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## Corporations--Ultra Vires as an Affirmative Plea

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Although it is apparent that past and present offenders who have escaped military jurisdiction will continue to go unpunished due to the constitutional provision forbidding ex post facto legislation, there is no reason for the possibility of future crimes without punishment if Congress takes prompt and appropriate action to correct this present deficiency in the law.

T. E. P.

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CORPORATIONS—ULTRA VIRES AS AN AFFIRMATIVE PLEA.—*P* corporation was comprised of three stockholders, *A*, *B*, and *C*. *A* was the president and owned 31 shares of stock. *B* was the secretary and owned 28 shares of stock. *C* was the treasurer and owned 1 share of stock. *A* and *B* were husband and wife and *C* was *A*'s stepson and *B*'s son. *P* insured *A*'s life for \$25,000.00 and named *P* as the beneficiary of the policy. *D* was the insurer. Later, *A* and *B* had marital difficulties and entered into a separation agreement whereby assignment of \$15,000.00 of the insurance policy was made to *B* as protection in the event that other terms of the separation agreement were not fulfilled. At the time of this assignment, *P*'s assets were much less than its liabilities. *A*, *B*, and *C* discussed the assignment and consented thereto. Still later, *A* and *B* divorced and *A* remarried. After *A*'s death, *D* paid \$15,000.00 to *B* although *P* notified *D* that *P* would seek all proceeds of the policy. *P* now sues *D*. Held, that *P*'s assignment was ultra vires, as *P* contended, and was thus void and of no effect and, also, that *P* was not estopped to urge ultra vires. *P* recovered all proceeds of the policy. *Crossland-Cullen Co. v. Philadelphia Life Ins. Co.*, 133 F. Supp. 473 (W.D.D.C. 1955).

Involved here is a completely executed gratuitous partial assignment of a chose in action. Being an ultra vires act, it affected only parties to the transaction, creditors of the corporation, the state of North Carolina, and stockholders of the corporation. All shareholders ratified the act and neither the creditors, nor the state, nor third parties to the act are involved in this suit.

"The theory that a corporation can do no acts beyond its authority, discarded by a majority of the courts in this country, is responsible for most of the decisions that ultra vires contracts are absolutely void. On the other hand, most of the courts hold that ultra vires acts are the acts of the corporation and are not void, and classify rights and liabilities according to whether the contract is (1) wholly executory, (2) wholly executed, or (3) executed

on one side only." 7 FLETCHER, PRIVATE CORPORATIONS § 3413 (perm. ed. 1931).

In cases where all stockholders have assented, the doctrine of estoppel is applicable, and the plea of ultra vires is unavailing. *Perkins v. Trinity Realty Co.*, 69 N.J. Eq. 723, 61 Atl. 167 (1905). Whatever will estop all the stockholders will estop the corporation itself. *Olson v. Warroad Mercantile Co.*, 136 Minn. 310, 161 N.W. 713 (1917). If the stockholders are estopped by consenting to an ultra vires act of the corporation, then a fortiori the corporation should also be estopped because the stockholders, in reality, constitute the corporation. It is generally so held where there are no creditors, or the creditors are not injured thereby, and where the rights of the state are not involved. See 7 FLETCHER, *op. cit. supra* § 3432.

As a general rule, a corporation can not make a pure gift of its property as such would be a violation of the rights of existing creditors and of stockholders. If there is no objection by creditors or stockholders then the general rule does not apply. *Southern Hide Co. v. Best*, 174 La. 748, 141 So. 449 (1932). A gift by a corporation consented to by all stockholders is good as against all except existing creditors at the time the gift is made. *McLaughlin v. Corcoran*, 104 Mont. 590, 69 P.2d 597 (1937). Where there are no stockholders except the officers and directors of a family corporation, they may, if they wish, give away the assets by unanimous consent, and the gift will be good unless rights of creditors are impaired. *Logeman Mfg. Co. v. Logeman*, 298 S.W. 1040 (Mo. App. 1927).

If a corporation transfers its property with intent to defraud creditors, or without consideration, existing creditors may sue in equity, after exhausting their remedies at law, to set the transfer aside as fraudulent and to subject the property to the satisfaction of their claims, or to hold the transferee liable for its value. *Beach v. Miller*, 130 Ill. 162, 22 N.E.2d 464 (1889); *Montgomery v. Phillips*, 53 N.J. Eq. 203, 31 Atl. 622 (1895). In some jurisdictions, creditors may treat the transfer as void, and levy an execution on the property. *Montgomery Web Co. v. Dienelt*, 133 Pa. St. 585, 19 Atl. 428 (1890). But, in most jurisdictions the transfer is only voidable at the suit of creditors, and the creditors' only relief is in equity. E.g., *Sharples Co. v. Harding Creamery Co.*, 78 Neb. 795, 111 N.W. 783 (1907); *Citizens' Bank v. McClelland*, 53 Kan. 699, 37 Pac. 132 (1894).

A corporation can not sue to avoid an ultra vires transaction that is fully executed. *Memphis Lumber Co. v. Security Bank and Trust Co.*, 143 Tenn. 136, 226 S.W. 182 (1920). In *National Bank of Commerce v. Francis*, 296 Mo. 169, 246 S.W. 326 (1922), the court said, "Under the great weight of authority, state and federal, the plea of ultra vires cannot be used as a sword to recover back money paid under an executed ultra vires contract, although it may be used, under certain circumstances as a shield to defend against the enforcement of such a contract." And, in *Erb v. Yoerg*, 64 Minn. 463, 67 N.W. 355 (1896), the court said, "This plea of illegality [ultra vires] is a shield, not a sword; a defense, not a ground for affirmative relief. If the transaction was illegal, the law simply leaves the parties where it finds them."

Assuming that *P* corporation was insolvent or rendered insolvent by the ultra vires act, then the proceeds of the life insurance policy should find their way into *P*'s treasury for the benefit of creditors, but only to the extent necessary for the protection of creditors. This could be accomplished only in a suit brought by creditors. Had the corporation been solvent, even though its capital was impaired, then under the facts here the act would be valid as there was no one who could complain.

G. H. W.

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COURTS — CONTEMPT — ATTORNEY NOT AN "OFFICER" OF THE COURT WITHIN THE MEANING OF THE FEDERAL CONTEMPT STATUTE.—Petitioner, an attorney was found guilty of contempt by an inferior federal court, under the Federal Contempt Statute, 18 U.S.C. § 401 (2) (1952), for mailing questionnaires to members of a grand jury. The statute provides a federal court with power to punish as contempt "[m]isbehavior of any of its officers in their official transactions." The court of appeals stated that petitioner was an "officer" of the court involved in an "official transaction," whose actions constituted "misbehavior." *Cammer v. United States*, 223 F.2d 322 (D.C. Cir. 1954). This decision was criticized at 58 W. VA. L. REV. 88 (1955), on the ground that the congressional purpose behind this statute was to restrict the federal courts' contempt power; so that if the statute were construed strictly, as contemplated by the framers, petitioner's activities would not be considered such as to be included in those of "officers" of the court involved in "official transactions" when only mailing letters.