

Articles

**MUCH ADO ABOUT NOTHING:
THE DOCTRINE OF *ULTRA VIRES* AND
ITS PLACE IN COMMERCIAL HISTORY —
PARTICULARLY IN MANITOBA.**

B.G. BROWNING*

The Law Society of Manitoba celebrates its centennial in 1977. During the period 1877-1977 the doctrine of *ultra vires* had its most active expression and suffered its ultimate decline. The following article is, therefore, offered not for any immediate relevance but as a commemoration.

B.G.B.

* Student, Faculty of Law, The University of Manitoba.

Ultra Vires Beyond the power. An act in excess of the authority conferred by law, and therefore invalid. E.g., a company's powers are limited to the carrying out of its objects as set forth in its memorandum of association, including anything incidental to or consequential upon those authorised objects, and the shareholders cannot, by any purported ratification of the company's acts make any other contract valid; and any such contract is *ultra vires* and void (*Ashbury Carriage Co. v. Riche* (1875) L.R.7 H.L. 653).¹

While the phrase "ultra vires" has been used to designate, not only acts beyond the express and implied powers of a corporation, but also acts contrary to public policy or contrary to some express statute prohibiting them, the latter class of acts is now termed illegal, and the "ultra vires" confined to the former class. (In re *Grand Union Co.* (C.A.N.Y., 219 F 353, 363; etc.)²

... it is a tale
Told by an idiot, full of sound and fury,
signifying nothing.³

The genius of English law may be said to be its adaptability to change. In many respects this adaptability equates to the "muddling through" so apparent in England's military, political and commercial life. There is little evidence of any long range rational planning towards a symmetrical unity — the national philosophical outlook is not that tidy — but much which lends support to the recently popular song "... we can work it out."

England's commercial history reflects her island geography. The self-sufficiency of her early years led to a strongly insular view which was the ideal soil for the growth of guild mentality: a mentality which encouraged the individual while restricting his individuality within a compass of guild rules. Rules which were sufficient unto their day but which were eventually forced to the background (although they survive in surprisingly large numbers) as ventures of increasing complexity encouraged financial and developmental co-operation, and, whisper it, speculation. There was little in the guild organization which was speculative and, indeed, such speculation was discouraged to allow stress upon consistency of quality. The cobbler stuck to his last, the pewterer to his bench and the weaver to his loom.

As England's commercial horizons expanded and as the demand for her quality products grew, it became inevitable that

1. Osborn, P.G., *A Concise Law Dictionary*, (5th ed.), Sweet & Maxwell, 1964.

2. Black, H.C., *Black's Law Dictionary*, (Revd. 4th ed.), West Publishing Co., 1968.

3. Shakespeare, Wm., *Macbeth* Act V, Scene V, line 26.

men would join together to allow returns from pooled capital which could not be achieved by individual holdings. To allow vehicles for this pooling, foreign trading companies were created, either by royal prerogative (charter) or by acts of the parliament of the time. These companies were similar in their intent to the individual monopolies which had earlier been granted, but had as their primary purposes the extension of trade through discovery and/or colonization rather than being rewards granted by a grateful monarch. Of the earliest, many, such as the East India Company which was chartered in 1600, have disappeared, while others, such as the Bank of England (1674) and The Hudsons Bay Company (1670), attest to a certain vigour and survive to the present day.

At issue here is the early fact that companies could owe their genesis either to the royal prerogative or to the action of the parliament of the day from as early as the late sixteenth century, but, however the birth, it was generally the case that a company was established with a particular purpose in mind — “trading into Hudson’s Bay”, “trade with the Pacific Islands” or the colonization of Virginia being typical.

But yet these chartered giants were not the root stock of modern corporations generally; rather, these owe their being to the unincorporated joint stock companies of the seventeenth and eighteenth centuries. Philosophically akin to large partnerships, these subjected their members to unlimited personal liability in the event of failure. And failures there were, typified by the South Sea Bubble but engendered by a speculative fever which was capable of attracting a thousand investors in one day to a company “. . . for carrying on an undertaking of great importance, but nobody to know what it is.”⁴

These failures retarded the evolution of corporations which did not come into recognizable modern form until the *Companies Act* of 1862⁵ although the *Joint Stock Companies Registration Act* of 1844⁶ and the *Limited Liability Act* of 1855⁷ had gone some distance along the road. By 1862, then, three forms of corporation could be seen, the chartered company, founded upon royal prerogative; the statute companies, founded by special action of the parliament; and the registered corporation, the incorporators of which had taken the initiative under the general and enabling *Companies Act*. (As an adjunct to the prerogative power to charter a company, the crown, by virtue of the

4. Holdsworth, *History of English Law*. Vol. 8, 214-215. Melville, *South Sea Bubble* (1921) 97. Quoted from Ballantine H.W. *Ballantine on Corporations*. Callaghan and Co., 1946.

5. 25, 26 Vict. c.89.

6. 7 & 8 Vict. c.110.

7. 18, 19 Vict. c. 133.

Chartered Companies Act of 1837⁸, was empowered to grant letters patent when such grant was deemed appropriate. Companies formed in such fashion may be seen as analogous to chartered companies but their position in regard to the *ultra vires* doctrine will be extensively considered later in this paper.)

If the creation of corporations was approached with a certain ambivalence so was the question as to what had been created — something akin to a natural person, though with certain obvious differences being “invisible, immortal and rest[ing] only in intendment and consideration of the law”⁹ finally being settled upon in regard to chartered and letters patent companies; while registered companies and those created by special act of Parliament are seen to derive their existence “. . . from the words of a statute, [and] the company does not possess the general capacity of a natural person and the doctrine of *ultra vires* applies.”¹⁰

Ultra vires? In the case of a chartered or letters patent company the charter will set out certain purposes for it. We have seen that, at law, such a corporation has the capacity of a human person and, as this is the case, such a corporation has liability for its actions which lie beyond the terms of the charter — although that may be subject to forfeiture when it is persistently or blatantly violated, under the procedure of *scire facias*.

On the other hand, the courts, early in the nineteenth century, looked with suspicion upon what tended to be the more speculative ventures which were often the reasons for company incorporation under special acts or registration. In consequence, they sought to restrain them and did so by the doctrine of *ultra vires*. They looked to the statute creating the company or to its memorandum of association for its *vires* or objects and ruled that if such a company acted outside its *vires* the transaction thus resulting was void and a nullity. It is this perception of the expression *ultra vires* which is explored in this paper although it must be stressed that usage has been such as to apply it to illegal acts, to acts of directors, to breaches of trustees' duties, etc. so that Strong, J., found it necessary to state:

. . . There has been some confusion in the cases arising from the use of the term *ultra vires* being indiscriminately applied to the acts of corporations or the governing bodies of corporations objectionable on very different grounds; it is sometimes applied to acts in which the governing body of the corporation such as a board of directors have transcended the powers delegated to them, though the act objected to was not beyond the powers of the corporation itself; in other cases, it has been applied to acts of the corporation itself, which, though not

8. 7 Will IV & 1 Vict. c. 73.

9. *Sutton's Hospital Case* (1812) 10 Co. Rep. 23a; 77 E.R. 960.

10. *Bonanza Creek Gold Mining Co. v. R.*, [1916] 1 A.C. 566. (P.C.) per Viscount Haldane @ p. 584.

beyond the capacity conferred upon it by the Act of incorporation, exceeded the powers to which the by-laws or constitution had limited the exercise of their powers but in its more general and proper signification it is applied to acts in excess of the powers conferred on the corporation by its Act of incorporation or charter.¹¹

(emphasis added)

Or, to rephrase that thought, "... when acts are spoken of as *ultra vires* it is not intended that they are prohibited, but merely such as are not within the powers, directly or indirectly, of the corporation."¹²

Writers find the beginning of the doctrine of *ultra vires* to be virtually contemporaneous with the *Joint Stock Companies Registration Act* of 1844¹³ and point to *Colman v. Eastern County Railway Co.*¹⁴ in which case the defendant railway company, for a perfectly sound reason connected with the enhancement of traffic upon its own railway, sought to associate itself with a steamboat company running ferries from Harwich — the rail terminus. In restraining the defendant company, Langdale, M.R., said that:¹⁵

... I am clearly of the opinion that the powers which are given by an Act of Parliament like that now in question, extend no further than is expressly stated in the Act, or is necessarily and properly required for carrying into effect the undertaking and the works which the Act has expressly sanctioned . . . I must say, in the absence of legal decision,¹⁶ that the acquiescence of the shareholders in such transactions affords no grounds whatever for the presumption of their legality.

After several cases which also dealt with statutory companies, Pollock, L.C.B., stated in *National Manure Co. v. Donald*¹⁷

That case [*Rochdale Canal Co. v. Radcliffe* (18 Q.B. 287)] is a direct authority that a parliamentary corporation is a corporation for those purposes only for which it has been established by parliament, and has no existence for any other purpose, and that whatever is done beyond the scope of such purpose is *ultra vires* and void.

(emphasis added)

Sixteen years later, and resolving some doubt on this issue, *Ashbury Railway Carriage Co. Ltd. v. Riche*¹⁸ extended the doctrine to registered companies in a decision upheld on appeal to the House of Lords. It was this case, too, which provided the decision sought by Lord Langdale in 1846 when it was ruled that an *ultra vires* act could not be ratified and validated even by unanimous approval of all shareholders.

11. *Compagnie de Villas du Cap Gibraltar v. Hughes* (1884), 11 S.C.R. 537.

12. *Clark v. Sarnia Street Railway* (1877), 42 U.C.Q.B. 39, per Harrison C.J. @ 45.

13. *Supra*, n. 6.

14. (1846), 10 Beav. 1; 50 E.R. 481.

15. *Id.*, at p. 486.

16. *Infra*, n. 18. This case provided that legal decision.

17. (1859), 4 H & N 8; 157 E.R. 737.

18. (1875), L.R. 7 H.L. 653, and for Canadian expression of the view re ratification see *Kenton Consumers Co-op Ltd. v. Archibald* (1954), 13 W.W.R. (N.S.) 594 (Man.), *Clarkson v. Davies*, [1923] A.C. 100 (P.C.) and *Toronto Finance Co. v. Banking Service Co.* (1926), 59 O.L.R. 278; affirmed [1928] A.C. 333, which latter makes the point that that which is non-existent because a nullity can never be ratified.

It must now be stated that although the generally prevailing view is that the doctrine applies only to the statute and memorandum companies, at least two writers¹⁹ argue that it has equal application to letters patent companies, and that there is no logical reason why it should not extend to chartered companies although they recognize the weight of contrary opinion. It is suggested that their views can be reconciled to opinion and practice by stating that, generally, a company's objects will stipulate what it *may* do whereas a charter may also stipulate what it *may not*. In the first case an attempt to exercise powers *in excess* of those in the company's act or memorandum will be *ultra vires*; in the second any attempted exercise of *forbidden* powers will similarly be.

In declaring *ultra vires* transactions to be nullities, the courts were articulating a potentially severe doctrine which could seriously hamper commercial development. This was very soon recognized by the same courts which had propounded it and, as early as 1887, Lord Macnaghten was to say: "But it has frequently been pointed out that the doctrine of *ultra vires* must be applied reasonably and not unreasonably."²⁰

When applied reasonably what are its effects?

- 1) First of all it has been mentioned that an *ultra vires* action cannot be ratified and validated even though it receives the support of all shareholders, (*Kenton Consumers Co-op*, *infra*.)
- 2) Where an *ultra vires* contract remains executory the contracting party has no recourse if the company repudiates the contract. Under these circumstances the company cannot be bound. (*Sinclair v. Brougham*, [1914] A.C. 398.)
- 3) Where the party to a contract has executed his part of that contract he has no action for the price of his goods supplied or services rendered by him although at common law he may follow the goods where they remain identifiable. Since the *ultra vires* contract is a nullity the supplier retains the title to the goods provided. At equity he may trace his goods under the doctrine of restitution. (*Sinclair v. Brougham*, *infra*.)
- 4) Where a company sues on a contract it is now clear that: A defendant when sued on a contract by a company is entitled to take the point by way of defence that the

19. J.A. Street and E.J. Mockler, See Street, *The Doctrine of Ultra Vires*, Sweet & Maxwell, 1930, esp. pp. 17 et seq. and Mockler in Ziegel, *Canadian Company Law*, Ch. 8, Vol. 1, Butterworths, 1967, at p. 231.

20. *Parkdale Corporation v. West* (1887), 12 App. Cas. 602.

contract was *ultra vires*. The contract is void and in the eyes of the law non-existent. There is no ground for distinguishing between executory and executed contracts.

(per Mocatta J. in *Bell Houses Ltd. v. City Wall Properties*, [1966] 2 Q.B. 656.)

- 5) A company can be restrained by any of its shareholders through an injunction from entering any *ultra vires* transactions. (*Simpson v. Westminster Palace Hotel* (1860), 8 H.L. Cas. 712; 2 L.T. 707.)
- 6) No factors such as “estoppel, lapse of time, ratification, acquiescence or delay” will operate to make an *ultra vires* action valid. (*York Corporation v. Henry Leetham & Sons Ltd.*, [1924] 1 Ch. 557, at 573.)
- 7) In jurisdictions which apply the doctrine in an unmodified way, the doctrine of constructive notice also applies and persons dealing with the company are deemed to know its powers even if they have not inspected the memorandum registered. (*Mahony v. East Holyford Mining Co.* (1875), L.R. 7 H.L. 869 at 893; *Sinclair v. Brougham*, [1914] A.C. 398; *Re Jon Beauforte (London) Ltd.*, [1953] Ch. 131; *Cotman v. Brougham*, [1918] A.C. 514.²¹)
- 8) Although property has been acquired by a company through an *ultra vires* expenditure it may nonetheless take any necessary steps to prevent damage to it by strangers. (*Nat. Telephone Co. v. The Constables of St. Peter's Port* [1900] A.C. 317 (P.C.))
- 9) A company may not recover money spent or goods disposed of under an *ultra vires* transaction. However, since a company can never authorize an *ultra vires* transaction it may sue any director responsible for the transaction and such director will be personally liable to the company for any sustained loss. It is, however, perfectly proper for the company not to proceed in such fashion. (*Garrard v. James*, [1925] Ch. 616.)

These above effects have been extensively criticized, as has the whole doctrine, but, despite this criticism, the doctrine survives in many jurisdictions with often quixotic results.

21. Per Lord Parker:

“The question whether or not a transaction is *ultra vires* is a question of law between the company and the third party. The truth is that the statement of a company's objects in the 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.” *Cotman v. Brougham*.

While it may seem reasonable that a railway company be restrained from operating a ferry service where its objects do not so provide, one may not find it quite so reasonable to be told that the coke one has supplied for the heating of a veneer plant would not be paid for because the objects of the purchasing company were not changed from the original intentions — the manufacturing of ladies' dresses.²²

It may well be asked 'what actions have been found to be *ultra vires*'?. It should be remembered that this will vary from company to company but the courts have ruled the following transactions *ultra vires* particular companies:

The application of company funds to promotion of a bill which, if passed, would have increased the efficiency of navigation upon a particular river thus increasing trade available to the railway company. (*Munt v. Shrewsbury, etc., Railway* (1850), 13 Beav. 1.)

The association of the railway company and ferry service referred to above. (*Colman v. E.C. Ry.*)

Provision of company funds to pay legal costs incurred by the directors who had been libelled when the libel was not against the company itself. (*Studdert v. Grosvenor* (1886), 33 Ch. D. 528.)

Payment of large sums to company officers on a winding up. (*Stroud v. Royal Aquarium, etc. Soc.* (1903), 19 T.L.R. 656.)

Underwriting of fire policies by a marine insurance company (*Re Argonaut Marine Insurance Co.*, [1932] 2 Ch. 34.)

Purchase of property other than through statutorily imposed procedure. (*Machray's Dept. store Ltd.*, *infra.*)

Company incorporated to operate office building acquired a quantity of tobacco for resale. (*Trades Hall Co.*, *infra.*)

Insurance company underwriting risks located out of province. (*Hooper Grain Co.*, *infra.*)

Trust company guaranteed a line of credit between two other companies. (*Re Northwestern Trust Co. and, etc.*, *Infra.*)

These random examples show the nature of particular judgments. Some dispute surrounds the rationale behind the doctrine. All that is certain is that the doctrine is either for the protection of the company, the shareholders, the general public, or the company's creditors — for it has variously been attributed

22. *Re Jon Beauforte (London) Ltd.*, [1953] Ch. 131.

to each. One early attribution by Lord Langdale²³ plumps squarely for shareholder protection:

If there is any one thing which is more desirable than another . . . it is this; that the property invested in railway companies should be itself safe; that a railway investment should not be considered, and not be a wild speculation exposing those who are engaged in it to all sorts of risks, whether they intended it or not . . . the investments should be of such a safe nature that prudent persons might, without improper hazard, employ their moneys in it.

By 1875, Lord Cairns was to state that the memorandum (and, thus, the doctrine of *ultra vires*) was not merely protective of the shareholders but:

. . . also to provide for two other very important bodies: in the first place those who might become shareholders . . . and, secondly, the outside public and more particularly those who might be creditors of companies of this kind.²⁴

(emphasis added.)

Yet, in 1960, an Australian judge, Fullagar, J., claimed that:

. . . the so called doctrine of *ultra vires* was evolved for the protection of corporations of limited capacity and their corporators not for the advantage of persons who deal [with such]²⁵.

It can be seldom that a doctrine has had so many rationales advanced as an explanation for its existence, especially when as many, or more, reasons for its change, modification, or abolition have been advanced.

It was noted earlier that Lord Macnaghten was forced to point out very early in its life that the doctrine required reasonable application.²⁶ Perhaps even initially it was the antithesis of the dominant *laissez faire* philosophy of the mid-nineteenth century and its apologists have never been able to reconcile it to any prevailing view. Perhaps it is so linked to the associated doctrine of constructive notice that legal theory and human actuality, or realities, can never be satisfactorily meshed. For whatever reasons, the courts have been reluctant to invoke the doctrine and legal draftsmen have been alert to avoid it so that the applications of the doctrine have been somewhat hit and miss and it has properly protected no-one. As Gower puts it:

It can hardly be doubted that the *ultra vires* rule was satisfactory in its intentions, and, perhaps, to some extent in its operation. At the time it prevented trafficking in company registrations, it ensured that an investor in a gold mining company did not find himself holding shares in a fried-fish shop, and it gave those who allowed credit to a limited company some assurance that its assets would not be dissipated in

23. In *Colman v. Eastern Co. Rwy. Co.*, *supra*, n. 14.

24. *Ashbury Railway Carriage etc. v. Riche*, *supra*, n. 18.

25. *Re K.L. Tractors Ltd.*, (1960-61), 106 C.L.R. 318 (Aust. H.C.).

26. *Supra*, n. 20.

unauthorized enterprises. Unhappily it was capable of causing hardships as great as those which it prevented . . .²⁷

When the registered company was permitted, Gower suggests²⁸ that the memorandum was probably meant to state the objects of a company in one or two paragraphs. Such a limitation was never much more than a pious hope as it would have led to too frequent invocation of the doctrine and draftsmen were quick to incorporate as many as thirty objects in the memoranda so that companies could be covered against virtually any future business opportunities or changes in corporate direction.²⁹ The courts had encouraged this trend, also, by tacitly finding powers incidental to, and therefore necessary for, the achievement of specified objects — and, of course, the more specified objects, the more can incidental powers be imputed.

Courts still hold that the objects must stipulate *some* purpose and that they cannot be so general as to give absolute authority to a company to go off in any direction it pleases³⁰ — but a clause was upheld in *Bell Houses Ltd. v. City Hall Properties Ltd.*³¹ which read:

... to carry on any other trade or business whatsoever which can in the opinion of the board of directors be advantageously carried on by the company in connection with or as ancillary to any of the above businesses or the general business of the company . . .

On this authority Gower's investor may well be surprised how quickly his gold mine converts to a fried fish shop.

This alertness of the draftsmen applied also to an aspect of the doctrine not discussed thus far. Where a memorandum of association lists the objects of a company and one idea appears to be a primary object the courts may treat the others as secondary or ancillary. Should the primary object fail or become incapable of achievement the company may be forced to wind-up.³²

This aspect of the doctrine was avoided with ease, and this is exemplified by *Cotman v. Brougham*³³, in which instance a company listed thirty sub-clauses among its objects and concluded by stating that none were ancillary and that each should be read as capable of standing alone. The clause was upheld and continues, in similar form, to be upheld today.³⁴

27. Gower, L.C.B., *The Principles of Modern Company Law* (3rd ed.), Stevens, 1969, p. 87.

28. *Id.*

29. *Id.*

30. *Introductions Ltd. v. Nat. Prov. Bank.*, [1969] 2 W.L.R. 791 at 794 where Harman L.J. stipulates that you " . . . still cannot have an object to do any mortal thing you want . . ."

31. [1966] 2 Q.B. 656 (C.A.)

32. *Re German Date Coffee Co.* (1882), 20 Ch. D. 169 (C.A.)

33. [1918] A.C. 514.

34. e.g. *Anglo Overseas Agencies Ltd. v. Green.*, [1961] 1 Q.B. 1.

The doctrine of *ultra vires* was, thus, treated with a measure of caution and respect. This led to a relaxation of its potentially inhibitory role and legal draftsmen then almost totally emasculated it. Gower bluntly states that the doctrine has “outlived its usefulness”³⁵, while Getz’s colourful analogy has the judges which assisted at the doctrine’s birth spending a hundred years “unwittingly subjecting it to the torture of a slow death.”³⁶ No writer pleads enthusiastically for it but not all common law jurisdictions have had the courage to give it the *coup de grace* which it would seem considerations of mercy if not policy should dictate.

In England, both the 1945 Cohen Committee and the 1962 Jenkins Committee made recommendations which, had they been implemented, would, in Gower’s paraphrased wording, have removed the sting from the doctrine, resulting in a considerable improvement and in the belated adoption of the rule “prevailing almost universally in the U.S.A. and in many Commonwealth countries”³⁷. Such reforms have not occurred and “all that has happened is that registered companies have been given wider powers to alter their objects.”³⁸ There is one further change which results by British participation in the European community and from s.9(1) of the *European Communities Act*³⁹ which is seen as destroying the doctrine of constructive notice and having an uncertain effect upon the *ultra vires* doctrine as a whole. Oliver⁴⁰ wrote, in 1975,

We must await with interest judicial decisions on these matters. It seems, however, unfortunate that the opportunity was not taken to eradicate the doctrine completely from English law . . .

. . . The doctrine from the point of view of businessmen is no more than an outdated irritant, and because it is deeply rooted in English company law they will doubtless look encouragingly at a legislature which has now taken the first slightly uncertain step in the right direction . . .

In Australia, sections 19 and 20 of the 1961 Companies Act⁴¹ do much to “mitigate the effect of” the doctrine⁴². These sections first allow participation in charities or acts in aid of the Commonwealth during war and make *intra vires* those extensive powers enunciated in an attached schedule (Schedule Three) unless these are expressly excluded or modified by the company’s memorandum or articles. While it remains possible

35. *Supra*, n. 27 @ 98.

36. Getz L., “Ultra Vires and Some Related Problems”, 1968, 3 U.B.C. L. Rev. #3, p. 31.

37. Gower pp. 98, 99.

38. *Id.*

39. *The European Communities Act*, 1972, c. 68. U.K.

40. Oliver M.C. *Company Law* (5th ed.) MacDonal & Evans, 1975, at p. 28.

41. *Infra* n. 42.

42. Mason & O’Hair, *Australian Company Law*, McGraw Hill, 1975, pp. 42-43.

for companies to act *ultra vires*, Section 20 provides for previously *ultra vires* contracts to be generally valid and challengeable only by members of the company in actions against the company or by the company against its officers, except where the Minister may be petitioned to wind up the company. Should such challenge result in a court order restraining completion of a contract, damages may be awarded to or against the company such that compensation for loss or damage sustained results, although anticipated profits shall not be considered as damages.⁴³

Although one author claims that the New Zealand courts show a more liberal approach to the doctrine than do the English; the doctrine, although not uncritically accepted, existed, in that country, in an almost unmodified form at least until recently.⁴⁴

It has already been mentioned that most of the United States have either abolished, or significantly alleviated the effects of, the doctrine. In 1946 Ballantine wrote:

In 1928 the Commissioners on Uniform State Laws approved provisions on the subject of *ultra vires* which have been followed in several states and have had some influence on legislation in others. This act seeks to clarify the law by (1) abolishing the doctrine of constructive notice of the articles of incorporation, (2) abolishing the doctrine of limited capacity and adopting a doctrine of general capacity, as under the Ontario Act.

and he goes on to say that the principles of Agency law would take up any slack.⁴⁵

Since 1946, more states have legislated to modify or abolish the doctrine so that today it is a question in but very few jurisdictions.

The doctrine has been "curtailed drastically"⁴⁶ in South Africa and exists in only vestigial form as a result of the current Companies Act.⁴⁷ All acts of the company which would affect outsiders and would be void under the doctrine are made valid by s. 36 of the Act save only that an action is preserved to allow recourse by members or directors of the company. The authors, commenting on this Act,⁴⁸ are at pains to point out the difference between acts which are *ultra vires* because outside the company's powers and those which have been "described erroneously in a number of judgments as being *ultra vires*" but which rather are prohibited by law. This point

43. *Id.*

44. Farrands W.L., *Company Law in New Zealand*, Sweet and Maxwell, 1970, 28 ff.

45. Ballantine H.W., *Ballantine on Corporations*, Callaghan & Co., 1946, at 264.

46. Cilliers & Benade, *Company Law*, Butterworths, Durban, 1973, at 52 ff.

47. *Id.*

48. *Supra*, n. 46 at p. 57.

bears emphasis since it has led to confusion in more than one jurisdiction.

That diversity and ambivalence so apparent towards the doctrine internationally exists "in spades" in Canada. This survey may be made more brief by stating at the outset that recommendations in virtually every jurisdiction will, if accepted, make this issue an historic one within but a few years, and to spend time on a detailed examination of nuances of differences would, perhaps, be unrewarding. For this reason some broad brush statements may suffice.

Quebec, New Brunswick and Prince Edward Island companies are incorporated by letters patent and the doctrine applies only in circumscribed form. Ferguson, J.A., said, when Ontario granted letters patent:

... the authorities, I consider, establish that a corporation created by charter had at common law almost unlimited capacity to contract, and that statements in the charter defining the objects of incorporation do not take away that unlimited capacity and that even express restrictions in the charter do not take it away . . .⁴⁹

We have seen, and shall see, that this view was never wholly accepted and the actual practice in these provinces much more closely approaches the historical Manitoba position.

Registration, or Memorandum and Article, Companies exist in Newfoundland, Nova Scotia, Saskatchewan, Alberta and British Columbia though in substantially modified form in that latter province. It is to be expected that the doctrine will have more extensive application in these provinces and it does, although subject to statutory restrictions and extensive criticism.

To use British Columbia to exemplify the position, which is not necessarily that of the other four memorandum provinces in the same details, the mode of incorporation, although changed in detail by the 1973 Act^{49a}, remains that of the traditional memorandum and articles being registered. The memorandum "shall . . . contain every restriction upon the business to be carried on by the company or upon the powers of the company." (sec. 7(2)(f)). With four imposed capacity restrictions, each company is stipulated to have the power and capacity of a natural person of full capacity. (sec. 23(1)). The four exceptions preclude companies from operating as a railway or common carrier; carrying on insurance, unless otherwise authorized; operating as a club, unless otherwise authorized; or operating as a trust business (sec. 23(2)). Companies shall not carry on any

49. *Edwards v. Blackstone* (1918), 42 O.L.R. 105 (C.A.)

49a. *Companies Act*, S.B.C., 1973, c. 18 as am.

business which they are restricted from carrying on by their memorandum nor exercise any powers in a manner inconsistent with the memorandum; however, no act of a company is invalid by reason of these prohibitions alone (sec. 24(1)(2) & (3).

The doctrine of constructive notice is removed from British Columbia by Section 28. (Specially limited companies are restricted to activities associated with mining or oil and natural gas operations including exploration and are prohibited from carrying on any other business.)

The effect of Section 27 is to provide sanctions where the company contravenes, or is about to contravene, Section 24(1) or (2) and allows the court, "upon application by a member, a receiver, a receiver-manager, a liquidator, or a trustee in bankruptcy" to order the company

- (a) to restrain from doing a particular act or transferring or receiving any property;
- (b) to require compensation to be paid by the company to another party to a contract;

or

- (c) to make any necessary order it deems necessary where it appears that a contract has not been substantially performed by any party to it.

Thus, as we shall see in regard to Ontario, and as we have seen in Australia the *ultra vires* acts of the company are still capable of identification. Insofar as they affect outsiders they are deemed to be valid. The doctrine is substantially modified in this way to protect those outsiders where they may previously have been devoid of protection. The rights of "insiders" are protected by the powers granted to the courts.

Where corporations are established by articles of incorporation, as they are federally, in Ontario and in Manitoba, the existence of the doctrine will be determined by the philosophy underlying the enabling statute. In the case of Ontario's present Act⁵⁰ the draftsmen chose to enumerate 28 powers which are deemed to be additional to those set out in a company's articles unless such articles expressly limit them. This device "builds in" the common law rules of *Cotman v. Brougham*⁵¹ and *Bell Houses Ltd.*⁵² and allows virtually any activity *intra vires* the company. In case there is doubt s.16 goes on to state that no act of a company and no transfer of property to or from it which it otherwise lawful shall be invalid because the corporation was

50. *Corporations Act*, R.S.O., 1970, c. 89, as am. 1971, c. 25, c. 98; 1973 c. 104.

51. *Supra*, n. 33.

52. *Supra*, n. 31.

without capacity or power to do such act or make or receive such transfer. However, the corporation may be restrained in exactly that fashion adopted in Australia and British Columbia. To this vestigial degree the doctrine survives in Ontario.

Federally, corporations are now subject to the provisions of the *Canada Business Corporations Act*⁵³ which was proclaimed in force December 15, 1975. Sections 15 to 17 stipulate the capacity of federally incorporated corporations and sets out their powers before explicitly stating that the doctrine of constructive notice has no application. Section 16(2) reads:

A corporation shall not carry on any business or exercise any power that it is restricted by its articles from carrying on or exercising, nor shall the corporation exercise any of its powers in a manner contrary to its articles.

It should be noted that the philosophy here is much closer to that behind charters than registered or statute companies in that it is only what is stipulated which is forbidden rather than that which is stipulated which is allowed. Where section 16(2) is contravened, section 206 allows application to the courts for dissolution but the actions of the company are not challengeable under the *ultra vires* doctrine (sect. 18(a) prohibits reliance on this doctrine by the corporation or its guarantors, for example: Section 16(3) equates to 16(1) of the Ontario Act.)

Excepting Manitoba, for the moment, then, it is clear that the doctrine has little or no application today in any jurisdiction in Canada. The remaining vestiges will not be further explored since, this being an area of dynamic change, it may be anticipated that the federal approach will have been widely adopted before too long.

The Manitoba position, with the passage of *The Corporations Act*⁵⁴ is similar to the Federal. Sections 15 to 17 of the Federal and Provincial acts virtually duplicate each other, except in geographic terms, in granting capacity and powers, in validating acts or transfers in excess of powers, and in destroying the doctrine of constructive notice.

The earlier Manitoba position is more confused since the courts were faced with two types of companies, the more general letters patent companies to which, on the authority of *Bonanza Creek Gold Mining Co. v. The King*⁵⁵, the *ultra vires* doctrine did not apply and the statutory or special act companies to which it did. For this reason alone Manitoba is a fascinating jurisdiction for study in an attempt to reconcile the traditional views with

53. *Canada Business Corporations Act*, S.C. 1974-75, c. 33

54. *Corporations Act*, S.M. 1976, c. 40 Cap. C225.

55. *Supra*, n. 10.

the doubts of others, notably Street and Mockler.

In *Stobart v. Forbes*⁵⁶ the plaintiff company which had been incorporated by letters patent under the Manitoba *Joint Stock Companies Act* (R.S.M. 1891 c.25) sued for the recovery of goods supplied to the defendant. Some of those goods were supplied by others but their claims assigned to the plaintiff. Defendant resisted upon the grounds that such assignment was *ultra vires* the company but the court found the power to be incidental to the express purposes within the letters patent. It stated that to do otherwise would be to unduly narrow or constrict the charter and the Act. To this extent the decision is unremarkable except in what it does not say. Had the court been unable to find the power to be an incidental one would it have been found to be a power which could be assumed by a chartered company or would it have been found to be indeed *ultra vires*? What clues exist to the possible answer? First of all Dubuc, J., distinguishes, at p. 186, the plaintiffs from two other litigants in other cases by saying that these latter were "semi-public" or "quasi-municipal corporations, and these are usually restricted to the special powers conferred on them by their charters somewhat more strictly than ordinary trading corporations." (emphasis added). However, the plaintiffs were chartered as wholesale merchants in dry goods etc. and "... it is clear that they could not operate a railway or a saw mill, as such operations would be entirely foreign to the purpose for which they were incorporated."

On balance then it would appear that Dubuc J. would have felt free to find *ultra vires* a transaction which he could not see as an incident.

In 1912 the Privy Council considered *Winnipeg Electric Railway Company v. City of Winnipeg*⁵⁷ in which the city claimed that actions of the company (an amalgam of four companies established by statutes) were *ultra vires*. The various Acts and agreements under which the company was constituted and operated did not expressly prohibit the company from bringing electricity in from outside the city and such a restriction could not be implied. It is to be noted that the claim was that the operations of the company were to run a railway — not only was it importing electricity but selling and distributing the surplus above the company's own requirements.

The judgment was for the company but it is remarkable in the fact that it was arrived at purely from consideration of the

56. (1900), 13 Man. R. 184.

57. [1912] A.C. 355.

incorporating statutes and without overt reference in the Privy Council to the doctrine. For this reason it is included more for completeness of a survey of Manitoba's actions than for its helpfulness.

The Manitoba Court of Appeal heard *Trades Hall Co. v. Erie Tobacco Co.* in 1916⁵⁸ and this judgment is of assistance in showing the view of the court in that year.

The plaintiff company (Trades Hall Co.) acquired a quantity of tobacco from the defendant in what was found to be an *ultra vires* transaction. The plaintiff had been incorporated to acquire and operate an office building; both plaintiff and defendant believed it was *ultra vires* the company to acquire the tobacco; the tobacco was sold to insolvent persons and plaintiff wished to assign the debt to the defendant.

It should be noted here that it was the plaintiff company which alleged that its own actions were *ultra vires*. This view seems to have been accepted in the court of appeal without much discussion although the trial judge did find that the company possessed sufficient authority to acquire the tobacco. In the result the defendants were reimbursed, *Sinclair v. Brougham* being distinguished to allow this.

In the next year, 1917, *Hooper Grain Co. v. Colonial Assurance Co.*⁵⁹ the defendant was a statutory company incorporated by special act. Its license allowed it to carry on business in Manitoba but it underwrote fire insurance policies outside the province and the court had little trouble with the traditional view that, for a statutory company, this action was *ultra vires*. The company was liable for the money representing the premiums collected. In the course of his judgment Macdonald J. stated "The Act incorporating the company does not limit or extend its powers to do business, and its powers must therefore be governed by such rights as the Province of Manitoba by the Act of its legislature confer upon it."⁶⁰ *Bonanza Creek*, a novel case in that year, was applied for perhaps the first time in a Manitoba court.

That year, 1917, was also the year which saw *Hutchings v. Can. Nat. Fire Insurance Co.* (No. 3)⁶¹ which was eventually to reach the Privy Council in 1918⁶². The dispute concerned a parcel of fully paid-up shares in the appellant (defendant) insurance company. The question was whether the directors of two com-

58. (1916, 10 W.W.R. 846.

59. [1917] 1 W.W.R. 1226.

60. *Id.*, at 1227.

61. (1917), 33 D.L.R. 752.

62. *Sub nom Can. Nat. Fire Ins. Co. v. Hutchings* (1914), 39 D.L.R. 401.

panies had "absolute power of refusing to approve and register transfers of fully paid-up shares in regular form and regularly presented to them." These Dominion companies had been incorporated by special act which incorporated Part II of The Companies Act (R.S.C. 1906 c.9) and — to anticipate somewhat — the power of the company to make the by-law on which the directors of both were relying was found out to exist and the by-law in question *ultra vires*.

Within his judgment, Sir Walter Phillimore⁶³ stated:

There is, however, for the present purpose no analogy between companies in the United Kingdom which are formed by contract, whether it be under a deed of settlement or under memorandum and articles of association to which the registrar of joint-stock companies necessarily assents if the documents are regular in form, and Canadian companies which are formed under the Canadian Companies Act, either by letters patent or by special Act.

But it is wiser to look at Canadian legislation as complete in itself and unaffected by British jurisprudence.

(emphasis added)

The Canadian companies . . . are pure creatures of statute and their powers and duties are found in the two Acts.

It is also of interest to note that Sir Walter Phillimore appeared persuaded that circumstances might make a power of veto in the directors of a company "convenient in use." "*But if it is to be introduced under the Canadian legislature, it must be in the letters patent or in the special Act.*"⁶⁴

1923 saw the *ultra vires* doctrine again at issue before Macdonald, J.⁶⁵ A letters patent company attempted to enter a partnership. In the absence of Canadian or English authority the learned judge found that it was *prima facie ultra vires* for an incorporated company to attempt this unless the liabilities of partnership are acquired as a necessary incidental power to the main objects of the company. The claimant company in this instance was McLelland and Stewart of Toronto and, as it was an Ontario company, the case is listed here only as an example of the obiter dictum of Macdonald J. in a case where he encountered a matter of first impression. No evidence as to the powers in the company charter appear to have been before the learned judge and the question as to the application of the doctrine was unanswered since no partnership was found to exist on the facts.

*Re Winnipeg Co-op Bakery*⁶⁶ resulted in a ruling that companies incorporated under *The Co-operative Associations Act*, R.S.M., 1913 ch. 41, had the same power as any other trading

63. *Id.*, at 404.

64. *Id.*, at 407.

65. *In re: Haddon's Book Shop* (1923), 2 W.W.R. 332.

66. [1925] 1 W.W.R. 79.

corporation to pledge credit for purposes incidental to the carrying on of the business for which they were created. It is otherwise of interest as an application of the rule in *Royal British Bank v. Turquand*⁶⁷ which states that a creditor need not enquire into procedures which are matters of internal management, (failure to conform to company practices will not negate otherwise *intra vires* transactions).

Another example of a dispute which concerned a special act company is *Re Northwestern Trust Co. and The Winding-Up Act; Pure Oil Co.'s Claim*⁶⁸ in which a company established as a trust company was found to have acted *ultra vires* in attempting to guarantee payment of a debt proposed to arise between two other companies.

In this Court of Appeal judgment the doctrine as it applies to special act companies was faced head on and clearly the doctrine applies. It then talks extensively of *Bonanza Creek and Trueman, J.A.*, uses these words: "If the company was a pure statutory creation, it was subject to the limitations held in the Ashbury case . . . , to attach to statutory creations. Extra-provincial capacity could exist only if conferred by the enabling statute. The statute not having conferred it their Lordships had to consider the effect of the incorporation of the company by letters patent."⁶⁹ He goes on to say that absent legislation restricting powers in charters the concept that letters patent companies enjoy the powers of natural persons has ". . . a revolutionary and devastating effect upon the *ultra vires* doctrine . . ." and that what Companies Acts legislation was designed to do was to extend some extra-provincial privileges without dealing with rights and powers. "I think it must be held that the Act carries out the intention, and *does not mean that corporations have the unrestricted contracting powers of a common law corporation.*" (emphasis added)

It appears here that the learned judge has associated letters patent corporations with statutory corporations in finding that each may be subject to the *ultra vires* doctrine. The distinction is then that to which reference was earlier made; the first may achieve *intra vires* that which is not forbidden, the latter only that which is permitted.

Mockler in his chapter in Ziegel⁷⁰ suggests that the granting of letters patent to provincial companies is so interwoven with other provincial legislation that the royal prerogative is cur-

67. 6 EC & B1 327; 19 E.R. 886.

68. [1926] 1 W.W.R. 426

69. *Id.*, at 439.

70. *Supra* n. 19.

tailed to such an extent that this form of incorporation is procedural and not substantive and, as such, companies so incorporated are not analogous to chartered corporations. He goes on to say that the matter is not fully settled and requires further exploration:

The real truth is, that, if you look at it very closely, the corporation owed its birth and creation to the joint effect of the charter and of the Act of Parliament, and you can no more neglect the Act of Parliament than you can the charter.⁷¹

Atkinson, L.J., suggested in *A.G. v. De Keyser's Royal Hotel Ltd.*⁷² that the royal prerogative, though absorbed into statute, is nonetheless circumscribed by that statute, which represents the will and intention of the King (he having given it authority) and of the "three estates of the realm".

*Bass v. St. Nicholas Mutual Benefit Association of Winnipeg*⁷³ found the actions of a charitable statutory company *ultra vires* in an unremarkable judgment in 1936 but in 1949 the C.P.R. was clearly seen to enjoy all the benefits of a charter and the company's powers were not circumscribed.⁷⁴

Another cooperative found itself arguing the doctrine in *Kenton Consumers Co-operative Ltd. v. Archibald*⁷⁵ before the then Mr. Justice Freedman. Plaintiff's business was that of a general store. It claimed the sum of approximately \$1,000 from the defendant for goods had and received. A set-off was claimed resulting from dividends allegedly due the defendant but the main argument revolved on another point. That point was whether a particular by-law was passed by the company's shareholders and not by its directors. This by-law repealed an earlier one passed by the directors and was said to fall under sec. 81(3) of *The Companies Act*⁷⁶ which read

"The shareholders, at any general meeting, may repeal, amend or re-enact any by-law."

The defendant was, at the time of passage of the by-law a consenting shareholder. The by-law in question was held *intra vires* but interestingly, the learned trial judge went on to say that if he were wrong in his finding and if the by-law were indeed *ultra vires*, the defendant had taken benefits and was therefore estopped from relying upon the doctrine. It had been argued that no amount of acquiescence of an *ultra vires* act could bind the company, *In re Exchange Banking Co.*⁷⁷ being cited in support of

71. Lindley, L.J., *Elve v. Boyton*, [1891] 1 Ch. 501.

72. [1920] A.C. 508.

73. [1936] 3 W.W.R. 305.

74. *C.P.R. v. Winnipeg*, [1953] 3 W.L.R. 438 (P.C.).

75. (1954), 13 W.W.R. (N.S.) 594.

76. R.S.M., 1940, ch. 36.

77. (1882), 21 Ch. D 519.

this argument, but the feature of this case seized upon by Mr. Justice Freedman was that which resulted in his finding that "... while acquiescence of an *ultra vires* act will not be effective to bind the company it may yet bind the individual shareholders who acquiesce."

This particular case is of interest also in the clarity of the written judgment.

In 1960 the Court of Appeal heard a dispute which fell four square upon the doctrine.⁷⁸ The defendant Health Service was a special act company whose special Act of incorporation included no specific power to buy land although it did give powers to allow it to mortgage and otherwise deal with its own real estate. At trial the finding was for the defendants, holding that an offer to purchase land which they had submitted was *ultra vires*. On appeal (Adamson, C.J.M., dissenting) it was held that implicit in the Act was the power to buy. This was clearly apparent from the fact that the power to mortgage its own property was present; it could only mortgage what it could acquire and the normal mode of acquisition is purchase. Accordingly the power to purchase was found to be an incidental power of the service and its action was in consequence *intra vires*. An order for specific performance issued.

The result agrees with the traditional views of the doctrine and of the doctrine of interpretation, for the authorities relied upon in the judgment are typified by the statement of Lord Fitzgerald:

The objects for which the respondent company, being a statute corporation, was incorporated must be collected from the statute of incorporation, and the powers of the company taken to be limited to those expressed in the statute or to be properly implied as incident to the purposes for which the corporation was created.⁷⁹

(emphasis added)

Finally in this chronological order, one of the most significant cases to be heard in Manitoba was *Machray's Dept. Store Ltd. v. Zionist Labour Organization*⁸⁰. It was found that an attempt by a company formed under Part V of *The Companies Act*⁸¹ to carry on, without pecuniary gain, charitable or social objects, to acquire land, was, absent express provisions in its letters patent permitting such acquisition, *ultra vires*. In this case the organization could have had its letters patent modified and gained the permission of the Provincial Secretary to

78. *Emco Ltd. v. Manitoba Health Service* (1960), 32 W.W.R. 19.

79. *Wenlock (Baroness) v. River Dee Co.* (1885), 10 App. Cas. 354 (H.L.) at 363.

80. (1965), 53 W.W.R. 218.

81. R.S.M., 1940, c. 36.

acquire necessary real estate. It had not conformed to this procedure, an added procedure (sec. 116(4) added 1953 ch. 9), and its attempted action was therefore *ultra vires* and no order for specific performance would issue.

The principles for which Mockler pleads in regards letters patent companies, are not, therefore, clearly discernible from a study of the Manitoba cases. All that can be said is that the doctrine was applied in the courts of Manitoba, and it appears that the following statement must be taken as the best available in the absence of the further research for which Mockler pleads:

Thus it may be said that the doctrine of *ultra vires* applies where the [letters patent] company *fails to meet certain statutory conditions* in the exercise of its powers. This differs somewhat from the general application of the *ultra vires* rule to letters patent companies. Ordinarily it is necessary to find a statutory restriction which is being contravened in order to apply the doctrine. Here [in *Machray's Dept. Store*] the court applied the rule for failure to meet a condition. Would the same result follow where the company has failed to meet a condition set out in the charter? One suggests that it would.⁸²

In sum, it appears that the courts of Manitoba agreed with Mr. Justice Cameron who, although referring to a Dominion company, stated

The letters patent are subject to the provisions of the Act, and it is to the Act itself that we must go to discover the powers of the company to enact by-laws. Under the letters patent an artificial person comes into existence, having the powers given to it by the legislature.⁸³

(emphasis added)

The alternative view stemming from *Bonanza Creek* and articulated in *Edwards v. Blackmore*⁸⁴ was expressly not followed in the *Machray's Dept. Store* case and, indeed, Mr. Justice Dickson relies heavily on Duff J's statement in *Canadian Bank of Commerce v. Cudworth Rural Telephone Co.*⁸⁵ when he quotes him as:

A company created by charter . . . is necessarily subject to the restrictions imposed upon it by the Legislature, and where the enactment imposing such restrictions evinces an intention that a given transaction shall not be entered into, then any attempt on the part of the company to enter into such a transaction must be inoperative in law.⁸⁶

(emphasis added)

While Manitoba courts were liberally willing to find powers to be incidental (e.g. *Stobart*; *EMCO*; *Winnipeg Co-op Bakery*; etc.) they were less willing to allow extension to company

82. Mockler, *Supra*, n. 19 at pp. 257-258.

83. *Supra*, n. 61.

84. (1918), 42 O.L.R. 105.

85. [1923] 3 W.W.R. 458 (S.C.C.) at 467.

86. *Supra*, n. 80.

objects. In these views they appear to have followed general common law principles and English jurisprudence insofar as special act companies were concerned but to have been rather more insular in their approach to letters patent corporations. In light of Mockler's perception that letters patent was a procedural and not a substantive expression of the legal mode of incorporation, it is suggested that this *via media* was, probably, correct. Certainly Chief Justice Meredith's outlook expressed in dissent in the Ontario Court of Appeal in *Edwards v. Blackmore*⁸⁷ would find sympathetic ears as late as 1965. His point that the doctrine was 'muddled' remains true today.⁸⁸

Fortunately, we may now ". . . turn with relief from the muddle of judicial, and law book authors', dicta, . . . on the subject, to the clear, consistent, and business-like . . ."⁸⁹ modern Acts of the Federal Parliament and the Manitoba Legislature and leave the doctrine shrouded within muddle and uncertainty of the past, at least within this Province.

87. *Supra*, n. 84.

88. *Id.*, at 309.

89. *Id.*, at 309.

