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The Powers and Liabilities of Directors of Corporations

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T H E S I S .

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"The Powers and Liabilities of
Directors of Corporations."

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William Young,
Cornell University School of Law,
1893.

I N D E X .

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As to the precise relation existing between the directors of a corporation and the corporation itself the authorities would seem at first glance to be ⁱⁿ ~~at~~ great confusion. They hold in varying degrees all the way from the common law idea that directors are agents of the corporation in its character as an artificial ideal entity, to the equitable theory that they are trustees of the corporation regarded as an aggregation of individuals. Thus a Conn. Court says plainly that they are agents and liable only to their principal, the corporation, for their acts. (26 Conn., 445) Horton C. J. of Kansas says that they are primary agents of the corporation, and in reference to the corporation property acts in the relation of trustees. (21 Kas., 365). But the prevailing doctrine undoubtedly is that the directors are trustees of the corporation. In Robinson vs. Smith, (3 Paige

Ch., 222) it was held that the directors were personally liable as trustees, for loss occasioned by their fraud or negligence. The English rule is stated in one place as follows. "He (the director) is in point of fact, not merely a director, but he also fills the character of trustee for the shareholder, and he is, in regard to all matters entered into in their behalf, to be treated as an agent; therefore, there attaches to the director for the benefit of the shareholders, all the liabilities and duties which attach to a trustee or agent. Accordingly, if a director enters into a contract for the company, he cannot derive any benefit from it." (25 Beav., 586)

In Law Rep., 9 Ch.Div., 322, it is said "They are the managing partners of the company, and if they abuse their powers, which they hold in trust for the company, to the damage of the company, for their own benefit, they are liable to make good the breach of trust to their cestuis que trustent like any other trustee." But Mr. Morawetz in Vol. I., sec. 516, says "It is clear that the directors or managing agents of a corporation are not trustees in a technical sense, although they are often called trustees in practice; they are merely agents, invested with wide discretionary powers in

the management of the company's business. The relation between the directors of a corporation and the company itself, is, however, in many respects a fiduciary or trust relation. Whenever an agent is vested with authority to use any discretion in the use of the powers conferred upon him, it is an implied condition that this discretion shall be used in good faith for the benefit of the principal, and in accordance with the true purpose of the agent's appointment. To this extent, every agency which is not a purely ministerial one involves a fiduciary relation between the parties." Prof. Pomeroy in 3 Pom. Eq.Jur., sec. 1089, gives what seems to be a very terse and accurate statement of this relation, in these words:- "The directors and supreme managing officers of corporations are constantly spoken of as trustees. They are not, however, true trustees with the corporation or the stockholders as their cestui que trustent, since they hold neither the legal title to the corporate property nor that to the stock.. In fact directors are clothed at the same time with a double capacity, that of quasi trustees and that of agents. It is of the utmost importance to discriminate exactly between these two characters, and to determine accurate-

ly, for whom, over what subject matter and to what extent they are thus trustees; for upon this trust relation primarily depend the equitable remedies which may be obtained against them by the corporation or by the stockholders. From their function as agency are derived their powers to act for the corporation as a legal entity; it measures the extent of these powers in the management of both the external and internal affairs; it fixes the rights and obligations of the corporation in dealings with stockholders and with third persons. The rights, duties, liabilities and remedies which results from the directors agency are therefore legal; the equitable rights, duties and remedies are mainly referable to the the trust element of the director's functions." Judge Sharswood of Penn. says in Spering's App., 71 Penn.St., 11, "It is by no means a well settled point what is the precise relation which directors sustain to stockholders. They are undoubtedly said by many authorities to be trustees, but that as I apprehend, is only in a general sense, as we term an agent or any bailee entrusted with the care and management of the property of another. It is certain that they are not technical trustees. They can only be regarded as

mandatories --persons who have gratuitously undertaking to perform certain duties, and who are, therefore, bound to apply ordinary skill and diligence, and no more." He goes on to say that since they are themselves stockholders, the presumption is that, interested as they are in the success of the business, they will bring their best judgment and skill to bear upon the duties of their office. Further, that since they are asked by the stockholders to thus serve without compensation, they should not be so strictly judged as should an agent or trustee of a private estate, and that for mere mistakes of judgment they should not be responsible, provided the mistakes were honest and fairly within the scope of the powers and discretion confided to the managing body, even though they were so gross as to appear to others absurd and ridiculous. But Judge Earl in Hun vs. Cary, 82 N.Y., 65, probably voices the consensus of authorities when he says, regarding Judge Sharswood's opinion just given, "As I understand this language, I cannot assent as properly defining to any extent the nature of a director's responsibility. Like a mandatory, to which he has been likened, he is bound not only to exercise proper care and diligence, but ordinary skill

and judgment. As he is bound to exercise ordinary skill and judgment he cannot set up that he did not possess them.

When damage is caused by his want of judgment, he cannot excuse himself by alleging his gross ignorance. One who voluntarily takes the position of director, and invites confidence in that relation, undertakes, like a mandatory, with those who he represents or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties. (Story on Bailments, sec. 182a)." In Hun vs. Cary, which was an action brought by a receiver of a savings bank against the trustees, for alleged reckless extravagance in the use of the funds, it was held that the relation between the savings bank and its trustees or directors is that of principal and agent and that between the trustees and depositors is similar to that of trustee and cestui que trust.

In regard to the relation existing between the directors and shareholders, different opinions are reported, but the prevailing doctrine is probably that the directors are trustees for all the shareholders. Their fiduciary relation is limited to cases in which the action of the directors

has affected the whole body of the shareholders; and when only ^{one} shareholder was affected, there was held to be no trust relation between the parties. (15 Am.Rep., 245) Shaw C.J. in 12 Metc., 371, says:- "There is no legal privity, relation, or immediate connection, between the holders of shares in a bank, in their individual capacity, on the one side, and the directors on the other. The directors are not the bailees, factors, agents or trustees of such individual stockholders." Robertson J. of the N.Y.Sup.Ct., (10 Bosw., 391) describes the relation of directors to shareholders as resembling a bailment. He says:- "There may be a confidential relation subsisting ^{between} a stockholder and a director, creating a certain duty by the latter to the former, or certain rights in the former which give the former a right to prevent, or sue for, the malfeasance of the latter. But I think it will be found that neither 'trustee' nor 'agent' expresses such relation, and that bailee of the capital of the corporation to perform specific duties therewith comes much more near to it." He also holds that in order to sue the directors for damage done by their acts, a stockholder may not sue alone but must make the corporation a party to the action. Equity, however,

has modified this rule so that if the corporation will not call to account officers who have either fraudulently or negligently exceeded their authority or if the corporation is under the control of those sought to be made parties defendant the stockholders who are the real parties in interest may file a bill in their own names making the corporation a party defendant; or a part of them may file a bill in behalf of themselves and all others standing in the same relation, if convenience requires it((Peabody vs. Flint, 6 Allen, 56) In this case it was held that the directors are trustees for the corporation and that the corporation is itself a trustee for the stockholders.

Upon a careful examination of all the authorities upon this subject, it will be found that although they seem to be in conflict, they all have one thing in common. There can be no doubt that the directors of a corporation act in a fiduciary capacity, or that their duties and liabilities are those of fiduciaries. There is no disagreement as to the measure of their duties and liabilities, or as to the standard by which their liability is measured. The only difference is as to who stand in such relation to them as to be able to en-

force such liability. It is probably true that, strictly speaking, the only direct privity is between the directors, and the corporation as an artificial entity, and that the directors are trustees for the corporation only. But it can not be questioned, in the light of the authorities that the shareholders have such interest in the enforcement of the trust, that they may in certain cases bring suit for that purpose directly against delinquent directors.

Coming now to the relation between director and creditors, we find the rules heretofore stated not always applicable. To the extent of creditor's interests, corporate funds are held in trust for creditors as well as for shareholders. Consequently, directors having in their charge funds on which creditors have valid claims and equitable liens, but in the management of which creditors have ordinarily no voice, occupy a position of trust towards the creditors as well as towards the shareholders; and owe it to creditors to protect their interests, as they owe it to shareholders to protect the interests of the latter. The only claim of creditors is, of course, to be paid the amount due them, and their main right is that the corporate funds shall not be

recklessly mismanaged, or diverted from their true purpose. And directors naturally owe it to creditors to keep the corporation solvent, and to use the funds in furtherance of the regular business. And, accordingly, directors will be liable to the persons for whom they hold corporate funds in trust, in which number creditors are included, if they either by fraud or negligence commit a breach of the trust confided to them. In the absence of gross fault or negligence, however, they are liable only to the extent of the capital stock and corporate assets.

In considering the powers of directors, we find three general rules laid down for their government, or more strictly speaking, one general rule and two limitations thereon.

The first rule as to the extent of the power conferred by "authority to manage the business of the corporation" is that such power extends to the doing of any ordinary act conducive to the success or demanded by the exigencies of the business; and since any person acting in a fiduciary capacity must necessarily exercise an honest discretion and under certain circumstances may do acts which at other times would be in violation of his trust, so directors, may, in critical emergencies do acts which would be unauthorized under ordinary circumstances.

The second rule is that authority to manage the

affairs of a corporation does not authorize the directors to change the scheme of the corporate enterprise or the nature of the corporate business; nor does it authorize them to bring the business to a conclusion either directly, or indirectly through acts which would render the continuation of the business as planned impossible.

The third rule is that since the constitution and all authority thereby conferred, relate to a specific enterprise and corporate purpose, no authority is conferred on directors to bind the corporation in regard to matters having no connection with the objects of incorporation.

Turning back to the first rule the question at once arises--How is the scope of the term ordinary act within the corporate powers to be determined? It would hardly be limited to routine or clerical or ministerial business, but would seem to have a more comprehensive meaning, Comstock J. of New York Court of Appeals, in construing the term "ordinary business" which a by-law empowered a quorum composed of less than a majority of directors to transact said in 19 N.Y., 206-17:-- "The ordinary business of the corporation had, I think, no limit short of the varied and extensive af-

fairs in which it was authorized by its charter to engage. It could construct and operate a canal, deal in stocks and trusts, and it could carry on the business of banking in all its departments. If the due execution of these powers did not constitute the ordinary business of the company then it seems to me impossible to suggest any definition of the term, and the by-law becomes senseless and unmeaningless; and if these express powers of the corporation were embraced in the terms of the by-law, it must necessarily follow that the quorum designated took all the incidental authority which the whole board would possess in the execution of the same powers. In the operation of banking, which constituted one portion of the ordinary business it might become necessary to borrow money, and the power to do so existed. As debts could be contracted the incidental power of paying them can not be doubted. So, the condition of the company's affairs might require a negotiation with creditors, and the postponement and securing of their demands. To secure a debt, and procure its forbearance in a period of embarrassment, would not by any means be an extraordinary act, in the sense of the by-law, although it might be unusual in the magnitude and importance

of the transaction."

Accordingly all business in furtherance of the corporate enterprise and not involving any departure therefrom, may be transacted by the directors. They have full authority, unless restrained by the charter or by-laws, to do anything the corporation may do. In fact the board of directors is frequently termed the corporation, and in the case of savings banks, for instance, this designation would seem to be entirely proper. ¶ Under the second general rule that ¶ directors cannot change the scheme of the corporate enterprise nor bring the business to a conclusion there are four things directors cannot do.

First:- they cannot change the nature or plan of the corporate business, nor in the absence of special authority can they accept from the legislature any radical alteration or amendment in the corporate constitution. But a statute facilitating the exercise of franchises already enjoyed is not viewed in the light of a substantial change in the constitution.

Second:- directors may not increase or decrease the capital stock of the corporation. Justice Bradley in 18

Wall., 233-4, says, in this connection:- "A change so organic and fundamental as that of increasing the capital stock of a corporation beyond the limits fixed by the charter cannot be made by the directors alone, unless expressly authorized so to do. The general power to perform all corporate acts refers to the ordinary business transactions of the corporation, and does not extend to a reconstruction of the body itself, as to an enlargement of its capital stock." These powers, of course, rest entirely with the shareholders.

Third:- directors cannot transfer corporate property which is necessary to the continuance of the corporate business. Such a sale is void as against non-assenting stockholders. But if the stockholders having notice, are silent and make no objection whatever, by their acquiescence they will be taken as assenting. (103 Penn.St., 546) So the directors of a corporation have no power to give away its funds, or deprive it of any of the means of accomplishing the purposes for which it was chartered. (48 Pa.St., 29, 37) But it has been held that directors have power to apply 1500 pounds out of the undivided profits of a manufacturing company, as a gratuity of one week's extra pay to each employee

who had worked with a good character throughout the year.

(45 L.J.Eq., 437) This doctrine has, however, not met with favor in the United States.

Fourth:- if directors have no power to sell corporate property which is essential to the continuance of the business, they certainly have no right to wind up the affairs of the corporation, such right residing solely in the body of the share-holders. But it has been held that the directors acting in good faith have the right to make an assignment for the benefit of creditors, not only without asking permission of the shareholders but against their expressed will. (91 Mo., 196) (91 Mo., 367)

The last of the three general rules herein before mentioned is that the directors have no authority to bind the corporation in matters not relating to the corporate business. On the face of it this would seem to be self-evident. The powers enjoyed by the directors whether conferred by the constitution or by a vote of the shareholders, have their ultimate basis in the corporate constitution, and in the agreement embodied therein. Therefore the directors have no power to do any act outside the limits authorized by

the charter or by-laws, and since the charter and agreement relate only to the corporate enterprise any acts having no relation to the corporate enterprise must be beyond the authority of the directors. Accordingly the directors have no authority to give the note of the corporation for a debt having no relation to its business, due to the payee of the note; and such a note will be void in the hands of persons having notice of the circumstances under which it was giving. But, on the other hand, if the directors acting within the apparent scope of their authority, commit a breach of their trust, the rights of an innocent person dealing with them will not be affected thereby. Thus, if directors, having due authority, borrow money for the corporation the lender is not bound to see that the money is used for the furtherance of the company's business and not used for purposes ultra vires, the corporation or embezzled by the directors. (20 Wkly.Rep., 254)

Acts of directors relative to matters in which they have no authority may be null and void at the discretion of the stockholders although if the acts are not contrary to law they may subsequently be ratified by the stockholders and

take effect ~~f~~^{from} the date of ratification. Ratification may be either express or implied, and in general the evidence thereof must be of as high a nature as would have been required to show prior authority. And moreover any delay on the part of the principal in repudiating the acts of his agent, by which the latter has overstepped his authority, makes the acts his own. (69 Pa.St., 426 & cases cited)

As to what portion of their authority directors may delegate to some of their own number or to other officers, no more definite rule can be given than that they cannot delegate authority which it was intended that they as a board should exercise. Thus while they cannot delegate authority to do acts involving personal skill and discretion, still they may delegate authority to do merely ministerial acts. This, to be sure, is rather an exercise than a delegation of their authority since it is not intended that directors should perform the duties of subordinate officers. They may, of course, regulate the authority of those whom they appoint, and thus they may authorize the president, or president and cashier, or the general agent, to borrow money and draw and endorse negotiable paper in the name of the corporation: (12 S.& R., 256) or may authorize a treasurer to sign mortgages belonging

to the corporation. (137 Mass., 431) Powers involving a wider discretion than may safely be entrusted to a single officer may be delegated by directors to a committee of their number if the board of directors be very large, As in 19 N.Y., 207, a board of twenty-three directors was allowed to delegate authority to a quorum to transact all ordinary business. They may delegate authority to a committee of their own number to alienate or mortgage real estate, or may authorize one of their number to sign any securities belonging to the company. And on the other hand there are decisions holding that directors cannot delegate their authority, to allot shares, to make calls, to declare dividends, or to order a sale of shares for the non-payment of assessments. ^P De ^P facto officers are those whose acts, although not those of lawful officers, the law, upon principles of policy and justice, will hold valid as regards the interests of the public and third parties, where the duties of the office were exercised: First without a known appointment or election, but under such circumstances of reputation or acquiescence as would lead persons to deal with them supposing them to be regularly elected officers.

Second, under color of a regular election or appointment, but where the officers had failed to conform with some requirement or condition precedent, such as taking an oath or filing a bond.

Third, under color of an election which was void because of the officer not being eligible, or on account of a want of power in the electing board, or by reason of some irregularity in its exercise, the defect, of whatever nature, being unknown to the public.

Fourth, under color of an election or appointment made in pursuance of an unconstitutional law, before the same is adjudged to be such. (38 Conn., 449)

A de jure officer is one who has the lawful right to an office, even though he may have been ousted from it or has never actually taken possession of it. An officer de facto must be actually in possession of the office and have it under his control, And it follows that two persons cannot be de facto officer for the same office at the same time. The contracts of de facto officers acting within the sphere of their office, are binding upon the corporation. A director de facto cannot avoid a liability by setting up that he

was not a de jure director, (2 ~~Raw~~le, 139); nor collect a salary as a de facto officer. (7 S.&. R., 380) He may be ousted only by a quo warranto proceeding and not by a suit in equity nor by an action in trespass.

Directors of a corporation, may by a breach of their official duties become personally liable to the corporation or its representatives, or to a part or all of the stockholders, or to third persons or creditors having dealings with the company. This liability may arise under an express statute or it may exist independently of any statute. In the former case, the statute defines the liability and points out the manner of enforcing it. In the latter case, the question as to when this liability arises and who may enforce it, and the manner in which it is to be enforced can only be solved by a clear conception of the relations existing between the directors and the corporation, shareholders and creditors. In the opening chapter the status of directors with regard to all of these was briefly outlined, and it was found that they have a two-fold character, that of agents and

trustees. It appears that the liability of an agent, is briefly this: For non-feasance, or for non-execution of the duties of his agency, he is liable only to his principal or some one claiming through his principal. For misfeasance or wrongs done in the course of his agency, whether within or without the scope of his authority, he is liable to the person injured, whether such person be his principal or a stranger. It is plain that the company itself has a remedy against its directors for negligence, fraud, breaches of trust, or acts done in excess of their authority, either at law or in equity, according to the nature of the wrong done. For acts of fraud or misfeasance, done by directors, whereby shareholders are injured, the latter have an action at law, on precisely the same grounds as other strangers would have. Shareholders also have a remedy against directors for breaches of trust committed by the latter where the corporation refuses to pursue for the shareholder, the proper remedy. Strangers have any appropriate remedy against the directors of the corporation which one man may ordinarily have against another in the ordinary relations of civil society, not resting in contract. In cases arising from wrongful acts, each is liable

for all the consequences. There is no contribution between them, and it is unnecessary, therefore, to make all the directors parties defendant, whether they have joined in the wrongful act or not. Following the rule of agency that a principal and agent may be jointly liable for acts of misfeasance committed by the agent in the course of the business of his agency, it has been held that a corporation and its directors may be liable in equity and possibly at law for a wrongful act of the directors. But it would be an action ex-contractu: an action at law will not lie against a corporation for deceit. Directors are not liable for the frauds of subordinate officers appointed by them unless they authorized the wrong or in some way shared in it, since the agents although appointed by the directors are agents of the corporation, and the doctrine of respondeat superior applies rather to the corporation than to the directors. If the intermediate agent has been guilty of negligence in appointing unfit subordinate agents, he is liable only to his principal for the breach of duty. Directors, however, may under certain circumstances become liable for the frauds of their agents, even though they did not know of them at the time they were

committed. This will happen where the directors personally and knowingly derived a benefit from the fraud. Here the subordinate agents who committed the fraud become in a sense the agents of the directors.

The general head to which the liability of directors to the corporation is referred is that of breach of trust.

This breach may consist of:--

- I. Fraud or mal-feasance,
- II. Of negligence or non-feasance,
- III. Of acts ultra vires.

In examining into the fraud of directors, we find one principle underlying all their acts: viz, that the directors of a corporation sustain toward its members the relation of trustees and cestuis que trustents, and in every transaction in their capacity as directors the utmost good faith is essential. We have seen that for mere mistakes of judgment they are not necessarily liable, but for all frauds they are held strictly to account. One of the most familiar doctrines of equity is that a trustee will under no circumstances be permitted, without the knowledge or consent of his principal to speculate out of his trust or to retain any profit

that may have accrued to him personally, but he must account to his cestui que trust for all profits he may have made out of the trust relation. This rule applies with full force to directors of corporations. (58 Pa.St., 126) It does not necessarily mean that they are precluded from making any profit whatever out of their trust relation, but that they must make no secret profit out of it. The body of the corporation may, after learning all the circumstances, allow them to make a profit out of the transaction, or after the transaction is completed, may ratify any acts done by them, and will thereafter be estopped from repudiating such acts. A common form of making secret profits is to receive a bribe in one form or another. Thus the directors of a rail-road may derive benefit from causing it to run through a certain town or section of the country. It is a question whether they are then trustees in equity of the fund thus received or whether they are guilty of a breach of their trust, but it has been held (in 6 Pa.St., 202) that the corporation may proceed against them either at law or in equity for the breach of the trust.

Another form of fraud practiced by directors is

seen in construction companies. It sometimes happens that a director of a rail-road company is a director in a R.R. construction company and he, or they if there are more than one of them, so manage the rail-road's affairs that the construction company is awarded the contract for building the road or portions of it. It is clear that one man cannot serve two masters whose interests are conflicting, and courts of equity usually pronounce such contracts illegal or invalid. Then, too, sales by the directors to the corporation or vice versa, are voidable at the option of the stockholders although not necessarily void. (60 Pa.St., 291) There is nothing to prevent sales of this kind, particularly where the corporation is represented by another agent who transacts this particular business and where good faith governs both parties. But the burden is always on the directors to show the purity of their intentions.

So where directors vote themselves salaries, or an increase over those salaries allowed them by the shareholders, a court of equity will interfere in behalf of the shareholders. Although directors of a bank voting extra compensation to one of their number for extra services as agent of

the bank, are not liable therefore if they act in good faith and for the benefit of the corporation, although the extra compensation is illegal and may be recovered back by the company from the director receiving it. (11 Ala., 191)

There are some other acts which are voidable but not absolutely void, the burden being always on the directors to show the fairness of the transactions. Such are contracts between corporations having directors in common. Also in the cases of directors purchasing property for the corporation or buying up corporate debts. But directors guilty of speculating with corporate funds, or of cancelling subscriptions of particular directors or shareholders, or allotting shares to infant children are held personally liable to the corporation.

With respect to the liability for negligence of the directors to the corporation we must recur for the solution of any problems which may arise to the doctrine governing the liability of agents and mandatories. This doctrine has been framed into two rules which are generally accepted as authority. They are:-- 1st., "Where directors are clothed with a discretion, they are not responsible to the corporation for

damages flowing from an exercise of this discretion, however, erroneous their exercise of it may have been.

2nd., In respect to their ministerial duties, they are not responsible to the corporation for anything short of gross negligence, non-attendance and fraud, whereby frauds have been perpetrated, or the property of the corporation emblezzled or wasted.

The directors of banks from the nature of their undertaking fall within the class of cases where only ordinary care and diligence are required. It is not expected that they should devote their whole time and attention to the institution in which they are acting, but other officers who are duly compensated therefor, have the immediate management. They are, of course, under the control of the directors and the degree of care necessary to be observed by the directors is controlled by circumstances or custom. If there have been no acts by the President or Cashier calculated to awaken suspicion as to their fidelity, ordinary care and diligence is sufficient. But if the directors become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is

required, and a want of that care would certainly render them liable.

Ultra Vires Acts. In considering directors' liability upon contractual engagements, the fundamental principles of agency apply. Thus it is laid down in the text books that a person who enters into a contract as agent for a disclosed ~~principal~~, and responsible principal, and within his powers, is not liable upon such contract. Further that if such person contracting as agent exceeds his powers, the principal is not bound, while he himself is liable, as he also is if in reality he has no existing principal. He must clearly and unmistakably both act and give the parties with whom he is dealing to understand that he is acting as agent, and is unwilling to incur any personal liability. Otherwise he will be held as a principal even though he had no such intention. If he has no principal at the time and there is not then in existence any person who could be principal, then, as the contract would otherwise be wholly inoperative, such person will be held to have acted in his own behalf and he cannot afterwards be relieved from liability by the ^{erv}intention of some person willing to ratify such contract.

So an agent of a corporation is liable where he either expressly or impliedly by his conduct misrepresents the extent of his authority. This last is probably the commonest instance where a person dealing with directors obtains redress from them personally on the ground of the contract being ultra vires either of themselves or of the corporation. The principle is as follows:-- "If a director or other official of a corporation making a contract with a person misrepresents his own authority, whereby a contract not enforceable against the corporation is made, and the person so contracting was not aware of the limitation of authority, such person will have an action for damages against the individual guilty of the misrepresentation; and it has been decided that he will have a similar action when the misrepresentation is of the powers of the corporation;" the accuracy of this last clause has, however, been questioned. Thus in Cherry vs. Bank, L.R. 3 P.C., 24, two of the directors of a company informed a bank that they had appointed "C" to be manager of the company, and had authorized him to draw checks. They had no authority so to do, but they ^{were} held upon checks drawn by "C" upon the implied warranty that they had the requisite author-

ity. An agent will not be liable if the person with whom he dealt knew or had the means of knowing that he had exceeded his authority. As to those matters wherein the powers, either of the corporation or of the agent are fixed by public act or by general laws, parties dealing with the agent have the means of knowing and must be presumed to know the extent of the power; and having thus constructive notice, cannot set up that they were deceived by any implied representations or warranty of power in the corporation or of authority in the agent. The mere fact that a director or other official enters into a transaction in such capacity is no representation or warranty of his own or of the corporate powers, or that the corporation will carry out such transaction.

If the directors of a corporation do an act which is clearly beyond the powers conferred upon them by the charter or incorporating statute, and whereby lossess are sustained by the company a court of equity will, in a proper procceding compel them to make good such loss out of their private estate. A provision in the charter of a bank, prohibiting any director or other officer under a penalty of fine or imprisonment, from borrowing any money from the bank does

not release a director from liability to the bank for the money thus loaned him. Such contract, though illegal, will be enforced because its enforcement is not contrary to public policy. but in conformity with it.

If directors knowingly issue illegal and spurious stock beyond that which they are authorized by the charter to issue, they are liable to any purchaser or subsequent transferee of the certificates of obligations who takes them relying on their apparent validity. But a director is not liable for a breach of trust or act ultra vires or improvident act committed by his co-directors, where he was not present when it was decided upon, took no part in it, and had no knowledge of it, unless it appears that he might have prevented it by ordinary attention to his duties. (71 Pa.St., 11) So also where a director was present ~~and~~ during only a ~~part~~ of the session at which an illegal act was approved and had no knowledge of the facts. But if he was present when the act was decided upon, whereby the funds of the corporation were wasted, and did not ~~oppose~~ it, he will ^{be} liable.

