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## Ultra Vires Transactions

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# Ultra Vires Transactions

It used to be commonly said that if a private corporation made a contract which the legislature, creating it, expressly or impliedly prohibited it to make, all courts would be bound to treat such agreement as "illegal and therefore wholly void."<sup>1</sup> This statement probably accurately expresses the orthodox attitude of courts with respect to *ultra vires* contracts. In some cases the same proposition stands today, but often it has been unsatisfactory in its application, and for this reason has been relaxed in many instances to a considerable degree. The problem of giving relief upon or enforcing *ultra vires* agreements of private corporations arises in connection with contracts which are either altogether executory or entirely or partially executed on one side. It will be the purpose of this article to determine, if possible, the state of the law governing in each of the situations mentioned and also to examine the legal results which follow complete performance of an *ultra vires* agreement by the parties thereto. It is not, however, proposed except incidentally to discuss the position of corporate shareholders or creditors, but merely to consider the rights and duties of the principals to the various transactions in controversies between them.

If the proper conception of a corporation is that it is a person, created by law, endowed with only such capacities as are given it expressly, and such others as are essential to the attainment of its legitimate corporate ends, it will follow that its unauthorized contracts and acts are nullities. If we start with such an assumption we shall find that a corporation has no power to act in such a way or to incur such an obligation. It is a case where there is a lack of ability. A corporation cannot bind itself in this direction, and its purported act and bargain cannot be its own. Therefore, under such a line of reasoning, the corporation will be in no way responsible for that which purports to be done in its behalf.<sup>2</sup>

1. *Ashbury Ry. etc. Co. v. Riche* (1875) L. R. 7 H. L. 653, 673.

2. "A corporation is an artificial being, invisible, intangible, and ex-

While such a rule would be easy of application, and would simplify the law of *ultra vires*, it is believed that it does not truthfully describe the result of such group activity. Suppose that a corporation *ultra vires* makes a contract and in the course of performance it receives money from the other party thereto and spends it; or suppose that the servants of the corporation, within the scope of their authority, but beyond that of the corporation, convert money, and the corporation appropriates and spends it. It is difficult in each of the assumed cases to say that the corporation never enjoyed the money because it did not have the power to take and use it. Yet, if the premise is sound, this should be the conclusion reached. It would mean that although the corporation never was possessed of the money, still its shareholders would have received the benefit of the same, and this would have occurred apparently through *corporate ac-*

isting only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." *Dartmouth College v. Woodward* (1819) 4 Wheat. (U. S.) 519, 636, 4 L. Ed. 629. "A contract of a corporation, which is *ultra vires* . . . is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified . . ." *Central Transportation Co. v. Pullman's etc. Co.* (1891) 139 U. S. 24, 59.

It used to be the rule that a corporation was not liable for the torts of its servants and agents, even though committed within the scope of their authority, because there was no capacity to commit the tortious act. Some early cases are cited by Professor E. H. Warren in 23 Harv. Law Rev. 498. See, for full discussion *Chestnut Hill etc. Co. v. Rutter* (1818) 4 Serg. & R. (Pa.) 6.

See dissenting opinion of Marshall, C. J. in *Bank v. Dandridge* (1827) 12 Wheat (U. S.) 64, 90, holding that a corporation, having no vocal organs, could not make an oral contract.

It is not the purpose of this article to make a detailed study of the English decisions, but they have, for the most part, followed strictly and consistently the orthodox rule, holding that an *ultra vires* act of a corporation, created by act of Parliament, is a nullity. See Machen, *Modern Law of Corporations*, sec. 1027 *et seq.* and cases cited. So it

*tivity alone.* Of course it is realized that this could be explained by saying that it was not the corporation which acted, but its agents, and if the shareholders have benefited, it is because the agents have improperly and illegally meddled in corporate affairs. The practical result, however, is that the corporation is in the same position as if *it* had received the money and when it is asserted that the advantage has accrued to it without its own action, the argument becomes unnatural, forced, and unconvincing to the normal business man. Perhaps the corporation should not have acquired the money in the supposed cases, but it is accurate to say that it did, but that in so doing it abused its powers, and used them in a way that the law neither sanctioned nor allowed.<sup>3</sup>

has been held that a corporate mortgage executed *ultra vires* is a nullity and that the mortgagee has no vested rights. The action was in ejectment. *Fairtitle ex dem. v. Gilbert* (1787) 2 T. R. 169. See also *Ex Parte British, etc. Assn.* (1878) L. R. 8 Ch. D. 679.

3. "Like natural persons they (i. e. corporations) can overleap the legal and moral restraints imposed upon them; in other words they are capable of doing wrong. To say that a corporation has no right to do an unauthorized act is only to put forth a very plain truism; but to say that such bodies have no power or capacity to err is to impute to them an excellence which does not belong to any created existences with which we are acquainted. The distinction between power and right is no more to be lost sight of in respect to artificial than in respect to natural persons . . . . When we speak of the powers of a corporation, the term only expresses the privileges and franchises which are bestowed in the charter; and when we say it cannot exercise other powers, the just meaning of the language is that as the attempt to do so is without authority of law, the performance of unauthorized acts is a usurpation, which may be a wrong to the state, or perhaps to the shareholders. But the usurpation is possible. In the same sense natural persons are under restraints of law, but they may transgress the law, and when they do so they are responsible for their acts. From this consequence corporations in my judgment are not wholly exempt . . . . Thus like moral and sentient beings, they may do and act in opposition to the intention of their Creator, and they ought to be accountable for such acts. Comstock, C. J., in *Bissell v. Michigan etc. Co.* (1860) 22 N. Y. 258, 264.

The idea that a group of individuals, when acting together to accomplish a common purpose, and in a common cause, act as if they were but one person is not a new one. It is not a notion peculiar to the law, nor did such conception begin with the invention of corporations. The fact is that for centuries men, when acting in concert with a common end in view, have been regarded as a unit, and the action of such an association as that of a unit, as if a single person were acting. Whenever we find an association existing we naturally and easily think of the activity as that of an ideal person apart from the human beings who make up the group. It is not intended to suggest that there will be no individual liability for the debts and obligations of the group. That is a matter with which the law is concerned and which it may regulate. What is meant is that the group or entity acts. If the members are held liable, it is not because they acted individually, but because they caused the association, through their membership therein, to act, and the law is unwilling to allow them to escape individual liability and responsibility.<sup>4</sup>

Viewing the problem in this way, it must be conceded that whenever a corporation commits an unauthorized act, there is an entity engaged in the consummation of the transaction, but that it acted in a way which the law forbade. Then the question arises as to the attitude of the courts with respect to this illegal and prohibited conduct.<sup>5</sup> Should the corporation be left

4. Warren, Collateral Attack on Incorporation, 21 Harv. Law Rev. 305; Warren, Executed Ultra Vires Transactions, 23 Harv. Law Rev. 495; Warren, Executory Ultra Vires Transactions, 24 Harv. Law Rev. 534.

5. "Under the doctrine of general capacities, the effect of incorporation is to create a legal person with the powers of every other legal person with respect to contracts, subject to such prohibition upon the exercise of certain powers as the charter may impose . . . . A corporation would then stand on the footing of a natural person with the power to make every kind of contract, subject to such penalties as the sovereign might impose for violating prohibitions upon making any particular form of contract." Pepper, Unauthorized Exercise of Cor-

undisturbed in the possession of rights and privileges which it has thus acquired, or should the party who has given the right to the corporation be allowed to set it aside? Should the corporation be permitted to sue on a prohibited contract and should the other party thereto be granted a similar right? It is not a question whether the corporation had the power or the ability to incur the obligation or obtain the right. It had that. The inquiry is whether the corporation is to be permitted to assert the right or to be held to the duty, in violation of its organic law.

The two theories as to the nature of *ultra vires* transactions set out above are obviously inconsistent with each other. The basis of the first is that the corporation is not competent or capable of performing the forbidden act, while that of the second is that the corporation is able, but that the exercise of such power is forbidden. In spite of this inconsistency, the writer is convinced that in many jurisdictions, in different types of cases, each theory prevails with the inevitable result that one rarely meets any well considered body of rules relating to *ultra vires*. It is not meant to state that the result of the actual decisions are necessarily unfortunate or unjust, but only to indicate that the courts' failure to adopt and adhere to a single theory as to the nature and extent of a corporation's powers and liabilities in *ultra vires* dealings has led to confusion in this branch of the law, thereby often rendering the determination of the law in any given situation difficult and sometimes a matter of speculation.

## I

It is settled beyond question that there is a decided policy against a corporation engaging in enterprises beyond its powers. It makes no difference what a court's conception of the nature

porate Power, 9 Harv. Law Rev. 255, 263. Senator Pepper, at the point cited, suggested that if a corporation is ever to be held to an obligation incurred *ultra vires*, it must be on a theory of general capacity to make all contracts, stating that which seems to be obvious enough, namely, that "without power there can be no contract. If there is no contract there is nothing to enforce."

of a corporation and its capacities may be, all courts hold, in the abstract, that no corporation can legally act in violation of its charter provisions, and that it is not lawful for it to carry on business projects which are either expressly or impliedly unauthorized.<sup>6</sup> There are a number of reasons for such a rule. Often it is a matter which affects the interest of the state. It is clearly improper for a corporation whose business is quasi-public in its nature to turn its attention and activities from serving the public, in the way it was created to serve, to other matters.<sup>7</sup> In the case of a strictly private corporation, the state is not so often interested in or affected by these kinds of activities. If a corporation organized to manufacture shoes, turns to making automobiles, the change does not as a rule jeopardize any public interest but in such a case, also, it is possible for the public to be injured, and when this is so, the state may object to what is being illegally done.<sup>8</sup>

Even in a case where a corporation's *ultra vires* action is not injurious to the public, the transaction may still be offensive by reason of the fact that it may invade the rights of corporate shareholders or creditors. It is the duty of a corporation to conduct its business for its shareholders in the manner specified in its charter. That is the basis on which a shareholder invests his money. Hence, absent a waiver of one kind or another on the part of a shareholder, any action of the corporation which is unauthorized, is a violation of its obligation amounting in sub-

6. *Blair v. Insurance Co.* (1847) 10 Mo. 559; *State ex. inf. v. Missouri etc. Club* (1914) 261 Mo. 576, 170 S. W. 904; *Central etc. Co. v. Pullman's etc. Co.* (1890) 139 U. S. 24, 24 L. Ed. 55; *People v. Pullman Car Co.* (1898) 175 Ill. 125, 51 N. E. 664; *Downing v. Mount Washington Road Co.* (1860) 40 N. H. 230; *Davis v. Old Colony R. Co.* (1881) 131 Mass. 259.

7. *Thomas v. Railroad Co.* (1879) 101 U. S. 71, 25 L. Ed. 950; *Williams v. Johnson* (1911) 208 Mass. 544, 95 N. E. 90; *Atty. Gen. v. Haverhill etc. Co.* (1913) 215 Mass. 394, 101 N. E. 1061.

8. *State ex. inf. v. Missouri etc. Club*, *supra*, note 6; *State v. Am. Sugar etc. Co.* (1916) 138 La. 1006, 71 So. 137; *People v. North River etc. Co.* (1890) 121 N. Y. 582, 24 N. E. 834.

stance to a breach of trust.<sup>9</sup> The position of a creditor of the corporation may be much like that of a shareholder. It is not unreasonable to assume that a creditor extends credit to a corporation on the assumption that it will continue and prosper in the business for which it was created. He assumes the risk of failure along this line but he does not intend to run the risk of loss flowing from a corporation embarking upon other schemes outside of its constituted sphere of activity. In fact there might well be held to be an implied agreement that a corporation will confine the use of its capital to its legitimate corporate business.<sup>10</sup> If, therefore, it does differently and the venture proves financially unfortunate, an *intra vires* creditor, if injured, should have just cause for complaint. These possible situations have led one learned author to state that when a corporation's *ultra vires* contract is enforced against it under the assumed conditions, the court is unconstitutionally impairing a corporation's contractual obligations running to its shareholders and creditors. It was argued that its funds are diverted in violation of a corporation's duty to these two classes of persons.<sup>11</sup>

9. Machen, *Modern Law of Corporations*, sec. 1153 *et seq.* *Morris v. Elyton Land Co.* (1899) 125 Ala. 263, 28 So. 513; *Einstein v. Raritan etc. Mills* (1908) 74 N. J. Eq. 624, 70 Atl. 295; *Stevens v. Rutland etc. Co.* (1851) 29 Vt. 545. See also *Williams v. Johnson*, *supra*, note 7.

10. Taylor, *Private Corporations*, 5th ed. sec. 271 *et seq.* See also *Bank of Chattanooga v. Bank of Memphis* (1872) 9 Heisk. (Tenn.) 408; *Bank of Covington v. Kiefer etc. Co.* (1893) 95 Ky. 97, 23 S. W. 675; *Re McNatt* (1904) 132 Fed. 620; *Re N. Y. etc. Works* (1905) 141 Fed. 430. The last two cited cases were in bankruptcy. The federal courts hold for the most part that a contract which is *ultra vires* is a nullity. See *infra* note 25. This may be the reason for holding that a creditor cannot prove his claim in bankruptcy, and not primarily that the allowance of his claim would be a violation of the rights of *intra vires* creditors. It is difficult to determine from the decisions on which theory the cases proceed.

It is not to be forgotten that it can always be said that a corporation lacks the power to make the agreement, and often this ground for holding the contract invalid is mentioned.

11. Taylor, *op. cit.* sec. 275.



Strictly speaking, there is no impairment of a contractual obligation, because there is no legislation,<sup>12</sup> but the fact cannot be denied that if a court does enforce an agreement, under these circumstances, it may be overlooking and disturbing vested rights of innocent parties.

If an unauthorized contract which is altogether executory were enforced, at the instance of either party, all of the evils mentioned in the last two paragraphs might result, and as no one will be harmed if relief is denied, the courts have with practically no exceptions, refused to recognize the validity of such agreements.<sup>13</sup> When neither party to the contract has performed, it is better to leave them as they are than to permit them to violate a settled policy. Enforcement of such a con-

12. *Railroad Co. v. Rock* (1866) 4 Wall. (U. S.) 177, 18 L. Ed. 381; *Nat. Loan Ass'n. v. Brahan* (1904) 193 U. S. 635, 48 L. Ed. 823.

13. *Garrett v. Kansas City etc. Co.* (1892) 113 Mo. 330, 20 S. W. 965. In this case there was an action for specific performance of an *ultra vires* contract. The court denied relief because the contract was executory. The court found that the contract violated the Missouri constitution and statutes regulating the powers of corporations, but the corporation was a Kansas corporation. The contract was also said to be against public policy. *Prairie etc. Club v. Kessler* (1913) 252 Mo. 424, 159 S. W. 1080, was an action to compel a director to live up to his fiduciary duties and convey land to plaintiff corporation at the figure that he had acquired the same. The corporation could not take the land *intra vires*. It was held that as the transaction was executory plaintiff could not enforce the same.

*St. Louis etc. Co. v. Hilbert* (1887) 24 Mo. App. 338, 343: "The question what the market value of the stock was, could only be material if the corporation had the legal power to take its own stock . . . A corporation in this state has no such power. It is not simply a question between the state and the corporation . . . but a question affecting the validity of the contract itself." *Wilks v. Ga. etc. Co.* (1885) 79 Ala. 180; *Nassau Bank v. Jones* (1884) 95 N. Y. 115, holding that the corporation had no legal capacity to make the contract. See also *McCutcheon v. Merz etc. Co.* (1896) 71 Fed. 787.

In *Harris v. Independence Gas Co.* (1907) 76 Kan. 750, 92 Pac. 1123, it was said (*dictum*) at p. 753, "It might seem reasonable that a system, which attempts not only to protect a party to an *ultra vires* contract

tract could be refused because a corporation had no ability to make it, and hence no obligation ever arose; or it could be held that a corporation was forbidden to assume the duty, which should have been known to the other party, and the contract therefore should not be held binding. Some courts are prone to hold that a corporation is not competent to give the promise.<sup>14</sup>

No one should be inclined to dispute the propriety of the result reached under either theory. The end attained by each is desirable. If all that has been done by the parties, is to formally enter into a contract, which the legislature did not intend to be made, the first object of the courts ought to be to defeat a recovery by a plaintiff. If a corporation is being sued, it is easy, when expedient, to deny relief on its *ultra vires* contract by saying it lacked capacity to give its promise. It should not, however, be forgotten that if a corporation had no ability to contract at the bargain's inception, logically it will have none at any time. It should be clear that nothing which a plaintiff can do can cure a fundamental and inherent lack of power in his corporate promisor. So, if a plaintiff has, subsequently to the making of the contract, changed his position, through performance or some other occurrence, he can never, consistently with the adopted principle of lack of corporate capacity, gain relief on the corporation's promise, or assert any right predicated thereon.

from actual loss, but where equity requires it, to insure to him the actual fruits of his bargain, ought, for the sake of completeness and symmetry, to enable him to insist upon the performance even of a purely executory contract. It certainly seems against conscience that one who has entered into a contract in the expectation of deriving a profit from it, may, upon discovering the probability of a loss, repudiate it, and escape responsibility by raising the question of want of corporate capacity." For an extreme case in *accord* with the rule stated in the text see *Jemison v. Citizens' etc. Bank* (1890) 122 N. Y. 135, 25 N. E. 264. See also *Wilson v. Mercantile Co.* (1912) 167 Mo. App. 305, 149 S. W. 1156, where the court applied the rule to an executed contract wrongly holding it to be executory. But the decision is sound on other grounds. See, *infra*, note 43.

14. See *supra* note 13.

Occasionally, a court will meet with a case where it will be felt that a plaintiff has what may be called an "equity" which ought to entitle him to the enforcement of his contract against a corporation, as if the transaction were unobjectionable, and relief of this nature will actually be given.<sup>15</sup> No opinion is expressed at this time as to the soundness or wisdom of such a ruling. Conceding, however, that it is correct, it is not perceived how it can logically stand side by side with decisions of the same court to the effect that an executory *ultra vires* contract is a nullity. As already intimated, if an executory contract creates no corporate obligation, the mere difference in the position of a plaintiff who has executed his part of the contract cannot cause a contractual duty on the part of a corporation. The decisions in the cases of executory *ultra vires* contracts cannot be reconciled with those in which a plaintiff is allowed to allege that there is a contract.

On the other hand, if it is held that executory obligations will not be recognized even though a corporation *made* the bargain because it is against the policy of the law, this ruling can be brought in line with the other. Under such reasoning it may be said where plaintiff recovers, that his "equities" are of such a nature as to outweigh and overcome the usual and normal policy against the enforcement of *existing* but forbidden contracts. It has already been submitted that on principle a corporation has a general capacity to act and contract,<sup>16</sup> and it is now urged that, for the sake of consistency and logical development in the law, this theory should be adopted. Whenever it is not followed, misunderstanding and confusion are bound to occur.

## II

The organic law of a corporation may prohibit certain contracts in various ways. It may enact that a certain agreement, if made, shall be void; or, upon principles of statutory construc-

15. See *infra* note 20 and text in connection therewith.

16. See *supra* note 5 and text in connection therewith.

tion, by implication it may forbid a corporation to make a contract; or the prohibition may be expressly stated. Finally, a general constitutional or statutory provision may be found to the effect that no corporation shall engage in any business other than that authorized by its organic law. Such a regulation as that last mentioned is contained in the Missouri Constitution.<sup>17</sup> Whatever form the expression may take, it is clear that if such an intention is expressed or found, there is, to say the least, a policy against a corporation making a contract contrary thereto. But such contracts are made, and will continue to be made. The question, therefore, is what is a court to do with such a contract which has been performed by a plaintiff? Suppose that A innocently makes a contract with corporation C and performs; that C, after receiving the benefits of A's action declines to carry out its obligation because it is *ultra vires*. If A were to sue C, should a court entertain the action or should it hold that the contract is against public policy and therefore not to be recognized?

If the law forbids C to make a contract and further stipulates that it shall be void, no recovery should be granted to A. The language of the prohibition is clear and explicit and there is no possible room for any contractual right. The contract is a nullity and it must be so held.<sup>18</sup>

On the other hand, if there is no statement in the law actually declaring the contract void, but merely an implied prohibition against C entering into the same, there may be a basis for

17. "No corporation shall engage in business other than that expressly authorized in its charter or the law under which it may have been, or may hereafter be organized, nor shall it hold any real estate for any period longer than six years, except such as may be necessary and proper for carrying on its legitimate business." Art. XII, sec. 7 Constitution of Missouri.

18. *Pratt v. Short* (1880) 79 N. Y. 437. See also *Re Mutual etc. Co.* (1899) 107 Iowa 143, 77 N. W. 868; *Maryland etc. Co. v. National etc. Co.* (1906) 102 Md. 608, 63 Atl. 70. The rule would be the same also if a corporation were suing on such a contract.

allowing A to recover.<sup>18a</sup> In order to permit this result with any degree of logical reasoning, it must be found that C had the ability and capacity to make the agreement and that its charter only forbade the exercise of such capacity.<sup>19</sup> Should a court view the transaction in this way, it could then find, as an existing fact, a real bargain between the parties, and it would then only have to determine whether the contract should be sanctioned in the face of the legislative restriction, because of the peculiar existing conditions. The two features of the situation which might influence a court to disregard its normal policy against the enforcement of *ultra vires* transactions are that, (1) A has performed his side of the agreement, and hardship will result to him unless relief be granted, and (2) C has received the benefit of such execution, and it seems unjust to permit it to retain this and escape payment by taking advantage of its own wrong. These elements have led American courts, in many instances, to hold that a plaintiff, situated as A, may recover on a contract, and a defendant corporation cannot escape by pleading *ultra vires*.<sup>20</sup>

18a. If the contract, in addition to being impliedly forbidden, is also against some well defined policy, or is immoral, no relief will be given thereon. See Machen, *Modern Law of Corporations*, sec. 1071. *State ex rel. v. Bankers etc. Co.* (1911) 157 Mo. App. 557, 138 S. W. 669 and *West Penn etc. Co. v. Prentice* (1916) 236 Fed. 891.

19. See, *supra*, note 5 and text in connection therewith.

20. *St. Joseph etc. Co. v. Hauck* (1880) 71 Mo. 465. In *Cass Co. v. Mercantile etc. Co.* (1904) 188 Mo. 1, 86 S. W. 237, the court said (p. 14), "The plea of *ultra vires* is not to be understood as an absolute and peremptory defense in all cases of excess of power without regard to other circumstances and conditions . . . Where a certain act is prohibited by statute its performance is to be held void because such is the legislative will. So where the consideration of a contract is by law illegal, as where the cause of action arises *ex turpe*. But where the act is not wrong *per se*, where the contract is for a lawful purpose in itself, as in the present case, and has been entered into in good faith, and fairly executed by the party who seeks to enforce it, we must assent to the doctrine of those authorities which hold that the excess of the corporate powers of the contracting party which has received the

benefit of the contract is an unconscionable defense, which may not be set up to exempt from liability the party so pleading it."

In *First National Bank v. Guardian Trust Co.* (1905) 187 Mo. 494, 86 S. W. 109, at p. 526, quoting from *R. R. v. McCarthy*, 96 U. S. 1. c. 267, 24 L. Ed. 693, the court said "the doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail, where it would defeat the ends of justice, or work a legal wrong." A recovery was allowed on a note executed by a corporation as a comaker. The consideration had been furnished by the plaintiff, but had not passed *directly* to the defendant corporation. The defendant was, however, benefited by the plaintiff's performance.

In *Hanlon etc. Co. v. Mississippi etc. Co.* (1913) 251 Mo. 553, 158 S. W. 359 defendant corporation made a contract *ultra vires* to promote another corporation. The action was not brought to enforce the contract, but there is *dictum* stating that if the plaintiff had sued on the bargain there could have been a recovery. Said the court (p. 579): "If the contract were only executed on one side, then the plea of *ultra vires* would have been unavailing, because a corporation cannot receive money to do a thing, and fail to do that thing, and after keeping the money excuse itself from liability by a plea of *ultra vires*." Yet in another part of the decision (p. 579) the court speaks of the contract to promote the plaintiff as being *ultra vires* in the strict meaning of the term and "void".

*Schlitz Brewing Co. v. Missouri etc. Co.* (1921) 229 S. W. 813 is a decision squarely in point, and appears to be the last word of the Missouri Supreme Court. In this case defendant was incorporated to deal in poultry and country produce. It contracted to buy beer from plaintiff. Plaintiff supplied beer under the contract and sued to recover the agreed price. It was held that plaintiff could recover and that defendant, having received the benefit of plaintiff's performance, was estopped to deny its capacity to take and pay for the beer. It was insisted by defendant that it could not be liable because the constitution forbade the corporation to engage in any business other than that expressly authorized (see *supra* note 17) but the court held (p. 815) that the constitutional provision did not make the contract void and that a forfeiture would not be exacted against the plaintiff in the absence of an express provision to that effect.

For other Missouri cases recognizing the rule that a plaintiff who has performed his side of the agreement may hold the corporation, see *Common Sense etc. Co. v. Taylor* (1912) 247 Mo. 1, 152 S. W. 5 (*dictum*); *Singer v. St. Louis etc. Co.* (1879) 6 Mo. App. 427; *Glass v. Brewing Co.* (1891) 47 Mo. App. 639 (*dictum*); *Welsh v. Brewing Co.* (1891)

47 Mo. App. 608 (*dictum*); *Lysaght v. St. Louis Ass'n.* (1893) 55 Mo. App. 538 (*dictum*); *Graham v. Brown* (1896) 68 Mo. App. 630; *Winscott v. Guaranty etc. Co.* (1895) 63 Mo. App. 367.

*Smith v. Richardson* (1898) 77 Mo. App. 422, at p. 430, the court said: "In determining the obligation of a private corporation for acts commonly termed *ultra vires*, an important distinction, noted in every well reasoned case is sometimes overlooked. No corporation can bind itself, or its stockholders by a contract expressly prohibited by its charter, by a statute, or by the general law. Such contracts are strictly *ultra vires*, and create no obligation so far as they are executory, although the consideration therefor may have been received and enjoyed by the corporation. On the other hand, an act or a contract merely in excess of the power granted to corporations . . . may yet if the contract has been executed by the other party and its consideration received by the corporation bind the latter on principles of estoppel . . . They are only unauthorized acts of corporations and not being void, but only voidable, the option to avoid them is lost if they have been wholly executed or executed by the adverse party . . . the estoppel . . . is grounded on the idea of preventing a fraud by the corporation on the party whom it has misled into the performance of the agreement." See also *accord Chenoweth v. Pac. Express Co.* (1902) 93 Mo. App. 185 (*dictum*); *York v. Farmers Bank* (1904) 105 Mo. App. 127, 79 S. W. 968; *Adams v. Mutual etc. Co.* 115 Mo. App. 21, 90 S. W. 747.

In *Osmer v. Lemay-Wegman Co.* (1910) 155 Mo. App. 211, 134 S. W. 65, at p. 224, the court said: "without going further into a discussion or citation of authorities, it is sufficient to say as to the case at bar, that it presents no merit whatever and is so obviously an attempt, under a plea of *ultra vires*, to perpetuate a fraud, that no court would twist the salutary rule underlying the doctrine of *ultra vires* into such a vicious use as to allow a defendant corporation to escape from liability on a contract of which it has enjoyed and still retains the benefits."; *Bush etc. Co. v. Banbricke etc. Co.* (1913) 176 Mo. App. 608, 159 S. W. 738; *Miles v. Bank* (1914) 187 Mo. App. 230, 173 S. W. 713. In the case last cited the decision could have been reached on grounds other than estopping the corporation to deny its capacity to incur the obligation; *Lohrer v. Vogel etc. Co.* (1922) 239 S. W. (Mo. App.) 1098.

For cases from other jurisdictions, see *Bissell v. Mich. etc. Co.* (1860) 22 N. Y. 258; *Bath etc. Co. v. Claffey* (1896) 151 N. Y. 24, 45 N. E. 390, containing a clear discussion of principles; *Camden etc. Co. v. Mays etc. Co.* (1886) 48 N. J. Law 530, 7 Atl. 523, holding (p. 563): " \* \* the plea of *ultra vires*, according to its just meaning imports not that the corporation could not make the unauthorized contract, but that

it ought not to have been made. Such a defense therefore rests upon the violation of a trust or duty towards the shareholders and is not entertained where its allowance will do a greater wrong to innocent third parties." *Lemmon v. East Palestine etc. Co.* (1918) 260 Pa. 28, 103 Atl. 510.

While most of the Missouri decisions hold the defendant corporation liable, if the plaintiff has performed his side of the agreement, there are some cases intimating a contrary rule.

In *LaFayette Bank v. St. Louis etc. Co.* (1876) 2 Mo. App. 299, it was said that defendant corporation might defeat its liability as an accommodation endorser, if it proved that the act was *ultra vires*, and the plaintiff *knew* this fact at the time of purchase. In *Aurora State Bank v. Oliver* (1895) 62 Mo. App. 390, defendant corporation assumed *ultra vires* the liability of a partner. It was held that the defendant could not legally incur such obligation and that plaintiff was "bound to take notice of the limitations on the corporate powers . . ." The court states that there is a "settled legislative policy" to confine the management of corporate affairs to its own officers.

In *Boley v. Sonora Co.* (1907) 126 Mo. App. 116, 103 S. W. 975, a corporation was held not liable on a contract to purchase its own shares. But the agreement, if carried out, would have amounted to an illegal impairment of capital. The court said that the proposed procedure would have been "disastrous" to creditors. These cases, with the exception of the *LaFayette Bank case*, permitting a corporation to plead *ultra vires*, can be distinguished from the Supreme Court cases cited, *supra*, on the ground that the transactions were against public policy.

In *Newlands etc. Co. v. Lowe etc. Co.* (1897) 73 Mo. App. 135, a corporation's contract to take shares in another corporation was held invalid. It was said (p. 138), "An act is *ultra vires* when not within the scope of the powers of a corporation . . . Such an act is void in toto." This seems to be the starting point of a line of decisions by the Kansas City Court of Appeals, which are not believed to be in *accord* with the cases in the Supreme Court.

In *Ellett-Kendall Shoe Co. v. Western etc. Co.* (1908) 132 Mo. App. 513, 112 S. W. 5, the same court held that an *ultra vires* contract of guarantee by a corporation would not be enforceable, even though executed by the plaintiff, because (1) it violated a statutory provision (to the same effect as the constitutional provision, cited *supra* note 17) prohibiting a corporation to engage in a business other than that for which it was chartered, (2) the corporation was not benefited by the plaintiff's performance, and (3) the contract was void.

See also *Interstate etc. Co. v. Woodward etc. Co.* (1903) 103 Mo.



App. 198, 77 S. W. 114 and *Orpheum etc. Co. v. Seavey* (1917) 197 Mo. App. 661, 199 S. W. 257. In the latter case it was held that a defendant corporation's promise to contribute to the cost of a building, when finished, was void, on the ground that it was in violation of the constitutional provision forbidding a corporation to engage in any business other than that for which it was organized. (See as to this point *Schlitz Brewing Co. v. Missouri etc. Co. supra*). In the course of the decision the court said (p. 664), quoting from *National etc. Co. v. Bank* 181 Ill. 35, 40: "A corporation has not natural rights or capacities, such as an ordinary individual or an ordinary partnership, and if a power is claimed for it, the words giving the power, or from which it is necessarily implied, must be found in the charter or it does not exist." The court also states that in the matter of *ultra vires* there is a distinction between powers which are in line with the chartered business and pertain thereto (even though *ultra vires*) and those which do not pertain to the business. It states that contracts of the former type may be enforced, but those of the latter may never be. It is difficult to imagine any contract which really pertains to the corporate business as being *ultra vires*. It may have been irregularly entered into. In this event, absent an estoppel, it will not be enforceable; but if the contract truly furthers a corporate end it is *intra vires*.

The Missouri cases would not seem to warrant the court in making the distinction which it did. If the court means by "contract not in line with the chartered business," contracts *expressly forbidden* by the charter, as distinguished from those impliedly forbidden, there is a quantity of *dictum* to support it. See especially *Cass Co. v. Mercantile etc. Co., supra*, and *Bank v. Trust Co.* (1904) 187 Mo. 1. c. 538, 86 S. W. 177 where it was said: "A distinction may perhaps be well made between cases where an act . . . is done in violation of an express prohibition . . . and the case where there is simply a defect of power in the corporation to do the act." On the other hand if the court in the *Orpheum Co.* case means by "contracts not in line with the chartered business" contracts to perform an act, not in furtherance of such business, but not expressly prohibited by the charter, such a contract ought to be enforced against the corporation if executed on the plaintiff's side unless it is wrong *per se* or against public policy. It is submitted that in the decisions of the Missouri Supreme Court, cited *supra*, there is nothing upon which to base a distinction between *ultra vires* contracts which do not pertain to its business and those which do, and that the cases will warrant a recovery in every instance where a plaintiff has performed his side of the agreement, unless it is immoral. See *Welsh v. Brewing Co.* and *Glass v. Brewing Co., supra*, where the Kansas City

Court of Appeals further elaborates its theory as to the nature of an *ultra vires* act. In these cases it was a question as to the liability of a defendant corporation on leases of saloons for the sale of its beer. The court stated that there was no express authority to assume the liability, and that perhaps the act was *ultra vires*, but that it was only technically so and therefore unobjectionable, as it really furthered the defendant's chartered business. The court permitted a recovery. The court seemed to fail to grasp the fundamental proposition that all corporate acts must be either *intra vires* or otherwise.

In an earlier case (*Grohmann v. Brown*, *supra*, 68 Mo. App. 1. c. 636) the same court said: "There is no pretense that the act of the association in borrowing the claimant's money falls within any express statutory prohibition. It follows that the defense of *ultra vires* cannot be invoked . . . ." The purpose of the contract was to enable a building and loan association to conduct a banking business, a purpose clearly, it would seem, not within the line of its chartered business. Again in *Chenoweth v. Pacific etc. Co.*, *supra*, the same court, 93 Mo. App. 1. c. 197, said: "It has been expressly declared by the Supreme Court of this state that the question of *ultra vires* can only be raised in a direct proceeding by the state against the corporation . . . except where the charter of the corporation not only specifies, and, therefore, limits the business in which it may engage, but by express terms, or by fair implication from its terms, invalidates transactions outside of its legitimate corporate business." The *Orpheum Co.* case can be explained on the basis that there was no contractual obligation resting on the defendant. See 197 Mo. App. 1. c. 672, where the court states that the defendant's subscription was a gratuity. See also in this connection *Brewing Co. v. Missouri etc. Co.* (1921) 229 S. W. 1. c. 816.

There is *dictum* in some of the earlier supreme court decisions that *ultra vires* contracts are nullities and unenforceable, but the force of these statements has been dissipated by the cases above cited. See, for example, *Hoagland v. Hannibal etc. Co.* (1867) 39 Mo. 451; *St. Joseph ex rel. v. Saveille* (1867) 39 Mo. 460. See also *Anglo-American etc. Co. v. Lombard* (1904) 132 Fed. 721, where the Federal Circuit Court of Appeals, wrongly, it is submitted, suggested that the rule of the Missouri courts was that there could be no recovery on *ultra vires* contracts.

In some of the cases it has been held that a plaintiff cannot hold a corporation unless his execution of the contract has benefited the corporation. See *Ellett-Kendall Shoe Co. v. Western etc. Co.*, *supra*, where the Kansas City Court of Appeals said (132 Mo. App. 1. c. 516): "If this were a case where defendant corporation had entered into an *ultra vires* contract which had for its object the conferring of some benefit

Such decision is believed to be sound and just. After all, while *ultra vires* contracts of the type now under discussion are illegal in one sense, as a rule there is nothing intrinsically wicked or vicious about them. To use a phrase, often used and abused, these contracts are not usually *malum in se*; they are generally only technical violations of the law. Moreover, it is to be remembered that in practically every case, had the organizers of the corporation been farsighted enough they could have endowed the corporation with the power which is being exercised unlawfully if they had inserted in the incorporation paper an appropriate provision. Even though one were inclined to look upon the contract as wrong *per se*, still A is an innocent party to the transaction and it would be a grave injustice to visit the sins of C upon him. The proper means of keeping a corporation within its legal scope of business activity is not the punish the party who innocently deals with it, but rather for the state, in a direct proceeding, to oust the corporation from its exercise of corporate privileges.

It can be said in opposition to the decisions last cited, and the argument advanced to support them, that a corporation's charter, which is the measure of its powers, is a matter of record; that all persons dealing with it are held to a knowledge of the

on the corporation, and the contract had been executed by the other party, the decisions in this state relied on by plaintiff would be in point. In such cases . . . "The defense of *ultra vires* is not open to a corporation . . . ' The case in hand belongs to a different class and is controlled by a different rule. Here the contract was in no sense for the benefit of the defendant . . . " See *accord*, *Marshalltown etc. Co. v. Des Moines etc. Co.* (1910) 149 Iowa 141, 126 N. W. 192. It is urged that such a refined rule is not proper. It is not a question of benefits conferred. The action does not sound in unjust enrichment. It is a matter of estopping the defendant because of the change in the plaintiff's position. This question has not been passed on by the Supreme Court of Missouri. But see *accord* with the suggestion *Harris v. Gas Co.*, *supra*, note 13; *Hutchins v. Planters' etc. Bank* (1901) 128 N. C. 72, 38 S. E. 252; *Timm v. Grand Rapids etc. Co.* (1897) 115 Mich. 1, 72 N. W. 990.

same; that, as a matter of law, every corporation is forbidden to exceed its authorized powers; and that every one is presumed to know the law. It is arguable, therefore, that every one transacts business with a corporation at his peril, and that if he acquires an *ultra vires* contract right, he must suffer the consequences and will not be heard to say that he did not know that the corporation was acting in violation of law.<sup>21</sup> If the law does expect and require all who deal with a corporation to be familiar with and understand the charter, the requirement is unreasonable and the expectation is doomed to disappointment.

The exigencies of ordinary business alone will often prevent a search of corporate records. Should a vendor, before making a sale, examine the charter of his corporate vendee? Should a contractor with a going concern be compelled to do likewise? If such is to be the rule, the burden of doing business with corporations will be intolerable, and the amount of time involved in making the required search alone will frequently prevent the convenient transaction of the business contemplated by the parties. Indeed, in many cases, the search could not be made, if desired, because of the distant location of the needed record.<sup>22</sup> But even conceding for the purpose of argument that a person should be held to a knowledge of a corporation's charter, should it also be presumed that he will understand that a corporation with which he proposes to deal will have only such powers as are necessary for the accomplishment of corporate ends? Should he further, for example, be presumed to understand that if a corporation is given power to hold land under a lease it has no power to acquire a fee simple? Or should he, at his peril, be presumed to know whether a court will agree with his decision

21. See cases cited *infra* note 25.

22. *Bissell v. Michigan etc. Co.*, *supra*, note 3, 22 N. Y. l. c. 281: "A traveler from New York to the Mississippi can hardly be required to furnish himself with the charters of all the railroads on his route, or to study a treatise on the law of corporations." Perhaps if he were to do the latter he might not be much wiser or closer to the solution of his problem.

that what a corporation is about to do is reasonably necessary to its existence? He might plausibly and reasonably enough decide one way and the court another, and each decision might be sustainable on reputable authority. If the familiar maxim that every one is presumed to know the law is to be indulged in, many cases will occur where there will be no safety in dealing with a corporation. It is urged that the presumption does not represent the facts, that its application is unjust and leads to the infliction of hardship on innocent parties. It should not prevail in this class of cases.<sup>23</sup>

23. It is one thing to hold that a man must be presumed to know that he should not violate the criminal law, and what the law is, but quite another that he must know the intricacies of the law regulating private business transactions. Parties in analogous situations have been estopped to assert the law. If an association usurps corporate authority it is estopped to deny its corporate existence, and courts will "legislate" the association into existence as a corporation for the purposes of the suit. If a vendee has been let into possession under an oral agreement to convey land, the vendor will be estopped to deny the validity of the agreement. If a party is given a parol license to go on another's land, and it is acted on, in certain instances, the owner of the land will not be permitted to revoke the license, short of the accomplishment of its intended purposes. In short, law should not be intended to be an instrument of fraud and courts, rightly or wrongly, impute, if possible, no such intent to legislatures and even invoke an estoppel and "judicially legislate." Of course, the estoppel is not the orthodox one. There is no representation as to a fact; nor is the matter, theoretically perhaps, one peculiarly within the knowledge of the representing party. It is an equitable estoppel. See *St. Louis etc. Co. v. City* (1884) 84 Mo. 202; *Bradley v. Repell* (1895) 133 Mo. 545, 32 S. W. 645, 34 S. W. 841 (a case not in point but containing valuable discussion); *United States Express Co. v. Bedbury* (1864) 34 Ill. 613; *Butcher v. Stapley* (1685) 1 Vernon 363; *Cape Girardeau etc. Co. v. St. Louis etc. Co.* (1909) 222 Mo. 461, 121 S. W. 300; 2 Tiffany, Real Prop. 2nd ed. 1208. But see 2 Morawetz, Corporations, 2nd ed. Sec. 692, and Pepper *Op. Cit.* p. 269. Both of these authors view the estoppel as being improper because of the legal and uncontravertable presumption that corporate powers are known and understood facts. But this so called estoppel is "equitable" in its nature and is not essentially based on unknown facts.

*Denver Fire Insurance Co. v. McClland* (1885) 9 Col. 1. c. 22, con-

The United States Supreme Court is apparently following the strict rule in this type of case, holding that a contract is a nullity and that a plaintiff, even though he may have fulfilled his side of a contract, cannot hold a corporation to any contractual duty and some state courts follow its decisions.<sup>24</sup> It is said by these courts that the contract is not only illegal but a nullity and

tains the answer to the learned authors' contention and is as follows: "The point was strongly insisted upon . . . that one dealing with a corporation is bound to know the extent of its powers to contract, that the corporate name itself indicates the scope of its business and the record of its charter . . . furnishes notice of the extent and limitation of its corporate powers and authority to contract.

"While as a general proposition this is true, yet it must be conceded that this constructive notice is of a very vague and shadowy character. Every one may have access to the statutes of the states . . . and to their articles of incorporation, but to impute a knowledge of the probable construction the courts would put upon these statutes and articles of incorporation to determine questions raised upon a given contract proposed, is carrying the doctrine of notice to an extent which can only be denominated preposterous."

24. *McCormick v. National Bank* (1896) 165 U. S. 538, 41 L. Ed. 718 (*dictum*) there being an express prohibition. *Concord etc. Bank v. Hawkins* (1898) 174 U. S. 364, 43 L. Ed. 1007 (corporate shareholder's liability held not binding on a corporation; the liability was treated as contractual.); *First National Bank v. Converse* (1905) 200 U. S. 425, 50 L. Ed. 537; *Merchants etc. Bank v. Wehrmann* (1905) 202 U. S. 295, 50 L. Ed. 1036; *Citizens etc. Bank v. Appleton* (1909) 216 U. S. 196, 54 L. Ed. 443; *First National Bank v. Am. etc. Bank* (1902) 173 Mo. 153, 72 S. W. 1059 (a decision in which the Missouri court applied the federal rule to a national bank); *National etc. Ass'n. v. Home etc. Bank* (1899) 181 Ill. 35, 54 N. E. 619; *Davis v. Old Colony R. R.* (1881) 121 Mass. 258; *Chewacle etc. Works v. Dismukes* (1888) 87 Ala. 344, 6 So. 122; But see *Bank v. Alexander* (1907) 152 Ala. 585, 44 So. 866.

There is *dictum* in *Eastern etc. Ass'n. v. Williamson* (1902) 189 U. S. 1. c. 128, 47 L. Ed. 735 and in *Ry. Co. v. McCarthy* (1877) 96 U. S. 1. c. 267, 24 L. Ed. 693 which approves estopping a corporation from asserting its lack of capacity to contract, but apparently it has not been followed except by some other courts, which have wrongly explained it as representing the rule of the Federal Supreme Court. See for example *Re N. Y. etc. Works* (1905) 141 Fed. 434; *Lancaster v. Southern etc. Co.*

void.<sup>25</sup> While no recovery is allowed on such a contract itself, still if a plaintiff's performance has resulted in unjust enrichment a recovery may be had to this extent.<sup>26</sup> The courts state that a recovery in quasi-contract is not in affirmation of a void

(1911) 89 S. C. 179, 71 S. E. 864 (a suit to rescind an *ultra vires* agreement). In the light of other and later Supreme Court decisions, the *dicta* in the *Eastern Ass'n* case and that of *McCarthy, supra*, are not believed to be entitled to serious consideration.

25. This proposition was stated by Gray, J. in *Central Transportation Co. v. Pullman's Car Co.* (1890) 139 U. S. l. c. 48, 35 L. Ed. 55 where the learned justice said: "The charter of a corporation . . . is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts . . . ." See also *National etc. Ass'n. v. Home etc. Bank, supra*, note 24, 181 Ill. l. c. 44: "The powers delegated by the State to the corporation are matters of public law . . . A party dealing with a corporation having limited and delegated powers conferred by law is chargeable with notice of them and their limitations, and cannot plead ignorance in avoidance of the defense (i. e. the defense of *ultra vires*)."

26. " \* \* \* the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it." Gray, J., in *Central Transportation Co. v. Pullman's etc. Co., supra*, note 25, 139 U. S. l. c. 60 (*dictum*). The *dictum* has been followed to the extent of allowing an action in quasi contract, but the Supreme Court has refused to rescind in any other way or to any greater extent such transactions, if executed, or partially executed, on the ground that the parties are *in pari delicto* and the contract is illegal. *St. Louis etc. Co. v. Terre Haute R. R.* (1892) 145 U. S. 393, 36 L. Ed. 738. (A suit to set aside and cancel an *ultra vires* lease.) See also, *accord, Harriman v. Securities Co.* (1904) 197 U. S. 244, 296, 49 L. Ed. 739. But see *Barrows v. Niblack* (1898) 84 Fed. 111, permitting a rescission. Then see *Pullman's etc. Co. v. Central etc. Co.* (1897) 171 U. S. 138, 43 L. Ed. 108.

But if the contract has been merely formally executed and not performed the Circuit Court of Appeals has held that a plaintiff is in time to repent, and gain a cancellation. *McCutcheon v. Mers etc. Co.* (1896)

agreement, but is a proceeding to disaffirm it.<sup>26a</sup> Perhaps this is the case but it would seem to be doubtful. If a corporation has been unjustly enriched, theoretically at least, the recognition of this fact is an admission of the existence of the very fact that is denied, namely that the corporation had the capacity to receive the benefit conferred upon it.<sup>27</sup>

Permitting a recovery in quasi-contract allows a plaintiff to hold a corporation in a less satisfactory way, and sometimes to a less degree, than is accomplished by entertaining an action on the contract. In the ordinary case, however, where a corporation, *itself*, has *received* performance from a plaintiff, the rule of the federal courts inflicts no substantial injustice on the latter but in a case where execution of a contract benefits a *third party* and not a corporation, this is not the case and a plaintiff, under

37 U. S. App. 586, 71 Fed. 787. It would seem then that if a plaintiff has performed his side of the agreement that the corporation under the federal rule can be held to no contractual liability; that if there has been no unjust enrichment, there can be no compensation, nor can the corporation be compelled to return that which it has received (except when an action sounding in quasi contract will lie) although strictly by the federal theory it ought not to have title to the benefits received. For cases permitting a recovery if there has been unjust enrichment to such a degree, see *Citizens etc. Bank v. Appleton*, *supra*, note 24; *Rankin v. Emigh* (1909) 218 U. S. 27, 54 L. Ed. 915; *Nashua etc. Co. v. Boston etc. Co.* (1895) 164 Mass. 222, 41 N. E. 268.

26a. "To maintain such an action is not to affirm, but to disaffirm, the unlawful contract." *Central Transportation Co's case*, *supra*, note 25, 139 U. S. 1. c. 60. See also Pepper, Unauthorized Exercise of Corporate Power, 9 Harv. Law Rev. 1. c. 261. But if the courts are willing to disaffirm the contract, why the decision in *St. Louis etc. Co. v. Terre Haute R. R.*, *supra*, note 26? The court there held that the plaintiff was *in pari delicto*, and could not regain possession of premises demised under an *ultra vires* lease.

27. See remarks of Andrews, C. J., in *Bath Gas Light Co. v. Claffy*, *supra*, note 20, 151 N. Y. 1. c. 36. In *Camden etc. Co. v. May's etc. Co.*, *supra*, note 20, 48 N. J. L. 1. c. 568, the court said: "It is illogical to say that the law will imply a contract by the company which it has no power to make for itself. A contract cannot be implied where an express contract cannot be made."



such a state of facts, is unable to look to corporate responsibility in any way.<sup>28</sup> It is felt that the federal decisions, and those following them, have overemphasized the policy against a corporation exceeding its authorized capacities, with the result that a desirable policy of protecting an innocent party, situated as a plaintiff is, has been lost sight of. It is believed that it is fortunate that most American courts, in effect, at least, have disregarded the conception of limited corporate capacity in this connection and have adopted a rule better calculated to promote justice in the business world.

It has already been noted that whenever a corporation is held liable on its *ultra vires* obligation, the chief inducement to so doing has been the fact that if relief were denied, a plaintiff

28. See *Citizens etc. Bank v. Appleton*, *supra*, note 24. It was held in this case that a plaintiff could not recover on a contract of guarantee to the extent that the defendant had not been benefited by the money advanced by the plaintiff.

Suppose there is no unjust enrichment and no right in the plaintiff to rescind within the doctrine of *St. Louis etc. Co. v. Terre Haute R. R.*, *supra*, note 26, could a plaintiff hold the acting members of the corporation liable on the contract on the ground that as there was no corporate act, the contract must have been their personal obligation? This question has received no consideration at the hands of the Supreme Court, so far as is known to the writer. But see *Seeberger v. McCormick* (1899) 178 Ill. 404, 53 N. E. 340, where the court held (p. 415) that, "the principle on which individuals so associated are held as partners is not in causing the corporation to exceed its powers, but in acting for and in the name of a presumed corporation, which has no corporate existence." As there was a corporation in being in this case the court held that the members would not be liable as partners. But the court loses sight of the fact that, as to the *ultra vires* act, it was as if the corporation *did not exist*, and therefore the act must have been the act of the members. It is submitted that the case on this point is unsound, conceding, as the court did, that the *ultra vires* act was a nullity. Under such an assumption, it would always be proper to hold the members, who authorized the contract to partnership liability thereon. *Seeberger's* case held the directors, who caused the contract to be made, liable on an implied warranty of authority to bind the corporation. But see *Abeles v. Cochran* (1879) 22 Kan. 287 which denies the liability of a

would be compelled unjustly to take a loss.<sup>29</sup> The courts have felt that a corporation should not lead a plaintiff to believe that it was able to make an agreement to the latter's detriment. Hence, a kind of equitable estoppel has been invoked. The principle is rightly applied where a plaintiff is really innocent and ignorant of the limits on corporate powers. Assume, however, that he knew that the agreement was unauthorized but still persisted in making and performing it. Should he then be able to sue and hold the corporation? This matter so far as is known, has received scant attention from the courts<sup>30</sup> and is not met with often in the cases. Enabling a plaintiff, who has made an agreement knowing that it was *ultra vires*, to recover is not justifiable. It amounts to a ruling that parties by contract can put themselves above the law. It encourages disrespect for the law and violates fundamental doctrines upon which the limitations on

director on the theory that the capacity of the corporation is a matter of record and that every one who deals with it must be presumed to know the limits on its capacity. Of course, if the plaintiff knows the limits of power there is no basis for a warranty. *Sanford v. McArthur* (1857) 18 B. Mon. (Ky.) 411.

There is some authority for holding members liable as partners. *Medill v. Collier* (1866) 16 Ohio St. 599. See also *Trust Co. v. Floyd* (1890) 47 Ohio St. 525, 26 N. E. 110 (a case of implied warranty).

29. See *supra* note 20.

30. But see *Denver etc. Co. v. McClelland* (1885) 9 Col. 11, 9 Pac. 771; *Franklin etc. Bank v. Whitehead* (1898) 149 Ind. 1. c. 578, 49 N. E. 592; "In many cases no injustice will be done by receiving the plea of *ultra vires* when defensively interposed by the corporation itself. But these are cases where a want of good faith can be imputed to the dealer . . . " *Bissell v. Mich. etc. Co.*, *supra*, note 20, 22 N. Y. 1. c. 276. "If the person dealing with a corporation knows of the wrong done or contemplated . . . he ought not to complain if he cannot enforce the contract. Aside from the law of corporations, agreements which involve or propose a violation of trust will not be enforced by the courts where no greater equities demand it." *id* 275. But see *Wright v. Hughes* (1889) 119 Ind. 324, 21 N. E. 907 where the court *arguendo* held the corporation estopped even though the other party to the agreement knew it to be *ultra vires*. See, also, *Lafayette Bank v. St. Louis etc. Co.* (1876) 2 Mo. App. 299. See, *infra*, note 66.

corporate powers rest. The only argument, which can be advanced to sustain such a recovery is that the agreement is not wrong *per se* and that a plaintiff has parted with value relying on a defendant's promise. Yet this is always what a plaintiff does when he performs his side of an illegal agreement. A plaintiff should be penalized by a denial of relief for having deliberately disregarded a legislative prohibition, even though what has been done may not have been intrinsically wrong or immoral.

### III.

A court which allows a non-corporate plaintiff who has executed his side of an *ultra vires* agreement to recover thereon, has usually permitted a corporation, if in a like position, to also sue on the contract.<sup>31</sup> The reason most often given is that it would be as equally unjust in this case as in the former to deny

31. *St Joseph etc. Co. v. Hauck* (1880) 71 Mo. 465; *Franklin Avenue etc. Co. v. Board* (1882) 75 Mo. 408. The case last cited was a suit by the corporation on bonds. Plaintiff acquired the bonds by assignment. If plaintiff was the assignee, then this is a case, not of a corporation being a promise *ultra vires* itself, but of having acquired an obligation, legal in itself, and seeking to enforce the same. Such a case raises a different question, which is dealt with, *infra*, note 96. See further in *accord* with the text *Russell v. Cassidy* (1904) 108 Mo. App. 577, 84 S. W. 171.

In *Lemp etc. Club v. Hackman* (1913) 172 Mo. App. 549, 567, 156 S. W. 79, the court said: "We deem it unnecessary to inquire into plaintiff's capacity in this regard (*i. e.* its capacity to make the contract in suit) for as we view the case this defense is not available to defendants. This for the reason that defendants have dealt and contracted with plaintiff in its corporate name, have recognized plaintiff's corporate capacity to receive the grant in question, and have received and retained the consideration for the contract sought to be enforced." "A corporation cannot avail itself of the defense of *ultra vires* when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefits of the performance and of the contract. The same rule holds *e converso*; if the other has had the benefit of the contract, fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation." *id* p. 567. The matter of the good faith of the

relief, a defendant having been benefited through a corporation's performance. An estoppel has been held to work against both parties. The courts have invoked it in favor of a corporation without giving the matter any close attention.<sup>32</sup> It is not perceived why a corporation should not claim such an advantage, if it is conceded that there is a corporate capacity and the shareholders are innocent, or if there are corporate creditors, who would be adversely affected if relief were denied their debtor. Of course, if there are no such creditors, and the shareholders have assented to the improper conduct by the corporation, a recovery should be denied, there being no innocent parties to pro-

human being to the contract is stressed in the case where he is the plaintiff and is suing on the agreement. In other words, one of the reasons for the rule is the fact that a corporation may lead a plaintiff innocently to believe that it has the capacity to make the agreement. But, as mentioned in the text, this can never be the case with the corporation. It cannot be led astray as to its own capacities. See also *accord*, *Lemp etc. Club v. Cottle* (1913) 172 Mo. App. 574, 156 S. W. 799. *Hall etc. Co. v. Am. etc. Co.* (1882) 48 Mich. 331, 12 N. W. 205; *Alexandria etc. Co. v. Johnson* (1897) 58 Kan. 175, 48 Pac. 847; *Whitney Arms Co. v. Barlow* (1875) 63 N. Y. 62.

In *Pac. R. R. v. Seeley* (1870) 45 Mo. 212 relief was refused a plaintiff corporation, which had performed its side of the agreement, the court saying (p. 215): "The charter of corporations constitutes the chart of their authority, and they have no powers except such as are expressly granted . . . ." But the contract was found by the court to be against public policy. *Kansas City v. O'Connor* (1890) 82 Mo. 655 is a like decision but there the plaintiff was a municipal corporation. The court, however, does not mention this fact. See *Farmers' etc. Bank v. Harrison* (1874) 57 Mo. 503.

In *St. Louis etc. Co. v. Hilbert* (1887) 24 Mo. App. 338 the plaintiff corporation was permitted to recover that which it had parted with to the defendant on the faith of the agreement, but the defendant had refused to perform his side of the contract and had repudiated it. In *Bowman etc. Co. v. Mooney* (1890) 41 Mo. App. 664 a plaintiff corporation was refused relief on an executory agreement. See *Mount Vernon Bank v. Porter* (1893) 52 Mo. App. 244.

32. 5 Thompson, Corporations, sec. 6021. See also *Lemp etc. Club v. Hackmann*, *supra*, note 31.

tect.<sup>32a</sup> But it is better if there are innocent interested parties, to compensate the corporation for that which has been done, rather than to cause the former probable loss.<sup>33</sup> The matter of confining the corporation within its chartered limits under these conditions can be left to the state, and should not be enforced indirectly in a collateral proceeding.<sup>34</sup>

Nevertheless, such an action will not lie for all of the reasons advanced in support of the cases holding a corporation liable on its contract. It will be remembered that in those cases it was sometimes said that a plaintiff could recover because he had been deceived by a corporation leading him into making and performing a contract, which he believed it could legally make.<sup>35</sup> Clearly, there is no such basis as this for entertaining an action at the instance of a corporation. It was not deceived. Indeed, if anyone, outside of the courts, could be held to a knowledge of the corporate powers, it would be the corporation itself. Accordingly, if an action is to be sustained by a corporation, it must be on the sole ground that it would be unjust to permit a defendant who has received the fruits of a bargain to plead the technical invalidity of the same to the injury of innocent parties.

32a. The courts, so far as is known, have not considered this possible lack of good faith as an important element. No case has been found denying relief on this ground. It is more than likely, if one may speculate, that it would be held in *accord* with the most liberal notion of an estoppel that shareholders knowledge and failure to object, constituted a waiver and made the transaction unobjectionable to this extent. Such a ruling is judicial legislation in its most obnoxious form because it sets the law aside for no legitimate purpose.

33. One of the possible objections to holding the corporation to an *ultra vires* obligation is the fact that such a liability may injuriously affect the shareholders and creditors. Where the corporation is the plaintiff, however, a recovery will benefit these two classes of persons. It will bring into its treasury additional assets.

34. *Bay City etc. Ass'n. v. Board* (1902) 136 Cal. 525, 69 Pac. 225; *Security etc. Bank v. St. Croix etc. Co.* (1903) 117 Wis. 211, 94 N. W. 74. See *Franklin Ave. etc. Inst. v. Board*, *supra*, note 31, but see *State ex rel. v. Bankers etc. Co.* (1911) 157 Mo. App. 557, 138 S. W. 669.

35. See *supra* note 20 and cases there cited.

If there are no innocent parties, as will be the case where the shareholders have acquiesced in the transaction and where there are no creditors, there is no real reason for permitting a corporation to sue.<sup>35a</sup>

If a court regards a corporation as a person of limited capacities and its *ultra vires* contract, because of this doctrine, a nullity, no contractual rights could arise from such an agreement, and a corporation could no more sue for a breach of an actual agreement than it could be sued. Two contracting parties are essential to a bargain but under the assumption made, there could be only one. Therefore, if the federal cases are to be theoretically consistent relief on principles of contract law will have to be denied a corporation, when it is a plaintiff,<sup>36</sup> just as it was allowed to plead *ultra vires* and defeat recovery when it was a defendant.<sup>37</sup>

The Supreme Court of the United States, however, has not always adhered to the theory that an act beyond the legitimate powers of a corporation can result in no rights being acquired thereunder. This position, while it has not led to consistency and a uniform line of reasoning, may possibly justify some decisions in lower federal courts to the effect that a corporation may recover if it has performed its side of the bargain. It has been

35a. See *supra* note 32a.

36. See *accord Central Transportation Co. v. Pullman's Car Co.* (1890) 139 U. S. 24, 35 L. Ed. 55 where the court said (p. 60): "But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws." Again (p. 60) the court stated: "No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it." The action was by the corporation to recover rent under a lease executed by it. Plaintiff was a public service corporation. Perhaps this element may have influenced the court in its decision to deal so harshly with the corporation. See also *Chambers v. Falkner* (1880) 65 Ala. 448; *Brunswick etc. Co. v. United etc. Co.* (1893) 85 Me. 532, 27 Atl. 525.

37. See *supra* note 24.

held that if a corporation performs an *ultra vires* act it is an *accomplished fact* and that no one may question its validity or the rights vested thereunder except the government, to whom the corporation is responsible in a direct proceeding brought for that purpose. Suppose that corporation C *ultra vires* conveys land to G or that G grants to C, and C is not legally competent to take and hold title. The uniform rule in the federal courts is that the grantee in each case acquires a good title. G may not regain possession nor may C. In short, the proposition is that if the transaction, even though *ultra vires*, is *executed* its validity cannot be questioned at the instance of anyone except the state. The latter can proceed against the corporation for having violated its charter, but this is the only possible consequence ensuing from what has been done.<sup>38</sup>

The above being the rule in the federal courts, on familiar equitable principles, it could be held by those courts that a corporation's promisor, if the corporation has performed its side of the contract, should be liable on his promise even though it is no part of a valid agreement. Equity has often held a promisor to the fulfillment of his promise if the promisee has acted to his detriment, expecting that the former would perform. If it would be unjust to permit him to escape from his purported obligation, he can be held even though his promise, in its inception, was not legally binding. This is done on principles of equitable estoppel.<sup>39</sup> Where a corporation has performed, the courts re-

38. See *infra* note 81 and text in connection therewith.

39. *West v. Bundy* (1883) 78 Mo. 407; *Dozier v. Matson* (1887) 94 Mo. 328, 7 S. W. 268; in these two cases it was held that an oral promise to give land, if sufficiently acted upon by the intended donee would be specifically enforceable. See also *Seavey v. Drake* (1882) 62 N. H. 393, *accord*. In *Slater etc. Co. v. Lamb* 143 Mass. 420, 9 N. E. 823 the court said (p. 422): "If it be assumed, in favor of the defendant, that the contracts of sale in the case at bar were *ultra vires* of the corporation, they were not contracts which were prohibited . . . the defect in them is that the corporation exceeded its power in making them. The defendant under these contracts has received the goods, and retained and used them. Either the corporation must lose the value of

gard the executed promise as vesting rights, just as if the corporation had been acting *intra vires*. Furthermore, the benefit of the performance has accrued to its promisor, and this has all been done by the corporation upon the faith of the defendant ultimately living up to his assumed obligation. It could, accordingly, very well be said that a defendant should be held to his promise in spite of the fact that it was not binding when given. He would be estopped to assert that his promise (which, whatever else it may be, is a promise) is not obligatory in the expected way.

Permitting a corporation to maintain an action on a contract on the suggested ground of an estoppel cannot be reconciled with the conception, sometimes indulged in by federal courts, that a corporation has only limited legal ability. Such an idea will lead one to the conclusion that an *ultra vires* act is nothing and that performance of such act will therefore not be detrimental to a corporation. The cases say that a promise to carry out such an act is void because a corporation lacks the power to perform. It is unable to do it. It is unreasonable to say in one breath that a corporation's promise to do that which is forbidden is a nullity, and in the next, if a corporation actually fulfills such promise and does such act, that rights vest and that the effect is to cause detriment to the corporation. Why is it that a corporation is unable to perform the act when it gives its promise, but actually performs it when it carries out the promise? But the Supreme Court has held in other connections that the act if done is a corporate act. It could therefore hold

its property, or the defendant must pay for it. In such an alternative courts have held on one ground or another than an action can be maintained when the sole defect is want of authority on the part of the corporation to make the contract. We think the corporation can maintain an action of contract against the defendant to recover the value of the goods. The defendant is not permitted to set up this want of authority as a defense; and, as the form of the transaction was that of contract, such should be the form of the action." The Massachusetts courts in a case where the corporation is the defendant permit it to plead *ultra vires* to escape contractual obligations. See *Davis v. R. R.*, *supra*, note 24.



as suggested under the assumed facts (not logically, but consistently with its other decisions) and allow a corporation to recover by estopping the defendant. It is not intended to indicate that any such rule has been finally adopted by that court. There are cases (which have been cited) which are contrary to any such notion. On the other hand, there are also some decisions, cited in the next note, and others to be dealt with later herein, which could be interpreted as being in line with an equitable estoppel.<sup>40</sup> The truth is that the federal law of *ultra vires*

40. The United States Supreme Court has permitted a national banking corporation to utilize security which has been received *ultra vires*. See *infra*, note 100 and text in connection therewith, where these cases are discussed. If a mortgage is to be regarded as an *executory* transaction, and a corporation is a person of limited capacity, it is difficult to reconcile these decisions unless it be on the ground of equitable estoppel as suggested in the text and, as there indicated, even such a theory is not consistent with the theory of limited capacity. For an analogous case see *Thompson v. St. Nicholas etc. Bank* (1892) 146 U. S. 240, 36 L. Ed. 956 holding that where a defendant corporation acquires an interest in bonds *ultra vires* it can retain the same.

In *Gold Mining Co. v. National Bank* (1877) 96 U. S. 640, 24 L. Ed. 648 plaintiff bank loaned defendant in excess of the amount authorized and sued to recover the same. Said the court (p. 642): "We do not think that public policy requires or that Congress intended that an excess of loans beyond the proportion specified should enable the borrower to avoid the payment of money actually received by him. This would be to injure the interests of creditors, stockholders, and all who have an interest in the safety and prosperity of the bank." Yet in *Central Transportation Co. v. Pullman's etc. Co.*, *supra*, note 3, the court did permit the tenant under the *ultra vires* lease to occupy the premises without being liable on the covenant to pay rent. Does the *Pullman Company* case overrule the *Gold Mining Co.* case? See also *Gerrell v. Home etc. Co.* (1894) 63 Fed. 371; *Mutual etc. Co. v. Wilcox* (1878) 8 Biss. 203, Fed. case no 9,980. The two last cited cases sustained an action by a corporation on a contract *ultra vires* of both the landlord and tenant. In *Oregon etc. Co. v. Oregonian etc. Co.* (1888) 130 U. S. 1, a lease was executed and possession delivered. The lease was *ultra vires*. The action was to recover rent accruing subsequent to repudiation by the tenant, and held not to lie. There is *dictum* in the case that all

has not been developed with any great degree of precision or certainty of principle.

(To be concluded next issue.)

*ultra vires* transactions are nullities. But again, the corporations were public service companies which may have influenced the court in its statement. The general discussion of Miller, J., was approved in *Central Transportation Co. v. Pullman's etc. Co.*, *supra*.

