shareholders. In fact it seems most unlikely that minority shareholders of Maher Shoes Limited would have agreed to Mr. Maher's doing any of the acts mentioned in Section 3 (5) (a).

The underlying proposition in the decision, that a controlling shareholder, holding shares of one class, has an unfettered power to appropriate to himself property or benefits belonging to a shareholder of another class must seriously be questioned, since it ignores completely the statutory and common law protection given to minority shareholders. The Alberta Companies Act[6] provides as follows:[7]

> If at any time the share capital is divided into different classes of shares, the rights attached to any class, unless otherwise provided by the terms of issue of the shares of that class, may be varied by a special resolution confirmed by an order of the court, with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class.

Similar protection of class rights is contained in Section 48 of the Act. It is submitted that in this Province at least, a controlling shareholder is not at liberty to proceed in the manner contemplated by the Board. It is implicit in the Board's reasoning that a wife will always do as her husband wishes—a proposition that is at least open to question.

A fact which may help to distinguish the decision in the Barber case from a future case involving a company capitalized as outlined in the second paragraph of this note, may be that there were accumulated earnings in Margot Investments Limited, part of which might legitimately have been declared as dividends to the holder of the Class B shares (i.e. Mr. Barber), notwithstanding the arguments put forward by counsel for the appellants. The point was not specifically dealt with by the Board but it might have been taken into account in deciding the case. This situation would, of course, not arise where the preferred shares are entitled to a fixed non-cumulative dividend.

In the light of the decision in this case it has been suggested that it might be advisable to arrange the shareholding in a company of this nature so as to ensure that the Testator, while retaining voting control, has a beneficial interest in less than seventy-five per cent of the total voting power, thus disposing of the contention that he can at any time pass a special resolution. It has also been suggested that it should be provided in the memorandum that the rights attaching to one class of shares cannot be varied or diminished without the express consent of the holders of that class of shares, and a carefully drafted provision of this nature could extend the protection already given by Sections 78 and 48 of the Alberta Companies Act.

—K. S. Dixon*

[6] R.S.A. 1955, c. 53.
[7] *Id.*, s. 78(2).
* K. S. Dixon, Q.C., of the Alberta Bar.

COMPANY LAW—ULTRA VIRES—RIGHT OF THIRD PARTY TO RAISE DEFENCE AGAINST COMPANY—

It is trite law that a company may raise as a defence to an action against it in contract that the particular transaction was *ultra vires* the

company. Strangely enough, the question of whether a defendant to an action by a company may raise the doctrine as a defence has remained unanswered even ninety years after the *Ashbury Railway*[1] case. In the recent English decision *Bell Houses Ltd.* v. *City Wall Properties Ltd.*,[2] Mocatta, J. came to the startling conclusion that the defence could be raised by such a defendant and that the plaintiff company, suing for a commission, could not recover on the contract.

On appeal,[3] the issue was not considered although Salmon, L. J., referring to the lower court decision, made the tart observation[4] that the doctrine of *ultra vires* was not formulated so that:

> . . . third parties, by looking at the memorandum should have the security of knowing that they might safely enter into a contract and promise to pay the company for services without any obligation to honour their contractual promise after they had received the services. The judge in effect came to the conclusion that the reasoning in *Ashbury Railway Carriage and Iron Company* v. *Riche* led to this strange result.

Despite this implication that the Court of Appeal might be prepared to render a decision with more effective social engineering in mind the trial judgment is a glaring caveat to draftsmen of company objects clauses. To date the doctrine of *ultra vires* has been a trap for unwary third parties. If it does in fact work against the company as well it will have the anomalous effect of penalizing the company's shareholders, the very persons for whose protection the doctrine was formulated.

—S. M. CHUMIR*

1 (1875), L.R. 7 H.L. 653.
2 [1965] 3 All E.R. 427.
3 [1966] 2 All E.R. 674 (A.B.C.).
4 *Id.*, at 690.
* S. M. Chumir, B.A., LL.B. (Alta.), B.Litt. (Oxon.), of the Alberta Bar.

COMMERCIAL LAW—RULE AGAINST PERPETUITES—APPLICABILITY TO LEASE—OPTION AGREEMENTS—

The Supreme Court of Canada in *Louis J. Harris* v. *The Minister of National Revenue*,[1] rendered a decision of much significance to the lawyer in general commercial practice. The case could be missed as to its significance, for it concerns matters of taxation and, while it may make a limited contribution to that field of law, it has a far greater impact in the field of commercial law because of its treatment of the application of the rule against perpetuities on a lease-option agreement.

The facts in the case are unique, revolving around an attempt by a taxpayer to claim capital cost allowance against property held by him under a lease-option agreement. In 1960 the owner of a service station property leased the same to an oil company for a period of 25 years at an annual rental of $3,900.00. A few months later the owner granted a concurrent lease to the appellant, Harris for a term of 200 years at an annual rental of $3,100.00, which contained an option exercisable by the appellant to purchase the property at a stated figure at the expiration of the 200 year period. The appellant deposited with the owner a sum of money as security for the performance of his covenants and authorized

1 [1966] S.C.R. 489.