THE ULTRA VIRES RULE WITH REGARD TO

COMPANIES INCORPORATED UNDER

THE COMPANIES ACT, 1955

A THESIS PRESENTED FOR

MASTER OF LAWS

BY

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CONTENTS

CHAPTER I  -  INTRODUCTION  ......................  1

CHAPTER II -  HISTORY OF THE DOCTRINE ........  7

CHAPTER III - GROWTH OF THE DOCTRINE ...........  27

CHAPTER IV - AVOIDANCE OF THE ULTRA VIRES RULE .. 41

CHAPTER V  -  THE ALTERATION OF MEMORANDA ....... 75

CHAPTER VI - ULTRA VIRES IN OTHER BODIES ........ 87

CHAPTER VII - EFFECTS OF THE ULTRA VIRES DOCTRINE. 104

CHAPTER VIII - ABOLITION OF THE ULTRA VIRES RULE .. 123
INTRODUCTION

Suggestions have been made for total abolition of the ultra vires doctrine in relation to the powers of limited companies (1), but so far these have not been adopted either in England in the Companies Act, 1948, or in New Zealand in the Companies Act, 1955. As the ultra vires doctrine therefore still forms part of company law, it is proposed to examine it critically insofar as it applies to the memoranda of companies and to consider the value of the doctrine to the modern law. This task of examination will be attempted by tracing the development of the doctrine to its modern form, by considering the attempts which have been made to evade its operation, by discussing its effect on the company and on third parties and by comparing its operation and effect with other corporate bodies. It is hoped that by analysing every aspect of the doctrine, its advantages and disadvantages will be apparent and that a correct assessment of its value can be made. The inevitable conclusion it is submitted, will be that the doctrine has become not only worthless, but a hindrance to freedom of commercial transactions.

(1) The Company Law Amendment Committee, 1945, Cmnd. 6659, known as "The Cohen Committee".
The Meaning of "Ultra Vires"

The term "ultra vires" has many different applications in law, some correct and others incorrect. The most common application of the term is probably in the sense in which it is here used, that is, in relation to corporate bodies. If an act is performed by such a body and that act is not within the scope of the powers entrusted to the body by Parliament, such an act is said to be ultra vires. This section is headed "meaning" rather than "definition" for a description of the term such as the one just given merely conveys a general idea of the term. It is impossible to arrive at a definition in the strict sense, against which any act by a corporate body can be measured, for the circumstances of cases are frequently complex. For example, if the directors of a railway company should purchase for the company a quantity of "green spectacles as a speculation" that would be clearly ultra vires (2); but if such a board were to build a theatre or chapel, it would, scarcely, be ultra or intra their powers according to the circumstances;

"it might be a speculation separate from the railway, and prohibited; or, if works (for the railway) were wanted in a waste place and the company found it to be to their interest to build a town and supply it

(2) Per Campbell C.J. in Norwich v. Norfolk Railway (1855) 4 E.1 and 9.1397.
with all requisites of inhabitancy, and (in order to secure a permanent supply of workmen of skill and responsibility) added a chapel and a theatre, with religious and secular instruction, it might be for the purpose of the railway, and valid, and though distantly connected, the outlay might be found eventually to increase the profit from the traffic.

From these dicta it is easy to imagine circumstances which are impossible to measure against any definition to ascertain whether they are intra or ultra vires. Any attempted definition of the term will only indicate the general nature of the doctrine and aid comprehension of its ramifications but it will not, as it were, codify the notion.

Halsbury (4) explains the term thus:

"the term 'ultra vires' in its proper sense denotes some act or transaction on the part of a corporation which, although not unlawful or contrary to public policy if done by an individual, is yet beyond the legitimate powers of the corporation as defined by the statute under which it is formed, or the statutes which are applicable to it, or by its charter or memorandum of association."

(3) Per Rule J., ibid 425.

(4) 3 Halsbury, 3rd. Ed. 411.
It is clear from this quotation that there are
times when the term is incorrectly used. The words “ultra
vires” and “illegality” are frequently interchanged and
confused, whereas they represent two totally different ideas.
A contract may have both these defects at the same time, but
it is also possible for it to have one without the other.
For example

“a bank has no authority to engage, and usually does not
engage, in benevolent enterprises. A subscription made
by authority of the board of directors and under the
corporate seal, for the building of a church or
college... would be clearly ultra vires, but it would
not be illegal. If every member should expressly
assent to such an application of the funds, it would
still be ultra vires but no wrong would be committed
and no public interest violated” (5).

If, on the other hand, a company was formed to carry
on business as restarauteurs and operated coffee houses
pursuant thereto, but sold drug laden cigarettes for those
who wanted them in the course of its business, such an
activity would not be ultra vires the memorandum if it was
drawn in general terms without reference to the sale of
drugs and yet the activity is clearly illegal. A com-
bination of both ultra vires and illegality would occur if
the bank operated the drug-selling coffee house.

(5) Bissell v. Michigan Southern Railway, New York
Rep. 258.
Another distinction must be drawn between acts ultra vires the company and acts ultra vires the directors. The former, for reasons to be discussed later, are void and incapable of ratification, while the latter, being acts by the directors in excess of their powers as conferred by the articles of association and other documents but within the powers of the company itself, are capable of ratification by resolution adopted by the members in general meeting. But if an act ultra vires the directors is not ratified nor comes within the rule in Turquand's case (6), it is void.

The final distinction to be made is between the terms "objects" and "powers". The Companies Act 1955 requires the memorandum of association to state the objects of the company. The objects are the primary purposes for which the company is established, and these appear, owing to a mixture of custom and respect for the Act, in the first paragraphs of the "objects clause" in the memorandum. For reasons which will appear later, draftsmen include paragraphs giving various powers to the company in the objects clause of the memorandum after the objects have been stated. These powers are intended to enable the company to perform its main objects.

For example, it has been held (7) that a trading company has implied power to borrow money, but other companies must have that power expressed in their memoranda (8). However, the company also derives its powers from other sources: from the articles, from the Second Schedule of the 1955 Act (when not negatived), and from those powers which are incidental either to the memorandum or to the general law. The Second Schedule of the Act, which, unless expressly negatived, is implied in all memoranda by Section 16, contains twenty-six powers which are stated to be "incidental and ancillary to the objects specified in the memorandum" (9). Various other powers are expressly given by the Act. These include power to change the name of the company (Sec. 32); to alter the articles (Sec. 24); to hold land (Sec. 28); to increase and consolidate capital (Sec. 70) and so on. All these powers are prima facie intended to assist the company to attain its main objects, and are ancillary thereto.


(8) This would presumably include drawing on a current bank account to such an extent that it is overdrawn.

(9) Thus they always remain powers because they are expressly stated in the Act to be merely ancillary to the main object. They can never become main objects by the operation of a Satsum v. Brougham clause - see infra.
II — HISTORY OF THE DOCTRINE

Before companies were incorporated under a general Companies Act, the principal forms of commercial association were chartered corporations, joint stock companies and partnerships. It was generally supposed that chartered corporations had all the powers of a natural person so far as was possible for an artificial entity to possess these powers. The foundation for this presumption is usually given as the case of Suttons Hospital (10), and it was believed that the only redress for exceeding the terms of the charter was quo warranto proceedings or the withdrawal of the charter itself by suits for intrig proceedings. The correctness of this view will be discussed later, but it can be said at this stage that acts which were beyond the powers of a chartered corporation were good until they were impeached by the Crown, and by the Crown only. Blackburn J. outlined the position in Riche v. Ashbury Railway Carriage Co. Ltd. (11) when he said:

"If there are conditions contained in the charter that the corporation shall do no particular things, and these things are nevertheless done, it gives ground for proceeding by act. In, in the name of the Crown

(11) (1874) L.R. 9 Ex. 264 at pp. 263 - 264.
to repeal the letters patent creating the corporation. But if the Crown take no such steps, it does not, as I conceive, lie in the mouth either of the corporation, or of the person who has contracted with it, to say that the contract into which they have entered is void as beyond the capacity of the corporation."

Thus the question of ultra vires in the sense in which it is here used has only limited application in the case of chartered corporations.

In partnership law the powers of the partnership are as wide as the powers of the individual partners in relation to the firm. Section 8 of the Partnership Act 1908 makes every partner an agent of the firm and his acts bind the firm and his partners; if in fact he has no authority to bind the firm and his partners, third parties are unaffected unless they knew of his lack of authority. Further, by Section 27(h) of the Partnership Act the business can be enlarged or changed with the consent of all the partners, even if this change is contrary to the terms of the partnership agreement. The doctrine of ultra vires does not and cannot apply to a partnership in the same way as it applies to a company, for a partnership possesses no corporate entity. The early joint stock companies before 1864 were merely enlarged partnerships. Any question of vires for one of these joint stock
companies was limited to an examination of whether the
directors had exceeded their authority; the powers of
the company itself were unlimited.

The ultra vires doctrine in company law was
directly caused by two factors: first by the necessity
to state the nature of the undertaking and secondly by
making this unalterable. It has been asserted that the
ultra vires doctrine came with limited liability but it
is suggested that limited liability was rather the
indirect cause of the doctrine. It would be possible to
have limited liability without the doctrine, but it was
thought safer to have the doctrine to protect members and
creditors; it would not be possible to have an unalterable
undertaking to a business without the doctrine of ultra
vires.

The earliest notions of the doctrine of ultra vires
can be traced back to the Select Committee on Joint Stock
Companies of 1843. Suggestions were made before this
Committee that the nature of the undertaking in the deed
of settlement of a joint stock company should be made
difficult, if not impossible to alter, so that some check
could be made against stock jobbing. One of the witnesses
before the Committee, Mr. H. Bellenden Ker, suggested that
"there should be a provision preventing the alteration
of the nature of the undertaking (to be precisely
described in the deed) except on having a new deed."
Another witness, Mr. J. Duncan also said
"that a joint stock company shall not carry on a
trade or business different from the trade or
business stated in its deed of settlement, under
heavy penalties."

Following this Select Committee, Parliament
passed the Joint Stock Companies Act 1844. This Act
changed to some degree the partnership-joint stock
company relationship which had hitherto existed.
Section 7 provided that the Deed of Settlement
"must set forth in a Schedule thereto the following
particulars, that is to say...... 2. The business
or purpose of the Company."

Section 25 of the Act provided
"that on the complete registration of any company
being certified by the Registrar of Joint Stock
Companies such company and the then shareholders
therein, and all succeeding shareholders, whilst
shareholders, shall be and are hereby incorporated
as from the date of such certificate by the name of
the company as set forth in the Deed of Settlement,
and for the purpose of carrying on the trade or
business for which the company was formed."

The company therefore had to follow the objects
set out in its deed and the powers of the company and of
its directors were founded on these objects.
The section went on to set out the various powers of the company and concluded by authorising the company

"12 To perform all other acts necessary for carrying into effect the purposes of such company, and in all respects as other partnerships are entitled to do."

It is submitted that this shows the intention of the legislature was to make a company's objects generally known and to limit the activities of a company to those objects which were set out in the deed. For the first time a company was a corporate entity, although limited liability was not to follow until some eleven years later. Shareholders, by Section 66, remained liable for the debts of the company for three years from the date they sold their shares. This personal liability of members explains to some extent why the advice of Messrs. Kerr and Duncan was not followed by Parliament and changes in objects were permitted. Section 50 provided that

"any directors or other managers of such company,

with the consent of at least three-fourths in number and value of the shareholders of such company present at a General Meeting summoned for that purpose, may at any time or times hereafter make any alterations in the constitution of the said company or otherwise as shall be necessary for enabling such company to come within the provisions of this Act."
It was also part of the general law that changes in objects, even though not authorised by the deed of settlement, would be valid if ratified by all the members after the change, or authorised by them before the change. Lord Cranworth in *Speakman v. Evans* (12), a case on whether a former shareholder, who no longer held shares, could be liable as a contributory on the winding up of the company, said:

"The act of the directors in cancelling the shares of the appellant, though not warranted by the deed of settlement, would be valid if it was either previously authorised or subsequently ratified by all the shareholders."

In another case on the same question, *Evans v. Smallcombe* (13) Lord Chelmsford said:

"The 'Chippenham' arrangement was undoubtedly ultra vires the directors. They had no power to permit any of the shareholders to withdraw from the company, nor to transfer their shares; nor could they declare a forfeiture of shares, except under the provisions of the deed of settlement. The 'Chippenham' agreement being, therefore, a departure from the deed which constitutes the contract between the

(12) (1868) *L.R. 3 H.L.* 171, 190.

(13) (1868) *L.R. 3 H.L.* 249.
members of the company, it could only be made good by the consent of every individual member composing the company. That consent might be either express, or might be inferred from the acquiescence of the shareholders after full knowledge of the transaction which was in excess of the powers of the directors."

Horrwitz (14) submits that the statement of objects in the deed of settlement and the restriction of the powers of such companies to acts connected with those objects as provided in the interest of shareholders, who were personally liable for the debts of the company. This submission must certainly be correct and it can be said that while Parliament did not prevent the objects in the deed being altered as suggested in the Select Committee of 1843, it ensured that the company would adhere to the objects stated in the deed unless the members agreed otherwise. In this way shareholders were protected as the change in objects was controlled by them. It could also be submitted, in addition to the submission of Horrwitz, that creditors were also protected by these provisions, although no reference was made to them of an intended change, for shareholders would be less willing to expose their personal liability by embarking on new activities and perhaps running greater risks.
Noursey (15) has argued that the opportunity for changes of objects was made by Section 7 of the 1844 Act, which enables supplementary deeds to be registered and he says that changes in objects not done in this way would be ultra vires the company, even if ratified by all members. It is submitted that this view is incorrect first because the Act did not say that Section 7 was to be used for this purpose and secondly that the provisions for alteration of objects (Section 59) did not make re-registration a part of the procedure. While it was possible for the members to ratify the acts of the directors which were beyond the objects in the deed the application of the ultra vires rule to acts of the company was thereby limited. Cases such as Sparkman v. Evans (12), Evans v. Snellgrove (13), and Houldsworth v. Evans (16) were argued on the assumption that the directors, and not the company, had exceeded their authority.

To summarize the position under the Act of 1844, joint stock companies were incorporated on registration, their deeds of settlement had to state the objects for which the company was formed, but these objects could be altered or an act outside the objects could be ratified by all the shareholders. Moreover, the liability of the

(16) (1865) L.R. 3 H.L. 263.
shareholders was unlimited. It has been stated earlier
in this chapter that the doctrine of ultra vires was
brought about by two causes; first by the necessity to
state the objects for which the company was established
and secondly by making these objects unalterable.
However the second point was not necessary to bring the
doctrine into existence; it merely made its presence
felt. The first point alone sufficed to create the
doctrine while the other made it grow. Thus the
doctrine was in existence long before limited liability
was accepted into company law, and the growth of ultra
vires at the beginning was quite independent of it.
Limited liability was not introduced until 1855 but the
Limited Liability Act 1855 contained no further
provisions concerning changes of objects and the
provisions of the 1854 Act still existed. Limited
liability together with the ease of altering objects
under the 1854 Act would have endangered creditors for
they would have no guarantee that the company's business
would remain unaltered nor would they have anyone to
look to except the company to meet their accounts. The
obvious way of overcoming this danger was by strengthening
the ultra vires rule, and this was done in 1856.

The Joint Stock Companies Act 1856 was the direct
forerunner of the modern Companies Acts. Two documents,
the memorandum of association and the articles of
association, were substituted for the old deed of
settlement. The form each document was to follow was
given in the Act. The memorandum had to contain the
name of the company, the place of the registered office,
the objects, whether the liability was limited and the
capital. The articles could be used to negative parts
of Table B if desired, could include further regulations
and contained the names of the directors. Table B gave
the company certain powers with regard to shares, increase
of capital, meetings, notes, directors, dividends, accounts
and audit. The Act made provision for altering the
articles by Special Resolution, but no mention was made,
nor was any procedure laid down for altering the
memorandum. Thus Parliament gave effect to the
suggestions of fifteen years earlier, and the objects in
the memorandum became unalterable.

Section 5 of the Act directed that the memorandum
should contain inter alia "the objects for which the
proposed company is to be established". Section 7
provided, as does Section 25 of the Companies Act 1955,
New Zealand, that the memorandum should be in the form
prescribed by the Act, or as near as possible thereto as
the circumstances admit. It is interesting to note that
in the memorandum given in the Act there were only five
clauses, each in length one line, with the exception of
the objects clause, which ran to a length of three lines
and a half. The effect of this type of memorandum upon judicial interpretation will be discussed later.

Section 33 of the Act provides:

"Any company registered under this Act may in General Meeting, from time to time, by such Special Resolution as is hereinafter mentioned, alter and make new provisions in lieu of or in addition to any regulations of the company contained in the Articles of Association or the Table marked B in the Schedule."

The Act made no similar provision for changing the memorandum. Harrells (14) speaking of the silence of the Act insofar as alteration of the memorandum is concerned says:

"It must be assumed therefore that (the memorandum) was still capable of being altered with the unanimous consent of all the shareholders."

On strict construction of the section, and by invoking the maxim "expressio unius, exclusio alterius", it is submitted that this is incorrect. The Act only referred to changing the articles because Parliament intended that only the articles should be changed. However, it must be conceded that it was probably believed at the time that the memorandum could be altered. This would follow from the fact that the old deed of settlement was freely alterable under the
earlier Acts, and it would be concluded that such was still
the case — until the contrary was enacted. Decrees of Judges
at the time show the quandary they faced trying to reconcile
the new Act with the old law. For example, in Simpson v.
Westminster Palace Hotel Co. (17) Lord Campbell L.C. said:

"The funds of a joint stock company established for one
undertaking cannot be applied to another. If an
attempt to do so is made, this act is ultra vires,
and although sanctioned by all the directors and by a
large majority of shareholders, any single shareholder
has a right to resist it, and a Court of equity will
interpose on his behalf."

Lord Cranworth also came to this conclusion and
impliedly agreed that all the members could alter the
memorandum. He said:

"I concur in the result at which my noble friend has
arrived, though I must own, not without having
experienced very considerable doubt during the
progress of the argument. I do not think it would
have been open to the majority of shareholders, or
to all the shareholders except one, to apply the
funds of the company to anything that was not, in
a legitimate sense, part of the business of
carrying on an hotel."

(17) (1860) 8 H.L.C. 712.
It is submitted that if the Judges had applied the "expressio unius" rule to Section 13 of the Act, they should have concluded that the memorandum, as far as the objects clause was concerned, was unalterable. Legal thought at the time had probably not recognised that a company incorporated under the 1856 Act no longer bore any relationship with the quasi-partnership nature of earlier joint stock companies. Certainly Section 12 of the Companies Act 1862 was new, but it added nothing that could not have been deduced from the 1856 Act on this point and, it is submitted, was enacted to curb erroneous decisions such as Simpson v. Westminster Palace Hotel Co. (17).

The next Act was passed in 1862 and for the first time bore the title "The Companies Act". The provisions of the 1856 Act were amplified, but the basic structure of the company remained unaltered. Section 12 of the Act provided that

"Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorised to do so by its regulations as originally framed, or as altered by Special Resolution in manner hereinafter mentioned, as to increase its capital, by the issue of new shares of such amount as it thinks expedient, or to consolidate or divide its capital into shares of larger amount than its existing shares,"
or to convert its paid-up shares into stock, but, save as aforesaid, and save as hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its Memorandum of Association."

Again it is submitted that this section did not add anything to company law which could not have been inferred from the 1856 Act, but it was included merely to remove the doubt which had existed in the intervening six years.

The final development of the ultra vires doctrine was brought about by the case of *Ashbury Railway Carriage & Iron Co., Ltd. v. Riche* (18). In this case, the company was formed under the Act of 1862 and the objects were "to make, sell ... railway carriages and wagons of all kinds; to carry on business of mechanical engineers and general contractors". Article 4 of the company's Articles of Association provided that "an extension of the company's business beyond or for other than the objects or purposes expressed or implied in the memorandum shall take place only in pursuance of a special resolution." The company by its directors entered into a contract with the respondent for the construction of a railway in Belgium and the question raised in the action was whether the contract was valid.

The dicta of the Judges before whom this case came at first instance show that there was still a divergence of

(18) (1875) L.R. 7 H.L. 653.
of opinion on the question of ratification of an *ultra vires* activity by all the members.

In the Court of Exchequer the Judges took up the question of ratification because, it is submitted, they had not yet clearly distinguished between an early joint stock company and a company incorporated under the Act of 1862. For example, Braswell B. said (19):

"I think the question is reduced to this, was the contract (with Riche) ratified?"

Martin B. said (19):

"There is no older rule of law than that if a contract be made on behalf of a man who has given no authority to make it, but who afterwards adopts and ratifies it, he is bound by it. This rule has been applied to Joint Stock Companies."

The Baron then applied this principle to the Ashbury Company. The Court had held on the facts that the contract was *ultra vires* the company, but judgment was given for Riche because it was held (Martin and Channell BB. Braswell B. dissenting) that the contract had been ratified by the shareholders. The company brought error before the Exchequer Chamber. Counsel for the defendant argued that if the contract was beyond the scope of the memorandum it was *ultra vires* and therefore

(19) (1874) L.C. 9 Exch. 224, 234, 245.
indefeasible of ratification. He quoted Section 8 of the 1862 Act (which provided that the memorandum must contain the objects for which the company was established) and he then linked it with Section 12 (which made the memorandum unalterable except for certain stated exceptions) and drew the logical conclusion that what was beyond the scope of the memorandum was therefore impliedly prohibited, and remained so in spite of attempted ratification.

Ratification, he pointed out, was nothing but the making of a contract where none existed before, but if there could be no contract it must follow that there could be no ratification.

Counsel for the plaintiff argued inter alia that if the contract was not originally binding, it was competent for all the shareholders to ratify it. The authority for this proposition was given as Evans v. Smellie (13) but it is submitted that this was a case which concerned a joint stock company where ratification was permissible and further that this case was argued on the footing that the directors and not the company had exceeded their authority, so it was scarcely relevant.

The first of the judgments was delivered by Blackburn J. (Brett and Grove JJ, concurring) and he held that the contract, although beyond the scope of the memorandum, was capable of ratification by the individual shareholders and that it had been so ratified.
The second judgment, delivered by Archibald J., in which Keating and Quinn J.J. concurred, held first that the contract, being beyond the scope of the memorandum, was incapable of ratification, and secondly that there was no evidence that it had in fact been ratified by all the shareholders. As the judgments were even in number and opinion, the decision of the Court of Exchequer was affirmed.

In his judgment, Blackburn J. cited Speckman v. Evans (12), Evans v. Sealecombe (13), and Holdsworth v. Evans (16) with approval and also the case of Sutton Hospital (10). The Evans cases have already been distinguished and the case of Sutton Hospital should not have been used in the Ashbury case as it concerned a corporation incorporated by Royal Charter, where ultra vires has a very different meaning from the present context. The Judge examined Sections 8 and 12 of the Companies Act 1862 and drew two conclusions: first that one dissentient shareholder would prevent a company from performing an ultra vires contract, and secondly that no person can be entitled to hold a company to a contract which is beyond the objects without proving that actual authority has been given to the board to make the particular contract. The first of these conclusions is remarkable in view of the submissions made by counsel for the defendant. The Judge went even further; he denied
that the legislature had shown any intention under the 1862 Act of changing the status quo as far as ratification of ultra vires actions by all the shareholders was concerned. As far as he was concerned, all the shareholders could ratify by special resolution an ultra vires action by the company in the same way as was done under the Act of 1854.

Archibald J. distinguished clearly between the memorandum and articles of a company and held that the memorandum could not be qualified by the articles to reserve power to change the objects by special resolution, as Article 4 had purported to do. He also held that the legislature had intended, by the "expressio unius, exclusio est alterius" rule, that the memorandum could be changed only in the specified instances contained in Section 12 of the 1862 Act, but in no other cases. He concluded that the contract in question was ultra vires and therefore void and incapable of ratification.

In considering the cases of Evans v. Snellgrove (13), Speddon v. Evans (12) and Houldsworth v. Evans (16), Archibald J. distinguished them from the circumstances of the present case for they were decided under Acts which allowed for ratification by all the shareholders, and further that these cases were decided on the basis that the actions in question were ultra vires the directors, not ultra vires the company. Archibald J. outlined the twofold purpose of the ultra vires doctrine — to protect
investors and to protect creditors. He preferred to regard ultra vires as a question of incapacity rather than one of illegality. This judgment, as will be seen later, anticipated the opinion of the House of Lords, but in the meanwhile the traditionalists enjoyed a narrow victory.

It is interesting to note the attempt made by Article 4 of the Articles of Association of the company to reserve the right to the company to alter its objects by special resolution. The articles of a company are subordinate to and controlled by the memorandum of association, which is the dominant instrument, and this has always been the case since the two documents replaced the old deed of settlement in the Joint Stock Companies Act 1856. The memorandum contains the conditions upon which alone the company is granted incorporation. The articles contain the internal regulations of the company and are controlled by the members subject to the limits imposed by the general law and by the memorandum.

The only time the articles may influence the memorandum is if there is an ambiguity in the memorandum. In such a case, articles registered at the same time as the memorandum may be used to explain but not to extend the objects. This was mentioned by Bowen L.J. in Quinnes v. Land Corporation of Ireland (20) where he

(20) (1882) 22 Ch. D. 369, 381.
pointed out that

"the memorandum contains the fundamental conditions
upon which alone the company is allowed to be
incorporated. They are conditions introduced for
the benefit of creditors and the outside public, as
well as shareholders. The articles are the internal
regulations of the company. How can it be said that
in all cases the fundamental conditions of the
charter of incorporation and the internal regulations
of the company are to be construed together? ... In
any case it is certain that for anything which
the Act of Parliament says shall be in the
memorandum, you must look to the memorandum alone.
If the legislature has said one instrument is to be
dominant you cannot turn to another instrument and
read it in order to modify the provisions of the
dominant instrument."

Apart from the question of ambiguity the articles
can never influence the memorandum as was suggested by
Article 4 of the Articles of the Ashbury Iron and
Railway Co. Ltd.
III. — GROWTH OF THE DOCTRINE

In the House of Lords and now Asbury Railway Carriage & Iron Co., Ltd. v. Riche (18) the judgment of Archibald J. in the Exchequer Chamber was upheld and the ultra vires doctrine emerged fully developed. Moreover, the opinions in the House of Lords were unanimous.

Lord Cairns L.C., in the first opinion to be delivered, pointed out that the precise effect of the Act of 1862 was entirely overlooked by three of the Judges in the Court of Exchequer and by half the Judges in the Exchequer Chamber. He continued:

"The provisions under which that system of limiting liability was inaugurated, were provisions not merely, perhaps I might say not mainly, for the benefit of the shareholders for the time being in the company, but were enactments intended also to provide for the interests of two other very important bodies: in the first place, those who might become shareholders in succession to the persons who were shareholders for the time being; and secondly, the outside public, and more particularly those who might be creditors of companies of this kind."

His Lordship then distinguished between the memorandum and the articles. He likened the memorandum to a charter which defines (and limits because it defines)
the powers of a company. What is outside the memorandum, he said, is *ultra vires* the company; but what is beyond the articles may be *ultra vires* the directors only. The memorandum, on a perusal of the 1862 Act, is unalterable except for the provisions mentioned in Section 12.

His Lordship next examined the capacity of the company to make the contract. He said:

"I am clearly of the opinion that this contract was entirely beyond the objects of the company... If this is so, it is not a question of whether the contract ever was ratified or was not ratified. If it was a contract void at its beginning, it was void because the company could not make the contract. If every shareholder of the company had been in the room and every shareholder of the company had said 'That is a contract which we desire to make, which we authorise the directors to make, to which we sanction the placing of the seal of the company', the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have attempted to do the very thing which, by the Act of Parliament, they were prohibited from doing."

It says much for the firmness of the Lord Chancellor's convictions that, apart from the last quotation, he did not discuss the question of possible
ratification at all, but based his opinion entirely on the construction of the Statute.

The next opinion was delivered by Lord Chelmsford who said that a company was a creature of statute and that it was quite within Parliament's prerogative to confer just as much power as it thought fit upon a company and no more. A company could only act as far as this delegated power enabled it, but no further. His Lordship described as "magister" the fourth Article of the company which purported to empower the company to extend the company's business beyond or for other than the objects or purposes expressed or implied in the memorandum, merely by a special resolution.

From these two opinions, the reasons for the doctrine of ultra vires have emerged. They are first, because a company is created by Parliament it is therefore open to Parliament to confer just as much power as it pleases on one of its creatures; secondly that by having stated objects in the memorandum shareholders will know the type of undertaking in which their money is being invested and will be invested in the future; thirdly this undertaking will be preserved for later shareholders; and fourthly that by having the objects of the company stated in the memorandum creditors have some safeguard in that the funds of the company will not be dissipated on unauthorised activities.
In dealing with the submissions on ratification, Lord Chelmsford said that the contract, being ultra vires, was void, not voidable, and the position was exactly the same as if no contract had been made at all. He distinguished Buchanan v. Evans (12), Evans v. Marshall (13) and Soulds v. Evans (16) on the basis that the actions complained of in those cases were ultra vires the directors only, but intra vires the company, thus making ratification possible.

Lord Hatherley gave the next opinion and although he did not differ from his brethren in his reasoning, one paragraph in his opinion is worth quoting because it shows a fine appreciation of the problem before the House and a clear understanding of the nature of a company which to some extent anticipates Selwyn v. Selwyn & Co. Ltd. (21).

He said:

"With regard to the object which the Legislature had in view, I think that the Legislature had in view distinctly the object of protecting outside dealers and contractors with this limited company, from the funds of the company being applied, or from a contract being entered into by the company, for any other object whatsoever than those specified in the memorandum of association, which the Legislature

(21) [1897] A.C. 22.
thought should remain for ever unchanged. It is quite true, as was said in the argument, that those same gentlemen who signed the memorandum night, the next hour if they liked, go into another room and frame a new object of business besides those specified in the memorandum of association they had already agreed to. I can only say in answer to that, they might sign a fresh memorandum and form a new company. The same seven gentlemen may form half-a-dozen companies if they think proper, and half-a-dozen memoranda of association may be executed for that purpose. But each would be a perfectly new company in that case, and neither as regards their shareholders, nor still more as regards the general body of the public, have they the power and authority under the Act of Parliament of combining together as a corporation with limited liability, to carry on business for any other purpose whatever than that specified in the memorandum of association.\(^9\)

Lord O'Hagan, in his opinion, asked first whether the contract in question was ultra vires the directors and he found that this was in fact the case. He then asked whether it was possible for the shareholders to ratify the contract and he held that it was not. This was another way of finding out whether the contract was ultra vires the company.
The final opinion was delivered by Lord Selborne who was much more direct than Lord O'Hagan, who really did not need to discuss the first question at all. If an act is ultra vires the company it cannot possibly be intra vires the directors. It is as though the Executive Council makes Regulations pursuant to some statute which does not enable the Regulations to be made. Lord Selborne held at the outset that the contract was ultra vires the company and added that this point, once established, was really decisive of the whole case.

The following conclusions may now be drawn from the opinions of the House of Lords to summarize the doctrine to date:

1. A company is a creature of statute, and Parliament can delegate as much or as little power as it pleases to corporate entities it creates.
2. The memorandum of association and the articles of association are two separate documents and objects cannot be included in the latter nor can power be given in the articles to change the objects in the memorandum.
3. What is not expressly included in the memorandum of association cannot be implied (this point will be expanded later in this chapter).
4. Articles of association may be changed by special resolution, but the memorandum of association cannot be changed.
5. If an object is not included in the memorandum of association, then any action by the company purporting to exercise that object is ultra vires the company.

6. An action which is ultra vires the company is void and is therefore incapable of ratification as there is nothing to ratify.

7. However, an action may be ultra vires the directors only, and if so it may be ratified by the members in General Meeting.

8. As a corollary to Lord Katherley's opinion, it can be said that the objects of company A cannot be used to validate the ultra vires actions of company B, even though the directors and members are the same in both companies.

9. The purpose of the ultra vires rule is to protect two classes of people: first, shareholders, both present and future, in that they may know the objects in which their money is to be used, and secondly, creditors in that the company’s funds, to which they must ultimately look for payment, are not being dissipated on unauthorised activities.

In the Ashbury case the House of Lords developed the doctrine of ultra vires as it applied to companies, and in doing so followed a course which bypassed the previous law applicable to joint stock companies and
even went further than the existing law with regard to bodies incorporated by statute. But the House of Lords later followed the earlier ruling in the *Ashbury* case and applied it to statutory corporations. In *Attorney-General v. Great Eastern Railway Co.* (22) the question was whether the *ultra vires* doctrine, as applied in the *Ashbury* case, was to be followed with regard to the respondent company, which was formed by an Act of Parliament. The House held that the doctrine was to be applied in like manner to statutory corporations, although it must be applied reasonably so that whatever is fairly incidental to those things which the Legislature has authorised by Act of Parliament ought not (unless expressly prohibited) be held to be *ultra vires*. Lord Selborne L.G. said:

"I assume that your Lordships will not now recede from anything that was determined in the *Ashbury* case. It appears to me important that the doctrine of *ultra vires*, as it was explained in that case, should be maintained. But I agree that this doctrine ought to be reasonably, and not unreasonably applied, and whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised, ought not

(22) (1880) 9 App. Cas. 473.
(unless expressly prohibited) to be held, by judicial construction, to be ultra vires."

Lord Blackburn, although he agreed with this opinion, did tend to put limitations upon it. He said: "I take it that this House has no more right than any other tribunal to depart from the principle of the decisions which have already been arrived at; more particularly I refer to the last case of Ashbury Railway Co. v. Rich. That case appears to me to decide at all events this, that where there is an Act of Parliament creating a corporation for a particular purpose, what it does not expressly or impliedly authorise is to be taken to be prohibited; and consequently, that the Great Eastern Company, created by Act of Parliament for the purpose of working a line of railway, is prohibited from doing anything that would not be within that purpose."

Lord Watson also applied the ultra vires doctrine as applied in the Ashbury case to statutory corporations when he said: "I cannot doubt that the principle by which this House, in the Ashbury case, tested the power of a joint stock company registered (with limited liability) under the Companies Act 1862, applies with equal force to the case of a railway company incorporated by Act of Parliament. That principle in its application to
the present case appears to me to be this, that when a railway company has been created for public purposes, the Legislature must be held to have prohibited every act of the company which its incorporating statutes do not warrant either expressly or by fair implication."

One further illustration is given to show how the House of Lords five years later affirmed that the Ashbury decision was also applicable to statutory corporations. In Baroness Denlock v. River Dee Co. (23) the point in issue was whether a statutory corporation had power to borrow under its statute. Lord Blackburn said:

"I think the law laid down (in the Ashbury case) applies to all companies created by any statute for a particular purpose. I think that if I were to confine the effect of the decision to companies created under the Act of 1862, and to say it did not extend to a corporation such as this, I should do wrong.... I think that the Ashbury case is a binding authority to the extent indicated in Attorney-General v. Great Eastern Railway Co." (22)

These two cases have been quoted at length to show three things. First, being later cases of the highest authority, they indicate the width and extent to which the ratio decidendi of the Ashbury case was followed in

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(23) (1885) 10 App. Cas. 354.
subsequent cases. No attempt was made to narrow it, but
indeed it was confirmed and extended by these later cases.
Secondly, the later cases show the strength of the Ashbury
decision in that it was fully confirmed, and even extended,
by the House of Lords five and ten years respectively after
it was decided. It thus became firmly established as a main
principle of company law. Thirdly, the law regarding
statutory corporations was brought into line with companies
incorporated under the Act of 1862 insofar as the doctrine
of ultra vires was concerned. Certainly there was a con-
tinuity of Judges in the three cases - Lord Selborne gave an
opinion in the Ashbury case and again in the Great Eastern
Railway case; Lord Watson gave an opinion in both the Great
Eastern Railway case and the River Dee case, as also did
Lord Blackburn. But the fact that in both these last two
cases the opinions were the same indicates a solidarity of
conviction, especially when it is realised that Blackburn J.
(as he then was) had given a judgment which did not accord
with the Lords' view when Rich v. Ashbury Railway Co. was
before the Exchequer Chamber (11). Thus, because of the
case of the Great Eastern Railway and the River Dee case,
corporations were now divided into two groups as far as the
ultra vires doctrine was concerned; on the one hand companies
under the 1862 Act and statutory corporations now followed
the rules as laid down in the Ashbury case. (24), while

(24) The Ashbury and Great Eastern Railway cases again
received approval from Lord Balfour in London County
chartered corporations formed an anomalous exception. The position of chartered corporations will be discussed in a later chapter.

It is submitted that at the point to which the rule has been discussed, ultra vires in relation to company law was at its zenith. The purpose of the rule was to protect investors and creditors of the company, and no attempt of a serious nature had been made to evade its effects. The notion behind the doctrine was uncomplicated: a company conferred limited liability upon its members and company was a creature of Parliament. Before a company could be incorporated, the Act stated that the objects for which the company was to be formed must be set out in the memorandum. The form of memorandum given in the Act indicated that the objects clause should be very brief. Once the company was incorporated it was unable to deviate from these stated objects, for if it did so the purported action would be ultra vires and void. Incidental powers which would be required by the company while engaged in carrying out its main object would be supplied from the articles or from Table B or from the general law.

However, in the words of Professor Gower (25) it can hardly be doubted that the rule was salutary in its intentions and perhaps to some extent in its operation.

(25) Modern Company Law 2nd Ed. P.82.
Certainly it had been brought into being to cure some of the ills which beset companies at the time, such as trafficking in company registrations. It is clear from the cases, moreover, that all the judges at the time did not fully understand its true meaning nor its exact ramifications. For example, in Trevor v. Whitworth (26) it was said to be ultra vires for a company to purchase its own shares (which amounted to an illegal reduction in capital) even though the company was empowered by its memorandum of association to do so. Clearly, the judges were mixing the notion of ultra vires with illegality, which was quite an unwarranted and incorrect extension of the rule, and one which may be disregarded. Gower's statement is further strengthened when it is remembered that the ultra vires rule can be the means of causing hardship just as great as it is designed to prevent.

For example, in Baroness Penlock v. River Dee Co. (23) the purity of the ultra vires rule would offer little spiritual or pecuniary consolation to the plaintiff who was endeavouring to recover £73,000 from the respondent company, when it was later learned that it was ultra vires for the company to borrow and the plaintiff must therefore suffer for the benefit of other creditors. Another disadvantage of the rule experienced at this time was the

(26) (1877) 12 App. Cas. 409.
impossibility of a company extending its objects, even though all the directors, shareholders and creditors agreed. It was because of the lack of flexibility, as well as the other hardships which the rule brought, that ways were devised to evade its rigours.
IV. AVOIDANCE OF THE ULTRA VIRE Rule

Companies Acts from the beginning have always indicated a concise objects clause in the memorandum. Indeed, Table II of the Companies Act 1955 discusses the objects clause in a little over four lines. The intention was for the objects to be set out in general terms and for the incidental powers to be implied by the general law, unless expressly mentioned in the articles. Part of the opinion of Lord Selborne L.C. in Attorney-General v. Great Eastern Railway (22) has already been quoted, and this shows that the Courts were prepared to approach the ultra vires rule as laid down in the Ashley (16) case in a liberal spirit so that whatever could be regarded as reasonably incidental to the main object would be intra vires. Moreover this interpretation did not only apply to companies incorporated by Act of Parliament; it was extended to companies incorporated under the Companies Act by later cases (27). The Courts have followed this trend and there are many cases which illustrate what may and what may not be implied from a certain memorandum. Many of these cases have been set out in Palmer (28), but it is not proposed to classify


then as each case decides the question on its own facts only, and sets no precedent.

The desirability of only including in the objects clause of the memorandum the object for which the company is formed is clear enough in principle, but in practice difficulties arise. There is first the wish to cover future expansion into fields of business quite different from those first envisaged. This leads to numerous phrases in the objects clauses, each of which would be sufficient for a main object in itself. Another difficulty is that although the primary object for which the company is formed is quite clear, doubts could arise at a later date as to the methods which the company is entitled to adopt to carry out the main object. For instance, is an omnibus company, which operates over long routes, entitled to set up accommodation houses along its routes for the benefit of its travellers, and are non-travellers entitled to stay there? If the memorandum of the company merely stated that the objects of the company are "to own, operate and manage an omnibus service in New Zealand", the directors of the company would have no way of being sure that their accommodation houses are intrinsically the company unless they presented an originating summons to the Court. Again, it might be wondered if the company has power to borrow money to carry out its objects. Company directors are naturally unwilling to leave such
matters to implication today, even under a much more complete Act (29), and it is hardly surprising that the objects clause under the old acts became very lengthy and included every possible object or power which the company could ever require. It scarcely needs mentioning that this practice was encouraged by the prohibition against altering memorandum. As a result the protection to creditors and shareholders which the ultra vires doctrine sought to establish was being nullified, for there was little likelihood of any object being ultra vires while memorandum contained so many provisions and thus shareholders and creditors derived little protection. The Courts tried to stop this avoidance of the rule by two methods: first by their method of construing the memorandum and secondly by granting an order for the winding-up of the company when the substratum had gone.

1. Ejusdem Generis Construction of Objects.

Where the objects of a company are set out in paragraphs in the memorandum, the true construction under the ejusdem generis rule is to find the paragraph or paragraphs which seem to embody the dominant object

(29) The position under the 1955 Act appears to be somewhat anomalous: Table B contains no powers whatsoever in the objects clause and yet Section 18 (1) refers to “objects or powers” in the memorandum in several places and permits the inclusion of powers in the objects clause.
of the company, and to treat all other paragraphs, however generally expressed, as merely ancillary to this main or dominant object and accordingly limited by it.

Several cases illustrate and explain this rule. In *Re Hawan Gold Mining Co.* (30) the company was established for working a gold mine in New Zealand and it turned out that it had no title to the mine and there was little likelihood of its getting title. The Court made an order for the company to be wound up although there were general words in the memorandum which enabled the company to purchase and work other mines in New Zealand and although a large majority of the shareholders wished the company to continue. The basis of the reasoning in the judgments is that the company was formed with the main object of mining in a certain place. The right to mine elsewhere in New Zealand was only ancillary to the former object and therefore when the company could not get title to the land in question, the substratum of the company had gone.

In *Re German Date Company* (31) the memorandum of the company stated that it was formed for working a German patent which had been or would be granted for

(30) (1882) 20 Ch. D. 151.
(31) (1882) 20 Ch. D. 169.
for manufacturing coffee from dates, and also for obtaining other patents for improvements and extensions to the patent. It was also provided that the company could acquire or purchase any other inventions for similar purposes, import and export all types of produce for the purpose of food, and acquire or lease buildings either in connection with the above purpose or for the purposes of the company. The German patent was never granted but the company bought a Swedish patent and set up works in Hamburg where it made coffee from dates without a patent. Some shareholders withdrew, but the majority of those who remained wanted the company to continue. The company was solvent. It was held that as the substratum of the company had gone, it was just and equitable for it to be wound up.

All the Judges in the case analyzed the memorandum paragraph by paragraph. Jessel M.R., having read the first two objects in the memorandum, angrily observed:

"The memorandum is tautologous, an observation which need not be confined to this memorandum - it is very common as regards all memoranda of association."

Baggally L.J. said at p. 187:

"No doubt in this case, as in many other cases, you have a variety of general words added, which, if they are to be construed by themselves,
would give powers to carry on almost any possible business which could be suggested. These must be taken within certain limits, and these limits are, that they must be regarded as ancillary to the purpose of the scheme for which the company was formed."

Lindley L.J. said at p. 188:

"The first question we have to consider is: what is the fair construction of the memorandum of association. It is required by the Act of 1862 to state what the objects of the company are. In construing this memorandum of association, or any other memorandum in which there are general words, care must be taken to construe those general words so as not to make them a trap for unwary people. General words construed literally may mean anything; but they must be taken in connection with what are shown by the context to be the dominant or main objects. It will not do under general words to turn a company for manufacturing one thing into a company for importing something else, however general the words are."

In these two cases the *a nosum generis* rule of construction was used for the first time since the *Ashbury* case (18) to interpret the main objects of a company. This method of construing memoranda was
approved by later cases, for example *Re Crown Bank* (32), *Re Amalgamated Syndicate* (33), *Re Coolgardie Consolidated Gold Mines* (34) and *Stephens v. Myorea Reefs (Kangundy)* Mining Co. (35). In the last case Swinney Bdy. J. again set out the rule:

"In my opinion, the right way to construe the memorandum of association is to take the first paragraph of clause 3, as stating the principal or primary object for which the company is formed. Then the remaining paragraphs of clause 3 must be read as conferring on the company full and ample powers for carrying out that main object. It is my right to give a liberal construction to these subsidiary paragraphs to enable the main object of the company to be carried out. But it is not right to accept a construction which would virtually enable the company to carry on any business or undertaking of any kind whatever. I think I am precluded from so wide a construction, not only by the general principles of construction, but by the several authorities cited by counsel for the plaintiff, and particularly by Lindley L.J.'s

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(32) 1890 Ch. B. 634.
(33) 1897 Ch. 600.
(34) 1897 L.T. 269.
(35) 1902 Ch. 745.
Judgment in the case of Re German Date Coffee Co.

It is submitted that this is a correct statement of the ejusdem generis rule of construction of memoranda although the ratio decidentis, as will be seen later, is no longer good law. In this case the promoters of the company had included in the memorandum a declaration to the effect that "the objects specified in each paragraph of this clause shall in no wise be limited or restricted by reference to or influence from the terms of any other paragraph or the name of the company". This was clearly an attempt to evade the ejusdem generis rule of construction and also to avoid the effect of Re Crown Bank (32) by which the name of a company becomes material in interpreting the objects. However, Swinfen Redy J. was not prepared to give the intended meaning to this clause. Speaking of it, he said (36):

"But it is said I must take paragraph 25 (which contains the words above) into special consideration. It is said that this paragraph was not present in the cases which were cited, and it is sufficient to make the object contained in each paragraph a separate and independent object of the company. I do not so read the memorandum, nor do I think that is the proper effect of paragraph 25. The paragraph, in fact,
cannot have any such meaning. Paragraph 17, for instance, is as follows: 'To procure the company to be registered or recognised in any part of the world.' It would be obvious nonsense to read this alone, as an independent object, because of paragraph 25. It is quite true that a company is not necessarily confined to one object. It may have two or more definite different objects. But unless all these different objects are set forth with reasonable clearness in the memorandum of association, then Section 8 of the Companies Act 1862 has not been complied with. A mere stringing together of a large number of very wide powers does not satisfy that section."

Much can be said in favour of the view the Judge took of the problem before him. He made an attempt to control the width of the objects clause and to uphold the ultra vires rule. As he so correctly said, it is nonsense to place a minor power (which may never be used by the company) in such a position that it may be treated as an independent object. Further, in present day terms, it is difficult to see how this decision could have been otherwise, for Section 25 of the Companies Act 1955 provides for the memorandum of a company to be in accordance with the form set out in the Third Schedule of the Act, or as near thereto as circumstances admit. It has already been
mentioned that Table B of the Third Schedule, which sets out the form of memorandum for a company limited by shares, disposes of the objects clause in four lines and a half. This argument is considerably strengthened when it is realised that Section 8 of the Companies Act 1862, to which Swinfen Bady J. referred, did not contain any directive for the form of the memorandum to follow the form in the Schedule to the Act. In fact, it is difficult to see how modern companies, with their thirty or forty paragraph objects clauses, are complying with Section 25 of the 1955 Act. This problem will be discussed in more detail later.

The same question came before the Courts fourteen years later in the case of In re Anglo Cuban Oil Co. Ltd. (37). Clause 3 of the memorandum contained the following declaration at the end of the objects clause:

"The objects set forth in any sub-clause of this clause shall not, except where the context expressly so requires, be in any wise limited or restricted by reference to or inference from the terms of any other sub-clause, or by the name of the company. None of such sub-clauses, or the objects therein specified, or the powers thereby conferred, shall be deemed subsidiary or auxiliary

(37) [1917] 1 Ch. 477.
merely to the objects mentioned in the first sub-clause of this clause, but the company shall have full power to exercise all or any of the powers conferred by any part of this clause in any part of the world, and notwithstanding that the business, undertaking, property, or acts proposed to be transacted, acquired, dealt with or performed do not fall within the objects of the first sub-clause of this clause."

Sewell J., at first instance, gave full effect to this declaration and held that he could not treat the sub-clauses as being merely subsidiary to the objects of the first sub-clause.

On appeal to the Court of Appeal, counsel for the appellant Essequibo Company Liquidator again referred the Court to Re German Daily Coffee Co. (31), Re Haven Gold Mining Co. (32), and Stephens v. Nyasore Reefs (Kangandry) Mining Co. (33), but the Court remained unimpressed with these authorities, especially the last-mentioned case. Warrington L.J. observed during counsel's submissions that in the Nyasore Reefs case (33) the judgment depended on the construction of a clause "which we have not got here". It is submitted that the effect of the clauses in each of the cases would have been identical, and the two cases should have been decided the same way.
Lord Justice Hardy, M.P., after reviewing the memorandum and declaration, said:

"This is an attempt - it may be the first time such a case has come before the Court - to get rid of the substratum rules and to say that each one of these objects shall be held to be an independent object and not to be tied up with or merely ancillary to the object of acquiring the licences... The question whether the substratum has gone is altogether a different one from the question whether the particular act in this case is ultra vires. That being so, unless we are to say that the whole of the declaration at the end of clause 3 is to be struck out, it seems to me that the view taken by Neville J. was correct. There is no doubt upon the construction. It is not a case in which, the matter being in doubt, we should take one view rather than the other. The words are too clear to admit anything of that kind."

Warrington L.J. took the matter a little further when he inquired whether a company with a memorandum in this form complied with the Act. He said that the Registrar was not bound to register a company if the form of the memorandum did not comply with the Act. He would not decide in this case whether the memorandum complied with the Act, but he expressed the "hope" that
the Registrar may in some such case as this refuse to register a company with such a memorandum. It is submitted that Parliament was expecting much from the Registrars at that time when they had to act in a quasi-judicial capacity and decide whether or not a company had complied with the Act, especially when the drawing of lengthy objects clauses had become a firm business practice. The difficulty which faced the Court was the provision in the Act which made the certificate of incorporation conclusive of the company’s existence and of the contents of the documents of the company, and thus prevented the Court from reviewing the memorandum, for example, at a later date. A better solution would have been to have given the Registrar power to refuse registration if he considered the proposed company did not comply with the Act, but, once the company was registered, to regard the certificate of incorporation as evidence of the company’s existence only, but not as evidence that all the powers or objects in the memorandum complied with the Act when the same were reviewed by the Court. In this way the very existence of the company could not have been challenged, but the Court could have reviewed the Registrar’s decision as to whether the documents complied with the Act. If the Court had had such power at the time, it is submitted, in the light of the quotations from the House of Lords
about to be given, that the decision would not have been
the way it was.

On appeal to the House of Lords sub nom. Cotman v.
Brougham (38) the decisions of Neville J. and of the Court
of Appeal were affirmed. It can be said, however, that
contrary to the Judges in the Court of Appeal, the Lords
seemed to feel that their opinion was against their better
judgment and they wished they could decide the case
otherwise. They were precluded from doing so, however, by
the fact that production of the certificate of incorporation
was conclusive evidence of the company's compliance with the
Act on Foundation.

Lord Brougham said:

"There has grown up a pernicious practice of
registering memoranda of association which, under
the clauses relating to objects, contain paragraph
after paragraph not specifying or delimiting the
proposed trade or purpose, but confusing power with
purpose, and indicating every class of act which the
corporation is to have power to do. The practice is
not one of recent growth. It was in active operation
when I was a junior at the bar. After a vain struggle
I had to yield to it, contrary to my better convic-
tions. It has arrived now at a point at which the
fact is that the function of the memorandum is taken

(38) [1918] A.C. 514.
to be, not to specify, not to disclose, but to bury beneath a mass of words the real object or objects of the company with the intent that every conceivable form of activity shall be found included somewhere within its terms. The present is the very worst case of the kind that I have seen. Such a memorandum is not, I think, within compliance with the Act... Before registering a memorandum of association the Registrar ought to consider whether the requirements of the Act have been complied with and to refuse registration if he conceives that they have not, bearing in mind that if he does not take that course he may put the Court into the position in which Your Lordships find yourselves in the present case - a position in which you must assume that all requirements in respect of matters precedent and incidental to registration have been complied with and confine yourselves to the construction of the document. I shall take care that the Committee which is now sitting looks into this question and considers whether amendment is desirable both to strengthen the requirements as to definition of objects and to control in some proper way the finality of the Registrar's certificate.

Lord Parker's opinion contained a sympathetic understanding of the problem which to some extent provided a reason but not a justification for what Lord Wrenbury
criticised. Lord Parker said:

"The question whether or not a transaction is ultra vires is a question of law between the company and a third party. The truth is that the statement of a company's objects in its memorandum is intended to serve a double purpose. In the first place it gives protection to subscribers, who learn from it the purposes to which their money can be applied. In the second place it gives protection to persons who deal with the company and who can infer from it the extent of the company's powers. The narrower the objects expressed in the memorandum the less is the subscriber's risk, but the wider such objects the greater is the security of those who transact business with the company. Moreover experience soon showed that persons who transact business with companies do not like having to depend on inference when the validity of a proposed transaction is in question. Even a power to borrow money could not always be safely inferred, much less such a power as that of underwriting shares in another company. Thus arose the practice of specifying powers as objects, a practice rendered possible by the fact that there is no statutory limit on the number of objects which may be specified. But even thus, a person proposing to deal with a company
could not be absolutely safe, for powers specified as objects might be read as ancillary to and exercisable only for the purpose of attaining what might be held to be the company's main or paramount object, and on this construction no one could be quite certain whether the Court would not hold any proposed transaction to be *ultra vires*. At any rate all the surrounding circumstances would require investigation. Fresh clauses were framed to meet this difficulty, and the result is the modern memorandum of association with its multifarious list of objects and powers specified as objects and its clauses designed to prevent any specified object being read as ancillary to some other object. For the purpose of determining whether a company's substratum be gone, it may be necessary to distinguish between a power and an object and to determine what is the main or paramount object of the company, but I do not think this is necessary where a transaction is impeached as *ultra vires*. A person who deals with a company is entitled to assume that a company can do everything which it is expressly authorised to do by its memorandum of association, and need not investigate the equities between the company and its shareholders."
Lord Parker concluded his opinion by following \textit{Re Crown Bank} (32) and said that a company's name, even though susceptible to change, is material in determining the objects of a company.

Although it was never expressly overruled by \textit{Gelman v. Brougham} (33), it is quite clear that the case of \textit{Stephens v. Knope Reefs} (35) was now no longer good law. This point will be discussed again shortly.

The portion of Lord Parker's opinion quoted above shows considerable understanding of the difficulties which confront company promoters, and the reasons which gradually brought about the increase in length of objects clauses, and contrasts very strongly with Lord Wrenbury's intolerance of the situation. Lord Parker's implied suggestion that the number of objects in the memorandum be limited carries considerable merit, but of course the difficulty is to find a number of objects which will be satisfactory to all companies both large and small. But the difficulties which faced company promoters did not justify them specifying powers as objects, nor, for that matter, expressly negating the \textit{ajus de generis} rule of construction in an effort to prevent these inflated powers being read as ancillary to the purposes of the company.

It is submitted that promoters went too far in their effort to achieve safety, and even when all their difficulties are considered in the light of Lord Parker's opinion, there is
no legal or practical justification for their practice, apart from the inconvenience the ultra vires rule caused then and the technical inability of the Court to examine the company to see if the Act was complied with. If the certificate of incorporation was conclusive of the company's existence only and if the Court then had power to see if all the requirements of the Act had been complied with, it seems clear that, in the House of Lords at least, the decision in *Cotman v. Brougham* would not have been as it was. It is indeed a pity that the Committee referred to by Lord Frensham did not take heed of his suggestion and either give the Court power to examine the company at any later time to see that its memorandum complied with the Act without disturbing the existing conclusiveness of the certificate of incorporation in respect of the company's due incorporation, or else give the Registrar greater authority of a positive nature to refuse registration if it seemed necessary to retain the existing rule as to the certificate being conclusive not only as to incorporation but also as to due compliance with the Act. Contrary to Lord Frensham's hope, there was no change in the legislation, and the *Cotman v. Brougham* (39) clause, with the unwilling blessing of the House of Lords, became a standard addition to all memoranda. Thus, the

(39) The phrase "*Cotman v. Brougham clause*" will be used henceforth to denote a sub-clause in the objects clause similar in type to the last sub-clause in the objects clause of *Cotman v. Brougham*. 
effectiveness of the *ultra vires* rule was seriously undermined because of the lack of an effective sanction against abuses of the procedure. Henceforth, only the disadvantages of the rule clung to it, for example, the difficulty of changing the objects clause or the pitfalls open to unscrupulous parties or the general difficulty of understanding lengthy memoranda; but the anticipated advantages, the protection of investors and creditors, was diminished to such an extent that it was almost gone.

The most recent case on the ramifications of the *Cotman v. Brougham* clause to come before the New Zealand Courts was *Christchurch City Corporation v. Flamingo Coffee Lounge Ltd.* (40). The defendant company was formed in 1951 under the name of "B. Allen (Textiles) Ltd." and the first three sub-clauses of its objects clause empowered it to carry on as drapers, clothiers and the like. Sub-clause 13 empowered it, inter alia, to acquire any privilege or concession from any government or municipal authority. Sub-clause 36 was almost identical with the declaration in *Cotman v. Brougham* and raised powers to objects and negatived the presumption for them to be construed *ejusdem generis* with the purposes of the company. In February 1958 the name of the company was changed to "Flamingo Coffee Lounge Ltd." and it began to engage in the business of running a restaurant and coffee

lounge. No other alteration was made to the memorandum.
In 1952 the company tendered for the right to operate a
coffee lounge at the Christchurch Airport, which was
controlled by the plaintiff corporation, and after the
tender was accepted, the Council became doubtful as to
whether the defendant company had power under its
memorandum to enter into the contract with it.
Proceedings were taken to determine this question.

It might be said at this stage that this case
shows effectively that the name of a company is of very
little importance, in determining its objects, contrary
to Re Crown Bank (32) and dicta in Cotson v. Brougham (38).
It is submitted that even if the name of the company had
not been changed, the result would have been the same, and
further that as the name of a company can be changed so
easily, it is a fact of minute importance when construing
the memorandum.

To return to the Flamingo case, Reggett J. agreed
with submissions by counsel for the defendant company and
confirmed that sub-clause 36 raised a power to the level
of a main object, notwithstanding the general terror of
the first few subclauses. Accordingly, subclause 13 became
an object, thus making it inter virens for the company to
enter into the contract with the Council. Subclause 13
contained the words "or may seem to this company conducive
to any of the objects of this company" with reference to
the right to enter contracts; Haggitt J. accepted the submission of counsel for the defendant company and held that the word "or", because of subclause 36, must be read as disjunctive and therefore not influenced by the first two or three subclauses of the objects clause.

Haggitt J. commented on the effect of the Coton
V. Brougham clause as follows:

"It may well seem startling that a company which was founded to carry on business as a draper and textile importer, and the main specific objects in whose memorandum of association relate solely to such a type of business, can lawfully, in reliance on what would be in most cases an ancillary object, embark on a wholly different type of business. However, the only question which the Court has power to determine in these proceedings is the true construction of the memorandum of association, and, in my opinion, on the clear wording of subclause 13, standing by itself, the company has power to engage in the new type of undertaking. It is not without interest to note how the trend of more modern authority has been to accept as proper what was severely criticised, though held to be lawful, in Coton v. Brougham. The only criticism, in recent times, of what may be a Coton v. Brougham object is that by Waley J. in Re E.K. Cole Ltd. (1)"

(1) [1945] 1 All E.R. 521n.
but, so far as I can see, in all other cases dealing with the matter since Cotman v. Broughan was decided, the Courts have accepted without demur the very extended powers afforded to an incorporated company through the inclusion in its memorandum of such an object. Indeed, as is pointed out in Gower's 'Modern Company Law' 2nd Ed. 85, 86, as a result of the practice that has grown up of including in memoranda of association a multiform list of objects and powers concluding with a provision similar to subclause 36, the whole object of the ultra vires doctrine has been largely frustrated and there seems to be no remedy for a third party who has given credit to a gold mining company and sees it wasting its assets on fried fish shops, provided these are covered by a paragraph in the memorandum."

It must be conceded that this decision is a correct one based on the existing law. Haggitt J. was precluded from not following Cotman v. Broughan (38) because of the case of Daysh v. Automobile Association (Wellington) Inc. (42), where the New Zealand Court of Appeal upheld the effect of the Cotman v. Broughan clause. However, even if the matter had not previously come before the New Zealand courts, it seems clear that Haggitt J. would have faced the same problem as the Lords faced in Cotman v. Broughan (38).
that of being forced to regard the certificate of incorporation as conclusive that all the requirements of the Act have been satisfied — and thus unable to deny validity to subclause 36 (h3). Nevertheless, it seems wrong that an action by a company, which would give a shareholder the right to petition for its winding up on the ground that the substratum has gone, may be held to be intra vires because of the inclusion of a Seton v. Broughton clause. This question will be considered later.

One further point in connection with the Flamingo case (h6) which is not apparent in the judgment has been discussed by H.R. Gray in the Modern Law Review (h4).

Although Haggitt J. declared that the contract to operate the restaurant at the Christchurch Airport was intra vires the company, it was realised that the coffee shop which the company had formerly and continued to carry on in Hereford Street, Christchurch, was prima facie ultra vires. As to this problem, subclause 35 of the objects clause provided

"To do all such other things as in the opinion of the company may be incidental or conducive to the attainment of any of the foregoing objects or the exercise of any of the foregoing powers."

As the Hereford Street shop could be described as

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(h3) Companies Act 1955 Section 29 (1).
(h4) 23 M.L.R. 561.
conducive to the attainment of the object under subclause 13, the running of the Hereford Street shop was also intra vires. That such argument from the negative to the positive should be valid shows how ludicrous the ultra vires doctrine has become. The most recent case on the application of the Cotter v. Brougham clause was Anglo Overseas Agencies Ltd. v. Green (45). The facts in the case were that the plaintiff had sued the defendant for conspiracy and breach of a contract to obtain a lease of a property for development purposes. The defendant denied the breach and raised the defence that the plaintiff had no power under its memorandum to enter into a contract for the development of property. The first two subclauses of the memorandum made it plain that the company’s main object was to act as importer and exporter, but the third subclause, if read alone, would have been wide enough to include this object. The last subclause was a Cotter v. Brougham clause, and the company relied on it to make subclause 3 an independent object to be read without reference to the first two objects, thus negating the ejusdem generis rule and making the contract intra vires. The defendant relied, one wonders with how much good faith, on Stephens v. Moore Beefe (Zanzibar) Mining Co. (35) as

(45) [1960] 3 All E.R. 264.
authority for the proposition that the last subclause (which was almost identical with that in Cotman v. Brougham) did not negative the ejusdem generis rule of construction, and submitted that the third subclause was merely ancillary to the first two subclauses. Salmon J. refused to follow Stephens v. Eyre & Reaf (35) and said that the effect of the words in the last subclause of the objects clause in that case, in Cotman v. Brougham and in the case before him were the same. As the House of Lords had upheld such a subclause, he did the same and held the ejusdem generis rule did not apply and the contract was therefore intra vires.

One further point which is of interest to note is that the Court has never been willing to extend the use of any general concluding clause, such as was used in Cotman v. Brougham, when it has had the opportunity not to do so. For example, in Mc Spieus & Pond Ltd. (46) the company was incorporated in 1882 to carry on business as refreshment contractors, provisions dealers, licensed victuallers and the like. It was sought to add a provision to enable the company "to carry on general stores and to contract for the execution of work and the rendering of services of all kinds", and a resolution to that effect was passed by an Extraordinary General Meeting. When the Court was

(46) (1895) 40 Sol. Jo. 32.
approached to sanction the addition, North J. said the words to be added seemed too wide, and directed that the words "and incidental thereto" be included.

Vaisey J. in Re E.K. Cole Ltd. (41) indicated that he would not be prepared to include a general concluding clause, similar to the one used in Cotman v. Brougham, in the altered memorandum which came before him for approval. It is regrettable that the reasons for his decision were not given in the report.

A similar unwillingness to add clauses greatly extending the objects was also shown in Re Patent Coke Co. (47) and Re John Brown & Co. (47) and Re Theodore Iron Co. (48).

2. Winding-up on Loss of Substratum.

The second method by which the Court is empowered to compel a company to adhere to the objects as set forth in the memorandum is to order the company to be wound up if its substratum has gone. This ground for winding-up will not be fully discussed here, as it is outside the scope of the present dissertation, except insofar as it shows that the Court is prepared to compel the company to adhere to its principle undertaking.

(47) [1923] 2 Ch. 222.
(48) [191b] 31 L.J. Ch. 245.
The statutory authority for the winding-up on this ground first appeared in the Joint Stock Companies Winding-up Act 1848, Section 5(3) of which provided "If any other matter or thing shall be shown which in the opinion of the Court shall render it just and equitable that the Company should be dissolved" then the Court should wind up the company. This provision was re-enacted in the Companies Act 1862 Section 79 (5).

This method of control by the Courts is subject to some severe limitations. First, even though the whole of the substratum has gone, this will not necessarily make actions of the company ultra vires provided the memorandum contains a Cotman v. Brougham clause and provided it is engaged in some business which is authorised under a power in the memorandum. In other words, an action may be intra vires the company on a strict construction of the memorandum and yet the substratum of the company may have gone. Lord Parker, in his opinion in Cotman v. Brougham, made this quite clear when he pointed out that in petitioning for a winding up it might be necessary to distinguish between a power and an object, even though a "Cotman v. Brougham" clause is included in the memorandum. Secondly, the exercise of this control by the Courts is dependant upon a member or a creditor bringing a petition, and if one is not brought,
there is no control. This was clearly seen in the
Flaminco case (i.e.), where it is fair to assume that the
substratum of the company had gone, and yet because no
member petitioned for a winding-up on this ground, the
activities of the company were intra vires on the
construction of the memorandum and the company was thus
safe from impeachment by the Court. Thirdly, the winding-
up of a company is only available if all the main objects
have failed so that the whole of the substratum has gone.
If a company has any principal objects and only one
fails, the Court will not order a winding up. It will be
seen later how difficult it is for the Court to decide
whether the substratum has gone when all the objects and
powers are main objects because of a Cattan v. Brougham
clause.

The facts in Re Haven Gold Mining Co. (30) and Re
German Date Coffee Co. (31) have already been discussed
earlier in this chapter. In both cases, the Court held
that the substratum, in the former case being the working
of a certain mine in New Zealand and in the latter the
acquiring of a German patent to make coffee from dates,
having gone, the companies should be wound up. The fact
that in each case the majority of members wished to
continue with the companies did not influence the Court
at all. This brings to mind the words of Jenkins J,
some sixty-five years later when he said in Re Eastern
"If a shareholder has invested his money in the shares of the company on the footing that it is going to carry on some particular object, he cannot be forced against his will by the votes of his fellow shareholders to continue to adventure his money on some quite different project or speculation."

In Re German Date Coffee Co. (31), Kay J. described the discretion of the Court to wind up the company thus:

"I take the line to be drawn to be this, that where on the face of the memorandum you see there is a distinct purpose which is the foundation of the company, then, although the memorandum may contain other general words which include the doing of other objects, those general words must be read as being ancillary to that which the memorandum shows to be the main purpose, and if the main purpose fails and fails altogether... then the substratum of association fails."

Clearly this was another way of saying that a company must adhere to its principal object for its acts to be intra vires, and to determine what was the company's principal object the adjudica generalis rule of construction.
was applied. Although the approach to the two problems is quite different, before the *Catman v. Brougham* clause was recognised there were very few times, if any, that the activity of the company was not *ultra vires* when grounds for winding up on failure of substratum existed. Indeed, the dicta of North J. in *He Groom Bank* (32) could be applied to either problem, and he raises an interesting point when he says:

"if what they are doing is *ultra vires*, there is a well-known remedy open to parties... and (that is) to apply to the Court to restrain the doing of what is beyond their powers, (instead of) a winding up petition."

However the Judge was able to envisage a case where the action could be *intra vires* but the company precluded from doing it because of some change in the law or the like. In such a case a winding-up petition could be presented, in spite of the fact that the activities of the company were *intra vires*. Moreover, since the *Catman v. Brougham* clause was recognised, cases have arisen where a power, raised to the level of a main object by the clause, in being primarily engaged in by the company to the exclusion of the object for which the company was formed, as for example was the position in the *Flamingo* case (40). In such circumstances impeachment under the *ultra vires* rule by way of injunction is
impossible; the only remedy for a member to take is to wind up the company. However, as Vaughan-Williams J. pointed out in Re Amalgamated Syndicate (33), the mere fact that the company is performing an ultra vires action will not, in any event, give the Court the right to wind up the company. There must also be a total failure of the principal object for which the company was formed. If this is not the case, then the proper remedy is to bring an action for injunction against the company to restrain it from the ultra vires action.

In Re Kitson & Co. Ltd. (50) the company was formed for the dual purpose of taking over an existing business, and carrying on as engineers. When the business was sold but the company intended to carry on as engineers the Court refused a petition as it held the substratum had not gone. The Court further held that the intention of the directors at any given moment to divert from the principal object is not material because the board is not the company. Lord Greene E.R. distinguished the German Date Coffee case (31) on the grounds that in that case the Court treated the German patent as a defined subject matter and as the company failed to acquire that patent, the substratum was gone. In the present case, however, the subject matter was carrying on a type of

(50) [1946] 1 All E.R. 435.
business and so long as the company carried on that type of business it was impossible to say that the substratum had gone.

Following *Re Hitson & Co. Ltd.* (50), *Re Taldus Rubber Co. Ltd.* (51) held that where a company was formed for the object of working a certain rubber plantation but whose memorandum contained certain other very wide objects plus a *Gosman v. Brougham* clause, the substratum of the company had not gone if it sold the rubber plantation and engaged in other business in pursuance of one of its other objects in the memorandum.

In *Re Eastern Telegraph Co.* (49) Jenkins J. observed that

"The cases to which I have referred do nothing more than enunciate the well settled principles that it is in general just and equitable that a company should be wound up where its substratum is shown to have gone, and that the question whether the substratum of a company has gone or not is one which depends, or may depend, on the construction of the memorandum of association."

It is difficult to see why Jenkins J. included the words "or may depend". The construction of the objects in the memorandum always must be considered in a

(51) [1946] 2 All E.R. 763.
petition for winding up on these grounds.

As J.F. Northey (52) said, the cases of Re Kitson & Co. Ltd., Re Eastern Telegraph Co. Ltd., and Re Dalfun Rubber Co. Ltd. show how difficult it is for the Courts to decide that the substratum has gone when all the objects are declared to be primary objects. The approach to the two problems, because all the objects are declared to be primary objects, must always be distinct. In fact, as Dr. Northey pointed out, the absence of a Colman v. Brougham clause in the case of North of England Zoological Society v. Chester Rural District Council (53) enabled the Court to decide that the main objects were charitable.

The winding up of a company on the grounds of its loss of substratum thus provides the Court with some control over the company's activities over and above the ultra vires rule. It is quite possible, as in the Flamingo case (50), for a company to have lost its substratum, and yet to be acting intra vires when all the objects are declared to be primary objects, and thus immune from the penalties of ultra vires actions. On the other hand, provided a petition is filed, the substratum rule goes further in its attempt to preserve the objects than the ultra vires rule because it is not necessarily subject to this limitation.

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(52) "Introduction to Company Law in New Zealand", 2nd Ed. b7.

(53) [1958] 3 All E.R. 535.
V. THE ALTERATION OF MEMORANDA

After Parliament had enacted by Section 12 of the Companies Act 1862 that the objects clause in the memorandum was unalterable, company draftsmen began to include many objects in the memorandum in addition to those required for the immediate business of the company in an effort to avoid embarrassment at a later date. This reaction was natural enough, but it made the resulting memorandum vastly different in size and scope from the concise examples given in the schedules to the Acts. This trend was not halted by the decision of Betts v. Brougham (38) but was rather increased, for these minor clauses could now be raised to the level of independent main objects. Gower (53) describes the position as follows:

"As a result of these developments the whole object of the ultra vires doctrine had been largely frustrated. It had ceased to be an effective protection to anyone and had become merely a trap for the unwary third party and a nuisance to the company itself. Its inconvenience had already been diminished since the Companies (Memorandum of Association) Act 1890, which had enabled the objects to be altered for certain purposes by special resolution confirmed by the Court."

The provisions for altering the memorandum will now be examined.

(53) op. cit. 85.

The provisions of the Companies (Memorandum of Association) Act 1890 of England were enacted in New Zealand in Section 162 of the Act of 1903. This was re-enacted without change in the Act of 1908. A wider section was included in the 1933 Act (Section 17) and this was included in the 1955 Act with very little change as Section 18. The section is as follows:

"18.(1) Subject to the provisions of this section, a company may, by special resolution, alter the provisions expressed or implied in its memorandum with respect to the objects of the company so far as may be required to enable it —

(a) to carry on its business more economically or more efficiently; or

(b) to attain any of its objects by new or improved means; or

(c) to enlarge or change the local area of its operations; or

(d) to carry on some business (whether related to its existing business or not) which under existing circumstances may conveniently or advantageously be combined with the business of the company; or

(e) to restrict or abandon any of the objects or powers expressed or implied in the memorandum; or

or
(f) to exclude or modify any of the objects or powers set forth in the Second Schedule to this Act, or to revoke or vary any such exclusion or modification; or

(g) to sell or dispose of the whole or any part of the undertaking of the company; or

(h) to amalgamate with any other company or body of persons.

18.(2) The alteration shall not take effect until, and except Insofar as, it is confirmed by the Court.

18.(3) Before confirming the alteration the Court must be satisfied—

(a) that sufficient notice has been given to every holder of debentures of the company and to any persons or class of persons whose interests will, in the opinion of the Court, be affected by the alteration; and

(b) that, with respect to every creditor who in the opinion of the Court is entitled to object and who signifies his objection in manner directed by the Court, either his consent to the alteration has been obtained, or his debt or claim has been discharged or determined, or has been secured to the satisfaction of the Court. Provided that the Court may, in the case of any person or class, for special reasons, dispense with the notice required by this section.
18.(4) The Court may make an order confirming the alteration either wholly or in part, and on such terms and conditions as it thinks fit.

18.(5) The Court shall, in exercising its discretion under this section, have regard to the rights and interests of the members of the company or of any class of them, as well as the rights and interests of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interests of dissentient members, and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement: Provided that no part of the capital of the company shall be expended in any such purchase."

The two remaining subsections of Section 18 deal with the procedure for filing such notice with the Registrar.

In subsection (1) of Section 18 paragraph (f) is new to the 1955 Act and other minor alterations have been made because of the addition to the 1955 Act of Section 16, as to implied objects and powers. Paragraph (b) has been extended by referring to "any objects" instead of "main purposes", and the words in brackets have been inserted in paragraph (d). Paragraph (c) has been extended to refer to "powers" as well as to "objects".
the Court of Appeal discussed the principles upon which it would act in an application under Section 17 of the Companies Act 1933, which apart from the small differences just mentioned, was the same as Section 18 of the 1955 Act. The company, which carried on business as stock and station agents, wished to extend its objects to enable it to carry on business as executors and administrators in the estates of deceased clients. In deciding the application, the Court must first be satisfied that the application falls within one of the heads of Section 18(1) and that all the relevant provisions as to notice have been complied with. If all these matters are in order, "the Court will then exercise its discretion upon principles which require the Court to see
(a) that the rights of creditors are protected,
(b) that the alteration is fair and equitable as between the members of the company, and
(c) that the interests of those members of the public who may be affected by the alteration will not be prejudiced".

Finally, "the Court in determining whether it has jurisdiction to confirm an alteration (under this section) will give great weight to the unanimous opinion of the voting shareholders if it is satisfied that they understand the


(55) Ibid 570.
effect, both express and implied, of the alteration, but
that the Court will, in any particular case where it thinks
the circumstances require it, undertake to determine for
itself, notwithstanding the unanimous views of the voting
shareholders in favour of the alteration, whether any
proposed new business can, under existing circumstances,
be conveniently or advantageously combined with the
business of the company.” (56)


Section 5 of the Companies Act 1948 Imp. enables
a company to alter its objects under the same heads as are
given in Section 18(1) of the New Zealand Act, with the
exception that there is no English section corresponding
to the New Zealand Section 18(1)(f) and the words in
brackets in the New Zealand Section 18(1)(d) do not appear
in the English Act. However the important difference
between the two sections is that in the English Act the
necessity to obtain the Court’s approval to a proposed
alteration to the objects is dispensed with. Under the
1948 Act, the company’s objects may be altered by special
resolution, but the right is given to a specified minority
to apply to the Court within twenty-one days of the special
resolution and oppose the proposed alteration. If such
application is made, the alteration is effective only in

(56) ibid 575.
so far as it is sanctioned by the Court. If no such application is made within the specified time, the alteration cannot be impugned. The minority entitled to apply is either:
(a) 15% of the issued capital of the company; or
(b) 15% of any class thereof; or
(c) 15% of any debentures which give the holder a right of objection to the proposed alteration; or
(d) 15% of any debenture holders whose debentures were issued prior to 1.12.47 and secured by a floating charge.

When a petition is presented under this section the Court may either confirm the alteration and thereby dismiss the petition or it may cancel the alteration or it may make a conditional approval of the alterations or it may adjourn the petition so that arrangements can be made for the shares of the petitioners to be brought.

Where the Court sanctions an alteration it may impose such terms and conditions as it thinks fit. It will have regard to the interests of the different classes of shareholders and creditors and will see that the necessary steps have been taken to ascertain their views.

In Re Jewish Colonial Trust Ltd. (57) the company had been formed for establishing a home in Palestine for the Jewish people. The objects clause provided authority for

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(57) [1908] 2 Ch. 287.
colonisation schemes in any other part of the world. It was sought to vary this clause so as to restrict the operations of the company to Palestine and adjacent lands. The special resolution approving the alteration had only been favoured by a small proportion of the shareholders: the majority had not voted. When the petition was presented for approval under a similar provision to that now in force in New Zealand, the Court adjourned it to enable advertisements to be made throughout the world inviting shareholders to vote one way or another. The Court refused to sanction the alteration; the vast majority of shareholders, representing over three-fourths of the share capital, had given no indication of their wishes on the subject in spite of the advertisements and in any case there was nothing to prevent those in control of the company who were in favour of the alteration allowing the more extended powers of the company to remain dormant. In Re Cyclists Touring Club (58) the objects were to protect and help cyclists and the like on public roads, and to provide legal assistance to enforce members' rights to use the roads. The club wished to alter its objects so that a wider membership, including motorists, could be obtained. The Court refused to sanction the alteration when the matter came before it for approval under similar provisions as now exist in New Zealand, because the protection of members against motorists was one of the

(58) [1907] 1 Ch. 269.
original objects and this could not be done against the club's own members if motorists were admitted. (There was no provision similar to Section 13(1)(f) of the 1955 New Zealand Act in force in England at that time).

Holt (59) submits that the former prohibition against a company ratifying an ultra vires action now no longer applies because of Section 5 of the English Act of 1948. He also suggests that it is now possible for a company, especially for a private company where no opposition is expected, to alter its objects to such an extent that they do not come within the heads of Section 5. In support of his first submission he argues that the prohibition against ratification was based on Section 12 of the Companies Act 1962 which prevented a change of objects in any manner whatsoever, and that this clause was the basis of the Ashbury case (18). His argument runs thus:

"A transaction of a company outside the objects of its memorandum is outside the powers of the company as at present constituted, and is invalid. But it can no longer be regarded as wholly void and incapable of ratification. A company has now power to alter its objects by special resolution and thereby to make the transaction intra vires, provided that no proceedings are taken within twenty-one days from the date of the resolution which result in a cancellation of the..."
alteration by the Court."

However, Cower opposes this suggestion in the next number of the review (60). He cogently argues that for an action to be capable of ratification, the ratification must date back to the time of the action and the company must, when the purported action is performed, be capable of entering into the transaction. This is of course not the case and the only answer can be a new contract. Holt unwittingly admits this to be the case in the extract above when he considers the possibility of the action being valid if no proceedings are taken within twenty-one days to oppose the special resolution. But he does not tell us what happens if the special resolution is opposed. If his thesis is good for one case it must be good for the other. Cower concludes by pointing out that Section 5 of the 1948 Act gives no retro-active effect to the alteration as authorised by that section, but only regulates the company's powers as from the date of the alteration if no opposition is offered. Neither party to an *ultra vires* contract will be bound by virtue of an alteration of the objects. A new contract is necessary after the alteration.

Cower appears to agree with Holt's second submission, viz. that an alteration of the objects outside the heads in Section 5 is now possible. He says (61):

(60) 67 L.Q.R. 41.

(61) Modern Company Law 2nd Ed. 65.
"If however no application is made within twenty-one days, the alteration cannot be impugned; this presumably is so even though the alteration was not made for one of the authorised purposes."

This view would appear to be correct in view of Section 5 (9) of the 1948 Act which makes the matter conclusive as far as the Court is concerned, unless proceedings are taken in terms of the section.

If the English provisions for altering the objects are used as the Statute provides, there is very little difference in principle between them and the New Zealand provisions for the terms of reference are the same in both cases except that the English Act contains no section similar to the New Zealand Section 16(1)(i) and that the words "whether related to its existing business or not" in the New Zealand Section 16(1)(d) are not in the English equivalent and that the New Zealand Act refers to "objects and powers" in paragraphs (a) and (i) of Section 16(1) while the English equivalents refer to "objects" only. Thus the New Zealand provisions are the wider of the two. In practice, the fact that no application to the Court is necessary in England to alter the objects will lead to a greater use of the provisions of the English Section 5. One also wonders whether, from the manner the English Statute casts the decision upon the voters of the special
resolution and gives them unassailable power to alter the objects, subject to an application in opposition, within and seemingly without the terms of reference of Section 5, Parliament has now recognised that the time has come for the objects to be freely changed but has not been brave enough to say so in as many words. For if Parliament had so dictated (and that would have only been the enactment of the recommendations of the Cohen Committee (1)) the ultra vires doctrine as we know it would have ceased to exist. The only room for the ultra vires doctrine, failing retro-active effect being given to the alteration of objects, would have been in the circumstances envisaged by Sower (60), whereby an act can be challenged as ultra vires when the authorisation for the act is not passed until a later date and is not effective before that date and the action was ultra vires at the time of performance.
VI. ULTRA VIRES IN OTHER BODIES

In this chapter the applicability of the ultra vires doctrine to bodies other than companies incorporated under the Companies Act will be discussed. A comparison of the doctrine as it operates within various bodies will be made with its operation under the Companies Act so that the similarities and differences may be defined; this chapter is not intended to be a full exposition of the law applicable to these other bodies.

1. Bodies Exercising the Functions of Government.

Generally speaking, legislative and executive acts may be upset on the grounds that they are outside the powers of the person or body performing them.

Parliament, however, is clearly not subject to the doctrine of ultra vires and enactments of Parliament are beyond the reach of the doctrine, provided they are passed in the appropriate manner and form (62). Subject to this qualification, Parliament may enact any legislation it thinks fit, and it is not open to the Courts to question any enactment which appears prima facie valid.

Subordinate legislation is subject to the doctrine of ultra vires and will be held ultra vires the authorising act and accordingly invalid if it is not within the objects

and intention of that act (63): this is substantive
ultra vires; subordinate legislation may be held
procedurally ultra vires if procedural requirements are
not complied with, for example requirements such as
consultation with particular bodies, the hearing of
representations or objections, publication of draft
proposals and an imperative direction to lay before
Parliament (64) by-laws, which are a special type of
subordinate legislation, may be declared ultra vires on
the additional ground of unreasonableness (65).

The relationship between ultra vires and
subordinate legislation on the one hand and ultra vires
and the objects in a memorandum on the other is
comparable in so far as the wider the powers the
enabling document gives, be it Act of Parliament or
memorandum, the greater the powers of the delegate; in
both cases (except by-laws) the only way in which the
exercise of a power under the relevant document can be
impeached is to prove that power ultra vires. The
notion of complete discretion, which is sometimes found
in an Act of Parliament authorising subordinate legis-
lation, is absent from company law, but an almost similar

(63) Per T.A. Gresson J. in Law v. Earthquake and War

(64) Cf. Griffiths & Street "Principles of Administrative
Law" 2nd Ed. pp 104-120.

effect may be obtained with a Goto v. Brougham clause in the memorandum together with very wide powers. There is no parallel in company law to the test of reasonableness as applied to by-laws; the test of reasonableness is not applied to the memorandum, for the objects are strictly construed on the basis of the whole document provided they are lawful.

Executive acts and ultra vires provides a much closer parallel to company law and ultra vires. Examples of executive acts are such acts of ministers as requisitioning land, issuing licences or detaining certain classes of persons. The parallel to company law arises in that a company can act only in pursuance of a power conferred upon it and if that power is not conferred the action is ultra vires and may be impeached; a minister acts in pursuance of a power conferred on him by an Act of Parliament or by subordinate legislation and if his action is ultra vires the enabling legislation that action may be impeached. On the other hand, ultra vires in relation to subordinate legislation relates to the correctness not of an action but of a set of rules or regulations.

The licensing cases illustrate how ultra vires could apply to executive acts. In Maklada Ali v. Jayaratne (66) the cancellation by the Controller of Textiles in Ceylon of the licence of a textile dealer was held to be

(66) [1951] A.C. 66.
an "executive act to withdraw a privilege". The Court was satisfied that the condition precedent to the exercise of this executive act had been complied with viz. that reasonable grounds existed for the cancellation of the licence. Presumably, had these reasonable grounds not existed, the Controller's action would have been ultra vires the relevant regulations and could have been upset on that ground. Whether the action of a minister in cases like this where the authorising act or regulation contains the words "reasonable grounds to believe" is valid, depends on the construction which is placed on that phrase. If the phrase has that meaning given it in *Liveridge v. Anderson* (67), that is that the minister is the sole judge of whether reasonable grounds exist (i.e., if the subjective approach is used) then no question of the action being ultra vires can arise. If, on the other hand, the necessity for reasonable grounds is treated as a condition which must exist before the particular power can be exercised (i.e., if the objective approach is adopted) the question of ultra vires becomes relevant as any act done when reasonable grounds do not exist may be impeached because it is ultra vires (68).

The application of the doctrine of ultra vires can in some way be excluded or limited from executive acts

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(67) [1942] A.C. 206.

(68) The construction placed on the words "has reasonable cause to believe" in *Liveridge v. Anderson* (67) was doubted in *Balakula Ali v. Jayaratne* (66). There is variation of opinion both juristic and judicial as to which construction is correct, but the better approach seems to be that adopted in *Balakula Ali v. Jayaratne*, i.e. the objective test.
where the authorising act contains such provisions as "where the Minister is satisfied" or "as he thinks fit" and the like. Even in these cases, though, the measures taken in pursuance of such authorisations must be "capable of being related to one of the prescribed purposes (of the Act)" (69), and if they are not so capable they may be upset on the ground that they are ultra vires.

In this connection it is important to note the dictum of Lord Green M.R. in Carltona Ltd. v. Commissioner of Works (70). The case concerned the exercise of a power under Reg. 51(1) Defence (General) Regulations 1939, which authorised a competent authority to take possession of land if it appeared to that authority to be necessary or expedient to do so. Lord Greene M.R. recognised that in cases such as that before the Court the minister was answerable only to Parliament for the execution of his powers and that if the statutory provision is clear - that the minister is answerable only to Parliament - then the Court is not competent to question the bona fide action of the minister, nor may it require him to tender evidence to prove he considered the matter and formed the opinion that the action was necessary in the interests of the State or as the case may be. All the Court can do is to see that the


(70) [1943] 2 All E.R. 560, 564.
power is one which falls within the powers given by the legislature and to see that those powers are exercised in good faith. Apart from that, the Courts have no power to inquire into the reasonableness of the policy or any other aspect of the transaction. This case was followed in New Zealand in Buller Hospital Board v. Attorney-General (71).

The relevancy of ultra vires to executive acts is, as in company law, a question of construction of the authorising document whether it is an Act of Parliament or Regulation or a memorandum. The operation of the doctrine can be at least partially excluded in executive acts, as in company law, by the insertion in the Act or Regulation of some phrase which makes powers sufficiently wide to put them outside the scope of the Courts and the application of the ultra vires rule, and to leave the surveillance over their exercise to Parliament.

2. Chartered Corporations.

The case of Sutton Hospital (10) has generally been taken to establish that a chartered corporation has all the powers of a natural person in so far as an artificial entity is physically capable of exercising

them. If it misuses its powers by exceeding the objects in the charter, quo warranto proceedings may be taken to restrain it or scire facias proceedings to forfeit the charter, but in the meantime its actions will be fully effective. Buckley (72) says a chartered company 

"can bind itself by acts as to which no power is affirmatively given by the charter, but even if the charter by express negative words forbids any particular act, the corporation can nevertheless at common law do the act, and, if it does it, is bound thereby, and the result is only that ground is given for a proceeding by scire facias in the name of the Crown repealing the charter."

The position was stated by Blackburn J. in 

_v. Ashbury Railway Carriage Co._ (19) where he said: 

"This seems to me an express authority that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself, and to deal with its property as a natural person might deal with his own. And further that an attempt to forbid this on the part of the King, even by express negative words, does not bind at law. Nor as I am aware of any authority in conflict with this case. If there are conditions contained in the

(72) Buckley on Companies 10th Ed. 12.
charter that the corporation shall not do particular things, and these things are nevertheless done, it gives ground for a proceeding by a declaration in the name of the Crown to repeal letters patent creating the corporation. But if the Crown take no such steps, it does not lie in the mouth either of the corporation or of the person who has contracted with it" to say that the contract was ultra vires.

However, in Prescott v. Birmingham Corporation (73) the respondent Corporation, which was a corporation created by Royal Charter, was empowered by the Birmingham Corporation Acts 1876 to 1954 "to maintain and operate a transport undertaking and to charge such fares to passengers travelling on their vehicles as they thought fit subject to any statutory maxima for the time being in force". The Corporation ran a 'bus service pursuant to these powers and in 1953 it resolved to introduce free travel on the Corporation's vehicles for old people resident within the city and of limited means. The plaintiff, who was a ratepayer of the City of Birmingham, brought an action against the Corporation and claimed first that the free travel scheme adopted by the Corporation was illegal and beyond the powers of the Corporation and secondly that the Corporation was not entitled to use any part of the general rate fund to operate the scheme. Both Vaisey J.,

and the Court of Appeal granted the declaration sought and gave leave to the plaintiff to apply for an injunction to restrain the Corporation.

The special point in this case to the subject under discussion is the right to bring an action to restrain a corporation created by Royal Charter. It is submitted that, although the Corporation itself was created by Royal Charter, its power to operate the transport service came from various Acts of Parliament and therefore a private individual legally interested in the funds of the Corporation (being a ratepayer) could challenge the ultra vires acts of the Corporation and seek to have them restrained. The acts in question - the granting of free rides to old people - were ultra vires the Statutes only; they did not affect the existence of the Corporation as provided for in the Charter.

The Court of Appeal concluded:

"We think it is clearly implicit in the legislation, that while it was left to the defendants to decide what fares should be charged within any prescribed statutory maxima for the time being in force, the undertaking was to be run as a business venture, or, in other words, that the fares fixed by the defendants at their discretion, in accordance with ordinary business principles, were to be charged... It by no means follows that they should go out of their way to make losses by giving away rights of free travel."
It is submitted that now that the remedy formerly available under *quo warranto* proceedings has been transferred to injunction proceedings, and as the writ of *sine die* is now seldom used in England and is abolished in New Zealand, relief similar to that given in *Pregotti v. Birmingham Corporation* (73) will be more common in the future.

3. Trade Unions.

It has been said that the case of *Taft Vale Railway Co. v. Amalgamated Society of Railway Servants* (74) paralysed the industrial and stimulated the political activities of trade unions (75). The case of *Osborne v. Amalgamated Society of Railway Servants* (76) decided that it was *ultra vires* for a trade union to spend money on political activities and that such spending could be restrained by injunction. In that case the plaintiff, a member of the respondent society, was granted an injunction when he tested the right of the society to make a levy to support the Labour Party. The question in issue was whether the Trade Union Acts 1871-76, which had defined trade unions, had intended the definition to be restrictive or merely descriptive. The House of Lords held that the

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(74) [1901] A.C. 826.

(75) *Fortescue, "The Development of Australian Trade Union Law".*

(76) [1910] A.C. 87.
definition was restrictive and that the doctrine of ultra vires applied and that the object of obtaining Parliamentary representation was not an object within the definition. In arriving at this conclusion, their Lordships overruled Lineker v. Pilcher (77) and Steele v. South Wales Miners Federation (78). In both these cases the acts in question, that of publishing a newspaper and asking levies to return and maintain representatives in Parliament, were held to be intra vires.

In the Osborne case, the union concerned was a registered trade union. The case, however, does not make it clear whether the principle also applies to unregistered trade unions.

Lord Halsbury made it quite clear that the same application of the ultra vires doctrine is good for trade unions as it is for corporations: he said

"The House of Lords in the Ashbury case seem to me to have settled the law in a manner which appears to dispose of this case. It is true that the Act does not make a trade union a corporation; but, taking the only distinctive

(77) (1901) 17 T.L.R. 256.
(78) [1907] 1 K.B. 361.
word used, a 'combination', it can hardly be suggested that it legalizes a combination for anything, and if some limit must be placed on its powers, one can only apply the same rules that were agreed to by the noble and learned Lords in that case, and it certainly would not be easy to find a more supreme authority than the judgment in that case."

Lord MacNaughten also held that the Ashbury rule applied where any society or association is formed by Parliament for a particular purpose.

In a recent New Zealand case, Fell v. Amalgamated Watersiders Industrial Union of Workers (79), where a trade union had authorised the ultra vires payment of damages in a libel case from union funds it was held that an individual member of the union could take steps to recover the money so paid from the person to whom it was paid. It was further held that the money could be recovered from any persons for whose benefit and in whose favour the payment was made if such persons knowingly acquiesced in and adopted such payment in such a way as to make them parties to the ultra vires transaction.

1. Incorporated Societies.

An incorporated society is not a common law corporation, but owes its origin in New Zealand to the Incorporated Societies Act 1908. Its objects are set out in the rules of the society.

In Automobile Association (Wellington) Inc. v. Devey (42) the question to be decided was whether it was ultra vires for an incorporated society, the plaintiff, to enter into an agreement with the State Fire Insurance Office for the latter to be its official insurers. In the Court of Appeal the Judges applied the same acts as would have been used to determine the question of vires for a company.

The case was made more interesting by the fact that the last clause in the rules provided that "the objects specified in the foregoing paragraphs shall be in no wise limited or restricted by reference to or inference from the terms of any other paragraph" - clearly an attempt to invoke the Catman v. Broughan decision. Berrowslough C.J., in the Supreme Court, tried to limit the operation of the objects when he said:

"If I am wrong in that view of the matter, then it would inevitably follow that it would be lawful for the Association to embark on any
business whatever, so long as one of the consequences of that business was the provision of some information or some facilities for some of the members. Such interpretation is, in my opinion, quite unwarranted."

The Court of Appeal reversed the decision of the Supreme Court. F.B. Adams, J. gave full effect to the paragraph in the rules mentioned earlier. He said:

"We think that there is a conclusive answer to this argument in the final paragraph of the rule as quoted above. Such a clause, notwithstanding the criticisms of its use contained in Cotman v. Brougham and In re Cole, means what it says for the purpose of determining the question whether any particular transaction is ultra vires. In our opinion the contract was within the powers."

In North of England Zoological Society v. Chester R.D.C. (80) the plaintiff society, incorporated under the Companies Act 1929 of England and limited by guarantee, sought to have its rates remitted on the grounds that it was charitable and thus entitled to exemption under the Rating and Valuation Act 1955. To decide this question the Court had to determine whether the objects of the Society were charitable. Vaisey J.
pointed out that there was no Colson v. Brougham clause in the memorandum and the ejusdem generis rule of construction therefore applied. He held that the three main objects were wholly charitable, and while some of the ancillary powers were partly charitable and partly non-charitable, prima facie they would be governed by the main objects and thus be construed then as charitable.

It can be stated that the same rules apply to incorporated societies as to companies in so far as the ultra vires doctrine is concerned.

However it was held in Be Stratford Poultry and Winter Show Association (Inc.) (81) that the Court was not precluded from looking behind the formalities of registration of an alteration to the rules to see whether the Society had validly adopted the alteration. This is the first time that the Court has gone behind the Registrar's certificate, and it is to be hoped that the principle might be applied to a company in a later case.

5. Statutory Corporations.

It has already been mentioned that it was not long after the Agilbury case was decided that the rule in that case was extended to cover companies incorporated by Act of Parliament. Attorney-General v. Great Eastern Railway (22), Baroness Henlock v. River Dee Co. (23).

It would appear from Re Dorking Villa Building Co. (82) that the rule in the Ashbury case also applies to unlimited companies. In that case a company was formed under the Act of 1862 with unlimited liability and the deed of settlement contained no express power to buy houses already built. The company petitioned to alter its objects so as to include this power. Approximately ninety per cent of the shareholders had approved of the proposed alteration. Simonds J. said that he had never known an application to enlarge the objects of an unlimited company. He was afraid that those who voted for the alteration might not understand how it might affect their position and as he wished to be satisfied that every member appreciated that his liability was unlimited, he adjourned the case for them to be advised. Although the report does not say so, the inference from the judgment was that the Judge would be prepared to make the order if all members were fully cognizant with the position.

6. Conclusions.

In this chapter an attempt to compare the similarities and differences with ultra vires in the bodies under discussion to ultra vires in company law has been made. In the case of trade unions, incorporated
societies and statutory corporations the operation of the *ultra vires* doctrine is the same as it is in company law. However, there is little similarity in the case of subordinate legislation as the notion of complete discretion is lacking from company law.

Executive acts bear a closer resemblance to company law as far as the doctrine is concerned, although the subjective test has never been applied in the latter. There is no notion of reasonableness in company law as there is when the doctrine is applied to by-laws.

To some extent, the position of chartered corporations forms an anomalous exception to the effect of the doctrine on bodies corporate, but, apart from this and generally speaking, the operation of the doctrine in corporate bodies remains similar to its operation in company law.
VII - THE EFFECTS OF THE ULTRA VIRES DOCTRINE

1. In Contract.

One attribute of the ultra vires doctrine is that it is self-executing in that all contracts made by a company which are not authorised by its memorandum or are not reasonably incidental to the objects, are absolutely void. Such contracts are enforceable neither by the company nor by the other parties to them. This rule is capable of causing hardship to the person who enters into the contract with the company, but it is founded on the idea that everyone is deemed to have notice of the contents of the public documents of a company, so that if he enters into a contract without previously searching the public documents of the company, or if, on searching the company and finding the proposed contract is not authorised by the memorandum but nevertheless enters into the contract, he has only himself to blame if the company or its successors seek to avoid the contract. Although the word "contract" is used here, there would, properly speaking, never be a contract in existence at any stage of the negotiations.

In practice this idea of constructive notice is quite fanciful. Modern commercial transactions often depend for their existence upon the speed with which they are completed and there is seldom time in such cases to search the memorandum and articles of a company,
especially when its documents repose in a Companies Office in a different town from the other contracting party. Further, many other transactions are so routine or so trivial that it would not be worth the trouble to search before entering into a contract, and many people are prepared to take a chance that the contract is authorised. Their confidence is not often misplaced, for the modern memorandum together with a declaration making all the objects primary objects is sufficiently compendious to cover most contingencies. H.R. Gray (83), when referring to Re Jon Beauforte (London) Ltd. (87), pointed out that not only is a search of the company's documents necessary but also, in view of the decision, it seems necessary for one to visit the factory to ascertain what in fact is taking place there. In nearly every case when the ultra vires rule is invoked, it is of assistance only to a company or to its liquidator or receiver who wish to escape from obligations to which the company has committed itself by relying on the bad draftsmanship of its own objects clause – a position which can scarcely be described as meritorious or in furtherance of the stated purposes of the doctrine viz. the protection of investors and creditors.

The doctrine of constructive notice as applicable to company law has been described by I.D. Campbell (84).

"According to this doctrine as it is commonly presented the legal effect of transactions with a company depends on the operation of the rule that all persons dealing with the company have either actual or constructive notice of the Act under which the company is incorporated and of its public documents. They are thus affected with notice of the provisions therein contained regarding the contractual powers of the company and its representatives and this in turn is a controlling factor in determining the validity or invalidity of the transaction."

Professor Campbell fully analyses the doctrine in this context and it will therefore not be discussed further here.

A much more difficult situation arises in the case of contracts which are not patently ultra vires when the company's memorandum is perused. If the company seeks to avoid such a contract, the doctrine of constructive notice is of no avail. In such a case the other contracting party can enforce the contract against the company unless he knew of the ultra vires purpose which the directors intended it to serve.

For example in Re David Payne & Co. (85) it was held.

(85) [1904] 2 Ch. 608.
that where a company has a general power to borrow money for the purposes of its business, a lender is not bound to inquire into the purposes for which the money is intended to be applied, and the misapplication of the money by the company does not avoid the loan in the absence of knowledge on the part of the lender that the money was intended to be misapplied.

However, if knowledge of the improper purpose can be reasonably imputed to the person contracting with the company he will be precluded from recovering and the transaction will be treated as though patently ultra vires and thus void ab initio. In *Hill v. Manchester & Salford Water Works Co.*, (86), when it was shown that the lender knew at the time he made the loan that the money was to be used for an *ultra vires* purpose, it was held that he was not entitled to recover.

The most recent case on this point was *Re John Beauforte (London) Ltd.* (87). In this case the objects of the company were to carry on the business of costumiers and the like. In 1949 the company decided to commence manufacturing veneer panels, an activity which the Court held to be *ultra vires*. In order to manufacture veneer panels, it built a factory in a

*(86) (1831) 2 B. & Ad. 5th.*

*(87) [1953] Ch. 131.*
different part of the country, bought veneers and obtained coke from a fuel merchant to use at the factory. The builders who had constructed the factory and the suppliers of the veneers took judgment against the company. In the compulsory winding-up of the company the three claims were rejected by the liquidator. Bosburch J. upheld the liquidator's rejection of these claims. Even the supplier of the coke, who argued that the coke could have been applied for an *ultra vires* activity, failed because the coke had been ordered on letter paper which described the company as veneered panel manufacturers, and this actual knowledge of the *ultra vires* purpose for which the coke was required, coupled with his constructive knowledge of the public documents of the company, was sufficient to disentitle him from claiming. The fact that two of the three creditors had obtained judgment against the company prior to the liquidator rejecting the debts did not make any difference. The Judge said that in the case of an *ultra vires* contract no judgment founded upon it is inviolable, unless it embodies a decision of the Court upon the issue of *ultra vires*, or a compromise of that issue. Bosburch J. reserved the question of what would have happened if the claimants in fact had no notice that their coke might be applied for *ultra vires* purposes - for example if it had been ordered on plain
paper—but it is submitted, for reasons to be given shortly, that in such a case the debt would have been recoverable.

The memorandum of the company in this case did not contain a declaration making the objects primary objects, and the construction was therefore quidam generalis. If the memorandum had contained such a declaration together with another clause authorising the company to enter into any contract with a government or local authority and the coke had been bought from a government department, the contract would have been intra vires. But it is very difficult to see that the addition of a Coteam v. Broomham clause in this case on the existing facts would have made any difference.

The case of Re Jon Beauforte carries the doctrine of constructive notice a little further. A person dealing with a company in a matter which is not patently ultra vires is unable to sue if he knows that purpose the company intends to achieve, and that purpose is ultra vires. It is not necessary that he should actually know that the purpose is ultra vires because he is deemed to have constructive notice of the contents of the memorandum. An interesting point then arises in considering whether the company can enforce such contracts. Assume that, in facts similar to Re Jon Beauforte, the company ordered coke on plain note paper or on paper which only disclosed
the *intra vires* activities of customers. It has already been submitted that the coke merchant could probably recover in such circumstances because he has no notice of the *ultra vires* activity. If the coke merchant failed to deliver the coke which was required by the company for an *ultra vires* purpose but known only to itself, could the company sue the coke merchant? It does not seem correct that a cause of action could be founded on an act which is void and known to be so by the plaintiff. If a contract is *ultra vires* the company, there is no contract at all, either for the company or for the other party. If there is a contract, it is a contract wherein both parties are joined, not just one or other. It cannot be valid but unenforceable by one party. It is therefore submitted that the company could not bring such an action.

It is clear that a person is deemed to have constructive knowledge of the contents of the public documents of the company. It is also clear from *De Jon Semperteg* that if a third party receives notice that an activity which is not patently *ultra vires* is being pursued to an extent which makes it *ultra vires*, he is bound by such notice. It is submitted that such notice must come from the company or from some responsible person. Idle gossip could not affect a party with notice.
If it then follows that an outsider can enforce a contract against the company when the contract is prima facie intra vires and when he has no notice of any ultra vires projection of the activity, as was submitted above, then all is well. In such a case the coke merchant could have recovered the cost of his coke if it had been ordered on plain note paper or on paper which only disclosed the intra vires activities. But if this is not so, and Foxburgh J. did not decide one way or another, then the point raised by Gray (83) that an outsider must also visit the factory to ascertain what in fact is taking place there would become a duty for an outsider to fulfill. However the words of Gower (86) are comforting, for he takes the view that "it seems clear that the coal merchant in Re Jon Beaufort would have been able to recover had he not known that the coke was required in connection with veneer manufacturing, which he was deemed to know was ultra vires." It is to be hoped that when the exact point comes before the Courts, a reasonable attitude will be taken to the position and the same good sense applied as was shown when a similar issue was decided in the case of Royal British Bank v. Purquand (6).

It has been stated earlier that if a transaction is ultra vires the company it is void and

(86) op. cit. 87.
unenforceable. It follows from this that persons who have entered into ultra vires contracts with a company have no rights at all. This proposition is generally true but on the other hand such transactions cannot operate to deprive the person of his rights to recover his own property if he can identify it in specie, because an ultra vires contract, being void, can confer no rights on such property in favour of the company. It has already been pointed out that even a default judgment would confer no rights upon the creditor if the contract is ultra vires, unless the Court has especially decided the question of vires or unless there has been a bona fide compromise to the claim (89). However it is submitted that this provision does not hold good for a judgment after trial, because, whether or not the question of vires was in issue, the other party would be estopped from denying the effect of the judgment.

If the contract is still wholly executory when the ultra vires is discovered, the position is quite simple. In effect no contract has come into existence and as nothing has been performed in pursuance of the purported contract by either side, the status quo is preserved by each party. However, if the contract has

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been partly performed by one side or the other, difficult problems arise, and these differ according to the nature of the purported contract with the company.

Probably the most common case of ultra vires in contract occurs when the company borrows when it has no power to do so or when it borrows in excess of the amount it is authorised to borrow. In such a case the money lent cannot be recovered by an action as would be used if the loan were intra vires, nor can an action be brought in quasi contract for money had and received. This latter point was decided in Sinclair v. Brougham (90). If such amounts lent were thus recoverable, it would impute an undertaking to repay, a basis of all valid loans, which itself would be ultra vires the company.

If a company borrows when it has no power to do so, or if it exceeds its limit of borrowing, and if it uses the borrowed money to repay intraviros debts, it has been held that the lender may enforce repayment. If his loan is secured, the creditor may realise his security and keep from the proceeds an amount equal to that used by the company from his loan to repay intraviros debts (91). The actions of the lender thus amount to a quasi-subsrogation to the rights of the creditors, but the

(90) [1911] A.C. 390.

(91) Blackburn and District Building Society v. Gunliffe Brooks Co. (1882) 22 Ch. D. 61, affirmed (1884) 9 App. Cas. 557.
lender is not entitled to any security held by the creditors, nor to any priority enjoyed by them. If he has no security for his own loan to the company, his position is that of an ordinary unsecured creditor, and he is not entitled to any security held by any creditor whose debt was repaid with his loan (92). In one case (92) the company had three classes of debentures ranking in priority and secured on the company's undertaking. The company borrowed from a bank in excess of its borrowing powers and used the borrowed money to pay overdue interest on the debenture ranking first in priority and part of the interest due on the debenture ranking second in priority. It was held that the bank was not entitled to the debenture holder's security, nor did it acquire the priority of the first class of debenture over the other classes, and that its only claim against the company was that of an unsecured creditor ranking for payment after all three classes of debentures.

This remedy is only available to the creditor whose loan has been used to repay intra vires debts of the company, and the onus is on the creditor to identify the debts which have been repaid. Further, the creditor does not become fully subrogated to the rights of the repaid creditors.

(92) Re Wrexham, Mold & Comyn's Quay Rail Co. [1899]
1 Ch. D. 440.
Tracing the money lent to a company is another remedy available to the creditor. The ultra vires loan may be traced by the lender both at common law and in equity. At common law, the creditor's right to trace the money lent rests on the basis that the money never became the company's property, but remained his own. If the company still has the coins and notes which made up the loan in its possession, the creditor may recover them in specie. If the principal of the loan, either coins or a cheque, has been paid by the company into its bank account so that it ceases to be identifiable, then this money cannot be traced at common law. It was held in Sinclair v. Brougham (90) that if the company uses the creditor's money to purchase some specific article, the creditor is entitled to regard the company as his agent in that it bought the article with his money, and he is entitled to recover it in specie, even in preference to secured creditors. The basis of this reasoning is that the creditor is the beneficial owner of the article as it was bought with his money by his agent, the company.

Tracing in equity gives relief to creditors where they would be without remedy at common law. From Sinclair v. Brougham and Re Euluk (93) it can now be

(93) 1951 A.C. 251.
said that where money, which is paid into the company's bank account and becomes unidentifiable and thus untraceable at common law, is used by the company to buy an asset, equity will give the creditor the right to charge the asset with his loan. The proportion of the creditor's charge on the asset will be the proportion to his loan which was paid into the bank account of the company to the balance of the company's own money which was in the bank account at the time. The procedure for the creditor to adopt is to seek a declaration from the Court that the asset is charged with his proportion of the loan and then to get an order for the asset to be sold and for the proceeds of the sale to be divided in the proportions above between him and the company. A tracing order can only be obtained in equity when the money withdrawn from the bank is used to purchase some specific asset. If it is used to pay debts, it is not open to the creditor to obtain a tracing order. Further, the rule in Claytons Case (94) provides that withdrawals are taken to be made against the amounts paid into the company's bank account in the same order as they are paid into the account. Thus, if a company withdraws a greater amount from its bank account than was in the account at the date the loan was deposited, it is deemed to have drawn on some of the loan moneys. If the company uses

(94) (1616) 1 Mer. 572.
part of the loan for some purpose which does not result in the company having an identifiable asset, and later uses the balance of the loan to purchase an identifiable asset, the creditor is only entitled to charge the asset with the proportion of his money which was used for its purchase by the company, not with the total amount of his loan.

The basis of the doctrine of tracing in company law is that while an ultra vires contract cannot create rights between the parties because it is void, it cannot therefore operate to deprive the creditor of his assets. He therefore can enforce his proprietary right to his assets, which, in effect, does not concern the question of vires in relation to the company, except in so far as the action is based on the presumption that the original contract was ultra vires the company. Sower (95) expresses some doubt as to whether the doctrine of tracing could be applied apart from the lender-borrower relationship, and suggests that the continuing relationship of lender and borrower on an ultra vires transaction ought perhaps be explained as examples of intervention based on unjust enrichment.

Another remedy available to a person who has lent money to a company in excess of the company's stated

(95) op. cit. 88, n59.
borrowing quote is to bring an action against the directors of the company for breach of warranty of authority. The basis for this remedy is that the directors have by their actions represented to the creditor that they had authority to bind the company and they are, or one of their number is, the agent of the company for the transaction. If such is not the case, the directors or director is liable to the creditor for his loss resulting from the contract. Further, the representation must be one of fact, not of law. In Weeks v. Probert (96) a director was held liable to reimburse a lender to the company when he negotiated the loan between the company and the lender and represented to the latter that the transaction was intra vires the company when it was not. It seems that this right of action does not accrue to a lender if the company has no power to borrow at all. This right of action does not concern the company directly, but is against a director and the question of vires, once decided, does not again arise.

(96) (1877) L.R. 8 Q.P. 427.
2. In Tort and Crime.

The theory that a company cannot be liable in
tort or in crime because tortious activities or crimes
are not authorised by the memorandum does not provide an
answer to a claim or charge. This theory once had con-
siderable support from jurists and even from the Courts.
For example, in Poulton v. London & S.W. Railway (97) a
stationmaster employed by the defendant arrested the
plaintiff for non-payment of freight charges, when the
defendant company only had power to arrest for non-payment
of fares. Blackburn, J. said:

"The act was done by the stationmaster completely
out of the scope of his authority, which there
can be no possible ground for supposing the company
authorised him to do, and a thing which could never
be right on the part of the company to do. Having
no power themselves, they cannot give the station-
master any power to do the act."

Another view held by jurists is the opposite to
that given above. It is that the ultra vires rule
applies only to contract and property and never has any
application to tort and crime. If this reasoning is
carried to its logical conclusion it would mean that an
ultra vires borrowing, being generally irrecoverable,
could be recovered in tort if the creditor could sue on

(97) (1867) L.R. 2 Q.B. 534.
some fraudulent misrepresentation of a director, and thus the whole purpose of the ultra vires rule would be brought to nothing. In Campbell v. Paddington Corporation (98), however, this approach was upheld. In that case the defendant had erected a stand for the public to see a procession. Although the erection of the stand was ultra vires, the defendant was liable for the public nuisance it created. Lush J. distinguished Poulton v. London & S.W. Railway (97) as follows:

"That case was only an illustration of the principle that where the wrongful act is done without the express authority of the corporation, an authority from the corporation to do it cannot be implied if the act is outside the statutory powers of the corporation. That principle has no application to a case where the corporation has resolved to do and has, in the only way in which it can do any act, actually done the thing which is not lawful and which causes the damage complained of."

Gower (99) speaking of the absurdity of this approach, says that the ultra vires doctrine has become so unreasonable anyway that perhaps we should not boggle at one more absurdity if that reduces its inconvenience.

The approach which Gower (99) favours is that

(98) [1911] 1 K.B. 369.
(99) op. cit. 92.
companies can be held liable in tort and crime but only if these are committed in the course of intra vicos activities. This view can be reconciled with all cases except Campbell v. Paddington Corporation (98). For example, in Liama v. London General Omnibus Co. (100) the defendant company was held liable for an accident caused by the act of one of its drivers in drawing across the road so as to obstruct a rival omnibus, and it was held to be no defence that the company had issued specific instructions to its drivers not to race with or obstruct other vehicles. The driver whose conduct was in question was engaged to drive, and the act which did the mischief was a negligent mode of driving, for which his employers must answer, irrespective of any authority or prohibition. Again in Canadian Pacific Railway v. Lockhart (101) the employers were held liable where their servant, in disobedience to orders not to use uninsured motor cars drove his own uninsured car while travelling for his employers. In Century Insurance Co. v. Northern Ireland Road Transport Board (102) the driver of a petrol tanker struck a match while pumping petrol from the tanker to a tank and threw the match on the floor.

(100) (1862) 1 H. & C. 526.
(101) [1942] A.C. 591.
(102) [1942] A.C. 509.
His employers were liable for the damage caused by the explosion, as he was negligent in discharging his duties.

A different element occurs if the company itself authorises the negligence, or if it performs the negligence itself by keeping dangerous premises, for example. In such cases the company itself is liable. There is no vicarious liability in these circumstances for the action of the person who authorised the wrong in the action of the company itself. (103)
VIII - THE ABOLITION OF THE ULTRA Vires RULE

The statutory foundations for the ultra vires rule were twofold: first, the necessity to state the objects for which the company was formed and secondly the prohibition from altering those objects. But no Companies Act went further than this and the development of the ultra vires doctrine took place within the Courts.

Three reasons have been given for the ultra vires doctrine in company law. First, it has been said that as a company derives its existence from Parliament, it is open to Parliament to confer only so much power as it pleases upon the company. If a certain power is not conferred upon a company, the company suffers a lack of capacity similar to an infant in regard to contract. This reason might be satisfactory from a theoretical basis, but in practice it is not Parliament which gives powers to a modern company, but the corporators. They can select any powers they please for the future company, subject only to these powers being lawful. If one looked at the objects of all the companies in New Zealand today it would probably be found that they covered every conceivable activity, and yet collectively they do not derogate from the authority of Parliament. It would appear that this reason is a legal fiction.

The second and third reasons frequently advanced
for the *ultra vires* doctrine are that by having stated objects within which the company must engage, present and future members are protected in that they know the type of business in which their funds are being invested, and creditors will also be protected in that they can be sure the funds of the company will not be diminished on unauthorised activities which may or may not be profitable. If these purposes had been carried out, the *ultra vires* rule would have more than justified its existence. In order to achieve these ends the memorandum would have needed to be a much simpler document than it now is, setting out only the main object or objects for which the company was formed and relying on the Articles, the Schedules to the Act or the general law to provide the miscellaneous powers necessary to give effect to the main objects. Such a memorandum was envisaged by Parliament in the Act of 1862, and the Courts were prepared to assist this type of memorandum. If such a memorandum had been adhered to there is little doubt that the two last mentioned purposes of the *ultra vires* rule would have been fulfilled. However, the corporators were unwilling to define the future business of the company in general terms, and they inserted further powers along with the main objects so that nothing would be left to implication. It has already been shown how the Court countered this trend by construing the objects
sui generis, and later how the corporators overcame this construction in Cotman v. Broucher (38). Thereafter the protection afforded by the ultra vires rule to members and creditors was negligible and, as discussed earlier "the whole object of the ultra vires doctrine has been largely frustrated. It has ceased to be an effective protection to anyone and has merely become a trap for the unwary third party and a nuisance to the company itself" (104).

In the introduction to this dissertation the chief purpose of the discussion was stated to be the examination of the ultra vires doctrine and by such examination to consider the value of the doctrine to modern company law. That examination has now been concluded and it is submitted that the inevitable decision will be that the ultra vires doctrine should be abolished. It is not within the scope of this dissertation to discuss fully the possible alternatives to the doctrine; however, mention must be made of the suggestions of the Cohen Committee (1) for they not only traverse the existing law but also provide a very fine answer to the problem.

The Cohen Committee stated (105):

(104) Gower "Modern Company Law" 2nd Ed. 85.
(105) Ibid Paras. 11 and 12.
"A contract made by the directors upon a matter not within the orbit of the company's objects is ultra vires the company, and, therefore, beyond the powers of the directors. This principle is intended to protect both those who deal with the company, and its shareholders. Had memoranda of association closely followed the forms in the First Schedule to the Act, this protection might have been real, but, partly with a view to obviating the necessity of applying to the Court for confirmation of an alteration of objects, a practice has grown up of drafting memoranda of association very widely and at great length so as to enable the company to engage in any form of activity in which it might conceivably at some later date wish to engage and so as to confer on it all ancillary powers which it might conceivably require in connection with such activities. In consequence the doctrine of ultra vires is an illusory protection for the shareholders and yet may be a pitfall for third parties dealing with the company. For example, if a company which has not taken powers to carry a taxi-cab service, nevertheless does so, third persons who have sold the taxi-cabs to the company or who have been employed to drive them, may have no legal right to recover payment from the company. We consider that,
as now applied to companies, the *ultra vires* doctrine serves no positive purpose but is, on the other hand, a cause of unnecessary prolixity and vexation. We think that every company, whether incorporated before or after the passing of the new Companies Act, 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 and any like provisions introduced into memoranda in future should operate solely as a contract between a company and its shareholders as to the powers exercisable by the directors. In our view it would then be a sufficient safeguard if such provisions were alterable by special resolution without the necessity of obtaining the sanction of the Court, subject in cases where debentures have been issued before the coming into force of a new Act, to the consent of the debenture holders by extraordinary resolution passed at a meeting held under the provisions contained in the trust deed or (in the absence of such provisions) convened by the Court."

This quotation from the Report divides into three parts. The first is the discussion on what could
be called the rise and fall of the ultra vires doctrine and from it the Committee also concludes that the time has come for it to be abolished. As this has been the main purpose of the dissertation and has already been fully traversed, it will not be taken up again. The second part contains the Committee's alternative suggestions in place of the ultra vires doctrine, and will be briefly discussed shortly. The third part contains the Committee's recommendations that the objects of a company should be freely alterable by special resolution. It has already been seen that this part of the recommendations was adopted in England in the Companies Act 1948, but was not so enacted in New Zealand.

To summarize the Committee's alternative recommendation to the ultra vires doctrine, it suggested that every company should have the same powers as an individual as regards third parties and that the objects clause in the memorandum should operate as a contract between the company and its shareholders as to the powers exercisable by the directors. The effect of this change, if it were adopted, would be that acts ultra vires the company would cease to exist. Acts ultra vires the directors would of necessity still continue, as the limitations imposed by the memorandum would still affect the director's powers, but would not enable the company
to escape liability. What was formerly a matter of capacity for the company would then be a matter of agency for the directors. The objects clause, of course, would be alterable, like the articles, by special resolution, without the sanction of the Court. Although the Committee did not recommend it, there would seem little reason, if the other suggestions were adopted, why the dichotomy of memorandum and articles should be preserved. It would be quite feasible for the whole of a company's constitution to be embodied in one document instead of two, especially as the construction and effect of both would be the same if the other recommendations were adopted. In such a document there would need to be certain compulsory provisions such as the name, nationality, objects, capital and liability. The nationality of the company would have to be unalterable but other provisions such as the name, capital and liability could be altered in certain prescribed forms and with certain consents of outside agencies.

If the recommendations of the Cohen Committee as regards the *ultra vires* rule were adopted, a third party dealing with the company would no longer be deemed to have notice of the public documents of the company, for he would be entitled to assume that the company could do anything which its directors purported
to do on its behalf. If the act which the company performed was not in fact authorised by the memorandum, the company would nevertheless be bound to the third party; any remedies would have to be sought between the company and members and the directors. If a director knowingly exceeded the authority conferred on him by the memorandum, a provision in the Act whereby the shareholders could petition the Court on very wide grounds for whatever relief would suit the circumstances would be desirable. The grounds for application and the relief could be framed along similar lines to Section 209 of the Companies Act 1955, which protects oppressed minorities.

Kahn-Freund (106) in an article on company law reform, which discusses the Cohen Committee Report, says that if the Committee's suggestions for replacing the ultra vires doctrine were accepted, the distinction between acts ultra vires the company and acts ultra vires the directors would cease to exist. This is another way of saying that an act formerly ultra vires the company would now be ultra vires the directors only but it would still be enforceable against the company at the suit of a third party. However, Kahn-Freund goes on to say that the objects clause will be subject to the rule in Royal British Bank v. Turquand (6) if

(106) (1946) 9 M.L.R. 235, 236.
the Committee's suggestions are accepted. It is difficult to see how this could be the case, for the Committee recommended that the ultra vires rule be completely abolished. If the objects clause becomes subject to the Surand rule, the doctrine of constructive notice, and the necessity to search the company's documents before dealing with it, still remains, although in a modified form, and more important still, the ultra vires doctrine would continue to be effective. It is clear this was not intended by the Committee's report when it refers to a company having powers as an individual.

A clear idea of how the Committee's recommendations would work comes upon examining French law. In an article in the Cambridge Law Journal, Jean Escarra compares the French system as follows (107):

"In France there is no such limitation (as in England). We look upon any company as having the same legal capacity as any individual being. No contract, for instance, can be deemed to be void on the sole ground that it is outside the scope of the objects stated in the memorandum of association. Directors can of course be held to

(107) "Some points of comparison between the Companies Act, 1948, and the French law of companies" (1951) 11 Camb. L.J. 15."
be liable in case of mismanagement, but there is no question as to the validity of the contract as such. It will be binding on the company, unless it has been specifically stated in the articles of association that it was beyond the powers of the directors to bind the company in that way. To state it otherwise, some contracts may be ultra vires the powers of directors and need to be ratified by the general meeting of the shareholders, but they can never be ultra vires the company. The ultra vires doctrine is a typical aspect of the English system of law. It is the exact reverse of the French system. In France, it is taken for granted, when entering into a contract with a company, that it has a legal right to do so. On the contrary, in England, when there is a doubt about a transaction which could be deemed to be ultra vires, the company is presumed to be unable to perform it, and it is left to the other party to show that the transaction is intra vires."

Similar rules govern the operation of German company law (108) and it is difficult to see why such provisions would not be satisfactory in English law.

(108) "Manual of German Law" Foreign Office Publications 1950 P.239, 244.
It is not intended to suggest that the recommendations of the Cohen Committee are the only solution to the problem, although it must be conceded that they bear great weight and offer a satisfactory answer. The object of this discussion has been to examine the ultra vires doctrine and assess its true value, and the discussion might well end with Kahn-Freund's (109) words which were used in referring to the Cohen Committee's suggestion to abolish the ultra vires doctrine:

"The ultra vires rule, which has long outlived whatever usefulness it may have had in the past, is to disappear in the limbo of legal history. Ashbury Railway Carriage Co. v. Hicks (18) is to die an unlamented death, and will drag down into the abyss a whole volume of casuistry. 'A stroke of the pen of the legislator and libraries become wastepaper.'"