This is not to forget, however, that this discretionary power can only be exercised on some judicial basis, which is simply whether the accused has given his express and intelligent consent. Beyond non-compliance with these two conditions it is difficult to conceive of any possible judicial reason for refusing an election under this procedural relic of our frontier days in Alberta. The result may well be, therefore, that the power to waive a jury trial is discretionary only in theory, because the practical consequences of the fact that there are very limited judicial reasons for exercising this discretion will necessarily mean that it is mandatory.

It is foreseeable that if this approach to the interpretation of s. 417 is followed by the Courts then the trend will clearly be towards even fewer jury trials. There have, in fact, been some capital murder cases tried without a jury subsequent to the *Lyding* case.[33] The criminal jury trial could well become as rare in Alberta as the civil jury trial is. This leaves us with a simple question: do we want this to happen? Has the value of the jury as a fact finding body in criminal cases been sufficiently established to justify the legislature in taking steps to prevent its extinction in Alberta? The answer to this question will also answer the question of whether we should retain s. 417 as part of our criminal procedure.

—J. G. MATKIN*

33 In at least three capital murder cases (unreported) subsequent to the *Lyding* case, where an election has been made under s. 417, the Court has allowed the same: *R.* v. *Whitford* (1965); *R.* v. *Kniess* (1967); *R.* v. *Ranch* (1967).

* B.A., LL.B. (Alta) of the 1968 graduating class.

COMPANIES—ULTRA VIRES DOCTRINE—HISTORY AND CURRENT STATUS—LEGISLATIVE CHANGE—*H. & H. LOGGING CO. LTD. AND ATTORNEY GENERAL OF BRITISH COLUMBIA* v. *RANDOM SERVICES CORPORATION.*

The recent decision of The Appellate Division of the Supreme Court of British Columbia in *H. & H. Logging Co. Ltd. and Attorney General of British Columbia* v. *Random Services Corporation*[1] may well be a portent of death for the doctrine of *ultra vires* in company law. In an oral judgment, Bull, J.A., (McFarlane and Branco, JJ.A., concurring) reversed the trial decision[2] and gave full literal effect to a subjectively worded object clause in the appellant company's memorandum of association. The clause provided that, in addition to the objects specified, the company was empowered ". . . generally to carry on *any other* business *which the company may consider* can be conveniently carried on in connection with the business of the company" [italics added]. Consequently, this case indicates that with proper drafting companies may endow themselves with the capacity to engage in whatever business activity may strike their fancy. The decision as to whether a particular activity is effectively connected with company business rests with the opinion of the company itself; hence, all restrictions of the *ultra vires* doctrine are extinguished.

1 [Sept. 23,] (1967), 60 W.W.R. 619; hereafter cited as *Random Services.*

2 (1966) 56 W.W.R. 51.

Should this prediction of fatality for the doctrine of *ultra vires* be abrogated by legislation? Or is *ultra vires* in company law not worth rescuing? In order to answer these two questions it is submitted that some examination must be made of its historical roots in company law, its effectiveness in modern application, and, also, its treatment in other jurisdictions.

(A) HISTORICAL RESUME OF ULTRA VIRES—

Certainly, the background of the doctrine of *ultra vires* has been discussed in much greater detail than is necessary here.[3] Strictly interpreted, *ultra vires* means 'beyond the privileges' or 'powers'; acts of a company which are beyond its privileges are a nullity. Traditionally, the doctrine of *ultra vires* applies to statutory and registration companies but not to charter companies which are created by the prerogative power of the Crown. The three single most important cases in the development of the doctrine of ultra vires are *Suttons Hospital,*[4] *Ashbury Carriage Co.* v. *Riche*[5] and *Bonanza Creek Gold Mining Co. Ltd.* v. *The King.*[6] In the latter case Viscount Haldane, after affirming the position of the former two, went on to state the traditional position:

> In the case of a company created by charter the doctrine of *ultra vires* has no real application in the absence of statutory restriction added to what is written in the charter. Such a company has the capacity of a natural person to acquire powers and rights. If by the terms of the charter it is prohibited from doing so a violation of this prohibition is an act not beyond its capacity, and is therefore not *ultra vires,* although such a violation may well give ground for proceedings by way of *scire facias* for the forfeiture of charter. . . . In the case of a company the legal existence of which is wholly derived from the words of a statute, the company does not possess the general capacity of a natural person and the doctrine of *ultra vires* applies. Where . . . a provincial company has been incorporated by means of a memorandum of association . . . the principle laid down by the House of Lords in *Ashbury Carriage and Iron Co.* v. *Riche,* of course, applies.[7] [i.e. per Lord Cairns, L.C., "no object shall be pursued by the company, or attempted to be attained by the company in practice, except an object which is mentioned in the memorandum of association."][8]

The security of the roots of the traditional doctrine of *ultra vires* have been widely challenged, mainly on two bases. The first position is that the *ultra vires* doctrine was peculiar to the English Companies Act of 1862 and, therefore, when the Act was removed from the law *ultra vires* should have been dropped.[9] Section 12 of the Act expressly prohibited any alteration in the object clause of the memorandum of association. Today this prohibition does not exist as company objects may be altered, so long as the statutory procedure is complied with.[10] Thus, the argument follows that today the doctrine of *ultra vires* survives only as an anachronism; the position of the law should truly be the same as it was previous to 1862 wherein acts outside the company's objects were only *extra vires* the directors, not *ultra vires* the company.

The second major challenge to the traditional doctrine of *ultra vires*

3 See H. A. Street, *Ultra Vires* (London, 1930); Horrwitz, Company Law Reform and the Ultra Vires Doctrine (1946), 62 L.Q.R. 66; Mockler, *Studies in Canadian Company Law* (Ziegel, ed.) 231 (Toronto, 1967).
4 (1613), 10 Co. Rep. 1a; 77 E.R. 960.
5 (1875), L.R. 7 H.L. 653.
6 [1916] 1 A.C. 556.
7 *Id.,* at 583-84.
8 *Supra,* n. 5, at 672.
9 See Horrwitz, *loc. cit. supra,* n. 3. See also Holt, *Alteration of a Company's Objects and the Ultra Vires Doctrine* (1950) 66 L.Q.R. 493.
10 e.g. *Companies Act,* R.S.A. 1955, c. 53, s. 44. Alteration of memorandum requires a special resolution (usually seventy-five per cent of the votes cast) and a confirming order by the court.

is that there exists no logical basis for drawing a distinction between charter and non-charter companies. Professor Mockler in his effective discussion in support of the dissenting judgment of Meredith, C.J., in *Edwards* v. *Blackmore*,[11] concludes:

> Is there anything about a company created by royal charter which is so inherently different from a company created by special act or under a memorandum of association which calls for a different rule concerning powers and capabilities? The answer is no.[12]

Without drawing a conclusion at this point, it may nevertheless be observed after this initial examination that the roots of the doctrine of *ultra vires* are precariously fixed.

(B) *APPLICATION OF ULTRA VIRES*

However insecure the historical inception of the doctrine of *ultra vires* may have been, that it does exist today is irrefutable. The reasons promulgated in support of its existence are that it protects investors in that they have some control over where their investment dollars will be spent; likewise, it affords protection to a creditor by ensuring that his security will not be dissipated on unauthorized activities.[13] An evaluation of the effectiveness of *ultra vires* in application will depend directly on how well it meets these purposes. It may be instructive to look first at charter companies to see how they get along, for the most part, without the assistance of *ultra vires*.

(i) Charter Companies

In the case of charter companies the interests of the creditor and shareholder are not protected by an act outside the company's sphere of authorized business being struck down as a nullity. The company will be bound by the transaction save in the limited instance where the transaction contravenes an express prohibition in the Act[14] or the instrument[15] creating the charter company.[16] The ordinary means of control lie in the personal liability of a director for 'wilful neglect or default'.[17] He may also be liable to reimburse the company for money or property acquired in his fiduciary capacity.[18] However, short of these personal remedies, the effective control over a charter corporation acting beyond its objects rests in pursuing a proceeding by way of *scire facias* which requires the delinquent company to show cause why the charter should not be annulled by the Attorney General. This proceeding may be commenced by a private interested party or by the Attorney General himself.[19]

Thus, in the charter company situation, even though extra-capacity transactions of the company are enforceable, the shareholders and creditors do have some redress, though it may not be as lethal as

11 (1918), 42 D.L.R. 280, 296. Meredith's, C.J., opinion was that the doctrine by Lord Coke in *Suttons Hospital* (*supra*, n. 4) does not in fact support the traditional *ultra vires* interpretation and that in each of the subsequent "authorities" it was not necessary to consider the issue of *ultra vires*. See also, Street, *op. cit. supra*, n. 3, at 18-22.

12 *Op. cit. supra*, n. 3, at 238.

13 See *Cotman* v. *Broughman*, [1918] A.C. 514, 522.

14 See *Grant* v. *Dominion Loose Leaf Co.* (1924), 56 O.L.R. 43; *Banking Service Corp.* v. *Toronto Finance Corp.*, [1928] A.C. 333.

15 *In re Mutual Investments Ltd.*, [1924] 4 D.L.R. 1070.

16 See standard provision e.g. *The Corporations Act*, R.S.O. 1960, c. 71, s. 287.

17 *Thomas* v. *Gale*, [1927] S.C.R. 314.

18 *Saskatchewan Land and Homestead Co.* v. *Moore*, [1915] O.W.N. 525.

19 See *A. G. of Canada* v. *Hellenic Colonzation Association*, [1964] 3 W.W.R. 482; *A.G.* v. *Winnipeg Electric Railway Co.* (1912), 5 D.L.R. 823, see also Roland, *Cancelling Charters of Canadian Companies* (1963) 21 U. of T. Faculty of Law R. 75.

traditional *ultra vires*. And, this is the situation in the greater part of Canada—the Dominion Companies and five provinces: Ontario, Quebec, Prince Edward Island, New Brunswick, Manitoba.[20]

(ii) Statutory Companies——

As stated above, these companies which are created by special act are amenable to the doctrine of *ultra vires* the same as registration companies.[21] Some of the provinces have attempted to reduce the application of *ultra vires* to these companies by enacting that they are to have the same capacity as a natural person, unless expressly provided otherwise.[22] However, in view of the restrictive interpretation given by the courts to these provisions as regards statutory companies,[23] it is doubtful whether they are substantially better endowed than those companies created in provinces without such a statute. Therefore, what is said below as to the application of *ultra vires* to registration companies will be equally applicable to statutory companies.

(iii) Registration Companies—

The five remaining provinces are the registration, or memorandum of association, jurisdictions—Alberta, British Columba, Saskatchewan, Newfoundland, Nova Scotia.[24] Here the traditional doctrine of *ultra vires* applies; its basic features may be summarized as follows:

(1) All registration companies have capacity to do only those acts which are within the specified objects or which are reasonably ancillary and incidental to them.[25]

(2) An *ultra vires* act is void and thus ratification is not possible; nor will estoppel or laches be applicable.[26]

(3) That the parties were actually unware of the company's lack of capacity is immaterial because the doctrine of constructive notice imputes knowledge of all the company's public documents filed with the Registrar.[27]

(4) Because it is a nullity, either party may raise the unenforceability of an *ultra vires* act.[28]

(5) Goods and money paid pursuant to an *ultra vires* are recoverable only if they can be identified according to the rules of tracing.[29]

(6) As regards actions against the director personally, the same requirements must be met as in a charter corporation, stated above.[30]

20 R.S.C. 1952, c. 53; R.S.O. 1960, c. 71; R.S.Q. 1964, c. 271; R.S.P.E.I. 1951, c. 26; R.S.N.B. 1952, c. 33; R.S.M. 1964, c. 43.

21 See *Royal Bank.* v. *Fleming*, [1953] O.R. 601.

22 See e.g. R.S.M. 1964, c. 43, s. 143.

23 See *Canadian Bank of Commerce* v. *The Cudworth Rural Telephone*, [1923] S.C.R. 618; *In re Northwestern Trust Company and The Winding Up Act* v. *Pure Oil Company's Claim*, [1926] 1 W.W.R. 426.

24 See R.S.A. 1955, c. 53; R.S.B.C. 1960, c. 67; R.S.S. 1965, c. 131; R.S.Nfld. 1952, c. 168; R.S.N.S. 1954, c. 41.

25 *A.G.* v. *Mersey Railway*, [1907] 1 Ch. 81, 99.

26 *Clarkson* v. *Davies*, [1923] A.C. 100; see also Gower *Alteration of a Company's Objects and the Ultra Vires Doctrine* (1951), 67 L.Q.R. 41. But see, Holt *loc. cit. supra*, n. 9.

27 *Ernest* v. *Nicholls* (1857), 6 H.L. Car. 401; 10 E.R. 1351; *Re Banker's Trusts* (1915), 8 W.W.R. 38.

28 Though this proposition has not been expressly set out, it is submitted that by implication this is the position adopted by the courts by not striking down third parties on this basis. See *H. & H. Logging*, *supra*, n. 1 & 2, *Anglo Overseas Agencies* v. *Green*, [1961] 1 W.B. 1; 3 All E.R. 245; *Bell Houses Ltd.* v. *City Wall Properties*, [1966] 2 All E.R. 674. Hence, it would appear that Professor Gower's analogy of lack of capacity in a corporation to an infant has not been taken up by the courts. See Gower, *Modern Company Law* 90-91 (2nd ed. 1957). See also Furmston *Who Can Plead that a Contract is Ultra Vires* (1961), 24 M.L.R. 715.

29 This is the general proposition in *Sinclair* v. *Boughman*, [1914] A.C. 398. There has been some exception: see e.g. *Niagra Public School Board* v.*Queenston Branch Women's Institute*, [1926] 4 D.L.R. 13.

30 *Supra*, n. 17 & 18, and accompanying text.

It is apparent from this basic summary that the application of the doctrine of *ultra vires* for the protection of shareholders and creditors is done at the expense of third parties. It is unrealistic to expect that third parties should be aware of the intricacies of a company's public documents. Yet, unwittingly a third party may find himself suffering the hardship of a void transaction, and for the most part, without redress.[31]

In addition, companies themselves complain that the doctrine of *ultra vires* impedes their business flexibility. To give themselves more self-contained latitude they have adopted the practice of drafting long, detailed and cosmically worded object clauses, the polar extreme of which is illustrated in the subjective phrasing in the *Random Services*[32] and *Bell Houses Ltd.*[33] cases.

The courts' initial reaction to the 'catch-all' type of memorandum drafting was to construe it narrowly and to hold that it contained only one main object and that all others set out were merely ancillary to it.[34] However, companies have been largely successful in countering this main object or *ejusdem generis* approach of the courts, by including an interpretation clause which expressly excludes such a construction. Typical of this type of a clause is that in a recent English case, *Anglo Overseas Agencies* v. *Green*:

> The objects specified in any paragraph of this clause shall, except where otherwise specified in such a paragraph, be in no wise limited or restricted by reference to or inference from the terms of any other paragraph or the name of the company.[35]

In an effort to reduce the inundating length and detail of companies' object clauses legislatures have now set a specific list of powers which are conferred upon every corporation unless expressly excluded by the memorandum.[36] Also, a broadly worded residuary clause is included, but it stops short of conferring subjective power to determine what other business activities are capable of being conveniently carried on in connection with the business of the company.[37] The *Random Services* case was the first time that a Canadian court was called upon to decide the effectiveness of a company itself including the subjective power in its residuary objects clause.

The facts of the *Random Services* case need only be set out briefly. The action was brought by the Attorney General of British Columbia at the instance of *H. & H. Logging Company Ltd.*[38] by which a declaration was sought that a timber sale contract between the Crown and Random Services Corporation was void for being *ultra vires*. Random Services Corporation had outbid H. & H. Logging Company at a public auction and so obtained a contract to cut and remove timber from certain designated lands. Random Services was incorporated as a private company under the British Columbia Companies Act; its memorandum specified a number of businesses that the company could engage in, ranging from "truckmen" to "accountants" to "importers and exporters,"

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31 See e.g. *Re Jon Beauforte (London) Ltd.* [1953] C. 131. *Canada Car and Manufacturing Co.* v. *Harris* (1874) 24 U.C.C. 380.
32 *Supra*, n. 1.
33 *Supra*, n. 28.
34 See *Crown Bank* (1890), 44 Ch. D. 634; *London Financial Association* v. *Kilk* (1884), 26 Ch. D. 107; *Stephens* v. *Mysore Reefs (Kangundy) Mining Co.*, [1902] 1 Ch. 745.
35 *Supra*, n. 28, at 8.
36 See e.g. R.S.A. 1955, c. 53, s. 19; R.S.B.C. 1960, c. 67, s. 22.
37 E.g. R.S.A. 1955, c. 53, s. 19(p.).
38 Pursuant to the *Forest Act*, R.S.B.C. 1960, c. 153, s. 142(2).

but logging was not one of them. Thus, it was the residuary clause that came to the fore to be interpretated. As mentioned above, it empowered the company,

> (f) to invest moneys of the company, not immediately required in bonds, stocks or shares and generally to carry on any other business which the company may consider can be conveniently carried on in connection with the business.

At trial in the Supreme Court of British Columbia, Verchere, J., held the timber sale contract was *ultra vires* Random Services Corporation. He decided that even though the memorandum of articles purported to confer the subjective power it was nevertheless, still limited on construction by the ancillary and incidental rule[39] so that any business carried on must be objectively "connected" to the specific businesses expressly set out:

> . . . the general concluding words in clause (f) of the memorandum . . . are limited in application to the objects specified, i.e. doing something *bona fide* connected with the objects to be allowed and in the *ordinary course of business adapted to their attainment.*[40]

Thus, while Verchere, J., acknowledged the subjective element in the power, he superimposed an objective test.

In the Court of Appeal, Bull, J. A., found that the contract of sale was *intra vires* and he did so by giving full literal effect to the subjective wording of the residuary clause. The ancillary rule and the authorities on which it is based, he said, "have no reference to a business which can, on proper construction, fall within the language of a specific 'object' clause in the memorandum of association."[41] Bull, J.A., referred to the recent case in the English Court of Appeal, *Bell Houses Ltd.* v. *City Wall Properties Ltd.*,[42] where the scope of a subjectively worded object clause was also in issue. The clause there provided that the company could

> . . . carry on any other trade or business *whatever* which *can in the opinion of the board of directors be* advantageously carried on by the company in connection with or ancillary to any of the above business. [italics added]

In an unanimous decision by their Lordships, Salmon, L.J., said of the particular clause:

> an object of the plaintiff company is to carry on any business which the directors genuinely believe can be carried on advantageously in connection or as ancillary to the general business of the company. It may be that the directors take the wrong view and in fact the business cannot be carried on as the directors believe; but it matters not how mistaken the directors may be. Providing they form their view honestly, the business is within the plaintiff company's objects and powers.[43]

In concluding, Bull, J.A., adopted these above statements by Salmon, L.J., in saying that, in his opinion, they "express the laws of this province."[44] [British Columbia]

Indeed, it is submitted that in the face of this expressly subjective residuary clause the court was compelled to give it effect.[45] To superimpose the objective ancillary rule is a misapplication of a doctrine based

39 *Supra*, n. 25.
40 *Supra*, n. 2, at 55 (italics added).
41 *Supra*, n. 1, at 622.
42 *Supra*, n. 28; see also Wedderburn, *What is the Point of Ultra Vires* (1966) 29 M.L.R. 191, 673.
43 *Id.*, at 687.
44 *Supra*, n. 1, at 624.
45 Any argument to the effect that this subjective clause was invalid *per se* for not complying with the "objects" requirement within the Act would have been struck down on the basis that the B.C. Act contains the standard provision which states that registration is conclusive proof that all requirements of the Act have been complied with, i.e. s. 35.

on a line of cases in which the memoranda were set out exclusively in objective terms.[46] Therefore, in British Columbia, at least, no company with a well drafted residuary clause in its memorandum need be bothered by the doctrine of *ultra vires*.

In terms of the expressed purposes of *ultra vires*, the practical effect of a company having a subjectively worded object clause will be that all third parties dealing with that company need no longer fear the possible hardship of *ultra vires;* for as long as the directors have acted *bona fide* the company is precluded from raising *ultra vires* as a defence.[47] On the other hand, the shareholders' and creditors' protection in such a company would be all but extinguished for the allocation of company funds may be limited only by the caprice and imagination of the directors.

Thus, with the proliferation of the subjective type of residuary clauses the current reversal of protection from the insiders to the outsiders of companies will be complete—*ultra vires* will be dead. The result of this development confers an increasing certainty on commercial transactions. On the other hand, as regards the shareholders, the attitude has been expressed that while their protection is extinguished, they have subscribed their money on the basis of such a memorandum so they should not be heard to complain.[48]

However, rather than merely shifting the "hardship" from one interest group to another, it is submitted that legislative steps should be introduced in an effort to protect the interests of both groups. In this respect a consideration must be made of the steps taken or proposed in other jurisdictions.

(C) *RECOMMENDATIONS—*

The Cohen Committee of England recommended total statutory abolition of the doctrine of *ultra vires* so far as outsider third parties are concerned but that it should be "retained" internally as between directors and shareholders.

> We think that every company . . . should, notwithstanding anything omitted from its memorandum of association, have as regards third parties the same powers as an individual. Existing provisions in memoranda as regards the powers of companies should operate solely as a contract between a company and its shareholders as to the powers exercisable by the directors.[49] [i.e. *extra vires*]

Nothing has been done to implement this recommendation in England and in 1962 the Jenkins Committee[50] again addressed the problem of

46 E.g. *Ashbury Carriage Co.* v. *Riche, supra*, n. 5 see also, cases cited *supra*, n. 34.

47 The argument could perhaps be raised that even with a subjective object clause the defence of *ultra vires* is still available and, therefore, the trap to third parties would be more formidable than ever. The position of such an argument would be, that it is open for the company to say, that the venture was not within, or ancillary to, any of the objects in its memorandum or provided in the Act (e.g. B.C. s. 22(1) and (p); Alta s. 19(p) and (v)), and nor was it, *in their opinion*, a venture which could conveniently be carried on with the company's business; therefore the agent or director involved was acting beyond the capacity of the company. Unless the court could find that the transaction was objectively *intra vires* it would be obliged to accept the subjective opinion of the company and find the transcation *ultra vires*. It is submitted that this argument would fail because the opinion of the company would not go to capacity but only to authority. The residuary clause gives the company capacity to engage in whatever the directors decide, in their opinion, is convenient. Whether they do in fact so decide is of therefore an internal matter which authorizes the venture only, the capacity for which was conferred when the objects clause was set out. A *bona fide* third party, by the rule in *Turquand's* case, would be entitled to presume that this internal requirement had been fulfilled. If it had not, then the venture is *extra-vires* the directors or agent but the agreement itself would still be enforceable. See Gower, *op. cit. supra*, n. 28, at 141-160.

48 *Bell Houses Ltd.* v. *City Wall Properties Ltd., supra*, n. 28, at 683 per Danckwerts, L. J. See also Wegenast, *The Law of Canadian Companies* 1367 (Toronto 1951).

49 Report of the Committee on Conmpany Law Amendment, 1945, Cmnd. 6659, at 9.

50 Report of the Company Law Committee, 1962, Cmnd. 1749.

ultra vires. The Jenkins Report was more moderate in its proposals. This committee's view was that the trend of conferring sweeping residuary powers on the directors has already given rise to a great deal of complaint by shareholders. The additional step of totally abolishing *ultra vires,* as regards outsiders, as recommended by the Cohen Committee would be a retrograde step for it would only enhance the justifiable complaint of the insiders. Thus, the Jenkins Committee recommended retained the doctrine of *ultra vires* in substance. However, the Committee felt that the hardship to outsiders could be reduced by implementing that:

> a contract entered into between a company and another party . . . contracting with the company in good faith should not be held invalid as against the other party on the ground that it was beyond the powers of the company: he should not, however, be allowed to enforce the contract without submitting to perform his part of it so far as it is unperformed.[51]

Also, in the interest of outsiders, the Jenkins Committee further proposed the abrogation of the doctrine of constructive notice which fixes third parties with the knowledge of a company's memorandum and articles of association. They felt that an outsider should be entitled to assume that the company and directors have the necessary powers; and even where he has actual knowledge of the contents of the memorandum and articles, he "should not be deprived of his right to enforce the contract . . . if he honestly and reasonably failed to appreciate that they had the effect of precluding the company . . . from entering into the contract in question".[52] However, the recommendations of Jenkins Committee on *ultra vires,* like those of the Cohen Committee, have not been implemented.

In New Zealand and Australia, however, positive legislative reform has been enacted. In New Zealand the subjective formula was adopted as the easiest method of vitiating the hardship of *ultra vires* on third parties. In their companies act the standard object clauses are set out; included is the capacity,

> To carry on any other business *which may seem to the company* capable of being conveniently carried on in connection with its business or calculated directly or indirectly to enhance the value of or render profitable any of the company's property or right.[53]

In Australia a position similar to that in New Zealand has been taken.[54] Following the case of *H. A. Stevenson & Son Ltd.* v. *Gillanders Arbuthnot & Co.*[55] in which a majority of the High Court gave literal effect to a subjectively worded residuary clause in the memorandum, the legislatures inserted a like provision in the schedule of powers and capacities of their "Uniform Companies Acts."[56] The Australians have since gone further by setting out expressly that:

> no act of a company (including the entering into of an agreement by the company) and no conveyance or transfer of property, whether real or personal, to or by a company shall be invalid by reason only of the fact that the company was without capacity or power to do such act or to execute or take such conveyance or transfer.[57]

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51 *Id.,* at 73.
52 *Id.,* at 13.
53 New Zealand Companies Act 1955, s. 16, sched. 2 (italics added).
54 See Ford *Uniform Companies Legislation: Its Effect In Victoria,* (1962), 3 Melbourne University Law Review 461. Young, *Companies in Uniform,* (1963), 36 Australian Law Journal 331.
55 (1931), 45 C.L.R. 47.
56 Uniform Companies Act, 3rd Schedule, para 1 (identical to New Zealand provision, *supra,* n. 52.)
57 *Ibid,* s. 20 implemented e.g. 1961 (N.S.W.) (No. 71 1961); 1961 (W.A.) No. 82 1961 (Q) (No. 55); 1962 (A.C.T.) (No. 7 of 1962).

Similarly, in the majority of jurisdictions in the United States though a transaction is beyond the powers of a company, it may nevertheless be upheld as regards outsiders. The Model Business Corporation Act sets this out expressly,[58] and in almost identical words to those in the Australian "Uniform Companies Acts" cited above. In both the Australian[59] and American[60] acts there is, however, added an important exception in that a proceeding may be brought by a shareholder[61] to restrain an unauthorized transfer or conveyence. In that event the Court may, if it deems "it to be just and equitable, set aside and restrain the performance of the contract and may allow . . . compensation for the loss or damage sustained."[62]

In Ontario, the recent Lawrence Committee[63] also made recommendations as to *ultra vires*. Being a letters patent jurisdiction the doctrine of *ultra vires* has limited application, as stated above.[64] Nevertheless, the Lawrence Committee advocated the total abolition of *ultra vires* as regards outsiders in all cases so that "Every corporation has and shall be conclusively deemed to have had from its incorporation the capacity of a natural person. . . ."[65] It is also recommended that, "the rule or doctrine of constructive notice be abolished. . . ."[66]

Considering this latter proposal first, it is apparent that where the doctrine of *ultra vires* has been renounced, by statute, as regards third parties, it is also implicit that the doctrine of constructive notice is done away with. It would be inconsistent for a third party to be able to ask the court to enforce a contract which he is deemed to have known was beyond the company's capacity.

Considering now the statutes and proposals at large, it is significant that none of them would appear to promulgate a mere shifting of the hardship from one interest group, the third parties, to another, the shareholders and creditors. Particularly in Australia and the United States an express provision is made to retain some control over the directors' spending.

However, it is submitted, where the subjective power is conferred upon a company in the schedule of standard powers and capacities,[67] then whatever recourse is preserved for the insiders against the management is rendered impotent. Indeed, as Professor Ford has suggested[68] in regard to the Australian statute it is to no avail if, on one hand, the right of insiders to restrain an executory agreement is preserved, if, on the other hand, no provision is made to prevent a company from endowing itself with exhaustive object clauses, or if the Act itself so endows the company when it includes a subjective provision in the schedule of powers. Even if no right of restraint is preserved in the statute, the right of redress

58 Model Business Corporation Act-Annotated s. 6. See generally, Kennedy (1958) 34 Notre Dame Lawyer 99.
59 *Supra*, n. 55, para. 2, 3.
60 *Supra*, n. 57, s. 6(a).
61 A debenture holder in Australia may also proceed against the company to restrain it where the debentures are secured by a floating charge on company property.
62 *Supra*, n. 58.
63 Interim Report of the Select Committee on Company Law (1967) 5th sess. 27th Legislature of Ontario.
64 *Supra*, n. 16.
65 *Supra*, n. 62, sec. 1:4.1.7.
66 *Supra*, n. 62, sec. 2:4.2.3.
67 New Zealand, *supra*, n. 52 and Australia, *supra*, n. 55. Note the American Model Business Corporation Acts, s. 4, stops short of conferring any subjective powers.
68 *Loc. cit. supra*, n. 53, at 470.

against the directors personally is normally still available, but this recourse is also extinguished by such omnibus drafting.

To prevent this unsatisfactory development it could be inserted into the statute that the object clauses set out in a company's memorandum, in addition to those provided in the act, must be stated objectively and in terms of the company's paramount purposes only. This would not impose an undue restriction on the company, for when required, the objects clause could be altered.[69]

Professor Gower has presented an effective means of curtailing omnibus object clauses and, thus, preserving some internal control in his drafting of a new companies act for Ghana.[70] The Act is like that in Australia and the American Model Act, in that it provides for the enforcement of a transaction when it is beyond the company's capacity except where it is executory and the court feels it would be just and equitable to set it aside with compensation.[71] In addition, however, in order to protect the interests of insiders as well from 'catch-all' drafting, the act provides that if a company has not commenced all its authorized business within a year or if it has ceased to carry on any authorized business for more than a year, it shall be a ground for winding up the company.[72]

In conclusion, it is most evident that the *ultra vires* doctrine in company law requires legislative attention. The practice of a company endowing itself with subjective powers in its object clause as illustrated in the *Random Services* case must be abrogated. Such a practice may be desirable in so far as it reduces the superficial distinction between charter and registration companies by expanding the latters' capacity closer to that of a natural person. However, it is unsatisfactory in that it shifts the hardship which was once on those outside the company to those inside. Though the hardship is perhaps not so severe once shifted to the insiders, effective legislation could serve the interests of both groups. The operation of *ultra vires* would be confined to the case where the transaction is executory and it is "just and equitable" with compensation, to set it aside. Effective legislation would also preserve insider control by precluding exhaustive and subjective drafting of the object clauses in the memorandum.

—BRIAN A. FELESKY*

69 Generally, this requires the passing of a special resolution and the confirmation of an order of the court. See e.g. Alta., ss. 41-60; B.C. ss. 46-66; Sask., ss. 47-74; see *supra*, n. 10.

70 *Companies Code Bill*, 1961 (Ghana).

71 *Id.*, s. 25(5).

72 *Id.*, s. 247 (2). The objects can be altered, of course, in accordance with the provision of the Act.

* B.A. LL.B., (Alta.) of the 1968 graduating class.