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THIS issue of the JOURNAL completes the third volume. We have followed in the main the plan of our predecessors, departing from it only in the addition of the department of Memorabilia. By making this a supplement, we have preserved the formal character of the JOURNAL, and at the same time have added a feature which we hope will prove both interesting and valuable. We have tried to keep abreast of the growth of the Law School and we take this last opportunity to publicly thank both our contributors and subscribers and to acknowledge our obligations for the warm support which we have received on all sides.

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To the student of corporation law no topic appears to be involved in more hopeless confusion than the so-called *ultra vires* doctrine as applied to private corporations. Judging from a careful reading of elaborate opinions of the various courts of last resort, it is apparent that our judges labor under the same difficulty. Nor does the perplexity end here. If it did, we might well dismiss the subject from consideration as one of no practical importance. But involving as it does the validity of all contractual obligations in favor of or against corporations, and the great majority of industrial enterprises being conducted by corporations, the proper solution of the problem is a thing of the greatest moment. The doctrine undoubtedly has its origin in the theory that a corporation is the creature of government, that the powers conferred upon it are franchises and in derogation of common right and the sovereignty of the state. And this theory is true in the case of

municipal corporations; there was some ground also for the application of this theory to private corporations when they were authorized by royal grant or special act of the legislature. Yet, even then, most of the powers of private corporations were not franchises, but rather attributes given to the corporation by the authorized contract between its members. The right to be a corporation is an undoubted franchise; so also is the right of eminent domain; the former belonging to the shareholders, the latter to the corporation, by virtue of grant from the state. Few private corporations have any other franchises. The right of banking corporations to issue notes to circulate as money comes within the true definition of a franchise. Every grant of franchises being in derogation of common right and a limitation upon, or an abridgement of, the sovereignty of the state, the state has an interest in preventing the usurpation of franchises and may properly adopt stringent rules for the prevention or punishment of such usurpation. But this can hardly be said concerning the attributes of corporations or those powers which are not franchises, but rather find their only origin in the agreement of the members. It can scarcely be maintained that the public has any interest in the exercise by a private corporation of powers of the latter class, where it would not also have a like interest in the exercise of such powers by private individuals. In other words, an act performed by a private corporation can be opposed to public policy only when the same act would be contrary to public policy if performed by an individual. One law and one policy ought to govern both. But in some jurisdictions a contract involving the exercise of a mere power not included in the constating instruments of the corporation, even though it meet with the approval of every member of the company, is held void equally with a contract involving the usurpation of a franchise. In other jurisdictions, the same theory is promulgated, but in case the contract is of the class mentioned, multitudinous exceptions are allowed on the doctrine of estoppel or other equitable principles. Is there any reason, apart from the principles of the law of agency, for adjudging to be void, on the ground of public policy, contracts of corporations unless they are usurpations of a franchise or would be opposed to public policy or public law if made by private citizens? The whole force of the doctrine of the common law that the unauthorized exercise of corporate powers is opposed to public policy and therefore void, in so far as it is applied to the exercise of mere powers or attributes, not franchises, is broken by the enactment of general laws permitting freely the

formation of corporations. For it is clear that, under existing circumstances, mere powers or attributes are not conferred upon private corporations by the state, but by the members who enter into the contract which brings the corporation into existence. The conferring of powers lies in the will of the corporators, considerations of public policy being satisfied by compliance with provisions relating to the filing of the articles of association with the Secretary of State or other designated officer, and the payment of the imposed fees. The corporators create the corporation under authority of law. It is believed that true public policy requires the enforcement of corporate contracts, unless they involve an usurpation of a franchise (and probably in most cases even then), or unless they are illegal on grounds equally applicable to contracts between natural persons. The remedy for unauthorized corporate action usurping public franchises should lie with the state; and, unless the state chooses to object either by its prosecuting officer or upon the relation of an interested private citizen, there is no one who can reasonably complain. Of course all this is upon the assumption that the acts under consideration are really the acts of the corporation in accordance with the settled principles of the law of agency. If the supposed corporate contract be not authorized by the corporation, the only parties entitled to object are the corporation and the shareholders. That is no concern of the public. It is a mere question of agency and should be settled accordingly. The remedy for really illegal contracts should be the same as in the case of illegal contracts between natural persons, with perhaps the additional remedy of a fine to be recovered to the state or an ouster of franchises in flagrant cases. On the other hand, the doctrine that all unauthorized contracts made by a corporation are void for want of contracting power has the merit of being logical if the premises are granted. But to prevent injustice resulting from the application of this doctrine, the right of the parties to such a contract to recover on the ground of *quasi-contract* for all benefits really enjoyed by the opposing party in pursuance of such void contract, unless it be illegal on other grounds, should be affirmed. This whole subject is a problem most emphatically calling for legislative solution. The adoption of either doctrine by the legislature and a consistent application by the courts of the one adopted would confer incalculable benefit by substituting certainty for uncertainty.