court, and can be taken away only by the power that called the court into being. Therefore, the legislature has no power to abridge or take away this power in the case of a court created by the Constitution, though it may do so as to courts of its own creation; and if any constitutional court acquiesces in such a usurpation the power merely remains in abeyance, and may be resumed at pleasure. (6) The proper method of procedure for such contempts is by affidavit setting forth all the facts necessary to give jurisdiction, a rule to show cause why an attachment should not issue, based on such affidavit, and an attachment in pursuance thereof, if the answer of the respondent is not sufficient to purge the contempt.

R. D. S.

DEPARTMENT OF CORPORATIONS.

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UNITED LINES TELEGRAPH CO., ET AL., *v.* BOSTON SAFE DEPOSIT AND TRUST COMPANY.[1]

Ultra vires Purchase of Stock by Corporations.

The Bankers' and Merchants' Telegraph Company entered into a contract with The Rapid Telegraph Company whereby, in consideration of the former company building certain telegraph lines, the latter agreed to mortgage its property and issue to the former $3,000,000 of bonds. The mortgage was given to The Boston Safe Deposit and Trust Company as trustee. The next day after the agreement the Bankers' Company entered into a contract with one Bullens, reciting the agreement of the previous day, and agreeing to deposit with him, as trustee, the bonds of the Rapid Company, he agreeing to procure at least 51 per cent. of the stock of the latter and transfer it to the Bankers' Company in exchange for the bonds, dollar for dollar, the surplus of bonds to be returned with the stock after the latter had been secured. The bonds were issued and the stock transferred, and the Bankers' Company began the construction of the new lines. Before their completion the Bankers' Company became insolvent, default was made in payment of interest on the bonds, and foreclosure was commenced. Defence was made by the receiver of the Bankers' Company and by a purchaser at a receiver's sale, on the ground, *inter alia*, that the agreements were *ultra vires* of the Bankers' Company. It was found, as a fact, that the agreements had been entered into in good faith for the betterment of the condition of the two companies.

[1] 36 Fed. Rep., 288. Affirmed 13 S. C. Rep., 396.

The laws of New York, where the Bankers' Company was chartered, and especially the law of 1870, ch. 568, permitted the investment by one telegraph company in the securities of another. *Held*, that the agreements were not *ultra vires*.

POWER OF ONE CORPORATION TO INVEST IN THE SECURITIES OF ANOTHER.[1]

This question was suggested rather than raised by the leading case, and, indeed was not discussed at any length in it, the facts of the *bona fides* of the transaction, the laws of New York, and the retention by the defending corporation of the fruits of the contracts being regarded as conclusive against the right to interpose the defence of *ultra vires*.

It is an important question, however, and has been frequently raised, in one form or another, both in England and America. The purchase of stock of one corporation by another is not a direct assault upon the rights of the public, or of the stockholders of the corporation, but an indirect one. It is the purpose for which it is secured, or the method of its use when secured, or the possibility of ill use, that presents the objectionable feature of such an act, and the cases show that it has been condemned for one of two main reasons: (1) Because it violates the agreement with the stockholders of the purchasing corporation that the proceeds of their stock subscriptions shall be used for charter purposes, and for those purposes only; or, to present the same reason in another aspect, because it is against public policy to permit the property of the corporation, which is a creature of the legislature, to be diverted from the purposes for which the legislature created it; (2) because it is against public policy for one corporation to absorb another competing corporation, so that but one corporation shall perform the functions designed to be exercised by two.

The violation of law for the first reason usually occurs in the case of trading corporations; for the second, in cases of public or quasi-public corporations, such as railroads. The distinction between the powers of trading and public corporations, however, is one which is oftener implied than expressed, and yet seems to run through many of the cases, and seems to furnish an important commentary to the discussion.

It is stated by Brice (on *Ultra Vires*, page 91) that in England, corporations formerly could not deal in shares of stock of other corporations, and that now it can be done, under limitations. But in England a corporation may not do those acts which are outside the statute or the memorandum of its association: Solomons *v.* Laing, 12 Beav., 339; East Anglian Ry. Co. *v.* Eastern Counties Ry. Co., 11 C. B., 775; Ashbury Ry., etc., Co. *v.* Riche, L. R., 7 E. & I. App., 653; *in re* European Society Arbitration Acts, L. R., 8 Ch. Div., 679; and such acts cannot be ratified by even all of the stockholders: Ashbury *v.* Riche, *supra*.

In Solomons *v.* Laing, *supra*, the South Coast Ry. Co. lawfully obtained certain shares of another railway company, but, in addition, had agreed to take 4000 shares more and give the latter railway some pecuniary assistance. It was said "a railway company incor-

[1] See Annotation on Corporate Contracts *ultra vires*. *Supra*, p. 50.

porated by Act of Parliament is bound to apply all the moneys and property of the company for the purposes directed and provided for by the act, and for no other purposes whatever. . . . But the company itself or the directors or any number of shareholders assembled at a meeting or otherwise have no right to dispose of the share of the general dividend which belongs to any particular shareholder in any manner contrary to the will or without the consent or authority of that particular shareholder." (See also Great Western Ry. Co. *v.* Metropolitan Ry. Co., 32 L. J. Ch., 382.) *In re* Barned's Banking Co., L. R., 3 Ch., 105, however, it was said concerning a trading corproation, "it is at first sight beyond the province of a trading corporation to become a shareholder in another or apply its funds for that purpose, but here one of the objects of the Contract Corporation was 'to purchase or accept any obligations, bonds, debentures, notes and shares in any foreign or English company, and to negotiate the sale of any such securities.'" And in the Royal Bank of India's Case, L. R., 4 Ch., 252, where a banking company had advanced upon the pledge of stock of another company and subsequently transferred the stock to its own name, it was held that such transfer was not *ultra vires*, and that it subjected the banking company to the liability of an individual shareholder. The fact that a trading company may, by taking shares of another corporation, be obliged to buy in the property of that corporation to protect itself, and so engage in a new business, is not very important, inasmuch as a company of brokers may lawfully make advances on a ship and then have to take the ship and run her to save loss, and yet be none the less a brokers' company acting within the scope of its lawful functions. It was said in that case, "there is not either by the statute or common law anything to prohibit a trading corporation from taking or accepting shares in another trading corporation. There may, of course, be circumstances which prohibit or render it improper for a company to do so having regard to its own constitution as defined by its memorandum and articles," as in Joint Stock Company *v.* Brown, L. R., 8 Eq., 381, where it was held that a corporation with power to invest in securities could not use that power to purchase shares in order to carry out a questionable venture.

In the United States the question has received considerable discussion. It is true that in some cases it has been broadly asserted that a corporation cannot become the owner of the stock of another corporation unless the authority to become such is clearly conferred by statute, as in Farmers' Bank *v.* Commercial Bank, 36 Ohio, 350, where a bank, suing another bank for refusal to permit a transfer of stock to it, was held not entitled to recover, or in Valley Ry. Co. *v.* Iron Co., 46 Ohio, 44, where it was held that an iron company could not subscribe to stock in a railway company.

It would seem, however, that the whole question may be relegated, so far as private corporations at least are concerned, to the broader principles enunciated by Chief Justice MARSHALL in the Dartmouth College Case, 4 Wheat., 636, that "a corporation being the creature of the law possesses only those

powers which the charter of its creation confers upon it either expressly or incidental to its very existence," or as expressed somewhat more broadly in Hill *et al.*, *v.* Nisbet *et al.*, 100 Ind., 341, that a corporation has those powers which "under all the circumstances are necessary or reasonable means of carrying out the object for which the corporation was created or one which under the statute it might accomplish:" Thomas *v.* R. R. Co., 101 U. S., 71.

The less rigorous rule, that the burden is on the one alleging a want of power to hold stock to prove it, (Evans *v.* Bailey, 66 Cal., 112, Ryan *v.* Leavenworth, 21 Kan., 14), does not appear to be generally accepted. On the contrary, the purchase or holding of stock not being one of the functions of a vast majority of corporations the burden is rather on the corporation to show that the purchase was a valid one.

Assuming the principle of the Dartmouth College Case as a basis, it is easier to understand most of the positions taken in this country. In the first place it has been held that certain classes of corporations, such as religious and charitable corporations and corporations for literary and scientific purposes, may invest their capital in the stock of other corporations so as to render their funds productive: Hodges *v.* Screw Co., 1 R. I., 312; Pearson *v.* Concord R. R. Co., 62 N. H., 537. It was intimated in the former case that insurance companies might do the same, but it has been held otherwise: Mechanics' Bank *v.* Meriden Agency Co., 24 Conn., 159; Berry *v.* Yates, 24 Barb., 199. A dry-dock company was held by the Louisiana court not to have the right to subscribe to the stock of a steamship company: N. O., Fla. & Hav. Steamship Co. *v.* Ocean Dry Dock Co., 28 La. Ann., 173. A savings bank was held not to have right to subscribe to stock in a manufacturing company: Franklin Co. *v.* Lewiston Savings Bank, 68 Me., 43. In this case, however, which is more quoted than almost any other, the savings bank had no surplus money at the time of the subscription, but another corporation advanced it and took the stock in its own name. The burden of the decision was rather that, while it was the duty of the savings bank trustees to invest its money, it was not contemplated that they would invest it in advance. In Talmage *v.* Pell, 7 N. Y., 348, it was held that a banking association has no power to purchase stocks for the purpose of selling them at a profit or as a means of raising money, except when such stocks have been received in good faith as security for a loan made by, or as a debt due to such association, and when taken in payment in whole or in part of such loan or debt; and again, in Nassau Bank *v.* Jones, 95 N. Y., 115, it was held that a banking corporation could not subscribe to stock of a railroad corporation. A subscription to stock could scarcely come within any of the exceptions mentioned in Talmage *v.* Pell, *supra*. Dealing in stocks by national banks is not expressly prohibited, but such a prohibition is implied from failure to grant the power: National Bank of Charlotte *v.* National Exchange Bank, 92 U. S., 122; but stocks may be accepted in an honest effort to compromise a doubtful debt, with a view to

their subsequent sale, such a transaction not being a 'dealing in stocks, and it makes no difference whether the compromise grow out a debt due by or to the bank. In Hill *et al. v.* Nisbet *et al.*, *supra*, it is stated that where "the purchase of stock in one corporation by another amounts to engaging in a business other than that authorized by its charter such purchase is *ultra vires*; and this is so, *not because the purchase is stock, but because the business is outside the scope of the charter.* Whether the purchase of stock in one corporation by another is *ultra vires* or not will depend upon the purpose for which the purchase was made and whether such purchase was under all the circumstances, a necessary or reasonable means of carrying out the object for which the corporation was created or one which, under the statute it might accomplish."

Just as there are certain classes of corporations which, it seems, may at any time invest their capital in stocks of other corporations, so there are certain conditions under which all corporations may accept such stocks, as when they are taken as security, in payment of a debt or in compromise: National Bank *v.* National Bank, *supra.* In Howe *v.* Boston Carpet Co., 82 Mass., 493, it was held, that a manufacturing corporation might take stock in payment of a debt. In Treadwell *v.* Salisbury Mfg. Co., 7 Gray, 393, it was held, that while a corporation quasi-public may be restrained and directed in the management of its affairs, yet a corporation established for trading and manufacturing purposes may wind up its affairs whenever it sees proper so to do by selling its assets for stock; and that the legality of the transaction could not depend upon the intention of the corporation to wind up its affairs immediately, for if it had taken the stock in payment for goods or for the sale of a building or land or water power, which it did not want, and desired to sell, while it still carried on its business, the act must have been equally legal.

This case was followed in Buford *v.* Keokul N. L. Packet Co., 3 Mo. App., 159, where it was held that a corporation on the eve of failure could transfer its property and take stock in payment. The rule allowing a stockholder to restrain a corporation from parting with its assets, is not to be construed into permitting him thus to force a corporation into insolvency. Another question is raised, where the corporation seeks merely to change its location by selling itself to a foreign corporation, and this it cannot do: Taylor *v.* Earle, 8 Hun., 1.

It is manifest that a stricter rule will be held concerning public or quasi-public corporations, such as railways. There is the additional reason in many such cases that it is against public policy to permit competing companies to amalgamate, whether by consolidation under forms of law or by the purchase of stock.

In Hazlehurst *v.* R. R. Co., 43 Ga., 13, following Central R. R. Co. *v.* Collins, 40 Ga., 582, it was held broadly, that a railroad has no right to buy up the stock of another company, and any stockholder has the right to object. In Millbank *v.* R. R. Co., 64 How. Pr., 20, it was held that a railroad company might take stock of an-

other company to secure debts, but the investment of funds in such stock is *ultra vires*. The whole subject is reviewed in Pearson *v.* Concord R. R. Co., 62 N. H., 537, where it is said: "A corporation cannot become a stockholder in another corporation, unless such power is given it by its charter or is necessarily implied in it, especially if the purchase be for the purpose of controlling or affecting the management of the other corporation. Corporations are creatures of the legislature, having no other powers than such as are given to them by their charters, or such as are incidental or necessary to carry into effect the purposes for which they were established. Certain classes of corporations, such as religious and charitable corporations and corporations for literary purposes, may rightfully invest their moneys in the stock of other corporations. The power, if not expressly mentioned in their charters, is necessarily implied for the preservation of their funds with which such institutions are endowed, and to render their funds productive. So an insurance company or savings bank may rightfully invest its capital or deposits in the stock of railroad companies, banks, manufacturing companies and similar corporations. The power is necessary to enable them to engage in the business for which they are organized, and, hence, is implied, if not expressly granted, in their charters. Such investments are in the line of their business. On the other hand, a manufacturing or railroad corporation is incorporated to do the business of manufacturing or transporting passengers or merchandise. Investing their funds in that of other corporations is not in the line of their business. Under extraordinary circumstances it may become necessary for a national bank, or a manufacturing corporation, or a railroad corporation, to acquire stock in another corporation, as in satisfaction of a valid debt or by way of security, but with a view to its subsequent sale or conversion into money so as to make good or redeem an anticipated loss." The Court also held, that in a suit by a stockholder to restrain such *ultra vires* acts, it is immaterial whether the contracts are fair and just.

Such purchases by railroads are also held against public policy, because they result in the obliteration of a competing road: Elkins *v.* Camden & Atlantic R. R. Co., 36 N. J. Eq., 5; Central R. R. *v.* Pa. R. R., 31 N. J. Eq., 475; Millbank *v.* R. R., 64 How. Pr., 20. In Booth *v.* Robinson, 55 Md., 419, a steam packet company was held to have the power to invest in stock of another steam boat company, which was not a rival. This case goes rather further in sustaining such purchases than any other. In some States the question of competing railroads has been dealt with by the legislature or in the constitution. This is the case in Georgia and Pennsylvania.

As to the position of two corporations to a contract *ultra vires* of one or both of them, the decisions have not been uniform: 32 AMERICAN LAW REGISTER, 40. It may be added, however, that where a corporation has taken stock when it had no right to do so, it is entitled to receive all dividends on the stock, but may not vote it: Woods *v.* Memphis, 5 Ry. & Corp., L. J., 372 (Ala.); Millbank *v.* R. R. Co., 64 How. Pr., 20.

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