REPORTS OF CASES IN HOUSE OF LORDS AND PRIVY COUNCIL, WHICH, THOUGH NOT ORIGINATING IN SCOTLAND, DEAL WITH QUESTIONS OF INTEREST IN SCOTS LAW.

HOUSE OF LORDS.

Monday, May 6, 1918.

(Before the Lord Chancellor (Finlay), Lords Atkinson, Parker, and Wrenbury.)

COTMAN *v.* BROUGHAM.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Company—Ultra vires—Memorandum of Association—Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *secs.* 3, 17.

A company E, incorporated under the Companies (Consolidation) Act 1908, underwrote and received allotment of shares in the A company which it transferred to the L company. All three companies being in liquidation the liquidator of the A company put the L company on the A list of contributories in respect of the said shares, and the E company on the B list. The liquidator of the E company brought an action claiming to have the E company omitted from the B list on the ground that the underwriting of the shares was *ultra vires* of the E company.

Held that under section 17 of the Companies (Consolidation) Act 1908 the certificate of incorporation was conclusive evidence that section 3 had been complied with; the memorandum of association was therefore valid, and under it the underwriting was *intra vires*.

Their Lordships' considered judgment was delivered by

LORD CHANCELLOR (FINLAY)—The Essequibo Rubber and Tobacco Estates, Limited, is a company which was registered on the 6th April 1910. The memorandum of the association is one of a type which unfortunately has become common. The Companies (Consolidation) Act 1908 requires that the memorandum of association should set out, *inter alia*, "the objects of the company" (section 3). The memorandum of this company in clause 3 set out a vast variety of objects, and wound up with the following extraordinary provision:—"The objects set forth in any sub-clause of this clause shall not, except when the context expressly so requires, be in anywise 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 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."

Warrington, L.J., expressed some doubt in his judgment in this case whether a memorandum setting out such a profusion of objects was a compliance with the Act, and it is possible that in some future case the question may arise on application for a *mandamus* if the registrar should refuse registration, taking the ground that the Act requires that the memorandum should be in such a form that the real objects of the company are made intelligible to the public.

In the present case no such question arises. The registrar accepted the memorandum of association and gave a certificate of incorporation, and that certificate is conclusive. The 17th section of the Act enacts that "a certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorised to be registered and duly registered under this Act." All that the Courts can do is to construe the memorandum as it stands.

In the present case the question is whether it was *intra vires* of the Essequibo Rubber Company to enter into the transaction which has ended in the company's name being put upon the B list of contributories to another company the Anglo-Cuban Oil, Bitumen, and Asphalt Company, Limited. The Essequibo Company underwrote shares in the Anglo-Cuban Company and received an allotment of 17,200 such shares. An order was made for a compulsory liquidation of the Anglo-Cuban Company, and it was ordered that the Essequibo Company, which is already in liquidation, should be placed on the B list of contributories in respect of £14,046 due upon these shares. An application was made to strike out the name of the Essequibo Company from the

list of contributories on the ground that the whole transaction was *ultra vires*. Neville, J., refused the application, and he was affirmed by the Court of Appeal.

The question depends upon the interpretation to be put upon the third clause of the memorandum of association. This clause has thirty heads dealing with a multitude of objects and of powers. It is only necessary to refer to the eighth and twelfth heads of that clause in addition to the general provision at the end of the clause which I have already quoted:—"(8) To promote, form, issue, and be interested in any company or companies, either in Great Britain, British Guiana, or elsewhere, and take, acquire, hold, transfer, sell, surrender, or otherwise dispose of and deal in shares, stocks, bonds, obligations, debentures, debenture stock, scrip, or securities in or of any such company, and to transfer to any such company any property of this company, and to subsidise or otherwise assist any such company; and in the event of any property sold to such company proving unsatisfactory to make over to it, gratuitously or otherwise, any other property or rights, either in lieu of the property sold or transferred or otherwise. . . . (12) To buy or otherwise acquire in any way, and hold, sell, or deal with or in any stocks, shares, securities, or obligations of any government, authority, corporation, or company which may be considered capable of being profitably held or dealt in or with by the company."

I agree with both Courts below in thinking that it is impossible to say that the acquisition of these powers was *ultra vires* of the Essequibo Company.

It is well worthy of consideration whether, if it should appear that the law as it stands is not sufficient to cope with such abuses as are exemplified in the memorandum now in consideration, the Companies Act should not be amended so as to bring the practice into conformity with what must have been the intention of the framers of the Act. But the only question before us now is the construction of the memorandum as it stands, and in my opinion this appeal must be dismissed with costs.

LORD ATKINSON—I concur in the judgment of Lord Parker, which I am about to read for my noble and learned friend.

LORD PARKER—I agree. It may well be that the memorandum of association in the present case is not framed on the lines contemplated by the Companies (Consolidation) Act 1908. This point would, no doubt, have been open to argument on proceedings for a *mandamus* had the registrar refused to accept it. Possibly also it might have been raised in proceedings on behalf of the Crown to cancel the company's certificate of incorporation—see the case of *Bowman* v. *Secular Society, Limited*, [1917] A.C. 406, at p. 439. It cannot however, be raised in these proceedings, because the 17th section of the Act makes the certificate of incorporation conclusive evidence that, *inter alia*, the provisions of section 3 as to stating the objects of the company in its memorandum of association have been duly complied with. The only point therefore open to your Lordships' House is the true construction of such memorandum, and on this point I find myself in such complete agreement with the Lord Chancellor that I have little to add. Clause 3, sub-clauses 8 and 12, of the memorandum are in their terms amply wide enough to cover the transaction in question, and the concluding words of subclause 30 were clearly introduced to preclude the operation of these (among other) subclauses being cut down by considerations such as arose in *Stephens* v. *Mysore Reefs (Kangundy) Mining Company*, [1902] 1 Ch. 745.

Mr Whinney in his able argument suggested that in considering whether a particular transaction was or was not *ultra vires* a company, regard ought to be had to the question whether at the date of the transaction the company could have been wound up on the ground that its substratum had failed. Upon consideration I cannot accept this suggestion. The question whether or not a company can be wound up for failure of substratum is a question of equity between a company and its shareholders. 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 subscribers' 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 exerciseable 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 power and 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.

The only other point which I need mention is the company's name. In construing a memorandum of association, the name of the company being part of the memorandum, can, of course, be considered. But where the operative part of the memorandum is clear and unambiguous I do not think its obvious meaning ought to be cut down or enlarged by reference to the name of the company. It should be remembered that the name is susceptible of alteration, and it would be impossible to hold that such alteration could diminish or enlarge a company's powers. On the other hand, the name may be very material if it be necessary to consider what is the company's main or paramount object in order to see whether its substratum is gone.

I think the appeal should be dismissed with costs.

LORD WRENBURY—On the 6th April 1910 the Essequibo Rubber and Tobacco Estates Limited were incorporated by registration under the Companies (Consolidation) Act 1908. To obtain the advantage of that incorporation the law required that "the memorandum must state . . . the objects of the company"—section 3, sub-section 1 (iii). There is some guidance furnished by the Act as to the meaning of these words. There are other matters which the Act requires to be stated in the memorandum. Sections 7 and 45 speak of all collectively as "conditions contained" in the memorandum of association; section 41 as "conditions of its memorandum." Section 9 speaks of the "provisions of its memorandum" with respect to the objects. Section 9 shows that the Act contemplates that the company will as a consequence of "the provisions of its memorandum" have what the Act calls "its business" and will have a "main purpose." Section 9 (*e*) speaks of the "objects specified in the memorandum." The meaning of the Act in this respect is not without authority, which at any rate is some guidance. One ground for winding up is that the Court is of opinion that it is just and equitable that the company should be wound up—section 129 (vi). *Re German Date Coffee Company*, 20 C.D. 169, is the leading authority for the proposition that when that which is called the substratum of the company is gone a winding-up order may be made under section 129 (vi). The substratum is gone when the "main purpose" has become impossible. This class of cases recognises the existence of a "main purpose" in a memorandum which names a host of acts in the clause which has to state the objects.

I cannot doubt that when the Act says that the memorandum must "state the objects," the meaning is that it must specify the objects, that it must delimit and identify the objects in such plain and unambiguous manner that the reader can identify the field of industry within which the corporate activities are to be confined.

The purpose, I apprehend, is twofold. The first is that the intending corporator who contemplates the investment of his capital shall know within what field it is to be put at risk. The second is that anyone who shall deal with the company shall know without reasonable doubt whether the contractual relation into which he contemplates entering with the company is one relating to a matter within its corporate objects.

The objects of the company and the powers of the company to be exercised in effecting the objects are different things. Powers are not required to be and ought not to be specified in the memorandum. The Act intended that the company, if it be a trading company, should by its memorandum define the trade, not that it should specify the various acts which it should be within the power of the company to do in carrying on the trade. The third schedule of the Act contains model forms of memoranda of association. These ought to be followed. Section 118 enacts that those forms, "or forms as near thereto as circumstances admit," shall be used in all matters to which those forms refer.

There has grown up a pernicious practice of registering memoranda of association which under the clause 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 own convictions. It has arrived now at a point at which the fact is that the function of the memorandum is taken 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, a compliance with the Act.

The Act throws upon the registrar a great responsibility when it provides, as it does, that his certificate of incorporation "shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with." 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 in the position in which your Lordships find yourselves in the present case—a position in which it 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 to inquire as to amendments desirable in the law relating to joint stock companies 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.

I turn to consider the transaction in question in this case and to see whether it falls within the company's objects upon a true construction of the memorandum of association, assuming, as I am bound to do, that this is a valid instrument.

The transaction was as follows —A company called the Anglo-Cuban Oil, Bitumen, and Asphalt Company, Limited, was in November 1910 being promoted by a company called the London and Mexico Exploitation Company, Limited. The Essequibo Company in November 1910 sub-underwrote 20,000 shares of 10s. each in the Anglo-Cuban Company for a commission of £600 in cash and £5000 in cash or shares upon one Chansay, who was the promoter, undertaking to purchase at par on or before the 30th November 1911 any shares which the Essequibo Company might have to take up. The Essequibo Company had to take up 17,200 shares. On the 29th November 1910 they applied for that number, and they were allotted to them. On the 6th September 1912 they transferred the shares to the London and Mexican Company. On the 12th November 1912 an order was made to wind up the Anglo-Cuban Company. The Essequibo Company have been put upon the B list of contributories. They by their liquidator (for they also are in liquidation) applied to vary the B list by excluding their name therefrom. The ground of that application was that the transaction was *ultra vires* the Anglo-Cuban Company. The only question open on this appeal is whether upon the construction of the memorandum of association the transaction was *ultra vires*.

The construction of the instrument does not admit of reasonable doubt, Clause 3, sub-clauses (8) and (12) are in terms so wide that an obligation in a contingent event to take up shares falls within them. The language of clause 3 (30) is such that I cannot say that such a transaction was *ultra vires* because it was not ancillary to or connected with or in furtherance of something which I find elsewhere in the company's memorandum to have been "its business." Upon the narrow question upon which alone it is unfortunately within the competence of this House to determine I think the decision below was right. It follows that this appeal must be dismissed, with costs.

Their Lordships dismissed the appeal, with expenses.

Counsel for the Appellant—F. Whinney—Morle. Agents—Sparks, Whitehouse, Russel, & Company, Solicitors.

Counsel for the Respondent—Hon. F. Russell, K.C.—Topham. Agents—Stanley, Evans, & Company, Solicitors.

HOUSE OF LORDS.

Monday, June 17, 1918.

(Before the Lord Chancellor (Finlay), Lords Atkinson and Wrenbury.)

PRICE *v.* GUEST, KEEN, & NETTLEFOLDS, LIMITED.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Master and Servant—Workmen's Compensation—Compensation—Computation—"Employment . . . during the Three Years next Preceding the Injury"—Onus of Proving Discontinuance of Employment—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Sched. I, secs.* 1 *and* 2.

On 10th March 1916 a workman who had been employed by the respondents for the preceding three years was killed by an accident in one of the respondents' collieries. The respondents disputed the method of computing the compensation due to his dependants. From 1st to 13th July 1915 the deceased workman worked "day by day." From 14th to 21st July owing to a strike he did not work. At the end of the strike he returned to work at increased wages. The dependants claimed that during the period of strike the deceased was not employed by the respondents and the compensation fell to be computed on the basis of his subsequent earnings. The respondents contended that his employment had been continuous.

Held (*dis.* L. C. Finlay) that the *onus* of proving the discontinuance of the employment was on the appellant, and there was no evidence to establish her contention.

Their Lordships' considered judgment (from which the Lord Chancellor dissented) sets out the facts.

LORD CHANCELLOR (FINLAY)—The question in this case is as to the measure of compensation payable under the Workmen's Compensation Act 1906 in respect of the death of a workman.

The relevant enactments are found in the first schedule to the Workmen's Compensation Act 1906 (1) (*a*) and (2) (*c*). Clause 1 of that schedule deals with the amount of compensation payable under the Act, and under (*a*) it provides what the compensation should be where death results from the injury. In cases in which the workman has left dependants wholly dependent upon his earnings, the compensation is to be "a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury," or £150, whichever of these sums is the larger, but in no case to exceed £300, "and if the period of the workman's employment by the said employer