Bond Law Review

Volume 2 | Issue 2 Article 2

1990

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Abstract
This article endeavours to show that the rule in The Royal British Bank v Turquand is a unique form of estoppel; it has the effect of estoppel by representation, but it does not require a representation to be made by the party estopped - at least this was the original ambit of Turquand. An examination of the rule at common law will be followed by an assessment of the statutory modifications thereof.

Keywords
Royal British Bank v Turquand, estoppel

THE RULE IN TURQUAND'S CASE: ESTOPPEL WITHOUT REPRESENTATION

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This article endeavours to show that the rule in *The Royal British Bank v Turquand*[1] (hereinafter *Turquand*) is a unique form of estoppel: it has the *effect* of estoppel by representation, but it does *not* require a representation to be made by the party estopped—at least this was the original ambit of *Turquand*. An examination of the rule at common law will be followed by an assessment of the statutory modifications[2] thereof.

The Common Law Position

In *Turquand*, the directors of a company had, by using the company seal, purported to give a bond to the Royal British Bank. Although the directors could have been authorised by a general meeting of the company to give the bond, they had not in fact been authorised to do so. The company sought to avoid liability on the bond by pleading *non est factum*. The plea failed before the Court of Queen's Bench as well as the Court of Exchequer Chamber. No issue of estoppel by representation was raised in the suit, and no such estoppel was found by either court.

The ratio decidendi of the Exchequer Chamber appears in the following part of Jervis CJs judgment:[3]

> ... We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have *a right to infer* the fact of a resolution authorising that which on the face of the document *appeared to be* legitimately done.

What is the nature of this 'right to infer'? It is the right to assume that what *appears* to be in order, is *actually* in order. There was no shadow of a suggestion in the judgment that the company had either expressly or impliedly represented to the bank that the requisite resolution had been passed, nor would any such suggestion have been derivable from the facts. Nonetheless, the company was estopped from asserting the true situation, namely, that the affixation of its seal had not been authorised. There was no representation, yet the company was estopped.

1 (1856) 6E & B 327; 119 ER 886.
2 *Companies Code* 1981 ss 68A-68D.
3 *Turquand*, pp 332 and 888, respectively. Emphasis added.

Why? Because, as a matter of practical fairness, it would be disruptively burdensome, in the absence of suspicious circumstances, to require persons dealing with a company to satisfy themselves that the company, in transacting business with them, was exactly adhering to its own internal procedure. Thus *Turquand*, at least in its genesis, afforded wider protection to the outsider than that offered by estoppel by representation in that *Turquand* was offering the outsider estoppel against the company even where the latter had not made any relevant representation. Correlatively, *Turquand* exposed the company to more extensive liability than estoppel by representation, the former being a unique liability to which a natural person was not subject. The similarity between *Turquand* and estoppel by representation is that both these forms of liability are negated by the presence of suspicious circumstances which the person asserting the liability fails to investigate. However, the difference between these two forms of liability is that whereas the *absence* of suspicious circumstances in transactions with a company suffices to attract *Turquand*, such absence is not in itself sufficient to attract to a natural person the liability of estoppel by representation, as the latter requires a relevant representation to have been made. In *Turquand*, it was *possible*, from the outsider's perspective, that the directors had been authorised to give the bond. There were no suspicious circumstances attending the giving of the bond. There was thus no need for the outsider to satisfy itself that the company had taken appropriate action to authorise its directors to give the bond.

The principle that, absent suspicious circumstances, a company may be presumed by an outsider to be properly doing what it is possible for it to do properly, was confirmed in the great case of *Mahony v The Liquidator of the East Holyford Mining Company (Limited)*[4] (hereinafter *Mahony*). There the company's articles of association empowered its board of directors to prescribe a method of signing the company's cheques. Someone describing himself as the company's secretary—but who had not been so appointed—wrote to a bank purporting to advise it that a general meeting of the company had authorised the company's cheques to be signed by any two of its three directors and countersigned by its secretary. In fact, not only was there no such authorisation, but no directors and secretary had been appointed. Putative cheques signed in the manner advised were duly paid by the bank. It is fundamental to note that none of the putative cheques involved the use of the company seal. Nonetheless, the company's liquidator was unsuccessful in his attempt to disclaim liability on the unauthorised cheques.

In rejecting the liquidators disavowal of the cheques, Lord Hatherly said:[5]

> . . . (W)hen there are persons conducting the affairs of the company in a manner which appears to be perfectly *consonant* with the articles of association, then those so dealing with them, externally, *are not affected by any irregularities which may take place in the internal management of the company*. They are entitled to presume that that of which only they can have knowledge, namely, the external acts, are rightly done, when those external acts purport to be performed in the mode in which they ought to be performed. For instance, when a cheque is signed by three directors, they are entitled to assume that those directors are persons properly appointed for the purpose of performing that function, and have properly performed the function for which they have been appointed . . .

4 (1875) LR 7 HL 869.
5 *Mahony*, pp 894-895. Emphasis added.

The sole exception to the right of the outsider to presume regularity, namely, the presence of suspicious circumstances, is specifically addressed by Lord Hatherly:[6]

> . . . Of course, the case is open to any observation arising from gross negligence or fraud. I pass that by as not entering into the consideration of the question at the present time. Outside persons when they find that there is an act done by a company, will, of course, *be bound in the exercise of ordinary care and precaution to know* whether or not that company is actually carrying on and transacting business, or whether it is a company which has been stopped and wound up, and which has parted with its assets, and the like. All those *ordinary inquiries* which mercantile men would, in the course of their business make, I apprehend, would have to be made on the part of the persons dealing with the company.

Thus Lord Hatherly made it plain that the rule in *Turquand* was essentially not one based on any *representation* made by the company to the outsider that what the company could have properly done, it had in fact properly done. Rather, the rule was that what the company could have properly done would be deemed, as against it, in the absence of suspicious circumstances, to have been properly done. Hence, under *Turquand*, the estoppel against the company is raised without any relevant representation by the latter.

Additionally, as noted earlier, no significance was, in *Mahony*, attached to the fact that, unlike *Turquand*, the company seal had not been used in the unauthorised transactions. The application of *Turquand* in *Mahony* serves to refute any suggestion that the use of the company seal in *Turquand* was essential to the formulation of principle in the latter. The estoppel resulting from the use of the company seal in *Turquand* was no more than a particular illustration of the general principle of presumed regularity prompted by the absence of suspicious circumstances.

Unfortunately, the principle of presumed regularity was not raised either in argument before, or in the judgment of, the Court of Appeal in *The Mayor, Constables and Company of Merchants of the Staple of England v The Governor and Company of the Bank of England*[7] (hereinafter *Staple of England*). There the clerk of the company fraudulently affixed the company seal to two powers of attorney given to the defendant bank to sell the bonds owned by the company. The clerk having misappropriated the proceeds, the company sought to disown the sale on the familiar ground that it had not authorised it. The bank protested that it was negligent of the company to confide its seal to the clerk without supervision, and argued from that that the company should consequently be estopped from asserting the clerk's want of authority. The bank's submission failed, the Court of Appeal determining that even if the company had been thus negligent, such negligence was not the proximate cause of the banks

6 *Mahony*, p895. Emphasis added.
7 (1887) 21 QBD 160.

unauthorised sale of the bonds. *Staple of England* was obviously contested on the basis of estoppel by representation, namely, did the company, through its negligence in giving custody of the seal to its clerk, *represent* to the bank that the powers of attorney were genuine? To which, rightly or wrongly, the Court returned a negative answer. However, *Turquand* is applicable without any representation. But the principle in *Turquand* was never mentioned in the suit. It is submitted that *Turquand* ought to have been argued and applied to estop the company. The bank in *Staple of England* had no more reason to impugn the authenticity of the powers of attorney given to it than had the bank in *Turquand* reason to impugn the authenticity of the bond it received. Yet in *Turquand* the company was estopped, whereas the company in *Staple of England* was free to assert the clerk's want of authority. The approach taken in *Turquand* should be preferred.

Because only persons without notice (actual or constructive) of the lack of authorisation may rely on the presumption of regularity, it was very early established that the directors of a company could not shield themselves behind *Turquand: Howard v Patent Ivory Manufacturing Company*[8] (hereinafter *Patent Ivory*). In *Patent Ivory*, Kay J explained:[9]

> Now in this case, unfortunately for the holders of these debentures, they are all directors, and therefore the well-known authorities which make it unnecessary to see whether the internal regulations of a company have been observed or not do not apply; because, of course, the *directors must be taken to know that the internal requirements of the company had not been observed* in the case of these debentures ...

Kay J was simply applying the exception based on notice which Lord Hatherly had propounded in *Mahony*.

The fundamental distinction between estoppel by representation, on the one hand, and, on the other hand, estoppel by mere absence of notice of irregularity in a company's internal management, was illuminated in the Court of Appeals decision in County of *Gloucester Bank v Rudry Merthyr Steam and House Coal Colliery Company*[10] (hereinafter *Gloucester Bank*). There the directors of a company, who were authorised to fix a quorum for their meetings, determined that any three of them should constitute such a quorum. A meeting of only two directors purported to authorise the company secretary to affix the company seal to a mortgage over the company's lands. The putative mortgagee did not allege that the company had represented that the use of its seal was authorised. Consequently, estoppel by representation was not raised by the mortgagee nor mentioned by the Court of Appeal. The Court expressly applied *Turquand* and *Mahony*, Lindley LJ saying:[11]

> ... The case is governed ... by *Royal British Bank v Turquand*, followed as it has been by a string of cases too numerous to refer to, the principal one being the Irish case, *Mahony v East Holyford Mining Company*. Here the directors may make any quorum they like—it may be two, or it may be three. They did apparently appoint three. The mortgage in question is under the seal of

8 (1888) 38 Ch D 156.
9 *Patent Ivory*, pp 170-171. Emphasis added.
10 [1985] 1 Ch 629.
11 *Gloucester Bank*, p636. Emphasis added.

> the company, signed by two directors, and countersigned by the secretary. *Now, what could anybody think of that? What is there to put them upon inquiry? What is there to give them notice of anything irregular, if there was anything irregular?* ... There is nothing irregular on the face of the deed even taken with the articles—there is nothing illegal in it ...

So the outsider triumphed because it did not have any notice that the apparently valid deed was in fact void, and *not* because the company had represented to the outsider that the deed was valid. In the light of the subsequent distortion of *Turquand*, it is instructive to note that the fact that the deed was a *nullity* did *not* preclude the application of *Turquand* in *Gloucester Bank*. Again, because the company seal was *not* used in *Mahony*, the specific reliance on the latter in *Gloucester Bank* demonstrates that *Turquand* is not conceptually tethered to the use of the company seal.

Returning to the basis of the principle, it is accepted that *Turquand* is not there to assist an outsider who is under a duty to investigate any reasonable suspicion attending any act purportedly done on behalf of the company. Thus in *Bryant Powis and Bryant Limited v La Banque Du Peuple*[12] (hereinafter *Bryant*), where an unauthorised person purportedly indorsed to an outsider (a bank) promissory notes belonging to the company but specified that he was doing so as the company's agent (using the phrase 'per pro'), the Privy Council held that the bank was under a duty (which it had failed to discharge) to ascertain the scope of the putative agent's authority. The company was therefore free to disown the void endorsements. *Bryant*, of course, did not decide that the bank (the outsider) failed because the endorsements were nullities (as indeed they were), but because it should have investigated the agent's admonitory use of the phrase 'per pro'. In short, there could not have been a presumption of adequate authority where the outsider was expressly warned of the *limited* nature of the putative agent's authority. Indeed, if *Turquand* did not apply to nullities as such, then the rule in that case would never have existed, since the bond in *Turquand* was indisputably a nullity.

Again, in *Duck v Tower Galvanizing Company Limited*[13] the Divisional Court of the Kings Bench Division applied *Turquand* to estop a company from asserting the fact that a debenture had been issued under the company seal by persons falsely claiming to be its directors. Lord Alverstone CJ did not equivocate in stating his view that, in the absence of notice, an outsider was entitled to assume against the company that what the company could have authorised, it had in fact authorised, saying:[14]

> ... The memorandum of association allowed the company to borrow money on debentures, and the articles of association of the company *might very well have justified* the issuing of such a debenture as this; ...

Thus far, *Turquand* had been fairly consistently applied. However, in 1906 the rule suffered a blow from which it has not been able to recover.

12 [1893] AC 170.
13 [1901] 2 KB 314.
14 *Duck*, p318. Emphasis added.

The blow was inflicted by the House of Lords in its decision in *Ruben and Another v Great Fingall Consolidated and Others*[15] (hereinafter *Ruben*). There the secretary of a company forged a share certificate for 5,000 shares in favour of a bank as security for a loan to the secretary himself. Those 5,000 shares had been purportedly transferred by the plaintiffs to the bank. In turn, the plaintiffs had previously purportedly received a transfer of those shares from a person (whose signature had been forged on this putative transfer) who was, in any event, not the owner of the shares. The shares never existed. The seal on the share certificate had been affixed by the secretary without authority, and the signatures of the two directors purporting to authenticate the seal had been forged by the secretary. The secretary then purported to countersign the directors' forged signatures. After the discovery of the fraud, the plaintiffs paid off the bank, and sought to get themselves registered as owners of the 5,000 shares. When the company refused to comply, the plaintiffs sued it for damages.

On the facts, there was an immediate and simple answer to the plaintiffs' attempt to invoke *Turquand*. The shares were transferred to the plaintiffs to secure a private loan to the company's secretary. Thus the plaintiffs should have been put on notice of the fictitious transfer, thereby disabling them from reliance on *Turquand*. This short and obvious refutation of the plaintiffs' claim was not used. Instead, Lord Loreburn, LC, chose to pursue a gratuitous and disruptive theme, saying:[16]

> ... The forged certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, *and will not be affected by irregularities of which they had no notice.* But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. *It cannot apply to a forgery.*

Why cannot the rule apply to a forgery? Because it is a pure nullity? But *all* the documents which had been upheld under *Turquand* until then were nothing more than pure nullities. Lord Loreburn thereby required a distinction to be capriciously drawn between a nullity resulting from a document bearing *forged* signatures and a nullity resulting from a document bearing *genuine but unauthorised* signatures. But there is no conceivable principle which could elevate a genuine but *unauthorised* signature above a *false* signature. Yet Lord Loreburn would allow *Turquand* to transmute an unauthorised signature into an authorised signature, but would *not* allow *Turquand* to transmute a false signature into a genuine one. Lord Loreburn gave no reason for his truncation of the false signature from the aegis of *Turquand*. Perhaps the truncation was but a naked policy decision. Certainly his Lordship was not able to cite a single authority in support of his extraordinary distinction.

Turquand was examined yet again, by Bankes LJ, although not by either Scrutton LJ or Atkin LJ, in *A L Underwood Limited v Bank of Liverpool and Martins*.[17] There a sole director of a company had fraudulently endorsed to himself cheques which were made payable to

15 [1906] AC 439.
16 *Ruben*, p443. Emphasis added.
17 [1924] 1 KB 775

the company. Bankes LJ, after referring to *Turquand and Mahony*, rejected the applicability of the rule on the single ground that the bank had failed to investigate the suspicious circumstance that the director was paying into his private account cheques which belonged not to him but to his company. Referring to Lord Hatherlys speech in *Mahony*, Bankes LJ said:[18]

> Applying Lord Hatherly's language to the facts of this case I ask myself what are the ordinary inquiries which mercantile men would, in the course of their business, have made on presentation of these cheques for collection? ... The cheques were plainly, on the face of them, the property of the company. They were endorsed by Underwood as sole director, a fact which, instead of absolving the cashiers from inquiry, appears to me to demand the exercise of greater caution on their part, having regard to the fact that the cheques were being paid in to Underwood's private account. Many of the cheques were marked in a way which, of itself, ought to have put the cashiers on inquiry ...

With respect, Bankes LJ's exposition of the exception to the rule is unexceptionable. Although both Scrutton and Atkin LJJ discussed ostensible authority, neither of their Lordships referred to the rule in *Turquand*. The fact that Scrutton and Atkin LJJ were able to examine ostensible authority without any reference to *Turquand* shows that it is possible to separate the two principles.

It has been noted that *Ruben* effectively, albeit illogically, restricted the rule in *Turquand*. The rule was to suffer a second truncation in *Houghton and Company v Northard Lowe and Wills Limited*[19] (hereinafter *Houghton*). There the principle that the outsider may assume against the company that what the company could have properly done the latter had in fact properly done, was *qualified* by the observation that the possibility of authorisation by the company must *not* be of an 'exceptional'[20] kind.

There Sargant LJ (Atkin LJ concurring) said:[21]

> ... I know of no case in which an *ordinary* director, acting without authority in fact, has been held capable of binding a company by a contract with a third party, merely on the ground that that third party assumed that the director had been given authority by the board to make the contract ...

This fundamental attack on the rule rests on the rhetorical claim that otherwise companies would be 'at the mercy of any servant or agent who should purport to contract on their behalf ...'[22] To which the obvious reply is: companies, because they decide whom they employ, should quite properly be made to take the risk of their employees or their agents exceeding their authority whilst purporting to exercise that authority which it is within the competence of the companies to confer, and which purported authority it would be burdensome on third parties to investigate.

18 *Underwood*, p788.
19 [1927] 1 KB 246, affirmed by the House of Lords in [1928] AC 1.
20 *Houghton*, p267, per Sargant LJ, Atkin LJ concurring (pp 262-263)
21 *Houghton*, p267. Emphasis added.
22 *Houghton*, p266, per Sargant LJ. Emphasis added.

The erosion of *Turquand* continued when *Ruben* was purportedly followed, but was in fact *extended*, by the Court of Appeal in *Kreditbank Cassel GMBH v Schenkers*[23] (hereinafter *Kreditbank*). There a branch manager had purported to draw bills of exchange on behalf of his company. In fact he had not been given authority by his company to do so. No signature had been forged, as the manager's signature, although unauthorised, was quite genuine. The basis of the decision in *Ruben* was that the directors' signatures were false. Notwithstanding this patent distinguishing feature, the Court of Appeal held that the manager's unauthorised signature was a forgery within the meaning given to that word by Lord Loreburn in *Ruben*. Unless *Kreditbank* is defensible on some other ground, the decision in that case is tantamount to a decision to overrule *Turquand*. It is submitted that the Court did have an alternative ground for its decision. Although this alternative ground did not involve an overruling of *Turquand*, it nonetheless implied yet another restriction on the principle in that case. The alternative ground was expressed by Scrutton LJ thus:[24]

> The second matter which I think binds me is this. In *Houghton & Co v Northard Lowe & Wills*, which in many of its details is very similar to this, two judgments in effect were given in the Court of Appeal. Bankes LJ dealt with the question on the particular facts and declined to express any further opinion, but Sargant LJ, in whose judgment Atkin LJ concurred, took a further point. He there said that although there is a power of delegation contained in the articles of association, and although a person dealing with a company is deemed to know it, he cannot be heard to say: I am deemed to have known of the power to delegate and I acted upon it, unless it is proved that he had knowledge of the existence of the power. *I hope it is not disrespectful to express the wish that Sargant LJ*, who is thoroughly conversant with this branch of the law, *had explained* to those not equally familiar with it, *how this fits in with the doctrine enunciated in a line of cases, of which Mahony v East Holyford Mining Co is an instance, that a person is deemed to know of the company's articles of association* . . .

As Scrutton LJ himself acknowledged, this particular line of reasoning of Sargant LJ in *Houghton*, which Scrutton LJ felt constrained to follow, was, in so far as it required the outsider to prove that he had actual knowledge of the companys competence to give the requisite authorisation as a condition precedent to his right to assume that the authorisation had been given, quite inconsistent with an unbroken line of preceding authorities, including the House of Lords' decision in *Mahony*. Nonetheless, in following this freshly discovered requirement, Scrutton LJ in *Kreditbank* was able to offer an alternative ground for decision which, although yet further restricting *Turquand*, would at least not require the overruling of the latter, as would have been required by that other line of reasoning in *Kreditbank* which brought a genuine but unauthorised signature within the forgery exception in *Ruben*.

It is submitted that neither of the two alternative grounds for decision in *Kreditbank* was justified. A simple reason, based on the suspicion raised by the branch manager making his company become, in effect, his guarantor, and on the fact that the outsider had failed to investigate

23 [1927] 1 KB 826.
24 *Kreditbank*, pp 840-841. Emphasis added.

this suspicious circumstance, would have sufficed as the sole and unexceptionable ground for decision. Indeed the possibility of relying on this simple ground was mentioned by Scrutton LJ when he said:[25]

> . . . This case having been tried as a short cause and the only evidence being upon affidavit, Mr Pritt did not go into the question of notice, and I think Wright J rather indicated that he could not, *otherwise I should have thought the transaction was so unusual as to put the seller and the bank upon inquiry* how it came about that this odd guarantee was given in fact by a person named Clarke, who appeared to be the same person as was being guaranteed. This point was not taken, and I do not rest my judgment upon it, *although if it had been taken I think that a good deal might have been said for it.*

If *Kreditbank* amounted to an erosion of the rule, the decision of Clauson J in *South London Greyhound Racecourses Limited v Wake*,[26] if sustained, would efface the rule altogether. There the *managing director*[27] and the secretary of a company had, without authorisation from the board of directors (authorisation being required by the relevant article), purported to issue a share certificate for 2,000 shares to the outsider. Clauson J held that the company was not bound by the issue of this putative share certificate. His Lordship based his decision on two grounds. First, the outsider did not know about the relevant article, and he therefore could not be heard to say that he had relied upon it.[28] With regard to this first ground, Clauson J would at least have had the shaky support of one line of reasoning in *Houghton* and *Kreditbank*. However, as his second ground, Clauson J purported to follow *Ruben*, holding that the mere unauthorised use of the company seal, notwithstanding the fact that the purportedly authenticating signatures were genuine, made the document a forgery, thus removing it from the ambit of *Turquand*.[29] If this second line of reasoning is correct, then Turquand would have been wrongly decided. However, as Clauson J did not have the authority to overrule *Turquand* and *Mahony*, it is submitted that his Lordship's second line of reasoning must be rejected as totally unsound. Moreover, Clauson J could have decided in the company's favour on the straightforward basis that the outsider had reason to investigate the authenticity of a share certificate signed by a managing director of one company who was, through the issue of the certificate, obtaining a stay of service of a writ directed against another company of which the managing director of the first-mentioned company was also[30] a director. That *Turquand* is not accessible to an outsider with actual or constructive notice of the lack of authorisation was reiterated by the Privy Council in *EBM Co Ltd v Dominion Bank*.[31] There it was held that it was 'extraordinary'[32] for a bank (the outsider) not to investigate the authority of directors purporting to charge their companys bonds to secure their private indebtedness to the bank.

25 *Kreditbank*, p841. Emphasis added.
26 [1931] 1 Ch 496.
27 *Wake*, p497.
28 *Wake*, p508.
29 *Wake*, pp 509-510.
30 *Wake*, pp 497-498.
31 [1937] 3 All ER 555, 569.
32 *Ibid.*

Eventually, in the Court of Appeal decision of *Uxbridge Permanent Benefit Building Society v Pickard*,[33] Sir Wilfrid Greene MR expressly distinguished the rule in *Turquand* from the general principle of ostensible authority, observing:[34]

> ... In the case of limited companies *special rules* came into operation. In the case of a limited company the actual authority of an agent is of necessity limited by the constituent documents under which the company has its existence and from which it derives its power, which a person dealing with the company is assumed to know; but the internal management and everyday internal administration of the company is a thing which an outsider cannot be expected to know by the light of nature or by inspecting some file as he can with public documents like memoranda and articles of association. In order to ascertain things of that kind he would have to make detailed inquiries inside the company's office. It is quite obvious that the business of limited companies could never be carried on if everybody dealing with a company was at his peril bound to ascertain whether the internal administration of the company had been regularly conducted. The fact that forgeries do not fall within this doctrine is *not based on the law of principal and agent* or any analogy therewith ...

In short, while Sir Wilfried Greene was constrained to accept that *Ruben* excluded false signatures from the scope of *Turquand*, his Lordship was *not* likewise constrained to exclude false signatures from the quite different principle of ostensible authority.

In 1946, the House of Lords in *Morris v Kanssen and Others*[35] authoritatively propounded the obvious proposition that *Turquand* could not be invoked by a person who was *not* an outsider. There it was held that a de facto director of a company could not rely on the rule against his own company, Lord Simonds (the other law lords concurring) stating:[36]

> ... His duty as a director is to know; his interest, when he invokes the rule, is to disclaim knowledge. Such a conflict can be resolved in only one way.

In 1964 the Court of Appeal decided the case of *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd and Another*[37] (hereinafter *Freeman*). Was *Freeman* a milestone or a gravestone for *Turquand*? It will be argued that, at least, it was not a gravestone. In *Freeman*, a de facto managing director had purported to engage a firm of architects to apply for planning permission to develop an estate owned by the company and to do related work. Because the de facto managing director had no authority to engage the architects, the company refused to pay the architects for their work. Since the articles authorised the appointment of a managing director, and since there were no suspicious circumstances to foreclose the outsiders reliance on the presumed regularity of the companys internal management, the Court could, and should, have applied *Turquand* to estop the company from asserting the de facto managing director's want of authority. However, the Court chose to uphold the architects' claim on the basis that the board of directors had

33 [1939] 2 KB 248.
34 *Uxbridge*, p257. Emphasis added.
35 [1946] AC 459.
36 *Kanssen*, p476.
37 [1964] 2 QB 480.

represented the de facto managing director to be the company's de jure managing director, namely, that the company was estopped because its board of directors had clothed one of its members with the ostensible status of managing director. The following observation of Diplock LJ makes it clear that the case was decided on the principle of ostensible authority:[38]

> ... We are concerned in the present case with the authority of *an agent* to create contractual rights and liabilities between his *principal* and a *third party* whom I will call 'the contractor'.

There is no doubt, given the Court's finding of a representation having been made by the company's board of directors, that ostensible authority constituted a *sufficient* basis for its decision. But the question may still be raised: was the board's *representation* a *necessary* basis for the success of the architects' claim? This question was not submitted to the Court for determination. Therefore, it cannot be concluded that *Freeman* decided that, on the facts of the case, the rule in *Turquand* could not have been applied. Indeed, if the Court had been *unable* to find the relevant representation, it might have had to rest its decision in favour of the architects on the rule in *Turquand*.

It is submitted that because ostensible authority requires a representation by the company, whereas *Turquand* does not, in matters comprehended by *Turquand*, the outsider will never need to invoke the principle of ostensible authority.

In Australia, *Turquand*, as a principle independent of ostensible authority, received an ephemeral triumph in *Albert Gardens (Manly) Pty Limited v Mercantile Credits Limited and Others*.[39] There, certain persons who did not possess the requisite share qualifications[40] were purportedly appointed directors by the company in general meeting. Their appointments were consequently invalid. Nonetheless these persons purported to issue securities in the name of the company. The High Court decided that the relevant article as well as the relevant statutory provision[41] was each able to validate these acts of the putative directors. However, and as an alternative ground for decision, Barwick CJ (the other members of the Court being in agreement with his Honour) held that the acts of the putative directors were valid by reason of the rule in *Turquand*, saying:[42]

> But, in addition, having regard to the facts I have stated, the respondent was entitled to assume that acts had been taken by the appellant to have duly appointed the persons who signed the securities as directors on behalf of the appellant. See ... *Royal British Bank v Turquand*. The principle of that case is apt to cover the circumstances of the present case.

It was a decision significantly supportive of *Turquand* in that the Court made no reference to the principle of ostensible authority which had assumed such exclusive importance in *Freeman*.

38 *Freeman*, p502. Emphasis added.
39 (1973) 131 CLR 60.
40 See now *Companies Code* 1981, ss 221 and 224(2).
41 See now *Companies Code* 1981, s224(1).
42 *Albert Gardens*, p65.

However, in *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Company Pty Ltd*[43] (hereinafter *Crabtree-Vickers*), the High Court saw fit to resolve an issue, which should have attracted discussion of *Turquand*, without any mention of the latter. In *Crabtree-Vickers* the managing director of a company had ostensible, but not actual, authority to make the purchase of the printing machinery in question. Although the Court ignored *Turquand*, it is clear that the managing director *could* have been given the requisite authority by the board of directors, and therefore, in the *absence* of circumstances calling for the outsider's investigation (which was the situation in the case), the case *should* have been a classic illustration of the outsider being entitled to assume against the company that the requisite authority had in fact been given—not only to the managing director himself but *also*, by identical reasoning, to the employee who ultimately made the purported purchase. Unfortunately, the Court opted to travel a more tortuous route. It held that although the company was estopped from asserting the managing director's lack of authority to make the purchase, the company was *not*, additionally, estopped from asserting that the managing director was not authorised to *represent* (hold out) an employee of the company as having actual authority where the employee in fact had not been given such authority.[44] The Court's reasoning is not free from difficulty because, since the company was deemed to have represented to the outsider that its managing director possessed *all* the usual powers of a chief executive, namely, *including* the power to make representations on behalf of the company, *and* since the managing director *had* represented that the relevant employee *did* have the authority to make the purchase, the company should have been estopped from asserting the relevant employee's lack of authority. Thus, even applying the Court's preferred principle—ostensible authority as distinct from an independent *Turquand*—its reasoning remains somewhat self-contradictory. Perhaps *Crabtree-Vickers*, not unlike *Ruben*, was one of those conceptually disruptive instances of a court feeling impelled to make a naked policy decision. The Court's attempt[45] to distinguish between the actual authority usually possessed by a managing director and the equivalent ostensible authority possessed by the managing director in the case before it is a repudiation of the principle of ostensible authority, since it is accepted that the function of the latter is precisely to *prevent* the company from asserting that its managing director did not have the *actual* authority usually possessed by a managing director. This difficulty in the Court's reasoning is distinct from the other difficulty created by it when it chose to eschew *Turquand*. An outsider receiving the order form of the company, purportedly signed on behalf of its managing director, as happened in *Crabtree-Vickers*, would have found no reason to suspect that the purported signature was unauthorised, and, under *Turquand*, should have been held entitled to assume that what the company could have authorised, it had in fact authorised. In summary *Crabtree-Vickers* appears to have undermined not only the rule in *Turquand*, but also the principle of ostensible authority.

43 (1975) 133 CLR 72.
44 *Crabtree-Vickers*, p80.
45 *Crabtree-Vickers*, pp 79-80.

Turquand seems to have survived *Freeman* in England because the Court of *Appeal in Rolled Steel Products (Holdings) Ltd v British Steel Corporation and Others*[46] still found it relevant to state that notice by the outsider of a lack of authority took the case outside the protection of *Turquand*.

Finally, apart from ss 68A-68D of the *Companies Code* 1981, did the rule survive, as an independent principle, the decision of the High Court in *Northside Developments Pty Ltd v Registrar-General*[47] (hereinafter *Northside*)? There a director of a company and its putative secretary had purported to affix the company seal to a memorandum of mortgage over its land in favour of an outsider (a bank) for a loan made to other companies, which the director controlled, in the businesses of which the first-mentioned company had neither interest nor connection. The affixation of the seal was made without authority, and consequently the purported authentication of the seal by the respective signatures of the director and the putative secretary was made without authority. The memorandum of mortgage was registered and, following default, the outsider, as mortgagee, sold the company's land to a purchaser whose subsequent registration of the memorandum of transfer operated to extinguish the company's title to the land. Whereupon the company sued the Registrar-General for damages under the *Real Property Act* 1900 (NSW), s127. In order to show that the Registrar-General was not justified in registering the original memorandum of mortgage in favour of the outsider (the bank) the company had to prove that the memorandum of mortgage had not been executed by, and so was not binding on, it. The Registrar-General relied on *Turquand* to support his argument that the company was estopped from disowning its putative memorandum of mortgage. All the justices were agreed that, in any event, the outsider could not have relied on *Turquand* because it had failed to inquire into the transaction when it was obvious that the loan was of no benefit to the company and that the latter had not received any of the money comprised in the loan. However, a number of observations made by their Honours would seem to deny to *Turquand* the status of a principle capable of operating outside the scope of ostensible authority.

Mason CJ said:[48]

> This Court has accepted that the judgments in *Freeman & Lockyer* correctly state the relevant principles of law: *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72 at 78. The judgments in *Freeman & Lockyer*, especially that of Diplock LJ, indicate that the rule in *Turquand's Case* in its application to the acts of a company undertaken through its agents is an exemplification of the law of principal and agent and that the ambit of the operation of the rule is to be ascertained by reference to the actual or ostensible authority of the agent who purports to act on behalf of the company . . .

Having made this remark, his Honour also said:[49]

46 [1986] 1 Ch 246.
47 (1990) 64 ALJR 427.
48 *Northside*, p431.
49 *Northside*, p434.

> The result would have been different if Barclays[50] had had a legitimate basis for thinking that the appellant[51] had an interest in the borrowing companies and that they were associated with the appellant, one having an interest in the other ...

Mason CJ's inference seems to be that, if only the aforesaid legitimate basis had existed, there would then have been no need, in order to estop the company, to show that it had, additionally, *represented* to the outsider that the requisite authorisation had been given. It follows that, at least insofar as Mason CJ is concerned, it is possible for *Turquand* to apply even in the *absence* of any relevant representation by the company in situations where the use of its seal is unauthorised. Careful not to raise a conflict with *Freeman*, Mason CJ said that the latter case 'says nothing about instruments executed under the *common seal* of a company'.[52]

However, a majority of the justices (Brennan, Dawson and Toohey JJ) refused to give *Turquand* an existence independent of ostensible authority.

Brennan J said:[53]

> ... As between a company and a party who deals with it, a company is bound by an act purporting to bind it not only when the person who does the act has the company's authority to bind it by that act but also when that person is held out by the company as having that authority and the party dealing with the company relies on that person's ostensible authority. Conversely, the company is not bound when the person who does the act has neither actual nor ostensible authority to bind the company by doing the act which the other party asserts to be binding on the company ...

Even more fundamentally, in language which obliterated *Turquand*, Dawson J, with whose judgment Toohey J agreed,[54] pronounced:[55]

> In other words, the indoor management rule only has scope for operation if it can be established *independently* that the person purporting to represent the company had *actual* or *ostensible* authority to enter into the transaction. The rule is thus *dependent* upon the operation of normal agency principles; it operates only where on ordinary principles the person purporting to act on behalf of the company is acting within the scope of his actual or ostensible authority.

With respect, even *Freeman* did not take this step. Nothing in *Freeman* says that *Turquand* must be rejected as an independent principle, or that the latter has to operate otiosely as a mere example of ostensible authority.

Gaudron J specifically distinguished between *'estoppel proper'*[56] and the rule in *Turquand*. Her Honour expressed the view that *Turquand* 'ought now to be seen as grounded in notions *akin* to those which underpin the law of *estoppel*'.[57]

50 The outsider (the bank).
51 The company against which Turquand was purportedly invoked.
52 *Northside*, p432. Emphasis added.
53 *Northside*, p437.
54 *Northside*, p453.
55 *Northside*, p449. Emphasis added.
56 *Northside*, p456. Emphasis added.
57 *Northside*, p455. Emphasis added.

In summarising *Northside*, it is submitted that whereas Mason CJ (but only where the company seal has been used) and Gaudron J seem supportive of *Turquand* being able to continue as a special principle of estoppel in which the company may be estopped without the need for it to have made a representation to the outsider, a bare majority of the Court (Brennan, Dawson and Toohey JJ) categorically reject the possibility that *Turquand* may have any form of existence except as a mere aspect of ostensible authority.

The Statutory Position

It is ironic that although the High Court has extinguished *Turquand's* common law existence as an independent principle the *Companies Code* 1981, soon to be followed by the *Corporations Act* 1989 (Cth), has largely restored the rule to the scope and stature it had enjoyed in its heyday under *Mahony*. The remorseless erosion of the rule, which began with *Ruben* in 1906, and which ended with its erasure by *Northside* in 1990, has been reversed by statute.

With respect to the *Companies Code* 1981, s68A(1) entitles a person 'having dealings with' a company, who does not have either actual or constructive notice to the contrary, to make certain assumptions against the company, which the latter is not permitted to deny. These assumptions are enumerated in s68A(3). Section 68A(3)(c) reproduces the common law principle of ostensible authority, without modification. Section 68A(3)(b) extends estoppel by representation to include persons described (ie represented) by the company, in its returns lodged with the Corporate Affairs Commission, as a director, the principal executive officer or a secretary of the company.

Regarding the assumption that the company seal has been authoritatively affixed, s68A(3)(e), a little curiously, restricts this right of assumption to purported attestation by either two ostensible directors *or* one ostensible director and one ostensible secretary. This statutory class of ostensibly authorised persons with respect to the attestation of the company seal appears to be narrower than that described in the original formulation of the rule by Jervis CJ in *Turquand*.

Section 68(3)(f) appears to permit the assumption that all (validly appointed) employees and agents of the company (no matter how junior in rank) have such authority as they claim to have, because such persons are deemed to perform properly or to have performed properly their duties to the company (a clear statutory endorsement of Lord Hatherly's speech in *Mahony*).

In view of the comprehensive sweep of s68A(3)(f), it seems that the provision in s68A(3)(a) may prove to be redundant, since the latter deems that, at all relevant times, the memorandum and articles of the company have been complied with. Indeed, s68A(3)(f), namely, the provision that employees and agents of the company are deemed incapable of doing anything wrong against the company, makes it difficult to find scope for the ostensible authority assumptions. An employee or agent of the company, if deemed always to be properly performing his duties to

the company, will, *ex hypothesi*, not in any circumstances (falsely) represent or (falsely) hold out to an outsider that a person who is not an officer or agent of the company is in fact such an officer or agent. If such an employee or agent does, as a matter of fact, hold out another person as an officer or agent of the company when such is not the case, then, because the representor is deemed to be properly performing his duty to the company, the latter will be estopped from denying the truth of the representation so made. If so, then the separate provision for the ostensible authority assumptions [s68A(3)(b) and s68A(3)(c)] would appear to be redundant. Equally, the comprehensiveness of s68A(3)(f) seems to render s68D otiose. Section 68D provides that, notwithstanding the fraud of, or forgery of the company seal by, the persons referred to in s68A(3)(b), (c), (d), (e) and (f), the person dealing with the company is, in the absence of actual knowledge to the contrary, entitled to make the assumptions in s68A(3). Section 68D is otiose because of the presumed propriety created by s68(A)(3)(f), and because s68A(4) is not restricted by s68D, as the latter is not expressed to operate notwithstanding s68A(4).

In fact, the proper performance of duty assumption [s68A(3)(f)] when combined with the exception concerning actual or constructive notice to the contrary [s68A(4)], would, even without the other paragraphs in s68A(3), completely express the original form of *Turquand* as stated in *Mahony*.

It should be noted that, with respect to the statutory provision for constructive notice, this provision has been purportedly curtailed in *Lyford & Another v Media Portfolio Ltd v Others*.[58] There Nicholson J, in the Supreme Court of Western Australia, held that the reference, in s68A(4)(b) of the Code, to what a person dealing with the company 'ought to know' by reason of 'his connection or relationship with the company' was *not* apt to include knowledge which that person ought to have acquired merely 'because something *in the particular transaction* would put a reasonable person on enquiry.[59] His Honour said:[60]

> . . . In my view, these words[61] require reference to the facts which show the nature of that connection or relationship and an assessment of whether that connection or relationship was such as ought to have produced the state of knowledge referred to in para(b).[62]

It is submitted that nothing in the words 'connection' and 'relationship' warrants the exclusion therefrom of connections and relationships formed by, or arising from, the particular transaction in respect of which the company is sought to be estopped. However, if Nicholson J is correct, then the common law ambit of constructive notice is wider than that in

58 (1989) 7 ACLC 271.
59 *Lyford*, p281. Emphasis added.
60 *Lyford*, p281.
61 'connection or relationship with the company'.
62 s68A(4)(b) provides:
Notwithstanding sub-section (1), a person is not entitled to make an assumption referred to in sub-section (3) in relation to dealings with a company if—
(a) . . .
(b) his connection or relationship with the company is such that he ought to know that the matter that, but for this sub-section, he would be entitled to assume is not correct, . . .

s68A(4)(b). Nonetheless, it is suggested that Nicholson J's curtailment of the statutory constructive notice should not be followed.

Furthermore, s68C provides that, except for registrable or registered charges, an outsider is *not* to be deemed to have notice ('knowledge') of any company documents (including the memorandum and articles of association) by reason only of their lodgment with the Corporate Affairs Commission or its Commissioner.

Finally, in *Australian Capital Television Pty Ltd v Minister for Transport and Communications and Others*,[63] Gummow J held that whereas s68A(1) was confined[64] to benefit persons 'having dealings with a company', the common law version of *Turquand* was not likewise confined. Disputatiously, his Honour said:[65]

> . . . Assume A sues B for damages in tort for inducing company X to break its contract with A, and B denies formation of the contract on the ground of an irregularity in the internal management of company X. If, as seems to be so, s68A of the Code does not apply, may not A rely on the rule in *Turquand's* case to meet the allegation by B?

With respect to his Honour, the answer to his question should be 'No'. The authorities, without exception, show that the rule may be relied upon only *against* the company. It is a rule of estoppel—albeit one not requiring inducement by representation. Furthermore, Gummow J's opinion is inconsistent with the subsequent, unanimous view of the High Court in *Northside* that *Turquand* is a principle of estoppel *against* the company. Indeed, Gummow J travelled beyond his own illustration. His Honour held that the company may itself[66] rely on *Turquand*, namely, the company may preclude an outsider from asserting that the company had not followed appropriate legal procedure. With respect, Gummow J inverted the principle in *Turquand*.

63 (1989) 86 ALR 119.
64 *Australian Capital Television*, p156.
65 *Australian Capital Television*, p157.
66 Australian Capital Television, pp 157-158.