them to their damage, was held responsible to the owner. In Barry *v.* Arnaud, 10 Adol. & Ellis, 646, a collector of customs was held to be an immediate officer of the Crown, whose functions were ministerial. Being a public ministerial officer, Lord DENMAN, C. J., held (p. 671), he is responsible for neglect of his certain limited duty to any individual who sustains damage by such neglect.

From the foregoing cursory consideration of some of the prominent cases touching the responsibility of public officials to individuals suffering because of the negligent performance of their duties, it would appear to be well established that unless there is a material discretion as to the conduct of the office reposed in the public official, his functions are considered as ministerial, and for negligently performing them he is liable in damages to an individual who is specially injured.

ALFRED ROLAND HAIG.

DEPARTMENT OF CORPORATIONS.

EDITOR-IN-CHIEF,
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Assisted by
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ST. LOUIS, VANDALIA AND TERRE HAUTE RAILWAY COMPANY *v.* TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY.[2] SUPREME COURT OF THE UNITED STATES.

Ultra Vires Contract of a Corporation. Lease of a Railroad to Another Corporation.

A lease for 999 years by one railroad corporation of its railroad and franchises to another railroad corporation, which is *ultra vires* of one or both, will not be set aside by a court of equity at the suit of the lessor, when the lessee has been in possession, paying the stipulated rent, for seventeen years, and has taken no steps to repudiate or rescind the contract.

Appeal from the decision of the Circuit Court sustaining a demurrer to a bill of equity.

[1] Mr. Freedley's services as editor of this department were secured too late to permit him to examine Mr. Woodruff's annotation. The general editors of the magazine are, therefore, alone responsible. Hereafter, Mr. Freedley will revise all annotations appearing in this department. —EDS.

[2] 145 U. S., 393. Decided May 16, 1892.

STATEMENT OF THE CASE.

In 1865 the plaintiff corporation was incorporated by an Illinois statute (amended in 1867 by another statute), to construct and maintain a railroad from the left bank of the Mississippi River, opposite St. Louis, eastward through Illinois to a convenient point on the Wabash River, for extending its road to Terre Haute, Indiana. The defendant corporation was incorporated in 1847 by an Indiana Statute (amended by another statute in 1865), to construct and maintain a railroad from some point on the western boundary line of Indiana eastward through Terre Haute to Indianapolis. The plaintiff was not authorized by its charter, or by any law of Illinois, to lease its railroad or by any contract or conveyance to part with the entire possession, control and use of its property and franchises, or to deprive itself of and vest in others the power of control in the management of its said road and other property, and in the exercise of its franchises. The defendant corporation was not authorized by its charter, or by any law of Indiana, to make or accept any lease, contract or other conveyance by which it should acquire or obtain, either indefinitely or for a fixed time, the ownership, management or control of any railroad located beyond the limits of Indiana.

The road of the plaintiff was completed on or about July 1, 1870; to obtain money for this purpose a mortgage, to secure $1,900,000 worth of bonds, was executed on April 6, 1867; and a second mortgage, to secure $2,600,000 worth of additional bonds, was executed March 13, 1868. Under the first mortgage provision was made for setting apart $20,000 annually as a sinking fund for the payment of the bonds secured thereunder; no such provision was made under the second mortgage, and all of said bonds were sold, outstanding and unpaid.

February 10, 1868, the plaintiff and defendant executed a lease, whereby the railroad property and franchises of the plaintiff were leased for 999 years to the defendant, who was to retain sixty-five per cent. (afterward increased

to seventy per cent.), of the gross receipts; the balance to be applied to the payment of the interest in the aforementioned mortgage bonds of the plaintiff; any surplus to go to the plaintiff.

The Illinois Statute of February 16, 1865, made it unlawful for any railroad company of Illinois, or its directors, to consolidate its railroad with any railroad out of the State, or to lease its railroad to any railroad company out of the State, without the written consent of all its stockholders within the State. Fifty-nine of the stockholders of the plaintiff corporation, residing in Illinois, never consented to or ratified the lease.

The bill, filed July 6, 1887, after setting forth the above facts, alleged further, that the defendant had received, in tolls and otherwise, $21,600,000; that the pretended lease was void for want of lawful power in either party to enter into it; that the defendant, by taking possession of the plaintiff's road, and without right, became in equity a trustee of the plaintiff, and liable to account to it for the property; that the defendant had refused to hand over the property, though requested to do so.

The bill prayed for a cancellation and surrender of the lease; for a return of the railroad and other property held under it; for an injunction against disturbing the plaintiff in the possession and control thereof; for an account; or if the lease should be held valid for an account and for farther relief.

The defendant demurred to the bill for want of equity, for laches, for multifariousness, and because the plaintiff had an adequate remedy at law. The demurrer was sustained; and the plaintiff, by leave of court, amended the bill by striking out the prayer for alternative relief, in case the lease should be held to be valid. The defendant demurred to the amended bill, on the same grounds as before, except multifariousness. Demurrer sustained. The plaintiff appealed.

GRAY, J.: This lease of the railroad and its franchises, for a term of 999 years, was a contract which neither cor-

poration had the lawful power to enter into, unless expressly authorized by the statute which created it, and which, if beyond the scope of the lawful powers of either corporation, was unlawful and wholly void, could not be ratified or validated by either or both, and would support no action or suit by either against the other.

The statute of Illinois of February 16, 1865, relied upon by plaintiff, declaring leases made without the written consent of Illinois stockholders "shall be null and void," would seem to be enacted for the protection of such stockholders alone, and intended to be availed of by them only; and then it is unnecessary to prove that the contract was beyond the corporate power of the plaintiff if it can be proved to have been beyond the corporate powers of the defendant, because, as established by this court, a contract beyond the corporate powers of either party is as invalid as if beyond the corporate powers of both, and the contract now in question was clearly beyond the corporate powers of the defendant. The defendant cannot avail itself of the laws of Illinois, because such a suit as this is governed, so far as regards the validity of the contract, not by the law of the forum, but by the law of the contract; the statute of Illinois was manifestly intended to confer power on domestic corporations only, leaving the powers of corporations incorporated elsewhere to be determined by the laws, by and under which they were incorporated, even if a State could confer on a foreign corporation powers it did not have by the laws of its own State.[1] It may, therefore, be assumed that the contract in question was *ultra vires* of the defendant, and, therefore, did not bind either party, and neither party could have maintained a suit upon it, at law or in equity, against the other. The general law in equity, as in law, is *in pari delicto potior est conditio defendentis*, and, therefore, neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside.

[1] Canada Southern Railway *v.* Gebbard, 109 U. S., 527, 537; Christian Union *v.* Yount, 101 U. S., 352; Starkweather *v.* American Bible Society, 72 Ill., 50; Santa Clara Academy *v.* Sullivan, 116 U. S., 375, 385.

The plaintiff in this case is in the position of alienating the powers which it had received from the State and the duties which it owed to the public to another corporation, which it knew had no lawful capacity to exercise those powers or perform those duties. If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better condition. In either aspect of the case the plaintiff was *in pari delicto* with the defendant. The invalidity of the contract, in view of the laws of which both parties were bound to take notice, was apparent on its face. The contract has been fully executed, on the part of the plaintiff, by the actual transfer of its railroad and franchises to the defendant; and the defendant has held the property, and paid the stipulated consideration from time to time, for seventeen years, and has taken no steps to rescind or repudiate the contract. Upon this statement of facts, for the reasons above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. And so far as the plaintiff corporation can be considered as representing the stockholders, and seeking to protect their interests, it and they are barred by laches. The Court will not disturb the possession of the property that has passed under the contract, but will refuse to interfere as the matter stands.

Decree affirmed.

Corporation Contracts Ultra Vires.

In Colman *v.* Eastern Counties Railway Company (10 Beavan, 1), decided in 1846, we have the earliest English discussion of the doctrine of *ultra vires*. Langdale, M. R., in delivering his decision said: "I am clearly of the opinion that the powers which are given by an Act of Parliament, like that now in question, extend no further than is expressly stated in the Act, or is necessarily and properly required for carrying into effect the undertaking and works which the Act has expressly sanctioned." The Eastern Counties Railway Company was chartered by Parliament to construct and maintain a railway between London and Manningtree. The Company, to extend and enlarge its business, proposed to pledge its funds to support the Harwich Steam Packet Company about to be formed, and to guarantee not only five per cent. interest on the stock, but also the full amount of

the subscription in case of the failure of the Company. Colman, a stockholder, prayed for an injunction to restrain the company from so pledging its funds, and the Court granted the injunction, the Master of the Rolls holding that there was nothing in the Act of Parliament which authorized the railway company to enter into such a transaction, and further that the acquiescence of the stockholders afforded no ground whatever for the presumption of its legality. The plaintiff in his bill expressly set forth the fact that the defendant had as yet entered into no agreement or contract with the Steamship Company.

Five years later, in East Anglian Railway Co. *v.* Eastern Counties Railway Co., 11 C. B., 775, the defendant company under a sealed indenture agreed, *inter alia*, to pay the cost of certain pending Parliamentary bills, authorizing the amalgamation of the plaintiff and defendant companies. The defendant did not pay the bills, and as a defence to an action at law to recover the amount, entered the defence that the contract was *ultra vires*, therefore void. The Court held this defence to be good, as the contract was not within the scope of the authority of the company as a corporation. The Chief Justice relied upon the authority of Colman *v.* Eastern Counties Railway Co. in reaching this conclusion. There is, however, a distinct difference between the two cases which he failed to observe. The case of Colman *v.* Eastern Counties Railway Co. was one where the plaintiff, a stockholder, sought (successfully) to restrain the corporation from doing that which it had no authority to do; in the second case, however, the two corporations entered into a contract, which the plaintiff on its part had executed. When, however, they demanded that the defendants perform their part of the contract, they were met with the assertion that the defendants had no authority to make such a contract; although they had received the benefit of the plaintiff's performance, they refused to do their share. They kept the penny and the cake. In Colman *v.* Railway Co. there was no contract; only one proposed; no one had assumed any obligation. In the latter case, a contract had been entered into and partly performed, one of the parties having done all that it had agreed to do.

Chief Justice LAWRENCE, in Bradley *v.* Ballard (55 Ill., 413), in commenting on a similar case, said: "It is said by the counsel for the complainant that a corporation is not estopped to say, in its defence, that it had not the power to make a contract sought to be enforced against it, for the reason that if thus estopped its powers might be indefinitely enlarged. While the contract remains unexecuted on both sides this is undoubtedly true, but when, under cover of this principle, a corporation seeks to evade the payment of borrowed money, on the ground that, although it had the power to borrow money, it expended the money borrowed in prosecuting a business which it was not authorized to prosecute, it is pressing the doctrine of *ultra vires* to an extent that can never be tolerated, even though the lender of the money knew that the corporation was transacting a business beyond its chartered powers,

and that his money would be used in such business, provided the business itself was free from any intrinsic immorality or illegality. Neither is it correct to say that the application to corporations of the doctrine of equitable estoppel, where justice requires it to be applied, as when, under a claim of corporate power they had received benefits for which they refused to pay, from a sudden discovery that they had not the power they had claimed, can be made the means of enabling them indefinitely to extend their powers. If that were true it would be an insuperable objection to the application of the doctrine, even for the purpose of preventing injustice in individual cases. But it is not true. This doctrine is applied only for the purpose of compelling corporations to be honest, in the simplest and commonest sense of honesty, and after whatever mischief may belong to the performance of an act *ultra vires* had been accomplished. But while a contract remains executory, it is perfectly true that the powers of corporations cannot be extended beyond their proper limits for the purpose of enforcing a contract. Not only so, but on the application of a stockholder, or of any other person authorized to make the application, a Court of Chancery would interfere and forbid the execution of a contract *ultra vires;* so, too, if a contract *ultra vires* is made between a corporation and another person, and while it is yet wholly unexecuted the corporation recedes, the other contracting party would probably have no claim for damages. But if such other party proceeds in the performance of the contract, expending his money and his labor in the production of values which the corporation appropriates, we can never hold the corporation excused from payment on the plea that the contract was beyond its powers. Take, for example, the case of a corporation chartered to build a railway from Chicago to Rock Island. Under such a charter the company would have no power to build steamboats, for the purpose of rnnning a line of such vessels between Rock Island and St. Louis. But suppose, notwithstanding the want of power, it should make a contract for the building of a vessel, and it is built by the contractor, and accepted and used by the railway, could any court permit the corporation, when sued for the value of the vessel, to excuse itself from payment on the ground that, although it has and uses the steamer, it had no authority to do so by its charter? Or, suppose that instead of having a vessel built by a contractor it employs a superintendent to build it and hires mechanics by the day, could it escape the payment of their wages on the ground that it had employed them in a work *ultra vires?*

"In cases of such character, courts simply say to a corporation you cannot in this case raise the question of your power to make the contract. It is sufficient that you have made it, and by so doing have placed in your corporate treasury the fruits of another's labors, and every principle of justice forbids that you be permitted to evade payment by an appeal to the limitations of your charter."

While the Supreme Court of Illinois is so strongly of this opinion, the United States Supreme Court in a number of cases, beginning with Pearce *v.* Railroad, in 1858, held to the contrary.

In Pearce *v.* Madison and Indian-

apolis R. R. Co., and Peru and Indianapolis R. R. Co., 21 How., 441, the two defendant companies had consolidated under a common board of management. The consolidated company, through its president, gave five promissory notes in payment for a steamboat to be used in conjunction with the railroad. Subsequently the consolidation was dissolved and each company assumed control of its own affairs. The plaintiff in this case became the assignee of the five notes and claimed that both companies were liable. The defendants held that the consolidation and purchase of the boat were *ultra vires;* the contract therefore was void and the plaintiff was not entitled to recover. The Supreme Court affirmed the decision of the Circuit Court, holding that the defendants had no authority to consolidate, and persons dealing with the managers of a corporation must take notice of their authority as contained in the act of incorporation. "It is concluded, that because the steamboat was delivered to the defendants, and has been converted to their use, they are responsible. It is enough to say in reply to this, that the plaintiff was not the owner of the boat, nor does he claim under an assignment of the owner's interest. His suit is instituted on the notes as an endorsee; and the only question is, had the corporation the capacity to make the contract, in the fulfillment of which they were executed? The opinion of the Court is that it was a departure from the business of the corporation, and that their officers exceeded their authority."

From all that appears on the record, the plaintiff was an innocent holder for value. The case is an illustration of the extremest application of what we may call the metaphysical interpretation of the doctrine of *ultra vires* as distinguished from the practical.

Justice CAMPBELL in this case, and C. J. JERVIS, in East Anglian R. W. Co. *v.* Eastern R. W. Co., held that a corporation can do only what its charter authorizes it to do. It has no power to do anything beyond its charter powers. This is all true as far as it goes, but it does not go far enough. We all admit that a corporation's powers are limited and defined by its charter, but cases can easily be conceived where the corporations exceed the powers granted them by their charters. When this is done, what obligations and duties arise first on their part; secondly, on the part of those with whom they deal? Judge CAMPBELL and C. J. JERVIS take the extreme position, and hold that when a corporation exceeds its powers, the act is void and no obligations or duties arise. Furthermore, they hold it is incumbent upon every one dealing with a corporation to carefully scrutinize its powers and beware lest it does not exceed its powers in dealing with them. The absurdity of this latter position will be manifest on examining the leading English case of Ashbury *v.* Riche, where it took the highest courts in England seven years to determine whether a certain act was or was not *ultra vires*. It is doubtful whether corporations would be enabled to transact any large amount of business if every one dealing with them first inquired as to their power to transact business. In active business, some things must be taken, if not for granted, at least on the good faith of the transacting parties. When

we deal with a corporation it is to be assumed that its officers are acting within their authorized powers. Endless trouble and worriment would ensue if every time we dealt with a corporation, we examined its charter, the statutes governing it, and its by-laws. The broader view adopted by nearly all the State courts in this country is this: it is entirely possible for a corporation to exceed its powers; when it does enter into a contract with another party, in good faith (provided the contract is not intrinsically illegal) the corporation is compelled to perform its share if the other party has performed his. It is liable to a penalty, however, for the attorney-general may find reason to ask for a writ of *quo warranto* for the forfeiture of the charter. Metaphysically speaking, a corporation cannot do what it has no authority to do; yet practically it can and does, and when it so does, it cannot escape doing what is fair and equitable, although it can be made to suffer a penalty for transgressing its authority. We shall see as we proceed with the examination of the cases that the United States courts incline to the former, the State courts to the latter, view.

The application of the doctrine of *ultra vires* in Thomas *v.* R. R. Co., 101 U. S., 71, decided in 1879, was eminently fair and worked no injustice to either party.

In 1863 the plaintiffs entered into a lease with the Millville and Glassboro R. R. for twenty years; the plaintiffs to run the railroad for one-half of the gross receipts; the contract could be terminated at any time within said twenty years, and the railroad revert to the company under certain conditions. In 1867 the R. R. Co. gave the required notice. In 1868 the legislature of New Jersey authorized the M. and G. R. R. Co. to consolidate with the West Jersey R. R. Co. A committee of arbitrators appointed awarded the plaintiffs $159,437.07, as the value of the unexpired lease to be paid by the West Jersey R. R. Co. This award was set aside in a suit in equity. The plaintiffs appealed. J. MILLER delivering the opinion held that the contract was not within the powers of the company. "The doctrine in this country is that the powers of corporations organized under legislative statutes are such only as those statutes confer. The charter of a company is the measure of its powers; the enumeration of these powers implies the exclusion of all others.

"In many instances where an invalid contract which the party to it might have avoided or refused to perform has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred. The rule has been well laid down by C. J. COMSTOCK, in Parrish *v.* Wheeler, 22 N. Y., 494, that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it. But in this case what is sought is the enforcement of the unexecuted part of this agreement. We cannot see that the present case comes within the principle that requires that contracts which, though invalid for want of corporated power, have been fully executed, shall remain as the foundation of rights acquired by the transaction."

In Central Transportation Co. *v.* Pullman Car Co., 139 U. S., 24, Justice GRAY (who delivered the opinion in Davis *v.* Old Colony R. R. *infra*) applies the extreme view, after a full consideration of all the cases on the subject, saying on p. 59: "A contract of a corporation which is *ultra vires*, in the proper sense, that is to say outside the object of its creation as defined in the law of its organization; and therefore beyond the powers conferred upon it by the legislature, 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 by either party, because it could not have been authorized by either. No performance on either side can give an unlawful contract any validity, or be the foundation of any right of action upon it."

We have noticed the two earliest English cases, the second one being an extreme application of the doctrine of *ultra vires;* later cases modified this application, and *In re.* Cork and Youghal Railway Co., L. R. 4, Ch. App., 748, where certain bonds had been issued *ultra vires* of the company, GIFFARD, L. J., at p. 760, says: "This case amounts to this: Documents were given under the seal of the company. These documents represented that the company was indebted to Mr. D. L. Lewis in the amount there stated; they were given for the purpose of being deposited by him as security for advances to be made; and if the representations in them had been true, those who had advanced their money on the deposit would have been assignees of the debts actually owing from the company to Lewis, and the transaction would have been perfectly legal.

"Now in this case the representations in the alleged bonds are either true or false, or partly true and partly false. In so far as they are true, the transactions are legitimate, for Mr. Lewis could assign his debt or debts. On the other hand, in so far as they are false, there was fraud on the part of the directors of the company. The representations on the face of the alleged bonds purported to be representations by the company, and induced the loans, and were made in order that the loans might be obtained. In so far, therefore, as the company had the benefit of those loans for its legitimate purposes it must be taken to have adopted the transaction. It cannot be heard to say the contrary and to that extent must be held liable."

The leading English case on the subject, however, is Ashbury Railway and Carriage Co. *v.* Riche, L. R., 7 H. of L., 65, already referred to as occupying the attention of the Bench of England for seven years. It was decided in 1875 by the House of Lords reversing the preceding judgments of the Court of Exchequer and Exchequer Chambers.

The Ashbury Railway and Carriage Co., registered under the Joint Stock Companies Act of 1862, had, according to the memoranda of association, these powers: "To make and sell or lend on time, railway carriages and wagons and all kinds of railway plants, fittings, machinery and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work and sell mines, minerals, lands and buildings; to purchase and sell as mer-

chants timber, coal, metals, and other materials, and to buy and sell such material on commission or as agents."

Possessing these powers the directors entered into an agreement for building a railway in Belgium, and afterward, on account of difficulties arising from the laws of Belgium, agreed to assign the concession to a *Societe Anonyme*, to supply the materials for the construction and to be supplied with money by the English company. The contract for constructing the line was given to Messrs. Riche, who commenced work and continued the work for a time, the Ashbury Company paying money to said Messrs. Riche for some time. Difficulties arose about payment as the work went on, the English shareholders not adopting the views of their directors as to the speculation. In May, 1867, they adopted a report disapproving of what had been done by the directors in the matter; an amicable settlement was proposed by which the directors were to purchase from the Ashbury Company any estate or interest which the company might have in the contract or concession. The company, however, dealing with Messrs. Riche, repudiated the contract for constructing the line as one *ultra vires*. Riche brought an action of damages for breach of contract. CAIRNS, L. C., on p. 672, said: "In such a case as this, it is not a question whether the contract sued upon involved that which is *malum prohibitum* or *malum in se*, or is contrary to public policy and illegal in itself. I assume the contract to be perfectly legal; to have nothing in it obnoxious to the doctrine involved in the expressions which I have used. The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract. This contract was entirely beyond the objects in the memorandum of association, and beyond the power of the company to make it. If it was void at the beginning, it was because the company could not make the contract. The acquiescence of every stockholder to the contract would not have validated it. I am unable to adopt the suggestion of the counsel that when the shareholders found that something had been done by the directors which ought not to have been done, they might be authorized to make the best they could of a difficulty into which they had thus been thrown, and therefrom might be deemed to possess power to sanction the contract being proceeded with. The directors might do that which even the whole company could not do, and then the shareholders could sanction what they could not antecedently have authorized. The contract is *extra vires*, wholly null and void, and it cannot be ratified."

The Supreme Court of the United States has frequently relied upon Ashbury Co. *v.* Riche, quoting it with approval in a number of cases. Not so with our State courts, who have quite generally adopted the broader application of the doctrine, As early as 1839, in Massachusetts. a case arose involving the application of the doctrine. One White had deposited an amount of money in a bank, and the cashier gave him a book with a certificate, that the money was to be paid to White at a certain time. This transaction the courts held to be a promise to pay money a future day certain, *ultra vires* of the cashier or the

bank. On a suit to recover the money before the time mentioned on the certificate had expired, the bank entered the defence that the contract was *ultra vires*, therefore void. The Court held that while no action could be maintained against the bank on the express contract, the money might be recovered in an action commenced before the expiration of the time for which it was to remain in deposit, the parties not being *in pari delicto*, and the action being in disaffirmance of the illegal contract: White *v.* Franklin Bank, 22 Pick., 181.

Comyns, in the second volume of his work on Contracts, page 109, edition 1809, stated the law on this subject as follows: "When money has been paid upon an illegal contract, it is a general rule that if the contract be executed, and both parties are *in pari delicto*, neither of them can recover from the other money so paid; but if the contract continues executory, and the party paying the money be desirous of rescinding it, he may do so, and recover back in an action of *indebitatus assumpsit* for money had and received. And this distinction is taken in the books, namely, where the action is an affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and instead of endeavoring to enforce, presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, there it is consonat to the spirit and policy of the law that the plaintiff should recover."

Subsequently, however, probably under the influence of GRAY, C. J., afterward promoted to the U. S. Supreme Bench, and the author of the decision in Central Trans. Co. *v.* Pullman Car Co. (*supra*), and St. Louis, etc., R. R. Co. *v.* Terre Haute, etc., R. R. Co., the Massachusetts Court adopted the extreme view of the doctrine in Davis *v.* Old Colony R. R. and in Davis *v.* Smith Organ Co., 131 Mass., 258. The R. R. Co. was organized under the laws of Massachusetts to construct and maintain a railroad. The Organ Co. was organized under Massachusetts laws to manufacture organs. Yet each agreed to pay a certain proportionate share of the loss, if any, incurred in holding the World's Peace Jubilee and International Musical Festival. The Jubilee was held, there was a loss incurred in conducting it, and the two defendant companies refused to pay their share, and as a defence to the action brought against them entered the plea *ultra vires*, which the Supreme Court sustained. The same question arose in another State (Indiana), the facts being essentially the same, and was differently settled: State Board of Agriculture *v.* Citizens' Railway Co., 47 Ind., 407, *infra*.

The Massachusetts Court, however, has reverted to its original position, holding in Slater Woolen Co. *v.* Lamb, 143 Mass., 420, that a corporation organized for "the purpose of manufacturing fabrics of worsted and wool or a mixture thereof, with other textile materials," may maintain an action for groceries, dry goods and other similar articles, sold and delivered by and in the name of a person who is keeping store as the undisclosed agent of the corporation, to a per-

son not employed by the company, who retains and uses the goods, even if the contracts of sale are not within the powers conferred upon the corporation by its charter. The Court took occasion to say that the contracts in question were not void as against public policy or good morals; the defect consisted in the company having exceeded its powers.

In New York the Courts have uniformly applied the doctrine in its broader interpretation; as early as 1853, PARKER, J., in Steam Navigation Co. *v.* Weed, 17 Barb., 378, saying: "When it is a simple question of capacity or authority to contract, arising either on a question of regularity or organization, or of powers conferred by the charter, a party who has had the benefit of the contract cannot be permitted to question its validity in an action founded upon it. I am happy to come to the conclusion that the law will not sustain this most unconscionable defence. It ill becomes the defendants to borrow from the plaintiff $1,000 for a single day, to relieve their immediate necessities, and then to turn around and say, 'I will not return you this money, because you had no power by your charter to lend it.' Let them first restore the money, and then it will be time enough for them to discuss with the sovereign power of the State of Connecticut the extent of the plaintiff's chartered privileges. We shall lose our respect for the law when it so far loses its character for justice as to sanction the defence here attempted."

The opinion of COMSTOCK, J., in Bissell *v.* Railroad Cos., 22 N. Y., 259, is a thorough discussion of the entire subject.

In Whitney Arms Co. *v.* Barlow, 63 N. Y., 62, J. ALLEN, on p. 62, says: "When acts of a corporation are spoken of as *ultra vires*, it is not intended that they are unlawful, or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed and the funds applied solely for carrying out the objects for which the corporation was created."

RUGER, C. J., in Nassau Bank *v.* Jones, 95 N. Y., 123, said: "While executed contracts, made by corporations in excess of their legal powers, have, in some cases, been upheld by the courts, and parties have been precluded from setting up, as a defence to actions brought by corporations, their want of power to enter into such contracts (Bissell *v.* R. R., 22 N. Y., 258; Whitney Arms Co. *v.* Barlow, 63 N. Y., 62; Woodruff *v.* E. R. Co., 93 N. Y., 618), *this doctrine has never been applied to a mere executory contract*, which is sought to be made the foundation of an action, either by or against such corporations."

Bradley *v.* Ballard (*supra*), has already been quoted. State Board of Agriculture *v.* Citizens' Railway Co., 47 Ind., 407, decided in 1874, contains a very full and able discussion of the subject. J. DOWNEY, in his opinion, after stating the facts, which were analogous to those in Davis *v.* Old Colony R. R. (*supra*), said: "The plaintiffs performed their part of the contract, and on faith of defendant's subscription expended $20,000 in fitting up said grounds. Yet defend-

ant refused to pay its share of the $1,000 subscribed on September 1, 1868, when due. Counsel for defendant urged that the contract in which the action was founded was void for want of power in the Street Railway Co. to make the same. Counsel for plaintiff submit (*inter alia*), that a corporation is estopped to plead *ultra vires* when money has been invested on the faith of its contract. A distinction may, perhaps, be well made between the case where an act of a corporation is done in violation of an express prohibition in its charter, or in some other law relating thereto, and the case where there is simply a defect of power in the corporation to do the act. So it appears there are acts of corporations which strictly are *ultra vires*, and for the doing of which the State may proceed against the corporation, and yet the acts of the corporation, under the particular circumstances, be binding upon the corporation.

"There appears also to be a distinction between the rights of the parties to a contract which remains wholly executory and the rights of parties to a contract when it has been wholly executed by the party dealing with the corporation.

"It does not appear that in making the contract the company violated any statute by which the act was prohibited. All that is claimed is that there is want of power. The Board of Agriculture performed its part. The railway company received benefits, but seeks to avoid paying the consideration promised on the above grounds. In our opinion the company is not at liberty to assume this position. It has received the profits resulting from the compliance of the plaintiff with the contract. These profits, we are at liberty to presume, have gone to swell the dividends of the stockholders in that corporation. It would be unjust for their company to escape performance of the contract by which these profits have been realized. If the street railway company has incurred a forfeiture of its charter by the act done, that is a question for it to settle with the State."

Northwestern Union Packet Co. *v.* Shaw, 37 Wis., 655 (1875); Wright *v.* Pipe Line Co., et al., 101 Pa., 204 (1882); Denver Fire Ins. Co. *v.* McClelland, 9 Col., 11 (1885), and Day *v.* Spiral Springs Buggy Co., 57 Mich., 146, take substantially the same view of the doctrine of *ultra vires*.

CLINTON ROGERS WOODRUFF.