4

Corporate Torts in England: Limiting Liability by Capacity

JOSHUA GETZLER

I. The Problem of Corporate Torts

Where does legal responsibility lie where a corporation commits a tort through its agents? Clearly the agents themselves may be liable, whether directors giving orders, or servants or employees, or maybe contractors following those orders. Moreover, the corporate person may be liable for non-authorised agent or employee conduct that yet lies within the scope of the company's activities. John Salmond, in his seminal torts study of 1907, stated the basic principle as follows:

> Since a corporation is incapable of acting either rightfully or wrongfully in its proper person, the torts which the law attributes to it are in reality those of its agents and servants by whom it acts and fulfils its functions … [T]his vicarious liability of corporations is determined by the same rules which govern the liability of any other principal for the torts of his agents and servants.[1]

A common defence to this general vicarious liability is that the corporate person would be unlikely to have authorised operationally a tortious course of conduct, so that vicarious liability of a director for another corporate servant may be possible, but no such liability for the corporate person itself.[2] This is to drive a wedge between attribution based on an agency concept, whereby the corporate servant's acts, duly authorised, are the primary acts of the company, and a vicarious or strict concept, whereby responsibility is ascribed to the company as a secondary liability based on an ethic or a policy of responsibility.[3] The defence based on absence of primary authority (actually, a demurrer pleading want of cause) was used extensively in the nineteenth and early

[1] JW Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries*, 1st edn (London, Stevens and Haynes, 1907) 55.

[2] See, eg, *Daniel v Metropolitan Railway Company* (1871) LR 5 HL 45; M Lobban, 'Daniel v Metropolitan Railway Company (1871)' in P Mitchell and C Mitchell (eds), *Landmark Cases in the Law of Tort* (Oxford, Hart Publishing, 2010) 95; RW Kostal, *Law and English Railway Capitalism 1825–1875* (Oxford, Oxford University Press, 1994) 254.

[3] See *Northern Land Council v Quall* [2020] HCA 33, (2020) 383 ALR 378 [81]–[87] (Nettle and Edelman JJ).

twentieth centuries to deny the corporate liability of the Crown for public officials' wrongdoing, leaving tort victims to shallow pockets.[4] The courts flirted with this theory for private corporations also, but eventually rejected it as a dogma-blocking liability.[5] Today, the test for responsibility has moved from voluntaristic agency authorisation to a strict vicarious liability based on more flexible concepts of 'close connection' and 'control',[6] which can be used not only within the corporation to establish group liability for agent action, but also across corporate groups to establish parent liability for subsidiaries.[7]

Even with the acceptance of corporate vicarious liability for agents' conduct, there were still historical hurdles to overcome before tort victims could meaningfully recover from the corporate assets. The corporation may have organised itself to be cash poor, precisely to insulate itself from *ex lege* liabilities.[8] Or the corporation might claim a constitutional disability preventing it from committing the actions raising tort liability in the first place. Up to the late nineteenth century, jurists gave credibility to the theory that a corporation could not be made liable for either torts committed or contracts entered into by agents or servants that were ultra vires, or actions committed in the course of any business or undertaking that went beyond the limits set by law for its undertakings.[9]

A prime solution to the first problem – the capital maintenance/concealment problem – is veil piercing in order to reach into allied corporate asset pools, directors' fortunes or even shareholders' fortunes, in order to satisfy judgment debts.[10] But in the absence of fraud, such veil piercing is difficult to achieve. This is a fascinating problem but one that must be discussed on a different occasion. The solution to the second issue

[4] J McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge, Cambridge University Press, 2012) 204.

[5] Salmond (n 1) 55–58.

[6] Recent discussion in the UK Supreme Court: *Barclays Bank Plc v Various Claimants* [2020] UKSC 13, [2020] AC 973; *Various Claimants v WM Morrison Supermarkets plc* [2020] UKSC 12, [2020] AC 989; in the High Court of Australia: *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1, (2022) 398 ALR 404; see further A Gray, *Vicarious Liability: Critique and Reform* (Oxford, Hart Publishing, 2021); C Beuermann, *Reconceptualising Strict Liability for the Tort of Another* (Cambridge, Cambridge University Press, 2019).

[7] *NatWest Markets plc and Mercuria Energy Europe Trading Limited v Bilta* (UK) Ltd [2021] EWCA Civ 680; *Okpabi v Royal Dutch Shell* [2021] UKSC 3, [2021] 1 WLR 1294; *Lungowe v Vedanta Resources plc* [2019] UKSC 20, [2020] AC 1045. The best modern treatment of corporate attribution of acts in tort is now R Leow, *Corporate Attribution in Private Law* (Oxford, Hart Publishing, 2022) 89–120.

[8] GP Miller, 'Das Kapital: Solvency Regulation of the American Business Enterprise', Coase-Sandor Institute for Law & Economics Working Paper No 32 (1995); LM LoPucki, 'The Death of Liability' (1996–97) 106 *Yale Law Journal* 1.

[9] Salmond (n 1) 56–58. Salmond affirmed the ultra vires rule in the next two editions of *The Law of Torts* (2nd edn, 1910; 3rd edn, 1912), citing for support JF Clerk and WHB Lindsell, *Clerk and Lindsell on Torts*, 5th edn (London, Sweet & Maxwell, 1909) 56; NL Lindley, *Lindley on Companies*, 6th edn (London, Sweet & Maxwell, 1902) i, 257–59; HSG Halsbury, *Halsbury's Laws of England*, 1st edn (London, Butterworths, 1907–) viii, s 854.

[10] See the survey articles by T Kuntz, 'Asset Partitioning, Limited Liability and Veil Piercing – Review Essay on Bainbridge/Henderson, Limited Liability' (2018) 19 *European Business Organization Law Review* 439; CH Tan, JY Wang and C Hofmann, 'Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives' (2019) 16 *Berkeley Business Law Journal* 140; *Prest v Petrodel Resources Ltd & Ors* [2013] UKSC 34, [2013] 3 WLR 1; *Stone & Rolls Ltd v Moore Stephens (a firm)* [2009] UKHL 39, [2009] 1 AC 1391; *Hurstwood Properties (A) Ltd v Rossendale Borough Council* [2021] UKSC 16, [2022] AC 690.

of disability or want of power or capacity is to read down or eliminate the doctrine of ultra vires placing restrictions on the plenary capacities of corporations. A specific strategy is to deny that the ultra vires incapacity should ever apply to authorised but tortious and ultra vires conduct; the corporation cannot exempt itself from responsibility for its actions by hiding behind a disregard for the limits of its powers. Such a position was evoked by the United States Supreme Court in an influential decision of 1885:

> The argument is unsound that whatever is done by a corporation in excess of the corporate powers as defined by its charter is as though it was not done at all … The truth is that with the great increase in corporations in very recent times and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in the corporate name and by corporate officers who were competent to exercise all the corporate powers.[11]

This argument seems to rest on a model of reliance by the community on the ostensible liability and moral responsibility of enterprises authorised by law to trade as entities. But it still begs the question – how can acts under a legally non-existent power be ascribed to a corporate entity? Observing the trend to enlarged corporate liability in 1913, Salmond abandoned his earlier position that ultra vires torts were impossible, and instead offered the argument that imposition of liability encompassed a dual analytical and a policy judgement: the company can be seen to be liable not for an act but for a default, a failure to have its servants remain within powers and perform agency tasks with due diligence to a required standard of care. The stated vires of a corporation cannot excuse culpable failures to monitor one's agents and ensure they reach a due communal standard.[12]

This artful argument points the way to a broader policy solution, which is to shave back the general operation of the ultra vires doctrine as a restraint on capacity and responsibility in all areas of private enterprise. Strikingly the latter read-down was achieved in the past 50 years in all major common law jurisdictions; but the reasons given for squeezing capacity restrictions from each system were quite varied, sometimes emphasising contractual reliance, sometimes insolvency protections, sometimes tort and regulatory convenience. This is a topic for a larger study.[13] This chapter examines the (mainly English) courts' handling of the problem of ultra vires solely in relation to the corporate person's liability in tort.

II. Why Limited Liability?

We may continue with the historical justifications commonly given for limited liability regimes for corporations, which screen the depth of recourse possible for breach

[11] *Salt Lake City v Hollister* (1885) 118 US 256, 260.

[12] JW Salmond, *Jurisprudence*, 4th edn (London, Stevens and Haynes, 1913) 287, 310; and see JW Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries*, 4th edn (London, Sweet & Maxwell, 1916) 60–65. For a comparable doctrine in trusts law, see discussion in J Getzler, 'Laying the Axe to the Root of the Tree? Shielding a Co-trustee from Liability' in P Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Oxford, Hart Publishing, 2018) 183.

[13] Note forthcoming dissertation on the full gamut of 19th- and 20th-century ultra vires law by William Moppett of Oxford University.

of contract or tortious duties.[14] Begin with contract. A company that limits its liability to the level of its subscribed or guaranteed capital through its statutory registered incorporation might claim to give notice to voluntary creditors ahead of their dealing with the company, so that they may build the legal limits of counterparty liability into their contractual assumption of risk. In other words, the asset partitions drawn by law between the internal capital of the company on the one hand, and the outside or non-corporate patrimonies of the company's agents and share owners on the other, is justified by the fair warning given to all who deal with the company, a kind of default partial-exemption clause constructed by statute. Pragmatic grounds are supplied as to why the responsibility-evading tendencies of limited liability may be tolerated: it permits ready vesting of capital in large-scale enterprises with a useful separation of ownership and control, allowing depersonalised professional management and heightened spreading of risk through joint stock trading, and protecting the arm's-length investors from risks that they cannot easily calculate or control, but without unduly shutting out creditors from recourse to enterprise assets.[15]

III. Accommodating Tort within Asset-Partitioning Models

The conventional notice justifications for asset partitioning are strained to destruction in the face of tort liability. Tort victims of corporate behaviour cannot credibly be said to agree to the exemption from damages created by the limited liability regime. Limitations of liability seem especially unfair where we are dealing with 'stranger' torts distant from voluntary transactional behaviour – though some law-and-economics theorists have bravely attempted to make just such claims, suggesting that we can each buy insurance or take added precautions to account for the non-negotiated corporate risks we all face, such that risks imposed by corporations on strangers are not really unbargained externalities. Arguably, the better justice claim goes the other way. If a tortfeasor happens to be a collective entity pursuing profits for its shareholders who have ample assets outside the corporate boundary, then shareholders' responsibility for the miscreant conduct of their collective agent might demand that those outside assets enjoy no immunity from attachment for tort damages, once the inside assets have been used up. The shareholders' culpability attaches to them personally on the ethical grounds that they failed to monitor the miscreant company that earned them profits. Such a double liability rule, binding shareholders, directors and servants for both their inside and outside assets, would give corporatised associations every incentive to avoid imposing external harm through the tort system. This is hardly a radical innovation, looking back into common law tradition; it is only to apply the partnership 'jingle' rule to corporate joint stock enterprise in the special case of torts harming involuntary creditors. Indeed, until the 1880s, lawyers and investors assumed that certain sensitive

[14] For one historian's view seeing limited liability as rent-seeking and evasion of responsibility, see P Johnson, *Making the Market: Victorian Origins of Corporate Capitalism* (Cambridge, Cambridge University Press, 2010).

[15] See further J Armour, G Hertig and H Kanda, 'Transactions with Creditors' in R Kraakman et al (eds), *The Anatomy of Corporate Law*, 3rd edn (Oxford, Oxford University Press, 2017) 109.

and high-trust forms of joint stock enterprise, such as banking and insurance, should follow a general partnership rule of full personal and solidary liability, precisely to ensure that shareholders would discipline directors and agents and curb externalities. The eventual abandonment of such solidary liability in the fiduciary financial sector was perhaps triggered by the mass insolvencies that followed the City of Glasgow Bank crash in 1878,[16] and the practical results of that relaxation of legal discipline today are not obviously salutary.[17]

The problem of tort victims of the corporation as involuntary or non-adjusting creditors was reformulated in the famous model of forward and reverse asset partitioning originally propounded by Henry Hansmann and Reinier Kraakman.[18] They argued that limited liability aimed at containing the liability of investors for the collective acts of the company, which they labelled affirmative or forward asset partitioning, was a useful but not essential element for certain forms of depersonalised joint stock activity. Partnership firms with solidary obligation and unlimited liability remained the dominant form across the nineteenth century; the subtleties of common law and equitable insolvency rules allowing contractual arrangements with creditors to create priority regimes affording sufficient protections to encourage commitment and lock-in of investment.[19] The limited liability company that arose in the mid- to late nineteenth century was rather to be explained by so-called defensive asset partitioning, dealing with the threat that agents and investors posed to the collective if they fell into debt outside the company's activities. Creditors might then be able to charge or acquire the individual debtor's share of a company capital and threaten to control or disintegrate the company stock; or, going even further, creditors of an individual agent or shareholder might be empowered to burrow deeper into solidary shares of the rest of the collective if some pooled liability could be established. Limited liability regimes locked the external creditors out of corporate capital, at least beyond the exchange value of the individual debtors' shares. The company and its membership could simply claim that an errant member's outside personal debts, such as gambling, could have nothing to do with the company's business, and hence no recourse against wider company assets should be permitted. However, such reverse or defensive asset partitioning cannot be arranged by contract but requires a statutory regime, constructing artificial legal persons to establish the necessary asset partitioning or shielding of corporate capital. Hansmann and Kraakman supplemented this model by making quite clear that forward asset partitioning should not rightly be applied to protect shareholders from the tort

[16] *Muir v City of Glasgow Bank* (1879) 4 App Cas 337; cf *Smith v Anderson* (1880) 15 Ch D 247.

[17] The leading modern study of the impact of limited liability banking is JD Turner, *Banking in Crisis: The Rise and Fall of British Banking Stability, 1800 to the Present* (Cambridge, Cambridge University Press, 2014).

[18] H Hansmann and R Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 *Yale Law Journal* 1879; and see also H Hansmann and R Kraakman, 'The Essential Role of Organizational Law' (2000) 110 *Yale Law Journal* 387, 431.

[19] Arguments teased out in J Getzler and M Macnair, 'The Firm as an Entity Before the Companies Acts' in P Brand, K Costello and WN Osborough (eds), *Adventures of the Law: Proceedings of the Sixteenth British Legal History Conference* (Dublin, Four Courts Press, 2005) 267; followed in H Hansmann, R Kraakman and R Squire, 'Law and the Rise of the Firm' (2006) 119 *Harvard Law Review* 1333; R Harris, 'The Private Origins of the Private Company: Britain 1862–1907' (2013) 33 *Oxford Journal of Legal Studies* 339; J Morley, 'The Common Law Corporation: The Power of the Trust in Anglo-American Business History' (2016) 116 *Columbia Law Review* 2145.

liabilities of their aggregate corporation. Such a direct tort liability would positively require owners and beneficiaries of a collective enterprise to constrain externalities imposed on involuntary creditors and so not make profits unfairly at the expense of others who had no say in it.[20]

IV. Ultra Vires as a Policing Device for Authorised Action

The basic legal logic evoked by Hansmann and Kraakman of protecting the corporation from its members' actions may have proved too successful. Defensive asset partitioning served a useful purpose in isolating blatantly non-corporate activities by shareholders or agents acting in their individual capacity. There was a decent argument that the inner corporate assets should be immunised from actions wholly outside company business, that is performed non-representatively without authority to bind the company. But we then have a serious problem – what if ostensibly corporate activities are authorised by the corporate hierarchy in pursuit of corporate goals and profits, but those self-same acts are formally defined to be outwith the company business by the terms of the empowering and constitutive corporate charter, statute or memorandum and articles of association? This might even yield the obnoxious managerial tactic of seeking corporate advantage *ex ante* by promoting dealings that may be disowned *ex post* if they get the corporation into loss or strife. Here we have the nub of the problem of ultra vires.

With the rise of trading and financial corporations after 1600, English courts found themselves constantly troubled by problems of corporate ultra vires or conduct beyond powers. The doctrine of ultra vires set a boundary, a constitutional limit, to the legal capacities and powers of associations, whether formed by common law, prerogative or statute. The boundary could be set expressly by prohibition: 'thou shalt not trade abroad'; or by implication from surrounding stipulations: for example, 'thou shalt trade in England' implies not trading abroad. A classic instance was the *Ashbury Railway* case of 1875, where the House of Lords held that overseas railway contracts fell outside the stated objects of a registered commercial company formed to pursue engineering projects only, and were therefore void notwithstanding a purported ratification by the shareholders. The policy reason given was that members old and new (and perhaps creditors) had predicated their dealings with the company based on its memorandum of association, and it would breach that protection to allow the company to ratify acts in breach of the memorandum.[21] *Ashbury* opened up a long debate concerning powers of

[20] Hansmann and Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (n 18); C Witting, 'Liability for Corporate Wrongs' (2009) 28 *University of Queensland Law Journal* 113; Harding, ch 2 of this volume; cf J Crowe, 'Does Control Make a Difference? The Moral Foundations of Shareholder Liability for Corporate Wrongs' (2012) 75 *Modern Law Review* 159, arguing that control must precede liability, rather than incentivising control as a response to liability.

[21] *Ashbury Railway Carriage and Iron Co v Riche* (1875) LR 7 HL 653 (*Ashbury*); *Riche v Ashbury Railway Carriage Co* (1874) LR 9 Exch 224 (*Riche v Ashbury*). The case arguably turned on the language of the specific incorporating statute; Lord Cairns in his leading speech held that since the 1862 Companies Act did not permit changes to the memorandum of association, ratification of acts in breach of the memorandum was excluded. In the later case of *Baroness Wenlock v River Dee Company* (1883) 36 Ch D 675, (1885) 10 AC 354, (1887) 19 QBD 155, Lord Blackburn, who would have found a valid ratification in *Ashbury* in any case,

ratification and *ex post* variation of memoranda of association, and the nature of third-party notice of limitations to powers. A second crucial case was *Sinclair v Brougham*,[22] decided just before the Great War, which examined how far proprietary tracing could be used to recover money paid under ultra vires dealings by a building society wrongly acting as a bank. Such cases used ultra vires to void associational activities and reverse the consequences of corporate acts. Another notorious case went the other way, ascribing added implied powers and capacities to a legal collectivity where the actors had assumed that no such powers existed. In the *Taff Vale* case of 1901, the House of Lords held that a registered trade union could as an entity commit torts through its members, and so could have its assets, including funds for mutual assistance, attached to meet its tort liabilities.[23]

Each of these great cases on group capacities caused furore and led to torrents of further litigation, to protracted bouts of statutory reform and, in the case of *Taff Vale*, to the foundation of the Parliamentary Labour Party. So the doctrine of ultra vires is important in English legal, economic and political history, well before the rise of judicial review of administrative action in the mid-twentieth century. Indeed, in 1877, shortly after *Ashbury* was decided, Mr Seward Brice, in his monumental treatise on corporate capacity, could write 'Perhaps indeed the Law of Corporations may be considered for most practical purposes as in reality only the application and development of the doctrine of *ultra vires*.'[24]

The doctrine of ultra vires was disruptive because it made for an infinite variation of legal statuses 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 *numerus clausus*, 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 actions. Similar problems applied to the legal categorisation of natural persons, with foreigners, married women, 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.[25]

The position today regarding the significance of 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,[26] denouncing the operation of the ultra vires doctrine as 'a protection to no-one and a trap to the unwary'.

indicated that he would have liked to confine the strong ultra vires rule in *Ashbury* to companies incorporated under the 1862 Act, but he accepted that the case stood for a wider rule.

[22] *Sinclair v Brougham* [1914] AC 398 (HL).

[23] *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426 (HL). But no implied power to raise funds for political purposes could be ascribed to trade unions, according to the House of Lords in *Amalgamated Society of Railway Servants v Osborne* [1910] AC 87.

[24] S Brice, *A Treatise on the Doctrine of Ultra Vires: Being an investigation of the principles which limit the capacities, powers, and liabilities of corporations, and more especially of joint stock companies*, 2nd edn (London, Stevens, 1877) x (first published 1874).

[25] Of course slavery, ancient and modern, massively complicated the law of persons, and revulsion against slavery from the 1860s onwards led to a denial that statuses had great impact on the operation of legal systems; Henry Maine's adage 'The movement of the progressive societies has hitherto been a movement from Status to Contract' (*Ancient Law*, 1861) can be read in this light. Perhaps today the fault line lies between the citizen and the foreigner/immigrant/refugee.

[26] *Communities Economic Development Fund v Canadian Pickles Corp* [1991] 3 SCR 388.

The remedy for the mischief of the voiding of corporate acts by the ultra vires doctrine has been to render the doctrine inoperative, or at least easily surmountable, and thus irrelevant. An American code ordains 'The validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.'[27]

Modern English law finally grasped this position following United Kingdom's entry into the European Union (EU), as EU law required harmonised company doctrine guaranteeing security for third-party transactions with corporate entities across the single market.[28] It now goes even further and insists that corporations be treated as natural persons, including capacity to enjoy human rights, notably including freedom to move jurisdiction; and even post-Brexit, the pull of EU doctrine on English praxis remains strong. But it is the native English materials that concern us here, as these are the structuring ideas for corporate tort liabilities.

V. The History of Ultra Vires

From the time of Sir Edward Coke to the later nineteenth century, the doctrine of ultra vires evolved as the nature of corporations changed. Early corporations tended to be franchised operations ~~pursing~~ public purposes, often with monopolist protection from competition, as with learned professions, trades, guilds and utilities with high sunk costs, long time horizons for realisation of profit and significant positive externalities.[29] The post-1830 corporate economy operated in more competitive factor and financial markets, and the corporation was handy to raise capital and assemble management and labour in pursuit of scale efficiencies, permitting vertical and horizontal alignments and enhanced maturity transformations.[30] The doctrine of ultra vires changed in tenor as corporations became pervasive economic players imposing heightened negative externalities on traders, customers, employees and the public, for example public and private nuisances, personal torts, market abuse.[31] Starting with the burst of railway capitalism

[27] American Law Institute, 'Model Business Corporation Act' (2006), s 3.04(a).

[28] European Communities Act 1972 (UK), s 9(1); RR Pennington, 'Reform of the Ultra Vires Rule' (1987) 8 *Company Law* 103; Department of Trade and Industry, *Reform of the Ultra Vires Rule: A DTI Consultative Document* (London, 1986), leading to partial abolition in 1989 and fuller abrogation by the Companies Act 2006 (UK), s 39: 'the validity of an act done by a company shall not be called into question on the ground of a lack of capacity by reason of anything in the company's constitution'. R Nolan draws conclusions from this story in 'Basic Corporate Plumbing' in J Armour and J Payne (eds), *Rationality in Company Law: Essays in Honour of DD Prentice* (Oxford, Hart Publishing, 2009) ch 9. For other jurisdictions: Canada Business Corporations Act 1985, s 15; Corporations Act 2001 (Cth), ss 124–125; Companies Act 1993 (NZ), ss 17–18.

[29] A Smith, 'Ultra Vires – A Problem of Sovereignty' (1946–47) 3 *Res Judicatae* 28; A Offer, *Understanding the Private–Public Divide: Markets, Governments, and Time Horizons* (Cambridge, Cambridge University Press, 2022).

[30] Some of the interplays of law, finance and corporate form are traced in J Getzler, 'The Role of Security over Future and Circulating Capital: Evidence from the British Economy circa 1850–1920' in J Getzler and J Payne (eds), *Company Charges: Spectrum and Beyond* (Oxford, Oxford University Press, 2006) 227.

[31] There was an outburst of interest in this subject in 1925–26, treated jurisprudentially rather than historically: EH Warren, 'Torts by Corporations in Ultra Vires Undertakings' (1925) 2 *Cambridge Law Journal* 180; AJ Harno, 'Privileges and Powers of a Corporation and the Doctrine of Ultra Vires' (1925) 35 *Yale Law Journal* 13; AL Goodhart, 'Corporate Liability in Tort and the Doctrine of Ultra Vires' (1926) 2 *Cambridge Law Journal* 350.

from the mid-1830s, and with the expansion of mining and heavy industry, the courts had to grapple with ascription of tort responsibilities to deep-pocketed artificial entities, where the individual responsibility of managers and owners was muted by forward asset partitioning. As limited liability and corporatisation took deeper hold at the close of the nineteenth century, spreading into the manufacturing and financial sectors, the depersonalisation of economic life intensified, and wrongful harms seemed to emanate from groups rather than individuals at all levels of the economy. David Ibbetson has suggested that this de-individualisation of fault wrought major changes to the basic liability principles in tort law, involving a shift from moral blame to social standards of care, such that corporate limited liability actually invited litigation seeking remedies against corporate assets.[32]

VI. Controlling Limited Liability

How much inhibition of liability could be tolerated in an industrialised, corporatised economy? Was it a viable position to hold that a corporation with limited legal capacity could not be held liable if its servants committed torts whilst pursuing company business yet outside the constituting purposes of the company? Distinguish the following cases. The shareholders through the corporate constitution may authorise a company to pursue acts through agents and employees that they might commit with a proper purpose but in a tortious manner. The issue is then whether the tortious performance of those acts takes them outside the authority of the agent. The law came to say there was corporate vicarious liability that was strict; the tortious quality of the act did not negate attribution of the authorised act to the company. But what if the tortious act, even if authorised by management, fell outside the corporation's formal limits of capacity? In that case the ultra vires rule dictated that those acts should be characterised not as corporate acts but as an independent enterprise, a frolic of the agent or employee outside the scope of corporate activity, and not to be ascribed to the corporation using the devices of attribution by authorisation or vicarious liability. Victims in these cases are in a difficult position, for they have no choice in being injured by an ultra vires and hence unauthorised individual tortfeasor. Should the victims nonetheless be shut out from suing the corporation with recourse to its assets, and be left to sue the directors, agents or employees as individuals who may have little fortune or insurance to meet judgment debts?

This painful ultra vires problem was long contained by the technique that originally evolved in public law and the law of trusts and partnerships, whereby individual actors attracting personal liability whilst promoting group purposes are given access to collective funds through indemnity and insurance to pay their judgment creditors. But such a solution was accidental and not to be relied upon in an emerging era of large-enterprise capitalism and mass torts. Instead of indemnity, the law searched for methods to attach the corporation itself. To understand this requires fresh historical perspectives.

[32] DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, Oxford University Press, 1999) 196–97.

VII. Defining Corporate Capacity – The Role of Charters (Prerogative Delegation) and Statutes (Legislative Creation)

We cannot investigate the historical operation of ultra vires in relation to tort without attending to the intellectual foundations of corporate capacity. The story begins with the *Case of Sutton's Hospital* (1612), where Coke found that corporations were emanations of the Crown, which was itself constituted as a 'corporation sole' by the common law, as a customary legal order defining all persons within jurisdiction.[33] In the seminal 1991 House of Lords case *Hazell v Hammersmith and Fulham London Borough Council*,[34] Lord Templeman stated that *Sutton's Hospital* case 'largely incomprehensible' to the modern reader but still good authority. Lord Templeman explained that the case

> has been accepted as 'express authority' that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself and to deal with its property as a natural person might deal with his own: *Riche v Ashbury Railway Carriage and Iron Co Ltd* (1874) LR 9 Ex 224, 263. The doctrine applies only to a corporation created by an exercise of the Royal Prerogative. A corporation created by or under a statute has no power except the powers granted expressly or by implication by that statute.[35]

The following doctrines emerged in the wake of *Sutton's Hospital*. 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 authorised by the Crown. Many of the early modern 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 appears to have relied on a presumption of lost grant from the Crown or even lost statute, as evidenced by long usage.[36] Many eighteenth- and nineteenth-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's Hospital*-style full capacity. In statutory corporations (or hybrids involving a statutory regulation of a chartered entity), the extent of capacity was always a question of parliamentary intent found through the normal process of statutory interpretation.[37] To incorporation by charter, statute or prescription

[33] *Case of Sutton's Hospital* (1612) 10 ~~*Coke Report*~~ 23a, 77 ER 960 (KB) ('before all the Judges of England') (*Sutton's Hospital*). The historical jurisprudence of early modern corporatism is explored in J Getzler, 'Frederic William Maitland – Trust and Corporation' (2016) 35 *University of Queensland Law Journal* 171; D Runciman and M Ryan (eds), *Maitland: State, Trust and Corporation* (Cambridge, Cambridge University Press, 2003); DJ Seipp, 'Formalism and Realism in Fifteenth-century English Law: Bodies Corporate and Bodies Natural' in PA Brand and J Getzler (eds), *Judges and Judging in the History of the Common Law and Civil Law* (Cambridge, Cambridge University Press, 2012) 37.

[34] *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1, [1991] 2 WLR 372, [1991] 1 All ER 545 (HL).

[35] ibid 39.

[36] See *Case of Corporations* (1597) 4 Coke Report 77b, 76 ER 1052 (KB).

[37] *Bonanza Creek Gold Mining Co Ltd v R* [1916] 1 AC 566 (PC).

Sutton's Hospital added the fourth category of incorporation by common law, 'as the King himself',[38] by which Coke may have been asserting a political claim that the Crown as a corporation sole is created by the common law as the foundation of all legal and constitutional order – and not that the common law is the creature of the Crown's higher prerogative of justice. Such common law corporations as the Crown obviously do not need sovereign consent to exist; they just are, by fiat of customary common law.

What, then, of registered companies formed under modern companies legislation, which have comprised the great bulk of trading corporations over the past 150 years? These are created by force of a facilitating statute and hence do not fall directly under the anti-ultra vires *Sutton's Hospital* rule. If chartered and common law corporations had an inherent capacity approximating a natural person, it was equally clear that Parliament (a special law-making assembly, not itself corporate, in distinction to the Crown) enjoyed the sovereign authority expressly to limit a statutory corporation's powers and render certain acts void as beyond capacity. Two further categories of association must be added. First, partnerships, deed of settlement companies, charities, religious orders and other associations might have functional corporate qualities yet lack full legal personality. Their foundation could lie in general law principles of contract, trust and plural ownership, or in local or ecclesiastical law outside the common law. Second, municipal and borough corporations as a subset of corporations aggregate may be created by multiple *causae*, and these generated a voluminous law specifying the practical powers and capacities of local government.[39]

We now turn to the details of the *Sutton's Hospital* case. Here the existence, capacity and powers of a charitable corporation created by letters patent were challenged by two men accused of trespass on the corporation's land. The Crown charter had forbidden the foundation to alienate land save by lease; the corporation had *later* acquired land and set up a hospital with governors in a new part of England, and these acts were alleged either to be ultra vires, or else to indicate that the corporation had never properly come into existence as a land-owning foundation. The trespassers' objections were denied; it was held that the corporation could come into legal existence as a person with full incidental powers even before its governors had been appointed and its lands settled. A corporation as a *persona ficta* need not have any precise location at the time of incorporation or thereafter, and the corporation could exist with a sufficient mechanism to appoint governors before any such appointments had occurred. The nature of the corporation was stated by Coke with rhetorical flourish:

> And it is great reason that an hospital, &c. in expectancy or intendment, or nomination, should be sufficient to support the name of an incorporation when the corporation itself is only in abstracto, and rests only in intendment and consideration of the law for a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law … They cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney … A corporation aggregate of many cannot do fealty, for an invisible body can neither be in person, nor swear, … it is not subject to imbecilities, death of the natural body, and divers other cases.[40]

[38] *Sutton's Hospital* (n 33) 29b.

[39] See further S Kyd, *A Treatise on Corporations*, 2 vols (London, Butterworths, 1793–94) i, 1–41; FW Maitland, *Township and Borough* (Cambridge, Cambridge University Press, 1898).

[40] *Sutton's Hospital* (n 33) 32b.

The chartered corporation might have a founder who had settled lands or organised an association to pursue some purpose, 'but the King alone can create or make the Corporation',[41] and can then vest powers in the founder or others to run the corporation. If the franchised powers and directions of a corporation as specified in its charter were abused or exceeded, the corporate act would have legal force, but a writ of *scire facias* lay to repeal the grant and dissolve the company. The breached direction need not expressly be a condition for repeal; any term delimiting the purpose of the franchise could supply a condition subsequent for dissolution.[42] This was always an *ex post facto* discretionary remedy for ultra vires acts, and the Attorney-General could not be forced to exercise his prosecutorial discretion if no public interest was detected in stopping the corporation's excess of powers. Thus, inaction by the Crown or Attorney-General served as a type of ratification of or acquiescence in the corporation's achieved acts. In effect, ultra vires acts were here merely voidable, and prior to any act of rescission or avoidance those acts were legally valid.

Did the natural capacity of a chartered or common law corporation extend beyond contract and property to acts amounting to torts? Earlier cases suggested not, with Sir Robert Brooke reporting a judgment in the Book of Assizes by Thorpe CJ of King's Bench around 1350 stating

> that trespass lies not against commonalities, to wit, by the name of a corporation, but against the persons who did it, by their proper names; for neither capias nor exigent lies against a commonalty.[43]

This may have been a procedural ruling pointing to difficulties in making a corporation submit to a curial remedy appropriate to trespass proper. Attachment for damages for trover and for trespass on the case were later recognised, and following this all inhibitions on attaching corporations for trespass were lost. But a more substantive principle may have informed the sense of a corporate immunity in the earlier period; for example, in a 1562 case Catesby J held that '[i]t cannot be denied that the Mayor, Sheriffs and commonalty are one entire body, which cannot be severed, and which cannot do any corporal wrong'.[44] In *The Company of Shipwrights of Redderiffe's Case* of 1614, Coke cited Manwood CB,

> as touching corporations, that they were invisible, immortall, and that they had no soule; and therefore no subpoena lieth against them because they have no conscience nor soule; a corporation, is a body aggregate, none can create soules but God, but the King creates them, and therefore they have no soules. they cannot speak, nor appear in person, but by attorney.[45]

Post-Restoration, when the basis of Crown power had shifted,[46] in *R v Mayor of London* in 1691, Holt CJ held that a *quo warranto* to take away the core powers of a

[41] ibid 34a.

[42] *The Eastern Archipelago Company v R on the Prosecution of Sir James Brooke* (1853) 2 Ellis and Blackburn 856, 118 ER 988 (Ex Ch).

[43] R Brooke, *La Graunde Abridgement* (London, Richard Tottell, 1573/6) 'Corporations' 43 c, citing 22 Ass f 100 pl 67; and see *Maund v The Monmouthshire Canal Company* (1842) 4 Manning & Granger 452, 453 c, 134 ER 186, 187–88 (CB).

[44] *Case of Norwich Corporation*, Mich 21 Eliz 4, fol 12 pl 4 (1562).

[45] *Tipling v Pexall* (1614) 2 Bulstrode 233, 80 ER 1085 (Ex).

[46] See D Kershaw, 'Revolutionary Amnesia and the Nature of Prerogative Power' (2023) *International Journal of Constitutional Law (ICON)* ~~(forthcoming)~~.

municipal corporation as a remedy for abuses in effect was a dissolution of the corporation by prerogative, and added that this was formally an action to be brought against the members of the corporation comprising 'the burgesses and inhabitants of the place', and not against the corporate person itself or the officers of the corporation.[47] The court doubted that any tort action associated with distress, such as replevin, could be brought directly against a corporation, though distress could be levied indirectly by action against the corporation's bailiff or agent, who might then seek indemnity or contribution.

VIII. Modern Cases on Ultra Vires

The formative modern case resolving the capacity for direct corporate tort liability was *Yarborough v Governors of Bank of England*, decided in 1812.[48] The case involved a negligent payment of stolen promissory notes, where the defendant tried to void the notes by ascribing the payor's negligence to the Bank of England. Lord Ellenborough stated:

> [T]he only question was whether an action of trover is maintainable against a body corporate; in other words, whether a corporation can be guilty of a trespass or a tort. As a corporation, they can do no act, not even affix their corporate seal to a deed, but through the instrumentality and agency of others: they cannot, as a corporation, be subject to a capias or exigent, (the process in trespass,) because the remedies which attach upon living persons cannot be applied to bodies merely politic and of an impersonal nature. But wherever they can competently do or order any act to be done on their behalf, which as by their common seal they may do, they are liable to the consequences of such act, if it be of a tortious nature and to the prejudice of others.[49]

Lord Ellenborough found many analogies in the law permitting him to attach corporations for wrongs. There were countless *mandamus* writs for false entries involving malice brought against municipal corporations, and also many counts of novel disseisin and nuisance, especially for blocking of commons. Old authority held that written instructions by the directors to commit a tort would bind the corporation, even in the absence of authorisation by common seal. The judges were unsure on this point in *R v Bigg*,[50] a 1717 case where an agent of the Bank of England had erased a receipt on a bank note using lemon juice and then fraudulently indorsed a substitute payee. If he lacked authority so to handle notes then his erasure and endorsement would be his own unauthorised act and be classed as forging and uttering, a capital felony; but if he had an implicit authority so to endorse then it would have become a fraudulent exercise of a valid power. The common law judges assembled at Serjeants' Inn to settle this important point of law, but divided on the authority question and ultimately entered a felony conviction, with a stay of execution and pardon entered on condition that Bigg

[47] *R v Mayor of London* (1691) Shower KB 274, 89 ER 569; affirmed in *Whitfield v South Eastern Railway Company* (1858) Ellis, Blackburn and Ellis 115, 120 ER 451 (QB) (*Whitfield*), a case of commercial libel against a bank.

[48] *Yarborough v Governors of Bank of England* (1812) 16 East 6, 104 ER 991 (KB).

[49] ibid 6–7, 991–92.

[50] *R v Bigg* (1717) 3 Peere Williams 419, 24 ER 1127; cf report *sub nom Dominus Rex v Bigg* (1716) 1 Strange 18, 35 ER 357.

voluntarily transport himself to Minorca. The discretionary sanction well matched the indecisive trial.

The reporter Peere Williams in the *Bigg* case was careful to note extensive arguments that a corporation aggregate could impliedly authorise its agents to act in the normal or incidental course of business, and commit torts in so doing as corporate agents, without necessarily acting under common seal or by written authority. But many of the judges agreed with the prosecution that actions putting a corporation's finances at risk required a common seal, or else were ultra vires and nullities *qua* corporate acts, and hence would fall to be characterised as a forgery by the individual. The same issue arose with some poignancy a century later in the sensational 1824 trial of Henry Fauntelroy. A flamboyant financier, he had made fraudulent transfers of trust beneficial interests and Bank of England notes in a desperate attempt to shore up a failing bank of which he was the active partner. He claimed his acts were within his ministerial powers and hence were valid if fraudulent and voidable acts; but the jury at the Old Bailey found him guilty of unauthorised acts falling within the definition of forgery.[51] The legal point continued to be debated in two further assemblies of the judges, but the forger was executed before the judges could reach a final decision. It was striking that the judges were being asked to decide whether the imprecise doctrine of corporate ultra vires should cost a man his life. Fauntelroy turned out to be the last man executed for forgery in England, and perhaps the harshness of his fate, and recoil at the legal imprecision of his trial, saved the lives of later fraudsters.

IX. Scope of Authority and Ultra Vires

Much nineteenth-century litigation concerned the methods of attribution of agents' or employees' actions to a corporation through the doctrine of vicarious liability, and here the questions concerned the scope of authority of the agent and whether the act in question was an organic act of the corporation, a vicarious act of the individual within his or her authority though committed tortiously, or a wholly unauthorised and independent action where the tort liability lay solely on the individual. Only rarely did the courts isolate the possibility of an ultra vires act that might yet be ascribed to the corporation as a tort, as this anomaly could usually be solved by holding the tortious conduct to be an independent and unauthorised act.

An example of this blurring of ultra vires with scope of authority questions was found in a string of cases concerning utilities in the early railway age. It was decided that authority to act on behalf of a corporation could be implied without formal writing, for example to distrain and collect tolls, fees and rent, where the authority implied did not vest a positive contractual authority to bind the company and did not commit its finances. In 1834, trover was successfully brought to recover the value of household furniture wrongfully distrained by a gas utility. The company, by receiving the proceeds from its agent, was held to have ratified his authority and conduct, and so made itself

[51] *Case of Henry Fauntelroy*, Proceedings of the Old Bailey, 28 October 1824, at www.oldbaileyonline.org, reference t18241028-97. I am grateful to James Edelman for alerting me to this case.

liable for the tort retrospectively.[52] In a case of 1842, the collection of rents and tolls, albeit wrongful, was said to fall within the ordinary authority of a corporate agent and so tort liability could attach to the corporation without receipt or ratification.[53]

In the important case of *R v Birmingham and Gloucester Railway Company* (1840–42),[54] a railway company was indicted for public nuisance for failing to build an adequate road and bridges to alleviate interruptions caused by its construction activities. The company was authorised by statute to acquire the land necessary to build the necessary road, but the power of acquisition had lapsed due to the company's delay. Chief Justice Denman rejected the railway company's defence that its power to remedy the default had lapsed; it remained liable as it was its own fault that the necessary statutory power was no longer available. On a further demurrer the court acknowledged the difficulties in indicting the company either through its membership or through an attorney appearing in court, but held that a distress infinite against its goods could serve as a surrogate. Justice Patteson held that despite doubts from Holt CJ in 1701,[55] there were many modern cases 'which shew that a corporation may be indicted for breach of a duty imposed upon it by law, though not for a felony, or for crimes involving personal violence, as for riots or assaults'.[56] The fact that the corporate person could not be imprisoned or arraigned for contempt was no stop on an indictment; *certiorari* could be used to remove the case to Queen's Bench, where a suitable remedy could be devised.

Once this pragmatic approach had been established in the 1840s, corporate liability for civil wrongs burgeoned, and came to embrace torts with a mental element, including malicious prosecution,[57] malicious libel[58] and false imprisonment, provided the agent or employee could be fixed with authority to act in the ordinary course of business for the corporation, as with railway employees at a station who could be taken to have authority to enforce fares.[59] The settled doctrine was stated as follows by Erle J in *Green v The London General Omnibus Company*:

> The whole course of the authorities … shews that an action for a wrong will lie against a corporation, where the thing that is complained of is a thing done within the scope of their incorporation, and is one which would constitute an actionable wrong if committed by an individual.[60]

[52] *Smith v Birmingham and Staffordshire Gas Light Company* (1834) 1 Adolphus and Ellis 526, 110 ER 1309 (KB).

[53] *Maund v Monmouthshire Canal Company* (1842) Manning and Granger 452, 134 ER 186 (CP).

[54] *R v Birmingham and Gloucester Railway Company* (1840) 9 Carrington and Payne 469, 173 ER 915, (1841) 2 QB 47, 114 ER 21, (1842) 3 QB 223, 114 ER 492.

[55] *Anonymous* (1701) 12 Modern 559, 88 ER 1518 (KB): 'A corporation is not indictable, but the particular members of it are.'

[56] *Birmingham and Gloucester Railway Company* (1842) 3 QB 223, 232, 114 ER 492, 496.

[57] *Whitfield* (n 47); *Abrath v North Eastern Railway Co* (1886) 11 App Cas 247; *Cornford v Carlton Bank Ltd* [1899] 1 QB 392.

[58] *Citizens' Life Assurance Company, Limited v Brown* [1904] AC 423 (PC).

[59] *Goff v Great Northern Railway Company* (1861) 3 Ellis and Ellis 672, 121 ER 594 (QB), extensively reviewing the authorities.

[60] *Green v The London General Omnibus Company* (1859) 7 CBNS 290, 141 ER 828 (CP). Instances of this doctrinal approach can be multiplied, as with *Limpus v London General Omnibus Company* (1861) 2 Foster and Finlason 640, 175 ER 1221 (Ex, Ass), (1862) 1 Hurlstone and Coltman 526, 158 ER 993 (Ex); *Seymour v Greenwood* (1861) 6 Hurlstone and Norman 359, 158 ER 148, 7 Hurlstone and Norman 355, 158 ER 511 (Ex).

But what if the agent acted in a manner outside the power of the corporation yet within his apparent or ordinary authority? In the 1867 case of *Poulton v The London and South Western Railway Company*,[61] in the Court of Queen's Bench, a stationmaster arrested a man transporting a horse by rail on suspicion of his not having paid carriage, but the company he worked for had a statutory authority only to arrest a passenger for fare evasion, not for failing to pay for carriage of goods. Justice Blackburn held that ultra vires protected the company:

> In the present case an act was done by the station master completely out of the scope of his authority, which there can be no possible ground for supposing the railway company authorized him to do, and a thing which could never be right on the part of the company to do. *Having no power themselves, they cannot give the station master any power, to do the act.* Therefore the wrongful imprisonment is an act for which the plaintiff, if he has a remedy at all, has it against the station master personally, but not against the railway company.[62]

Justice Mellor expanded the point as follows:

> I think the distinction is clear; it limits the scope of authority, to be implied from the fact of being the station master, to such acts as the company could do themselves, and I cannot think it ever can be implied that the company authorized the station master to do that which they have no authority to do themselves: and that seems to me to be the boundary line … If the station master had made a mistake in committing an act which he was authorized to do, I think in that case the company would be liable, because it would be supposed to be done by their authority. Where the station master acts in a manner in which the company themselves would not be authorized to act, and under a mistake or misapprehension of what the law is, then I think the rule is very different; and I think that is the distinction on which the whole matter turns.[63]

Justice Shee added:

> [A]n authority cannot be implied to have been given to a servant to do an act, which, if his master were on the spot, the master would not be justified in doing, on the assumption of a particular state of facts. It is clear, from the construction of [the statute], that the company had no power to arrest this passenger because he had not paid the price for the carriage of his horse.[64]

The Court of Exchequer pursued this line of reasoning in the 1874 case of *Mill v Hawker*.[65] However, here the court split, with Kelly CB dissenting sharply (and note that it was rare for puisne justices to form a majority against the chief justice of a common law court in this time). The facts were that a highway board wrongly believed that there was a public right of way across the plaintiff's land; and after making an order for locks to be removed from an obstructing gate, it gave a written authority for the board's surveyor to remove the lock forcibly. There was no public right of way and the landowner sued the corporation's clerk and surveyor for trespass on the land and damage to property. A nonsuit was brought on the basis that this was a corporate not an

[61] *Poulton v The London and South Western Railway Company* (1866–67) LR 2 QB 534.
[62] ibid 540 (emphasis added).
[63] ibid 540–41.
[64] ibid 541.
[65] *Mill v Hawker* (1874) LR 9 Exch 309.

individual act. Baron Cleasby, with Pigott B concurring, found that there could be no such tortious corporate act displacing individual liability, and so a trial of the employees could be ordered:

> But it is equally clear that when the acts are such as the corporate body is not by law qualified to do, and the corporate body, if they pretend to do them, are acting ultra vires, then the mere fact of giving a corporate form to the act does not prevent it from being the act of those who cause it to be done. It seems plain that in such a case the individuals and not the corporation really do the act, and no authority is needed for that conclusion.[66]

Corporate employees, especially employees of public corporations, simply had to accept some individual risk of ultra vires-based liability, trusting to the good sense and proper legal advice of their corporate employer when acting. Moreover, it was said to be incorrect on policy grounds for the courts to permit or require public corporations to pay out taxpayers' money for wrongful ultra vires actions:

> The effect of holding that such a body as the highway board were competent in their corporate capacity to commit such an act of trespass as the one complained of in this case, would be that, whenever the trespass was illegal and redress was had, the persons who had really caused the trespass would not be responsible, and the damages would be paid out of funds which ought to be applied in maintaining the roads, and the persons eventually responsible would be the ratepayers, and among them, perhaps, the persons entitled to redress, and to whom the damages were to be paid. And thus the members of the highway board would acquire a power to divert and waste the funds intrusted to them for public purposes by proceedings which might originate in feelings which it would be most inconvenient to inquire into.[67]

Chief Baron Kelly, in a lengthy and reasoned dissent, held that the corporation or its board could be liable for a tort and not the employees who carried it out. First, he held that the separate corporate personality walled off the members of the highway board from individual personal liability; for this no mention of limited liability was necessary, but simply a theory of primary or organic attribution:

> I conceive it to be settled law that no action lies against the individual members of a corporation for a corporate act done by the corporation in its corporate capacity, unless the act be maliciously done by the individuals charged, and the corporate name be used as a mere colour for the malicious act, or unless the act is *ultra vires*, and is not, and cannot be in contemplation of law, a corporate act at all.[68]

Next, he held that an illegal and tortious act authorised by a corporation could arouse corporate liability, and that the ultra vires doctrine could be separated from the question of due authority in most cases of corporate wrongdoing:

> It was, indeed, once imagined, though on very technical grounds, that trespass would not lie against a corporation, and it is so stated in Comyns' Digest, Franchises, F. (19.). But, besides that many authorities are to be found in the year books to the contrary, the law is now well settled that upon any tortious act committed by a corporation, or under its authority, or by its direction, trover or trespass is maintainable … It was never suggested that … the action should have been brought against the individuals who happened to be present when the act

[66] ibid 317.
[67] ibid 319.
[68] ibid 321.

> in question was ordered to be done. I cannot doubt, therefore, that this action ought to have been brought against the board, and all these decisions are uniform to shew that it would have been maintainable. The mischief and inconvenience that would result if the contrary were held to be law is great and obvious. If judgment be recovered against these [employees] execution might issue for the whole amount of damages and costs against any one among them, and he would have no remedy for contribution against the rest, nor as it should seem, upon the facts of the case, for indemnity against the corporation. And it is at least doubtful whether the board would have a legal right to indemnify him out of the funds which come to their hands under the Act of Parliament. On the other hand, if the action had been brought against the board, and judgment obtained against them, they may pay the damages and costs out of the funds which they are enabled to provide for the various purposes of the Act …
>
> It was argued that no action could be maintained against the board on the ground that the resolution and the order to the surveyor were *ultra vires*. But I apprehend that this is a misapplication of the term *ultra vires*. If the board, by resolution or otherwise, had accepted a bill of exchange directing their clerk or other officer to write their corporate name or title across a bill drawn upon them for a debt, this would have been *ultra vires*, and no holder of the acceptance could have recovered the amount against them. It would have been void upon the face of it, and it is immaterial to consider whether the individuals who had written or authorized the acceptance would have been liable to any, and, if any, to what action at the suit of a holder for value. But it is otherwise with an act merely unlawful or unauthorized, as a trespass or the conversion of a chattel. If such an act is to be deemed *ultra vires*, and therefore no action would lie against the corporate body by whom it had been authorized, it is clear that a corporation would not be liable for any tort at all committed or authorized by them, and the decisions above cited would be contrary to law. … Poulton v London and South Western Ry Co merely shews that there is no implied authority by a railway company to their servants to do an illegal act. Here no question arises upon an implied authority, for this board have expressly authorized and commanded the surveyor to do the act complained of.[69]

Following the Chief Baron's dissent, the case was reviewed in the Court of Exchequer Chamber before six common law judges of Queen's Bench and Common Pleas.[70] Justice Blackburn led the court in holding that the servants in obeying an order that was ultra vires could not escape personal liability, and so supported the Exchequer Court majority on that point, but he also expressly refused to decide the point of whether the corporation or its board could be jointly or severally liable for authorising a tortious act ultra vires. The opinion of Cleasby B finding no corporate liability was left untouched and the question of principle evaded, precisely because it was 'one of considerable importance and great difficulty. If it were necessary to decide that question, we should require time for consideration, and possibly, when we had considered it, our decision would not be unanimous.'

Justice Blackburn's trepidation may have been exacerbated by the important decision made some seven months earlier by the Exchequer Chamber in *Riche v Ashbury Railway Carriage and Iron Co Ltd.*[71] Here the review court had split 3:3 on the question of whether a company could ratify an ultra vires act, with Blackburn J holding that it could; only four months later the House of Lords had overturned that conclusion and

[69] ibid 322–24. A similar argument against scapegoating of individual employees for corporate acts is suggested in Derrington and Walpole, ch 16 of this volume.

[70] *Mill v Hawker* (1875) LR 10 Exch 92.

[71] *Riche v Ashbury* (n 21).

insisted that the corporate objects irrevocably bound the company and voided its ultra vires acts.[72] The community of common law judges, then at their zenith of confidence and prestige, clearly found the doctrine of ultra vires flummoxing. But after exciting so much controversy, the problem faded from view. After *Poulton*, it does not seem that the tort aspects of ultra vires rule were ever litigated afterwards in a significant case, and with the intensification of vicarious liability for corporations the problem of ultra vires became moot. Salmond's conclusion that the corporation was really being attached for failures to monitor agents and prevent breach of duties, as evoked in his writings after 1913, might seem to have provided an exit.[73]

X. A Revival of Corporate Purposes Doctrine?

The historian of laws past sometimes stops to look to the history of the present, and even peer into the future. We live in an age of economic fragility, with financialisation and globalisation constantly disrupting collective economic life. Companies are no longer integrated command mechanisms with a clearly delineated hierarchy of control, but are rather a set of inputs and outputs elongated across chains of supply, arrayed into shifting form by digital communication, so abandoning the Coasean administrative theory of the firm.[74] The concept of a corporate employee and a corporate employer in a stable contractual and status relationship has become thoroughly contested legal terrain.[75] The amoral pursuit of profit by corporations with revolving management and shareholders pursuing short-term returns has been linked to environmental and social degradation across the globe. The popularity of Corporate Social Responsibility and Anti-Modern Slavery charters and Environmental, Social and Governance commitments speaks to a deep unease in the turn of the corporate economy. Scholars now speak of reviving the concept of corporate purpose and placing the idea of community-mandated and limited powers at the centre of a reconfigured corporate economy.[76] The nineteenth- and twentieth-century interaction of tort and ultra vires doctrine might have valuable lessons to teach as to how potent and disruptive collective enterprises can best be led to internalise risk and be held to account for the true social costs of their activities. We may continually pursue purposes as individuals and groups, but setting legal effect to those purposes is hardly simple.

[72] *Ashbury* (n 21).

[73] See text accompanying nn 9–13.

[74] LE Ribstein, *The Rise of the Uncorporation* (Oxford, Oxford University Press, 2009).

[75] *Uber BV v Aslam* [2021] UKSC 5, [2021] WLR(D) 108; J Adams-Prassl, *The Concept of the Employer* (Oxford, Oxford University Press, 2015).

[76] See, eg, C Mayer, 'The Future of the Corporation and the Economics of Purpose' (2021) 58 *Journal of Management Studies* 887; cf EB Rock, 'For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose' (2021) 76 *The Business Lawyer* 364.