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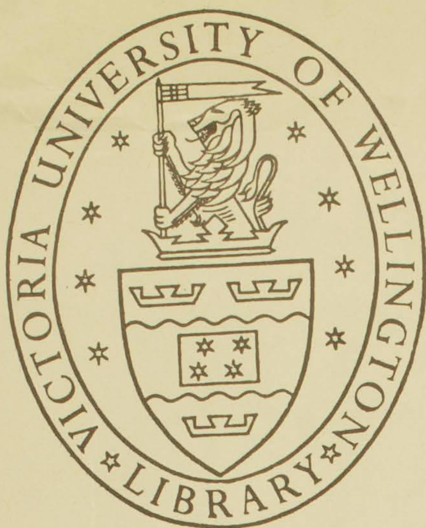

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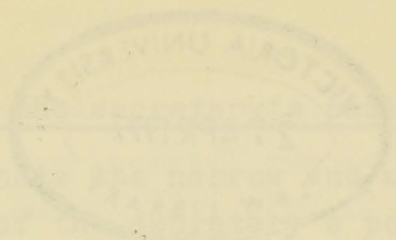

Research paper submitted for the Degree of Master of Laws and Honours in Law at the Victoria University of Wellington, 1976.

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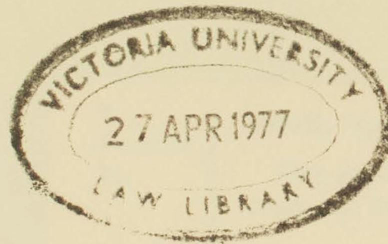

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Introduction

In this paper we shall be concerned to examine the legal position of the company secretary, with regard to his functions, duties, powers and liabilities. By duties we mean those things which he is required by law to do. For example, under the Companies Act 1955 pursuant to ss. 231 and 349, he is required to sign the statement of the company's affairs, and if he fails to do so he will be liable to the sanctions imposed by the Act. Duty is thus clearly related to liability. Then there are his functions, by which we mean acts that he can do, e.g. make a statutory declaration pursuant to ss. 29 or 117. Here again there is overlapping, for a function is also a form of power. Because of this overlapping between duty and liability in the one case and function and power in the other, the proposed division into four rather than two separate categories is not entirely accurate. However, for the purposes of exposition in this paper, it will be convenient to ignore the inaccuracy and treat them as divisible into the four categories proposed.

Development of the secretary's position

We shall note the narrow and unrealistic view of the status of the secretary's position which from early times was adopted by the courts, and which narrow view was paralleled, but to a less extent, by the legislature. We shall contrast that with the wider, more realistic view taken by the business world. We shall note the growth in the volume and importance of the work undertaken by the secretary, the gradual recognition of his importance by the legislature, and finally a broadening of the attitude of the courts themselves. We shall consider whether the current legislative and judicial views accord with the reality of the situation as evidenced by the practice of the commercial world.

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Managerial functions

A company is an artificial creation, brought into existence for the purpose of carrying on those activities which are necessary for the attainment of its objects as they are set out in its memorandum and articles of association. It is the pursuit of these which is the real business of the company and the one which involves the skills of management. These skills are exercised by the managers of the company who primarily are the board of directors but who in practice will delegate their managerial functions to a managing director.

Ministerial and administrative functions

The total functioning of the enterprise involves however more than those activities which are aimed exclusively at the attainment of the company's listed objects. It also involves a great deal of incidental work which, although not concerned with the objects in the narrow sense, is nevertheless essential to the welfare of the company. This incidental work can be classified as the administrative and ministerial functions and duties pertaining to the business operation, and relates to the internal and domestic housekeeping aspects of the company's activities. Because these activities are not directly concerned with the attainment of the objects, they are not strictly managerial and do not call for the exercise of the skills of management. Indeed, should such activities be undertaken by the manager, they would occupy valuable management time and thus detract from the overall efficiency of the enterprise. Overall efficiency therefore requires that these duties be delegated. In practice that is what has happened, the work being traditionally delegated to another, usually a servant of the company, known as a secretary, although sometimes an outside professional will be employed. Thus relieved of the non-managerial work, the manager is left free to concentrate on the true tasks of management. Similarly, by being allocated this work on

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an exclusive and full-time basis, the secretary will acquire a high degree of skill, with the result that these duties and functions will be carried out more efficiently. Thus the advantage of a secretary to the company is two-fold - it frees the manager from calls on his time in the non-managerial area, and at the same time ensures that the company is well served in its housekeeping activities.

Areas of the secretary's operations

The duties and functions of the secretary, as well as his related powers and liabilities, may be looked at under three broad heads - those which are exercised pursuant to statute, those exercised within the company, and those exercised towards outsiders.

Statutory duties and functions

The best known of the duties and functions of the company secretary are those which he performs as a consequence of the requirements of the Companies Act 1955. It will have been under this or an earlier Act that the company will have been originally created and it will be pursuant to this Act that the company will continue to operate. The act of creation and that of ensuring the company's continued existence involve a considerable amount of clerical work. For example, its original incorporation will have involved the preparation of documents and their stamping and filing. Similarly its continued existence as a company operating within the law will require the keeping of records and the filing of returns, and the compliance with the various other formalities required by the Act. Any structural changes, whether they involve a variation of objects, change of name, or a merger or takeover, will similarly require compliance with the appropriate statutory requirements. In imposing these duties and functions the Act does not specifically place them on the secretary, for, primarily, they are the responsibility of those who

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manage the company. However, as we saw, they are not in the nature of managerial functions, and it would represent a wasteful use of valuable managerial skills to require the manager to carry them out. Moreover, not only are they numerous and wide-ranging and requiring of a detailed knowledge of company law and of accounting practice, but they are demanding in the sense that, being statutorily imposed, they are mandatory, and require to be done without fail and at the proper time and with a high degree of accuracy and thoroughness. As time has gone on, the legislation has tended to exercise an ever-increasing and stricter control over the company and this has been done by an increasing insistence on more accurate and detailed accounting as well as the submission of fuller reports and returns. Besides that, the penal sanctions have increasingly been made more stringent and increasingly been widened to control larger areas of the company's activities. This has meant that the clerical function has become more important and at the same time more demanding both in the time and skill of the person who carries it out. Therefore apart from the undesirable diversion of their managerial skills into non-managerial areas noted earlier, the plain fact is that the managers would not possess the knowledge, training or experience necessary to carry out the present day requirements of company legislation.

Secretary made compulsory

The legislature has recognised the importance of these statutory functions and duties now required of the company by making the appointment of a secretary compulsory and, moreover, by making it one that is to be exercised exclusively has made it into a full-time career. The legislature thus acknowledges that the secretary fulfils a role which is not merely desirable but essential to that which the legislature considers to be the proper functioning of a company.

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His functions limited

The Act is of course not concerned with the wider issues of the welfare or efficiency of the company but the narrow point of its legality and its compliance with the statutory rules. Therefore the legislature has not legislated any wider than that necessary to achieve this limited aim, and inevitably this has led to the Act being expressed in terms which state the secretary's functions and duties in terms of these limited clerical and administrative functions. However, limited as these functions might be in the managerial sense, they are highly important in the eyes of the legislature, as the means to the company's discharge of its statutory obligations.

Surprisingly however, compliance with these statutory requirements is not sought by the direct method of the imposition of any specific duties or functions on the secretary as such. There are it is true some duties and functions which are imposed on him directly, as for example, the duty placed on him by s.231 to verify the statement of the company's affairs submitted to the Official Assignee, or a power given to him by ss. 29 and 117 to certify by statutory declaration the company's compliance with certain statutory requirements. But these are trivial and in relation to the wide range of other duties and functions covered by the Act are quite inconsequential. Neither are his functions defined in the Act, as for example are directors' (see regulation 80 _et seq_ of Table A). The definition of his functions has been left to the courts but in view of the unrealistic view which they have taken of his functions, as will be examined more fully later, and which have done so little to illuminate this area of company law, it is rather surprising that the legislature when making the appointment of a secretary compulsory in 1955 did not take the opportunity of expressly

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prescribing his duties and functions. However, they did not, and the position is that, although there are many duties and functions imposed on the secretary, they are not imposed directly, but only indirectly, by the Act. These are, first of all, those duties and functions, which, being imposed on the company, are those which by their nature are clearly of a clerical and administrative nature and thus fall naturally within the secretary's sphere of operations. These duties and functions include the keeping of books of account, the preparation of accounts and balance sheets, the preparation and filing of returns and so forth. In addition to these duties there are those further ones which could involve the secretary. These are those occasions where the statute imposes liability on persons or members of the company, for the secretary, being both a person and a member, can also be liable - see for example, ss.320, 321 and 322 and note Re Maidstone Buildings Provisions Ltd (1971) 3 All E.R. 363. In that case the court held that a chartered accountant who acted as secretary and financial adviser to a company was not a person who was knowingly a party to the carrying on of the business of the company with intent to defraud creditors, contrary to the Companies Act 1948, s.332 (i.e. our s.320). The most that could be alleged against him was that being aware of the insolvent condition of the company he failed to take steps to prevent it trading fraudulently. Mere inertia on the part of a secretary does not, however, make him party to the carrying on of the company's business.

Added to these possibilities are the provisions contained in some sections, e.g. ss. 151, 152, 153 and 154, which in imposing duties and functions on the directors allow them to excuse themselves of those responsibilities by delegating the duties and functions to a reliable person, who obviously

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will be the secretary.

Secretary as officer

However the fact remains that, apart from the inconsequential exceptions of verification and certification noted earlier, or the larger responsibilities indirectly imposed on him as a person or a member, or a delegate, the Act does not require the secretary as such to do anything. Neither does it require him to have any qualification. This is rather a strange omission, especially after specifically requiring that such a person be appointed and that his name be recorded in the register. As it happens, however, this and the other omissions of definition referred to do not matter, for responsibility of the secretary is achieved by the device of fixing responsibility on him, not as secretary but as the officer responsible for carrying out the secretarial tasks. This responsibility is achieved by the indirect method of placing the duty of compliance with the provisions of the Act on those persons who are officers of the company and then defining the term "officer" to include the secretary.

We see then that in the main the functions and duties of the secretary under the statute are not specifically prescribed, but are merely those duties and functions which should he wilfully and knowingly permit default in their discharge would make him liable as an officer. Added to this must be those responsibilities imposed on the secretary by reason of his being a person, or a member of the company, or a delegate of the directors, as noted earlier.

A matter of interpretation

But by whatever device he is made liable, in the final analysis the scope of his duties will depend, not upon his being an officer, or for that matter on his being a person or a member, but upon whether the duties are such as would normally fall within the secretary's province.

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This is largely a matter of interpretation. Some of the duties and functions laid on the company are so clearly within the secretary's province that the person filling that position would be liable as a defaulting officer should he not do them. One such obvious function would be the issuing of certificates of shares under s.90; another would be the registration of charges pursuant to s.102. These duties and functions cannot be discharged by the company, but only by an agent; they are so obviously ministerial that it must be inferred that the legislature in insisting upon the appointment of a secretary, whose traditional function is to do this work, and by including him in the definition of officer, and by making the defaulting officer liable, has intended that the secretary should primarily be the person responsible. Thus by means of the linkage of a series of propositions, the responsibility of the secretary is made manifest. One wonders why the legislature, with an Act available before them, chooses to work in this round-about fashion.

As already noted, the tendency is for the legislature to exercise an ever-increasing and stricter control over the company by requiring more accurate and more detailed accounting, and fuller reports and returns, and by making the penal sanctions more stringent, and windening them to include a larger class of activity. But the legislature does not stop there, for the area of the possible liability of an officer is not restricted to these routine administrative responsibilities, but extends to cover the full range of the company's activities. Thus an officer is liable for misfeasance or breach of trust under s.321. Similarly those protections provided by s.468 against actions for negligence or other defaults are given to officers. Therefore the area of the company's activities in which the secretary can be involved is greatly enlarged. This means that the

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secretarial responsibilities under the Act are becoming more important, and that likewise the secretary's status is improving. His status comes however, not from his designation as secretary, but from the inclusion of such designation in the term "officer". He is thus equated, in this respect at least, with director and manager. As Lord Denning says at p.19 in Panorama Developments v. Fidelis Fabrics (1971) 3 All E.R. 16 -

> "A company secretary is a much more important person nowadays than he was in 1887. He is an officer of the company with extensive duties and responsibilities."

In that case the secretary of the defendant company fraudulently ordered hire cars from the plaintiff, stating that they were required for the purposes of the defendant's business. The defendant claimed that the secretary had no authority to make contracts and representations on behalf of the company.

Similarly in those cases where the company is involved in criminal liability arising from the acts of the secretary, it is usually his act as an officer rather than as secretary that makes it the act of the company. See Registrar of Trading v. W.H. Smith (1969) 3 All E.R. 1065, where it was sought to make the local managers liable as officers, and it was held that the word "officer" excluded a local manager but included a secretary. See also Tesco Supermarkets Ltd v. Nattrass (1971) 2 All E.R. 127, where a secretary was considered to be included in the class of officer who acted as the directing mind and will of the company.

Other statutory requirements

Then there is the responsibility of ensuring the company's compliance with various other Acts. Thus the Factories Act 1946, the Accident Compensation Act 1973, and other Acts will require the making of various reports in a variety of different circumstances. Although as with the Companies Act, theoretically the

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liability for compliance with the statutes will be placed on the company and its directors, in practice the responsibility to see that the duty is discharged will fall upon the secretary, and he will usually be the person in default should the duty not be carried out. As with the duties imposed by the Companies Act, so with these statutes, the duties imposed by them are ever-expanding as society exercises an increasing control over a wider range of activities. Thus, just as the need to protect investors and creditors has led to an increase in the control and oversight exercised by the Companies Act, so the need to protect consumers and workers has led to similar provisions being included in the Health Act 1956, Factories Act 1946 and many other Acts.

However, as we shall see, the secretary's real importance does not depend upon these duties and functions which he performs under the Companies and other Acts, which are after all merely routine and clerical, but from his high executive standing within the company arising from the importance and value of his specialised and expert knowledge in the affairs of the company.

Powers

We have noted the various statutory duties and functions which are imposed by the Act, either expressly or by implication, on the company secretary. The imposition of these duties will in turn, by implication, invest the secretary with those powers which are necessary to enable him to carry them out. For example, the secretary will have an implied authority, flowing from his responsibility to keep the books and to file returns, to purchase the necessary books and forms. Similarly he will have power to arrange to have the company seal prepared, and to have the company's name painted on the company premises. See In re King's Cross Industrial Dwellings Co. (1870) L.R. 11 Eq. 149, where it

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was taken for granted that a company would be bound by its secretary's contract for that which was essential to the existence of the company - in that case, the advertising of the company prospectus. See also the Panorama case. However these powers which derive from his statutory functions and duties are of little consequence. Indeed, far more impressive are the things which, according to the cases, he cannot do, although they are related to his duties and functions under the statute. Thus he cannot call a meeting without the directors' instructions, Haycraft Gold (1900) 2 Ch. 230; or alter the minutes, In re Cawley (1889) 42 Ch. D. 290, or register shares, CHida Mines v. Anderson (1905) 22 T.L.R. 27. These cases show how limited are the incidental powers which the courts have considered as being necessarily invested in the secretary to enable him to carry out his statutory functions.

Liabilities

We noted that the secretary was defined in the Act as being included in the term "officer" and that the Act imposed a wide range of penalties on defaulting officers. The main liability of the secretary under the Act derives therefore from the possibility that any failure, omission, or default of the company in any of its statutory duties will make him liable as a defaulting officer. Whether it will or not will depend upon whether the statutory duties are properly the secretary's responsibility. As we saw, in very many cases they will be, because they will have been delegated to him by the board. Thus the statutory requirements of the keeping of proper books of account, of seeing that proper balance sheets are prepared and that they comply with the statutory requirements as to form and content, are imposed by the Act primarily on the directors but, as expressly recognised by the Act, as for example, in such sections as 151, 152 and

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153, these responsibilities may be delegated to others, and so long as the directors reasonably believe their delegates to be competent and reliable, the directors are relieved of liability, and the delegates become liable. As far as the accounts are concerned these responsibilities will fall on the person who prepares the accounts, who will be the secretary, and on the auditor who will audit and certify those accounts - see s.166. In the case of a private company, unless it is a "non-exempt private company", the requirement of having an auditor may be dispensed with. Then s.133 will also operate to exempt it from filing copies of balance sheets and auditor's reports with the Registrar. In such cases, the auditor will have dropped out of the picture and any delegated responsibility remaining will be that of the secretary alone. How well he discharges that responsibility will depend largely on his skill and application. Where he is a chartered accountant or chartered secretary, a high standard of competence will be required of him, not only by the respective Accountants and Secretaries societies through their disciplinary requirements, but also by the law, in that negligence by such a person will not be readily excused under s.468. See Dimond Manufacturing Co. Ltd. v. Hamilton (1969 N.Z.L.R. 609. That case concerned the negligent preparation of a balance sheet by an accountant. Speaking of the higher standard of care resting on directors, Turner J. said at p.630 -

> "I agree (with what Gore-Browne had to say about directors) and add that the same observation can be made in respect of a professional secretary ..."

The ground on which the directors are able to escape liability for those statutory duties which they have delegated is their reasonable belief in the competence of their delegate. In other words they must exercise proper care in the selection of the officer who is to be made responsible for the carrying out of this work.

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Often, as for example, in the case of a public company, or even a large private company, prudence will dictate that a delegate with adequate professional skill and training be chosen. Hence it may well be that the selection of a person other than one who is qualified as a chartered accountant or chartered secretary could in some circumstances constitute a failure by the director to exercise care.

Domestic and internal

We come now to the second head under which the duties and functions of the secretary, as well as his powers and liabilities, may be studied, that dealing with those activities arising out of his relationship with his own company. These are all those matters of internal administration of the company. Here the secretary appears in his true light. Here he fulfills the role of a senior executive officer and will have duties and functions, as well as powers, commensurate with that ranking. Nevertheless as a secretary he remains the servant of the company and it is his duty to carry out the instructions given to him by those who manage the company. His first duty will therefore be towards the board of directors. But it is not his only duty. He will also have duties under the Act towards others, e.g. towards shareholders in relation to meetings and share transactions. Normally of course he cannot call a meeting without board approval, or register a share transfer without similar approval, as noted earlier. But otherwise he must see that the duties owing to these other persons are discharged, and that the rights of shareholders and others under the Act, as well as customers and members of the public, are protected, even should their interests be in conflict with one another, or with those of the board. As in other areas, here too, his responsibilities are increasing. As John Perham in The Embattled Company Secretary (January 1973) The Chartered Secretary 21 states -

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"... Today, when almost every aspect of company activity is coming under attack from the outside, it makes him (i.e. the secretary) one of the most visible. For as government gets nosier, stockholders louder and consumers angrier, the secretary is the key liaison man between his company and all these outside forces."

But throughout it all, the secretary remains the servant of the company and the appointee of the board, and his first task therefore is to be thoroughly conversant with the company's memorandum and articles of association, as well as statute and company law generally, so that he can advise his board in these areas and ensure that their actions and policies are in compliance with their powers and the law generally. He will be required to be well informed on market trading and financial matters and to be able to advise the board in these areas. These duties, and more, are considered by writers in this field as being within the province of the secretary - see e.g. Job Description for the Company Secretary, an article by R. Neilson in (January 1973) The Chartered Secretary 5, in which he allocates the secretary's duties under the broad heads of secretarial and legal; financial and management control; administration; and general. Perhaps these views of the role of the company secretary are best summarised in the preface to the 7th edition of Paul's Secretarial and Administrative Practice, where the learned author states them in these words -

"... an efficient corporation secretary is vitally concerned with economic studies; human relations, i.e. with directors, shareholders, the Stock Exchange and the public; financial management; the protection of assets; relevant legislation, both current and new, and taxation."

We see then that writers on the subject see the secretary's role and functions as being very wide indeed. This accords generally with the findings of Lindgren, based on a survey of a number of companies in Australia, that the secretary is a very important officer within

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the company's domestic heirarchy - see (1974) B.L.R. 288. The courts however, it must be noted, have adopted a much more restricted view. In particular they do not accept that the giving of financial advice is part of the secretary's function - see Re Maidstone Buildings Provisions Ltd. That judgment does not stand alone, but is in line with the traditional attitude of the courts which has been expressed in a long line of cases stretching back to the last century. See for example Newlands v. National Employers' Accident Association (1885) 54 L.J.Q.B. 428. In that case a secretary fraudulently promised that if the plaintiff took shares in the company he would be appointed as its solicitor. The plaintiff applied for and was allotted the shares. The secretary also fraudulently represented that the plaintiff had been duly appointed solicitor. The court held that the company were not bound by the secretary's representations. Brett M.R. at p.430 stated the position thus -

> "A secretary is a mere servant; his position is that he is to do what he is told and no person can assume that he has any authority to represent anything at all ..."

Although the courts showed a change in attitude towards the secretary in Panorama's case, their attitude still falls far short of that of these writers. Panorama's case will be dealt with more fully later; meantime we may note that the courts are not prepared to go as far as these writers (and the business world generally) in the recognition of the width of the secretary's powers, either within the company in its internal arrangements, or in its external relations towards outsiders. Perhaps the prescription put forward by the secretary in Dimond's case, and accepted by the Court, more accurately defines his general duties towards the company. There the secretary was also an accountant and described some of his duties as an accountant's duties but in the context in which they were being exercised there is little doubt that they were

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secretarial. They are stated at p.618 thus -

> "... There was a daily collection of mail, and the distribution, and dealing with mail, recording of cash and banking of the cash. The processing and verification of all inward accounts and the payment of those accounts. That means all the money coming into and going out pass through our office. We attended weekly to the payment of wages ... (the company) prepared the wages but we verified them and paid them and enveloped them. I attended to all the matters of insurance. Through our office were typed and processed all the outward invoices. I attended to correspondence, we attended to all matters of taxation, all company documents."

Although the secretary was not a member of the staff of the company but an independent professional, the prescription did presumably show the full secretarial function. It will be seen that there is no mention of the secretary being required to give financial advice. Even though Panorama's case has widened the area of his functions, it does not refer to financial advice. Therefore, although in many cases the giving of such advice will be undertaken by the secretary, as part of his normal activities, that will arise not from any duty requirement but a practice based on his expert knowledge in these matters. That will be particularly so where by reason of his also being a chartered accountant he will be engaged by the company to prepare its tax return. However as Pennycuick V.C. held in Re Maidstone, when giving financial advice, the secretary is acting not as secretary but in the role of financial adviser.

Again some writers see the secretary as playing a leading part in such matters as takeovers and mergers. See The Role of the Secretary In Take Over Bids, by D.C.I. Marwood, in July (1973) The Chartered Secretary, 9; and The Secretary In A Financial Environment, by I.E. Rockley, in (April 1975) The Chartered Secretary 5. In the latter writer's view the true picture of the secretary "is one of a generalist operating with, and to some extent controlling the activities of, the specialist

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managers of the corporate whole." It may be however, that in this area too, these writers overstate the position. No doubt the secretary will play an important role in such matters, but that role will be confined to putting into effect the decisions of the board rather than in advising them as to what decisions to make as these two writers would seem to suggest. Even on the most favourable view, that expressed in Panorama, the secretary's powers fall short of managerial functions, and in Re Maidstone, financial functions were expressly held not to fall within the secretary's province. Still there is no doubt as these writers say that, because of his position and skill, the secretary does exercise a considerable influence over the actions and policies of the board and that on the whole it is a beneficial influence and one which enhances the efficiency of management.

But the secretary also exercises his skills to a much greater extent in the company's day-to-day operations, for he is of course responsible for staffing matters, including recruitment and records. As stated by Lord Denning in Panorama, the secretary is certainly entitled to sign contracts connected with the administrative side of a company's affairs such as employing staff. In fact not only staffing, but all matters falling within the domestic domain are the responsibility of the secretary. We saw this in the prescription of the secretary's duties referred to in Dimond's case. Although largely routine, these functions and duties, being housekeeping matters, are very important to the well-being of the company. It is in this area that the responsibilities of the secretary have grown so much over the years and where he has mainly exercised his talents and where, through improving old skills and developing new ones, he has brought the office of secretary to the high standard which we see today. Secretaries have joined together to form a professional body which has for its object the promotion and advancement of the professional standing of its members. This has been achieved by fostering education and training, and the setting of high standards of skill and ethics which its

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members must attain.

It is this development of skill in the housekeeping area of the company's affairs that has been the main reason for the improved status of the modern secretary. Company managers and the business world generally have come to accept the secretary's expertise in this area. However, as we noted, generally speaking, this improved standard of skill and professionalism, as well as enlarged responsibilities, have not been recognised either by the legislature or by the courts. In the case of the legislature, its only concern is that creditors and investors be protected, and the legislature has been content therefore to legislate for those purposes only, and although the duties imposed on the secretary in consequence are considerable, they are administrative and clerical only, and trifling when compared to his functions towards the company in relation to its internal administration and operations in the widest sense.

A similar limited and unrealistic view has been adopted by the courts. There the issue has invariably been one concerning the company's external relations, to which issue, skill and responsibility within the company are not directly relevant. Nevertheless these matters are the essence of the secretarial function, and are therefore matters which should, one would think, serve to indicate to the court the extent of the secretary's powers to represent the company towards outsiders. It seems however that rarely if ever is evidence submitted on this point and the matter is left largely to "the general knowledge of business which is attributed to the court" (per Brett M.R. in <u>Newlands</u> case). As pointed out by one writer, no empirical study has ever been made in this area, and in the absence of such study, the knowledge of the court rests exclusively upon the experience and intuition of the judges. (see Lindgren 46 A.L.J. 385 and (1974) Business L.R. 288). It is

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true that in the Panorama case the judges did extend the secretary's powers, but that extension was based not on any evidence of any organised empirical study but on the more liberal subjective attitudes of the judges who dealt with the case. This evidential aspect will be dealt with more fully later in this paper.

Powers

As we noted, the functions and duties of the secretary, in regard to the internal administration of the company are very considerable indeed, and relate to the total housekeeping activity. The secretary will therefore have implied the authority necessary to discharge those wide responsibilities. It is impossible to list them, but as indicated by Lord Denning in the Panorama case, they will certainly include the signing of contracts connected with the administrative side of a company's affairs, such as employing staff, and ordering cars, and so forth.

Liabilities

Certain liabilities devolve upon the secretary towards the company arising out of the employment contract. Thus where he is a servant of the company he owes, as an implied term of the contract of employment, the duty of care and will be liable to indemnify his employer against any loss suffered as a result of any breach of that contractual duty - Lister v. Romford Ice Co. (1957) A.C. 555. Where the secretary is the servant of the company employed in a master-servant relationship the company would usually not invoke this right, on the grounds of loyalty to its servant and the servant's lack of funds. Exactly the same may be said, both as to the liability and the waiving of the remedy, about a tort committed by the secretary for which the company

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is vicariously liable. However if the secretary were insured it would be a different matter, in regard to both his contractual and his tortious liability. Therefore, if the day ever comes, as it may well do, where secretaries, even when employed in a master-servant relationship, are required to be insured, we might see some activation of these possible remedies in this master-servant area. This could well occur, for example, with the increasingly common practice of chartered accountants acting as secretaries, for in their case they are often covered by insurance against negligence.

Where the secretary is an independent contractor the position is entirely different. Here the restraints of loyalty no longer operate, for the secretary will be a professional secretary serving a number of companies who will be his clients and the relationship will be purely a business one. See, for example, such cases as Kleinwort v. Automatic Machine Corpn (1934) 50 T.L.R. 244, and Meulen's Hair Styling v. C.I.R. (1963) N.Z.L.R. 795. In the first case, the defendant ran a rent-a-secretary service so to speak, and in the second case the secretary who was a chartered accountant was the secretary of sixteen different companies. See also Dimond's case. Nor is there in these cases any lack of financial substance, for the professional secretary will invariably be insured against claims for professional negligence. Although the relationship between the secretary and the company is no longer a strict master-servant one, it is still contractual, and no doubt the company suffering loss from the negligence of the professional secretary within the contractual arrangement could invoke breach of an implied contractual term under the principle in Lister's case. However the more usual remedy will be the wider one arising from tort and especially that of negligent misstatement as evidenced in such cases as Hedley Byrne and Co. v. Heller and Partners Ltd (1964) A.C. 465. This remedy was invoked in Dimond's case. There a professional secretary had been negligent in

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the preparation of a balance sheet which he disclosed to a prospective investor. It was held that the special relationship necessary to support a Hedley Byrne type of action existed between the secretary and the prospective investor whom he had advised. Although that case concerned the secretary's dealings with an outsider, and the remedy was invoked by such outsider, the principle would just as readily apply where the secretary was advising the company. In regard to any action by another against the secretary for negligent advice, it should be noted that it need not be against him as secretary but merely as adviser, for following Re Maidstone's case, often the advice, e.g. financial, will be given, not as secretary, but in some wider capacity. Also to be noted are the provisions of s.321 which provide for a liquidator or other person concerned with the winding up of a company to take proceedings against persons (which would include a secretary) who have been guilty of misfeasance in relation to the affairs of the company.

External

We now come to the third head of the duties, functions, powers and liabilities of the company secretary. This relates to the duties and functions which exist between the company and outsiders and which are exercised by the secretary. By far the most important and usual way in which a secretary involves his company with outsiders is by exércising a power, contractual or otherwise, on behalf of the company. As we shall see, some of these, being those in the nature of contractual powers, are based on agency principles, with the secretary acting as an agent on behalf of the company; in others, where nothing in the nature of a contract or representation exists, he is treated as one of the company's organs. Thus in Tesco Supermarkets Ltd v. Nattrass (1971) 2 All E.R. 127 he was treated as the directing mind and will of the company to commit a crime and in Donato v. Legion Cabs

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(1966) 2 N.S.W.R. 583 as the company's natural mouthpiece for the purposes of publishing a libel. In every case it is a matter of authority - in the agency situation, the secretary is invested with authority by delegation from a principal; in the others, his power comes not from any delegation but by reason of his status or position in the body corporate.

How the secretary can commit the company

There are three different ways in which the secretary can bind his company to outsiders. First he can enter into a contract on behalf of the company. This is the usual agency situation with the secretary acting as the agent of the company, either upon the basis of a representation by the company, that is, by an apparent authority, or upon the representation by the agent, that is, by a warranty of authority. The most common example of the agency situation is where the secretary enters into a contract in the name of the company, e.g. for the purchase of boiler plates, which is an act of management (see *Williams* v. *Chester and Holyhead Railway Co* (1851) 17 L.T.O.S. 269), or for the purchase of office equipment or the hire of cars, which is an act of administration - see the *Panorama* case. Secondly he can make a representation to another whereby that other, on the strength of such representation, enters into a contract with a third party. Here the secretary is not making a contract on behalf of the company but is merely giving information to an inquirer who requires the information to enable him to decide whether or not to enter into a contract with a third party. The third party may of course be the company itself, as in *Newland's* case or some other person, as in *Barnett Hoares and Co.* v. *South London Tramways Co.* (1887) 18 Q.B.D. 815. In that case a company was held not bound by its secretary's representation as to the amount of retention money owed by the company to its contractors, on the faith of which the plaintiff lent money to them.

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But in neither case does the secretary act in the formation of the contract or warrant his authority. The third way in which the secretary may commit his company is where he gives information on behalf of the company. It may be information which the company is required to disclose under legal compulsion, e.g. under an order of discovery, or it may be something that it confesses or admits to, and the secretary speaks for the company. See Harris v. MacQuarrie Distributors Pty Ltd (1967) V.R. 257, in which case it was held that a person who was both a director and the secretary of a company did not have, by reason only of his filling those offices, power to bind his company by an admission to a council inspector. Here the secretary's authority is based on agency principles. Contrasted with that case is Donato v. Legion Cabs Ltd (1966) 2 N.S.W.R. 583, where the secretary published a libel for which act the company was held liable and it was held that the authority of the secretary to speak did not depend upon agency principles but on the secretary filling the role of the natural mouthpiece of the company.

The secretary as agent

Like any other body, a company if it wishes to make a representation or enter into a contract, can only act through its agent, and a large part of the problem in this area of contract and representation is to know precisely the powers possessed by the agent so that an outsider dealing with him as the agent of the company can be sure that he has the necessary authority to bind the company. One could always check on this point by referring to the articles which specify the powers of the company, and which are open to public inspection, but business would become difficult if not impossible if every person having dealings with a company were required to check on the existence and scope of the agent's powers. Nevertheless, strictly speaking, that is the clear consequence of

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the legal rule that no principal can be bound by the act or representation of an agent unless the agent purporting to bind the principal has been given the necessary authority, either actually or ostensibly. It is the responsibility of the third party to satisfy himself on this point, either by actual knowledge or from proper inference.

How an agent binds the company

It will be necessary to examine this question of how a secretary can bind his company in rather more detail.

As we noted, circumstances in which a company may be bound by the acts of its secretary in the field of contract and representation are those in which the secretary acts as the agent of the company. This principal-agent relationship will arise where there has been authority, either actual or apparent, delegated to the secretary by the company. Actual authority arises from an appropriate contract existing between the principal and the agent whereby the latter's powers are defined, and to which contract the outsider is a stranger. Apparent or ostensible authority arises not from any such principal-agent contract but out of a relationship between the principal and a third party whereby the principal represents to the third party the existence of the agent's authority. It is based on estoppel whereby the principal is precluded from denying the appointment: Freeman and Lockyer v. Buckhurst Park Properties Ltd (1964) 2 Q.B. 480.

Actual authority

This can be express or implied. It is express when it is given by express words, such as when there is a delegation of particular duties to the secretary contained in the articles or, as would be more usual, delegation to him by the board of directors,

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by resolution, or by the managing director by direction. It is implied when it is inferred from the conduct of the parties and the circumstances of the case, such as when the articles or, as is more usual, the board, appoint a person as secretary. By such appointment the company impliedly authorises the secretary to do all such things as fall within the usual scope of that office: Hely-Hutchinson v. Brayhead Ltd (1968) 1 Q.B. 549.

In the case of the secretary, these functions are those administrative and ministerial ones which a secretary is normally required to do. He has, in regard to such matters, authority, either express or implied, arising out of his appointment, to enter into contracts on behalf of the company. One obvious case of express actual authority would be that relating to those duties expressly imposed on the secretary by the Act. From this express authority there would be inferred the implied authority necessary to carry out those acts incidental to these express duties. An example of this would be the authority to purchase the necessary statutory forms. See In re King's Cross Industrial Dwellings Co. (1870) L.R. 11 Eq. 149, where it was held that a company would be bound by its secretary's contract for that which was essential to the existence of the company. As stated in that case - "If one thing is plain, it is that the secretary has implied authority to pledge the credit of the company for issuing advertisements, of which the company is to have the benefit or chance of benefit."

But as we shall see, the tendency of the courts has been to reduce the usual authority of the secretary almost to vanishing point - see Newlands, and Barnett cases; also Ruben v. Great Fingall Consolidated (1906) A.C. 439, where the secretary was party to the issue of certain forged share certificates. It was held that the company was not liable for his fraud; it had never held out the secretary as having authority

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to do more than the mere ministerial act of delivering certificates. The consequence of this narrow attitude was that no third party could safely contract with the secretary. As we saw, in Panorama the narrow view was abandoned, and in its place it was held that the scope of the secretary's powers and functions, although still administrative and never managerial, extended to contracts relating to the employment of staff, the ordering of office machinery and stationery, the hiring of cars to meet customers of the company, and similar matters. In that case the court referred to the authority as "ostensible authority" although the authority there being exercised falls within the example of implied actual authority given by Lord Denning in Hely-Hutchinson's case. However, by whatever name it is called, the effect of this judgment was to extend the area of the actual authority implied to the secretary by recognising a wider range of duties and functions as being within the usual scope of that office. Such extension, since it involved an increase in what was considered to be within the usual scope of the secretary's authority, has in turn also extended the area of his ostensible authority.

There can of course be no authority of any sort - actual or ostensible - unless the authority purported to be exercised is within the powers of the company. Therefore in determining whether the company is bound by a particular act or representation of the secretary, the first inquiry must always be as to the powers of the company. If the requisite powers to enter into the proposed contract are found to exist, then the next inquiry must be whether the contract comes within the particular authority of that particular officer. We know that the extent of a company's powers are those contained in its memorandum and articles, and that these documents will be filed, and that everyone dealing with the company is deemed

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to have notice of them.

In theory, the first thing a third party should do, therefore, is to check the memorandum of association, to confirm that the secretary's proposed action is within the objects clause of the company. However, examination of the memorandum of association, only serves to show whether the company is empowered to enter into such contracts; it is still necessary, assuming that it can, to know by whom. This will be contained in the articles of association. These will usually be either those set out in Table A of the Act or ones which substantially follow them. On looking through Table A one will see that they contain very little to encourage a person to deal with the secretary of the company as its agent, for nowhere are there conferred on him anything in the nature of managerial functions. These are wholly reserved to the directors, whose powers of delegation are severely limited - see e.g. regulation 102. However, one function, that of the signing of cheques and bills, may be delegated - see regulation 85.

It follows that any authority purported to be exercised by a secretary which is clearly contrary to those documents cannot be within his actual authority and will not bind the company. Thus a secretary cannot have authority to do something which is ultra vires the company. Nor could he do something which the articles clearly show as not being within his authority, e.g. where they expressly provide for the signing of cheques by nominated persons who do not include the secretary.

One item of information which will be in the record will be the details of the appointment of the secretary, and his name. Hence no one can assume without more than a person of some other name has the authority of the secretary. But any officer of the company who is so authorised may act as secretary (s.181). Whether the person named as secretary or an

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authorised officer is exercising the power, the authority which he may exercise will be limited to that needed to perform his secretarial functions. Although these have been enlarged by the Panorama case, they are nevertheless still restricted to administrative and ministerial functions and do not extend to managerial functions. Thus although the secretary in the Panorama case could order cars, he would not have been permitted to order cloth, and in the absence of special authorisation no one could safely assume that he could.

However, so long as everthing, so far as it can be checked by perusal of the public record, appears to be in order and as being adequate to authorise the exercise of the power by the secretary, a third party is entitled to assume that all those matters of internal management which may be necessary to make the acts of the company regular will have been complied with, unless he has actual knowledge to the contrary, or is put on inquiry - Royal British Bank v. Turquand (1856) 6 E. and B. 327. The fact that some other person other than the named secretary is acting will obviously put the third party on inquiry, but any explanation reasonable in the circumstances, e.g. in routine matters that the named secretary was on leave, will suffice to satisfy the inquiry. The regularity of his appointment being confirmed, the authorised officer would have actual authority to carry out the secretarial functions of the company. As with the named secretary, his powers will be express insofar as they are contained in the terms of his appointment, or are those expressly required of or allowed to him under the Companies Act (ss. 29, 117), and will be implied insofar as they fall within the scope of a secretary's usual authority. As we saw, Panorama's case, although referring to the authority as "ostensible", has somewhat widened the scope of his usual authority to include those activities which are involved in the day-to-day running

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of the company. But nevertheless the assumption of regularity and thus the conferment of actual authority should not be pushed too far. Often the articles will empower the board to delegate, as for example, the signing of cheques, as in regulation 85 of the articles contained in Table A. Although it is conceivable that they might have delegated the power to the secretary, yet such duties are not sufficiently part of his usual functions for it to be assumed that, because the board could have delegated this power to him, they will have in fact done so - *Rama Corpn Ltd* v. *Proved Tin and General Investments Ltd* (1952) 2 Q.B. 147. Nor should one assume that the secretary has any authority to certificate share transfers. Although this is one of his most common statutory functions, he will not have power to bind the company unless, as provided in s.89, he is actually so authorised.

Ostensible or apparent power

We now leave actual authority to deal with those occasions where the authority of the secretary arises not from any actual appointment of him as agent by the company but by a representation or a holding out, of such appointment made by the company to a third party. As we noted, this is called ostensible or apparent authority, and is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board appoint the secretary, they invest him not only with implied authority but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as secretary are entitled to assume that he has the usual authority of a secretary. As we saw, the main effect of the *Panorama* case was to enlarge the area covered by the usual scope of the secretary's office, and that this has had the effect of enlarging the area of both his implied actual and his ostensible authority. But

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sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the secretary, they may expressly limit his authority in some way. In that case his actual authority is subject to this limitation, but his ostensible authority includes all the usual authority of a secretary. The company is bound by his ostensible authority in his dealing with those who do not know of the limitation. See Wilson v. Gilbert (1965) 39 A.L.J.R. 348, which concerned a manager rather than a secretary but the principle is the same. There the manager of an insurance company, who as part of his normal functions had power to write guarantee bonds, had been expressly instructed to cease to write such bonds. It was held that, despite this limitation of his actual authority, his ostensible authority remained to authorise the continued writing of such business.

Or again, the secretary may not be appointed in fact, but only appear to be so - see e.g. Mahoney v. East Holyford Mining Co. (1875) L.R.7 H.L. 869. In that case a *de facto* secretary's representation to a bank as to who were the company's signatories on its cheques bound the company.

Two methods of holding out

There may be a holding out and thus the creation of apparent authority under two circumstances - where, as in the examples given, the secretary is represented as having the usual powers of a secretary but which in fact he has not, and the other where he is represented as possessing unusual powers which in fact he does not possess. Although both cases are examples of a holding out by the company, and are therefore based on an estoppel whereby the company is precluded from denying its representation, there are differences between the two relative to the need for actual knowledge of the representation.

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<u>Usual authority</u>

This is the first of the two methods of creating ostensible authority, and arises in those circumstances where a third party may depend upon the usual authority of the secretary. Of course where there is actual appointment with no curtailment of powers, there is actual authority and there is no problem; it is only where there is no appointment or there is a limitation on the secretary's powers that the doctrine needs to be invoked. Where a third party deals with a company through a person who is held out as the secretary and who purports to exercise a power which a secretary usually has, the third party can hold the company liable for the secretary's acts, even though the latter is not in fact the secretary, or, if he is, should he be exceeding his actual authority because of some limitation imposed on it. The difficulty will be to know what is "usual". We know that the secretary usually exercises administrative and ministerial powers, but the problem has been that throughout the years the courts have reduced these "usual" powers virtually to nothing - see <u>Barnett's</u> case. This has been changed recently with the <u>Panorama</u> case, where the administrative powers of the secretary were spelled out more generously. In other words they became part of his usual powers so that as long as a third party dealt with a person occupying that position, then he was entitled to assume that that person's usual authority covered these functions. This protection will not operate however where the third party knows that the person is not the secretary, or that he has no actual authority, or if the circumstances are such as to put the third party on inquiry, or if there is something contained in the public documents (which the third party is deemed to have read) which shows that there could be no actual authority. Where the rule operates it will however operate regardless of whether or not the person invoking it has read the articles.

<u>Unusual authority</u>

This is the second method whereby ostensible authority

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might arise. It applies where the secretary is exercising an unusual authority so that the rule just discussed does not apply. Here to gain protection there must be a representation by the company that the secretary possesses that unusual authority and a reliance placed on such representation by the third party. As in the other case, the need for the rule applies only where the secretary lacks actual authority. Where the secretary is purporting to exercise an authority that a secretary does not usually have, should he be exceeding his actual authority, the third party will not be protected, unless the secretary was represented by the company as having that unusual authority and the third party relied on it. But to rely on a state of affairs so as to be induced to act, a person must have actual knowledge of that state of affairs; constructive notice alone is not sufficient. Therefore, before he can invoke any power given in, say, the articles, which would allow the secretary to exercise some unusual authority, he must show that he has actually read the articles in question: Rama's case .
As with the other forms of authority, none can exist if it is prohibited by the memorandum or articles of association.

In both cases of holding out whether it is of usual or unusual powers, the holding out must be done by someone having actual authority to make the representation - see Freeman's case.

Forgery

The general rule is that, should a company represent that a document is genuine, it will be estopped from afterwards denying such representation. ' The difficulty is to determine when such a representation can be made by a secretary so as to bind the company. In examining this question, one must distinguish between the two types of forgery which may be involved - that which consists of the counterfeiting of another's signature,

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and that which involves signing without authority - see *Campbell* (1960) 76 L.Q.R. 130. In the first type of forgery, the rule is that such forgery does not bind the company unless warranted genuine by some official acting within his authority. In the second type of forgery the company will be bound if the act is done by the secretary acting with authority. In *Ruben v. Great Fingall Consolidated* (1906) A.C. 439, where a company secretary had issued a share certificate to which he had affixed the company's seal and forged the signatures of the directores in whose presence it purported to be affixed, it was held that the document was a forgery and that therefore it could not bind the company unless some official acting within his authority had warranted that it was genuine. It was there held that a secretary had no such authority, either actual or ostensible. However, it was also stated that, whatever his authority, it could not apply to a forgery, but only to a genuine document. As later explained in *Slingsby* v. *District Bank* (1931) 2 K.B. 588.

> "... an act of forgery is a nullity and outside any actual or ostensible authority."

In these cases, however, the forgery involved was that of counterfeiting and therefore did not involve any agency relationship. Where the forgery is the other type, i.e. a representation by the secretary that he has authority to bind the company, an agency relationship does exist, and no question of nullity need be involved. Here the effect of the forgery upon the company will depend upon the authority possessed by the secretary. As we saw in relation to the certification of share transfers under s.89, the secretary's actual and ostensible authority in this area is very limited. However within those limits, the rule is that the company will be estopped if the forgery is put forward by an officer who is acting with actual, usual, or ostensible authority. In that case it does not matter that the officer is

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acting fraudulently - see Uxbridge Permanent Building Scy v. Pickard (1939) 2 K.B. 248.

Narrow View

Most of the disputes which have raged in this area of company law have centred on this question of the precise authority of the secretary to bind the company. As we noted, the courts early adopted a very narrow view of the secretary's powers. This was at a time when the role of secretary was in its infancy and was still developing. It goes without saying that the importance of the position then would be nothing like it is today. But still one gets the impression from the cases, that even in those early days, the practice in the commercial world was to treat the position as one of some importance, and the secretary as a person having fairly wide powers. Indeed it was this readiness of business people to treat the secretary as such that led to the numerous disputes which in those days existed in this area. At the same time, one could see the danger that existed from allowing unduly wide powers to an agent, for as said in a later case with regard to a bill of exchange,

> "... that would be a most alarming doctrine for companies, for any one who has the pen of a ready writer need only sit down and write a bill of exchange in the name of a company."

see - Kreditbank Cassel v. Schenkers Ltd (1927) 1 K.B. 826. In that case a branch manager drew bills in the name of the defendant company. It was held that as the branch manager had no authority, the company was not bound. The courts were conscious of the vulnerability of companies for the acts of their agents, and tended to protect the companies by severely curtailing the usual and ostensible powers of these agents. This they did, in the case of the secretary, by reducing his status to that of the most menial servant.

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A typical example of the narrow views of these early judges of the secretary's powers were those of Martin B. who in Williams v. Chester and Holyhead Railway Co. in 1851 placed him below a managing clerk, referring to him in these terms:

> "The secretary of a railway company is in a very different position from that of a managing clerk of a private company or firm; he is the secretary only; and unless his act is authorised by the directors or the committee, it is not in our opinion binding on the corporation or company".

Not only could he not bind the company, but he could not even speak for it. Thus in Rennie v. Wynn (1849) 4 Exch. 691, where the secretary purported to write on behalf of the company to the plaintiff advising him that he had been appointed engineer, the court refused to allow the letter to be tendered in evidence against the company. The court held not only that the secretary had no general power to appoint anyone, but also that he had no power to make communications to bind the company. Another case was In re Royal British Bank ex parte Frowd (1861) 30 L.J. Ch. 322. That case concerned a clerk, but the principle would apply equally to a secretary. There the clerk by fraudulent representation induced Frowd to invest in the company. Frowd took shares, became liable on them, and sought to rescind the contract on the ground of fraud. The principle was that such rescission was available if the purchase had been induced by the representations of the company, but not if the representations had been made by someone else. It became necessary therefore for Frowd to show that the representations of the clerk were the representations of the company. The judge held that they were not, adding that it never occurred to him that the representation of a clerk or manager or director were the representations of the company . We see the same restrictive view of the secretary's powers to make representations on behalf of the company in Newland's case. There are many other similar cases where the courts refused to treat the

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acts, representations, or utterances of the secretary as binding on the company.

Basis of Narrow View

All these cases are explicable in terms of the ideas of the times which were acting on the minds of the judges. These ideas were related not so much to the evidence of business practice, for none seems to have been placed before the courts, as to erroneous legal doctrines which were prevalent at the time in the company and principal-agent areas and which influenced the minds of the judges. One learned writer, Lindgren, writing in 46 A.L.J. 185, has referred to these early ideas and their influence on the powers of the agent to bind his principal, first as a natural person, and second as a corporation. The effect of these influences was to restrict the agent's powers and although most of the cases dealt with agents other than secretaries, so long as the secretary's powers continued to be examined in the context of principal and agent, any reduction in any agent's powers generally, reduced the secretary's power in a similar way.

There were many of these false notions abroad, and although some were more influential than others, all to a greater or less degree played a part in restricting the secretary's powers. One particularly influential one was the rule, stated for example, by Willes J. in Barwick v. English Joint Stock Bank (1867) L.R. 2 Ex. 259, that an agent could not bind his principal when acting otherwise than for the principal's benefit. This restrictive rule of an agent's powers was applied in Whitechurch Ltd v. Cavanagh (1902) A.C. 117. It was again applied to the secretary situation in Ruben v. Great Fingall Consolidated (1906) A.C. 439. This particular rule was exposed and discredited in Lloyd v. Grace Smith and Co. (1912) A.C. 716, but up till then it had a very wide and important influence in restrictively fixing

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the secretary's powers. Indeed, so strongly ingrained in the courts' thinking had the notion become that even after Lloyd's case its influence remained. See Kleinwort's case.

Another early influence was the doctrine that no fraudulent representation of the secretary could bind the company unless it was done under the authority and direction of the board of directors in the sense that the agent was acting directly for the principal. As stated by Lord Esher M.R. in British Mutual Banking Co. v. Charnwood Forest Railway Co. (1887) 18 Q.B.D. 714, at p.717 -

> "This (the rule that to bind the principal the agent must be acting for the benefit of the principal) ... is equivalent to saying that he must be acting for the principal, since if there is authority to do the act it does not matter if the principal is benefited by it."

Yet another false notion which intruded into the principal=agent area to limit the authority of the secretary was that there could be no liability for careless though innocent words, which was first established in Derry v. Peek (1889) 14 App, Cas. 337. We see the intrusion of this doctrine in Bishop v. Balkis Consolidated Co. (1890) 25 Q.B.D. 512. This doctrine was not finally dispelled until the Hedley Byrne case in 1964.

The result of some of these early influences is apparent in Newlands case. Although it was there argued that a secretary was a person authorised to make communications about the company to persons desiring to enter into relations with the company, the court would have none of it, but preferred to adopt the traditional view of the secretary's role. The result was that his authority was reduced virtually to vanishing point. As stated by Brett M.R. -

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> "A secretary is a mere servant, his position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all ..."

Perhaps on its particular facts this judgment can be justified - the contract had been in existence for two years, and the company had presumably benefited from it. But the trouble was that the limitation of the secretary's authority stated so narrowly in that case was treated as a universal truth and applied to cases where the facts were quite different. The most striking of these was perhaps Barnett's case. In that case a company was held not bound by its secretary's representation as to the amount of retention money owed by the company to its contractors, on the faith of which the plaintiff lent money to them. This was not an agency case at all, for there the inquirer simply wanted the information contained in the company's records to use for his own purposes. It was therefore far less appropriate there than in Newlands' case to examine the question of the secretary's authority to speak for the company in terms of agency principles. As argued before the court, "it is part of the ordinary business of a company that such inquiries as were made by the plaintiffs should be addressed to it with relation to financial matters in which it is interested. The proper person to whom they must necessarily be addressed on behalf of the company is its secretary. It is necessarily, therefore, within the scope of his employment as secretary to answer such inquiries". This would seem to be the proper way in which to have examined the function of the secretary in that particular case, that is to say, in terms of his right to act as the natural mouthpiece of the company. However, that was not to be - the court neither listened to these arguments nor even called on the defendant to answer them; it simply applied the strict agency principles which were current. As Lord Esher M.R. put it :" I am content to give my judgment in the same terms as I employed in Newlands case." Barnett's case was approved by the House of Lords in George Whitechurch Ltd v.

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Cavanagh (1902) A.C. 117, and again in Ruben's case.

These early doctrines, and other besides referred to by Lindgren, such as those peculiar to the company area, that a body corporate lacked capacity to commit and therefore to be answerable for a tort or crime, or that a body corporate could not be liable for a tort in which a distinctly human feeling or motive was an element, all had a restricting influence on the extent of the powers accorded by the courts to a company or its agent and thus to a secretary. Although the notions which bred these restrictive attitudes were later discarded as false, nevertheless the current of the law was thus early set on its erroneous course, and having been so set, even though the course may have been seen later to have been a false one, it tended to become fixed so that the principles governing the powers of the secretary came by and large to be treated as final and immutable. As noted by some writers (e.g. Lindgren op.cit.; Telfer (1973) Kingston Law Review), a feature of these decisions on the scope of a secretary's authority has been the tendency for the courts to base their decisions not on facts placed before them of what commercial practice is, but on the "general knowledge of business which is attributed to the court", per Brett M.R. in Newlands' case. In that sense the scope of the secretary's usual authority became to be almost a rule of law.

This narrow view was followed and applied without question by later judges - see, for example, Daimler Co v. Continental Tyre and Rubber Co. (1916) 2 A.C. 307, where a secretary was held not to have the power to institute legal proceedings; Houghton and Co. v. Nothard Lowe and Wills (1928) A.C. 1, where the confirmation by the secretary, acting without authority, of an unusual contract was held not to be binding on the company; and Re Cleadon's Trust (1939) Ch. 286, where it was held

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that the secretary has no power to borrow money on behalf of the company. Although, on the facts, these decisions may perhaps be justified, the judgments are redolent of the narrow views of the status of the secretary as expressed by the judges of an earlier age. Note, for example, these words by Viscount Dunedin in Houghton's case at p.11 -

> "The arrangement is of such a character as to be quite beyond the power of a secretary to impose on the company ..."

Or again at the same page -

> "The knowledge of a mere official like the secretary would only be the knowledge of the company if the thing of which knowledge is predicted was a thing within the ordinary domain of the secretary's duties."

Or as Viscount Sumner put it at p.18 -

> "The mind, so to speak, of a company is not reached or affected by information merely possessed by its clerks"

Yet secretaries in practice continued to exercise wide powers, and the trend of the business world was to increase their powers. The legislature too were beginning to recognise the secretary's growing importance. Textbook writers without exception pointed to the complete divergence of the judicial view from these practices. But the courts persisted in holding, based on their antiquated ideas of business practice, that the secretary had no power beyond that of a servant of humble character. As one commentator (Collier 1972A C.L.J. 44) says, one would almost expect to find, on opening the door of the company's office, Uriah Heep engaged in licking stamps and blotting copybooks. It was not until the Panorama case in 1971 that a change came.

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The Panorama case

That was a case where the secretary of a company entered into a contract for the hire of cars on behalf of and in the name of the company. The company denied liability on the ground that the secretary had no authority to bind it in contract. The argument proceeded along the usual lines - that the secretary had no express authority and so lacked actual authority; that therefore the only authority the secretary could claim would be that which the company held him out as possessing; that the company made no representation other than that implied by its appointment of him as its secretary; but that such representation served only as a representation that the secretary had the usual powers of a secretary, and such usual powers were very limited and certainly did not involve the power to enter into contracts on behalf of the company for the hire of cars. In support of this argument the company was able to invoke a wealth of authority going back to Barnett's case and beyond which held that a secretary was a mere servant whose position was that he was to do as he was told, and that no person could assume that he had any authority to represent anything at all. As we saw, the result of this traditional judicial attitude was to reduce the secretary's usual powers virtually to nothing, which meant that no one dealing with him could without specific confirmation treat him as having any authority to do, almost, anything. Not only was this view onerous and unfair to persons dealing with the company, but it was out of touch with the realities of commercial practice. But it was of long standing and had twice been approved by the House of Lords. It had been applied throughout the Commonwealth and continued to be so applied, even as late as 1966 in Donato's case where it was expressly held that a secretary's general authority did not extend into the fields of contract or representation. Therefore any change in judicial thinking was not considered to

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be very likely. However the court, conscious apparently at long last of the utter unreality of the traditional judicial viewpoint, refused to follow it, preferring instead to follow the example of commercial practice and of legislative policy which for long had accorded to the company secretary an importance and status commensurate with his position and responsibilities as the chief administrative officer of the company. As Lord Denning said at p.19 -

> "But times have changed. A company secretary is a much more important person nowadays than he was in 1887. He is an officer of the company with extensive duties and responsibilities".

Salmon L.J. spoke in a similar vein when at p.19 he said -

> "I think there can be no doubt that the secretary is the chief administrative officer of the company."

Both judges spoke of the authority possessed by the secretary as falling within his "ostensible" authority. As Collier (op.cit.) points out, this seems to be an infelicious way of putting it. As we saw earlier in Hely-Hutchinson's case, Lord Denning distinguished clearly between actual implied authority and ostensible authority. Of course, as Lord Denning explained, implied and ostensible authority often amount to the same thing, at any rate from the point of view of outsiders, so that the question of whether it is the one or the other will not matter, as it did not in the present case. But it might, if, for example, the other party to the transaction is not really an outsider but an "insider" as in Morris v. Kanssen (1946) A.C. 359. As Collier says, it might be conducive to greater clarity and understanding if the words "ostensible" or "apparent" were to be used only in the sense of non-actual authority. In Panorama's case it would seem that the secretary, having been duly appointed as such, had actual implied authority and not merely ostensible authority.

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In their departure from precedent the judges paid scant regard to the niceties of <u>stare decisis</u>, for instead of the traditional attempt to justify their departure by an elaborate process of distinguishing the earlier cases, they simply treated them as being no longer valid. So much for the law that had stood for over 90 years. Although the change of view was prompted by changed circumstances rather than any overturning of principles, nevertheless again there was no attempt to base the decision on any broad empirical study of the particular facts of the company in question, but to state the secretary's authority more in terms of a rule of law, e.g. as a power "to sign contracts connected with the administrative side of the company's affairs." But as Telfer, <u>op.cit.</u> points out, the significance of each company secretary in his particular company will vary - in some he is the principal executive figure, in others he deals simply with the clerical duties associated with the board of directors and the Companies Office. No broad rule of law can cover all these differences.

There was however no complete abandonment of the old law. The secretary's enlarged powers were confined to administrative matters only and were not to be allowed to encroach on managerial functions. Thus Salmon L.J. said at p.19 -

> "Whether the secretary would have any authority to sign a contract relating to the commercial management of the company, for example, a contract for the sale or purchase of goods in which the company deals does not arise for decision in the present case and I do not propose to express any concluded opinion on the point."

The difficulty however is to know in the marginal case just where the boundary between the administrative and managerial functions is to be drawn. The purchase of cloth by a clothing manufacturer as in the case before the court was clearly considered to be managerial and thus outside the secretary's usual function. Therefore

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the law as was laid down as far back as 1851 in Williams' case in the case of the purchase of boiler plates remains unchanged. Similarly the secretary would lack ostensible authority in such as case as Houghton's case, where he sought to confirm an unusual contract, or in Re Cleadon's Trust where he purported to borrow money on behalf of the company. Again probably he has no authority to warrant the genuineness of a forged share certificate as in Ruben's case. Nor, although he will have authority to give a receipt for a share certificate, will such authority extend to the certification of a share transfer when no certificate has been lodged, as in the Whitechurch and Kleinwort cases. As we saw, s.89 is applicable only in those cases where there has been company authorisation. But on the other hand, the common task of certificating share transfers is so much part of the secretary's routine administrative function as necessarily to fall within the administrative functions referred to by the judges in Panorama's case. On the same reasoning, it could be said that the secretary should no longer lack authority to perform such administrative tasks as calling a meeting or registering share transfers, and that cases like Chida's case may therefore no longer be authoritative.

The hiring of cars in circumstances such as those which existed in the Panorama case would be treated as administrative and thus within the usual authority of the secretary. It would also cover such matters as the engaging of staff. Presumably also covered would be the act of supplying information in answer to an inquiry by a prospective lender regarding the amount of retention money held by the company to the account of the prospective borrower, as in Barnett's case, although the making of representations as to the company's affairs in order to induce people to take shares in the company as in Newlands' case would probably not be.

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Therefore, although it is clear that the company secretary now has as part of his usual powers the authority to bind the company in administrative matters relating to the day-to-day affairs of the company, what is still not clear is how far those powers are to extend. In re Maidstone, Pennycuick V.C. made it clear that the area was to be limited rather than extensive, and that it was no part of the secretary's function to concern himself with the management of the business. He states the position at p.368 thus -

> "So far as the position of a secretary as such is concerned, it is established beyond all question that a secretary, while merely performing the duties appropriate to the office of secretary, is not concerned in the management in the company."

According to one commentator (Bastin (1971) The Law Teacher 174) the authority of the company secretary to bind the company by contract or to make representations as to the company's affairs may, following Panorama's case, be summarised in these terms:

(1) If it can be shown that the secretary has express authority, any transaction within the scope of that authority will be binding on the company;

(2) If the transaction can properly be regarded as relating to administration, then this will be covered by the ostensible (i.e. usual) authority of the secretary and the company will be bound unless it can be shown that the party attempting to rely on this authority was aware of any restrictions that may have been placed on it;

(3) If the transaction is other than an administrative one, then the company will not be bound unless the

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secretary has been held out as having authority to enter this particular type of transaction by the organ of the company with actual authority.

Liabilities

A secretary who seeks to bind his company in contract or by a representation to a third party, represents that he is the agent of the company and that he has the authority of the company as his principal so to bind. Where his authority is lacking so that the company is not bound, the third party will have a remedy against the agent.

Deceit

If the agent knows that he possesses no authority to act as agent, but nevertheless makes a representation to the contrary and in consequence causes loss to the party with whom he contracts or to whom he makes the representation, he may be sued in tort by that party for deceit: Polhill v. Walter (1832) 3 B. and Ad. 114.

Breach of Warranty of Authority

If on the other hand, the agent mistakenly though innocently believes that he possesses authority, he cannot be liable in tort for deceit. However the courts have held that the agent must be deemed in such a case to have implicitly warranted the truth of his assertion that the necessary authority existed and therefore in acting without such authority he was in breach of that implied warranty, and that for such breach the third party has a remedy: Collen v. Wright (1857) 8 E. and B. 647. The remedy has come to be known as an action for the breach of an implied warranty of authority.

In the case of a secretary acting as the agent for a company it must be remembered that, as pointed out

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earlier, persons dealing with the company are deemed to have notice of its memorandum and articles and so of any lack of authority in the secretary as disclosed on that record. As we saw this knowledge does not go however to matters of indoor management. The distinction made by the courts is that between misrepresentation of fact, in which case the agent will be liable, and of law, in which case he will not. The position regarding the application of this doctrine in the company area has been stated by Street, Ultra Vires, 314, in these words:

> "The true position perhaps is that an outsider, being taken to know the contents of statutes and other public documents, cannot complain of any statement as to powers, the correctness of which he can estimate by reference thereto. But if he is misled by statements affecting the operation of such documents, so that knowledge of the law will not help him, then the maker of such statements will be liable on a warranty of authority."

Secretary as mouthpiece

Up till now, in considering the company's relations with outsiders, we have seen the secretary in the role of an agent, with his powers (and liabilities) dependent upon an authority derived from the company as his principal. We now leave that idea, to consider an alternative possibility, that of treating the authority of the secretary as deriving not from any principal-agent relationship existing between him and the company but as attaching to the position itself as a function of that position. He would be seen as the organ of communication to speak for the company. As we saw, this way of looking at his function had been suggested in argument in earlier cases, e.g. Barnett's case, but was not accepted. It had been applied in some earlier cases, as for example in Bush v. Weiss (1846) 8 L.T. (O.S.) 137, where letters by the secretary stating that certain work had been done were readily admitted in evidence as an admission of that

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fact. Again a somewhat similar attitude was adopted towards the secretary's role in Reuter v. Electric Telegraph Co. (1856) 119 E.R. 892. The role of the secretary to act as the mouthpiece of the company was denied however in Bruff v. Great Northern Railway Co. (1858) 175 E.R. 757, and also in Harris v. MacQuarrie Distributors Pty Ltd (1967) V.R. 257. All these cases were ones where the secretary's act was not intended to bind the company in any contractual sense but merely to speak for it, but in the main the courts tended to treat his power as deriving from the agency relationship. A different approach was adopted however in one recent case, that of Donato v. Legion Cabs (1966) 2 N.S.W.R. 583. That case concerned the publication of a libel by the secretary acting on behalf of the company, and it was held that by reason of his appointment alone and quite apart from any authority derived by him as an agent, he had the necessary authority to publish on behalf of the company so as to bind it. As stated by Wallace, P. at p.588

> "The secretary of an incorporated legal entity is its natural mouthpiece and may be understood as having a very general authority on ordinary matters relating to the company's affairs and administration though not usually of course in such fields as those of contract or representation."

This view seems, with respect, to be an eminently sensible one. We noted earlier, when examining the secretary's statutory duties, the requirement of the Act that a secretary be appointed, and the wide range of statutory duties which fell within the area of his responsibility - the keeping of the share register, the preparation and filing of returns, the keeping of records, and so on, all of which gave him an intimate knowledge of the day-to-day state of the company's operations. We noted also, when examining his duties and functions towards the company itself, that he was primarily responsible for the internal

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running of the company. Finally we saw that his role was recognised in Panorama's case as that of the chief administrative officer. It follows that, as the person so intimately involved with the internal affairs of the company, he should be the one both to receive communications and to speak for the company on all matters falling within those areas.

Tort

The circumstances under which the secretary can bind the company in tort are very wide. Here again it is usually based on agency principles. The general rule is that a company is liable to be sued for any tort committed by its agent if an action would lie against the agent and he is acting in the course of his employment or within the scope of his ostensible authority and the act complained of is one which the company might possibly be authorised by its constitution to commit. The secretary is of course himself also liable - Dimond's case.

Crime

In the case of offences for which there is liability without fault, the company is liable vicariously for the acts of its secretary done in the course of his employment. Where proof of mens rea is necessary, only the person who actually commits the offence is liable. Therefore, in such a case, it is only where the secretary can be said to be acting as the company that the company will be liable for his act. Normally to be so acting he must represent the directing mind and will of the company and control what it does: Tesco's case. This implies a good deal more participation in the management of the company than was conceded to the secretary, even in the Panorama case, for to be part of the directing mind and will of the company requires that the participant be part of the management. It seems however that in the

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area of a company's activities which is covered by the criminal law, the secretary, whether as an officer or as the secretary, is considered to have large powers of management - see Registrar of Trading v. W.H. Smith (1969) 3 All E.R. 1065, where the secretary was included among those who manage the company's affairs. Lord Denning stated the position at p.1069 thus -

> "Officer may include, of course, a person who is not a manager. It includes a secretary. It would also include an auditor, and some others. But the relevant officer here is an officer who is a manager. In this context it means a person who is managing in a governing role the affairs of the company itself."

A similar view was taken of the secretary's status in Tesco's case, where all the law lords accepted that the reason the secretary was named in the statute which they were there considering was that he typified the person who may personify the directing mind and will of the company. See also Meulen's case, where knowledge of the secretary was imputed to the company. The reason for this upgrading of the secretary's status is of course the courts' strong desire to fix liability on the company, and their need therefore, should the act be done by the secretary, to identify him with the company.

In Re Maidstone however, a more restrictive view was taken, for there as we saw it was held that a secretary in performing the duties appropriate to the office of secretary is not concerned in carrying on the business of the company, and could not, therefore, be held liable as a party to fraudulent trading by the company under s.320 of the Companies Act. Thus the wide view of the secretary's status invoked to extend liability to his company, is not adopted in the converse case to extend the company's liability to him.

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Conclusions

We see then that the commercial world has from earliest times tended to accord to the secretary a position of importance, both within the company and towards outsiders, and that as time has gone on that tendency has continued. We noted the views of textbook writers which confirmed this trend. Especially important in this trend was, as we saw, the policies of the professional body of chartered secretaries, aimed at the upgrading of the secretarial skills of their members and so fitting them to undertake a wider range of activities and to give more skilled advice to their directors. All these factors go to show a growth in the status and importance of the secretary. One writer (Lindgren in 1974 Business L.R. 288) conducted a survey of a number of companies with regard to their contracting practices, and although not conclusive on many aspects of the inquiry, it did at least confirm the fact of the great importance of the secretary in the conduct of the affairs of most companies. We noted the gradual recognition and upgrading of the company secretary by the legislature through its policy of increasing the secretary's statutory functions and duties, and by requiring his appointment. But these statutory provisions are very limited, being confined to matters which are purely routine and ministerial. The legislature has therefore not moved far enough and there is still a considerable divergence between its recognition and that of the commercial world of the status and importance of the company secretary. As regards the courts, we saw how in the early history of the company secretary, they adopted a narrow view of his powers, a view which even then was behind that of commercial practice. But the courts persisted with the view, so that the divergence widened. It was not until Panorama's case that many of the old restrictions were cast off. However the full extent of the new freedom is not yet clear, for the

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secretary's authority being based still on agency principles, it does seem that there will be a good deal of activity which must inevitably remain excluded from the scope of that authority. Thus those managerial functions which, as Lindgren's researches show, fall so naturally within the sphere of the secretary's operations, being managerial, are under agency principles excluded. Thus the divergence between the judicial and commercial world remains. We noted a possible alternative approach that of the organic rather than the agency concept, adopted in Donato's case. So far however this is limited to fields outside representations and contracts.

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