

vailed over the general language in section 59. Similarly, the purview should have prevailed over the saving clause. Black, Construction and Interpretation of Laws § 112 (1896).

Had the court in the instant case found that the statute authorized the amendment, there would have remained the question of whether the statute was a constitutional exercise of the reserve power. Statutory and constitutional provisions reserving the power to amend corporation laws have been held to be written into the corporate charter at the time of incorporation. 1 Thompson, Corporations § 429 (3d ed. 1927). The charter constitutes a contract between the stockholders *inter sese* and between the corporation and the state. *Dow v. Northern R.R.*, 67 N.H. 1, 36 Atl. 510 (1887); 7 Fletcher, Cyclopedia Corporations § 3657 (1931). Legislation not within the scope of the reserve power constitutes an unconstitutional impairment of contract. Ballantine, Corporations § 272 (1927). But the question of what legislation is authorized under the reserve power has caused difficulty. Curran, Minority Stockholders and the Amendment of Corporate Charters, 32 Mich. L. Rev. 743, 750 (1934). Although the reservations are couched in general terms, courts have by construction restricted their scope. Thus it has been held that under the reserve power the rights of the stockholders *inter sese* may not be affected. *Matter of Election of Directors of Newark Library Ass'n*, 64 N.J.L. 217, 43 Atl. 435 (1899); *Avondale Land Co. v. Shook*, 170 Ala. 379, 54 So. 268 (1911). See Stern, The Limitations of the Power of a State under a Reserved Right to Amend or Repeal Charters of Incorporation, 53 Am. L. Reg. (44 n.s.) 73, 85 (1905). The application of this standard would invalidate the statute in the instant case. But the distinction between intra- and extra-corporate rights is hard to draw and may unduly restrict future legislation. Thus most courts have not followed this rule. *Farbstein v. Pacific Oil Tool Co.*, 127 Cal. App. 157, 15 P. (2d) 766 (1932); *Lord v. Equitable Life Assurance Society*, 194 N.Y. 212, 87 N.E. 443 (1909); 7 Fletcher, Cyclopedia Corporations §§ 3695-98 (1931). Confusion has been enriched by the question-begging slogan that the reserve power cannot be constitutionally exercised to deprive a stockholder of vested rights. Clearly, whether or not a right is vested depends upon whether the state has reserved the power to change it. One court, however, has made the surprising suggestion that, without regard to the language of the reservation clause, statutes authorizing changes in what courts consider vested rights are unconstitutional. *Yoakum v. Providence Biltmore Hotel Co.*, 34 F. (2d) 533, 545 (D.C.R.I. 1929). There is no apparent constitutional basis for invalidating statutes that admittedly come within the scope of the reserve power, and this suggestion is illustrative of a desire to strike down, without regard to the terms of the reservation, amendments which constitute an unreasonable deprivation of the rights of dissenting stockholders. Since the reservation is a part of the corporate "contract," impairment of contract cannot be the constitutional basis for invalidating amendments authorized by statutes admittedly within the scope of the reserve power. But by an extension of notions of due process, a court might strike down unnecessarily broad reservations as unconstitutional conditions. Although this would involve a radical limitation of the states' power over the corporations they create, it would make possible a more effective protection of the reasonable expectations of stockholders.

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Corporations—Ultra Vires—Capacity of a Fraternal Beneficiary Society to Contract for Old Age Benefits—[Illinois].—The plaintiff became a member of the de-

fendant fraternal beneficiary society, whose charter defined its powers by reference to the law under which it was incorporated. This law provided that such society "shall make provision for payment of death benefits and may, *in addition thereto*, provide for the payment *by local lodges* of benefits in case of disability, sickness, or old age . . ." Ill. L. 1893, p. 130, Hurd's Ill. Rev. Stats. 1893, c. 73, 258 (italics added). From the *central* office of the defendant the plaintiff received a certificate of life insurance containing a provision for an old age annuity, which the society later refused to pay, defending suit on the ground that the annuity provision was ultra vires and thus void. *Held*, the society is bound by the annuity provision. *Van Deventer v. North American etc. Society*, 284 Ill. App. 1, 1 N.E. (2d) 861 (1936).

The power to pay old age benefits is apparently not granted central offices although it is granted local lodges. The policy behind this distinction is unclear, and the court was not convinced that it was really intended. The wording of the statute seems clear, however, and the court therefore based its decision primarily upon the rule that an agreement may be binding even though ultra vires.

A contract is ultra vires when it is beyond the authority of the corporation as defined by the statute under which it is formed, or by its charter or incorporation paper. 2 Machen, *Modern Law of Corporations* 1012 (1908). A series of extensions of Coke's *dictum* in the *Case of Sutton's Hospital* (10 Coke 32b (1612)), that a corporation rests entirely upon the law under which it was created, led to the rule that ultra vires contracts are void. An act beyond the authority of the corporation is not an act of the corporation and, hence, does not bind the corporation. *California Bank v. Kennedy*, 167 U.S. 362 (1897); see critical examinations of this doctrine in Machen, *Corporate Personality*, 24 Harv. L. Rev. 253 (1911); Warren, *Executed Ultra Vires Transactions*, 23 Harv. L. Rev. 495 (1910). Relying mainly upon this "void" theory (see Carpenter, *Should the Doctrine of Ultra Vires Be Discarded?* 33 Yale L. J. 49, 57 (1923)), practically all American courts refuse to enforce wholly executory ultra vires contracts at the suit of either party. 7 Fletcher, *Cyclopedia Corporations* § 3459 (1931).

The obvious hardship caused by refusal to enforce contracts executed on one side combined, no doubt, with a certain dissatisfaction with the premises of the void theory, has induced the great majority of the courts to enforce partially-executed ultra vires contracts. *Bath Gas Light Co. v. Claffy*, 151 N.Y. 24, 45 N.E. 390 (1896); *Richeson v. Nat'l Bank of Mena*, 96 Ark. 594, 132 S.W. 913 (1910); *Wright v. Hughes*, 119 Ind. 324, 21 N.E. 907 (1889); 7 Fletcher, *Cyclopedia Corporations* § 3473 (1931). This rule is usually justified by the theory that the one benefited is estopped to raise the defense of ultra vires. The cases are in bewildering confusion, however, and the federal courts and some state courts still more or less consistently apply the void rule even to partially-executed contracts. *Central Transportation Co. v. Pullman's Car. Co.*, 139 U.S. 24 (1891); *Wiley Fertilizer Co. v. Carroll*, 202 Ala. 335, 80 So. 417 (1918); *Davis v. Old Colony R. Co.*, 131 Mass. 258 (1881). Illinois is in this group. The supreme court originally followed the majority rule. *Bradley v. Ballard*, 55 Ill. 413 (1870); *Eckman v. C. B. and Q. R. Co.*, 169 Ill. 312, 48 N.E. 496 (1897). Later, however, it adopted the "void" rule. *Nat'l Home Bldg. & Loan Ass'n v. Home Savings Bank*, 181 Ill. 35, 54 N.E. 619 (1899). This rule has been followed almost consistently by the supreme court, but only intermittently by the appellate court. See cases collected in Ill. Bus. Corp. Act Ann. 52 (1934). Some of the appellate court decisions to the contrary have been reconciled with the supreme court rule on the ground that there was involved

merely an abuse of power, rather than a complete want of power. *Central Trust Co. v. Smurr & Kamen Machine Co.*, 191 Ill. App. 613 (1915); see Ill. Bus. Corp. Act Ann. 54 (1934). Thus it was urged by counsel for the plaintiff in the principal case that since the power of contract for old age benefits was given to one part of the organization, namely the local lodges, the association in contracting through the central office had not acted beyond its powers but had merely wrongfully used powers given it. The court did not discuss this argument. Indeed the major part of the court's emphasis was upon the hardship and injustice involved in refusing to enforce the contract, fully performed by the plaintiff. In support of its decision the court cited supreme court decisions made when the earlier "estoppel" rule prevailed and ignored later cases setting up the "void" rule.

Criticism of the appellate court for thus quietly asserting its independence is easy. But the whole doctrine of ultra vires has enjoyed little favor in recent legal opinion. The limited capacity theory is denounced as unsound, the corporation portrayed as a real thing, not merely a creature of the law which created it. Machen, *Corporate Personality*, 24 Harv. L. Rev. 253 (1911); Warren, *Collateral Attack on Incorporation. B. in General*, 21 Harv. L. Rev. 305, 307 (1908). Once the limited capacity theory loses its dominance, the doctrine of ultra vires ceases to be necessary. In its place is proposed the agency rule of apparent authority. See Stevens, *A Proposal as to the Codification and Restatement of the Ultra Vires Doctrine*, 36 Yale L. J. 297 (1927); Carpenter, *Should the Doctrine of Ultra Vires be Discarded?* 33 Yale L. J. 49 (1923); Ballantine, *Proposed Revision of the Ultra Vires Doctrine*, 12 Corn. L. Q. 453 (1927). Where it is not specifically prohibited or contrary to public policy, a contract would be binding even though not authorized if the parties reasonably supposed it to be within the authority of the corporation. Under this rule there would be no constructive notice of a statute unless it contains a specific prohibition. Injury to stockholders and to the state can be prevented to a certain extent by stockholder- and attorney-general suits but in any event such injury is outweighed by the greater injury to third persons under the void rule. The Illinois legislature apparently concurs in this argument since it recently abolished ultra vires as a defense for most corporations. Ill. Bus. Corp. Act § 8 (1933), Smith-Hurd Ill. Rev. Stats. 1935, c. 32, § 157.8. See also Cal. Civ. Code 1931, § 345; Mason's Minn. Stats. 1927, c. 58, § 7492—10, 11 (supp. 1936). Since the Business Corporation Act does not apply to fraternal beneficiary societies, however, such corporations are still subject to the existing law. If the legislature desires to impose extraordinary restrictions upon the contractual powers of insurance companies, it should rely on express legislation, not on the uncertain mercies of ultra vires.

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**Criminal Law—Director and Corporate Crime—Principal and Accessory—**  
 [Illinois].—The Illinois Motor Fuel Tax Act provides that distributors of gasoline who are not licensed and who wilfully fail to account for taxes collected under the Act should be subject to fine and imprisonment. Smith-Hurd Ill. Rev. Stats. ch. 120, § 431 (1930). For repeated violations of these provisions the Blue Rose Oil Co., a corporation, was dissolved under § 82 of the Business Corporation Act. *Blue Rose Oil Co. v. People*, 360 Ill. 397, 196 N.E. 456 (1935). The defendant, who was the president and active controller of the corporation's policies, was indicted as an accessory before the fact for aiding and abetting the corporation in its violations. From a judgment of the