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would seem that under the authorities, assuming that a safe place to work in and safe appliances to work with, are furnished by the master, a stevedore cannot recover for an injury caused by the negligence of a fellow servant, even though the negligence which causes the injury is the failure of one of his co-workers to give a warning signal that is customary in that business.

Fred R. Boynton.

WHEN MAY AN *ULTRA VIRES* CONTRACT BE ENFORCED IN WASHINGTON?²—Under the early common law, an *ultra vires* contract of a private corporation was absolutely void, on the theory that there being no power to make such a contract, legally there was no contract. It is at the present time well established in practically all jurisdictions that neither an action at law nor in equity can be maintained either by or against a corporation on an *ultra vires* contract which remains *executory* as to both parties or has been only partially performed, even though unanimously ratified by the board and stock holders.¹ It is also well settled that where such a contract has been fully performed by both parties, the courts will leave them where they have placed themselves, both being deemed *in pari delicto*.²

But on the question of the enforceability of a contract which has been fully or substantially performed by one party but remains *executory* as to the other, there is a direct conflict of authority. The United States Supreme Court and other federal courts, England, and a few of the states adhere strictly to the early rule that an *ultra vires* contract is void *per se* for lack of power to make the same, and consequently that no rights can be acquired thereunder, by performance, estoppel, or otherwise.³ This is, as a matter of technical theory, the most logical rule, although not necessarily the most just. Such courts, however, frequently seek to prevent an injustice by allowing a recovery by the party who has performed, for the reasonable value of the benefits actually conferred upon the other in money, property, or services, not upon the express contract but in disaffirmance of the contract, upon the theory of a *quasi* contract implied by law to avoid unjust enrichment of the defendant.

A greater number of the State courts follow the "state rule" that an *ultra vires* contract is not strictly void but merely voidable, that

¹ 3 FLETCHER CYC. CORP. 2594, §1530; 14a C. J. 317 7 R. C. L. 675.

² 3 FLETCHER CYC. CORP. 2655, §1585; 14a C. J. 319.

³ *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55, 11 Sup. Ct. 478 (1890) *Pittsburgh, Cincinnati and St. Louis Ry. Co. v. Keokuk and Hamilton Bridge Co.*, 131 U. S. 371, 33 L. Ed. 157, 9 Sup. Ct. Rep. 770 (1889) *Louisville, New Albany & Chicago Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 43 L. Ed. 1081, 19 Sup. Ct. Rep. 817 (1899). The following states adhere more or less closely to the federal rule: Alabama, Illinois, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Ohio, Tennessee and Vermont. See also 3 FLETCHER CYC. CORP. 2600, §1539 14a C. J. 319 7 R. C. L. 678.

it does not involve an utter lack of power on the part of the corporation but is rather in the nature of an illegal contract prohibited either expressly or impliedly by law, that *ultra vires* means not that the corporation could not but that it ought not to have made such contract, and consequently that the party who has not performed may be estopped to exercise the right which he would otherwise have to set up the defense of *ultra vires* in an action on the contract.⁴

In Washington, *ultra vires* contracts, other than conveyances of real estate,⁵ have never been expressly denominated "voidable" rather than void by our Supreme Court, and the language used in some of the earlier cases indicates that such contracts are deemed void.⁶ Our Court has never recognized the technical distinction drawn by some of the courts adhering to the "state rule" between capacity and right; that is, the idea that *ultra vires* means not that the corporation utterly lacks power to make the contract but that it has no legal right and ought not to do so.

However, the other phase of the "state rule"—the applicability of the doctrine of estoppel—has become well established in this State. "The doctrine of *ultra vires* as a defense has died so hard that it is well to repeat the proposition which seems to be fully established by the more recent decisions, that where a contract has in good faith been fully performed either by the corporation or the other party, the one who has thus received the benefit will not be permitted to resist its enforcement by the plea of mere want of power."⁷ This just rule was first recognized in this state in the 4th Washington in 1892, and has been consistently followed since that time. In fact, generally speaking, the Washington cases may for the most part be divided into two groups: (1) those holding that the non-performing party is estopped to set up *ultra vires* as a defense, in view of the benefits received by him through the performance by the other party;⁸

⁴ FLETCHER CYC. CORP. 2609, §1543; 14a C. J. 319, 7 R. C. L. 680.

⁵ *Puget Sound National Bank v. Fisher*, 52 Wash. 246, 249, 100 Pac. 724 (1909) *Milton v. Crawford*, 65 Wash. 145, 118 Pac. 32 (1911), *Latshaw v. Western Townsite Co.*, 91 Wash. 575, 158 Pac. 248 (1916).

⁶ *Tootle v. First National Bank*, 6 Wash. 181, 33 Pac. 345 (1893), *Washington Mill Co. v. Sprague Lumber Co.*, 19 Wash. 165, 52 Pac. 1067 (1898), *Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 172, 60 Pac. 141 (1900), *State ex rel Spring Water Co. v. Monroe*, 40 Wash. 54, 82 Pac. 888 (1905), *Olsen v. Northern Steamship Co.*, 70 Wash. 493, 127 Pac. 112 (1912).

⁷ *Tootle v. First National Bank*, 6 Wash. 181, 183, 33 Pac. 345 (1893), quoting 2 BEACH, PRIVATE CORP., §425.

⁸ Cases in which corporation benefited and held estopped: *Miller v. Washington Southern Ry. Co.*, 11 Wash. 414, 416, 39 Pac. 673 (1895), *Allen v. Olympia Light & Power Co.*, 13 Wash. 307, 309, 43 Pac. 55 (1895) *Wheeler, Osgoode & Co. v. Everett Land Co.*, 14 Wash. 630, 633, 45 Pac. 316 (1896), *City of Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 172, 180, 60 Pac. 141 (1900), *Blair v. Metropolitan Savings Bank*, 27 Wash. 192, 201, 67 Pac. 609 (1902), *Graton & Knight Mfg. Co. v. Redelsheimer*, 28 Wash. 370, 377, 68 Pac. 879 (1902), *Krisch v. Inter-State Fisheries Co.*, 39 Wash. 381, 384, 81 Pac. 855 (1905), *Jackson v. Mercantile Mutual Fire Insurance Co.*, 45 Wash. 244, 246,

(2) those which, while not denying the general rule, hold that the facts and circumstances of the particular case are insufficient to create an estoppel.⁹

There is still a third small but important group of cases which go a step further and hold that even though the non-performing party has received no benefits from the performance by the other party, yet he will be held estopped to raise such defense, in order to prevent injustice to the party who has performed in reliance upon the contract.¹⁰ "The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong. *Railway Co. v. McCarthy* 96 U. S. 258. This rule is so well established that it is the work of supererogation to quote authorities to sustain it."¹¹

Thus in *Creditors Claim & Adjustment Co. v. Northwest Loan & Trust Co.*,¹² it was held that defendant bank could not defend an action on its guaranty on the ground of *ultra vires*, where it telegraphed a guaranty and then by request wrote a confirmatory letter, stating that it was secured by a \$2000 note, that its telegraphic guaranties were accepted by other banks, and that the telegram was "a guaranty in fact" "To hold otherwise, in the light of this record, would be to encourage fraud and bad faith, and to put the law in the position of awarding a premium to dishonesty" This rule also may be said to be well settled in this State, although its applicability will of course depend upon the circumstances of the particular case.

The attitude of our court is well stated in *U. S. Fidelity & Guar-*

88 Pac. 127 (1907) *Puget Sound National Bank v. Fisher* 52 Wash. 246, 249 100 Pac. 724 (1909) *Sesnon v. Lundeborg*, 66 Wash. 1, 7, 118 Pac. 900 (1911) *Union Savings & Trust Co. v. Krumm*, 88 Wash. 20, 27, 152 Pac. 681 (1915) *Flanagan v. American Minerals Producing Co.*, 108 Wash. 569, 572, 185 Pac. 609 (1919) *Moore v. American Savings Bank & Trust Co.*, 111 Wash. 148, 161, 189 Pac. 1010 (1920). Also *Korn v. Spokane & Eastern Trust Co.*, 276 Fed. 68, 71 (C. C. A., 9th Ct., 1921) *Equitable Trust Co. v. Washington-Idaho Light & Power Co.*, 300 Fed. 601, 614 (Dist. Ct., Judge Webster, 1924).

Cases in which other party benefited and held estopped: *Hall & Paulson Furniture Co. v. Wilbur* 4 Wash. 644, 649, 30 Pac. 665 (1892) *Tootle v. First National Bank*, *supra* (dictum).

⁹ *Washington Mill Co. v. Sprague Lumber Co.*, 19 Wash. 165, 173, 52 Pac. 1067 (1898) *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 85, 101 Pac. 509, 132 Am. St. Rep. 1058 (1909) *Mooney v. Mooney Co.*, 71 Wash. 258, 264, 128 Pac. 225 (1912) *Hoffman v. Gottstem Investment Co.*, 101 Wash. 428, 172 Pac. 573 (1918).

¹⁰ *Frost v. Puget Sound Realty Associates*, 57 Wash. 629, 635, 107 Pac. 1029 (1910) *Creditors Claim & Adjustment Co. v. Northwest Loan & Trust Co.*, 81 Wash. 247, 253, 142 Pac. 670, Ann. Cas. 1916D 551, L. R. A. 1917A 737 (1914) *U. S. Fidelity & Guaranty Co. v. Cascade Construction Co.*, 106 Wash. 478, 483, 180 Pac. 463 (1919).

¹¹ *Tootle v. First National Bank*, *supra*.

¹² 81 Wash. 247, 253, 142 Pac. 670, Ann. Cas. 1916D 551, L. R. A. 1917A 737 (1914).

anty Co. v. Cascade Construction Co.,¹³ wherein it was said, referring to the defense of *ultra vires*: "We would not be understood as abolishing this defense.

We would sustain it in any case where the transaction is prohibited, illegal, or immoral. We merely wish to be understood as following no Procrustean rule in such cases, but such defense must always be considered on the merits in law and fact."

It is contended by some with considerable plausibility that the rule in Washington as to the legal nature and enforceability of an *ultra vires* contract is technically inconsistent in that in some of the earlier cases an *ultra vires* contract is held void, and at the same time it is held that performance of the void contract by one party gives rise to certain rights thereunder by way of estoppel. However, such rights arise primarily not so much from the *ultra vires* contract as from the performance thereof and the fact that under the circumstances, either by reason of the benefits received therefrom by the other party or otherwise, it is recognized as unjust to allow him to deny the validity of the contract. Effect is given to the contract under such circumstances, not because it is valid, but because the defendant is not legally permitted to set up such invalidity as a defense. A strict adherence to the technical abstract rule that an *ultra vires* contract is void *per se* (except as there is resort to recovery upon *quasi* contract) frequently operates unfairly, dishonestly, and with manifest injustice. It is submitted that this is a commendable instance of a departure, in accordance with the modern tendency of the weight of authority among the state courts, from a strict interpretation of an old technical theory, in the direction of rendering the law a more effective instrumentality for the administration of justice.

Elwood Hutcheson.

PROTECTING REAL ESTATE CONTRACT PURCHASES.—Many assignees of the vendors' interests in installment contracts for the sale of real estate suppose that the recording of the assignment protects them by giving constructive notice of their rights. The increasing amount of investment in real estate contracts makes it important to determine the best method for protecting the assignee.

Our Supreme Court¹ has said that recording "is purely a creation of the statute", and since the recording of such assignments is not provided for by statute it would seem that no constructive notice follows from recording.

¹³ 106 Wash. 478, 483, 180 Pac. 463 (1919).

"A contract entered into by a corporation is presumed to be within the corporate powers unless the contrary appears, and the burden of proof is upon the one who attacks the contract as *ultra vires*." *Belch v. Big Store Co.*, 46 Wash. 1, 5, 89 Pac. 174 (1907), citing 1 CLARK AND MARSHALL, PRIVATE CORP., §174.

Ultra vires is a defense not favored in law. *U S. Fidelity & Guaranty Co. v. Cascade Construction Co.*, *supra*.

¹ *Fischer v. Woodruff*, 25 Wash. 67, 64 Pac. 923 (1901).