

RATIFICATION IN PUBLIC LAW

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If a person without authority to do so purports to exercise governmental power on behalf of a public authority, his action will be ultra vires and invalid. What then is the position if the public authority approves the action taken by the self-appointed agent? Can the authority ratify the agent's action so as to make it valid retrospectively?¹

There is a considerable degree of conflict among textbook writers on this question. Garner² expressly states an extremely wide ratification principle. Whitmore and Aronson³ and Cross,⁴ though less explicit appear to recognise a wide rule in favour of ratification. De Smith⁵ on the other hand states that an authority cannot generally ratify a decision encroaching on individual rights but recognises that some of the cases reveal difficult marginal problems of interpretation. Wade⁶ suggests that the courts will not permit ratification generally in matters of substance but denies that there is any rigid rule.

At first sight the decided cases also appear to be in conflict. The apparent conflict can however be largely resolved. The thesis of this article is that as a general rule the law does not allow ratification of an unauthorised governmental act. Cases which appear to recognise ratification are either based on an express power of ratification or can be justified on some other principle and are not true cases of ratification. Where however a public authority relies on a private law power, eg one derived from property or contract, the same rules of ratification apply as in the case of private individuals. Each of these propositions will be discussed in turn in the remaining sections of this article.

I THE RULE AGAINST RATIFICATION

One fairly narrow principle appears to be firmly established. An authority cannot ratify the act of a person to whom it could not have validly delegated its power. Any principle of agency must give way to that of *delegatus non potest delegare*. In *Barnard v National Dock Labour Board*⁷ a port manager purported to suspend the plaintiff dock workers. The power of suspension was vested in the local dock labour board. The Court of Appeal held that the board could not delegate its power to suspend to the port manager. The board had also contended

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1 Where the authority after proper consideration adopts the agent's decision as its own, the decision is valid from the date of adoption. This process is sometimes called ratification, eg *General Box Co v US* 100 L Ed 1055 (1955) but it is preferable to regard the approval of the authority as its own decision rather than a ratification of the decision of the agent: see *Canterbury Building Society Ltd v Baker* [1979] 2 NSWLR 265, 271.

2 *Administrative Law* (5th ed 1979) 156, 333, 414.

3 *Review of Administrative Action* (1978) 196-197.

4 *Principles of Local Government Law* (5th ed 1974) 64.

5 *De Smith's Judicial Review of Administrative Action* (4th ed Evans 1980) 303.

6 *Administrative Law* (4th ed 1977) 309-310.

7 [1953] 2 QB 18.

that it could ratify the manager's decision. Denning LJ dismissed that contention on the ground that ratification could have no greater force than a prior delegation and that since there was no power to delegate there was no power to ratify.⁸

A wider statement of the rule against ratification appears in *St Leonard Vestry v Holmes*.⁹ The vestry had statutory power to serve a notice requiring householders to repair their drains. A notice was served on Holmes on 8 August 1884, not by the vestry but by its sanitary inspector, requiring repairs to be begun by 11 August. The work was not done and on 26 August the inspector served another notice, this time with the purported approval of a sub-committee of the vestry. Holmes refused to comply with the second notice and the inspector arranged for the repairs to be carried out by a builder. The vestry later took out a summons to recover the expenditure. In his defence Holmes submitted that the notices were invalid. The Divisional Court agreed and dismissed the summons. Day J appears to have rejected any possible argument based on ratification:¹⁰

It is important that the vestry should exercise a discretion in each case, and it is not enough that the inspector does what he pleases, and then relies on his acts being afterwards approved by the vestry.

There are a number of weaknesses in this case as an authority against ratification. First, it is not clear what act of the vestry could be regarded even as an attempt to ratify. The Divisional Court clearly held that the act of the sub-committee was not the act of the vestry itself because there had been no effective delegation to the sub-committee. The only act of the vestry itself appears to have been the institution of proceedings to recover the expenditure,¹¹ a fairly tenuous form of ratification. If there was an attempt to ratify it could have failed for one of two reasons. First, the power conferred on the vestry may have been one which could not have been delegated even in advance. If so the decision may stand for the narrower proposition noted above that an authority cannot ratify where it cannot delegate.¹² If however the vestry could lawfully have delegated to the sanitary inspector the discretion whether to serve a notice, the case then stands for the rule that even where an authority can delegate it cannot ratify.

This last interpretation of *St Leonard Vestry v Holmes* was applied in *Bowyer, Philpott & Payne Ltd v Mather*.¹³ A local authority had statutory locus standi to sue for a penalty for breach of the Public Health Act 1875 and was expressly empowered to authorise an officer or member to institute proceedings. Mather, the authority's inspector of nuisances instituted proceedings on 17 May 1918 against the company in respect of a pig's carcase. A committee of the local authority met on 22 May and purported to approve the inspector's action. At the hearing of the information the company argued that the inspector had no authority to institute proceedings and that the meeting of the committee on 22 May

⁸ *Ibid* at 40.

⁹ (1885) 50 JP 132.

¹⁰ *Ibid* at 134.

¹¹ See the assertion of Grantham QC at 133, that the institution of proceedings implied that everything had been done regularly.

¹² See *Barnard v National Dock Labour Board* *supra* n 7 at 40 per Denning LJ; see *supra* n 8.

¹³ [1919] 1 KB 419.

did not cure the defect. The inspector argued that the institution of proceedings took place in effect when the committee made its decision. The Justices held that even if the inspector had no authority initially to institute proceedings the subsequent approval cured any defect. They ordered the company to pay the penalty. On appeal the Divisional Court quashed the conviction. The Court held that the validity of the institution of proceedings had to be judged by what happened on 17 May not 22 May. This finding thus raised squarely the question of ratification ie retrospective validation. The Court unanimously held that the power to authorise was limited to cases where the officer was authorised before the proceedings were instituted.

The case is a strong authority against a general principle of ratification in the sense that, if there were such a principle, all the conditions were favourable to its application. It seems clear that the inspector was acting on behalf of the local authority though this point was not expressly considered. There was a competent principal in the shape of the local authority at the time the inspector took his action. The principal was legally capable not only of bringing the proceedings but of authorising the inspector to do so. In other words there was an express power of delegation. Finally through its committee, the authority did attempt to ratify the action of its inspector. Even so the purported ratification failed.

These cases are supported by the actual decision in *Blackpool Corporation v Locker*¹⁴ but the reasoning in that case is in part unsatisfactory. A Minister of the Crown had power to requisition houses and their contents and authority to delegate that power. He delegated to the local authority power to requisition houses. The local authority purported to requisition Locker's house and furniture. The Minister later approved the corporation's action. The Court of Appeal held that the Minister's approval did not validate the unauthorised action of the local authority for two reasons. First, the corporation was not acting as agent for the Minister but was exercising its own delegated authority. Secondly, the Minister could not ratify because he had divested himself of his power of requisition by delegating it to the corporation. It is submitted that this second reason is wrong. Delegation is not the same as divesting¹⁵ and in any case a public authority may not fetter its power by divesting itself of it.¹⁶ Nonetheless there was a second reason available to give support to the decision of the Court and that was the rule against ratification recognised in *St Leonard Vestry v Holmes and Bowyer, Philpott & Payne Ltd v Mather*.

II EXPRESS POWERS OF RATIFICATION

If, as has been suggested, there is a general common law rule against ratification in administrative law, that rule must give way to any valid express power to ratify.¹⁷ Cases which might otherwise be regarded as

14 [1948] 1 KB 349.

15 *Huth v Clarke* (1890) 25 QBD 391.

16 See Sykes, Lanham and Tracey, *General Principles of Administrative Law* (1979) 55-57.

17 Similarly parliament or any other authority with power to make orders retrospectively may in effect ratify an unauthorised act by making a retrospective order in the same terms as the unauthorised one. This is not the same as ratification because it will apply whether or not the unauthorised actor purported to act as an agent.

inconsistent with the general rule so stated may be accounted for on this basis. One case which has been regarded as laying down a wide common law power of ratification¹⁸ is *Firth v Staines*.¹⁹ A vestry had statutory power to delegate its discretionary powers to a committee subject to the condition that the acts of such a committee be submitted to the vestry for its approval. On 15 October a committee given delegated powers, authorised the vestry's sanitary inspector to serve notice on an owner of premises requiring him to abate a nuisance and in default to take proceedings. On 19 October the inspector served the notice requiring the owner to provide proper ventilation for his drains. The owner neglected to do so and on 3 November the inspector took out a summons against the owner. On the same day, after the summons had been issued the vestry approved the committee's resolution and the proceedings which resulted. At the hearing, the magistrate held that as the committee's resolution had not been approved before the notice was served the notice was invalid.

The prosecutor appealed to the Divisional Court which held that the subsequent approval by the vestry validated the notice and summons. The learned judges differed however in their reasoning. Hawkins J²⁰ pointed out that the statutory power of delegation was limited to any "purposes which in the discretion of the vestry would be better regulated and managed by . . . such committee." His Lordship continued:²¹

[I]f at each step in the execution of their powers the committee are first to obtain the sanction of the vestry, the whole object of their appointment is lost, and the section under which they are appointed might just as well be omitted from the Act.

It seems then that Hawkins J based his decision on the fact that the statute on construction gave an express power of ratification.

The other judge in the Divisional Court was Wright J whose judgment appears to support a much wider view of ratification. His Lordship held that the case was to be decided according to the ordinary principles of ratification which required the satisfaction of three conditions: that the agent purported to act for the principal; that at the time the act was done there was a competent principal; and thirdly, that at the time of ratification the principal was legally capable of doing the act himself.²²

It is difficult to see how this wide statement of the ratification principle can stand with the principle stated in *St Leonard Vestry v Holmes*.²³ The cases can readily be reconciled however on the approach taken by Hawkins J and it is submitted that this is the correct approach.

A more borderline case which can however be explained in the same way is *R v Chapman, Ex p Arlidge*.²⁴ A sanitary authority had statutory power to serve abatement notices and make complaints in respect of nuisances. It also had statutory power to delegate its functions to a committee. A bylaw of the authority empowered the chairman of a

18 Eg by Whitmore and Aronson, *supra* n 3 at 196-197; Garner, *Administrative Law* (3rd ed 1970) 132, 289; Cross, *supra* n 4 at 64.

19 [1897] 2 QB 70.

20 *Ibid* at 74.

21 *Idem*.

22 *Ibid* at 75.

23 *Supra* n 9.

24 [1918] 2 QB 298.

committee to give instructions on urgent matters when the authority was on vacation provided that such acts were reported to the sanitary authority. On 21 September the authority's medical officer of health discovered a nuisance on A's premises. A refused to abate the nuisance and the officer reported the matter to the chairman of the authority's public health committee. The chairman directed the issue of an abatement notice on 25 September. The chairman's action was approved by the committee on 9 October and by the authority on 18 October. As the nuisance remained unabated a complaint was made on 23 October and on 5 December the magistrate made an abatement order. A applied for certiorari to quash the order on the ground that the abatement notice was invalid. A's submission found favour with one judge but failed to persuade two other judges of the Divisional Court. It is instructive to examine Atkin J's dissenting judgment first. Having approved²⁵ the application of Wright J's ratification principle in *Firth v Staines*,²⁶ Atkin J cautioned that if it were applied widely it would have far-reaching consequences: it would mean that the authority could ratify the actions not only of committees and officers but also those of a third person not connected with the authority provided he had purported to act on their behalf. His Lordship suggested the following limitation on the principle of ratification—if the act is done by a committee empowered by statute to exercise the discretion of the council it will be valid if afterwards adopted by the council.²⁷ The instant case was one where the act was done by a person to whom no discretion was given and so the purported ratification was invalid.

Avory and Darling JJ held that there was a valid ratification of the chairman's action. Avory J held that because of the bylaw the chairman was the authorised agent of the council. This distinguished the case from one where the council might try to ratify the act of a third person unconnected with the council. His Lordship pointed out that it had not been suggested that the bylaw was ultra vires.²⁸ Darling J agreed with Avory J and observed that if steps could not be taken, as they were taken in the instant case, the public would be exposed to great danger because it would be very difficult to enforce the Public Health (London) Act 1891 during the vacation.²⁹

Despite all the discussion of ratification, *Chapman* is not really a case of ratification but of prior authorisation. The combined effect of the statutory power of delegation and the valid bylaw was that the chairman had been authorised in advance to take the action in directing the issue of an abatement notice. Admittedly the action had to be reported to the council. At most this was a formal condition subsequent depending on the action of the chairman himself. His action in issuing the notice was valid though, if the duty to report was mandatory, failure to report might have invalidated the notice ex post facto. But once the action was reported the condition subsequent was performed and nothing further remained to be done to confer validity on the notice. No doubt the council's approval was necessary as a practical matter for the

25 Ibid at 305.

26 Supra n 19.

27 Supra n 24 at 306.

28 Ibid at 308.

29 Ibid at 309.

continuation of the proceedings but it is submitted that it was not in law necessary in order to give validity to the notice. If the council had disapproved the chairman's action it could perhaps have taken some steps to discipline him for error of judgment but that action even if coupled with a formal resolution of disapproval would not have invalidated the issue of the notice.

However, the judges treated the case as one of ratification³⁰ but if that is what it was, it was a case where the statute and bylaw together expressly conferred a power of ratification. It does not support a common law principle of ratification. Indeed all three judges agreed that if a third party had purported to issue the abatement notice the council would have been unable to ratify the action.

Firth v Staines and *Chapman* were considered in *Bowyer, Philpott & Payne Ltd v Mather*,³¹ which is discussed above.³² The appellants argued that the two earlier cases turned on the language of the statute there in question. This view was apparently accepted by Avory J³³ and by implication by Darling and Salter JJ. Though the significance of the argument was not spelt out, it is submitted that the crucial factor was the existence in each case of what was taken to be an express power of ratification. The best reconciliation of the cases so far discussed then is that they reject a common law power of ratification but recognise that such a power can be conferred by statute or valid delegated legislation.

III RATIFICATION, PROCEDURAL REQUIREMENTS AND EVIDENCE

A rather complex case which at first sight appears to recognise a common law power of ratification is *Warwick Rural District Council v Miller-Mead*.³⁴ A local authority had statutory locus standi to take proceedings in the High Court for abatement of a nuisance if the authority was of the opinion that summary proceedings would afford an inadequate remedy. On 21 July the authority's solicitors issued a writ against M. On 24 July the authority met and resolved to take proceedings in the High Court. At the hearing on 9 August, M raised a preliminary objection that the proceedings were a nullity on the ground that, at the date of the issue of the writ, the authority had not expressed its opinion and therefore had no capacity to sue and so could not ratify the solicitor's act in issuing the writ. Widgery J³⁵ held that the short interval between the issue of the writ and the authority's resolution justified an inference that the authority would have recorded on the date when the writ was issued the same opinion as that expressed in the resolution three days later. In these circumstances the authority could ratify the solicitor's act. His Lordship left open the question whether there would have been power to ratify if the interval had been great enough to justify a belief that the opinion of the authority might have been different at the date of the writ from that held at the date of the resolution.³⁶

30 Ibid at 306 per Atkin J; at 308 per Avory J; at 309 per Darling J.

31 Supra n 13.

32 Ibid.

33 Ibid at 424. See also the discussion of these cases in the dissenting judgment of Willmer LJ in *Warwick Rural District Council v Miller-Mead* [1962] Ch 441, 461-462.

34 Ibid.

35 [1961] Ch 590.

36 Ibid at 597.

M's appeal to the Court of Appeal was dismissed by a majority.³⁷ Again it is useful to start with the dissenting judgment. Willmer LJ took the view that the only way that the authority could express its opinion was by resolution. As it had not done so at the date of the issue of the writ it was not competent to bring proceedings at that time. As it was not at that time a competent principal it could not ratify its agent's action by subsequent resolution.

The majority however held that the proceedings were validly taken. Lord Evershed MR held that it was sufficient that the opinion was formed before the motion, the first effective step in the action, came to be heard. Alternatively if it were necessary to show some evidence of the council's opinion before the issue of the writ, that had been done: the Court could hold that the opinion formally expressed on 24 July had been held three days before.³⁸ On neither view does any question of ratification arise. Indeed Lord Evershed referred³⁹ with apparent approval to two cases which reject the principle of ratification, *St Leonard Vestry v Holmes and Bowyer*, *Philpott & Payne Ltd v Mather*.

The third judge, Danckwerts LJ, did mention ratification. In dealing with the resolution of the council he said:⁴⁰

It is plain that the council were ratifying as clearly as they could the commencement of the action on 21 July by their officer and were giving a formal expression of their opinion which the minutes suggest may well have been held . . . at an earlier date.

However his Lordship went on to decide the case on the same grounds as Lord Evershed.⁴¹ It is submitted that Danckwerts LJ did not attempt to overrule the cases against ratification. He made no reference to those cases and in the light of his agreement with the reasoning of Lord Evershed it was not necessary for him to consider the question of ratification. It seems likely that his Lordship used the term ratification to mean factual endorsement rather than as a method of providing *ex post facto* authority for an unauthorised act.

This interpretation of the case is supported by the later decision of the Court of Appeal in *Poppett's (Caterers) Ltd v Maidenhead Borough Council*.⁴² Under the Landlord and Tenant Act 1954 the local authority, as landlord, had statutory power to object to an application for renewal of P's lease which was due to expire on 31 December 1969 if it intended to demolish the property. On 13 June 1969 the authority's town clerk served a notice on P objecting to an application for renewal on the ground that the authority intended to demolish the buildings. At no time did the authority itself by formal resolution express that intention but there were a number of committee minutes, confirmed by the authority, which supported the view that the authority had in fact formed that intention. P subsequently applied to the County Court for renewal of the lease and pleaded that the objection to the application was invalid on the ground that the only way in which the authority could form the intention was by resolution. The County Court dismissed P's applica-

37 *Supra* n 33.

38 *Ibid* at 455-456.

39 *Ibid* at 450-451.

40 *Ibid* at 464.

41 *Ibid* at 465.

42 [1970] 3 All ER 289.

tion. P's appeal to the Court of Appeal was also dismissed. Relying on *Warwick Rural District Council v Miller-Mead*, the Court held that the authority's intention could be proved otherwise than by formal resolution of the authority and that there was in the instant case sufficient evidence of that intention. There was no mention of ratification for the simple reason that it was not necessary to rely on any principle of ratification. The similarity between the two cases adds weight to the submission that the same was true of *Warwick Rural District Council v Miller-Mead*.

IV RATIFICATION AND ACTS OF STATE

One area of public law where a power to ratify has been clearly recognised is that of Act of State. The leading case is *Buron v Denman*.⁴³ D liberated certain slaves, the lawful property of B, an alien slave trader. D's action was ratified by ministers of the Crown. B sued D for trespass in respect of the slaves and D pleaded Act of State. The charge to the jury was given by Parke B who indicated that his brother judges Alderson, Rolfe and Platt BB had no doubt that the ratification was as effective as a prior command and supported the plea of Act of State. Parke B himself concurred in this view but expressed doubts about it. He conceded that the law recognised the principle of ratification in relation to actions between individuals but thought that where the Crown was involved different considerations should apply. If an individual ratified a trespass the nature of the act remained unchanged, the party injured could sue both agent and principal; if on the other hand the Crown ratified a trespass, the plaintiff was deprived of his right to sue the agent and was left with an inferior moral right to proceed against the Crown.⁴⁴ There are difficulties with the learned Baron's reasoning but the statement of principle is sound. These matters will be considered later.

Despite Parke B's reservations, the principle in *Buron v Denman* has been approved and applied in later cases, in particular by the Privy Council in *Secretary of State in Council of India v Kamachee Boye Sahaba*,⁴⁵ where a seizure by the East India Company of a rajah's property was ratified by the Crown with the result that the rajah's widow was unable to recover the property. The ratification was held to be a good basis for a plea of Act of State.

There is obviously a strongly entrenched power of ratification recognised in this area which at first sight conflicts with the denial of a power of ratification in cases such as *St Leonard Vestry v Holmes and Bowyer, Philpott & Payne Ltd v Mather*.

But the two lines of authority do not appear to have been weighed against each other and there are clear distinctions. First, the former line of cases is concerned with statutory functions while the latter relates to the prerogative powers of the Crown. It is well established that the

43 (1848) 2 Ex 167; 154 ER 450.

44 Ibid at 188; 459.

45 (1859) 13 Moo PC 22; 15 ER 9. See also *Salaman v Secretary of State in Council of India* [1906] 1 KB 613; *Phillips v Eyre* (1870) LR 6 QB 1, 23-24; *Johnstone v Pedlar* [1921] 2 AC 262, 279-280, 290-292.

courts will not interfere with the exercise of prerogative power.⁴⁶ Secondly, a plea of Act of State is not a contention that the Crown's agent acted legally but that the municipal court has no jurisdiction to enquire into the matter. This was at least partially recognised in *Buron v Denman* itself and is made quite explicit in *Secretary of State in Council of India v Kamachee Boye Sahaba*:⁴⁷

[I]f a wrong has been done, it is a wrong for which no Municipal Court of justice can afford a remedy.

That being so it is understandable that the material time for determining the existence of an Act of State is when the proceedings are brought rather than when the initial act is performed. In cases such as *St Leonard Vestry v Holmes* where the courts have undoubted jurisdiction they can determine for themselves what recognition they will give to a purported ratification.

V RATIFICATION AND PRIVATE LAW RIGHTS

This article is primarily concerned with the ratification of unauthorised governmental acts and so no detailed treatment of ratification in private law will be attempted. Some discussion is justified however because Parke B introduced private law analogies in his judgment in *Buron v Denman*⁴⁸ and it may be that courts faced with ratification in a public law context may look at private law cases for guidance. The main object of this section is to emphasise that even in private law where a vigorous principle of ratification is at work certain restrictions are recognised. A second point is that public authorities have not only governmental powers but private law powers derived from property and the right to make contracts. In this respect it is not unreasonable for public authorities to be treated in the same way as private individuals or bodies.

The starting point for the purpose of this discussion is *Buron v Denman*.⁴⁹ It will be recalled that Parke B⁵⁰ doubted that the private law rules relating to ratification could properly be extended to the public law area of Act of State. The difference as he saw it was that in private law, ratification left the agent's liability untouched but added the principal as another defendant, whereas ratification by the Crown would confer protection on the agent for what would otherwise be a tortious act. This would be an intelligible distinction to draw but unfortunately it was based on a false premise. Parke B himself cited two instances of ratification in a private law context, one which supported the distinction which he drew and one which refuted it. The example which supported his reasoning was as follows:⁵¹

In the case of a tenant from year to year, who has, by law, a right to a half-year's notice to quit, if such notice be given by an agent, without the authority of the landlord, the tenant is not bound by it.

46 For a recent reaffirmation by the House of Lords see *Gouriet v Union of Post Office Workers* [1978] AC 435.

47 *Supra* n 45 at 86; 33 per Lord Kingsdown. It is true that in *Johnstone v Pedlar* *supra* n 45 at 291 Lord Sumner spoke in terms of legalising a wrong but at 290, he clearly recognised the jurisdictional nature of the plea of Act of State.

48 *Supra* n 43.

49 *Ibid*.

50 *Ibid* at 188-189; 459.

51 *Ibid* at 188; 459. See also 23 *Halsbury's Laws of England* (3rd ed) para 1176.

And the implication is that the landlord would not be able to ratify.

However the other private law example given by the learned Baron undermined the distinction he hoped to draw:⁵²

If, for instance a bailiff distrains goods, he may justify the act either by a previous or subsequent authority from the landlord. . . .

Parke B does not appear to have recognised how close this example was to ratification in the Act of State context. On the hypothesis that neither the bailiff nor the crown servant has prior authority, an act of each interfering with another's rights is at the time of its commission an actionable tort. A cause of action has come into being. In both cases that cause of action against the agent will be extinguished if the principal, the landlord and the Crown respectively, ratifies the agent's act. If anything, the landlord's act of ratification is more devastating than the Crown's since the right against the bailiff is extinguished as a matter of substance, whereas the alien injured by the Crown's ratification has some recourse in international law. This difference however cannot support the distinction suggested by Parke B between private law ratification and ratification by the Crown.

Parke B's bailiff example is well supported by authority. The leading case is *Whitehead v Taylor*.⁵³ A landlord gave a bailiff authority to distrain the plaintiff's goods. The landlord died. The bailiff later distrained and his act was adopted by the landlord's executrix. Lord Denman CJ held that the executrix could ratify the bailiff's act even though his authority was at an end for she might have ratified the act of an entire stranger and the effect of the ratification was to legalise a past act even when given after the bringing of the action. This case clearly recognises that a wide principle of ratification operates in the law of tort and that the power of ratification is not limited to the acts of bailiffs. This is borne out by *Hull v Pickersgill*.⁵⁴ A person became bankrupt and his property was vested in assignees. His creditors seized the property on behalf of the assignees but without their authority. It was held that the subsequent ratification by the assignees made the seizure lawful. In *Phillips v Eyre*⁵⁵ Willes J described the power to legalise by ratification what would otherwise be a tortious action on the part of unauthorised agents in wide terms. A similar view is taken by textbook authorities. *Halsbury*⁵⁶ for example states that an act which is wrongful only because of lack of authority may be justified by ratification.

Nor is the principle limited to ratification by private individuals. In *Potter v North*⁵⁷ it was held that because of the principle of ratification, a bailiff to the King need not allege a patent and the bailiff to a corporation need not allege a deed. This recognises that the Crown or a local authority may, as landlords or other property owners, ratify the actions of self-appointed agents in the same way as private persons.

It seems therefore that of the two analogous cases cited by Parke B

⁵² *Ibid.*

⁵³ (1839) 10 Ad & E 210; 113 ER 81.

⁵⁴ (1819) 1 Brod & B 282; 129 ER 131.

⁵⁵ (1870) LR 6 QB 1, 23.

⁵⁶ 1 *Halsbury's Laws of England* (4th ed) para 768. See also *Clerk and Lindsell on Torts* (14th ed 1975) 162; *Salmond on the Law of Torts* (17th ed Heuston 1977) 451.

⁵⁷ (1669) 1 Wms Saund 247c n 4.

the wider and weightier was more strongly against him than he appears to have recognised. Nonetheless it is worth looking a little further at the other example given by him, the case of the notice to quit. The rule against ratification in this context was authoritatively stated in *Right v Cuthell*.⁵⁸ In holding that a landlord cannot ratify an unauthorised notice to quit, Lord Ellenborough CJ pointed out that the notice must be one on which the tenant can safely act at the time it is given.⁵⁹ Lawrence J agreed and stated a limitation on the principle of ratification in these terms:⁶⁰

The rule . . . seems only applicable to cases where the conduct of the parties on whom it is to operate, not being referable to any agreement, cannot in the meantime depend on whether there be a subsequent ratification.

Not long afterwards however, Abbott CJ applied the ratification principle in a similar case. In *Goodtitle v Woodward*⁶¹ the property was owned by several trustees. Some of the trustees authorised A to give a notice to quit. A gave the notice which was subsequently approved by the remaining trustees. Abbott CJ recognised that a notice to quit required the assent of all the trustees but held that the subsequent ratification validated the notice.

His Lordship asserted that the notice was one which could have been safely acted on by the tenant at the time it was given. It is hard to see how that was so if the notice required the assent of all the trustees. Had the remaining trustees failed to ratify, the notice would presumably have been of no effect and the tenant would have remained liable on his obligations under the lease.

In any event *Goodtitle v Woodward* was disapproved by a majority of the judges in *Doe d Mann v Walters*⁶² which reasserted and applied the principle against ratification stated in *Right v Cuthell*. This limitation on the right to ratify is now firmly established.⁶³

The landlord and tenant cases show that even in transactions between private individuals the principle that ratification is equivalent to prior authorisation will not be applied automatically. Other factors have to be considered such as the injustice the principle may cause to the third party. It is this factor rather than the reason actually given by Parke B in *Buron v Denman* which justified the learned Baron's hesitation in extending the principle of ratification into the Act of State sphere.

In *Buron v Denman* Parke B looked to the effect of ratification in respect of tortious liability to provide an analogy with an Act of State. He did not mention ratification in the context of contractual liability. Clearly the position in contract is a less apt analogy because the party affected by the ratification has entered the initial transaction voluntarily and so to some extent has brought the effect of ratification upon him-

58 (1804) 5 East 491; 102 ER 1158.

59 Ibid at 498; 1161.

60 Ibid at 499; 1162.

61 (1820) 3 B & Ald 689; 106 ER 813.

62 (1830) 10 B & C 262; 109 ER 583.

63 See *Doe d Lyster v Goldwin* (1841) 2 QB 143; *Jones v Phipps* (1868) LR 3 QB 567.

self.⁶⁴ Not surprisingly then a wide principle of ratification applies to contractual situations. An extreme example is *Bolton Partners v Lambert*.⁶⁵ D offered to buy P's sugar works from P's agent A, who had no authority to sell. A accepted the offer on behalf of P. D withdrew the offer but P later ratified A's acceptance. The Court of Appeal held that the ratification related back to the time of the acceptance by A and so P could sue for specific performance. Even in this case however, Cotton LJ recognised that the rule as to ratification was subject to some exceptions: an estate once vested cannot be divested nor can an act, lawful at the time of ratification, be rendered unlawful by the application of the doctrine of ratification.⁶⁶

Furthermore the actual decision in *Bolton Partners v Lambert* has been disapproved and a wider limitation on the operation of the doctrine of ratification was suggested by Isaacs J in *Davison v Vickery's Motors Ltd (in liquidation)*.⁶⁷ Having pointed out that the rule equating ratification with prior authority was a fiction Isaacs J said:⁶⁸

Fictions, however, are not arbitrary. They are not allowed to work an injury; their operation is to prevent a mischief or to remedy an inconvenience that might result from the general rule of law. . . . Where, therefore, an injury would be caused by the operation of the fiction, it cannot be invoked to alter the general course of the law.

It is not proposed to examine here the operation of the doctrine of ratification as it applies to the law of contract in any detail. The main points are first, that even in the area of contractual liability the doctrine of ratification is not applied automatically but is subject to countervailing considerations, and secondly, that public authority contracts should be governed by the same ratification rules as those between private individuals or bodies.

VI CONCLUSION

If it is the case that even as between private individuals and bodies the doctrine of ratification is subject to limitations designed to prevent injustice, it is reasonable to suppose that public law may have its own principles which will limit the scope of ratification. One such principle which comes into headlong conflict with that of ratification is *delegatus non potest delegare*. Another is the principle that governmental action should not detrimentally affect the interests of the subject retrospectively. Examples of this broad principle are the rule against retrospective delegated legislation⁶⁹ and the rule that delegated legislation does not

64 A similar observation applies to ratification in company law but here too limitations on the power of ratification are recognised: see Baxt, "Judges in Their Own Cause: The Ratification of Directors' Breaches of Duty" (1978) 5 Mon LR 16.

65 (1889) 41 Ch D 295.

66 *Ibid* at 307.

67 (1925) 37 CLR 1. Isaacs J's judgment was a dissenting judgment but it was not necessary for the majority to consider ratification on the view taken by them of the facts. His Honour's approach was approved by Davidson J in *Att-Gen v Wylde* (1946) 47 SR (NSW) 99.

68 *Ibid* at 19.

69 See *Master Ladies Tailors Organisation v Minister of Labour and National Service* [1950] 2 All ER 525.

come into force until published.⁷⁰ It is submitted that the cases against ratification in the first section of this article embody and apply one or other of these principles.

That is not to say that governmental bodies can never rely on ratification. Where ratification works in the interests of the subject or in a neutral fashion, there seems little reason for not applying the ratification principle. Moreover public authorities enjoy two kinds of powers, those possessed in common with private individuals and institutions, such as powers derived from property, power to enter contracts, and those which are special to the public authorities, such as the power to make laws, to give orders, or to take away rights. The former might be designated the private law powers of public authorities, the latter governmental powers.

With regard to the former, public authorities share with private bodies and persons the right of ratification. Suppose for instance A sees P trespassing on D's land and on D's behalf ejects P. D can ratify A's action if D is a private individual and there is no reason why D should not be able to do so if D is the Crown, a local authority, a public corporation or any other governmental agency. But where the power concerned is a governmental one the principle of ratification should give way to the principle against retrospective detrimental governmental action and so should rarely be available.

70 *Watson v Lee* (1980) 54 ALJR 1 (HC Aust). See generally, Lanham, "Delegated Legislation and Publication" (1974) 37 MLR 510.