THE CRIMINAL LIABILITY OF CORPORATIONS

BY

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DECLARATION

I hereby declare that this dissertation has been written by me and it is a record of my own research work.

It has not been presented in any previous application for a higher degree. All quotations are indicated and the sources are fully acknowledged.

Signed.

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ABSTRACT

This is an attempt to look at the corporations liability for its own acts and those of Its organs or agents and servants. The purpose, then, is to look into the criminal liabilities of Companies for such things as breach of statutory duties, such as failure to make returns and to keep books of accounts or to hold annual general meetings and fraudulent acts such as tax evasion, fraud and other crimes;e.g. deceit and conspiracy. To that extent, therefore, the issues of vicarious liability, liability in tort and contract for those actions or omissions of the corporation's agents or officers would be examined in passing.

This area of the law has been chosen for study because corporations, be it public or private, occupy an important segment in the economic and industrial life of a country and should, therefore, be of much interest to company lawyers in particular and the private business enterpreneurs, the general public and Government alike. Companies (including statutory corporations) are the conerstone of any country's industrial and economic growth and, therefore, have a vital role to play in a developing economy like Nigeria where the need for a strong industrial base is manisfestly desirable. The role of companies, therefore, cannot be over emphasized. The resultant effect of their importance is in the overwhelming

desire of business enterpreneurs investing their capital in company shares, partnerships and other business concerns thereby creating new avenue for the diversification and investment of capital as against the traditional, unprofitable method of keeping hard currency at home, which is to a very large extent a relic of the past.

Since the formation and promotion of companies have become an important avenue of investment in our developing economy it is necessary and pertinent for the avoidance of social friction to examine those acts and omissions for which a company could be held liable criminally or civilly. Through this study it is hoped, there will be a renewed public awareness and confidence in the particular business concern citizens are investing in, as well as providing them the opportunity of knowing what duties companies owe private citizens who have shares in them and other corporate bodies outside their own. With this knowledge at the back of their mind, the activities of company executives will be regulated. Indeed they are presumed to be aware of the extent of their civil and criminal liabilities.

Against this background, an attempt has been made by legislation to actually regulate the activities of companies for the benefit of the public and also to ensure a successful development of the country economically and industrially. For instance, the

Nigerian Indigenisation Act has imposed certain limitation on the powers of the management. The Companies Act 1968 also provides for such things as disclosure of accounts, making annual returns, issuance of prospectus or statements in lieu and other requirements. The Banking Act of 1969 also provides in section 11 A(1) that:

> "No manager or other official of the licensed bank shall in any way, either directly or indirectly be interested in any advance, loan or credit facilities and if so interested should inform the Bank."

The essence of this legislation is to place a total prohibition on directors and management of Banks from withdrawing money from their banks, a contravention of which will lead to a fine of Ten thousand Naira (N10,000) or three years imprisonment and forfeiture of any resulting gains or benefits. But in almost all the banks and corporations in Nigeria the Directors and management allocate to themselves loan and credits from their corporations before anyone else. Is that not a contravention of the law? This thesis is an attempt, therefore, to look at the extent of the liabilities of corporate organisations, their agents and principal officers and servants. It is hoped that the thesis will throw more light on many latent issues such as the liabilities of corporation while acting through their human agents on the one hand, the criminal and civil remedies available to the individuals and similar bodies of a corporate nature

on the other.

It is an inescapable fact that many shareholders do not know their rights and remedies and thus show little or no interest in the affairs of their company except to receive dividends whenever they are due. Hardly ever are shareholders aware that they have a stake in the running of the company, or let alone, permitted to know such things as the civil and criminal liabilities of their companies. An apt - illustration of the situation is section 7 (2) of Decree No.20 of 1984. which provides for the winding up of any company which contravenes any law or regulations. A number of companies had to face the penalty of paying heavy fines for actions contrary to the Decree or breach of other statutory regulations. This is to reflect the growing concern of government (both State and Federal), in our industrial, commercial and social life.

Finally, it will be the concern of this paper to examine the criminal liability of companies in situations where they fail to make annual returns to the Registrar of Companies and to make true profit declarations for the purposes of tax assessment to the revenue Commissioner. The issue whether such reliefs will be awarded through the application of Statutory powers vested in the Commissioner of Inland Revenue or through the institution of criminal prosecution in a court of law will also be a major thrust of this thesis.

It is trite knowledge though that many a writer have expressed support for the idea of a non-criminal approach to penalising corporations for such statutory offences. Whether or not their views are acceptable in the Nigerian context is one of areas of concern of this thesis.

Because the purpose of company law is to prevent fraud and mismanagement the tendency exists in the mind of the reader to regard the princple of corporate personality as being negative or of neutral importance. Functionally corporate personality doctrine is the corner stone of company law. It is for this obvious reason that one cannot but start with the analysis of the origins of the corporate personality in order to know what exactly one is making liable. To be liable there must be duties in respect of which one must have omitted to act or failed to exercise a duty of care. To know the duties if any, which the corporation owes the individuals one must examine the attributes of the corporation and how the doctrine of corporate personality came to be accepted and recognised in Nigerian Company Law.

For the purposes of convenience one cannot begin to examine the criminal liability of corporations without first discussing even briefly how the corporation came into being thereby becoming liable for its own acts or those of its officers.

Corporate criminal liability is now an accepted principle of Nigerian Criminal and Company Law. For this reason it represents a complete reversal of the original English Common Law rule. It was not until the middle of the 1940's that corporations were made liable for some specific offences involving mens rea. Corporations were successfully made liable in cases of public nuisance, but they were not made liable for crimes of which mens rea was a necessary ingredient. When liability was finally imposed upon corporations the bases upon which it was imposed and the reasons underlying its imposition were not made apparent. One could suggest that it was due to the increasing advancement of the country commercially, industrially and economically. The acceptance of the concept of the corporation as a separate, distinct legal person, and its appearance as a common mode of business organisation forced development in this area of the law.

In Britain, U.S.A., Canada and Nigeria corporate criminal liability is an accepted phenomena but in Scottish law corporations are not generally made liable for offences involving mens rea. In Norway, liability is only imposed in respect of economic crimes. The basic reason for the bar to criminal liability has been that, corporations have no mind capable of entertaining a criminal intent; that they have no capacity to commit crimes and that they cannot be committed to prison. Corporate criminal

liability is still at the embryoric stage in Nigeria; hence not much of such cases go to court. But that is not to say that Nigeria does not recognise the criminal liability for corporations. In fact contrary to the case of Decree No.20 of 1984, which provides the punishment of corporation is an inescapable example of this development. For this reason it is hoped that the examination of this subject will be both interesting and important. It is also for this reason that the historical development of corporate personality, its legal consequences and subsequently its attributes will be examined for a clearer appreciation of the subject.

Organisational structure.

The thesis is divided into 7 main chapters. Chapter 1 which is an introductory chapter deals mainly with the origins and various theories about the corporate personality.

This will provide the basic background for a proper understanding of other chapters. It will serves, as an introductory material without which the discussion envisaged is bound to be incomplete.

Chapter II - This will deals, with the outcome or consequences of incorporation. It will also examines the various attributes of the corporations. The doctrine of lifting the corporate veil will is also be examined with the aim of laying the proper

foundation for the discussion of latter chap-ters.

Chapter III - deals with the early development of corporate criminal liability and also the reasons for making corporation criminally liable.

Chapter IV - In chapter IV, the relationship between the three essential concepts in corporation law will be looked at viz: The relationship between corporate criminal liability, corporate civil liability and corporate social policy will be examined.

Chapter V - will examine the crimes for which the corporation itself would be held liable and those which the officers of the company will be held liable.

Chapter VI - deals with the stipulated penalties for non-compliance with the provisions of the companies Act of 1968.

Chapter VI - being a concluding chapter examines the future reforms in corporation law.

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I would also wish to express my hearty thanks and appreciations to the following: J. S. Anga, T. Anzaku, Ahmed Abdullahi, Musa Ahgu and A Baba Shani for making positive contributions one way or the other to the success of my work.

Finally, I am expressing my sincere gratitude to my sister, Serah for her assistance, kindness and patience throughout the period.

The loving kindness of my little boy OVye has encouraged me immensely to concentrate on this work.

DEDICATION

Enveloped in sorrow and compounded by the perplexities of human existence.

It is with very heavy heart that I dedicate this thesis to my beloeved sister, Miss Hassan Ombele Ebuga, whose transition to the great beyond took place on the 29th July, 1985.

Also remembered are Miss Asabe Ayuku Ebuga; Mr. Maigona Ebuga and Mr. Hussaini Ebuga.

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TABLE OF CASES

TABLE OF STATUTES

KEY TO CASE REFERENCE

(a)

A.C.	-	Appeal cases
All E.R.	-	All England Reports
All N.L.R.	-	All Nigeria Law Reports
Ch.D.	-	Chancery Division
Cr. App. R.	-	Criminal Appeal Reports
Dr & Sm	-	Dratch and Smith.
E.A.C.A.	-	East African Court of Appeal
E.C.S.N.L.R.	-	East Central State of Nigeria Law Reports
E.N.L.R.	-	Eastern Nigeria Law Reports
E.R.L.R.	-	Eastern Region Law Reports.
E.R.	-	English Reports.
EXD	-	Exchequer.
F.H.C.	-	Federal High Court.
F.S.C.	-	Federal Supreme Courts
G.L.R.	-	Ghana Law Reports
K.B.	-	King's Bench.
N.M.L.R.	-	Nigeria Monthly Law Reports
N.N.L.R.	-	Northern Nigerian Law Reports
N.Y.R.	-	New York Reports
Q.B.	-	Queen's Bench.
Q.B.D.	-	Queen's Bench Division.
U.S.	-	United States.
V.R.	-	Victoria Reports.
W.A.C.A.	-	West African Courts of Appeal.

W.L.R.	-	Weekly Law Reports
W.N.L.R.	-	Western Nigeria Law Reports
W.R.N.L.R.	-	Western Region Nigeria Law Report.

(b) Journals

C.L.J.	-	Cambridge Law Journal
Colum Law Rev.	-	Columbia Law Review.
Com. Law Rev.	-	Commercial Law Review.
Crim. Law Revi.	-	Criminal Law Review.

(c) Others

C.C.	-	The Criminal Code.
C.P.A.	-	The criminal procedure Act
P.C.	-	The Penal Code.
I.P.C.	-	The Indian Penal Code.

CHAPTER I

INTRODUCTION

1. The origin of corporate personality

It is a long established principle that a corporation has a separate personality distinct from its members. The nature of juristic persons has received attention since the ancient Romans who considered the isolated and independent agencies as much the units of law as natural persons and accordingly attributed personality to the corporations and the States. The term "personality" is derived from "Persona" which was a mask worn by a player in the Greek theatre. Under the roman law, persons had the right to form associations for purposes which is non-criminal and non-penal in nature. A person in law is a right and duty bearing unit and is either a natural or a juristic one. Although the common meaning of the term person is a living human being yet in law, it includes artificial persons like Companies, registered Societies and Public Corporations. Lord Blackburn in Pharmaceutical Society v. London and Provincial Supply Associations Ltd,[1] observed that:

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1. [1880] 5 A.C. 857.

> "The word person may very well include both a natural person, a human being and an artificial person, a corporation. I think that in any Act of Parliament, unless there be something to the contrary probably (but that I should not like to pledge myself to it ought to include both."2

The germ of the corporate idea lies merely in a mode of thought; in thinking of several in a group as one. The corporation though representing perhaps the most advanced attainment of the group idea, is only one manisfestation of a development which has gone in every country because no person sat down, cogistated and said "It would be convenient to give several person acting together certain attributes and call them a corporation."

The conception of an ideal person having legal rights and duties was borrowed directly from the early English Theory as to Church ownership. The unit of interest or oneness produced by the association in different ways of several persons because such an active factor in practical affairs that forced people to recognise it as an independent entity. A corporation is really a collection of the flesh and blood of individuals who have an identity of interest in certain affairs. The corporation then grew by nature, that is, it was a product of a natural evolution.

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2. At p.869.

The theory of corporate personality has its origins from the curpus juris where juristic persons were divided into four principal classes viz the communes, the voluntary associations, the charitable and religious associations and the treasury.[3]

Verifiable evidence of the validity of the principle of corporate personality in so far as commercial corporations are concerned can be traced to the early seventeen century where Sir Edward Coke said:

> "A corporation was something invisible, immortal, existing in attendment and consideration of law as a separate entity different from its members."[4]

As a result the members were not responsible for the debts of such corporations because personal responsibility of members were considered inconsistent with the nature of body corporate. But the principle had not been extended to corporations existing for commercial benefit of their members. Members of such companies were simply liable to contribute towards the payments of the debts incurred to the outside world and such liability must be discharged before members were paid any debts owed

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3 Bahadurkt Personality of the Public Corporation and lifting the Corporate Vail (1972) 14th Journal of Institute (Indian) 208.

4 Sutton's Hospital Case (1612) 10 Coke Rep. 226, p.32.

to them by the joint undertaking. It did not matter that the members had paid their subscription in full.

As time went by corporate personality was extended to commercial corporations and when, by 1862 joint stock companies had become effectively established as corporations with power to limit the liability of their members by mere registration, it was thought that it would have amounted to irregularity if not a contradiction in the law to deny commercial corporations separate personality of their own.[5]

In Parrar v. Parrar Ltd.,[6] Lindley L.J. in supporting this view said:

> "A sale by a person to a corporation of which he is a member is not either in form or substance a sale by a person to himself. To hold that it is would be to ignore the principle which lies at the root of the legal idea of a corporate body being distinct from the persons composing it. A sale by members of a corporation to the corporation itself is in every sense a sale valid in equity as well as at law."[7]

This principle of separate existence of a company was enunciated in the English case of Salomon v. Salomon & Co.[8] where the House of Lords seized the opportunity to link the old concept of corporate personality with joint stock-companies.

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5. The true characteristic and main function of modern companies were protected by the English Company Act 1862.
6. (1888) 40 Ch. D. 395 at 409.
7. Ibid at 409.
8. [1897] A.C. 22.

In this case, Salomon was a boat manufacturer. It was a solvent business when he decided to convert it into a company in order to obtain the advantage of limited liability. His plan was that the shareholders should be confined to his family. He therefore took £20,000 shares and his wife and 5 children took one share each. Salomon also received mortgage debentures of £10,000 in part payment by the Company for the business. Later the company ran into financial difficulties and a receiver was appointed with the company going into liquidation. The assets were sufficient to satisfy the debentures, but the unsecured credits with the debts amounting to £7,000 received nothing. This was challenged in the courts on the grounds that the company was one-man company and a sham; so the debentures issued to Salomon were not valid and not entitled to enjoy priority over the unsecured creditors. The trial court agreed with this reasoning and the court of appeal affirmed the decision. The House of Lords, however, unanimously reversed this decision and held that the liabilities in the form of debts as well as the assets of Salomon & Company belonged to that

company and not to its shareholders. Any other view would constitute "a very singular contradiction."

If the limited company was a legal entity, then its business belonged to it and not to Mr. Salmon. As Lord Macgnathen poin's it:

> "I cannot understand how a body corporate made capable by statute can lose its individuality by issuing the bulk of its capital to one person... the company is at law a different person altogether from the subscribers to the memorandum."9

It can be seen from the foregoing that Salomon's case which is the locus classicals on the subject has confirmed its broad frame work and inviolate character in subsequent decision.[10] In Lee v. Lee's Air Farming Ltd.,[11] it was held that a person who is the controlling shareholders and a sole director of a company with full powers of management may nevertheless be the company's servant or agent, since he and the company are separate and distinct legal persons.

2. The Jurisprudential bases of corporate personality.

The concept of corporate personality which

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9. As per Lord Macgnathen p.95.
10. Macaura v. Northern Assurance Co. Ltd. [1925] A.C. 619.
11. [1961] A.C. 12.

resorted to in law for definate purpose of safeguiding the interest of the individual and of society for example, a child in his mother's womb is regarded as having capacity of owning property. A legal fiction is a device for attaining a legal consequence or avoiding an undesired legal consequence. It has the advantage of allowing certain bodies to be treated as persons in some respect and as non-persons in others. The fiction formula further makes it easy to reject some undesirable consequences of legal personality even in the case of fully developed legal persons such as companies. To sum up, the value of the fiction theory is that it starts from a natural, extra-juristic conception of personality as founded in ethics and religion to the effect that certain groups or institution determined by law, though lacking in Supreme; that is;

> Human dignity are nevertheless treated by law as if they were human persons.

(ii) <u>The symbolic theory.</u>

This theory looks at the members of the corporation and beneficiaries as the true subjects for vesting rights and duties. Therefore, it considers the corporation as having the capacity to

be treated as persons. Thering, the principal advocate of this school, teaches that the subjects of rights in cases of corporate ownership of property is simply the natural persons who compose the entity, is pure fiction or metaphor. But he maintains that the fictition personality is not created by the State because it does not exist. To him a corporation is merely an abreviated way of writing the names of several members.

The most valuable contribution of this theory is the fact that it emphasises the necessity of looking behind the entity recognised by the law to discover the real state of affairs, when so desired. It also promotes the interests of the group behind the company.

(iii) The Realist theory.

Because it is opposed to all other theories, the realist theory asserts that the subjects of legal personality need not be human beings alone. Even, human being possessing a will and a life of its own is the subject of rights and in this sense corporations are being joint alike and are as capable of having a will as the human beings. This personality, according to Clark is neither fictitious nor artificial nor created by the State but created by law. A company, it is said, is a living

organism and a real person, with body, members and a will of its own. When a company is formed by the union of natural persons, a new real person, a real corporate "organism" is brought into being. It is endowed with a will and with senses. It can will an act by the men who are its organs as a man wills and act by his brain and body. For example, some writers hold that the corporate organism possesses a will and is for that reason a real person. Others assert that a corporation has no will, but that a will is not essential to personality.

This theory is of immence importance in determining the tortious[14] and criminal liabilities[15] of corporate persons.

Lord Haldine in Lennards case[16] amply explained it thus:

> "(A) Corporation is an abstraction; it has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation."

An example of this theory can be found where a corporations residence has to be determined.

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14. See Chapter 3 infra.
15. To be discussed in Chapter 4.
16. [1915] A.C. 705.

Wherever functions the brain or the governing and directing mind of the corporation, there the corporation resides. An extreme application of this theory was illustrated in Macaura V. Northern Assurance Co. Ltd.,[17] where the House of Lords went far enough to treat corporation as endowed with life. This probably is carrying the theory even beyond the human imagination and understanding as a corporation may be likened to a human being but it is not a human being itself. This is true because while a corporation may be held vicariously liable it can neither be hanged nor ex-communicated.

(iv) The concession theory.

This theory asserts that corporate bodies have no legal personality except in so far as it is conceded to them by the law of the State. To him, therefore, law is the only source from which legal personality of a Company may flow. This theory appears to be a truism because in modern world legal personality can hardly be secured otherwise than by compliance with the conditions laid down by the law.[18] The legal personality of the corporation is therefore not unlimited but what is conceded to it by the law. In this regard, concession theory is more closely linked with the philosophy of the nation

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17. (1925) A.C. 619.
18. Nigerian Companies Act of 1968 Ss. 15 & 17.

State than the fiction theory. This theory appears to be most realistic theory of corporate personality.[19]

One important lesson we can learn from the foregoing theories of corporate personality is that these theories have only political significance with little or no usefulness for the true solution of practical legal problems. Whichever one is preferred it cannot adequately interprete the phenomenon of corporate personality. In respect of the lights attributed to the corporate entity, the object of the law is to carry those rights to human beings who, collectively compose the corporation and constitute its subtratum. Corporations are created or allowed to be formed by the State merely for the purposes of benefiting human beings and improving their econonic and industrial life. The corporate entity (which is personafied as a corporation) is regarded as having rights and liability for the sake of convenience but it is human beings of flesh and blood that enjoy the rights and bear the burden attributed by the law to the corporate entity.

Therefore the preposition "a corporation is a person" is either a mere metaphor or is a fiction

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19. Agbonika A.M.J. - The Doctrine of Corporate Personality - Its ganesis and application in Nigeria. (Unpublished)

of law. This is the element of truth in the fiction theory of corporate entity which may be regarded as the othodox doctrine. But although a corporation is a fiction, the entity which is personafied is no fiction, the union of the members is no fiction. The acting as if they are one is no mere metaphor. In a word, therefore, although a corporate person is a fiction yet it is a fiction founded upon fact.

Legal personality is only a technical personafication of a complex of norms, a focal point for imputation which gives a unity to certain complex rights and duties.[20]

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20. Webb L.C. Legal Personality and Political Pluralism 1958.

CHAPTER II

LEGAL CONSEQUENCES OF CORPORATE PERSONALITY

1. The Effect of incorporation.

It is a fundamental attribute of corporate personality from which other consequences spring that a corporation is a legal entity distinct from its members. It is therefore capable of enjoying rights and of being subject to duties which are not the same as those borne by its members. This then raises a number of questions, mainly as to what extent a legal person resembles a human person. Can it do everything which a human being can do? Obviously, there are many things which daily experiences shows that it can do and there are others too, which it cannot do. It can for instance own property, sue and be sued, enter into a contract or other business agreements. But it cannot, on the other hand, get married or commit adultery or rape. Can it be prosecuted for a crime? These are perlexing question and strenous efforts will be made to examine the characteristics and capacity of an incorporated company with a view to gaining fuller picture of the nature and scope of the doctrine of corporate personnality.

(i) Limited Liability.

In the first place, corporate personality implies that individual members of a company are not personally liable for its debts. In the case of

a company limited by shares each member is liable to contribute when called upon to do so, the full nominal value of the shares held by him in so far as this has not been fully paid by him or any prior holder of those shares. In the case of a company limited by guarantee each member is liable to contribute a special amount to the asset of the company in the event of its being wound up. Thus, when obligations are incurred on behalf of the company it is only the company that is liable not its members. In contrast an unincorporated association not being a legal person cannot be liable. Hence obligation entered into on its behalf binds only the actual official who purports to act on its behalf or the individual members if the officials have actual or apparant authority to bind them. In either case the persons bound will be liable for the full extent of their property unless they restrict their responsibility to the extent of the assets of the association. Hence the extent to which members will be liable depends on the terms of the contract of the association.

In the case of partnership each partner is an agent of the other partner and his acts done in carrying on the normal business of the kind carried on by the firm binds the partners.[1] The other partners will only restrict their financial liability

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1. S.5 Partnership Act of 1890.

in respect of acts otherwise authorised by an express agreement to that effect with creditors concerned. This attribute of limited liability is one of the most important advantages of a company as a medium of business organisation. But this separation of the legal person from its members may sometimes work against the interest of the business as can be illustrated by the case of Macaura v. Northern Assurance Co. Ltd.[2] The owner of a timber estate sold the whole of the timber thereon to a timber company in consideration of fully paid up shares in the company. Subsequently by policies effected in his own name with several insurance companies he insured this timber against fire. The greater part of the timber having been destroyed by fire, he sued the insurance companies to recover the loss, but the actions were stayed and the matter was referred to arbitration in pursuance of the conditions contained in the policies. The claimant was the sole shareholder in the company and was also a creditor of the company to a large extent. It was held that the claimant had no insurable interest in the goods insured and disallowed the claim.

(ii) Capacity to sue and be sued.

The other advantage attributed to incorporated company is that a company as a legal entity can maintain legal action to enforce and can correspondingly be sued for breach of its legal duties.

2. [1925] A.C. 619.

where a wrong is done to the company, prima facie, the company is the proper plaintiff and its members would have no locus standi[3] to bring up suits in their individual rights.

It is also wrong to sue an officer of a company instead of the company itself.[4] Unless he is authorised to defend his action. Definately, the rights and liability of a company to sue and be sued is an important advantage over an unincorporated association.

But with the fact that a partnership can sue and be sued in a firm's name reduces the differences between the two. The court has taken the ability to sue and be sued to the extreme in that, a company can sue for defamation as was noticed in the case of South Hetton Coal Co. Ltd., v. North Eastern News Association.[5] However, according to section 385 of the company Act, 1968, a limited liability company may be ordered to give securities for cost if it appears that the Company will be unable to pay the cost.

(iii) Capacity to contract.

The contractual capacity of a company is duly incorporated under the Nigerian Companies Act No.51 of 1968. This provision gives virtually the same capacity to corporation as those given to human

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3. Foss v. Harbottle (1843) 2 Hare 461.
4. Agbonmagbe Bank Ltd., v. General Manager G.B.O. Ltd., (1961) 1 ALL N.L.R. 116.
5. (1894) 1 Q.B. 133.

beings or natural persons except where the company acts ultra - wires. Because a company is a legal person, it has the capacity to make contracts with other persons including its members.

Salomon v. Salomon & Co.[6], itself is a direct and clear authority for this preposition. A company, therefore has implied powers to enter into contract which are incidental to the fullfilment of its main objects for which it is created[7] like a natural person, it is not essential to the validity of a contract entered into by a company that the company itself be described with provision as long as there is no doubt about its identity. A contract of Sale by a member to the company cannot be rendered invalid on grounds of fraud merely because he used his preponderance of votes in the company to effect a Sale.[8] For this reason, a company wholly owned by a Man and his wife or by a whole community cannot be treated as their agent so as to render them liable individually for breach of contract entered into by the company. In the case of British Thompson Houston Co. Ltd. v. Sterling Accessories,[9] Tomlin J. said:

> "It is not possible, even in the case of the so-called one Man Companies to go behind the Legal Corporate entity of the Company and treat the creator and controller of the Company as the real contractor merely because he is the creator and Contructor."

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6. Supra.
7. A.G. v. G.E. Eastern Rly [1880] 5 A.C. 473.
8. N.W. Transport Co & Beatty [1887].
9. (1921) Ch. 33 p.38.

It follows from this that businessmen cannot have the best of both worlds by taking the advantages of a Corporate personality without its disadvantages thus, the owner of a business who converts it into a company creates a legal person to which he himself owns duties, which he cannot breach by treating himself as the real Company. For this reason, a judgment creditor of the individuals cannot guarantee debts owing to the company. A Company capacity to enter into a contract by virtue of its separate personality includes the right to purchase and hold land as beneficial owner and it does not, in that capacity hold property as agent or trustee for its members.

But where a company purports to enter into contract whose nature and purpose are outside its expressed or implied authority, the contract would be declared ultra - vires the company for lack of capacity to enter into such a contract.[10] However, where a question of knowledge or intention in connection with mispresentation in the prospectus in respect of allotment of shares arises, the company's knowledge or ignorance must be found in the minds of its agents.

(iv) Perpetual Succession.

One of the advantages of an artificial person is that it is not susceptible to "thousand natural shocks that flesh is heir to". It is alleged that

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10 Ashbury Rly Carriage & Iron Cwy Ltd. v. Riche [1875] C.R.

it has a perpetual succession unlike a natural person regardless of the changes that may occur in the membership either by death or other calamities.

The most authoritive statement on perpetual succession as a significant attribute was made by the eniment jurists, Professor Gower who said:

> "One of the obvious advantages of an artificial person is that it is not susceptible to the thousand shocks that flesh is heir to. It cannot become incapacited by illness, mental and physical, and it has an allotted span of life. This is not to say that the death or incapacity of its human members may not cause the company considerable embarrassment. Obviously, this will occur if all the directors die or are imprisoned or if they are too few surviving members to hold valid meeting, or the bulk of the Directors become enemy aliens. But the vicissitude of the flesh have no direct effect on the disembodied company. The death of a member leaves the company unmoved, members may come and go, but the company can go on for ever. The insanity of the Managing Director will not be a cilamity to the company provided he is removed promptly, he may be the company's brain but ... bectomy is a simpler operation than on a natural person"

The above witty observation of Professor Gower is pointer to the fact that whereas the death of an individual businessman may put an end to his business or severely affect its operation and the death of a partner may automatically dissolve the partnership business and jeopardise the partnership, incorporation encourages continuity of the business of the company. Professor Gower asserts further that even if the shareholders are dead and there are

no decendants, the company continues to exist a persona - facta. The life is brought to an end by winding up in accordance with Companies Act. It is submitted, however, that this is not a necessary incidence of incorporation because a company may be formed to carry out a single venture immediately it has achieveditz objective, it will be wound up.

Re National Motor Mail Coach Company Ltd.[11] here a company incorporated for the purpose of promoting and playing preliminary expenses of another company which was being formed. After it has achieved its objective, it went into liquidation.

(v) Capacity to own property

It is an established legal norm that one most obvious advantages of Corporate personality is that it enables the property of the association to be clearly distinguished from that of its members.

The Corporation property is clearly distinguished from that of its members and members have no direct proprietary right to the company's property but merely to their shares. A change in membership which causes an inevitable dislocation to a partnership firm, leaves the company unmoved, thus shares will be transferred but the company's property will be untouched. No splitting up of its property will be necessary as it will or change in the Constitution of the partnership firm. A Company can therefore hold its property[12]

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11. (1908) 2 Ch. 815.
12. L.C.B. Gower, Modern Company Law 4th Ed. 19 1F. ct

Macaura v. Northern Assurance Co. Ltd.,[13] illustrates clearly that members have no insurable interest in an asset owned by the Company. The Corporator even if he holds all the shares, is not the corporation.

(vi) Capacity to commit tort.

A Company can generally sue and be sued for a tort, with such exceptions as are from the very nature of its corporate existence. A company cannot for instance, sue for assault nor for libel unless it attacks its business reputation,[14] since a company can appoint agents and because it is a legal person acting through its agents or servant, the law does not find its difficult to make it liable vicariously for the tort committed by its agent or servants acting in the course of the company's business and within the scope of their authority.

This is why the company may be made liable for the misrepresentation in its prospectus. Vicarious liability of the company extends to the torts requiring some subjective test for their commission such as deceit.[15] As a corollary, it can sue for libel and slander effecting its business even without proof of any special damages.[16] A company is vicariously liable for torts committed by its agents or servants in the same manner in which any principal or employer would be liable, especially in respect

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13 Supra.
14 D & L. Caterers Ltd. v. D Ajou (1954) 3.B. 364.
15. Gower, Principles of Modern Company Law 3rd Ed. P.31A
16. U.A.C. Ltd. v. Sekn Owonde (1954) 13 WACA 207.

of tort requiring an element of intention, malicious libel and fraudulent misrepresentation.

However, a company cannot be held liable for the ultra-vires tort of its servant or agent.

In an observation, Lord Ibramwell said that, every person who authorises another person to act for him in the making of a contract undertakes for the absence of fraud in that person given in the execution of the authority as much as he undertakes for its absence in himself when he makes the contract.[17]

(vii) Capacity to commit crimes.

Before 1944, the old common law rule was that corporate criminal liability was impossible. Hence, it was generally thought that a company cannot in the absence of any statutory provisions be criminally liable for crimes committed by its agents and servants. Several reasons were deduced for this view, namely, that there was no one who could be brought before the court and if necessary placed in the dock. Secondly, that it was not easy to find a suitable punishment for a corporation. Mens Rea is a necessary element and since a company has no physical attributes and mind of its own, it cannot be found guilty of a crime. The most forthright statement of the company's immunity in these

17 Weir v. Bell (1878) 3 EXD 238 at 245.

respects came from Lindley C.J. in the classic case of Citizen's Life Assurance Co. v. Brown:[18]

> "The artificial legal person called the corporation has no physical existence. It exists only in contemplation of law. It has neither body, parts or passion. It cannot wear weapons nor serve in war. It can be neither loyal or disloyal, it cannot be convicted for treason. It can neither be friend nor enemy. Apart from its corporateness, it has neighter thoughts, wishes, nor intentions, for it has no mind other than the minds of the incorporators. To suggest that a state of mind exists in or should be implied to a company would amount to introducing metaphysical subtleless which are needless and fallacious"[19]

Amongst this adherents of Lord Lindley's School of thought is Blackstone who, in excluding the attributes of mind and body from a Company, opines that:

> "A Company can neighter maintain, nor be made a defendant to, an action battery or such like personal injuries for a corporation can neighter beat nor be beaten, in its body politic. A Corporation cannot commit treason, a felony or other crimes, in its corporate capacity. It is not liable to corporal penalties nor to attain or forfeiture, or corruption. Neither can it be committed to person, for it excellence being ideal, no man can apprehend or arrest it. And therefore it cannot be outlawed neither can it be ex-communicated"[20]

The above views expressed by Lord Lindley and Blackstone are now a mere anochronism. Since 1904, much waters has passed under the bridge, and in a number of recent cases, corporations have been held liable for the actions of the agents acting on their behalf. It is submitted that this modern principles

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18 (1904) A.C. 423.

19 at 425.

20. See Mahle, R. S. Company Law 2nd edition 1959.

of liability of a company for acts of its agents is not formed on the principle of vicarious liability, but on the grounds that the agents are organs of the company. The court will investigate as a question of fact how the Management of the Company has in reality been conducted so as to determine who is the responsible officer in the area of activity in which the offence was committed. Such officer may be the directing "Mind and Will" of the company which is referred to as the alter - ego doctrine which allows the law to attribute a mental state of those who in fact control and determine the Management of the Company itself as been the "directing Mind and Will".

That a company can be held criminally liable through the acts of its officer was demonstrated by the divisional court which held inter-alia, that:

> "It is true that a corporation can only have knowledge and form an intention through human agent but circumstances may be such that the knowledge and intention of the agent must be computed to the body corporate. If the responsible agent of a company acting within the scope of his authority puts forward on its own behalf a document which he intends to deceive, I apprehend that his knowledge and intention be imputed to the company."21

In Nigeria, the criminal liability of corporations is now beyond question. In Kandilas and Karaberis Ltd v. C.O.P.[22] the Company was convicted of stealing by fraudulent conversion punishable under section 383 and section 390 of Criminal Code.

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21 Per Lord Macnaughten in D.P.P. v. Kent & Sussex Contractors Ltd. [1944] K.B. 146.

22. (1958) W.N.L.R. 147.

Also in the case of A.G. v. Amalgamated Press of Nig. Ltd.,[23] publishing Company was convicted of publishing a report knowing or having reason to believe it to be false. The problem of criminal liability of corporation illustrates the increasing relative and functional interpretation of a corporate personality where the only punishment which the court can impose is death, penal servitude, imprisonment, or whipping or a punishment which is otherwise inappropriate to a body corporate such as perjury, bigamy, adultery. The court will not satisfy itself by embarking on a trial which, if the verdict of guilty is retained, no effective order by way of sentence can be made.

The consequences of the corporation, however, are not necessarily wholly beneficial to the members. If a trader sells his business to a company, he will cease to have an insureable interest in its assets even though he is the beneficial owner of the shares.[24]

Similarly, a parent Company will not have any insureble interest in the assert of the subsidiary companies wholly owned by it, for the rule that a Company is distinct from its members applies to the separate company of a group. Thus, one cannot but agree in toto with Professor Kahm - Freud's stricking

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23. (1956-57) 1 E.R.L.R. 12.
24. Macaura - supra.

phrase that sometimes, corporate entity works like a boomerang and hits the Man who was trying to use it.[25]

In Nigeria, the concept of incorporation has been used in two main areas as a shield to protect corporate wrong doing, particularly with regard to the rights of creditors of companies. The first centres round the problem of obtaining money in Company's name. The brain behind the Company such as the Majority shareholder, the Chairman of the board of directors or the executive Managing Director may borrow money in the company's defaults.

The Lawyer who brings an action on behalf of a client against the Company, then surprinsingly learns that the company is not solvent though the "brain" behind the company is, what ought the law to do about this? So far, the usual argument has been to say that the company is a legal entity different and apart with its members, including the Management.

The second area of Corporation wrongdoing likely to affect Nigerian economy and which featured preminently in Ghana[26] relates to a change in the type of business association. This method is often used by Management to evade the repayment of just debt owed by their Company by changing from

25. (1944) 7 N.L.R. 52 at 56.
26. Maiduob & Co. Ltd v. Bartholomew Co. Ltd. (1968) 1 G.L.R. 122.

one type of business association to another and then dispose of the assets of the old company to the new one knowing fully well that the old company is indebted to outisde creditors. The new company would naturally claim the benefit of distinct corporate personality by relying on Solomon's case. This affords the management the opportunity to engage in fraudulent dealings against the Company's creditors.

While it is a legally accepted fact that ignorance and illiteracy are misfortune and not previlege, and therefore not an exense, the law that takes no account of the ignorence and illiteracy of the community in which it operates by allowing such obvious device to be employed to check creditors of the Company is out of tune with the ethics of that community. The law in that respect ceases to be an instrument of social control. In such a situation, our courts ought to try and redress the injustice whenever they can, especially where the justice of the case so demands without necessarily resorting to Salomon's case as a legal dogma. Thus where a change from business association to another involves a transparent fraud on the Company's creditors, Nigerian Courts should deviate from strict adherence to the concept of corporate entity. Instead of favouring shareholders, company creditors should be given adequate attention and protection. The reason being that shareholders are fully protected by our

law.[27] Furthermore unless due regard is given to the protection of creditors right, we may as well be in the danger of shifting a rich source of capital formation which is very vitel to the operation of any meaningful commercial activity.

The conclusion to be drawn from the problems is that the corporate personality doctrine through perpetuation of fraud seems to be prevalent both in England and in America.

The second point to note is that our courts have not adopted any consistent attitude or policy in dealing with such frauds. Thirdly, there is a clear need to protect creditors who provide loans to the companies in Nigeria, otherwise, this source of Capital formation will soon dry up. Fourthly, there is also the need to protect the general public against this abuse so that Companies could command public trust and confidence.

2. Exception to the rule of separate legal personality.

Corporate personality is not an immutable principle. Just as, it can be extended or buttressed to do justice, it can be disregarded where, to apply it as an absolve and general principle would lead to fraud or conflict with general principle of law and justice. No matter how beneficial legal concepts might be, they are not excepted to conflict with

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27 Sections 31, 106(1)(c) 143-145, 158 and 309 of Company Act, 1968.

some of the multifarious human activities and interest. Even where no such conflict exists concepts can be used to achieve aims which they are not and should not be designed to serve. Just as the concept of corporate personality has been logically applied by the courts, to serve its important purposes it has been used by traders as a device to defeat some important values in law. But, as in the case with all concepts created by judicial processes, the courts have resisted its dislike for the commission of the fraud, improper conduct, or to defeat the ends of the law. When therefore the separate entity of an incorporated company for certain purposes is challenged, the courts look at the intention and the activities of the individuals composing it to see, if in fact, the advantages of separate legal personality of corporations are being applied to protect unworthy interest. Generally, the law will not go behind the separate personality of the Company to the members.

However, in some cases, the court have disregarded the corporate entity and instead paid regard either to the individual members or economic realities behind the legal facade. In looking at the human instead of the corporate entity Nigerian Courts will call in the general principles of law or allow itself to be assisted by precident decision by the special circumstances of the case. The result is

sometimes referred to as "lifting the veil", "piecing the corporate veil" of the principle of corporate personality.[28] The following are therefore some of the circumstances under which the veil may be lifted.

(a) Under express statutory provisions.

Whilst legislation has adopted the general principle of corporate personality, in the development of company law, it has also limited its use to prevent abuses. Where it is considered that the full protection afforded members of the company may weaken legislature's devices against abuse, the legislation has denied such protection.

(i) Where the number of members fall below the legal minimum.

If at any time the number of members of a company is reduced below two in the case of private company and below seven in other cases, and the company carries on business for more than six months while the number is so reduced every person who is a member of the company during the time that it so carries on the business after those 6 months and knows that it is so carrying on business with such number of members, is personally liable for the payment of the whole debt of the company contracted during this period. Section 31 of the Companies Act 1968, it is submitted that this provision is not adequate in the Nigerian Context since most of the

28. See Akanki - Relevance of Corporate Personality principle. (1977-80) 11 NLJ p.11.

members do not attend meetings and even if they do, they don't understand what is going on at the meeting either because of illiteracy or because of the complete trust placed in the directors to manage the company effectively. There is inexcapable fact that directors might not find it necessary to tell members that the members has fallen below the legal minimum especially in cases of public companies. The ambit of the provision:

> "..... and knows that it is carrying on business with such number of members...."

is inadequate due to the fact that denial of knowledge will be a good defence.

The veil is often lifted to make the members liable as if they were partners in a firm, such a reduction of members may be brought about by either death or by shareholders transfering their shares to some of their own members.

(ii) Where there is recklessness or fraudulent trading.

According to section 309(1)(2) of the Companies Act 1968, in the course of the winding up of a company, if appears that any business of the company has been carried on in a reckless manner or with intent to defraud creditors of the Company or for fraudulent purposes, the court may, on the application of the official receiver or contributory of the company, declare that any persons who were knowingly parties to carrying on of the business in that manner shall

be personally responsible without any limitation of liability for all or any of the debts or other liabilities of the company as the court may direct.

Unlike the corresponding section under English Companies Act, 1948, section 33. This provision covers not only fraud, but also recklessness and is therefore, wider than in Nigeria's section 37. This provision enables the court, in appropriate case, to grant more far reaching protection to creditors.

(iii) Where company's name is not mentioned in bill of exchange.

Section 106(1)(c) of the Companies Act requires that the name of a Company is mentioned in legible character in all bills of Exchange, Promissory Note, endorsement and cheques.

If any officer of the Company or any person on his behalf, issue or authorises the issue of any bill of exchange, promissory note, cheques, order for money, or goods without the name of Company mentioned, he will be liable to the holder of any such bill of exchange or promissory note for the amount thereof unless it is duly paid by the Company.

It is submitted that the name of the Company may be written on any part of the bill, and the observation "Limited" is sufficient as was held

in the case of Strong & Co., Ltd. v. Woolf[29] since the purpose is to warn creditors that they are dealing with limited liability company.

(iv) Holding and subsidiary companies.

Generally, the legislation recognises the separate identity of Companies bound together by subsidiary and parent Company relationship.[30] But where to treat each Company in such a group as a separate one from the other, would be regarded as one and the same Company. This restriction on the principle of separate personality Companies is note worthy in the Companies legislative Provision relating to preperation of account and balance sheets. It is enacted that the account and balance sheet of a parent Company must reflect the true position of the necessary matters of all the Companies related to it as subsidiaries, and the account of each subsidiary must show the aggregate amount of its indebtedness to and from other Companies belonging to the group.[31] Reports of assets, liabilities, profits and losses of the subsidiaries must be annexed to the statement in the Companies Prospectus or Statement in lieu of prospectus. These measures are designed to prevent misleading information about the financial position of a group of Companies controlled by its holding.

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29. [1917] 1 KB 1 CA Sub.
30. Sections 27, 55 and 191 of Companies Act 1963.
31. Sections 143 - 146 & Sch. 8 Part II.

Companies which can arise where it is possible for the Company to publish a rosy picture of itself without reference to the gloomy State of affairs that may exist in its subsidiaries.

And this is done for the benefit of the members. Creditors will be better protected if the Companies were treated as entirely separate entities. The effect of these provisions is to defract from the independent legal personality of each of the Companies and to show that they are related and should be subject to examination behind the veil of incorporation.[32]

(v) Taxation

When the liability for tax is in issue, the courts are more prepared to treat one Corporation as the agent of another on grounds of public interest. The residence of such a Company, for tax purposes becomes a question of fact to be established by consideration of its control and Management and not merely by interpretation of its constitution. The extent to which the courts will go to prevent the use of Corporate entity to evade payment of tax is highlighted by the case where an American Company was held liable to pay tax for carrying on business in England through a British Company.[33] The index of agency relationship was found to be present on

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32. National Bank of Nigeria Ltd. v. The African Press Ibadan High Court (Unreported) Suit No. I/145/63 5-8 1963.

33. Fire Stone Tyre & Rubber Co. Ltd. v. Ilewellin (1956) 1 All E.R. 693.

the fact that the American Company owned all the shares and took all the profit of the British subsidiary. Where, therefore, Federal Board of Inland Revenue is of the opinion that any disposition is not infact given effect to or that any transaction which reduces or would reduce the amount of any tax payable is artificial or fictious, it may disregard any such disposition or direct that such judgment shall be made as respect liability to tax as it considers appropriate so as to counteract the reduction of liability to tax effected or reduction which would otherwise be effected by the Company concerned shall be assessable accordingly.[34]

This means that if a Company "hides" behind the Corporate veil to avoid or escape from or reduce tax liability, the veil may be pierced into through legislative devices. In this regard, Delvin J., (as he then was) had this to say:

> "No doubt, the legislature can forge a sledge-hammer capable of cracking open the Corporate shell; and it can if it chooses to enact a law that the courts Ignore all the conceptions and principles which are at root of the Company; in the field of taxation; the legislature had done precisely that."[35]

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34. CITA 1961 Section 25.

35. Penrose v. Martyr (1858) (EXD) 499.

(v) Investigation into Company's ownership.

Where it appears to the Registrar of Companies that there is good reason to do so, he may refer the case to the Minister of Commerce (or trade) for his approval and thereafter may appoint one or more competent Inspectors to investigate and report on the membership of the Company for the purposes of determining true persons who are or have been financially interested in the success or failure of the Company or able to control or materially to influence the policy of the Company.

Another in-road into the doctrine is that provided by the Nigerian enterprises promotion Act of 1977 under which certain business are reserved exclusively for Nigerians. For the purpose of determining whether Nigerians are being used as front the courts have been empowered by the Act to conduct inquiry with a view to finding out the real owners of the Company.

(i) Judicial lifting of veil.

For a long time, the courts have taken it upon themselves to lift the corporate veil in cases where they are not expressly authorised to do so by Statutes. However, the doctrine of lifting the veil is far from clear at least in English law. At times, the courts generally seem to be denying the separate legal existence of the Company, example, when they call it a sham.

At other times, they call the Company a nominee or even a trustee for those who control it, thereby recognising that the Company does have a separate legal existence. This dualism is traceable back to Salomon v. Salomon because the House of Lords said not only that Salomon and Company was a legal entity distinct from Salomon and his family, but also that the Company was not the agent of or trustee for Salomon. In subsequent cases where the courts have lifted the veil, they have done so either by denying one or sometimes both of the above proposition in respect of the particular Company in the case.

That this doctrine is not an infallible one has been confirm by Lord Denning, M.R. in Littlewood Mail Orders Stores Ltd., v. I.R.C.[1]

where he warned:

> "The doctrine Salomon v Salomon & Co. Ltd. has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited Company, through which the courts cannot see. But that is not true. The Courts can and often draw aside the veil. They can and often do pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and should follow suit."

The courts in recent years, have in exptional cases felt willing or compelled to lift the veil of incorporation in order to look at the realities behind the legal facade.

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1. [1959] 1 W.L.R. 1241.

The courts have made gigantic efforts i the following areas.

(i) Agency.

It is sometimes necessary to lift the Corporate veil of the Companies find out whether the shareholders are using the Company as an agent. Where shareholders use the Company as an agent, they will be liable for the debts of the Company. It is a question of fact whether a subsidiary is carrying on business of its parent Company or of its own. In other words, Agency may not be inferred merely from control of a Company or ownership of its shares. Since a Company is an artificial entity, its acts are of necessity performed for it by human agents; the directors or shareholders.

The need for this human agency has been explained by Viscount Maughan in the case of Lennards' Carrying Co. Ltd., v. Asiatic Petroleum Co. Ltd.,[37] where he observed:

> "My Lords, a Corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the Corporation, the very ego and Centre of personality of the Corporation..."

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37. (1915) A.C. 705 H.L.

Thus in Re - P.G.F. Films,[38] an American Company provided all the funds for making a film which was sought to be registered as a British Company. That the film produced was produced by arrangement by a British Company of which the American Company owned 96 of the 100 Capital. It was held that the British Company was no more than the nominee or agent of the American Company which was the true maker of the film.

Instead of using the agency principles it could have been better to employ the American concept of "Under Capitalization". The principle of agency often adopted by the courts in checking the use of incorporation is to satisfy legislative intention in general and revenue law in particular.

(ii) Fraud or improper conduct.

The courts will look behind the corporate entity whenever the Company formed is considered to be mere "Sham" or "Cloak" for the perpetuation of fraud or improper conduct. Thus, if directors, promoters, or majority of the shareholders manipulates the company in order to serve their fraudulent ends, the courts will not allow them to hide under what appears prima - facie, to the regular resolution or expressed intention of the company. The leading case is Gilford Motors Co. Ltd v. Horne[39] where an

38. L.R. (1933) 1 W.L.R. 483.

39. [1933] Ch. 935.

Managing Director of the plaintiff company, the defendant bound himself by a "restrain of Covernant" Clause in a valid agreement not to compete with the company, his employer or solicit its customers, even after leaving the services of the company. Thinking that he could avoid that liability for breach of Convernant by hiding under Corporate personality, he formed a one Man Company which carried on a competing business and solicitation of the customers of the Plaintiff Company. The court held that the defendant was guilty of a breach of Convernant by using a Sham Company as a cloak or Strategem and granted an injuction restraining him and his Company.

(iii) Where a Company acts as a trustee.

Another area where the courts have been forced one way or the other to reconsider Salomon's case is in trusteeship. Where all the shares in the Company is held upon certain trust and the management of the Company is in the hand of the trustees, the courts may lift the veil of incorporation so as to impress the Company's property with the terms of its trust.

It cannot be doubted that a Company if so authorised by its memorandum, may act as a trustee and that the beneficiaires and its members may infact be one and the same person. Thus, where it is necessary

t. decide whether the Company holds its land on charitable trusteeship so that it might be exempted from certain legal obligation, the personality of those in control is considered material indicating the nature of that Company.[40]

(iv) Associated Companies.

Each Company in a group of Companies is a separate legal entity possessed of separate legal rights and liabilities. However, according to Lord Denning in D.H.N. Ltd., v. Tower Hamlets;[41]

> "The evidence of a general tendency to ignore the separate legal entities of various companies within a group and look instead at the economic entity of the whole group."

It must be observed that judicial decisions on the issue of associated Companies are not consistent, but the preponderance of judicial pronouncements have been in favour of lifting the corporate veil if economic condition so warrant.

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40. Trehanong Working Men's Club & Kindstanding Ltd., v. Macdonald (1948) 1 ALL E.R. 576.

41. [1976] 1 W.L.R. 852.

CHAPTER III

THE DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY

1. Genesis of Corporate Criminal Liability.

The development of corporate criminal liability was first hampered by both conceptual and practical obstacles. Initially it was thought that a corporation had no mind, could not will, and so could not personally entertain the intent necessary to commit a crime. Similarly, before the development of vicarious liability, it was clear that a corporation lacked corporal members, and could not, therefore, act physically. It was also thought that corporations, other than charter corporations are creatures endowed with such limited powers as were specified in an incorporating statute. Powers were never conferred freely in order to make it possible to hold the corporation responsible for crimes. The commission of any crime was therefore ultra vires a corporation and could not be imputed to it.

The evolution of corporate responsibility is a striking instance of judicial change in law. An instance of the recent origin of some of the most fundamental conceptions of corporation law is afforded by the question as to what extent corporations are subject to indictment and conviction

difficulty. A corporation could not be subjected to bodily punishment: "what? said a counsel in the Quo warranto case," "must they hang up the common seal?"[3] It could however be fined, and to this day the fine remains the most important mode of punishment applicable to corporations apart from any statutory disqualification and forefeiture as provided by Decree No.20 1984 Section 7. The argument that criminal procedure is inapplicable to corporations may have some weight where the statutory procedure contains no method of compelling a corporation to submit to the jurisdiction of criminal courts.

In People v. Equitable Gas Light Company,[4] where there is no such statutory objection the courts have readily devised appropriate means of ensuring that they have jurisdiction. While a corporation cannot be imprisoned it may be fined so that unless the only punishment prescribed for the crime in question is imprisonment or death, the method of punishment affords no difficulty.[5] The difference between the punishment to which individuals and corporation are thereby subjected

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3 (1682) 8St. TC. at 1138.

4 (1888) 5N.Y. Supp. 19.

5. See Decree No.20 of 1984 section 7.

does not violate the requirements of equal protection of the law as may be argued by some writers.

Some of substantial difficulties are as follows:

(i) A corporation having no muscles, could not act, except through the human beings who are its servants. It could not act personally and therefore its responsibility could not (it was thought) be other than vicarious. But at common law there was generally no vicarious responsibility in crime. Consequently there was assumed to be no possibility of applying the ordinary rule of the criminal law to corporations. This proposition has been qualified in three ways:

(a) For a nonfeasance, an omission to act, there is no obstacle to holding a corporation responsible.[6] The difficulty of lack of mens rea was not considered. If a statutory duty is cast upon a corporation and not performed, the corporation can be convicted of a statutory misdemeanour. It was thought that though a national entity is incapable of failing to act. This argument is reinforced by the consideration that where the duty is imposed solely on the corporation there can in general, be

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6 Birmingham, Gloucester Railway Company. [1842] 3 Q.B. 23.

no other remedy than indictment of the corporation for no individual person will be in breach of legal duty.

It was possible to hold a corporation vicariously responsible in nuisance, on the assumption that this was a crime of vicarious responsibility of common law. Thus a corporation can be convicted of obstructing the highway. A statutory offence could be visited on a corporation to the same extent as a private master. A corporation could be convicted of an offence of strict liability where the facts fell within the words of the statute, as where a corporation could be held on civil law principles to have sold an article.

As time went by an important development in the theory of corporate liability had been taking place in the law of tort. The original view that a corporation could not act personally, but only through servants, was abandoned in the law of tort through a legal fiction. This involved distinguishing between inferior (executive) and superior (directive) servants of a corporation. Where it was committed by an inferior servant the liability of the corporation was still vicarious. But where it was committed by a director or other members of

the governing body the liability of the corporation was regarded as personal, i.e. to say, the same as the liability of a human being for his own act. The acts of the organ of the corporation were attributed to the corporation and treated for legal purposes as though they were the acts of the corporation itself.

Viscount Haldane L.C. expressed the doctrine in the leading case as follows:

> "A corporation is an abstraction. It has no mind of its own any more that it has a body of its own, its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent but who is really the directing mind and will of the corporation."

The very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it may be so, that person has an authority co-ordinate with the board of directors giver to him under the articles of association and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company. The fault or privity (of the company within the meaning of the statute) is the fault or privity of somebody who is not merely a servant or an agent for whom the

company is liable upon the footing respondent superior, but somebody for whom the company is liable because his action is the very action of the company itself.[7] The chief application of the doctrine in tort was in respect of the doctrine of common employment whereby it is held that a corporation could, through its directorate, be guilty of personal negligence which made it liable even its servants, when it will not be vicariously liable for the negligence of the inferior servants.

This idea, it is suggested, had considerable potential[illegible] ... nal law. There is generally no vicarious responsibility in crime for people are responsible for their own acts. However by means of a fiction, a corporation could be made accountable as for its own acts, provided that the act was committed [illegible] made) by an organ. This extention of the law took place in I.C.R. Haulage Limited.[8] a case which clarified the doctrine of earlier decision. It was held that a company could be included in the indictment for conspiracy (alone with its managing director or others), the fraud of the director being imputed to the company. That is not to say that the doctrine of imputation does expunge the guilt of the director

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7. Lennard's Carrying Company Limited v. Asiahee Petroleum (1915).

8. (1944) K.B. 551.

himself since a person with a controlling interest in a company was convicted of fraudulent conversion of money entrusted to the company.[9]

(ii) The second substantial difficulty in the way of holding a corporation responsible in crime was that it had no mind and could therefore have no guilty mind. It could not be held accountable for any crime of intention knowledge or deceit. "Did you ever expect a corporation to have a conscience", Lord Thurlow is credited with asking, "when it has no sould to be damned and nobody to be kicked" they cannot be excommunicated for they have no souls".

The arguement that a corporation is incapable of criminal intent is more formidable. Conceding that in civil cases the intent of the representative of a corporation is imputable to it, by no meaps follows that the rule is the same in the case of crimes. This limitation has been surmounted. It was easily held that a corporation could be guilty of crime of absolute prohibition and even of a crime requiring mens rea, where the offence involved vicarious responsibility. Finally the alter ego doctrine enabled the state of mind of the organ to be regarded as the company's own. The effect is

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9. Dellow v. Busby (1942) 2 ALL E.R. 439.

that a company may now be convicted even of express statutory mens rea such as wilfully pretending or of an intend to deceive. An individual is liable for the tortious act of his agent within the general scope of his employment, though intent is an essential element in tort. But to charge him with the agent's crimes he must be shown to have authorised the act or shared in the intents. Accordingly it is held that in some jurisdiction that some corporations are liable only for crimes not involving mens rea.

But the contrary view however is undoubtedly the prevailing one today and it is not certainly justifiable on grounds of policy if not also on grounds of logic. It is generally assumed that even if the foregoing objections are overcome, still there are certain crimes so far outside the scope of the corporation's powers that the corporation cannot be convicted of them. It is difficult to see any reason for such a distinction, and it is interesting to note that although corporations have been held criminally liable for contempt of court, conspiracy and various statutory crimes requiring intent, no decision has been found in which a

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10. Law Society v. United Service Bureau Limited [1934] 1 K.B.

corporation was freed merely on the grounds that the crime was completely outside the scope of its corporate powers. The recent case of People v. Tyson,[11] in which a corporation was held for trial on charge of ground Larceny seems correct, upon principle, and in line with the weight of modern authority. The majority rule appears to be that a corporation may be indicted for crimes to which specific intent is essential. It has been asserted that a corporation cannot be guilty of a crime which is ultra vires. "A corporation" wrote Pollock, cannot commit crimes, for it cannot authorise them.[12] But a contrary view was expressed in Barker v. Britannic Association Company Limited,[13] where a company was convicted of disregarding an express statutory restriction as to the maximum amount for which it could insure a customer.

The doctrine of ultra vires which was advanced as a bar to corporate criminal liability was enunciated in the case of Ashbury Railway Carriage Company Limited v. Riche.[14] The doctrine provided

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11. People v. Tyson 50 NY LJ, 1029 (1914).
12. N.Y. City Mag. 1914, N.Y. L.J. Jan. 13, 1914.
13 (1928) 1 K.B. 766.
14. 1875 L.R. 7 H.L. 653.

that a company could not pursue objects other than those specified in its object clause. Activities falling entirely outside the ambit of those specified in the object clause were said to be ultra virqs the company and therefore the company could not be held liable in respect of such activities, even if they amount to offences. Originally, however, the doctrine was advanced as an answer to the contention that a corporation could be made liable for torts involving malice committed by its officers, agents and servants. In Abrath v. North Eastern Railway Company,[14] Lord Bramwell stated that a corporation could not be held liable for torts in which malice or motive is an essential ingredient because it could only do that which is within its authorised powers. It could not authorise its agents to do that which is not within the limits of those powers.

This contention has now been rejected by the House of Lords, per Lord Lindley, in the case of Citizens Life Assurance Company v. Brown,[15] when he stated that the corporation civilly was to be placed in the same position as a human employer with

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14. [1886] 11 App. Case 247, [1883] 11 A.C. 247.
15. [1904] A.C. 423.

respect of liability for the torts of his employees. All employers were liable for torts involving malice committed by their employees in the course of their employment. The corporation was in the same position. The ultra vires bar holding a corporation not criminally liable was simply dismissed by inference. In none of the cases in which corporate criminal liability has been imposed was the matter argued. It now seems clear that the doctrine of ultra vires will be taken to refer solely to capacity and that, if a criminal act is performed in pursuance of an activity intra vires the corporation, the corporation will be held liable in respect of it.

Many years passed by before corporate liability was extended beyond either strict or vicarious liability. There was so much development of the law by 1947 that the position of the board of directors was defined as a government organ of the corporation so as to furnish a justification and a rationale for the imposition of criminal liability.

Corporate criminal liability came to be accepted as a governing principle of criminal law from the decision in Mousell Brothers Limited v. London and North-Western Railway Corporation.[16]

16. [1917] 2 K.B. 836.

In that case, Mousell Brothers Limited were charged with fraudulently avoiding the payment of freight charges, contrary to the Railway clauses consolidation Act 1845. The fraud had been perpetrated by the Company's branch Manager and a clerk at the Manchester Office. The prosecution pressed for conviction urging not that the corporation was vicariously liable for the acts of its officers, agents and servants but that it could only act through its officers and was personally liable their actions. The court also relied on the Interpretation Act 1889, to show that it was intended by parliament that corporations should in general be criminally liable. The court convicted the corporation, holding it to be vicariously liable for the acts of its branch Manager. Mousell's case is ever since hailed as a milestone on the path to corporate criminal liability.[17] It would be suggested that it was not until 1944 that corporate criminal liability become firmly established in English criminal law. There are three important decisions responsible for the development.

In D.P.P. v. Kent & Sussex Contractors,[18] this case involved two charges. The first was that the

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17. See L.H. Leigh, The Criminal Liability of Corporation in English Law 1969, London p.29.

18. [1944] K.B. 151.

company with intent to deceive, made use (for the purposes of the motor fuel rationing (No.3 Order 1941) of a fortnightly vehicle record in respect of a specified vehicle, which was false in material particular in that it mis-stated the journeys and mileage done by the vehicle over a specified period.

The second charge was that the company, in furnishing the form, made a statement which was false in a material particular, contrary to Regulation 16 of the Defence (General) Regulations, 1939. The document forwarded was signed by its transport Manager.

It was found at the lower court that the offence included a mental element, that a corporation could not entertain a criminal intent, and that, therefore, the company could not be made criminally liable. On appeal the Divisional Court directed the magistrates to convict the company. Viscount Caldecote C.J., who delivered the judgment treated as clear law the proposition that a corporation can possess guilty knowledge and form an intention to perform a criminal act. Apart from certain established exceptions, such as treason and certain offences in respect of which the only penalty is capital or corporal.... there are a number of

criminal offences of which a company can be convicted. Various liability was said to be ... beside the real point which we have to decide, which is, I repeate whether a company is capable of an act of will or of a state of mind, so as to be able to form an intention to deceive or to have knowledge of the truth or falsity of a statement. In finding that the intention of a corporation officer can be imputed to the company or its intention, he states that... although the directors or general manager of a company are its agents, they are something more. A company is incapable of acting or speaking or even thinking except in so far as its officers have acted, spoken or thought.[19]

This decision still leaves alot of questions unresolved. In the first place, can it be said with precision that the court intended to lay down any rule respecting criminal liability generally? It may well have been primarily of quasi-criminal or summary offences. This point was made clear by the statement of Lord Caleke, C.J., that as the mental element of the offences were set out in the applicable statutory instrument, no question of mens rea arose.[20]

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19. 1944 K.B. at p.155.

20. (1944) K.B. at 156 per Naghen J. and p.158 per Hallet J.

There is also the fact that the cases cited in the judgment were cases dealing with vicarious liability for summary offences involving intent.[21] It is submitted, with the greatest respect to their Lordships that it seems likely that the court failed to appreciate the extent to which it was altering the generally accepted position; that corporations could not be made liable for crimes involving criminal intent.

The above decision was approved by the court of criminal appeal in R. v. I.C.R. Haulage Ltd.[22] Here the company was prosecuted for a common law conspiracy to defraud and it was held that it could be convicted not withstanding the fact that mens rea was certainly an essential element of the offence. "Whether", said the court,[23] "there is evidence to go to a jury that the criminal act of an agent, including his state of mind, intention, knowledge or belief is the act of the company and ... whether the jury are satisfied that it has been proved, must depend on the nature of the charge, the relative position of the officer or agent and the

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21. (1944) K.B. pp. 150-152.
22. (1944) K.B. 551 C.C.A.
23. At p.559.

other relevant facts and circumstances of the case".

But Stable J., cautioned that:

> "It did not decide that in no circumstances a criminal intention in the mind of a servant or agent can be imputed to a principal who is a limited liability company."24

Humphreys J. stated that:

> "It is difficult to imagine two persons whose acts would more effectually bind the company or who could be said on the terms of their employment to be more obviously agents for purposes of the company than the secretary and the general manager of that branch and the sales manager of that branch".25

The Company, he stated, could only act through agents. In law the sales were made and returns forwarded within the company's authority. On the principles of vicarious liability, of the liability of the master for the acts of his servants committed within the scope of the servants employment, the conviction was justified.

There has been some clarification, that liability will now be imposed where the officer of the company occupies a superior position in the corporate structure and exercises managerial,

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24. (1944) at 551.
25. (1944) 2 ALL E.R. at 517.

though perhaps delegated function.

In John Henshall (Quarries) Ltd., v. Harvey,[26] the divisional court hold that the fact that the performance of a function had been delegated to a servant was not enough to impute the servant's mens rea to the corporation.

Adverting to a dictum by Denning L.J. in H.L. Bolton Co. Ltd., v. T.J. Graham and Sons Ltd.,[27] Parker, C.J., held that a distinction had necessarily to be drawn for the purposes of imputing liability between some person representing the brains of the company as for example a director, the managing director, the Secretary or other responsible officers and a mere servant.

In Magna Plant Ltd., v. Mitchell,[28] where a corporation was charged with "permitting" the use of a vehicle where all the parts and accessories of the vehicle were not maintained in a safe condition, the Divisional Court declined to hold the company liable for the fault of a mechanic and a depot engineer. A corporation is to be held liable

the firm, or in the case of an individual, a person to whom delegation in the true sense of delegation of management has been passed.

From the above discussions it will be seen that corporate criminal liability has been received as a general principle of criminal law. It is also clear that such liability is to be seen as personal, that is, that there exist a difference between it and vicarious liability as the latter is commonly understood. In some cases a corporation may be either personally or vicariously liable for the actions of virtually the same officials.

There now seems to be two cases in which corporate criminal liability may be imposed. It may be imposed in respect of actions commanded by the board of directors as the brain or by a responsible officer enjoying managerial functions. The species of liability known as corporate criminal liability differs from vicarious liability in so far as the court requires the human actor to occupy a rather special position in the corporate hierachy; a position which involves the exercise of a superior executive function in respect of an area of corporate activities to which a statute imposing

criminal sanction relates.

The foregoing discussions have been mainly concentrated in English cases, but in Nigeria the concept of corporate criminal liability has not been completely ignored, for as early as the 1940s corporation have been held criminally either for its own acts or those of its organs.

In Attorney-General Eastern Region v. Almagamated Press of Nigeria Ltd.,[29] the corporation was charged with an offence under Section 14 of the Newspaper Law, 1955, of the then Eastern Region which reads:

> "Any person who publishes, or reproduces or circulates in a Newspaper any statements, rumour or report knowing or having reason to believe that such statement or rumour or report is false, shall be guilty of an offence...."

Before evidence was heard, it was submitted on behalf of the corporation that:

(a) a corporation was not capable, by its nature, of committing the offence charged, and

(b) that the enactment of the section was ultra vires the legislature of the Eastern Region because "trade and

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29. (1954) 1 E.R. N.L.R. 75.

> commerce among the Regions is exclusively the concern of the Federal Legislature and, that, to lay down what a newspaper shall or shall not contain is to place a limitation on trade and commerce among the Region.

Held:

1. that a corporation was capable of committing the offences;
2. that no attempt has been made to control or limit the trade between Regions in Newspaper and that the section was properly enacted by the Legislature of the Eastern Region.

It is submitted that this is a good decision and the reasoning very sound. Although counsel argued that since a corporation cannot appear in person to plead it could not be liable for the offence, but the trial judge was right to hold that the corporation be properly convicted having in mind the provisions of section 468 C.P.A. relating to pleadings of corporate bodies. Also in Hamilios and Karaboris Ltd. v. The Commissioner General of Police,[30] the first

30. (1958) 3 F.S.C. 10.

appellant a corporation sold two lorries to a purchaser on credit under a written agreement which required the purchaser to supply timber from time to time to the first appellant. An account was kept between the parties. The first appellant repaired the lorries from time to time and debited the cost of the repairs to the accounts. The supply of timber fell short of expectations and the purchaser was unable to cope with payment. He sent the lorries to the first appellant for repairs. The second appellant who was employed by the first appellant as a Manager, refused to repair them unless cost was paid. Eventually the lorries disappeared and the second appellant offered to pay for the lorries, but the purchaser refused the offer. The first appellant sued the purchaser for the recovery of £3,238:17s:7d being balance due from the latter; and the latter (i.e. the purchaser) reported the matter to the police.

The two appellants were prosecuted for stealing the lorries and were convicted. They appealed to the high court and their appeal was dismissed. On further appeal Held,

On the grounds of appeal which dealt with onus of proof, it was clear that no case of larceny

was proved before the learned trial magistrate and the only way it was sought to establish a case was to throw it on the appellants.

2. Whatever the position of a manager may be in cases of absolute liability, he cannot be convicted of an offence involving mens rea except in respect of his own acts or omission and even if, in this case, it had been a reasonable inference that the lorries had been stolen by someone, there is no evidence whatsoever to implicate the second appellant personally.[31]

The court found that since there was no case against the second appellant, there can be no case against the first. Whether or not it is legitimate to import the doctrine of criminal liability into Nigerian Law, it is indisputed that the courts have employed it in a number of cases. There is so far no argument against the importation of such a doctrine.

In English law the scope of the doctrine of mens rea had differed according to whether a particular crime is a common law offence or contained in a statute. At common law there is an irrebutable presumption that practically every common law offence

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31. R. v. Opara (1943) W.A.C.A. 70, Ibadan City Council v. Adukale (1970).

requires proof of a guilty mind. But where the offence is a statutory one then the presumption is rebuttable on proof that the wording of the offence, or the object of the legislature, excludes it. But in Nigeria there are no common law crimes and, therefore, such a distinction is unnecessary since every offence in Nigeria is a statutory offence. The requirement of mens rea is always at best a rebuttable presumption.

In D.P.P. (Western Nigeria) v. Associated Newspapers of Nigeria,[32] the offence in that case was one of wilfully publishing false or perverted report of debate or proceedings of the House.... The accused person intentionally published a report which they knew was false. Nevertheless it was held that conviction could be supported if it was established that they had made no attempt to ascertain whether the reports were true or false - even though there was no evidence to show that they knew it was false.

Whatever the case it is submitted that the doctrine of corporate criminal liability has come to stay in Nigeria.[33] Its importance cannot be over-emphasized in view of the growing industries

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32. (1959) 1 N.R. N.L.R. 247.
33. See section 7(d) Decree No. 20 of 1984.

and Industrial enterprises in Nigeria. It might well be important that investors and customers alike know the importance of their dealings with corporations and the public at large. If the decisions in the above cases is anything to go by then one can safely say that the Nigerian Courts and public at large are beginning to realise the importance of ascerting their rights as against both the individual business man and the corporation at large. This area of the law needs more attention as the development of any country depends on its industries.

2. Reasons for the responsibility.

The liability of corporations however derives its real impetus from liability for nonfeasance in cases of public nuisance.

Corporations were indictable for non-performance of duties laid down by statutes and such a possession was seen not in essence a criminal proceedings, but as a means of enforcing the performance of a public duty.

As the object of the prosecution was not the punishment of the defendant but the removal of the nuisance, it was not necessary that all defendants be in personal attendance at the time that judgment was pronounced. The penalty was a fine, and a penalty

could be imposed upon the corporation. In Regina v. Birmingham & Gloucester Railway,[34] the defendant corporation was indicted for disobeying an order directing it to remove a bridge which it had erected over a road.

This is because the growing familiarity of the body corporate with the ordinary life of the community made it necessary to fit the corporation within the framework of liability.

The point of controversy arose also in Regina v. Great North of England Railway Company,[35] where the defendant company was indicted for cutting through and obstructing a highway with its railway line. It had failed to build a bridge over the highway in accordance with the statutory requirement. The crown argued that the case was analogous to a mere trespass to land, and that an indictment would lie in respect of it and that the tendency of modern decisions is to make corporations civilly and criminally amenable like individuals. The court's attention was drawn to the application of vicarious liability to the corporation in tort, and the company was convicted.

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34. (1842) 3 Q.B. 223.
35. (1646) 9 Q.B. 315.

of the agent... may be controlled in the interest of public policy by imputing his acts to his employers and imposing penalties on the corporation for which he is acting."

It is an instance of policy overriding principle.

3. Another reason for imposing liability upon the corporation was supplied by an American Court. An indictment for nuisance raised in some cases, the question of destruction of corporate property. To mitigate the nuisance might seriously involve the destruction of corporate property. It is argued that it will be unjust to order the destruction of the corporation property in its absence.

It is probable that the assumption that shareholders could be forced to employ their undoubted powers in order to force management to abide by the law, was unworkable.

4. In England, parliament was responsible for the practical extension of liability; thus subjecting corporation to penalties under various of the clauses acts for failure to abide by their terms. There was also in addition to this, statute 1827[39]

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39. An act for further improving the Administration of Justice in Criminal Cases in England 7 & 8 Geo IV.

which apparently was intended to have an even wider effect. Section 14 of that statute which deals with the administration of justice in criminal cases provided that in such cases the word "person" should include corporation. This statute could be read as rendering corporations prima facie liable for most statutory offences. In fact, it was suggested by counsel in Mutual Loan Agency v. A.G. of South Wales,[40] that parliament intended that corporations be made generally liable for all indictable offences punishable on summary conviction.

That a corporation was generally considered to be a person within the meaning of statutes was a generally accepted principle at common law.

5. Corporate criminal liability was also based under the Trustee Acts.[41] This was, however, provided for under a number of statutes dealing primarily with the regulation of certain undertakings carried on by bodies corporate, these acts regulated the activities of corporations carrying out public utility functions. A primary object of the legislation was to ensure that the activities with which they dealth should be carried on with as little in

40. (1909) ACCR 72.

inconvenience to the public as possible. The method of control adopted was to penalise non-compliance with the statutory provision by a penalty recoverable by action. The importance lies not so much in subjecting certain areas of business activities to a detailed scheme of administrative control.

6. Another reason for the imposition of criminal responsibility on corporation was the general regulation of business activity in the interest of the public. As corporate activity burgeoned into most fields of enterprises, corporations naturally become subject to statutes regulating their conduct. The result was an increasing spate of convictions against corporations for violation of regulatory legislation as, in increasing numbers, corporation became subject to their terms.

7. Another factor conducing a wide spread rule of liability was the definition of a person contained in the Interpretation Act 1889, section 2(1) whereof provided:-

> "In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an act passed before or after the commencement of this Act, the expression "person" shall, unless the contrary intention appears, include a body corporate."

One would tend to suggest that a combination of two factors that is vicarious liability in tort and statutory interpretation, combined to extend liability for offences involving mens rea in respect of which employers were vicariously criminally liable, to corporations.

In Peak Gunston and Tee Ltd. v. Ward,[41] the corporation was charged with the strict liability offence of selling adultered milk. It is submitted that the case of Lever Brothers Nigeria Limited, should have been convicted too for selling to the public adulterated Margerine which contained soap.

The reasons for imposing upon corporation criminal responsibility for their agents' acts are the same reasons which justify treating the same Acts as criminal in the individual actors.

Whatever social purpose (if any) tends to be served by punishing or threatening to punish the individual who does a given act, tends also to be served by punishing or threatening to punish the corporation in the course of whose business he does it. The argument against corporate criminal responsibility that the corporation cannot itself be "guilty" and therefore should not be punished tends to rest on the

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41. [1902] 2 K.B. 1.

There is no competition between the two responsibilities and the question which is commonly the more effective in preventing corporate business from being conducted in criminal ways is unimportant. The chief purpose of criminal law is deterence - The prevention of acts which are conceived to injure on social interest or the other. The question is not whose mind is "guilty" but whose responsibility will serve this deterrent purpose.

It seems evident that this purpose is further served if corporate criminal responsibility is further added to the criminal responsibility of the corporate representative. If the corporation is immuned, it often stands to gain rather than to lose by the Commission of crime in its business and directors, shareholders and agents, from loyalty to it or in the hope of altering their own position in it, or through it, may take a chance of personal responsibility for the sake of corporate advantage.

On the other hand if the proposed crime involves a prospect of loss by fine to the corporation and consequently injury to the actors position with it or investment in it, this prospect added to the chance of personal responsibility, may deter him. In substaining the conviction of a Railroad corporation for rebating, the Supreme Court said:

> "It is a part of public history of the times that statutes against rebates could not be effectively enforced so long as individuals only were subject to punishment for violation of the law, when the giving of rebates or concession enacted to the benefit of the corporations for which the individuals were but the instruments".42

The situation developed in more than one report of the Interstate commerce Commissioner, no doubted influenced in bringing about the enactment of the Elkins Law Making Corporations criminally liable.

The Elkin's Acts provide:

> ".... the act, omission or failure of any officer, agent or other person acting for or employed by any common carrier... shall in every case be also deemed to be the act, omission or failure of such carrier as well as that of the person".

There are many reasons for this:

1. It may on ocassion be clear enough that some individuals have committed a crime for corporate purposes, and yet not it is not clear who those individuals are. It is moreover relating difficult to apprehend and prosecute a number of particularly large number of individuals even if their identity is known; the corporation is always readily available. And the individual may be financially so irresponsible as to have nothing to fear from a fine, while the assets of the corporation may be abundant.

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42. See H.W. Edgerton: Corporate Criminal Responsibility (1950) 3 CCJ p.284.

2. The juries, as has long been notorious in civil cases, are not reluctant to find corporation guilty as to find individuals guilty.

The Nearing Case[43] illustrates this position. Scott Nearing and the American socialist society were jointly prosecuted for wilfully obstructing the recruiting or enlistment service in the United States. The alleged means of obstruction was the publication of a book or pamphlet called "The great Madness". The jury was instructed to acquit the corporation unless it found that the individuals who acted were authorised by the board of directors or by the membership of the corporation to obstruct the recruiting or enlistment service. There was no direct evidence that the members of the corporation or its board of directors or even the publishing committee authorised the publication. The only evidence against the corporation seems to have been that some of its officers authorised the publication, and that Nearing was paid with the corporate meeting that two pamphlets by Nearing have been published. On the other hand it was not disputed that the book was written by Nearing. Yet the jury acquitted Nearing and convicted the corporation and this result was substained on appeal. As the district court observed.

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43. 252, Fed. 223 (S.D.N.Y. 1918).

> "Indictment for crimes where human beings are jointly tried with corporations, the human interest naturally centres around the living individual. During a trial the corporation is a sort of, abstraction, and seems rather a secondary figure. The human being may lose his liberty if convicted, which the worst that can happen to the corporation is the imposition of a fine. When, therefore, the jury tendered its verdict, the first impression was one of inconsistency and compromise."

It is submitted that this decision is wrong. The reasoning is also erroneous. From the facts of the case it is evident that Scott Nearing committed the offence yet he was acquitted. The corporation which took little or no part at all was convicted of the offence of another person. The proper thing the court could have done if it really wanted the corporation to be convicted was to convict the two parties, which in my view was not all necessary. The fact that the corporation has money to pay the fine imposed makes no difference and does not justify the reason for its conviction. Does it, than, mean that once a rich man is taken to court he will be convicted whether or not he is guilty simply because he has the means of paying the fine? Is that fair trial? It is respectfully sumitted that the learned judge erred in law to have convicted the corporation instead of Nearing on the flimsy grounds that Nearing's liberty will be gone.

Corporate criminal liability tends to prevent crimes not only by influencing the corporate representatives of all degreess to abstain from conducting its business in unlawful way but also by influencing those higher or those remote degree to restrain subordinates. Shareholders who know nothing about the business of a corporation incur no personal responsibility if it is in fact conducted in a criminal way. A shareholder may examine the corporation's book, he may restrain the company by injunction, if necessary, from doing a criminal act, but as criminal act which impose no responsibility upon him, may be very profitable to it, the law offers him little inducement - if the corporation also is immuned to prevent crime by the exercise of his powers of investigation and restraint. So, far as it makes the corporation criminally responsible, the law supplies the shareholders with a strong motive to see that the business is lawfully conducted. Similarly, directors, managers and superior agents are necessarily more inclined to encourage or ignore criminality on the part of their subordinates when only the subordinates alone are subject to punishment, than when their crimes involve a risk of injury to the corporation and

through it to the directors and managers themselves. Prevention is the principal aim of sanctions and one effect of imposing a sanction upon the corporation for crimes committed in their corporate capacity by its directors would be to deter such persons from guilty conduct. It may be idealistic to suggest that in very many cases the representatives of a corporation would shrudder at the thought of inflicting upon the directors entity the infamy of a criminal conviction. But the directors might well hesitate to expose the goodwil of their business to such notoriety as has overtaken some American Corporations in consequence of prosecution.

Corporations which the courts have found guilty of illegal practices may not know a prison cell or wear the broad arrow but their goodwill suffers a very definite depreciation. Even a conviction for murder might thus prove salutory as involving the sanction of public disapproval and possibility of intervention by the Attorney-General.

The deeds which men do as directors lives

imbued with the personalities of its boys.[44] A Company which gets a bad name is apt to form bad habits and it is as well that its chair should be shortened in order to lessen its potentiality to harm.

Lawyers are all aware as laymen that corporations consist of human beings and can act only when a human mind contrives and a human hand executes, nor have they by a pedantic insistence on the separateness of the legal personality of a corporation precluded themselves from treating human acts as its acts. Yet what purpose of policy could exemplary damages serve to which a punitive fine would not also prove conducive? The deterrent effect would operate precisely where it is most needed, upon the directors, qua directors, that is, upon the intelligent-thinking elements in the corporation affecting directly their relation to the corporation and not simply their private interest. It is suggested that criminal liability be imposed on those legal persons which are corporation only for the acts of the human beings who are primarily representatives with the powers of the group upon which they are predicated, it goes without saying that liability would be

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44. See Twinn Criminal Responsibility of Corporation 3 Camb. L.J. 1927-1929.

restricted to such acts as were within the contemplated scope of activity of the group unit. Public policy demands that corporations be held to a higher degree of responsibility than individuals in proportion as they are more powerful and equipped materially to work much greater harm.[45]

45. See 10 Ibid.

CHAPTER IV

SOCIAL POLICY OF CORPORATE CRIMINAL AND TORTIOUS LIABILITY

1. Social Policy

As noted earlier corporations have long been held criminally liable for its and or for the acts or omissions of its agents. The question may be asked: what social policy underlies the corporate criminal liability as a general principle of English and subsequently of Nigerian Criminal Law? One is tempted to inquire as to what social policy corporate liability seeks to serve.

According to Winn[2] liability is imposed on the theory that consideration of public policy outweighs the claims which the corporation might assert to immunity on the grounds that it had itself no knowledge of the agent's act. As was stated by the United States Supreme Court in N.Y.C. & H.R. Railway Co. v. United State of America:[3]

> "The act of the agent... may be controlled in the interest of public policy, by imputing his act to his employer and imposing penalties on the corporations for which he is acting."

This is said to be an instance of overriding policy principle. Corporate criminal liability is a response

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1. Chapter 3, ante.
2. The Criminal liability at corporation 1 Camb. L.J. 1927-29 at
3. 212 U.S. 481.

to problems created by the business activities of large corporations The problems, and the rational of the response are basically to be found in American literature.[4] These seek to restrain combinations in restraint of trade by the use of criminal sanctions. The era of capitalists ruthlessness gave rise to a judicial and legislative response, exhibiting, at least nominally, many of the same tendencies. The law was, therefore, brought into collision in a direct and immediate way with the interest of the capitalist system.

In many respects it will be found that corporations are generally governed honestly. This general impression, however, ought not to lead to the conclusion that the business of corporations or any mode of business organisation is not conducted so as to fall within the ambit of criminal law. There may be what is called white collar crimes which were defined by Sutherland as:

> "A violation of criminal law by a person of the upper socio-economic class in the course of his occupation".

In his work[5] he found the conduct of seventy corporations which he researched into to be persistently criminal, that, in essence those who managed large corporations conducted corporate affairs in a manner which directly contravened the

4. Edwin, Antitrust and the Changing Corporation (1961) p.282.

5. Ibid - Crimes and Business (1941) 217 Annuals 1121.

criminal law. But there was no consistent policy adopted in respect of the manner of proceeding against them, since there was intention of eliminating the stigma of crimes.

Be that as it may, the possibility of proceeding criminally against a corporation is useful where it is desired to obtain an authoritative interpretation of a statute. Also, since a corporation has a reputation, not only in law but in fact, it is proper that the judicial process should be able to bring to light any facts that are relevant to that reputation. To take an example, where the manufacturers of Margerine i.e. Lever Brothers Nigeria Limited allow soap to find its way into the tins of Margerine produced by them (as happened in one case), it is right that the offence should be linked in the public mind with the name of the company, and not merely with the name of the directors or managers who may be nonetities. The fact that the company is brought into the proceedings by name makes clear to the world that the higher levels of the Company's organisation are involved. These arguments go no further than justifying a declaratory judgments against the corporation, or a nominal fine. They do not explain on what principle a corporation may be substantiality fined. Yet it is common practice to impose heavy fine on corporations.

We need to identify the problems which involve an assumption that many offences are commanded, or, at least, encouraged by high managerial officials. The validity of the assumption that high officials often participate in wilful violation of penal provisions applying to the conduct of their corporation's business is clearly beyond question. Unless this can be shown to be a valid general assumption, there is a possibility that corporations will be held liable for offences which management not only encouraged but also actively tried to prevent. The strict view taken by United States Federal Courts reflects the assumption that, operating behind the facade of multiple responsibility.

Corporate management has encouraged wilful violations, where such violation would appear to benefit the corporation and indirectly themselves. In the absence of corporate liability imposed essentially in respect of acts delegated by the highest levels of management to middle range personnel, the corporation and hence high management could immunise itself from liability.[6] The only difficulty here is that the incidence of punishment may fall capriciously upon the innocent and the guilty alike. Corporate criminal liability in its present stage in Nigeria fails to provide a defence to the

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6. Delansnd Rebeck - Corporate Criminal Liability for the Acts in Violation of Company Policy (1982) 50, Georgetown L.J. 547.

corprrations governing officers which may in no sense desired the Commission of criminal offences.

If the directors of corporations were the sole shareholders, a fine levied on the corporation could be justified as an indirect way of fining the directors for their own offences. But then, this end could be achieved with greater precision by fining the directors, who would be men of substance, because they would possess the shares. In most large concerns directors are not the sole shareholders, and a fine imposed on the corporation is in reality aimed at shareholders who are not directors or persons responsible for the crime. The old theory that shareholders whose purposes are thus lightened will be moved to dismiss directors, is unrealistic and no longer the law because the shareholders in large public companies have practically no control over the management.[7] In any event it is curious reasoning that an innocent person may properly be punished in order to compel him to do something that the law could, if it wished, do directly.

Essentially it could be said that the corporation is made liable for a failure to police the activities of its servants, agents and officers. This result may be appropriate where the legislature is cast in terms which indicate that such a duty is intended

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7. Berle and Means, The Modern Corporation and the Private Property (New York 1929).

to be imposed. It was thought at one time that the typical case which the criminal law had to meet was a case of deliberate infraction of the law by the governing body of the corporation, acting as such. Winn[8] is of the opinion that the governing members of corporations were likely, unless stringently supervised, to employ corporate assets and funds for unlawful purposes. He asserted that corporations have, because of their magnitude, a unique potential for mischief. He argued that directors wield their powers not as private men, but as a group exercising corporate powers by direct attribution. Regarding the concensus of Directors as reflecting a group will, in action, and fearing that directors would influence one another in the adoption of policies which finally and in private each would repudiate, he said there should be an additional sanction. The purpose of the sanction was to compel shareholders to exercise care in the selection of Directors and to ensure shareholders supervision of their policies.

Let us now take the case of Train derailment of 1970 at Langa-Langa.[9] It will be noted from the circumstances of the accident that from a decision in the boardroom of a Railway Company to accelerate

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8. Criminal Liability of Corporation (1927-28) 3 Cam. L.J. 398.

9. An accident first of its kind registered by the Nigerian Railway Corporation since its ince tion in which uncountable number of lives were lost.

a particular service or to omit the observance of certain precaution, death followed, and if the decision was taken in wanton disregard of the foreseeable consequences, it is not less criminal than an agreement between the Nigerian police to "work a hold up" with machine guns and live bullets against the students. It will be recalled that a great number of lives were lost and many became permanently disabled. Indisputably the directors or officers who participated in a decision authorising the agents of the Railway Corporation to endanger human lives are themselves personally responsible alike before moral and legal tribunals. But public policy demands that not only they but the corporation shall be responsible. The resources which they manupulate belong to the corporation. Men are note notoriously prone to mass depravity and will acquiese at a meeting in the adoption of a policy which is morally and legally wrong. This is very important particularly in Nigeria where corrupt practices are nothing but open secrets.

A corporation has been said to have no morals, but its members can be induced by an effective sanction to make its outward conduct conform to standards, and where they can control its directors public policy demands that they should be responsible in their corporate capacity. This argument has, of course, no application to cases where the

directors are autocracts subject to no control, but in scarcely any business company will t directors have power to determine fundamental questions of policy without reference to the body of shareholders on whom caution may be injoined by the enforcement of a criminal fine against corporate funds. This is not to say that the shareholders have control over the management of the company's affairs.[10] It is impracticable for single shareholder to maintain surveillance upon the directors, but the plan might well be adopted of appointing a trustee for the shareholders interest whose duty it would be to make known to shareholders any illegitimate action by which the directors might threaten to commit against the interest of the corporation. It is a simple matter in drawing up articles of association to make adequate provisions for discussion in a shareholders' meeting of any question which it may be desired to raise, and for controlling the directors by means of special Resolutions.[11] Criminal conduct of such intensity on the part of top management is probably rare. This is not to argue that top management is never implicated in the commission of criminal offence. It is perhaps enough to say that the common assumption that offences are usually directed by top

10. Quinn and Axton v. Salomon, (1909) A.C. 442.
11. Marshall valve & Gear Co. Ltd. v. Manning Wardle Co., Ltd. (1909) 1 Ch. 267.

management to junior staff to carry out using the corporation as a cloak for their activity is not the only situation. Increasing diversification of management functions in large corporations may enable management to use corporate activity as a cloak for crime. It also renders control over and supervision of corperate activities by the board of directors and Managing Director less immediate. The board frequently exercise an approval function, leaving detailed management to the Managing Director who thus becomes the key figure in management.[12] Inevitably, functions must be delegated and their exercise once delegated must involve a substantial measure of autonomy. This is where violations take place, as a result of the activities of an official to whom managerial functions have been delegated.

The question, then, is whether the imposition of criminal liability is necessary. In respect of such legislation, the judiciary have assumed that the true function of such legislation is to impose the duty upon a corperation to ensure its enforcement throughout all levels of corporate activity. It may be said that the inarticulate purpose of fining corporations is not punishment but a means of exacting the payment of compensation to society for a quasi-tort or for unjust enrichment; and, so regarded, justice obviously requires the

12. Florence, ownership, control and success of large Companies (1961).

fine to be borne by the same persons as those who received the fruits of the illegitimate enterprise. In a practical way, this may be achieved by fining the corporations. But even if a justification along these lines is accepted in theory, it means that the fine must not be greater than the damage done to society by the crime, or alternatively, that it must not be greater than the profit made out of the crime by the offender. If this be the legislative purpose and the the response be adequate, it is of little importance who in the corporate structure actually bears the responsibility for the infraction. The consequence, however, of accepting and adopting corporate criminal liability as a general principle of criminal law is to admit of its function also of serving as a sanction for serious offences which mens rea on the part of the offender is a necessary ingredient. It is wondered whether corporate criminal liability adequately fulfills the function of punishment and deterrence.

Some answers to these doubts may be found in the fact that those who participate in a corporation enterprise generally have a spirit of loyalty to the enterprise, at least if they occupy responsible positions. This feeling may cause them to alter their conduct when the enterprise is adversely affected by the sentence of a criminal court. Either the wrongdoer himself may mend his ways, or

those who are placed over him may control or dismiss him in order to prevent a repetition. These results might perhaps not be produced if the sentence of the court were a mere condemnation in words, not accompanied by the pecuniary punishment that is generally thought appropriate to offences of the type.

Further, the argument that the individual ought to be held responsible supposes that there is an individual who can justly be dealt with. Sometimes the division of responsibility within a corporation is such that it is difficult to fix on an individual. In any case, an individual cannot be made responsible for a mere comission unless there is a legal rule requiring of him personally the duty to act. Again, where the offence results from habits common to the organisation as a whole, it may not be just to single out one person for substantial punishment even though he may be shown to be the actual offender in the concrete case.

These considerations show that the problem is a difficult one. There are occasions when a corporation may be legitimately fined; but no valid argument exists for imposing on a large corporation in the sort of swingering fine that would be thought appropriate to an errant millionare, treating the corporation as though it were a human being. The danger of penalising corporations is that they offer

too obvious and easy a target. As always with strict and vicarious responsibility, proceedings directed against the innocent may tend to miss the guilty. An American official experience is of interest here, it is to the effect that:

> "Criminal prosecution of a corporation is rather ineffective unless one or more of the individual officers are also proceeded against".13

Suffices here to say that too much weight has been given in the discussion of social and public policy to the imposition of corporate liability for crimes, to the argument that since the law has prescribed certain definite penalties which are to be incurred only by offenders having guilty knowledge and guilty intent, the innocent members of the offending corporations ought not to be subjected to those penalties. Even the guilty officials are not in fact subjected to such penalties in their personal but only in their corporate capacity. On the conviction of a corporation no shareholder goes to prison unless he abetted or otherwise involved himself in the criminal act. No individual pays the fine imposed. The sanction is borne distributively in the same proportion as the fruit of illigitimate enterprise have, or might have been enjoyed. Nor does the penalty fall any harder on shareholders than on the innocent families of convicts who are not corporators.

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13. Decision 200, quoting from O.P.A. Manual.

2. The distinction between tortious and Criminal liability.

The question which needs to be answered is: what is the necessity in distinguishing between the criminal and civil liability of a corporation for the acts of its agents? The simple and orderly course would seem to make no distinction; the burden of proof may be said to rest, logically, upon the propenents of a distinction, though we are so a accustoned to the idea of some distinction that the proposal to complete its abolition carries the practical burden which always rest upon the propenent of change. What difference is therebetween crimes and tort which require or justify a narrower corperate responsibility for crimes than for tort? It is said that crimes are injuries to the State, the public or society at large while torts are injuries to individual. But many crimes are torts and many torts are also crimes. Nothing can injure society, or the public, without injuring a greater or lesser number, and proportion of individuals. The same thing is true of the "State" which means either the government or the society that is governed. Since government consist of human beings and exist to serve human purposes, an injury to the government is an injury to the individuals by or for whom it is conducted. It is true, of course, that an act may injure the government, in the sense of the minority by or for whom it is conducted, and yet be

harmless or even be beneficial to society as far as the majority are concerned. But this does not militate against the preposition that it is impossible to injure either society or the government without injuring individuals. Conversely injury to individuals is not often made a tort unless it is felt to have a tendency to injure society. Not only murder, rape and arson, but restraint of trade and the sale of adulterated food injures society because they injure individuals. The same is also true of personal injuries, deceit, defamation, malicious prosecution and unfair trade. The supposed difference in nature between crimes and torts is a difference in emphasises or point of view on the one hand and in procedure on the other.

For:

> "the real distinction between a tort and a crime is to be sought for not in a difference between their tendencies, but in the difference between the methods by which the remedy for the wrong is pursued. An offence which is pursued at the discretion of the injured party or his representative is a civil injury. An offence which is pursued by the sovereign or by subordinates of the sovereign is a crime".14

But even if it were true that crimes injure only society and torts only individuals, would it follow or even tend to follow, that the criminal responsibility of corporations should be narrower than their

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14. Austin Jurisprudence (3rd Edition 1869) quoted at P.16.

civil responsibility? Do the interest of the society deserve less protection than the individual interest?

It is true that in many instances, crimes, the Commission of which cannot be prevented by the prospect of personal responsibility will not be pfevented by the prospect of corporate responsibility either. But corporate responsibility inevitably tends to supply an additional deterrent and this additional deterrent cannot fail to be effective in a substantial number of instsnces. The only serious harm which it can do, consists of injury to those really innocent shareholders who have nothing to do with the crime and no real opportunity of preventing it. This injury, though regretable, is the same as those which result in imposing on innocent shareholders tort or contract or workmen's compensation and other forms of responsibility. However, innocent the owners of the corporate enterprise requires that the burden of torts and industrial accidents shall fall upon them rather than upon the casual victim and it requires. Similarly, that corporations' representatives be deterred (so far as corporate responsibility can deter them) from conducting business in criminal ways. But the responsibility of employers was long extended to them regardless of their being or not being also criminals. And the liability of the

employer for the deliberate acts of his servants seems to have been introduced in special cases of corporations.

It has been clear for sometime that corporations may be responsible for the exemplary or punitive damages on account of the tort of their servants. It is true that the conspicuous social interests involved are not identical in the two cases; and that they consist in compensation in the one case and prevention in the other. But, men, social interest in prevention is perhaps as much as the social interest in compensation though sometimes even outweighing the private interest of the individual shareholders.

Moreover, the difference between the social interest involved in the two cases is hardly so marked as the traditional way of looking at them assumes, for full responsibility serves at least a secondary purpose of deterrence, and it is arguable that criminal responsibility in the form of fines may otherwise a secondary purpose of compensation. That is to say, it is not vengeance, but economic reparation to society for the injury which the crime is assumed to have inflicted upon society. As the New York court of Appeal has put it in the following words:

> "... the duty to make reparation to the State for the wrongs of one's servant, when the reparation does not go beyond the payment of a moderate fine, is a reasonable regulation of the right to do business by proxy".15

It is sometimes assumed that a crime cannot be a corporate act unless it is authorised or ratified by the directors or the shareholders. A minor objection to this view is that such action, even if it has occured, may be very difficult to prove, and it is not likely to be set out in the minutes of the Meetings of the Corporation. The machinery for committing crime is necessarily extra-legal. If A has cohered into an intra vires contract in the name of a corporation, the directors could lawfully authorise him to do so and the question of its responsibility is the question of his authorization. But if A committed either a crime or tort in the course of the corporation's business, no one could lawfully authorise him to do so and the question of the corporation's responsibility is the broad question of policy. Will the general interest be served by imposing liability? If A has committed a tort in the course of the corporation's business there is clearly no need for saying that the directors or shareholders must have authorised the commission of the particular

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15. As per Justice.... in People v. Sheffield Farms Co. 225 N.Y. 25, 121, N. 2474 (1918).

tort, or of a class of tort to which it belongs, in order to make the corporation responsible. An authority to A to act for the corporation in the course of which some tort was incidentally was done is enough to make its corporation responsible. If in doing the same work it commits a crime, his want of authorisation is no greater and the reasons of policy for holding the corporation are no less. By the language of the us Supreme Court:

> "We see no valid objection in law, and every reason in public policy why the corporations which profit by the transaction and can only act through its agents and officials, shall be held punishable by fine because of the knowledge and intents of its agents",16

If the business in which the crime is committed is ultra vires, it is reasonable to hold that neither the business nor anything in furtherance of it is done by the corporation unless, the shareholders have authorised or acquiesed in the business. But if they have, its ultra vires character furnishes no logical reason for releving the corporation from the responsibility for the crime. Ultra vires torts and ultra vires transfer of property create rights and liabilities. There is no reason for a distinction in this respect between torts and crimes.

3. Summary.

The consequences of criminal responsibility in

16. New York Central R.R. v. U.S. 212, US (1909).

the case of corporation are neither different in kind from consequences of civil responsibility nor necessarily greater in degree. The contrary notion results from confusing the corporate situations with those of the individual. In the case of an individual; while tortious reaponsibility commonly involves no burden but an economic one, many forms of criminal responsibility may involve his liberty and some may involve his life. Even if the sentence is a fine, he, may in many jurisdictions be committed until it is paid. Furthermore, the individual is more likely to suffer opprobrium from criminal prosecution than from a civil one; and in the case of same crimes, the odium which results from conviction or even prosecution is great. This may be a good reason for refusing to equate the individual's criminal responsibility with his agents tortious acts. But such distinction are nearly irrelevant when the defendant is a corporation. Where a corporation is convicted of crime, no matter the crime, the State can neither hang any one nor deprive anyone of a day's liberty. Neither can it injure anyones reputation. Certainly it can seldom affect the reputation of those persons connected with the corporation who are unconnected with the crime.

The consequences of a corporation criminal responsibility as of its civil responsibility are

purely economic. This is true even if the corporation in addition to being fined is deprived of its trading certificate or suffers a loss of popularity and patronage. To the innocent shareholder it is quite immaterial whether his corporation is found guilty of a crime, tort or breach of contract, in each case he stands to suffer monetary loss only. This is more common in Nigeria where a large number of the shareholders are illiterate. And even if literate, shareholders are often not aware that they have a stake in the management of the Company and consequently seeing to its welfare.

CHAPTER V

CRIMINAL LIABILITY OF CORPORATIONS

1. Liability of the corporation for the Acts of its organs and officers.

A company as an artificial legal entity must of necessity act through the medium of its human officers or agents. It should be noted that not every act by the Officers will necessarily bind the company, though they are regarded as its Organs. The condition for liability will depend, first on whether the act is within the capacity of the company that is, intra vires that company, and secondly, on whether they have acted within the scope of their employment or authority. This second condition is generally answered in accordance with the ordinary principles of the law of agency and of vicarious liability which has been dealt with in chapter 4. All that needs to be emphasized here is that an agent who enters into a transaction on behalf of his principal binds the principal only if he acted within either (a) the actual scope of the authority conferred upon him prior to the transaction or by (b) subsequent ratification or, (c) The apparent (Or Ostensible) scope of his authority. A principal as an employer, may also be vicariously

liable in tort for acts of his employees which, though not authorised; are nevertheless within the scope of their employment.

In general the wide doctrines of agency and vicarious liability enable a company to be held liable whenever Justice so requires not withstanding that it is an artificial person that can therefore act only through its human agents and servants. But, there are some circumstances, especially, but not exclusively, in relation to criminal liability, where a person is not held liable unless he himself is personally at fault. This is never applied strictly because, to do so would mean that corporate bodies would never be held liable. To avoid this consequence the court have developed the doctrine that the acts and thoughts of certain agencies of a company may be regarded as those of the company itself. Those agencies are in effect treated as Organic parts of the company, that is, the general meeting, the board of directors and even a managing director have, in effect come to be treated as Organs of the Company rather than as mere agents. Lord Haldene in Lennard's carrying Co. v. Asiatic Petroleum

Co. Ltd'.[1] said that the corporation has no mind of its own any more than it has a body of its own; its active and directing, will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. Also in H.Y.S. Truculunt,[2] a Third Sea Lord was held to be the "directing mind" of the Admiralty.

It is in the realm of criminal law that Lord Halden's principle has exercised an especially powerful influence. The question whether a company ought, on ground of public policy to be made criminally liable had much been debated on and finally answered in the affirmative by the courts, by introducing a general principle of criminal liability of companies based on the theory that for the acts of certain officers, the company was personally liable. Thus in D.P.P. v. Kent and Sussex Contractor Limited[3] a company was prosecuted under the Defence Regulations for making use of a document with intent to decieve and for making a statement which it

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1. (1915) A.C. 705, H.L.
2. (1952) P.1.
3. (1944) K.B. 146.

knew to be false. It follows then that the human actor in respect of whose action liability may be ascribed to a corporation must occupy a superior position in the corporate structure. He may be a person acting under the authority of the board of directors or he may be the managing director or he may be a person enjoying a wide delegated authority over some aspects of the corporation's business. In essence, therefore, the Officer must have authority over the subject matter of the offence in order to ascribe liability to the corporation in which case he will be said to be representing the brian of the company. There has been lots of controvercies as to what Officer's can be said to be the alter ego of the corporation. Glanville William[4] considers a branch manager to be the alter ego of a corporation. The recent decision of the House of Lords in Tesco Supermarkets Limited v. Natrass[5] raises the question whether the owner of a chain of retail shops may escape liability under the Trade Description Acts 1968 by pleading that the offence was that of a named employee within the Organisation. Tesco had displayed washing power at a reduction, but on the occasion in

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4. Criminal Law: The General part (2nd Edition) (1961)
5. (1971) 2 W.I.R. 1167.

question, had sold a packet at what was in reality the full price. The company maintained that the mistake was due to the negligence of an assistant, who had not followed the company's system for the sale of reduced price goods.

The magistrates found that the manager of the shop was responsible for the manner and extent of the display of reduced price goods. They also found that the appellant's system of selection of managers both generally and in this particular instance, was careful and reasonable, and that adequate staff and equipment were provided for the running of the store. They further found that the appellants had exercised all due diligence, first in devising a proper system for operation of the store, and secondly, by securing as far as was reasonably practicable that it was fully implemented. They held however, that, as, there had been a false or misleading indication as to the price of the goods, an offence had been committed under the Act,[6] This offence is one of strict liability and it has been held that an enterprise is liable under the Trade Descriptions Act in respect of a transaction "... carried out on their behalf and for which they recovered the

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6. Trade Descriptions Act 1968 s.11(2).

prices.[7] On those facts the company was convicted by the local magistrate and the conviction upheld by the Divisional courts. The company obtained leave to appeal to the House of Lords. The appeal involved the interpretation of section 24(1) of the Act, which provides that it shall be a defence for a person charged to prove (inter alia) that:-

> (a) the commission of the offence was due... to the act or default of another person... and,
>
> (b) he took all reasonable precaution and exercised all due deligance to avoid the commission of such an offence by himself or any person under his control".

The points of law of general public importance involved in the appeal were;(i) whether the phrase "another person" includes servents of the accused; and (ii) whether the accused remained vicariously liable for failure of persons to whom he had delegated the performance of his obligation under section 24(1)(b).

In Series v. Poole,[8] the Divisional Court had considered the obligation under the Road Traffic

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7 Macnab v. Alexanders of Greenock Limited, High Court of Justiciary 134, J.C.C. 136 (April 1970).

8. (1969) 1 Q.B. 676.

Act 1960,[9] to keep records of the driving periods of employees, in conjunction with a defence by which the holder of a carriers license, might plead that "... he used all due diligence to secure compliance with those provisions". In that case it was found that the defendant remained liable where he had delegated to a Secretary the duty to keep records, although it had been found that the defendant properly instructed the secretary and the fault had been hers in failing to carry out her duties correctly. The court had regarded the obligation imposed by the Road Trafic Act as both absolute and personal, so that it was not sufficient for the defendant employer to establish a good system in order to escape liability, The Lords justice in giving the principal Judgement, had said that sometimes this concept was described as a matter of vicarious liability, though vicarious liability in its strict sense, was really a term unknown to criminal law. Liability properly derived from the fact that if parliament imposed an absolute duty on somebody else, "... he may, as I have said, acting perfectly reasonably appoint somebody else to

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9. S.186.

perform his duty, his alter ego, and in that case as it seems to me, if the alter ego fails in his duty the employer is liable.[10]

In Tesco's case, the court considered that under the Road Traffic Act, the offence created was an absolute one and that the reasoning in Seriot v. Poole[11] applied. Tesco's manager was a person to whom the appellant company had delegated their duty to take all reasonable precautions and exercise all due diligence to avoid the commission of an offence under the Act, and if the manager had failed properly to carry out that duty, then the appellant were unable to show that they had satisfied section 24(1)(b).

The court, therefore, concluded that although the reasons which the magistrates gave for their decision (namely that the manager could not be "another person" for the purpose of section 24(1)(a) of the Act) were wrong in law, their finding that the company remained liable for the failure of their manager was correct. This reasoning finds support in R.C. Hammett Limited v. L.C.C.[12] in which the Divisional Court held that the defendant enterprise was liable for the failure of acts/a branch

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10. (1969) 1 Q.B. 676 at 683, Per...
11. (1969) 1 Q.B. 676.
12. (1933) 97 J.P. Sup. 105, Concerning a violation of the sale of goods (weights & measures Act 1926).

manager to secure the observance of the system by a salesman under him. The courts, having regard to the circumstances of the case, the character and magnitude of the company's business, and the authority delegated by the board of directors to the managing officers of the company, seek to determine whether the actions of the person involved can be said to be the actions of the company.[13]

As was said in an early Canadian case, R. V. Canadian Allis-Chalmers Limited:[14]

> "What the rank or position of the officer or employee or other agent would have to be in order that his negligence might be deemed to be that of a corporation cannot be stated generally; what would be said in the case of a "One-man". Company might be quite inaccurate in the case, say of a railway company whose lines extend across a continent; but in every case the evidence must be such as to justify a finding that the company. The employer was negligent; or there can be no conviction."

Suffice here to state that the courts really seek to ascribe liability in respect of the actions of some person whose standing in the corporation is so high that his actions are likely to reflect an underlying corporate policy. For instance

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13. R.V.I.C.R. Haulage Limited (1954) 114 L.J.O. 25.
14. (1933) 54 O.C.R. 38 at 46 Rer Rose 3.

section 120(3) makes a director responsible for negligence in failing to secure the keeping of books of account, but contains a proviso allowing a defence that the director had reasonable grounds to believe that a competent person was charged with the duty of keeping the books. It should be noted that before liability will be imposed upon a corporation, the human actor involved must have been acting within the scope of his authority, otherwise his acts cannot be taken to be corporate actions. In this case his acts will be taken to be that of the corporation itself. It is generally assumed that the intention of the officer is imaterial despite the decision in Moore V. I. Bresler Limited.[15]

So far as the separate corporate entity is a fiction, and the corporation is in fact, its shareholders, it follows at once that the acts and thoughts of the directors and agents are not strictly those of the corporation, but also that the acts and thoughts of shareholders which relate to its business are strictly those of the corporation. Acts of those superior agents or representatives are treated in law as the acts of the corporation itself, rather than of its servants. On the same principle it is settled law that "a corporation though it cannot act except through its servants

15. (1944) 2 ALL ER 515.

or agents, may nevertheless have personal negligence imputed to it. It is for his purpose that Greer L.J. said in Fenton v. Denville[16] that a general manager of the business is deemed to be the alter ego of the company and it would be responsible for this personal negligence .

2. Offences for which Corporations may be Guilty.

It is now clear that a corporation can be made criminally liable by the express wordings of a particular statute. Section 74(5) of the Factories Act, for instance, contemplates the possibility of the commission of any one of the offence it creates by "a company, Cooperative Society, or other body of persons". Thus in R. v. Anglo - Nigerian Tin Mines Limited,[17] it was held that a firm could be prosecuted for certain offences under the old mineral ordinance. Neither the criminal nor the penal code deal specifically with the criminal liability of corporations. In its definitions of specific offences, the criminal code uses the word "person" but does not contain the definition of the word in so far as criminal liability generally is concerned. The Interpretation Act in section 3 states that "person" includes any company or association or body of persons corporate or unincorporated. And

16. [illegible]. 302.
17. (1950) 10 A.C.R. 69.

section 5(1) of the penal code states that the word "person" includes both a natural person and an artificial person e.g. a native authority or other corporations. From these definitions, it is obvious that a corporation in Nigeria can be charged with all offences whether requiring mens rea or not. The only limitations will be that a corporation cannot be charged with an offence carrying a punishment which by the very nature of the punishment the corporation cannot suffer, for example death and imprisonment. It should be noted that most offences punishable by imprisonment in Nigeria can be punished by a fine also. In the case of the penal code most offences punishable with imprisonment are specifically stated to be also punishable with fine in the alternative. They include serious offences such as culpable homicide not punishable with death under section 224 and theft (S.287 etc.). In all such cases a corporation cannot escape liability of punishment. The position, therefore is that in Nigeria, the question of punishment is not of very great hindrance towards full criminal responsibility. What should guide the courts more is the question whether in any particular case the mens rea of the alter ego can be properly imputed to the corporations. The courts might not be willing to do so in offences like Bigamy and rape for the mere fact that the courts could

well take the view that these offences cannot be committed by a corporation. But there is no reason why a corporation cannot be held guilty of manslaughter[1].

Corporations can now be held liable for many, and perhaps most offences. At first corporate criminal liability consisted in failure to perform a duty laid on the corporation which gave rise to a public nuisance. Today, corporations are commonly held liable for all manner of summary offences. As these are directed for the most part to the regulation of various aspects of trade and commerce, they form the most important head of corporate criminal liability. There is a considerable list of offences in respect of which it has been said that corporations may be held liable. In practice liability generally relates to certain types of commercial fraud or violation of regulatory legislation which are closely related to the business activity of the corporation. It is submitted that there is no crime which corporations should be regarded as incapable of committing, unless one created by a statute which is clearly aimed at human beings only.

(i) Liability for contempt of court.

A few things need to be mentioned on corporate liability for contempt of court because of its importance to publishers. The liability of

given for the editor and reporters, and they did not know of the proceedings against it. On a motion by the Attorney General against the newspaper proprietors, the editor and the reporter for the writ of attachment for contempt, the respondents did not dispute that the article tended or was calculated to prejudice the fair trial of M; but contended that since they had no knowledge of the pending criminal proceeding they could not be guilty of contempt:-

It was held by their Lordships that actual knowledge of proceedings was not a necessary element of a contempt of which the court would take cognisance and punish and that lack of intention or knowledge was only material in relation to the penalty which the court will inflict. The tax was within the matter complained of was calculated to interfere with course of printing not, that the authors and printed intended that result, and publication of matters charging alleged criminal offences was at the risk of those responsible for it. Accordingly, each of the respondent was held guilty of contempt. In Nigeria too corporations have been convicted for contempt. Thus in R. v. Ojukoro,[20] The Lagos newspapers Nigeria Daily Times, Nigeria Advocate and Eko Akete published a statement that a theft at government house had been traced to an ex-convict

20. (1950) 13 WACA 50.

who had recently been discharged from prison. It was held that this was a statement calculated to prejudice the minds of the public against the accused, and that therefore it constituted contempt of court.

In another case of R. V. Service Press Limited,[21] the article published in a newspaper stated that a dangerous situation had arisen owning to an alliance between "the imperialist fences" and "the shady characters" of a certain party and that a certain political oponent had boasted of close intimacy with officials "and even including Her majesty's High Court Judges" and that he had predicted the judgment in a recent famous case and his prediction came to the very letter.

It was held that the result of the article could only be to destroy the confidence of the public in the courts, and that is fatal and dangerous obstruction to justice which called for rapid and immediate realness. Therefore, the contempt would be dealt with brevi manu and the contemnor being a limited company is fined.

Thus it will be said that there are situations where the attachment for contempt sought consists in failing to obey an order of the court. In England under Order 52 rule 4 dealing with attachment for disobedience of an order of the court,

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21 (1945) 10 WACA 70.

Corporation may be fined.[22] In addition its officers may be attached. The order goes, not against the officers but against the company. Liability on the part of the officers for contempt of court results, not because they have been named in the order, but because by assisting the breach of an order they have aided in the resulting contempt of court. The order which if sought be enforced must be directed to the Company.

(ii) Liability for conspiracy.

Can it be argued that the Corporation has a mind separate and apart from that of its Board of Directors or Managing Directors?

The Corporation can only think as its officers have thought. Their decisions are those of the corporation. Their deliberation must for most purposes represent the thought processes of the corporation. If these high Officers are to be identified with the corporation, it seems strange to hold that they can conspire with it. The Board of directors or of high mangerial status are to be treated as the representations of the Corporation for purposes of Criminal law. If these persons represent the Corporation how can they conspire with it?

The decision in De Jottey Marks v. Greenwood (Lord) & others.[23] Seem to suggest that no

22. The rules of the Supreme Court S.1 1965/1776.
23. (1936) 1 ALL E.R. 863.

conspiracy could exist in such a situation. The plaintiff was managing director and the defendants were the chairman and the other directors of a limited liability company which was incurring losses. The plaintiff had urged that an investigation should be held to inquire with the reasons for these losses, but no investigation was then held. The plaintiff was compelled through ill-health to leave England. The defendants at a board meeting, thinking that the company's poor financial position was due to the plaintiff's mismanagement, suspended him from his duties and proposed the holding of an investigation. A report hostile to the plaintiff was duly made by the investigator. The plaintiff's salary was paid after his suspension, but on one occasion, no payment was made. He thereupon wrote to the Company demanding to know within two days whether he had been dismissed. On receiving no satisfactory reply, the plaintiff issued a writ against the defendants for damages for wrongfully conspiring to procure a breach of his contract with the company. He also resigned directorship. It was held that:

(i) On the evidence, the plaintiff had never been dismissed.

(ii) A conspiracy to cause a breach of contract is not in itself good conscience cause of action. The intended breach is an integrated part of the cause of action and must take

place before the writ is issued,

(iii) Directors in a board meeting cannot induce or conspire to induce that meeting to breach a contract, though some may before such meeting so conspire.

(iv) The action of those who induce others to break contract can only be justified, where such actions are taken as duty.

But some decisions appeared to suggest either tacitly on explicitly that there should be charge of conspiracy between a corporation and its managing directors, thereby raising the issue whether a corporation could ever avoid a conspiracy charge in cases where a senior officer directed or permitted the Commission of an offence. This seems to be the decision in R. v. Bloisers Transport Services Limited.[24] Where the appellent, a company and its managing director, appealed against conviction an indictment in respect of two counts of conspiracy to permit lorry drivers to drive without taking the statutory rest period and to encourage the drivers to make false entries in their lodge books. These offences were trisble only summarily and the grounds of appeal were:

(i) that to trial judge wrongly refused to quash the indictment on the grounds that

24. (1963) 3 ALL E.R. 170.

conspiracy to comit offences triable only summarily cannot properly be made the subject of indictment;

(ii) That the trial judge failed to give proper direction as regard the requirements of corroboration of evidence of accomplices.

The justification for the existence of conspiracy as a separate crime at all, according to wright,[25] is multifaries and by no means unchallenged. Malice may be more readily where two or more parties have engaged in premeditated consideration. But in the situation under consideration, the only actual knowledge is that of the managing director and there can be no additional justification for assuming it. If one man acting in two capacities, can comit conspiracy. Where should the line be drawn? Why attach particular significance to the fact that of these capacities is an organ of a limited liability company. Why should a trustee not conspire with himself to benefit a trust? The mere fact that actual human beings stand behind those two representations is irrelevant in any purposeful sense. The recent cases stress even more strongly the importance of the organic or alter ego doctrine. While it accept the need to impute the acts of directors and some other officers to their companies,

25. Law of Criminal Conspiracy & agreement, P.8.

it seems to be imposing an indefinable limit to what the courts would regard as the alter ego of the company. Thus in R. v. McDonnell,[26] an indictment charging the sole director of a private company with conspiring with the Company to defraud failed because, in the opinion of the court, the offence of conspiracy requires the participation of at least two minds; since McDonnel was the sole director of the company his mind was the mind of the company and, therefore, could not be said to have conspired with the company to commit an offence. There was indeed the absence of two minds; for the company's mind was, in the circumstances properly, the mind of the accused. It is quite evidence that the decision impose limitation on the practical application of an aspect of the theory of separate legal entity whereby a one-man company is considered to be an entity separate from its principal shareholders. Nevertheless, the decision is surely (sound) and to be welcomed, since an incorporated company acts, speaks and thinks through the agency of human beings, and their minds, knowledge and intentions, are imputable to the company, for it is only through them that the corporate body has a mind.

But practical and subsidiary corporations can conspire together. Each is a separate legal entity

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26. (1965) 3 W.L.R. 1138.

and for most purposes treated as such[27] provided that each has a spearate organisation and its own management, there would appear to be no difficulty in holding that such corporations could conspire together.

(iii) Breach of statutory duties.

Where a statute has laid upon a corporation a legal duty to execute certain duties and those duties are not executed, the corporation may be held liable and fined for non-compliance. Thus Bowen L.J. observed in R. v. Tylor Commercial Company Limited[28] that where a duty is imposed on a company by statute, such as the duty to register the names of its members imposed by the companies Act, a breach of such duty is indictable in the absence of any indication to the contrary in the statute.

The S.C. of Canada Company v. H.M. The Queen[29] that under section 213 of the CC, a corporation may be indicted for omitting without lawful cause to perform the duty of avoiding danger to human life from anything under its care, the Company in the particular case having failed to maintain a bridge over which it ran trains.

Similarly in Evans & Company Limited v. LCC[30] a company committed a criminal offence by

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27. Salomon v. Salomon (1897) A.C. 22.
28. (1891) 2QB 588.
29. 31 Can. S-Ct. 81.
30. (1914) 3 K.B. 315.

keeping their shop every afternoon in the week in violation of the shops Act, 1912, section 4, on the idea of keeping open or on that of failing to close, the essence of the offence being disobedience - of the statute.

The basis of liability in this class of cases is that the act either was done in breach of a statutory duty or amounted to a public nuisance in the nature of a trial committed against the public at large liability to criminal penalty has also been imposed by the English courts for violation of various statutes which make a simple commission of a certain wrongful act a crime irrespective of any mental element of mens rea. It has also been shown that corporation could be convicted for fraud thus in U. S. V.N.Y. Hensld Company[31] a corporation was convicted of the offence of knowingly depositing in the mails unmailable matter. A corporation is capable of the statutory offence of knowingly and fraudulently concealing assets from its trustees in bankruptcy. In Emp. v. Dhanraj Mills, Limited[32] Beamont, C.J., said. "In my view a corporation through its agents, can entertain an intention to apply a false trade description to goods". He went on to say, however, that in the case before him, the proof of intention was unnecessary for

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31. 159 F. 296.
32. (1947) W.A.C.A. 202.

conviction. (This case was decided under the Indian penal code which contain a definition of persons in section 11 similar to that contained in the Northern Nigeria Penal Code). It was even held in the case of I.G.P. v. Mandilas and Karaberis & and another[33] that a corporation as well as its area manager could be jointly found guilty of stealing. Another case of fraud is Moore v. I. Brestler Limited,[34] the secretary of respondent company, who was also the general manager, and the sales manager of the company's Nothingham branch, sold, with object of defrauding the company, some of the company's goods intended for sale. The secretary, who alone kept the accounts, and the sales manager made certain returns in respect of purchase tax on the sales which were false in material particular with intent to deceive, contrary to section 35 of the finance (No.2) Act, 1946. The company and two officers were charged with offences under the Act. The company was convicted but on appeal to quater sessions the convictions were discharged on the grounds that the sales were not made by the officers of the compeny as the agents of or with the authority of the company, but in defraud of the company. In this further appeal it was held that the company was guilty of the offence because the

33. (1958) W.R.N.C.R. 147.
34. (1944) 2 ALL E.R. 515.

officers were acting within the scope of their employment in making the sales, and the returns, and that the fact that these were made with intend to defraud the company did not render the officers any less the agents of the Company acting with authority. Welsh had critised this decision on the grounds that this is a confusion between respondent superior and the doctrines of identification.[35] This criticism has also been adopted by Glanville Williams.[36] It is submitted, however, that since a corporation must of necessity act through some human beings and the two officers concerned were the officers of the company who had the duty to make returns on behalf of the company, their act in that regard could properly be regarded as the acts of the company. This, with respect, does not necessarily lot in the doctrine of respondent superior. To rule that a company cannot be held liable in circumstances, of this nature is to limit considerably and unnecessarily the criminal responsibility of corporations. Also in the Nigeria case of A.G. (Eastern Region) v. Amalgamated Press[37] a corporation was charged under section 14(1) of the Eastern Region Newspaper Law (1955) which

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35. R.S. Welsh (1966) 62 L.Q.R. 345 at 360.
36. Glanville Williams, Criminal Law, 2nd edition p.859.
37. (1956-7) : E.R.L.R. 12.

provided that "any person who publishes or reproduces, or circulates in a newspaper any statement, rumour or report knowing or having reason to believe that such statement, rumour or report is false, shall be guilty of an offence". In convicting the accused company, Ainley C.J. said:

> "I have no doubt that a corporation can have knowledge of the falsity or otherwise of that which is published in a newspaper, and a corporation through its agents, is clearly capable of publishing newspapers. I cannot see, therefore, where a corporation is incapable of publishing a newspaper that which the corporation knows, or has reason to know is false."

Corporations have also been held liable for false statements in prospectuses. Thus damages are payable to any person who has incured a loss through the subscription of shares in, or debentures of a company by reason of any untrue statement in the prospectus. Persons who would be liable include:-

(a) any person who is, or has agreed to be a director of the company;

(b) every person who has authorised the issue of the prospectus, although this does not include any expert whose consent is required for the issue of a prospectus and has given that consent,

unless his liability is due to an untrue statement made by him.

(c) every person who is a promoter of the company.[38]

In addition, criminal proceedings may be brought against persons who issue a false prospectus. Section 45 of the company Act 1968 provides for criminal liability for misstatements in a prospectus. By this provision, any person who authorises the issue of a prospectus which contains any untrue statement is liable on conviction in the high court to imprisonment for a term not exceeding two years or to a fine not exceeding ₦1,000 or to both. Alternatively he may be liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding ₦200 or both.

The defence available to the accused person is proof that the statement was immaterial or that he had reasonable grounds to believe that the statement was true.[39]

Section 39 provides for the matters to be set out in a prospectus. This section makes no express provision for either civil or criminal liability, except for the criminal sanction implored by subsection (4) non compliance with

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38. S.44 (1968) Nigeria Companies Act, 12 - S.45. (1)(b).
39. S.45(2).

that subsection. On the other hand subsection (5) provides that in the event of contravention, or non-compliance with any of the requirements of the section "a director or other persons responsible for the prospectus shall not incur any liability" if he proves certain specific defences. This can only mean that if he cannot prove one of those defences he will be liable, presumable civilly, and it was so held in Re South of England National Gas Company.[40]

This section, therefore, becomes a valuable response in the investor's hand. By imposing an obligation to state the matter specified in section 4 and apparently, affording a civil remedy if they are not stated, the Act has erected protective wall around the investors, and any attempt to make subscribers contact us of their rights under this section in void. The Act makes provisions for criminal penalties in respect of non-compliance with some of its provisions relating to prospectus, and statement in lieu of prospectus. By section 49, a company having a share capital which does not issue a prospectus on or with refurence to its formation, or which has issued such a prospectus but has not proceeded to allot any of the shares offered to the public for subscription, shall not allot any of its shares unless, at least three days before the first allotment there has been delivered

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40. (1911) 1 Ch. 573.

to the registrar for registration or statement in lieu of prospectus signed by any person who is named therein as a director or a proposed director of the company or by his agent authorised in writing. Subsection (4) the section provides for the penalty for non-compliance, as follows:

> "If a company acts in contravention of subsection (1) or (2) of this section, the company and every director of the company who knowingly and wilfully authorises or permits the contravention shall be liable to a fine not exceeding £100."

By section 14 of the prevention of frauds (investments) Acts 1958, no person may distribute or cause to be distributed or have in his possession for distribution any document which to his knowledge, are circular inviting or calculated to lead to acquisition of disposition of, subscription for or underwriting of, securities or speculation in them. This prohibition the contravention of which is a criminal offence, does not however, apply to a prospectus which complies with the companies Act, 1968. Many difficulties could have been avoided if the courts had been prepared to recognise that a contract to subscribe for a company's security was a contract unberrcimae fide - demanding full disclosure.

It can thus be said that one of the underlying purposes of this penalties is to ensure that

persons who are invited to deal in securities shall, generally speaking, either have the minimum information required by the companies Act for prospectus, or else shall only be approached by respectable dealers. By this sanctions, a person who carries on a business of dealing in securities must, subject to certain exceptions, be a person licensed by the Board of Trade to deal in securities; or be a member of a recognised stock exchange.

(iv) Tax Evasion and Avoidance.

Taxation is an important instrument of the government for generating income for socio economic development. It has a three fold function, ...t is to provide revenue to finance government expenditure; to act as an instrument to achieve the economic aims of the government, and to redistribute income on a socially acceptable basis. A tax system should be so designed as to generate sufficient revenue as well as encouraging the development of key sectors of the economy or of certain activities within these sectors.

One of the greatest problems facing the country, is the problem of tax avoidance and evasion which is prevalent in this country. There is thus a tremendous gap between actual and potential tax collections. There has been widespread incidence of tax avoidance and evasion in the country by ...es and other taxable persons employing all

kinds of tax avoidance devices to escape or minimise their taxes not to talk of deliberately fraudulent ways and means of eveding tax altogether; sometimes with the help of the revenue officers.

For a proper understanding of the problem of tax evasion and avoidance in Nigeria, the distinction between those two terms is necessary. Tax evasion is usually defined to mean the failure to pay one's tax or the reduction of one's tax liability through illegal or fraudulent return or failure to make a return or even failure to pay tax on time. Evasion is therefore not only morally wrong but also it involves a breach of the tax law.

The courts treat tax evasion as a criminal offence, like all other offences of a criminal nature, it has to be proved beyond reasonable doubt.[41] Tax avoidance, on the other hand, is the minimisation of tax liability by so arranging one's affairs as to take advantage of provisions of the law. The tax payer ends up paying less tax than otherwise would have been payable. Tax avoidance does not necessarily denote an activity that is in all cases obnoxious and even considered by some people to be legal.[42] Though considered legal, where there are manipulations of various kinds which have the effect of reducing considerably the revenue

41. S.137(1) Evidence Act.
42. I.R.C.V. Fishers Executors (1926) N.C. 395.

due to the government, such practices should be prevented. No one says that a person should so arrange his personal affairs that the revenue authority can put the largest shovel in it, however, the tax requires and expects the observance of its rules. Where a taxable person embarks on artificial arrangements for the purposes of escaping or reducing tax liability, otherwise due, such arrangement should be circumscribed and condemned as reprehensible and obnoxious.[43]

> "Tax Evasion is one of the growing industries in the West; and in the developed and the developing World there are highly qualified accountents who earn good living solely by advising businessmen how they and their firms can legally escape from tax burden. This might be regarded as deplorable by men, but indicates an acceptance of the fact that men are reluctant to pay taxes. There must be penalties for criminal tax evoidance."[44]

There is even greater justification in a developing country, like Nigeria where capital formation is badly needed, for penalising tax avoidance schemes.

The question of tax evasion is even more serious. Tax evasion usually involves the use of deception, dishonest concealment and other illegal means to escape liability to taxes while tax

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43. Latilla v. I.R.C. (1943) A.C. 377 Per Viscount Simmons.

44. West Africa No.3233 2nd July 1979 p.1147.

avoidance involves the open use of every legitimate device to avoid such liability. The former is illegal and usually criminal, the latter is lawful and has often received the tacit approval of the courts as illustrated in Aryshire Pullman Motor Services and D.M. Ritchie v. I.R.C.[45]

Although none can be exact on the extent of the problem of tax evasion in Nigeria, there seems to be sufficient evidence that it is on the increase manifested by the glaring fraudulent concealment of income through false enteries in the account books or failure to keep such books which is rampant amongst companies. Quite a large number of companies declare losses year in year out, yet it is surprising that such companies do not voluntarily wind up, neither are they compulsorily liquidated. Rather they still continue business unabated with directors remuneration increasing every year as well as luxurious and prestigious investments such as landed properties and expensive cars. There can be no clear evidence of tax evasion than this. As Mr. Sosanya has observed:[46]

> "Tax evading has become, the favourite crime of the Nigerian, so popular that it makes armed Robbery seem like minority interest. It has, indeed, become so widespread that there now exists a cash economy of vast proportion over which the tax-man has no control and which is growing than several times the rate of the national economy."

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45. (1920) 14 Tax cases 54 at 763.
46. Taxation Reforms in Njgeria by S.O.A. Sosanya N.N.A. (1981) at p.7.

The Federal Military Government was so alarmed by this situation that it made provisions to check this incidence of tax evasion, especially of companies, by providin_ in part XII of CITA 1979. Offences and penalties for tax evasion and avoidance. Section 58 of CITA 1979 provides for the collection of companies income tax.

They provides in part:

> "Every company shall, not later than three months after the end of each year of assessment, pay provisional tax of an amount equal to the tax paid by such company in the immediately preceding year of assessment as on lump sum of such number of monthly instalment (not being more than six months) as may be approved by the board."

Where an assessment has become final and conclusive and a demand note has been served upon the person in whose name the company is chargeable then, if payment of the tax is not made within the time limited by the demand note, for the purpose of enforcing payment of the tax due:-

(a) distrain the tax payer by his goods or other chattels, bond or other securities;

(b) distrain upon any land, premises, or place in respect of which the tax payer is the owner, and, subject to the provision of this section, recover the amount of tax due by sale of anything

so distrained. For the purpose of laying any distress under this section, any officer authorised in writing by the board may execute any warrant of distress and if necessary break open any building or place in the day time for the purpose of laying such distress, and he may call to his assistance any police officer and it shall be the duty of the police officer when so required to aid and assist in the execution of any warrant of distress and in laying the distress. The things distrained, will be kept for fourteen days at the cost of the tax payer, and if the tax and the cost of the keeping are not paid, the things will be sold.[47]

Section 66 CITA 1979 specifies that any person guilty of an offence against the Act or any person who contravenes or fails to comply with any of the provisions of the Act or any rule, shall be liable on conviction to a fine of N200 and where such offence is the failure to furnish a statement or information or to keep records required, a further sum of N40 for each and every day during which such failure continues, and in default of payment to imprisonment for six months, the

47. S.61 CITA 1979 (as amended).

liability for such further sum to commence from the day following the conviction, or from such day as the court may order. Where a Company fails to comply with the requirement of any notice given by the board of Inland Revenue, for the purpose of the tax to be charged upon the company for any year of assessment, the board, may, in lieu of the institution of proceedings, impose a penalty upon the company for an amount equal to the tax chargeable upon the company for the preceeding year of assessment. This is proper provided a written notice of the penalty shallbe served upon the company and any amount of such penalty remaining unpaid thirty days after service of such notice may sue and recover in courtby the board in ects in its name with full cost of action from the company liable thereto as a debt due to the Federal government.[48]

Every company which, and every other person who, without reasonable excuse makes an incorrect return by omitting or understanting any profit liable to tax, or gives any incorrect information in relation to any matter or thing affecting the liability of any company to tax shall be liable on conviction to a fine of #200 and double the amount of tax which has been undercharged in consequence of such incorrect return of information,

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48. S.66(4)(b) CITA 1979.

or would have been so undercharged if the return or information had been accepted as correct. But no company or other person shall be liable to any penalty unless the complaint concerning such offence was made in the year of assessment in respect of or during which the offence was committed within six years after the expiration thereof.[49]

These are some of the efforts made by the companies Income Tax Act 1979 to curb Tax Evasion and avoidance. This problem is even more acute when one tries to make a distinction between tax evasion and avoidance and to state at what point avoidance becomes evasion or a transaction which "innocently" starts out as avoidance eventually ending up as tax evasion. The courts too have not always been careful in making a distinction between the two by sometimes saying "evasion" which "avoidance" is intended; as was shown in I.R.C. v. De Vigier.[50]

It is the view of many people that the loss of revenue caused by the widespread tax evasion in the country is due largely to our inefficient and inept tax administration. There exist therefore an urgent need to improve our tax administration and check the corrupt practices of our revenue officials. It is against this that the provisions of S.69 CITA

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49. S.67(2) CITA 1979.
50. (1964) 4 T.C. 24, 35.

1979 was enacted. It states that any person, being a person appointed for the due administration of the Act or employed in connection with the assessment and collection of the tax who:-

(i) demands from any company an amount in excess of the authorised assessment of the tax; or

(ii) withholds for his own use or otherwise any portion of the amount of tax collected;

(iii) renders a false return, whether orally or in writing, or the amount of tax collected or received by him, or;

(iv) defrauds any person, embezzles any money, or otherwise uses his position as t deal wrongfully with the Board,,or;

(b) not being authorised under this Act to do so, shall collect the tax under this Act shall be guilty of an offence and be liable on conviction to a fine and imprisonment.

Monetary penalties and criminal sanctions should be drastically increases so as to make it unworth while for companies or their directors or other taxable persons to attempt evading tax. For this purpose there should be public exposure in the case of detection of fraud. There is no

pretending that these measures would eradicate the problem of tax evesion, But one thing is sure and that is that they will go some way in reversing the present uncontrolleble trend to reasonable dimensions.

CHAPTER VI

STIPULAT D PENALTIES FOR NON-COMPLIANCE WITH THE 1968 COMPANIES ACT.

As already seen the companies Act itself is not only a civil document but contains sanctions that are penal in nature. For example Section 383 of the Act sums it all up by providing that:-

(1) All offences under this Act may be tried by a court of competent jurisdiction in the place where the offence is alleged to have been committed. Under section 383(2) where provision is made in the Act for a criminal sanction to be imposed in case of an act, on ssion or default without reference therein to the default being an offence, or without reference to conviction thereof in a court, as the case may be, the reference to bthe act, omission or default shall be construed as referable to an offence and the expression "offence" as used in this section shall have effect in relation to any such act, omission or default.

The following are some of the penal sanctions provided for in companies Act.

1. Misleading statements in prospectus, an offence punishable by section 44(1).[1]

The obligation of those who issues prospectuses inviting application for shares was long ago laid

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1. Companies Act No.59 of 1968.

down by Kinderaley V.C. in News Brunswick etc., Co. Ltd. v. Muggeridge.[2]

> "Those who issue a prospectus, holding out to the public the great advantage which will accrue to persons who will take share in a proposed undertaking and inviting them to take shares therein contained are bound to state everything with strict and scrupulous accuracy and not only to abstain from stating as facts which is not so, but to omit no one fact within their knowledge, the existence of which in any degree affect the nature or extent, or quality, of the privileges and advantages which the prospectus hold out as inducements to take shares."

In Central Railway of Venezuela v. Kisch,[3] Lord Chelmsford said that no mis-statement or concealment of any material facts or circumstances ought to be permitted, that the public who were invited by a prospectus to join in any new venture ought to have the same opportunity of judging everything which had a material bearing on the true character of the adventure as the promoters themselves possessed, and that the utmost candour ought to characterise their public statements. Section 39 gives statutory effect to the principle laid down in the above cases. The section provides that a statement included in a prospectus is to be deemed to be untrue if it is misleading in the form and content in which it is included.[4] Thus there are both civil and criminal liability for misstatements in prospectus.

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2. (1865) 1 Dr. & SM 363, 383.
3. (1867) LR, 2 HL 262.
4. See also R. v. Kynaston (1932) 1 K.B. 442.

(a) Civil liability for misstatement in prospectuses.

Under this head must be considered the claims of an allottee who by a misstatement in the prospectus was induced to apply for shares or debentures offered therein or to accept the company's offer for allotment. The allottee may have claims;

(i) against the company;

(ii) against the directors, promoters or persons who had authorised the issue of the prospectus;

(iii) against experts.

We are concerned here with the actions against the company. The following civil remedies at common law are available to an investor who became a shareholder on the faith of a prospectus which contains the false statements.

(a) Rescision of allottment.

Where a prospectus contains a false statement of fact and induces a person to apply and be allotted shares in a company believing the false statement to be true, he may rescind the allottment and get their money refunded when he discovers that the statement is false.[5]

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5. Lynde v. Anglo - Italian Hemp shipping Co. (1896) 1 Ch. 178.

(b) Loss of the right to rescind where a person has been induced by misrepresentation to become a member of a company by subscribing to the memorandum of association he loses the right to rescind the allotment[6] as he is a founding member.

(c) Action for damages for Deceit.

A person who has been induced to purchase shares or debentures by a prospectus which contains a false statement of fact can sue the person who issued the prospectus for damages.

(d) Action for damages for negligence.

It used to be thought that, on the basis of the decision in the case of Derry v. Peek,[7] an action for damages could only arise or if deceit could be proved of if there was a pre-existing contractual or fiduciary relationship. The decision of the House of Lords in the case of Hedley Byrne & Co. Ltd v. Heller & Partners Ltd.[8] has however, laid down that even at common law there will be liability for negligent mis-statements so long as a duty of care is owed by the maker to the recipient of the statement. Thus directors who have accepted

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6. Jennings v. Hroughton (1853) De am & G 126.
7. (1889) 14 AP. Cas 337.
8. (1946) A.C. 465.

responsibility for the prospectus and experts whose reports and consent have been attached to it will be liable for negligent mis-statements they make in the invitation to subscribe for shares. are experts whose reports and consent have been attached to it will be liable for negligent misstatements they make in the invitation to subscribe for shares.

1. Criminal Liability.

In addition to civil liability which persons may incur, criminal proceedings may be brought against persons who issue a false prospectus. Section 45 provides for criminal liability for misstatement in a prospectus. Under this section, any person who authorises the issue of a prospectus which contains any untrue statements is liable on conviction in the High Court to imprisonment for a term not exceeding two years or to a fine not exceeding ₦1,000 or both. Alternatively, he may be liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding ₦200 or both.

2. Meetings and proceedings.

By Section 122, every company limited by share and every company limited by guarentee and having a share capital shall, within a period of not less than one month nor more than three months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company called the statutory meeting.

Section 123 provide for the failure to comply with section 122. It says, that the failure to comply with the requirement of section 122 of the Act shall be an offence punishable on conviction by a fine of fifty pounds (₦100) where an officer of the company is guilty of the failure, and where a director of the company is knowingly and wilfully guilty of the failure he shall on conviction be liable to the like penalty.

3. Liability where proper accounts are not kept.

A company is liable where its officers fail to keep proper books of account. In such cases where the accounts are not properly kept the aim has always been to defraud the public. It is in recognisance of this that companies Act 1968 provides penalty for failure to keep proper account.

If where a company is wound up it is shown that proper books of accounts were not kept by the company throughout the period of two years immediately preceeding the commencement of the winding up, or the period between the incorporation of the company and the commencement of the winding up, which ever is the shorter, every officer of the company who is in default shall, unless he shows that he acted honestly and that in the circumstances in which the business of the company was carried on the default was excusable, be liable on conviction in the High Court to imprisonment for a term of one year,

.. as the conviction is in a lower court, to imprisonment for a term of six months.[9]

4. Penalty for improper use of the word "Limited".

The Act also provides penalty for the improper use of the word "limited". Section 389 says that, if any persons trade or carry on business under any name or title of which "limited" is the last word, they shall, unless duly incorporated with limited liability, be liable to a fine of five pounds (₦10) for every day upon which that name or title is used.

In essence,, this means that unless a company is incorporated with the word "limited" as its last name it cannot carry on business with the word limited. Where a company acts in contravention of this provision it incurs liability.

5. Penalties against foreign Companies in Nigeria.

The only section which deals with the consequences to foreign companies for non-compliance with the Act is section 371. However, before we deal with the section, it is pertinent, I believe for us to know what the Act makes obligatory on foreign companies to do in which failure will lead to penalty. Put in a different way, what are the offences in part X of the Act which draws penalties in section 371?

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9. Nigerian Companies Act No.59 of (1968).

First, it is obligatory for a foreign company (which had or established place of business in Nigeria (on 18th November, 1968) or its principal office within 3 months of the date on which it is deemed to incorporated persuant to section 369(1), to inform the registrar of companies as to the future intentions of the company in respect of its operations in Nigeria.

Secondly, it is also obligatory on such a foreign company if its business is to continue to be carried on in Nigeria, that its principal offices shall forthwith take all necessary steps to incorporate the company in Nigeria persuant to section 1 of the Act.

Thirdly, without the approval or authorisation of the commissioner of trade, no foreign company which has been incorporated in Nigeria can issue any prospectus inviting subscription from members of the public.

Also, and fourthly, if the foreign company informed the registrar of companies that it does not intend to carry on business in Nigeria, its principal officer, within a reasonable time, should apply to the court to have the company wound up under the supervision of the court.

Fifthly, where a foreign company had ceased to exist in the country of its incorporation before the

16th November, 1968 (the commencement date), action should be taken by the principal officer or the company to wind up the company in Nigeria.

Sixthly, foreign companies who have no established place of business on the 18th day of November, 1968 are required:

(i) to give notice in writing of their intention to the registrar, and then,

(ii) take all necessary steps to obtain incorporation as a separate entity in Nigeria.

Finally, until foreign companies coming under section 368(b) get incorporated, they will not have a place of business in Nigeria.

All these seven obligations imposed on foreign companies in part X of the Act are matters for which section 371 prescribes penalties. Every foreign company that contravenes any or all of them shall be punishable under section 371 under the section:

> "If any foreign company fails to comply with the requirements of this part of this Act in so far as they may apply to the company that company;
>
> (i) shall be guilty of an offence and liable on conviction to a fine of not less than £1,000 (₦2,000);

(ii) and every officer or agent of the company who knowingly or wilfully (i.e. intentionally) authorises or permits the default or failure to comply, shall whether or not the company is also convicted of any offence, be liable on conviction to a fine of not less than £100 (₦200);

(iii) and where the offence is a continuing one, to a further fine of £10 (₦20) for every day during which the default or failure continues."

Thus section 371 provides penalties for both the foreign company and the principal officer of the company who defaults or aids the default in compliance with the mandatory provisions or penal laws of part X of the Act. It is important to note that the mandatory obligations are penal provisions because section 371 talks of "guilty of an offence", and "conviction". Only in penal laws are such words used. The fact that the section does not provide for imprisonment is no ground to dismiss the contravention of the obligations as not carrying penal sanctions. Fines are provided instead of imprisonment, first, because it serves a better purpose (revenue) than imprisonment, secondly a company not being a human being cannot be imprisoned. One can argue that the principal officers in default

can be sentenced to imprisonment since he is a physical person, but the question is: If the principal officer of the company is imprisoned, who will take steps to correct the default? It is in the realisation of this fact that section 371 does not provide for imprisonment. All the same, that does not prevent the punishments provided in the section from being penal. In addition to these penalties the case of WEMA Bank Ltd v. N.N. Shipping Line Ltd.[10] establishes that every foreign company which fails to comply with the provision of part X of the Act shall:

(i) Not be a juristic person (i.e. will not exist in law) and

(ii) Not be able to sue or be sued in its own name.

The corollary of the above consequences is that such a foreign company cannot have its interest protected in Nigeria.

The position in Ghana[11] seems to be similar to section 371 of our Act and, in fact, supports the decision in WEMA Bank v. N.N. Shipping Ltd.[12] Section 313(1) & (2) of Ghana's companies code provide:

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10. (1976) F.N.C. P.68.
11. See Chapter V Ghana Companies Code, 1963; provisions applicable to non-Ghanaian companies.
12. (1976) F.N.C. 68.

(i) ".... Any external company or any local manager (i.e. principal officer) or process agent of an external company who fails to comply with any of the obligations imposed upon it or him by the foregoing provisions (i.e. provisions applying to non-Ghanaian companies) of this chapter (chapter V of the Code), the external company and any local manager or process agent who is in default shall be liable to a fine not exceeding £G50 or in the case of continuing default £G5 for every day during which the default continues.

(ii) If there is any default in delivering to the registrar any document required to be delivered for registration persuant to the foregoing provisions of this chapter of the code, The rights of the external company shall under or arising out of any contract made in Ghana during such time as default continues shall not be enforceable by action or other legal proceedings...."[13]

Thus in both Nigerian and Ghanaian laws, the foreign or External company and the principal officer or local manager of the foreign company are both liable to conviction and fine in cases of non-compliance with the obligation imposed on them. In the case of Ghana, however, the law goes further to provide statutorily that apart from the conviction and penalty of fine, that the foreign company may suffer, it shall also be disabled from enforcing its rights by any legal actions.

Thus in the Ghanaian case of West African Mahogany Co. Ltd. v. F. Hills & Sons Ltd.,[14] the court refused to enforce the rights of an external

13. Emphasis mine.
14. I.G.L.R. p.246.

company because it had defaulted for six years to comply with the provisions of delivering documents to the registrar of companies and it could not prove that such default occured despite acting with reasonable deligence.

Summing up, penalties against foreign companies in Nigeria are for non-compliance of the obligations imposed on them by part X of the Act as enumerated. And it is submitted that it is the duty of the registrar of companies to refer such defaulting companies, to the Attorney-General of the Federation for prosecution or in the alternative, personally prosecute the defaulting companies in court.

Railway,[2] it was decided that corporations could be held liable for offences involving mens rea. In those offences which could be committed vicariously, corporations were easily found criminally responsible. Thus the real solution that was found to the problem of finding a corporation guilty for an offence requiring mens rea was by imputing to the corporation the state of mind of certain of its directors or other officers, this is termed by viscount Haldane L.C. as the "alter ego" doctrine.[3] By means of this doctrine the means rea of the alter ego is inputed to the corporation so an to create, in appropriate cases, criminal liability in the corporation. In United States v. Dofferweigh,[4a] the Supreme Court held that all those who had a "responsible share in the furtherance of the transaction" were criminally liable for the offence of introducing into interstate commence mislabelled bottles of cascara and digitals as prohibited by the pure food and Drug Act. Hence the General Manager was properly convicted, for he had a duty and capacity to prevent impurities in the drugs supplied by his company. This is clearly a very sound decision, as it would help to check the activities of companies especially as it affects their products. There is nothing foliish in punishing someone by means of the criminal law for falling to perform a performable duty of whose existence he

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2. (1842) 3 Q.B. 231: 114 E.R. 492.
3. Lennards carrying company Ltd. v. Asiatic Petroleum Co. (1915) A.C. 713.
4a. (1842) 3 Q.B. 231.

ought to have taken trouble to discover.

The corporation is not, in the eye of the law, so abstract, impalpable or metaphysical that it cannot be regarded as a principal, or master. Like any other principal, can, in general, enforce and be bound by the contracts of its human agents acting on its behalf. The doctrine of vicarious liability enables us to hold a corporation criminally liable for the acts of any of its servants. Once it is decided that this is one of those cases where a principal may be held criminally liable for the acts of its servants, there is no difficulty in holding that a corporation as the principal is liable. Corporations which the courts have found guilty of illegal practices may not know a prison at all or wear the broad arrow, but their good will suffers a very difinite depreciation.

The position in Nigeria can be summarised as follows;

1. The general rule is that a corporation like any other entity recognised by the law, can be indicated for its criminal acts.

Thus legal personality must of necessity connote the general power to act.[4] As was argued in R. V. I.C.R. Haulage Limited,[5] the acts of a corporation must be performed by its

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4. Aguda - Principles of Criminal responsibility in Nigerian Law - Ibadan University Press 1965.
5. (1944) K.B. 55.

human agency, and for this purpose there is no distinction between an intention and other functions of the mind. Generally speaking, therefore, a corporation can be held liable for offences requiring mens rea and for other offences as well.

2. Whether the criminal Act of an agent is to be regarded as the act of the company itself must depend upon the nature of the charge, the relative position of the officer or agent, and the other relevant facts and circumstances of the case. Thus the agent must be a responsible agent or an important official and, the agent must have been acting within the scope of his authority. It is submitted, therefore, that acts which are not directly authorised by the governing body of the corporation should not be regarded as the acts of the company itself. The "Organ" for this purpose should be interpreted to include the board of Directors. The general manager and a branch manager if he has a controlling voice in the administration of the corporation. As stated earlier on, an act performed by an organ of a corporation should be imputed to the corporation only if it is directly authorised by the board of primary representatives[6] or, in proper cases, if it is an act

6. See Moore v. I Bresler Limited (1944) 2 ALL E.R. 515.

[redacted]

> of one element in the crime of perjury;[13] it can be convicted of wilfully making statements which it knows to be false.

It is submitted that the corporations should be criminally responsible in most cases. A corporation should be considered capable of many crimes and guilty of most crime, if the human persons who commit the crime act in the course of their employment [illegible] in fact. It is suggested that the courts if they have not fully reached this position, should be approaching it. In the past few years they have progressed from very narrow view to, or towards very broad view of corporate criminal responsibility and it should be continued in that direction. But it is not yet clear that corporations can commit all crimes, on the contrary, it is constantly assumed that they can not. And it is still not clear what human action is necessary to the commission of the corporate crimes.

2. Recommendations.

It has been suggested that the present level of corporate criminal liability is not an adequate response to the problems of crimes committed by or at the instigation of corporate management. The employment of the criminal sanctions against

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13. e.g. Perjury.

corporations is probably both useful and necessary. At any rate until such time as our system of sanctions become more sophisticated, its continued use is not yet at hand. An adequate system of sanctions must take account of the possibility that such offences may be committed wilfully and seek to defer such happenings. The scale of demand of the companies products both preclude adequate identification of the individuals involved, and protect men from the stigma which otherwise they would suffer. Thus, because demand is greater than supply no one even stops to think of whether or not a company has good or bad reputation. For instance, in 1985, the health authorities announced over the Television that certain baby cereals were not fit for human consumption, but suprisingly, those items were still sold and purchased. This is because the good products are difficult to come by and even where they are found, they are too expensive. In such circumstance one would suggest that the Federal Government should set up industries for the manufacture of the so called essential commodities. And even where other private corporation embark on the production of such items, the government should try to stablise the prices of such goods. Section 14 of the price control Act is a good example of such government intervention; If it will be properly implimented.

2. Generally speaking corporate criminal liability should be imposed only where there is an intention to penalise a corporation, and the Act in question is performed by and agent acting in the scope of his office or employment on behalf of the corporation.

3. There are lots of difficulties posed by corporate criminal liability; it is suggested that our penal system should make provisions to surmount the difficulty presented Moor v. I. Bresler Limited,[14] that a corporation might otherwise be held liable for offences essentially committed for the purpose of defrauding the corporation. If the purpose of liability is to make management ensure that standards will be enforced throughout an industry it is unsound to restrict liability to instances where acts are committed with intent to benefit the corporation. The object here will be to ensure that regulations will be complied with.

4. Corporate benefit itself should not be essential to liability. Rather there should be measures designed to deal with willful offenders. Thus the personal stigma of conviction and punishment will be more likely to succeed since it is particularly feared by offenders, enjoying a rather superior social status. So in theory

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14. Supra.

there is no reason why such persons could not be prosecuted.

5. It is also suggested that in cases where the management of the companies hide under the corporate entity, to commit fraud, the court should be more than willing to pierce the corporate veil to see what in reality lies behind.[15] Thus the separateness of the legal personality should not be used as a sham to commit offence.

6. Corporate criminal liability has always been viewed as cumulative in addition to personal liability of the personal officers of the company. Hence the recognition of corporate responsibility should not affect the rulethat officers, servants, or agents who commit offences whichcan be attributed to the corporation for which they act are themselves primarily liable criminally. It has been suggested therefore that corporate directors should be liable where neglect of their duty to the corporation in causing it to perform its statutory duties results in the death of some members of the public. An instance of such is the pollution caused by the Gas leakage from the union carbide factory in India where quite a great number of people lost their lives. Although there were compensations, yet

15. F.G. Films Limited (1953) 1 W.L.R. 483.

it is of no use saying that, the amount of compensation paid is in any way an equivalent of the lives lost. It would be suggested that the operation of oil companies in Nigeria resulting in depletion of plants and animal lives should be similarly treated. The Benue Cement factor should also be treated in the same way as it has the same pollution effect. In cases where a duty of care on the part of the corporation is required in order to found liability it may be difficult to show that any given offices should have been concerned in the matter. Not all directors and officers of a corporation are or can be fully convesent with the day to day affairs of the company, considering the laxity placed on directors duties. There is, therefore, a primary problem in the selection of appropriate persons to be prosecuted. Corporate personal who are actually involved in the commission of an offence cannot protect themselves behind the facade of the corporate entity.

7. Be that as it may the real problem underlying this whole field is the difficulty of proving that the highest executives of management were aware or party to an offence. As respects liability of lower officers one would say failed to fulfil a duty to the corporation.

8. The report of the Royal Commission on Criminal procedure questioned:

> "Whether it is proper to use criminal process to enforce revenue and regulatory laws which are the typical province of most of those non-police agencies. With the current pressure of criminal business on the courts, this is surely a matter to which the government should be giving attention."16

This question could well be posed in Nigeria considering the widespread practices of tax avoidance and evasion. There is, therefore, an urgent need to improve our tax administration to maximise tax revenue in order to obtain additional revenue for development. This will lead to significant improvement in tax equity by enhancing equal treatment of all taxable persons.

9. Perhaps the introduction of computer technology to assist in the calculation or alteration, of accounts might make the work of the revenue officials more efficient.

10. Monetary penalties and criminal sanctions should be drastically increased so as to make it worth while for companies or their directors to attempt tax evading. It is suggested that there mere failure to make a return should constitute a criminal offence. And that consideration be given to the standard of life

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16. Royal Commission on Criminal Procedure, Report, Limited M.S.O. 1981.

of the tax payer; That the statutory power to recover tax as a civil debt should be exercised in all cases before criminal prosecutions is contempleted and the exercise of discretion whether or not to prosecute should be subject to very clear rules which should be published to educate companies and their management.

11. It is further suggested that the various penalties provided in the companies act be modified as the old provisions cannot be a reality considering the economic situation of the country.

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