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ULTRA VIRES TRANSACTIONS

(Concluded).

IV.

Suppose that corporation C is organized to manufacture ploughs, and that its law contains no express provisions against following other lines of business; or suppose that C is incorporated for the same purpose, under a different law, which expressly enjoins it from engaging in other enterprises. In either case if C were to follow another line of activity and to make a contract in furtherance of the same it would be *ultra vires*. On principle, any act which is not expressly authorized, or reasonably essential to carrying out corporate purposes is improper and beyond charter powers. In order to keep a corporation within its appropriate sphere of activity it is not necessary to hem it around with express statements of what it shall not do. Anything outside of the sphere and not pertaining to its business is regarded as forbidden.⁴¹ This being the situation, it follows that in the second assumed case the explicit injunction contained in C's law is surplusage and may well be due merely to an over-anxiety on the part of the law-making body. C's conduct would have been just as effectively fettered without the statement. In the normal case, therefore, it is not safe to say that there is a basis for distinguishing between acts which are beyond corporate power by reason of an express prohibition and those which are impliedly forbidden. Each act, so far as being *ultra vires*, is equally obnoxious. There is no such thing as varying degrees of *ultra vires*. A corporate act is either *intra vires*, or not, depending upon whether it aids in the accomplishment of genuine corporate ends.

So far, then, as the question of *ultra vires* is concerned, if a

41. The proposition is elementary. See Machen, Modern Law of Corporations, secs. 46 and 68. See *supra* note 2.

court is inclined to enforce a contract of this type in spite of an implied prohibition, it ought to enforce, in the same way and to the same extent, a contract which is *ultra vires* because of an express prohibition.^{41a} Both agreements are *ultra vires* in the same degree, and if one is enforceable, so ought the other to be unless some other objectionable element is present. Any unauthorized contract, of course, may be contrary to good business morals, or against public policy, and whenever this is so it will not be recognized.⁴² Perhaps when an express legislative prohibition is found against the making of a contract, a court may feel that such statement evidences a strong policy against the agreement, and signifies a desire, on the part of the legislature, that it should not be enforced under any conditions or to any extent. Such decisions are met with in the reports,⁴³ and when relief is denied on this ground they are understandable. On the other hand, if the court refuses to sanction the contract on the ground that it is of a different *ultra vires* nature, because expressly forbidden, the decision is not satisfactory and makes an illogical

41a. Naturally whenever a court refuses to enforce an impliedly forbidden contract, it will refuse to enforce an expressly forbidden one. See, *supra*, note 24 and text in connection therewith.

42. See *supra* note 18a.

43. See *State Bank v. Oliver* (1895) 62 Mo. App. 390 a case not squarely in point, but illustrating an application of the general principle. In *Boley v. Sonora Co.* (1907) 126 Mo. App. 116, 103 S. W. 975 an agreement by a corporation to purchase its own shares was held to contravene statutory provisions and accordingly was unenforceable, although executed by the plaintiff. See also *Franklin etc. Bank v. Whitehead* (1898) 149 Ind. 560, 49 N. E. 592; *Ré Mutual etc. Co.* (1899) 107 Iowa 143, 77 N. W. 868; *Morris etc. R. R. v. Sussex R. R.* (1869) 20 N. J. Eq. 542. See also *State v. Bank* (1907) 136 Iowa 79, 113 N. W. 500; *Strickland v. National etc. Co.* (1911) 79 N. J. Eq. 182, 81 Atl. 828.

In *Wilson v. Mercantile Co.* (1912) 167 Mo. App. 305, 149 S. W. 1156 defendant corporation sold its shares, agreeing to repurchase the same at any time. Plaintiff sought enforcement of the agreement, but the court held that the statute forbade its making and refused relief thereon. The court also intimated (wrongly it would seem) that the agreement was executory, but the real ground for the decision is stated at p. 325, where it was said: "But when the transaction is one not permitted, or which is forbidden by law, and not merely in excess of but contrary to the charter powers of the company, the plea of *ultra vires* is available." But there should be a recovery in unjust enrichment. See *supra* note 26.

distinction. Still there is a considerable amount of *dicta* that expressly forbidden *ultra vires* contracts will not be recognized merely because they are forbidden."

Some courts are apt to discern in an express legislative provision an intention to penalize the parties by leaving them in whatever position they may have gotten themselves and neither one is aided. Yet, other rulings may be found which are exceedingly favorable to a corporation. Some authority holds that the intention of the legislature in establishing the prohibition was only to give the state a right to proceed to oust a corporation from its charter.⁴⁴ Other cases are to the effect that the prohibition was only intended to protect a corporation, or some other interested party, from liability or loss, in the event it exceeds its authority and binds itself in the forbidden way.⁴⁵

It is not possible to reconcile all of the cases on this point, but it is suggested that the matter should be approached with the end in view of determining in each case whether the express prohibition does embody an emphatic policy against the enforcement of an agreement. The mere presence of an express prohibition is not believed to be a sufficient basis for assuming this fact. It may be in the law accidentally or as an attempt to incorporate into the statute ordinary common law principles. If, as a matter of fact, there is no decided policy against the contract, then, it is submitted, that it should be enforced, if the conditions are such as would warrant a court in giving relief on a similar impliedly forbidden agreement. After all, there is no substantial difference between the position of the plaintiff in this case, and the plaintiff under a contract that is *ultra vires*

44. See cases cited and quoted from, *supra*, note 20, and note L. R. A. 1917 A, l. c. 794.

45. *Union etc. Bank v. Matthews* (1878) 98 U. S. 621, 25 L. Ed. 188; *Union etc. Bank v. Rocky Mountain etc. Bank* (1877) 96 U. S. 640, 24 L. Ed. 648. See also *First National Bank v. Stewart* (1882) 107 U. S. 676, 27 L. Ed. 592.

46. See *Union etc. Co. v. Rocky Mountain etc. Bank*, *supra*, note 45; *Union etc. Bank v. Matthews* (1878) 98 U. S. l. c. 629, 25 L. Ed. 188; *Farmington etc. Bank v. Fall* (1880) 71 Me. 49; *Wald v. Wheelon* (1914) 27 N. D. 624, 147 N. W. 402. See also *Hunter v. Garaffo* (1912) 246 Mo. 121, 151 S. W. 741.

because of an implied prohibition. If a plaintiff is a human being, he has changed his position, expecting a corporation to perform, and if a corporation is suing, the innocent shareholders and creditors may suffer if relief is denied. It would seem improper to hold that just because the law explicitly provides that the contract shall not be made, innocent parties should be made to suffer unless the contract is wrong *per se* or involves the violation of some important policy which ought to be subserved under all conditions.

V.

Wherever a statutory or constitutional provision is found, stating in effect that no corporation shall engage in any business other than that expressly authorized in its charter, or the law under which it may have been organized,⁴⁷ and a contract in violation of such restriction is made and performed by a plaintiff, it becomes necessary to determine the exact meaning of the prohibition and how it affects the rights and liabilities of parties to the transaction. It could be said that its purpose was to make any contract contrary to the command void and of no effect, and, under such interpretation, neither party could enforce it even after complete performance on his or its part. There are cases so holding.⁴⁸ But the provision might be deemed to only incorporate into the charter "the applicable common law,"⁴⁹ which attributed meaning, in most American jurisdictions on principles of estoppel hereinbefore discussed,⁵⁰ would lead to a recovery on a contract by either party after performance on his or its side,

47. The text appropriates, in substance, the words of the Missouri Constitution. See *supra* note 17.

48. *Anglo-American etc. Co. v. Lombard* (1904) 132 Fed. 721 (a case interpreting the Missouri constitutional prohibition in this way; but see, *infra*, note 51); *Knowles v. Sandercock* (1893) 107 Cal. 629, 40 Pac. 1047; *Zurn v. Mitchell* (1917) 196 S. W. (Tex.) 544 (see Texas case *contra*, cited, *infra*, note 51). The plaintiff should be able to sue in unjust enrichment. See *supra* note 26.

49. *Joseph Schlitz etc. Co. v. Missouri etc. Co.* (1921) 229 S. W. (Mo.) 1. c. 815.

50. See *supra* notes 20, 32 and 39 and text in connection therewith.

just as if the bargain had been *intra vires*.⁵¹ Decisions agreeing with the last suggestion are believed to be the better. As has been urged, it is not wise to lay too much stress on the technical illegality of the transaction to the detriment and loss of innocent parties. Of course, if the contract is also wrong *per se* or is against some policy, relief should be denied in this case as in all others where such facts exist.⁵²

VI.

The question still remains, assuming that a court recognizes the principle of equitable estoppel as being properly applicable to *ultra vires* contracts, how far must a plaintiff have performed such an agreement in order to hold a defendant for a breach thereof?⁵³ Suppose that there has been no actual performance at all, but that a plaintiff has gone to substantial expense in preparing to perform, and, at that point, a defendant repudiates his or its obligation. Should damages resulting from the breach be recoverable? A correct solution of this problem will depend upon the theory which underlies the rule estopping a defendant

51. The Missouri constitutional prohibition appears to have been passed unnoticed in this connection by the Supreme Court of Missouri until 1921, when it was held in *Joseph Schlitz etc. Co. v. Missouri etc. Co.* 229 S. W. 813 that it did not make a contract entered into in violation of its terms, a nullity, but that the same would be enforced according to the principles of the common law. In other words, the constitutional provision was held merely declaratory of the general rule that such a contract, as that described, was *ultra vires*, but the matter of enforcing it, if made and performed by the plaintiff, remained as before. See also *accord* with this general proposition *Summet v. Realty Co.*, (1907) 208 Mo. 501, 106 S. W. 614; *Bond v. Terrell etc. Co.* (1891) 82 Tex. 309, 18 S. W. 691.

In *Orpheum etc. Co. v. Seavey and Ellett-Kendall Shoe Co.*, *supra*, note 20, the Kansas City Court of Appeals intimated that a contract *ultra vires* a corporation would not be enforceable because of the constitutional restriction. But these decisions on this point are *contra* to the *Joseph Schlitz Co.* case, *supra*, and should not be followed.

52. See *Hunter v. Garanfio* (1912) 246 Mo. 131, 151 S. W. 741, a case distinguishable only on this ground from *Joseph Schlitz etc. Co. v. Missouri etc. Co.*, *supra*, note 51.

52a. If such principle (i. e. that of estoppel) is not recognized by a court the plaintiff could not recover under any conditions. See *supra* note 25.

from questioning the validity of the transaction. If estoppel is predicated on the fact that a defendant has received the fruits of the bargain, and will not be allowed to keep them without paying as agreed upon, a plaintiff cannot recover. There has been no enrichment of the defendant in the assumed case to any extent. There are cases holding that nothing short of performance of the agreement by a plaintiff, to some extent at least, will entitle him or it to sue for a breach thereof.⁵³ Such authority can be sustained only on the ground that the defendant has not been benefited by what has been done. It is believed, however, that it would be better to hold a defendant liable, regardless of whether there has been any benefit bestowed, if it is found that a repudiation of the contractual obligation will damage a plaintiff.

The reason why a defendant should be estopped from asserting that a contract is *ultra vires* is not necessarily the fact that enrichment of a defendant has resulted. Naturally a defendant's enrichment strengthens materially a plaintiff's position, but this element should not be a controlling one. The determining factor should be a change in position by a plaintiff to his or its detriment while relying on a defendant's assumption of an apparent obligation. By way of illustration in a different but analogous field, assume that A promises, without consideration, to convey at a future date a parcel of real estate by way of gift to B. If B in reliance upon the promise (which is not enforceable in its inception) enters upon the land and changes his position materially, many courts would hold that the promise to make a gift, because of the injury otherwise resulting to B, is specifically enforceable, and would compel A to make a conveyance to B.⁵⁴ In this case obviously there is no benefit to A.

53. In *Thomas v. West Jersey etc. Co.* (1879) 101 U. S. 71, 25 L. Ed. 950 the court said (p. 86): "Having entered into the agreement it was the duty of the company to rescind or abandon it at the earliest moment. . . . Though they delayed its performance for several years, it was nevertheless a rightful act when done. Can this performance of a legal duty . . . give to plaintiff a right of action?" See also *Oregon etc. Co. v. Oregonian etc. Co.* (1884) 130 U. S. 1, 32 L. Ed. 837. See cases cited *infra* note 59, and *Nassau Bank v. Jones* (1884) 95 N. Y. 115.

54. See *West v. Bundy*, *Dozier v. Matson* and *Seavey v. Drake*, *supra*, note 39.

He is not held to his promise because it would be unconscionable for him to keep something of value without paying for it. He is bound because of the real hardship which will result to B if A is allowed to escape. It is not a case of benefit to a defendant, that moves the court to estop the defendant. It is the hardship which will otherwise be inflicted on a plaintiff. Accordingly, it is urged that there is ample authority and justification for holding a defendant to an *ultra vires* contract, when a plaintiff has materially changed his or its position relying on the agreement. A defendant should be bound regardless of whether he or it has been benefited by what a plaintiff has done. While this is believed to be the proper way to deal with this situation, there is very little authority to be found to sustain the writer's contention. The courts, for the most part, have insisted upon finding that a plaintiff has fulfilled some portion of the agreement before invoking an estoppel in aid.⁵⁵

If a plaintiff has done more than prepare to perform an agreement and has actually performed to some extent, but less than fully, all courts, even though they may never have adopted the doctrine of estopping a defendant, would permit a plaintiff to recover to the extent that a defendant has been unjustly enriched. Compelling a defendant to pay this amount is consistent

55. But see *Dictum* in *Harris v. Independence Gas Co.*, *supra*, note 13. In *Mutual etc. Co. v. Stephens* (1915) 214 N. Y. 488, 108 N. E. 856 plaintiff was a tenant under an *ultra vires* lease. The lease contained an option in favor of plaintiff to purchase the demised premises. The plaintiff sought specific performance of the option. The court conceded that this part of the transaction was executory, but granted the relief prayed for on the ground that plaintiff had gone so far with performance and execution that it would be unjust to deny it complete performance. At page 493 the court said: "But it (i. e. the contract) has been so far executed that it is impossible to restore the parties to their original situation. . . . The defendants have recognized the plaintiff as their tenant. . . . They should not now be permitted to plead its *ultra vires* act to avoid performing their part of the agreement. . . . " Even in jurisdictions which do not estop a corporation to deny its lack of capacity to make an unauthorized contract, it would be possible, if the corporation were suing, to estop the defendant from asserting that the agreement was illegal, if the corporation had changed its position relying on defendant's promise. See *supra* note 39 and text in connection therewith.

with the strict orthodox rule as it prevails in the most conservative jurisdictions, because it is said that in such an action a plaintiff is not affirming but disaffirming a transaction.⁵⁶ Moreover, if a court were willing to permit a recovery on a contract, on the basis of estopping a defendant, it would be possible to do this in the assumed case, to the extent of performance actually furnished the defendant, if the contract is divisible, but not if it is entire.⁵⁷ In the latter case, merely the value of that which has been furnished as distinguished from the contract price could be allowed.⁵⁸

When it comes to the matter of that portion of a contract which has not been fulfilled, and a possible recovery of damages resulting from a defendant's repudiation on principles of estopping the latter, the question is much like that where a plaintiff has merely made preparation for performance. As a rule there has been no benefit received with respect to this portion of the bargain by a defendant and that being the case, courts are apt to hold that there can be no recovery.⁵⁹ As already stated in another connection such a decision seems unjust.⁶⁰ It has also been said by

56. See *supra* note 26a.

57. *Oil Creek etc. Co. v. Penn. Trans. Co.* (1876) 83 Pa. St. 160. See also *Sabine Tram Co. v. Bancroft* (1897) 40 S. W. (Tex.) 837.

58. See *supra* note 26. Such a decision would not of necessity involve an estoppel, but could in *accord* with the strictest rule proceed on the theory that the action was in disaffirmance of the contract. But it might also be predicated on an estoppel. See *Day v. Spiral Buggy Co.* (1885) 57 Mich. 146 and, *supra*, note 57.

In this situation, also, if the corporation is suing to recover the value of that which it has delivered in part performance of the *ultra vires* contract, a court could estop the defendant even though it would not estop the corporation, were it being sued. See *supra* note 39 and text in connection therewith.

59. In *Bowman etc. Co. v. Mooney* (1891) 41 Mo. App. 665 the contract had been partially executed on each side and the court refused relief as to the executory portion thereof. *Sabine etc. Co. v. Bancroft*, *supra*, note 57; *McNulta v. Corn Belt Bank* (1897) 164 Ill. 427, 45 N. E. 945, *accord*. In *Day v. Spiral Buggy Co.*, *supra*, note 58, 57 Mich. 1. c. 152, the court said: "No doubt it results in a degree of hardship in some cases, when a party fails to obtain all that has been bargained for, but the loss of the anticipated advantages as an incident to unauthorized dealings is one for which the parties themselves are responsible, not the law."

60. See, *supra*, note 54 and text in connection therewith.

the courts in cases of this class that that portion of an agreement, which is unexecuted by a plaintiff, is entirely executory, and the normal rule in such situations has therefore been applied, and relief denied. A plaintiff is denied a right to sue on a purely executory agreement because nothing has been done in reliance on a contract.⁶¹ This is not so in the case under discussion, for a plaintiff has changed his or its position. For this reason the case in hand is not analogous to the case of a mere executory contract, and the reasons for denying relief there ought not to control here. The just ruling would be to entertain an action by estopping a defendant from asserting its illegality.⁶²

61. See *supra* note 13.

62. In *Lemp etc. Club v. Hackman* (1913) 172 Mo. App. 549, 156 S. W. 791 and in *Same v. Cottle* (1913) id. 574, 156 S. W. 799 the question to be decided was whether or not a corporate tenant in possession under the lease, who had paid the rent, and occupied the premises during most of the term was entitled to exercise an option to renew the lease, it being *ultra vires*? The court held in each case that the corporation was entitled to specific performance of the option. It was said (172 Mo. App. l. c. 568): "Having executed the lease, and for a period of approximately ten years acquiesced in the exercise by plaintiff of its rights thereunder, and having received the full consideration stipulated to be paid under the contract it does not lie in the mouth of the defendants to now question the corporate capacity of plaintiff when the latter is seeking to specifically enforce one of the covenants therein, which defendants bound themselves to perform." At another point in the opinion (p. 567) the court treats the agreement as being fully executed on the plaintiff's side, so that perhaps the case merely stands for the proposition that where the plaintiff has performed fully the defendant is estopped. But such a rule does not fit the facts and is not applicable. An option contract gives the optionee the privilege (for which he has paid) of accepting an offer on furnishing further consideration, i. e. accepting the offer which is the subject matter of the option. The furnishing of this further consideration is in its nature executory and is not even an obligation. Before plaintiff in the principal case would have been in a position to have alleged that it had *fully* executed its side of the agreement it would have had to have assumed the obligations of a tenant under the *new* lease. The case therefore is in reality one where the plaintiff had partially executed its side of the bargain and changed its position to its detriment. The case, in its result, actually supports the rule advocated in the text but the reasoning therein does not. See accord *Harris v. Gas Co.* (*dictum*) and *Mutual etc. Co. v. Stephens*, *supra*, note 55.

Vermont etc. Co. v. De Sota etc. Co. (1910) 145 Iowa 491, 122 N. W. 930 is not in point, but suggests *arguendo* that the material question in all these classes of cases is the matter of change in plain-

VII.

Occasionally, a corporation will contract to exercise an apparently legitimate power, but its exercise, under the existing conditions, will be illegal because in furtherance of an unauthorized purpose. For example, suppose that a corporation contracts to purchase land, with the secret intention of speculating, which act is foreign to its business. In such a case all courts would hold that the corporation's promisee, if he has changed his position innocently relying on the former's promise, may hold it to the bargain.⁶³ So again, if a corporation, with capacity to issue negotiable notes gives one for an unauthorized purpose, and such note comes into the hands of a holder in due course, or even of an innocent assignee, it can be enforced.⁶⁴ In each of the assumed cases a corporation would be estopped to deny its capacity to incur the obligation, because of the obvious injustice, which would result to an innocent party if an action on the contract were refused him. In all cases where a corporation appears to have the power to legally contract in the way in which it does, it will not be allowed, as against an innocent party, to assert that a promise was illegal because furthering an unknown *ultra vires* object.

There is no certain or reasonable way by which an innocent party to such an agreement can discover that it is in reality *ultra*

tiff's position. But see *Wilson v. Mercantile Co.* (1912) 167 Mo. App. 305, 149 S. W. 1156, discussed in note 43 *supra*. It should be again noted that a court which will not estop a corporation might still estop the other party to the agreement, at the instance of the corporation. See *supra*, note 39 and text in connection therewith.

63. *Re David Payne & Co.* (1904) 2 Ch. 608; *Miners' etc. Co. v. Zellerbach* (1869) 37 Cal. 543 (*dictum*); *Bradley v. Bullard* (1870) 55 Ill. 413; *Brewer etc. Co. v. Boddie* (1899) 181 Ill. 622, 55 N. E. 49; *N. Y. etc. Co. v. Kidder etc. Co.* (1905) 192 Mass. 391, 78 N. E. 463.
64. *Monument Nat. Bank v. Globe Works* (1869) 101 Mass. 57. "But when the transaction is not the exercise of a power not conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other contracting party, the doctrine of *ultra vires* does not apply." *id* 58. *National Bank v. Young* (1886) 41 N. J. Eq. 531. See also Norton, Bills & Notes, 4th ed. 288 *et seq.*

vires and perhaps for this reason an estoppel may be said to be legal rather than equitable in its nature. The *fact* of abuse of power is peculiarly within the knowledge of the corporation concerned and is acted upon by a plaintiff to his detriment.⁶⁵ The *ultra vires* defect in the transaction is not due to ignorance of the law. The corporation's promisee could perfectly well know the law, yet with this knowledge the contract would still be illegal, because of the abuse of power, and yet not appear to be so. On the other hand, it could be said, even here, that courts in recognizing the contract as binding, put a corporation above the law and permit the other party to a transaction to successfully contend that a corporation can exercise a power which it did not possess. It seems certain that the action of the corporation is really *ultra vires*. Every power, regardless of the fact that it may be legally possessed in certain connections, is illegally exercised when it is used to accomplish a non-corporate purpose.^{65a} However, in spite of these technical and theoretical objections, for the sake of a plaintiff, it would not do to sustain a plea of *ultra vires* to an action on such a contract.

In cases where an abuse of power is known to a party who contracts with a corporation at the time of the making thereof, the corporation should not be held liable in any jurisdiction except to the extent that there may have been unjust enrichment.⁶⁶

65. It is not believed, absent some detriment to the plaintiff through change in position or performance, that the estoppel should be invoked. But see *contra* Machen, *Modern Law of Corporations*, sec. 1061. The cases cited by the learned author to support his suggestion do not seem convincing.

65a. But see cases of corporate loans cited and discussed, *infra*, note 66 which seem to regard such transactions as being really *intra vires*.

66. The cases for the most part assume this but see *National Bank v. Globe Works*, *supra*, note 64; *National Bank v. German-American etc. Co.* (1889) 116 N. Y. 281, 22 N. E. 567. It has been held where money is loaned to a corporation to further an *ultra vires* purpose that the lender can sue and recover the same on the contract even though he *knew* of the ulterior improper purpose. *Jenson v. Teltec etc. Co.* (1909) 174 Fed. 86. See also cases *accord* collected in note L. R. A. 1917 A. l. c. 763. The only basis for such a decision, unless placed on the broadest kind of an equitable estoppel is that the act of borrowing is *intra vires* because the corporation possesses a general and unlimited capacity to borrow. In *Wright v. Hughes* (1889) 119 Ind. l. c. 330, 21 N. E. 907, the Supreme Court of Indiana in

No estoppel ought to be invoked to help a plaintiff who has attempted to acquire a right with his eyes open in deliberate violation of the law.⁶⁷ If relief were given under such facts, it could not be based upon an estoppel of the technical variety, because there has been no action in the dark by a plaintiff to his detriment. There is nothing approaching deception in this situation.

Turning to the rights of a corporation under this kind of a contract, if it is purely executory, no relief ought to be granted thereon. There has been no deception and no change of position, and the ordinary rule in such cases should be applied.⁶⁸ On the other hand, if a corporation has executed its side of the agreement, or partially executed it, or changed its position in preparing for execution, recovery ought to be allowed or denied in accordance with the decisions of the particular jurisdiction as hereinbefore discussed.⁶⁹ The case is merely that which is ordinarily encountered, i. e. an *ultra vires* contract sued upon by a corporation.

dealing with such a transaction said: "The power to borrow money was plenary and subject to no restrictions. In such a case although the lender may know that it is the purpose of the borrower to use the money in an irregular way, yet if the contract between the lender and the borrower is not in violation of law or declared void by statute, the money may be recovered unless the lender was in some way implicated in furthering the borrower's design or accessory to the prohibited or illegal act." But there were other compelling reasons for the ruling. See also *Thompson v. Lambert* (1876) 44 Iowa 239.

It is submitted that a corporation never has plenary power to do any act. It is only when the act is done in pursuance of authorized corporate objects that it is *intra vires*. Whenever it is done for any other purpose it becomes illegal. No corporate act can be taken from its setting and, after an examination in the abstract, characterized as either legal or illegal. If the act reasonably appears to an outsider to be legal and this appearance is acted on to the latter's detriment, then there should be an estoppel but not otherwise. Of course, the results of the cases which allow a lender to recover are probably correct. Unless the transaction is wrong *per se* the lender should recover the amount which the corporation has been enriched in an action sounding in quasi contract. See *supra* note 26. See contrary to the *Hughes* case, *supra*, *Maryland etc. Co. v. Bank* (1906) 102 Md. 608, 63 Atl. 70.

67. See *supra* note 30.

68. See *supra* note 13.

69. See especially notes 31 and 39, *supra*, and text in connection with each.

VIII.

A corporation will sometimes enter into an agreement of which only a portion will be *ultra vires*. Under such conditions, when for any reason a plea of *ultra vires* will be available to either party, it is essential to determine whether it will go to entirely defeat an action on the contract or merely to prevent relief on that portion which is objectionable in this respect. If the contract is entire and indivisible, the plea if available will defeat the action altogether.⁷⁰ On the other hand, however, even though the plea is available, if the contract is divisible and the defendant, according to ordinary rules of contract law, cannot object to a suit on the legal part, the actions should lie to this extent.⁷¹ In any event it would be proper, if the defendant has been unjustly enriched to allow a recovery for that value in an ordinary quasi-contractual action.⁷²

IX.

A matter remaining for consideration is the effect of complete execution of an *ultra vires* contract by each of the parties thereto. We are not concerned with enforcing the agreement. It has been fully executed. The problem is, what rights may be founded on such performance? Has each party complete legal title to the benefits received, or has the corporation, as a matter of fact, because of a legally inherent inability and lack of power, neither parted with nor received anything as a result of attempting to carry out the bargain? If the corporation has passed and

70. See *Downing v. Mount Washington etc. Co.* (1860) 49 N. H. 149; Machen, *Modern Law of Corporations*, sec. 1059.

71. *Farmers' etc. Bank v. Harrison* (1874) 57 Mo. 503; *National Bank v. Kiefer etc. Co.* (1893) 95 Ky. 97, 23 S. W. 675; Machen, *op. cit.* sec. 1059; Thomson, *Corporations*, sec. 5981. See also *Kraniger v. People's etc. Soc.* (1895) 60 Minn. 94, 61 N. W. 904, and *Downing v. Mount Washington etc. Co.*, *supra*, note 70. *Sed qu.* Might not the whole transaction be regarded as tainted with illegality? See *Shaw v. Carpenter* (1881) 54 Vt. 155.

72. See *Farmers' etc. Bank v. Harrison* and *Kraniger v. People's etc. Soc.*, *supra*, note 71.

received title, as intended, following performance, is the closed transaction to be regarded by the courts as unassailable by the parties thereto, or may it be avoided by either or both of them? Of course, the transaction will always be open to attack by the state if the public interest has been affected to the extent of making the corporation liable in *quo warranto* proceedings to an ouster.⁷³

Carrying the doctrine that a corporation is a being of fixed powers and capacities to its natural conclusion, courts, wherever such a conception prevails, should hold that so far as fulfillment of an agreement involved corporate action nothing resulted therefrom.⁷⁴ Under such a theory if corporation C *ultra vires* bargained to convey land to V, and pursuant to such an arrangement C purported to grant to V and received the purchase money stipulated for, it would seem to follow that C still owned the land and did not have title to the money. Logically, therefore, C ought to be able to bring an action to recover possession of the land and remove the cloud on the title, which the purported deed cast on it. V should likewise have a right to recover the money. The conveyance and the receipt of the money were not corporate acts, but would have to be considered as the acts of those who wrongfully and without authority attempted to act for C. No corporate significance should be attributed to the transaction whatever.⁷⁵ Undoubtedly, if a corporation's law or charter provided that its

73. See *supra* notes 6, 7 and 8.

74. See *supra* note 2.

75. Professor E. H. Warren aptly expresses this idea in speaking of a lease executed *ultra vires* by a corporation. He says (Warren's Cases on Corporations l. c. 756 note): "If the objection to the *ultra vires* lease was, as stated in the *Central Transportation* case (see *supra* note 2) 'not merely that the corporation ought not to have made it, but that it could not make it,' it would seem to follow that the act of making the lease was simply the act of certain human beings to which no corporate significance could be given; that the lease was a cloud on the plaintiff's title; and that it was entitled to a declaration to that effect, with the relief properly predicated upon such a declaration." See *Barrows v. Niblock* (1898) 84 Fed. 111, accord. But the Supreme Court holds differently.

Courts have sometimes held an *ultra vires* act to be that of the human beings who purported to act for and bind the corporation. See *supra* note 28.

ultra vires act should be void, a court might hold that the doing of such an act in the course of performance of an agreement would be a nullity.⁷⁶ But absent any such express provision, no decision has been found which goes to this extreme, either in a case where the act done was expressly or impliedly forbidden.

The Supreme Court of the United States, which, as we have seen, has been fairly persistent in laying down the rule of limited corporate capacity,⁷⁷ has often been called upon to deal with the situations now under discussion, and has without any apparent hesitation invariably held that a transaction, when completed, would be recognized as vesting the intended rights, and would not be subject to attack, or open to objection at the instance of any one except the appropriate government. The court's attitude towards such a problem is well illustrated by *Kerfoot v. Farmers' and Merchants' Bank*.⁷⁸ That was an action in ejectment, with a "count" in equity, to regain possession of and title to land, which had been conveyed by the plaintiffs' predecessor to a national bank and by it in turn to the defendants. The bank had no capacity to take title, and the plaintiffs proceeded on the theory that the title never left their predecessor, and therefore, on his death, came to them. The Supreme Court, however, refused to sanction such a contention, holding that the deed to the bank did convey title and that the bank in turn effectively and legally passed title to the defendants. In this connection the Supreme

76. See Machen, *Modern Law of Corporations*, sec. 1066; *Hunter v. Garaflo* (1912) 246 Mo. 131, 151 S. W. 741; *Lee v. Bankers' Trust Co.* (1911) 157 Mo. App. 557, 138 S. W. 669. See also cases cited, *supra*, note 18 and *Union etc. Bank v. State etc. Bank* (1889) 155 Mo. 95, 55 S. W. 989. But see *Chase etc. Co. v. National etc. Co.* (1914) 215 Fed. 633. There is considerable loose dicta in the cases to the effect that "void" transactions when executed are to be left undisturbed, but the statements are usually *obiter*, and the transactions referred to will be found to be *ultra vires* and "void" because impliedly forbidden. Some such statements are collected in a note in L. R. A. 1917 A, 1. c. 759. Such expressions are unfortunate and serve to make one lose sight of the distinction between the ordinary *ultra vires* transaction and one which the organic law characterizes as "void." If the act be of the latter variety, no rights should ever arise therefrom. The doing of it should bring nothing to pass.

77. See *supra* note 24.

78. (1910) 218 U. S. 281, 54 L. Ed. 1042.

Court said: "In the absence of a clear expression of legislative intention to the contrary, a conveyance of real estate to a corporation for a purpose not authorized by its charter is not void, but voidable, and the sovereign alone can object. Neither the grantor nor his heirs nor third persons can impugn it on the ground that the grantee exceeded its powers."⁷⁹ This rule was justified on the ground that it had the "salutary effect of assuring the security of titles, and of avoiding the injurious consequences, which would otherwise result."⁸⁰

The proposition that an executed *ultra vires* transaction serves to vest title to the fruits of the bargain in each of the parties thereto, unless the law expressly provides to the contrary, is well established in all jurisdictions⁸¹ and is the only just decision under

79. 218 U. S. l. c. 286.

80. 218 U. S. l. c. 287. See, *accord*, *Land v. Coffman* (1872) 50 Mo. 243; *Shewalter v. Pirner* (1874) 55 Mo. 218. See also *Ragan v. McElroy* (1889) 98 Mo. 349, 11 S. W. 735.

81. *Thornton v. Nat. Bank* (1879) 71 Mo. 221; *First Nat. Bank v. Gililan* (1880) 72 Mo. 77; *Franklin etc. Inst. v. Board* (1882) 75 Mo. 408; *Hovelman v. Kansas City R. R.* (1883) 79 Mo. 632; *St. Louis Drug Co. v. Robinson* (1883) 81 Mo. 18; *Belcher Sugar Co. v. St. Louis etc. Co.* (1890) 101 Mo. 192, 13 S. W. 822; *Conn. etc. Co. v. Smith* (1893) 117 Mo. 261, 22 S. W. 623; *Kansas City etc. Ry. v. Kansas City etc. Ry.* (1895) 129 Mo. 62, 31 S. W. 451; *White Oaks etc. Soc. v. Murray* (1898) 145 Mo. 622, 47 S. W. 501 (*dictum*); *Hall v. Bank* (1898) 145 Mo. 418, 46 S. W. 1000; *Riesterer v. Horton Land Co.* (1900) 160 Mo. 141, 61 S. W. 238; *Summett v. City etc. Co.* (1909) 208 Mo. 501, 106 S. W. 614; *Ancell v. Ill. etc. Bridge Co.* (1909) 223 Mo. 209, 122 S. W. 709; *Union Bank v. Hunt* (1879) 7 Mo. App. 42 (*dictum*) (see same case, reversed on other grounds 76 Mo. 439); *St. Louis etc. Co. v. Partridge* (1880) 8 Mo. App. 217; *City v. Bank* (1898) 74 Mo. App. 365; *Hough v. St. Louis Car Co.* (1914) 182 Mo. App. 718; 165 S. W. 1161.

See also cases cited, *supra*, note 80 *accord*; *Martindale v. Kansas City etc. Co.* (1875) 60 Mo. 508; *Kinealy v. St. Louis etc. Co.* (1879) 69 Mo. 658; *Hill v. Rich Hill etc. Co.* (1893) 119 Mo. 9, 24 S. W. 223. The last three cases lay down the rule that *ultra vires* transactions are not subject to collateral attack.

See further in *accord* with the text, *National Bank v. Stewart* (1882) 197 U. S. 676; *Reynolds v. Nat. Bank* (1884) 112 U. S. 405, 28 L. Ed. 733; *Long v. Georgia Pac. Ry.* (1890) 91 Ala. 519, 8 So. 706; *DeWitt etc. Bank v. Mickelberry* (1910) 244 Ill. 77, 91 N. E. 86; *Baker v. Northwestern etc. Co.* (1886) 36 Minn. 185, 30 N. W. 464; *Hagerstown etc. Co. v. Keedy* (1900) 91 Md. 430, 46 Atl. 965 (*dictum*). See *contra* *Matthews v. Skinner* (1876) 62 Mo. 329, a case taken to the Supreme Court of the United States, and there

the conditions. The arguments advanced in favor of recognizing as valid partially executed *ultra vires* agreements⁸² apply with even greater force to executed transactions. No real good could be accomplished by ripping open the transaction or by treating that which has been done as a nullity to the detriment of corporate shareholders and creditors, or the other party to the agreement. It is better to leave the parties as they are and to allow the state, if any real injury to the public has followed to watch over this phase of the matter.

If a corporation acquires a right *ultra vires*, it is in the position of a legal owner or obligee as against all the world except the state. It is the same as if it held title *intra vires* and it cannot be shown collaterally that this is not the case. It can assert and sustain such a title⁸³ and convey or assign it, passing an indefeasible right when so doing.⁸⁴ Furthermore, so long as a corporation retains such title, it should be held to all the normal duties of a legal owner. It should, for instance, be liable for a tort committed in connection with land owned by it. The courts

overruled *sub nom.* *National Bank v. Matthews* 98 U. S. 621, 25 L. Ed. 188. The *Skinker* case has not been followed by the Missouri courts. For a discussion of this case see, *infra*, note 97 and text in connection therewith.

82. See, *supra*, note 20 and text in connection therewith.

83. *Conn. etc. Co. v. Smith* (1893) 117 Mo. 261, 22 S. W. 623; *Hall v. Farmer etc. Bank* (1898) 145 Mo. 418, 46 S. W. 1000; *White Oak etc. Soc. v. Murray* (1898) 145 Mo. 622, 47 S. W. 501 (*dictum*); *Ancell v. So. Ill. etc. Co.* (1909) 223 Mo. 209, 122 S. W. 709; *St. Louis etc. Co. v. Partridge* (1880) 8 Mo. App. 217; *Alexander v. Tolleston Club* (1884) 110 Ill. 65; *Chicago R. R. Co. v. Keegan* (1900) 185 Ill. 70, 56 N. E. 1088; *Lancaster v. Amsterdam etc. Co.* (1894) 140 N. Y. 576. See also *Kansas City etc. Ry. v. Kansas City etc. Ry.* (1895) 129 Mo. 62, 31 S. W. 451.

If a corporation acquires a title *ultra vires* and thereafter leases the property, the lease will be valid and the covenants therein contained enforceable. See *Springer v. Chicago etc. Co.* (1903) 202 Ill. 17, 66 N. E. 850. See also *Cowell v. Springs Co.* (1879) 100 U. S. 55, 25 L. Ed. 547.

84. *Land v. Coffman* (1872) 50 Mo. 243; *Showalter v. Pirner* (1874) 55 Mo. 218; *Ragan v. McElroy* (1889) 98 Mo. 349, 11 S. W. 735; *Hall v. Farmers etc. Bank* (1898) 145 Mo. 418, 46 S. W. 1000; *Lantry v. Wallace* (1900) 182 U. S. 536, 45 L. Ed. 1218 (*dictum*); *Leasure v. Hillegas* (1821) 7 Serg. & R. (Pa.) 313. See also *Walsh v. Barton* (1873) 24 Ohio St. 28.

in this respect should place *ultra vires* ownership on the same footing with legal ownership with all the consequent duties and burdens.⁸⁵ Nevertheless in some rare cases, this altogether correct result has not been reached by some courts.

It has been held that a corporation, which owns shares in another corporation *ultra vires* will not be subject to the statutory liability imposed on such an owner.⁸⁶ If ownership of shares is to be considered a *status*, as is title to any other form of property, the burden of responding to the statutory duty should rest upon a corporate shareholder just as if it held the shares *intra vires*. As already indicated,⁸⁷ courts regard an executed *ultra vires* transaction as being of the same character as one which is *intra vires*. It is as if a corporation had acquired the right legally with all of the results usually attached to such a title. If a corporation, without authority, owns Blackacre, it should be subject to all the duties and burdens, which the law exacts as incidental to such ownership. Why, then, should it not likewise be the rule, that an *ultra vires* corporate shareholder should be subject to similar burdens? There would seem to be no real basis for making a distinction between the two situations, and a corporation should be liable in the way that the statute provides.⁸⁸

85. See Machen, *Modern Law of Corporations*, sec. 1072; *Alexander v. Relfe* (1881) 74 Mo. 495. There is scant authority on this precise question but the reasoning adopted in all cases dealing with the matter of *ultra vires* ownership, leads to the suggested conclusion.

86. *California National Bank v. Kennedy* (1897) 167 U. S. 362, 42 L. Ed. 198; *Conrad etc. Bank v. Hawkins* (1898) 174 U. S. 364, 43 L. Ed. 1007; *First etc. Bank v. Converse* (1905) 200 U. S. 425, 50 L. Ed. 537. See also *Merchants' Bank v. Wehrmann* (1906) 202 U. S. 295, 50 L. Ed. 1036; *Converse v. Emerson* (1909) 242 Ill. 619, 90 N. E. 269.

87. See *supra* note 82.

88. " * * * a corporation may be liable for an *ultra vires* act (*National Bank v. Graham*, 100 U. S. 699; *Salt Lake City v. Hollister*, 118 U. S. 256) and * * * a transfer to it of property, *ultra vires* for it to hold, usually becomes a foundation to it of the rights commonly incident to the ownership of such property (*National Bank v. Matthews*, *supra*, *Cowell v. Springs Co.*, 100 U. S. 55, 60; *Reynolds v. Crawfordsville Bank*, 112 U. S. 405, 413.) It is submitted that such transfer should also be a foundation of the liabilities commonly incident to the ownership of such property." Note, Warren, *Cases on Corporations*, l. c. 698.

The statutory liability of a shareholder has been described as being contractual in its nature,⁸⁹ and, upon this ground, the courts have usually proceeded to the decision that a corporation will not be liable under the statute upon the shares which it holds illegally. Naturally, if the obligation is of this nature, and the courts will not recognize the doctrine of estopping a corporation to deny its capacity, the decisions are logical. But there is no real contract in such a case. The promise to respond, according to a statute, is at best a fiction and the ordinary shareholder would be responsible even though he had never assumed the duty.⁹⁰ It is an obligation which the law *compels* a shareholder to assume and such a duty lacks all of the elements of a true contract, except that it can be said in a general way that every man is presumed to intend to do that which the law requires of him. Occasionally, however, a shareholder will not intend to conduct himself in this way, yet he will be held to the duty. It is this last situation which shows quite clearly that the burden is not contractual but exists *in invitum*.⁹¹ It has been held that a corporation shareholder is entitled to dividends declared on its shares, as incidental to title.⁹² If a corporation occupies the *status* for one purpose, why does it not occupy it for all? It is not suggested that liability ought to exist for the sake of "symmetry" but because it is felt that duty is incidental to ownership just as much as benefits are, and because the former does not depend for its valid existence in any sense upon the assumption of an *ultra vires* contractual obligation.^{92a}

89. *Whitman v. Oxford etc. Bank* (1900) 176 U. S. 559, 44 L. Ed. 587.

90. Hohfeld, *Stockholders' Individual Liability*, 9 Col. Law Rev. 285.

91. The obligation imposed by the statutes * * * is *quasi ex contractu*. It must be taken that all persons who become stockholders know the law * * * and assent to the liability which the law imposes upon stockholders. * * *," *Post etc. Co. v. Toledo etc. Co.* (1887) 144 Mass. l. c. 343, 11 N. E. 540. "Over and over again therefore the obligation of X (a shareholder) and the other stockholders may come into existence without their actual concurrence, and in some cases in spite of their express dissent. * * *" Hohfeld, *op. cit.* 312.

92. See *Bigbee etc. Co. v. Moore* (1898) 121 Ala. 379, 25 So. 602.

92a. There is authority holding that the corporation shareholder is liable to respond to the statutory liability. See *Hough v. St. Louis Car*

X.

Cases where a corporation is suing upon an *ultra vires* contract must not be confused with those where, without authority, it has obtained by assignment or purchase a chose in action or negotiable instrument. The first situation has been dealt with and it has been seen that some courts denied recognition to such agreements on the ground that they were nullities.⁹³ Suppose, however, that P has a good contract right against D, legal in every way and one upon which P could sue D and recover. P assigns such right to corporation C, which could not become an assignee *intra vires*, it being either expressly or impliedly forbidden. Should D be able to defect C's action on the promise by pleading *ultra vires*? It might be suggested that this defense should be available on ordinary orthodox principles.⁹⁴ Such a holding, however, is not sound, and not in *accord* with the proposition, recognized by all courts, that where a corporation obtains a title its rights thereunder are not subject to attack on the ground that there was no authority to acquire such a right.⁹⁵ There is no infirmity in the promise which C, as assignee, sues upon. The obligation was good in its inception and C's position, is merely that of a corporation which has gotten a vested right through the exercise of an unauthorized capacity. Courts are not disposed to deny a corporation the benefits accruing to it through the possession and con-

Co. (1914) 182 Mo. App. 718, 165 S. W. 1161; *City v. Bank* (1898) 74 Mo. App. 365; *Fidelity etc. Co. v. German etc. Bank* (1905) 127 Iowa 591, 103 N. W. 958. But see *Lee v. Bankers Trust Co.* (1911) 157 Mo. App. 557, 138 S. W. 669 where the court would not hold the corporation because its act in acquiring the shares and holding them was against public policy.

93. See *supra* note 24.

94. See *Wilks v. Ga. etc. Co.* (1885) 79 Ala. 170, a case where the court did not recognize the possible difference between a case where the corporation was the contracting party and one where it was the assignee of such a person.

Suppose that an obligee assigns his contractual right to a corporation. The corporation would take the right with the burden. If the burden involved the doing of an act *ultra vires*, the corporation, whenever the doctrine of estoppel is not recognized, should not recover.

95. See *supra* note 81.

ceded ownership of such a right. The contract sued upon is not *ultra vires*. All that was done, which was open to this objection, has been completed and is a closed chapter. Accordingly, the better rule will permit a corporation to sue as an assignee and deny the availability of the defense.⁹⁶

XI.

There are a number of cases in the Supreme Court of the United States and elsewhere dealing with the rights of a corporation to utilize security, which it has taken *ultra vires* to assure payment of an obligation running to it. The national banking act contained a provision expressly forbidding banks organized thereunder to loan money on real security, but they nevertheless did so from time to time. The question has been: can a mortgage, or deed of trust, taken in violation of the express statutory prohibition, be enforced or foreclosed? The federal supreme court has invariably held that this can be done and that the plea of *ultra vires* could not be raised to defeat an appropriate use of the security. Probably the case most often cited on this point is *National Bank v. Matthews*,⁹⁷ which went up from the Supreme Court of Missouri.⁹⁸ It was an action to restrain a sale by a trustee, under a deed of trust, on the ground that the defendant corporation could not legally take such security. The court, reversing the Missouri Supreme Court, held that an injunction

96. *First Nat. Bank v. Gillilan* (1880) 72 Mo. 77; *Franklin etc. Inst. v. Roscoe* (1882) 75 Mo. 408; *Riesterer v. Horton etc. Co.* (1900) 160 Mo. 141, 61 S. W. 238; *Prescott etc. Bank v. Butler* (1893) 157 Mass. 548, 32 N. E. 909; *Hennessy v. St. Paul* (1893) 54 Minn. 219; *State etc. Co. v. Farmers Co.* (1902) 65 Neb. 34, 90 N. W. 997; *Farwell etc. Co. v. Wolf* (1897) 96 Wis. 10, 70 N. W. 289, 71 N. W. 109. See also *St. Joseph etc. Co. v. Hauck* (1880) 71 Mo. 465.

97. (1878) 98 U. S. 621, 25 L. Ed. 188. The case was one where the plaintiff bank took the deed of trust by assignment. It was not issued to it directly but to its assignors, who then borrowed money from the plaintiff assigning the deed of trust to secure their obligation. The case, on this ground, might have been assimilated to those discussed, *supra*, in connection with note 96. But the court treated the case as one involving simply the question of a corporation's right under a deed of trust taken without authority.

98. *Matthews v. Skinner* (1876) 62 Mo. 329.

would not issue. It was admitted that the act of taking the security was unauthorized and forbidden, but it was held that inasmuch as the deed had been executed and the money loaned on the faith thereof, the bank's rights would be left undisturbed and a sale allowed. The exact reasons for the decision are not altogether clear. The court says at one point in its decision that it could not have been the intent of Congress to nullify the transaction to the detriment of innocent parties interested in the corporation.⁹⁹ In another connection it was said that the transaction was at most only technically illegal and that the bank's "garments" were "unspotted,"¹⁰⁰ but the gist of the court's reasoning seems to be that it would be unjust to permit the plaintiff to borrow and use the money and then prevent a foreclosure of the deed of trust because the corporation was not competent to take it. The court also said that the bank never got title to the land¹⁰¹ (it being in the trustee under the deed) but this distinction seems to be unduly refined, for a corporation ought not to be able to do through a trustee that which it cannot do directly. The case has been followed ever since and has been cited frequently to sustain the proposition that where a corporation gains a title *ultra vires*, it is not assailable, or subject to attack at the instance of any one except the state.¹⁰²

99. 98 U. S. l. c. 629.

100. 98 U. S. l. c. 626.

101. 98 U. S. l. c. 625: "Here the bank never had any title, legal or equitable, to the real estate in question." It is difficult to understand what the court meant by this statement, especially in view of the following statement in the same decision: "Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed * * *" 98 U. S. l. c. 628. It is submitted that the bank did get an equitable title to the land for the purpose of security, as is always the case in a mortgage transaction. Even though the bank was not the party for whom the deed was originally executed, still, as assignee, it became the equitable owner of the security.

102. *Thornton v. Nat. Bank* (1879) 71 Mo. 221; *St. Louis Drug Co. v. Robinson* (1883) 81 Mo. 18; *Summett v. City etc. Co.* (1907) 208 Mo. 501, 106 S. W. 614; *National Bank v. Whitney* (1880) 103 U. S. 99, 26 L. Ed. 443; *Fortier v. New Orleans etc. Bank* (1884) 112 U. S. 439, 28 L. Ed. 764. See *Union Bank v. Hunt* (1879) 7 Mo. App. 42, same case 76 Mo. 439.

The possible effect of *Bank v. Matthews* upon federal decisions is more or less problematical. It may amount merely to a holding that a mortgage or deed of trust is an executed transaction; that a corporate mortgagee's rights are therefore completely vested; and that for this reason foreclosure is proper and entirely in *accord* with the federal or strict rule. Under such a conception, foreclosure would merely amount to a corporation asserting a vested right. It would be analogous to a case where a corporation brings ejectment to recover possession of land which it owned *ultra vires*.¹⁰³ While it is true that there is authority for holding that a mortgage is an executed transaction,¹⁰⁴ its soundness, especially if the question is raised in an action of foreclosure, is open to doubt. If the debt fails for any reason it is always held that the mortgage as incidental thereto fails also.¹⁰⁵ It would be more correct to say that the mortgage is executory, just as the debt is.^{105a}

Foreclosure of mortgages taken by a corporation *ultra vires* can also be justified on the ground that a defendant should be estopped to assert a corporation's inability to enter into the transaction.¹⁰⁶ It is believed that such a decision would be just and to a certain extent reconcilable with the conception that a corporation is a person of limited capacity, as that doctrine has been developed by the more conservative courts in actions against corporations.^{106a} It is to be hoped that the foreclosure cases will lead the way at least to a general rule in the federal courts to the ef-

103. This is the view which Mr. Machen takes of the decision. Machen, *op. cit.* sec. 1036.

104. *Campbell v. Tompkins* (1880) 32 N. J. Eq. 170; *Raguet v. Roll* (1836) 7 Ohio Rep. 70.

105. *Shaw v. Carpenter* (1881) 54 Vt. 155; *Stillman v. Looney* (1866) 3 Cold. (Tenn.) 20.

105a. *Pearce v. Wilson* (1885) 111 Pa. St. 14.

106. See *supra*, note 40 and text in connection therewith.

106a. See *supra*, notes 39 and 40 and text in connection therewith.

fect that a corporation, whenever it has performed its side of the agreement and represents innocent parties, may sue upon the contract itself.¹⁰⁷

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107. The case book on private corporations by Professor E. H. Warren and that by Professor Burnett have been of assistance to the writer in the preparation of this article. The arrangement of authorities in each volume is helpfully suggestive and Professor Warren's notes often point to a solution of troublesome problems.