficiently high up in the corporate hierarchy. As long ago as in 1996, the Law Commission proposed a solution to this difficulty in its recommendation that a company should be criminally liable if management failure was a cause of a person’s death, without the need to show that any human being was guilty of manslaughter or, indeed, any other crime.624

The focus would be on the quality of the operating systems deployed by the company rather than the guilt of individuals. In 2000, a private member of Parliament introduced a bill into the legislature which would have given effect to the Law Commission’s recommendation. It was withdrawn on the basis that the English Government was consulting over the introduction of its bill, which is how matters still stand at the time of writing.625 The main area of dispute seems to be not about the principle of corporate criminal liability in this situation, but about whether the senior management of the company should be made liable as well, if the company is liable under the proposed offence. If so, should that liability be a criminal liability or a civil one, such as disqualification from acting in the management of companies for a period in the future? The wheel thus has come full circle; under the directing mind and the will doctrine, the crimes of individual managers made the company liable; now the question is how far corporate crimes should make individual managers liable.626

The identification theory has been carried to the logical conclusion that a company and an individual, who is its directing mind, can not be successfully indicted for conspiracy since this requires the meeting of two or more minds.627 But it has not been carried to absurd extremes. If those who constitute the controllers are engaged in

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624 Supra Note 557, page 173
625 Reforming the Law on Involuntary manslaughter; The Government’s Proposal (May 2000) Cited from Supra Note 557 Page 174
626 Supra Note 557 Page 174
627 R V Mc Donnell (1966) 1 Q.B. 233
defrauding the company they cannot successfully defend a civil action by the company or a criminal prosecution by saying:

“We were the controlling organs of the company and accordingly the company knew all about it and consented”. Were such a defense to prevail, it would wholly negate the duties which the controllers owe to the company. So far as concern the internal relationship between the company and its officers, dishonest acts directed against the company by its organs are not attributed to the company.628

CONCLUSION

As we have observed in corporate law that company is a separate but artificial legal person, it can act only through natural legal persons. Thus, the central issue becomes the determination of which people in which circumstances can be regarded as having acted as the company. We have explored that question in relation to corporate liability in contract, tort and crime, and also the question of whether those acting on behalf of the company become personally liable or entitled as a result of their actions, Although these questions are central to a core feature of the company law, that of separate legal personality, in fact the answers to them are to be found, predominantly, not in special doctrine of company law, but in the general rules of the law of contract (and agency), tort and crime respectively. The nearest to a special rule of company law that we have come across is the “directing mind and will” theory, which although now regarded as inadequate, represented, when introduced, a method of expanding the liability of the company.629

We have focused on the areas where the general doctrines intersect with the rules of company law. In relation to the law of contract, the agency rules have long been skewed in their application to companies by the doctrine of ultra vires and constructive notice. As a result of the reforms of 1989, however, these distortions have largely been removed. Moreover, the impact of provisions in the company’s constitution upon the director’s ostensible authority has been significantly reduced, even where the third party has actual knowledge of it. All these tendencies of the modern law will be reinforced if the recommendations of the Company Law Review

628 Supra Note 557 Ibid
629 Ibid Page 175
are implemented. Only in the criminal area and only in respect of crimes requiring *mens rea* has a fully satisfactory theory of attribution of liability to the company not been worked out. The identification theory has been made more supple as a result of the *Meridian* decision quoted above, but the courts seem at present wedded to the view that this decision depends upon statutory construction and so has no application to serious common law crimes. The law commission proposal yet to be implemented by the government.630

8. ULTRA VIRES AND THE PERSONAL LIABILITY OF DIRECTORS

A. TOWARDS COMPANY

It is the duty of the directors to see that the funds of the company are used only for the legitimate business of the company. Consequently, if the funds of the company are used for a purpose foreign to its memorandum, the directors will be personally liable to restore to the company the funds used for such purpose. In other words, a shareholder can sue the directors to restore to the company the funds which have been employed by them in the transactions which they have no authority to enter.631

B. TOWARDS THE THIRD PARTY

The directors of a company are treated as agents of the company and therefore it is their duty not to go beyond memorandum or powers of the company. Where the directors represent to the third party that the contract entered into by them on behalf of the company is within the powers of the company while in reality the company has not such powers under its memorandum, the directors will be personally liable to third party for his loss on account of the breach of warranty of authority. However, to make the directors personally liable for the loss of the third party on account of breach of warranty or authority, the following condition must exist:

(a) There must be representation of authority by the directors. The representation must be of fact, not of law.

630 Ibid
631 Jehangir R Modi V Shamji Ladha (1867-68) 4 Bom H.C.R. 185
(b) By such representation the directors must have induced the third party to make a contract with the company in respect of a matter beyond the memorandum or powers of the company.
(c) The third party must have acted on such inducement and suffered some loss.\textsuperscript{632}

A leading case on the points is \textit{Weeks v Propert}\textsuperscript{633}:

In this case a railway company had borrowing powers under its special Act but these powers had been fully exercised by the directors. Thus, the borrowing powers had been completely exhausted, nevertheless the directors advertised for loans on debentures. On the basis of the advertisement the plaintiff offered a loan of pound 500 and the directors accepted the loan and issued to him a debenture. The debenture was declared void because it was in excess of the borrowing powers of the company. In an action by the plaintiff against the directors, it was held that the directors by the advertisement had warranted that they had the power to borrow while in fact they had no such power and consequently their warranty was broken and they were personally liable to the plaintiff for his loss. Thus, the respondent was allowed to recover the pound 500 and interest by way of damages from the directors on account of the breach of warranty of authority that they had the power to borrow money and to issue debentures.

9. FEW PROVISIONS OF LAW HELD ULTRA VIRES\textsuperscript{634}

1. Section 192(1) \textcopyright \ of the Punjab Municipal Act 1911 and section 203(1) \textcopyright \ of the Haryana Municipal Act 1973 were declared \textit{ultra vires} on the ground that in these two sections provision was made for compulsory transfer of un-built areas to Municipal Committee for the public purpose without giving compensation which violates Art. 14 of the Constitution.\textsuperscript{635}

2. The Tamil Nadu Race Club (Acquisition and Transfer of Undertaking) Act 1986 was declared violative of Art. 14 and consequently struck down, on the ground that the legislative policy in the Act declared horse racing as a public

\textsuperscript{632} Rai Kailash on Company Law 9th Ed, (2005) page 86-87
\textsuperscript{633} (1873) L.R. 8 C.P. 427
\textsuperscript{635} Yogendra Pal v Municipality AIR 1994 SC 2550
purpose and in public good whereas in a previous enactment the policy was to treat horse racing as gambling\textsuperscript{636}

3. Section 4E of the Tamil Nadu Entertainment Tax Act 1939 as amended by Act 37 of 1994 whereby entertainment tax was levied on cable television was declared invalid and consequently \textit{ultra vires} on the ground that it was violative of freedom of speech and expression guaranteed under Art. 19(1) (a) of the constitution.\textsuperscript{637}

4. The proviso to Clause (b) of sub-section (2) of Section 127A of the Madhya Pradesh Municipalities Act 1961 was declared \textit{ultra vires} being contrary to the charging section.\textsuperscript{638}

5. Levy of purchase tax on sugarcane under section 4 of Bihar Finance Act 1981 was held to be not permissible in view of the special provision made in section 49 of Bihar Sugarcane (Regulation of Supply and Purchase) Act 1982 since both the Acts operate in the same field and Sugarcane Act being a Special Act would override Finance Act which is a general enactment.\textsuperscript{639}

6. When under the Karnataka Medical College and Dental Colleges (Selection for Admission to Post-Graduate Courses) Rules 1987, the State Government permitted private managements to fill 80% seats, it was held that the Rules \textit{per-se} trench upon the legislative field earmarked for Parliament under Entry 66, List 1. Under the entry, the Parliament has legislative competence to make laws for both:-

(a) Co-ordination as well as
(b) Determination of standards in the institution of the higher education including all matters which are ancillary and subsidiary thereto.

As held by Five Judge Bench of Supreme Court in \textit{Dr. Preeti Srivastava V State of Madhya Pradesh}\textsuperscript{640}, regulation of admission into institutions of higher education has to be held comprised within the legislative Entry 66 of List 1 (Union List). Once the regulatory provisions are made under the central Acts, all

\textsuperscript{636} K. R. Lakshmanan V State of Tamil Nadu AIR 1996 SC 1153
\textsuperscript{637} Suresh V State of Tamil Nadu AIR 1997 SC 1889
\textsuperscript{638} Mathuram Agrawal V State of M.P. (1999) 8 SCC 667
\textsuperscript{639} Govind Sugar Mills Ltd. V State of Bihar AIR 1999 SC 3097
\textsuperscript{640} AIR 1999 SC 2894
contrary stated laws become *ipso facto ultra vires* and void under Article 254 (1) of the constitution in so far as they are inconsistent or repugnant to the Central provisions. Thus the relevant Karnataka State Rules were declared *ultra vires* and void in terms of Article 254 (1) as the subject has been occupied by express legislation and regulation of the Union.\(^{641}\)

7. When the government of Kerala amended the Kerala Fishermen’s Welfare Fund Act 1985 by amending Act 15 of 1987 and levied an impost by way of contribution from purchaser/Exporter of fish for social security and social welfare of fishermen, the Supreme Court held that the relevant provision is *ultra vires* since it lacked legislative competence.\(^{642}\)

8. Under the Punjab Social Security Act (11 of 2000), social security cess was levied to provide pensions to senior citizens, widows, destitute women, dependent children and disabled persons. Though the object of the Act was laudable, the levy of the cess was declared *ultra vires* since it is not relatable to Entry 54 of List 2 of Schedule VII of the constitution and Entries 9 and 42 of List 2 do not empower the state legislature to levy such cess, as held in the case of *Pioneer Agro Extract Ltd V State of Punjab*.\(^{643}\)

9. When the Government of Gujarat amended the Bombay Motor Vehicles Tax Rules 1950 and made a provision for payment of advance tax, irrespective of the fact of non-use of vehicle, it was held that the collection of such tax is without authority of law and even the provision for refund of the tax for non-use of the vehicles would not validate the legislation.\(^{644}\)

10. When clause 9-A of the cement control order 1967, which required every cement producer to pay to the cement regulation account an amount of Rs. Per metric tone of non-levy cement, was challenged, the Supreme Court declared the provision *ultra vires* section 18-G of the Industries (Development and Regulation) Act 1951 for want of sanction to levy such tax.\(^{645}\)

\(^{641}\) Dr. R.R. Patil V State of Karnataka AIR 2002 Kant 211
\(^{642}\) Koluthara Exports Ltd. V State of Kerala AIR 2002 SC 973
\(^{643}\) AIR 2002 P&H 135
\(^{644}\) A. G. P. V.S.M. Ahmedabad V State of Gujarat AIR 2002 Guj 121
11. Provision to Rule 81 (2) of Gujarat Land Revenue (amendment) Rules 1977 prescribing assessment of land revenue at double the rates for non-user of land was declared ultra vires and invalid on the ground inter alia, that the classification envisaged in the proviso has no rational nexus with the object to the code which is to collect the revenue according to the use of land.⁶⁴⁶

12. Section 33-B of the people Representation Act 1951 (as inserted by the Representation of the People (third Amendment Act 2002) was held to be illegal, null and void on the ground inter alia, that it violated the fundamental right enshrined in article 19 (1) (a) of the constitution in so far as it failed to effectuate the right to information and freedom of expression of voters in respect of assets and liabilities of the candidates.⁶⁴⁷

13. Section 116 (3) of the Delhi Municipal Corporation Act 1957 which delegates unguided and un-canalized legislative power to the commissioner to declare any plant or machinery as part of land or building for determining rate-able value was held ultra vires and invalid. The exercise of the discretion by the commissioner is also not subject to any appeal before a higher authority.⁶⁴⁸

10. FEW TRANSACTIONS OF COMPANIES HELD ULTRA VIRES

1. In this case the appellant company had been formed with the object of carrying on business as mechanical engineers and general contractors but the company entered in to a contract for financing the construction of railway in Belgium. The House of Lords held the contract as ultra vires and hence null and void.⁶⁴⁹

2. The company which was authorized by its memorandum to carry on the business of costumers, gown makers and other activities of allied nature, entered in to some contracts in order to carry out its decision to undertake the business of veneered panels. The court held that the contracts were ultra vires

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⁶⁴⁶ State of Gujarat V M/S Arvind Mills AIR 2003 SC 636
⁶⁴⁷ People’s Union for Civil Liberties V U.O.I. (2003) 4 SCC 399
⁶⁴⁹ Ashbury Rly. Carriage and Iron Co. Ltd. V Riche (1875) LR 7 HL 653
and the company was not liable for any of the claims arising out of such contracts. 650

3. In this case the directors of the company were authorized to make payments towards any charitable or any other benevolent object or for any general or useful object. In accordance with the shareholders resolution, the directors paid two Lac rupees to a trust formed for the purpose of promoting technical and business knowledge. The Supreme Court held that the payment was *ultra vires* the company. 651

4. In another case it was held that grant of annual pension of 500 pounds to the widow of the managing director, five year after his death was held to be *ultra vires* 652 Further The Learned Judge held that validity of the grant must be tested by the answer to the following questions:-
   a) Is the transaction reasonably incidental to the carrying on of company’s business?
      b) Is it a bon-fide transaction?
      c) Is it done for the benefit and to promote the prosperity of the company?
   The powers of a company to do various acts can be exercised only for *intra vires* purposes and not for *ultra vires*.

5. The company had the power to borrow money, not the borrowing of money for the purpose of pig-breeding was held to be *ultra vires*. 653

6. The scheme to distribute the money received on the sale of its assets was held *ultra vires*. BOWEN LJ said-
   “Charity has no business to sit at board of directors *qua* charity. There is however, a kind of charitable dealing which is for the interest of those who practice it, and to that extent and in that garb charity may sit at the board, but for no other purpose”. 654

7. Where the prosperity of a Railway Company depended materially upon the navigation being improved and accordingly they proposed to apply to

650 Jon Beauforte (London) Re, (1953) 1 All ER 634
651 A.L. Mudaliar V Life Insurance Corporation of India AIR 1963 SC1185
652 In Lee Behrens & Co. Ltd Re 1932 All ER Rep 889
653 In Introduction Ltd. Re (19690 1 All ER 887
654 Hutton V west Cork Rly Co. (1883) 23 Ch D 654
Parliament for the requisite power. An application of the funds of the company towards the promotion of the bill was held *ultra vires.*

8. The memorandum of a company stated that it was formed for working a German patent which would be granted for manufacturing coffee from dates; for obtaining other patents for improvements and extension of the said invention; and to acquire and purchase any other invention for similar purposes. The intended German patent was never granted, but the company purchased a Swedish patent, and also established works in Hamburg where they made and sold coffee from dates without any patent. A petition having been presented by two shareholders, it was held that the main object for which the company was formed had become impossible, and therefore, it was just and equitable that the company should be wound up.

9. Where the directors were issued new shares without the sanction of the resolution of the company in the general meeting and hence *ultra vires.*

10. Where on winding up of a company, a resolution was passed for the distribution of a large sum among its officers which was held to be *ultra vires.*

11. Where a Marine Insurance Company whose memorandum excluded fire insurance, granted a policy to cover the risks which were almost exclusively fire risks, held *ultra vires.*

12. Where the company raised money by the issue of debenture and invested the same or part thereof without expressly authorized by the contents of its memorandum of association and hence held *ultra vires.*

13. Where the directors of the company carried on the trade which was *ultra vires* the company hence they could not bind the company by the contract and the consignee could not recover the amount of their shipment.

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655 East Anglian Rly v V.E.C. Rly (1851) 11 C.B. 775
656 German Date Coffee Co., Re (1882) 20 Ch. D. 169
657 Moseley v Koffytein Mines Ltd. (1911) AC 409
658 Stroud v Royal Aquarium Etc. Society (1903) W. N. 149
659 Argonaut Marine Insurance Co. (1932) 2 Ch. 46
660 Imperial Bank of India v Bengal National Bank AIR (1930) Cal 536
661 Report Canning & Land Investment Co. (1871) 17 BLR 358
14. Where a resolution was passed by the board of directors of a company, providing for the payment of certain percentage of the net profit of the company to the family of a managing director every year was held not incidental to the business of the company, and hence *ultra vires*.662

15. Where a company had contracted to pay a pension to the wife of the controlling shareholder after his death in consideration of his agreeing to act as general manager of the company for the remainder of his life, the court held that the agreement was a “sham” and hence *ultra vires*.663

11. FEW TRANSACTIONS OF COMPANIES WHICH WERE HELD INTRA VIRES

1. A company was incorporated with the object of:-
   (a) Acquiring an existing engineering concern and
   (b) Carrying on business of general engineering.
   Subsequently the company proposed to sell the original business and to embark upon other general engineering activities. Some of the shareholders petitioned for winding up on the ground that the company’s substratum had disappeared. The court rejected the petition. The company was not carrying on its main objects, but carrying on ancillary objects and hence *intra vires*.664

2. The principle will, however, be of no help where a company is formed for general purposes as opposed to a defined subject matter. Pointing out this in *Kitson & Co. Ltd, Re*665, the court said; the impossibility of applying such a construction seems to be manifest when one remembers that business is a thing which changes. It entirely changes its range of products and so forth and the substratum is not lost and hence *intra vires*.

3. The rule has also failed to prevent the evasion of *ultra vires*, and the decision of the court of appeal in *Bell Houses Ltd V City Wall properties Ltd*666 has stamped its approval upon another technique of evasion. In this case a

662 Ragu Rama Arya V East Coast Transport Co. AIR (1963) AP 152
663 Re W & M Roith Ltd, (1967) 1 WLR 432
664 Ferrom Electronics (p) Ltd. V Vijya Leasing Ltd., (2002) 109 Comp Case 467 Kant
665 (1946) 1 All ER 435 CA
666 (1966) 2 WLR 1323
company’s objects clause authorized it to carry on any other trade or business which in the opinion of board of directors could be carried on advantageously in connection with the company’s general business. The court held the clause to be valid and an act done in bona-fide exercise of it to be *intra vires*. But a clause of this kind does not state any objects at all, rather it leaves the objects to be determined by the directors’ bona-fides. 667

4. Purchase of Gold and Silver by a shipping company out of its funds was held to be *intra vires*. 668

5. Where a company was given expressed power by its memorandum to purchase the lands. It was understood by implication that the company had power to let the land and also to sell the same held *intra vires*. 669

6. Where a railway company let the interior of the arches of the bridge, though it was not expressly mentioned in the memorandum of association. It was held that those acts which are fairly incidental or consequential are *intra vires* expressly forbidden by the memorandum. 670

7. Where it was mentioned in the objects clause for giving guarantee in respect of other companies liabilities and incurring expenses for the said purpose, other than those relating to companies own business and the company incurred those obligations, it could not be challenged as *ultra vires* transaction as they were within their objects itself and hence *intra vires*. 671

8. A step taken by the company to augment the working capital of the company will be incidental to the business of the company and conducive to the attainment of the main objects of the company is *intra vires*. 672

12. CONSEQUENCES OF ULTRA VIRES ACTIONS

I. Generally *ultra vires* acts and transactions are void’-

An *ultra* act or transaction is void *ab initio*. An act is *ultra vires* because the authority has acted beyond its power in the narrow sense or because it has abused its

667 Beuthin R. C., The Ultra Doctrine; An Obituary Notice,(1966) 83 SALJ 461
668 Waman Lal V Scindia Steam Navigation Co. (1944) Bom 131
669 Gujarat Ginning & Manufacturing Co. V Motilal H S Weaving Co. (1930) Bom. 84
670 Foster V L.C&D Railways (1875) 1 Q.B. 711
671 Charterbridge Corp.V Lloyds Bank Ltd (1969) Comp Case 824
672 Turner M & Co. Ltd. V H.F. investment Trust Ltd AIR (1972) SC 1311
power by acting in bad faith, or for an inadmissible purpose or on irrelevant grounds or without regard to relevant consideration or with gross unreasonableness. For avoiding such acts on declaration is necessary and the law does not take any notice of them. Like illegal actions, such actions are void.673

If any body created by a statute goes beyond the area of its powers, the act is *ultra vires* and is of no effect.674

The acts or transactions of a company which are beyond the powers as conferred by the memorandum of association are wholly null and void so far as the company is concerned. Such an act or transaction cannot be ratified by the shareholders even if they consent to it. As held by the Supreme Court in *A. Lakshmanswami Mudaliar Case*675, an *ultra vires* contract remains *ultra vires* even if all the shareholders agree to ratify it.

Similar was the outcome of the celebrated case of *Ashbury Railway Carriage & Iron Co. Ltd. V Riche*676, in which the House of Lords held that since the contract entered into by the railway company was beyond the purview of the objects of the company, it was *ultra vires* of the whole company and, hence void, and so could not be sued for breach of the contract. According to the Indian Contract Act also, if one or both the parties to a contract has incapacity to contract, it makes the contract void.

II. Ultra vires borrowings- its effect

A borrowing which is *ultra vires* the company does not have the legal recognition as a debt against the company since it is void. The company neither be sued by the lender in case of default in repayment of the loan nor the company can be compelled to give any security for the loan. In such a case remedy available to the lender may be as follows:-

(i) The lender may approach the court for obtaining an injunction against the company restraining it from spending the money and for recovering the amount actually existing.

673 Supra Note 634 Page393
674 Kashmir University V Md. Yasin AIR 1974 SC 238
675 AIR 1963 SC 1185
676 (1875) LR 7 HL 653
(ii) The lender may obtain a tracing order to claim any asset that might have been acquired by the company by spending the amount borrowed by it.

(iii) In case of debtor company spent the amount borrowed in paying off its lawful debts, “lender is entitled to step in to the shoes of the creditors who have been paid off and subrogate to their rights”. As prof. Kuchhal has said- “The logic behind the above remedies may be noted. As the transaction of the ultra vires lending is void ab-initio, the lender continues to be the owner of that money and he has the right to recover it under the equitable doctrine of restitution.”

III. When ultra vires act or transaction is voidable

An act or a transaction in respect of a company is ultra vires in a relative sense. The same act may be ultra vires or intra vires depending on who took the decision to do the act and who had the power to act. If the directors do an act for which they have no powers, the act is ultra vires the directors. But the same act may be made valid by the company at a general meeting if the company had powers to do the act. Acts, which are ultra vires, are voidable.

I. Borrowing ultra vires the Directors of a company- its effect

A borrowing which is ultra vires the Directors but intra vires the company may be ratified by the company if it so likes. In that case the transaction becomes valid and binding. If however, the act of the Directors is not ratified, the lender is protected provided he can establish that the money was advanced by him to the company in good faith and he had no knowledge that the directors had exceeded their powers. This is known as the doctrine of “indoor management” which was laid down in Royal British Bank Case.

The Directors may also be sued by the lender for the breach of implied warranty of authority.

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677 Prof. Kuchhal M.C., Modern Indian Company law 11th Ed. 1991 P 311
678 Supra Note 634 Page 395
679 (1856) 6 E&B 327
II. Void and Voidable Act

The concept of void and voidable has been nicely summarized by De Smith, Woolf and Jewell in their book, Judicial Review of Administrative Action\textsuperscript{680}, as follows-

“Behind the simple dichotomy of void and voidable acts (invalid and valid until declared to be invalid) lurk terminological and conceptual problems of excruciating complexity. The problem arose from the premise that if an act, order or decision is \textit{ultra vires} in the sense of outside jurisdiction, it was said to be invalid or null and void. If it is \textit{intra vires} it was, of course, valid. If it is flawed by an error perpetrated within the area of authority or jurisdiction, it was usually said to be voidable; that is valid till set aside on appeal or in the past quashed by means of writ of certiorari for error of law on the face of the record”.

To determine what is void and what is voidable is a difficult area and some confusion exists in the mind of the authorities. “….. If it became necessary to fix on one or other of these expressions that a decision is made contrary to natural justice is void, but that until it is so declared by a competent body or court, it may have some effect or existence in law. This condition is better expressed by saying that the decision is invalid or vitiated.”\textsuperscript{681}

As observed by Supreme Court in \textit{Dhurandhar Prasad Singh V Jai Prakash University}\textsuperscript{682}, the expressions void and voidable have come up for discussion by courts on innumerable occasions. The expression ‘void’ has several facts. \textit{Ultra vires} acts, transactions, decree i.e. those which are without jurisdiction are one type of void acts, transactions or decrees. For avoiding such acts no declaration is necessary, the law does not take any notice of the same and these can be disregarded in collateral proceedings or otherwise. The other type of void acts e.g. may be transaction against a minor without being represented by a next friend. Such a transaction is a good transaction against the whole world. So far as the minor is concerned, if he decides to avoid the same and succeeds in avoiding it by taking recourse to appropriate

\textsuperscript{680} 5th Edition Para 5-o44  
\textsuperscript{681} Calvin V Carr (1980) AC 574 Page 589-90  
\textsuperscript{682} (2001) 6 SCC 534
proceedings the transaction becomes void from the very beginning. Few types of void acts may be which are not totally nullity but for avoiding the same declaration has to be made. Voidable act is that which is a good act unless avoided e.g. if a suit is filed for a declaration that a document is fraudulent and/or forged and fabricated, it is voidable as the apparent State of affairs is the real State of affairs and the party who alleges otherwise is obliged to prove it. If it is proved that the document is false and fabricated and a declaration is made to that effect, a transaction becomes void from the very beginning. There may be voidable transaction which is required to be set aside and the same is avoided from the day it is so set aside and any day prior to it. In cases where the legal effect of a document cannot be taken away without setting aside the same, it cannot be treated to be void but would be obviously voidable.\textsuperscript{683}

III. Void and Illegal Contract

An ultra vires contract which is void has no legal effect. An illegal contract may resemble a void contract in that there is no legal effect between immediate parties but has the further effect of tainting with illegality transactions collateral to it and, therefore, not enforceable in certain circumstances. If an agreement is merely collateral to another or constitutes an aid facilitating the carrying out of the object of another agreement, which though void is not prohibited by law, may be enforced as collateral agreement. An illegal contract countenance a claim based as the agreement being failed with an illegality of the object sought to be achieved which is hit by law.\textsuperscript{684}

IV. Relief under an Ultra vires Action

An ultra vires order or decision is void but even a void order or decision rendered between two parties cannot be said to be non-existence in all cases and circumstances. Ordinarily such an order will remain effective inter partes, until it is successfully avoided or challenged in higher forum. If an order or decision is void, it only conveys the ideas that the order is invalid or illegal, but it cannot be avoided.

\textsuperscript{683} Supra Note 634 Page 396
\textsuperscript{684} Rajat Kumar Rath V Government of India air 2000 Ori. 32
There are degrees of invalidity depending upon the gravity of the infirmity as to whether it is fundamental or otherwise.\textsuperscript{685}

An order or action which is \textit{ultra vires} the power of the authority concerned becomes void and such order or action does not confer any right. But the order or the action need not necessarily be set at naught in every case. Though the order is void, if the parties do not approach the court within reasonable time and have the order invalidated, acquiesced or waived, the discretion of the court has to be exercised in a reasonable manner. The court may in appropriate cases, even decline to grant any relief even though the order has been held to be void.\textsuperscript{686}

A party aggrieved by the invalidity of the order should approach the court for relief or declaration that the order against him is inoperative and not binding upon him. Such an action should be taken within the prescribed period of limitation. If the statutory limitation period expires, the court cannot give the declaration sought for.\textsuperscript{687}

As professor Wade has said, “The court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances.\textsuperscript{688} But a void, order cannot be validated merely because of delay seeking annulment of the order.\textsuperscript{689}

An order may not be made in good faith, but it is still capable of legal consequences, unless, proceedings are taken at law to establish the cause of invalidity and get it quashed or otherwise upset. But the position is different in respect of an order or action which is patently and substantively invalid. As observed by Lord Denning, MR. in \textit{R V Paddington Valuation Officer’s case}\textsuperscript{690}, if rating list is so defective that it is a nullity, there is no need for an order to quash it. It is automatically void.

V. Concept of awarding personal damage

Apart from the fact that \textit{ultra vires} action makes it void, the authorities responsible for “oppressive, arbitrary and unconstitutional action” as stated by Lord

\begin{footnotesize}
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\item 685 State of Kerla V M. K. Kunhikannan Nambiar AIR 1996 SC 906
\item 686 State of Rajasthan V D.R. Laxmi (1996) 6 SCC 445
\item 687 State of Punjab V Gurdev Singh AIR 1991 SC 2219
\item 688 Administrative Law, 6th Edition P 352
\item 689 Subhash Kumar Lata V R.C. Chibba (1988) 4 SCC 709 Cited from Supra Note 634 page 398
\item 690 (1966) 1 QB 300
\end{itemize}
\end{footnotesize}
Devlin in *Rooks case*\textsuperscript{691}, are liable to pay exemplary damages. In the same case at page 1120, Lord Wilberforce observed, *inter-alia*, reiterating the principle stated in 1703- “if public officers will infringe men’s right, they ought to pay greater damages than other men to deter and hinder others from the like offences….”. This concept was discussed subsequently by the court of appeal in *A.B. South West Water Services Ltd.*\textsuperscript{692}, in which STUART SMITH, L J observed as follows:

“The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. It is common ground that this category of persons is not limited to the servants of Central government, but includes servants of the local Government and the police.”

LORD DEVLIN’S opinion came under further discussion in *Broome case*\textsuperscript{693}, LORD REID at pages 1078-88 observed the following:-

“I think that the context shows that the category was never intended to be limited to Crown servants. The contrast is between the Government and private individuals. Local Government is as much Government as a National Government, and the police and many other persons are exercising Government functions. It was unnecessary in *Rooks V Barnard*\textsuperscript{694}, to define the exact limits of the category, I should certainly read it as extending to all those who by common law or statute are exercising functions of a Governmental character.”

The view generally excepted in English Courts is that the gross misuse of power involving fortuitous conduct by agents of the Government according to the traditional classification of law of tort “would give rise to any one of a number of causes of action”.

In India the concept of absolute liability of public servants for misfeasance has been of recent origin. The Supreme Court in *Common Cause, A Registered Society V Union of India*\textsuperscript{695}, observed as under:-

\begin{itemize}
\item \textsuperscript{691} (1964) AC 1129
\item \textsuperscript{692} (1993) QB 507
\item \textsuperscript{693} (1972) AC 1027
\item \textsuperscript{694} (1964) AC 1129
\item \textsuperscript{695} AIR 1997, SC 1886
\end{itemize}
“We are of the view that the legal position, that exemplary damages can be awarded in a case where the action of a public servant is oppressive, arbitrary or unconstitutional is unexceptionable”. Accordingly the Supreme Court directed, Capt. Satish Sharma, to pay exemplary damages of Rs. 50 Lac to the Government for making allotments of retail outlets of petroleum products (petrol pumps) in his capacity as the Minister for Petroleum and Natural Gas which was wholly arbitrary, nepotistic and are motivated by extraneous consideration”. The court also said that Capt. Sharma “deliberately acted in a biased manner to favor these allottees and as such the allotment orders are wholly vitiated and are liable to be set aside”.

The Court further remarked that Mr. Sharma has acted in utter violation of the law laid down by this court and has also infracted the provisions of Art.14 of Constitution. As already stated, a minister in the central Government is in a position of a trustee in respect of the public property under his charge and discretion. The petrol pumps/gas agencies are a kind of wealth which the Government must distribute in a bona-fide manner and in conformity with laws. Capt. Satish Sharma has betrayed the trust reposed on him by the people under the constitution. The court directed inter alia that Capt. Satish Sharma shall now cause within two weeks why a direction would not be issued to the appropriate police authority to register a case and initiate prosecution against him for criminal breach of trust or any other offence under law.

Earlier in Lucknow Development Authority V M.K. Gupta696, Supreme Court observed that public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behavior and they cannot act negligently. If a public officer abuses his office, either by an act or omission or commission, and the consequence that is an injury to an individual, an action may be maintained against the government. If the court directs payment of compensation against the state, immediate payment of the compensation may be made to the complainant from public fund but the same is to be recovered from those government officials who are found responsible for the omission or the commission of the act causing injury.

696 AIR (1984) SC 787
Similarly, the director of a company has personal liability if they make any *ultra vires* payment, that is, payment for an object not within the purview of the object clause of the memorandum of association. The directors can be compelled to refund the money to the company. The directors will also be personally liable to any person who suffers a loss because of “breach of warranty of authority.”