twenty-five thousand dollars to be expended within one year from the first day of May next, provided the foundation shall be completed within the present year, and the further sum of twenty-five thousand dollars within two years from first day of May next, and the further sum of fifty thousand dollars within or prior to the year one thousand eight hundred and sixty." Dr. Burroughs complied with these conditions, so far as regards the organization of the board and assignment of his contract to it, but the said board did not in time comply with the other conditions. Therefore on the tenth day of November, A.D. 1856, Judge Douglas granted an extension of the time and added the following limitation and condition. 

"This extension is granted upon the condition and with the understanding that the title of said land shall forever remain in said university for the purposes expressed in said agreement and that no part of the same shall ever be sold or alienated, or used for any other purpose whatever."

The university raised in subscriptions about $250,000, but the financial storm of 1857 swept them nearly all away, and after using what was indispensable for the running of the university, only $7,000 remained with which in April, 1857, the board dug and laid the foundations of the building, and the building remained in that condition for fifteen months or until about September, A.D. 1858.

At this last named time all right to the land was forfeited, and Douglas might have recovered possession and appropriated it to his own purposes, because in point of time the board had forfeited both the original contract and the extension. By the original contract and the extension they were by this time to have expended $50,000 on the building. Instead of this they had expended only $7,000 in a foundation, and the building had then stood still for fifteen months, and at the time last referred to nothing was being done and nothing could be done, because the board had no funds.

Instead, however, of reclaiming the property, Judge Douglas made further concessions. On the thirty-first day of August, A.D. 1858, he gave an out-and-out unconditional deed of the ten acres of land to the board of trustees of the university, thereby waiving the condition in reference to the time of the completion of the building and the limitation in reference to alienation, because neither of these instruments was recorded and both were ignored and neither was brought forward and incorporated into the deed. The very object as well as the effect of the making of this unconditional deed was to release the board of trustees from these conditions and limitations, as conditions precedent, and to give them the land and to enable them to mortgage it to raise money with which to build the building which they had agreed to build without such aid.

This conclusion is deductible from the following facts: The unconditional deed of Judge Douglas was made as stated, August 31, 1858. Judge Douglas was then the president of the board of trustees of the University of Chicago, and the following appears among the records of the board of trustees of the university, of a meeting held September 7th, 1858:

"Resolved by this board, that the university grounds and the building to be located thereon, be mortgaged or conveyed by trust deed as herein provided, as security for a loan or loans not exceeding the sum of $25,000, and for a term not exceeding five years, to secure the erection of the university buildings; and that the presi-
"And vice president or secretary of the board be and they are hereby authorized and directed to execute such trust deed or mortgage as they may think proper on the said grounds and buildings, to secure such loan or loans of money, and to execute bonds therefor, bearing interest at a rate not exceeding ten per cent. per annum, payable semi-annually."

Pursuant to this resolution Judge Douglas, as president of the board, executed the notes and mortgage of the university to secure the sum named in the resolution, and at the same time the following resolution was passed: "Resolved, that the thanks of this board be presented to the Honorable S. A. Douglas for his liberality in waiving the terms of the original contract for the conveyance of the university grounds, and giving us a deed to the land donated by him for the university."

The following resolution was also passed at the same time:

"Resolved, that the executive committee of the board be authorized to execute such bond to Judge Douglas as shall be satisfactory to him, and approved by such executive committee, for the faithful carrying out of the university enterprise, according to the spirit of the original contract."

It requires no one to come from the "dead past" of those times, to tell us what was the intention of the parties to this contract. The extension, the unconditional deed, the resolution of the board within nine days thereafter to borrow money by mortgaging this very land to erect the building they obligated themselves to erect before they got the deed, the execution of the mortgage by Douglas himself, the thanks of the board to Judge Doug-
who made the limitation, and who made the deed without condition, was for the erection of the side walls of the building above the foundation, on which $7,000 had been expended. The money lasted until they got the side walls up, but did not hold out to roof the building, and therefore, in 1864, the following resolution was passed by the trustees of the university, to obtain this roof:

"Whereas, the university building is now in progress of construction, and it is highly important to have the same put under roof before the approaching winter; and

"Whereas, the subscriptions made to pay for said work cannot be collected in time to secure the putting of said building under roof by the time aforesaid, and there is no way in which the same can be done but by borrowing money upon a mortgage of the university property; therefore,

"Resolved, That consent and authority be, and the same are hereby unanimously given to the execution of a mortgage upon the ten-acre tract of land situated in Chicago, Illinois, upon which the buildings of the University of Chicago are situated, with all the improvements thereon, to the Union Mutual Life Insurance Company of Maine, to secure the payment of the sum of $15,000 to be loaned by said company to said University for one year from the first day of October * and that the vice-president and secretary of the board be and they are hereby authorized and directed to execute a note to the said company for the said sum; also, a mortgage in the name of the university upon the said tract of land to secure the same, and to affix the corporate seal of the university to said mortgage."

This was a second mortgage upon the property in question, and it ran along in this manner until 1866, when other sums to the amount of about $20,000 being advanced, the whole amount due to the complainant was $75,000. The notes for $25,000 and $15,000 were thereupon taken up and surrendered to the university, and a new loan for $75,000 was made which was based upon the authority of a resolution found on page 90 of the brief, and accompanied with the assent of a majority of the trustees of the institution. The $20,000 advanced in money was used to pay back bills upon the university building. In 1869, as a resolution of the board of trustees of the university recites, in consequence of the death of the late treasurer of the board of trustees, and the consequent unsettled condition of the finances of the university, a new loan of $25,000 was made of the Union Mutual Life Insurance Company, and by resolution of the board, a mortgage, second to the $75,000 mortgage of 1866, was taken upon the property in question.

Matters ran on in this way until the 8th of February, 1876, when by the concurrence of the executive committee to whom all the powers of the institution had been delegated, and by virtue of the assent of a majority of the trustees of the university, in writing, $14,000 more was borrowed, making the loan interest and principal, $150,000, for which a new note and mortgage were given, and the old papers, to wit, the mortgage of 1866, for $75,000, and the mortgage of 1869 for $25,000, were held as collateral to this new loan.
I. NECESSITIES OF THE UNIVERSITY.

By a review of these facts it will be seen that the university put into the construction of this building $7,000, and no more. The finding of the master is to the effect, that the making of these loans was necessary to the erection of the university buildings, and the maintenance of the institution. The evidence shows conclusively, that the first loan of $25,000 in 1858, executed by Douglas, erected the side walls of the university. The first mortgage of the complainants was to take up or to pay off that loan. The second loan of 1864 was for $15,000, to cover the building with a roof, and protect it from the storms of the coming winter. The $20,000 of 1856 was for the payment of back bills upon the construction of the university long past due. The holders of these bills had become very impatient, so much so that when it was known that Woodworth, then a banker in the city, had money and was paying university bills, such a crowd assembled before his bank as caused it to be thought that a run was instituted upon the bank. The $25,000 of 1869 also went into the university, and to pay back bills which had accumulated, and the $14,000 advanced when there was a settlement, and new paper given for $150,000, was used to pay the professors who were on a strike because they had not been paid salaries which had long been due.

Thus it appears the trustees of the university were, from April, 1857, until 1869, or a period of twelve years, in building the university building, which is simply an ordinary building, and could be constructed in three months. It also appears that the trustees were unable to raise from the public, money enough to defray the running expenses, and that in 1876, $14,000 was required to pay the arrearages of salaries to the professors, and to keep the institution going.

It is also in evidence in this case that the complainants have been compelled to advance $2,000 for special assessments in erecting lamp-posts and constructing sidewalks upon the property. It has also paid the insurance upon the university building since 1878. The reason of this impoverished condition is that the university consisted originally and has always consisted of ten acres of land. Douglas made a gift of this. The university had this, but it was all it had, except yearly subscriptions used to run the university, and ground is a very poor thing with which to run a literary institution, especially if the trustees keep all the ground. They had, therefore, of sheer necessity, been compelled to mortgage the land, and with the money thus acquired have built the building and largely paid the running expenses of the institution. We would not be understood as reflecting upon the university or its management because of this impoverished condition. Education is not an enterprise that pays in money, and there is not another institution in the world that has run as long as this has simply by subscription.

The master in his report, having found the amount due as herein stated upon the subject of the necessities of the institution, finds as follows:

"I further find and report that it is shown by the testimony that the interests of the university required the loans of money made by the complainant from time to
time, as shown for the purpose of paying the salaries of the professors, defraying the current expenses of the university, and in the erection of the buildings, and the proceeds of said loans were actually applied in this way, the university having no other resources to which to resort for these purposes."

II.

HAD THE BOARD OF TRUSTEES OF THE UNIVERSITY OF CHICAGO POWER UNDER ITS CHARTER TO MAKE A CONTRACT FOR THE CONSTRUCTION OF A UNIVERSITY BUILDING, AND FOR THE PAYMENT OF ITS PROFESSORS?

The charter of the university, passed by the legislature in the year 1857, provides:

"The object of this incorporation being the promotion of general and professional education, the application of science to agriculture and manufactures, and the cultivation of the fine arts; the said corporation shall have perpetual succession, with power to sue and be sued, contract and be contracted with; to make and use a common seal, and to alter the same at pleasure; to buy and sell, and to take and hold real and personal property."

"Sec. 3. The board shall have power to choose its own officers, and prescribe their duties; to establish such ordinances and by-laws for the government of its own proceedings as it may deem necessary."

"The board is charged with the superintendence and government of the university, with power to create different departments in addition to the usual collegiate department, as a department of law, of medicine, of agriculture, and such others as it may deem necessary; and to prescribe courses of study, and maintain discipline and government in each; to elect a president, and, at its discretion, a vice-president of the university, and all necessary professors, tutors and instructors, and to prescribe the duties and fix the salaries of each; to fix the rate of tuition, and the terms of admission to the university.

"The board may acquire—by gift, grant or devise or purchase—any real or personal property; and may use, sell, lease, or otherwise dispose of, any and all property belonging to the university, in such manner as they may deem most conducive to its interests; provided, that real estate shall not be sold without the consent of a majority of all the trustees."

A perusal of these provisions, and the charter generally, will show that the board possessed all the powers which characterize any corporation. Certain trustees constituted a corporation with a name. It had power of succession, to sue and be sued, to contract and be contracted with, to make and use a seal, and to buy and sell real estate and personal property. This board is charged with the superintendence and government of the university, and the objects are defined as "the promotion of general and professional education, the application of science to agriculture and manufactures, and the cultivation of the fine arts." The board may also acquire, by gift, grant or devise or purchase, any real or personal property; and may use, sell, lease or otherwise dispose of any and all property belonging to the university in such manner as they may deem most conducive to its interests; provided that real estate shall not be sold without the consent of a majority of all the trustees."
Whenever a corporation is created and power to make contracts conferred, such powers must be exercised in furtherance of the objects of the corporation. For instance, a religious corporation being organized with power to make contracts and buy and sell real or personal estate, it does not mean it may contract to buy wheat on the board of trade or speculate in real estate generally. Neither can the powers in this instance be similarly enlarged. The religious corporation can contract for a church, chapel or Sunday-school building, or to settle a minister and fix his salary; will become liable to be sued on such contracts; may borrow money to build such church, and mortgage the property for its payment, if the burden be too great to be immediately borne, even though no express powers to make such contracts be given. The scope of all corporations without special authority is limited to the purposes of such corporations and the furtherance of the objects sought to be accomplished. But in this instance the contract was especially authorized by the charter, and, besides, is within the limits of the objects of the corporation.

The scope of this institution was education. Who does not know that the school-house precedes the school. Therefore, the question is, were these trustees within the scope of their powers when they built the school-house? That they were, can not be questioned. If they were within the scope of their powers in building the school-house, were they not also in contracting for it? Certainly they were, because they were acting in furtherance of the objects of the corporation, and had especial powers granted by the charter for this purpose. And yet we are told the true way is to contract for a house, have it built, and cheat the fellow that lent them the money out of it.

On the contrary the truth of this situation is that when it was found they could not build the building, Douglas waived his condition in order that they might use the land and comply with their obligation to him relative to the construction of it, and then the university would have the land and the building costing $100,000 on it, and might proceed within the scope of its duties in promoting education, using the land under the terms of the charter and disposing of it in such manner as they deemed most conducive to the interests of the university. And yet shall it be said, while Douglas waived his condition requiring a building costing $100,000 before giving the land, and gave it without such compliance, there remained in force another part of the same condition, to wit, that of non-alienation, when the purpose and effect of such condition is to cheat the party who loaned money on this mortgage wholly out of it? Both Mr. Douglas and the trustees are clearly estopped from such proceedings.

The power to sell, which is given in this charter, has always been construed to embrace the power to mortgage, except where from the phraseology or circumstances it can be gathered that the intention of the grantor or testator was to have a sale out and out, and the whole business closed. Here the contrary is deducible, because, while almost every use to which land can be put is named, it is provided that the trustees may otherwise "dispose of" the land in any way the best interests of the institution may require.

The power of a corporation to mortgage its lands is conclusively established in Illinois as a necessary incident to the power to purchase and hold real estate and to make contracts, even in the absence of any express power of
alienation. *Aurora Agricultural Society v. Paddock*, 80 Ill., 263, was a bill to foreclose a trust deed executed by an agricultural society to secure payment of a loan. It was objected that the society had no power to mortgage its property. The court say, page 264:

"The appellant was organized on the 6th day of March, 1859, under an act approved February 15, 1855, which authorized the incorporation of agricultural societies. (Gross' Statutes, 1869, page 119.) By the third section of the act, the society was made a body corporate, with power to sue and be sued, to acquire and hold real estate not exceeding five hundred acres, to construct the necessary improvements and buildings for its purpose, to have and employ capital, machinery, live stock, etc., not exceeding in value $10,000.

"While it is true, no section of the act confers direct authority upon the society to sell or mortgage its property, except upon a dissolution of the corporation, yet the act does not prohibit or restrict the society from selling or giving a mortgage upon its real estate. The power to mortgage, when not expressly given or denied, must be regarded as an incidental to the power to acquire and hold real estate and make contracts.

"We understand it to be the common law rule, that corporations have an incidental right to alien or dispose of their lands and personal property, unless specially restrained by the act under which they are organized or by statute.

"It is said in Angell & Ames on Corporations, p. 153: 'Independent of positive law, all corporations have the absolute *jus disponendi*, neither limited as to objects nor circumscribed as to quantity.' The same doctrine is clearly laid down by Kent, vol. 2, p. 280.

"We are therefore, of opinion, as the society was not prohibited from mortgaging its lands, it possessed the power to do so as an incident to the power to purchase and hold real estate and make contracts."

*West v. Madison County Agricultural Board*, 82 Ill., 205, was also a bill to foreclose a trust deed executed by an agricultural society upon its lands, to secure a loan of money for the erection of its buildings. It was objected that the society had no power to mortgage its lands. But the court say, page 266:

"Whether the law under which the agricultural board was incorporated expressly confers authority upon it to execute a deed of trust upon its real estate to secure borrowed money, or not, we think that power is incidental to the corporation, and one it may rightfully exercise in furtherance of the objects for which the corporation was created. Authority is given in the general law, under which these agricultural boards are organized in the several counties, by which they may contract and be contracted with, may purchase, hold or sell property, and may sue and be sued. Accordingly, it would seem the power of a corporation to mortgage its real estate might be regarded as a necessary incident to the power to acquire and hold real property. *Aurora Agricultural and Horticultural Society v. Paddock*, 80 Ill., 263.

"Corporations will not be permitted to exercise powers that might be hurtful to the public interests beyond those expressly conferred by their charters; but where a corporation has exercised powers germane and incidental to those conferred, and in furtherance of the general objects of the corporation although the subject of the contract may not be within
any definite power given, it will be estopped from
denying it had authority to make such contract.
Good faith to third parties who deal with such cor-
porations, and who may have no accurate knowledge
of the extent of their powers under their charters,
demands the adoption of this salutary rule. *Chicago
Building Society v. Crowell*, 65 Ill., 453.

The principle declared is conclusive of the case at
bar. The money was borrowed to facilitate the ob-
jects of the corporation as declared in the general
law, was used for the benefit of its property, and, no
doubt, greatly enhanced its value and utility. It was
for the promotion of the objects for which the cor-
noration was created, and was therefore within its
implied or incidental powers."

On this point also we cite *Mills v. Banks*, 3d Pere
Williams, 8; *Bell v. Harris*, 4 Myln & Craig, 264;
*Woods v. Woods*, 1st Myln & Craig; *Haldenby v.
Spoford*, 1st Beav.; *Holmes v. Williams*, 8 Simons Chy.,
§§6; *Earl of Oxford v. Earl of Albermarle*, 12 Jurist,
Part I, 811; Sugden on Powers, §§2; *Lancaster v. Dorn*,
1st Rawle, 231; *Zane v. Kennedy*, 73 Penn. St., 182;
Angell & Ames on Corporations, §§192 and cases cited.

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**AMOUNT FOUND DUE.**

The master's report in this case finds, as matters of
fact, the making of the loan of $25,000 in 1858, the
making of the loan of $25,000 in 1861, the making of
the loan of $15,000 in 1864, the making of the loan
of $20,000 in 1866, and the issue of a new mortgage for
$75,000 to cover that, and interest upon previous loans,
the making of the loan of 1869 of $25,000, the advance
of $14,000 in 1876, an accounting between the university
and the complainant, the finding that the $150,000 was
then due, and the execution of the present deed of trust
to secure this amount. The master also finds that said
last mentioned note was based upon the consent in writ-
ing of a majority of the trustees, and the action of the
executive committee, to which body the trustees had
before that time delegated all the powers of the board.

The master also finds that the principal note of $150,-
000 bore interest at the rate of eight per cent. for the five
years it was to run, but after it became due, it was not
paid at maturity, bore interest at the rate of ten per cent. The
interest was represented by coupon notes which also bore interest at the rate of ten per cent. after they became due, if not paid at maturity.

The master, therefore, finds due the following sums:

On the principal note $199,133 00
On the coupon notes 95,454 40
Total on the principal notes and the coupon notes $294,587 40
Amount due on the special assessments 2,422 98
Amount due for insurance 4,240 56
Total amount $301,250 94

IV.

RECITALS OF THE DEED OF TRUST.

The following is the recital incorporated in the deed of trust in this case: “The above indebtedness is for a loan of money authorized by a resolution of the executive committee of the board of trustees of the University of Chicago, adopted January 25, 1876, and the consent in writing thereto of a majority of said board of trustees, and the conveyance is executed and delivered in pursuance of such resolution and consent.”

Such a recital, being incorporated into a deed of trust like the present, is evidence of the facts set forth, and the university is estopped from denying its recitals, even though they were untrue. This doctrine originated in the case of the Royal British Bank v. Tarquand, 6 Ellis & Blackburn, 88 English Common Law, 327, in which it is held that where a corporation is authorized to borrow money upon its bonds, provided a resolution to that effect is first passed, the fact of borrowing money raises conclusively the presumption that such resolution was passed as required. In this case the facts alleged in this recital are essential preliminaries to the validity of the mortgage. The charter provides that the board may delegate to the executive committee all its powers, and that real estate may be alienated by the consent of a majority of its trustees. The university was the best judge of whether these things preliminary to the power to make the deed of trust, were complied with, and if they even exercised the power without a recital, they are held to be estopped from denying that these preliminaries were complied with.

The court says, in Royal British Bank v. Tarquand: “And the party here on reading the deed of settlement, would find not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done.”

This question arose in the Supreme court of the United States in the case of Knox County Commissioners v. Aspinwall, 21 How., 539, and decided in 1858. A line of cases since that period has established a uniform rule in the courts of the United States. This case adopts in its reasoning the rule laid down in Royal British Bank v. Tarquand, and in reference to the recital which in that case was similar to the present, says: “The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of power. This
"principle was recently applied in the case of the Court of Exchequer in England."

Since then the doctrine there laid down has been followed in the United States Supreme Court in *Bissell v. The City of Jeffersonville*, decided in 1860; *Moran v. Commissioners of Miami County*, in 1862; in *VanHoosier v. Madison City*, in 1863; *Mercer County v. Hackett*, in 1863; *Lind v. The County*, in 1852; *St. Joseph Township v. Rogers*, in 1872; *Marcey v. Town of Oswego*, in 1875; *Humboldt Township v. Long*, in 2d Otto; *Town of Venice v. Murdock*, in 2d Otto; *Commissioners v. Bowles*, 4 Otto, 1876; *Commissioners of Johnson County v. January*, 4 Otto; *County of Warren v. Marcey*, 7 Otto, 1869; *Pana v. Barber*, 7 Otto; and as recently as *Sherman County v. Simons*, 109 U. S., 735, and decided in 1884.

These cases constitute and establish a regular, definite and well considered rule, applicable in the United States court in which this case is now pending, and it is to the effect that wherever a corporation is authorized to issue its bonds or obligations upon compliance with certain conditions precedent, and in its bonds makes recitals that such conditions precedent have been complied with, it is bound by such recitals whether they are true or false.

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V.

EVERY STEP WHICH IS ESSENTIAL TO THE VALIDITY OF THE DEED OF TRUST AND NOTES IN QUESTION, HAS BEEN COMPLIED WITH.

The facts and argument upon this subject, are found in the brief between pages 24 and 35. The following is a summary of such facts:

The board of trustees of the University of Chicago had the authority, in its charter, to delegate all its powers to an executive committee. The following is the provision:

"The board may appoint, of its own members, an executive committee of not less than five members, to be charged with the interests of the university in the intervals of the sessions of the board, and may prescribe the duties of such executive committee and delegate to it all or any portion of the powers of the board."

The rule of the board defining the powers of the executive committee, is found on page 26 of the brief.

"The executive committee, in the absence of the board, shall have all the powers of the board, and its acts shall have lawful effect, and be binding upon the university, until disapproved by the board of trustees."

The executive committee at that time, consisted of seven persons, and the following resolution is in reference to a quorum: "Any three of the executive committee of the board, with the chairman thereof, or vice or temporary chairman in addition thereto, shall form a quorum for business." With the necessary quorum being present,
the executive committee authorized the loan in question, and the assent of a majority of the board is set forth on page 29. We have proved by two witnesses, the signatures of all of this board to this writing; therefore, not only are the trustees bound by their recital in the deed of trust, but the facts proved in this case show a compliance by the board with all the conditions precedent to the lawful making of the loan in question. The consent of the trustees need not be obtained at a formal meeting. It was anticipated the point would be made, from the fact that the consent signed by the trustees was signed at their places of business, and not when they were assembled at a meeting, for any purpose; but the authorities are overwhelming to the effect that no such meeting is necessary. Besides, the language of the charter in this case provides that real estate may be alienated upon "the consent of a majority of all the trustees," and does not require that there shall be a formal meeting at which such consent shall be expressed.


VI.

IT IS INEQUITABLE AND TOO LATE FOR THE UNIVERSITY TO PLEAD THAT THIS MORTGAGE WAS ULTRA VIRESTHE CORPORATION.

The cases on this question are found in the brief between pages 40 and 63, and with the other cases that might have been placed there, the whole amount of them may be measured by the cartload. The law is, in substance, that corporations like individuals must be honest; that they cannot borrow money and use it without paying it back. And even if the act is ultra vires, the objection must be made at the earliest possible moment, for the law will not allow a party to borrow money and ratify that act repeatedly, and after a long lapse of time plead that the act was ultra vires.

The court say in Bradley v. Ballard, 55 Ills., 414:

"It is said by counsel for the complainant that a corporation is not estopped to say, in its defense, that it had not the power to make a contract sought to be enforced against it, for the reason that if thus estopped, its power might be indefinitely enlarged. While the contract remains unexecuted on both sides, that is undoubtedly true, but when, under cover of this principle a corporation seeks to evade the payment of borrowed money, on the ground that although it had power to borrow money, it expended the borrowed money in prosecuting a business which it was not authorized to prosecute, "it is pressing the doctrine of ultra vires to an extent that can never be tolerated, even though the lender of the money knew that the corporation was transacting a
"business beyond its chartered powers, and that his
money would be used in such business, provided the
business itself was free from any intrinsic immorality or
illegality. Neither is it correct to say that the applica-
tion to corporations of the doctrine of equitable estoppel
where justice requires it to be applied, as when under a
claim of corporate power they have received benefits
for which they refuse to pay, from a sudden discovery
that they had not the powers they had claimed, can be
made the means of enabling them indefinitely to extend
their powers. If that were true, it would be an insup-
erable objection to the application of the doctrine, even
for the purpose of preventing injustice in individual
cases. But it is not true. This doctrine is applied only
for the purpose of compelling corporations to be honest,
in the simplest and commonest sense of honesty, and
after whatever mischief may belong to the perform-
ance of an act ultra vires, has been accomplished."

In Zubriskie v. Railroad Company, 23 Howard, 381,
the court say:

"A corporation, quite as much as an individual, is held
to a careful adherence to truth in their dealings with
mankind, and cannot, by their representations or silence,
involve others in onerous engagements, and then defeat
the calculations and claims their own conduct had super-
induced."

Jones on Mortgages, 3d Ed., page 127, says:

"The directors of a corporation, without authority,
either expressly or impliedly, derived from the stock-
holders, have no right to execute a mortgage or to
authorize any one to do so; but even if the directors ex-
ceed their authority in borrowing for the corporation
and executing a mortgage to secure the repayment of
it, the corporation cannot, after enjoying the benefit of
the loan and acquiescing in the transaction, question
their authority.

"The stockholders may restrain the directors or other
officers in any attempt to transcend their powers, but if
they remain silent, permitting them to execute mort-
gages upon their property and receiving the benefits of
the loan, they are estopped to say that the officers were
not authorized to do these acts."

From these decisions it appears that the only time
when the power of a corporation to do an act can be
tested, giving to it the full measure of its rights, is before
others became involved by that act. In the case at bar,
if the loan and deed of trust had been ultra vires, every act
done by the corporation since, in acknowledgment of these
loans, is dropped into the scale of binding the corpora-
tion.

The negotiation of the first mortgage made in 1858
was the exercise of the same power which has since been
exercised by the university in its contract with complain-
ant. The honorable recognition of its duty to pay that
mortgage and payment of it by the loan of 1861 was a
ratification and recognition of that mortgage of the
highest character. The making of the first mortgage of
the complainant for $25,000 in 1861; the recital in the
resolution that the object of that loan was to pay off the
first mortgage; the making of the second mortgage in
1866 of $15,000; the making of the third mortgage in
1865 of $75,000, involving a new loan from the complain-
ant of $20,000; twenty-four payments of interest made
on these various obligations; the making of the loan of
$25,000 in 1869; the making of the trust deed in question in 1876, in which the old papers were held as collateral, and the waiting for more than twenty years before repudiating or attempting repudiation in reference to any of these obligations, are all held in the authorities cited, to be acts of confirmation of this mortgage, and all tend to bind the corporation, even though in the first instance and before the rights of third parties had attached, the exercise of such powers might be conceded for the sake of the argument to be ultra vires.

The payments of interest are scattered all along through these mortgages. The notes of 1861 for $25,000, and 1864 for $15,000 have been given up to the university, and consequently we do not know the payments of interest. The effect of the payments made upon them is therefore lost, but since the execution of the mortgage of 1866 the following payments, in detail, have been made by the university.

- March 1, 1867, $3,000; September 1, 1867, $3,000;
- April, 1868, $60; April, 1869, $2,120; interest paid to
- March 1, 1869; interest to September 1, 1869; to
- March 1, 1870; $1,600 on account of interest March,
- 1872; in April, 1872, on account, $1,400; September,
- 1872, $275.27; in March, 1873, on account, $1,000; in
- July, 1873, on account, $2,000; twelfth month, 1874,
- received on account of interest, $8,300; tenth month,
- 1875, on account of interest, $290; twelfth month,
- 1875, interest $50. On the note of 1869 are the fol-
- lowing: Payment of interest to July 6th, 1870,
- $489.65; January 6th, 1865, $102.86; August, 1875,
- $348.51. On the note of $15,000 are the following
- credits: Seventh month, 1876, interest, $100; tenth
- month, 1876, $100; tenth month, twenty-sixth day,

"1876, $1380; no date, $30; paid on account of prin-
cipal, March 28, 1878, $5,000."

The period covered by these payments is eleven years, and they amount to $34,333. Besides this, it was in evidence in this case, that the defendants upon one occasion, about 1873, paid to the complainant, in notes, the proceeds of which were to apply in the liquidation of this debt, something more than $51,000. Some of the payments credited are the proceeds of these notes. But the evidence shows that after holding such notes for a series of years their value was about to be swept out of them by the foreclosure of a first mortgage, these notes being secured by a second mortgage, and the university requested the complainant to return said notes to B. F. Jacobs, the trustee, and these were returned pursuant to said request, amounting to about $40,000.

From 1858, when the power to mortgage was for the first time exercised by this company, until recently, repudiation was never thought of. The university received money, and borrowed more for its direst necessities, and if ever the authority of a corporation could ripen into com-
plete power by time, by acquiescence, by repeated bor-
rowings, by repeated payments and by recognition every-
where and on all occasions, this mortgage has ripened and become lawful and of full effect, even though for the sake of the argument, we concede, which we do not, that it was originally ultra vires.
VII.

THE BOARD OF REGENTS.

A perusal of the whole charter will show that all powers of controlling the property and for the management of the university were lodged in a board of trustees, and all the powers of visitation were lodged in a board of regents. At common law, the powers of management would be in some donee or trustee or board, and the powers of visitation would be in a court of chancery. In the case at bar, while the board of regents probably did not oust the court of chancery of its jurisdiction, so far as the university was concerned, the supervision of this board of regents as to acts ultra vires or in violation of the charter, was binding upon the corporation. The board of regents alone, within the corporation, had power to review the action of the board of trustees. They were made by the charter the judges of whether the board of trustees did acts ultra vires. They had access to books and papers, and were to report any violation of the charter to the legislature. This board was a tribunal created by law within the corporation to decide this question; and we therefore submit, that the acquiescence of the board of regents in the exercise of these powers by the board of trustees for twenty-six years, and in the number of loans and the number of payments, concludes the university, and renders the trust deed in question binding upon the corporation.

VIII.

IS THE CONDITION AGAINST ALIENATION, INSERTED BY DOUGLAS IN THE AGREEMENT OF EXTENSION OF NOVEMBER 10, 1856, CARRIED FORWARD INTO THE ABSOLUTE AND UNCONDITIONAL CONVEYANCE WHICH HE AFTERWARDS MADE, AND ARE THE TWO INSTRUMENTS TO BE CONSTRUED TOGETHER IN DETERMINING THE POWER OF THE UNIVERSITY TO EXECUTE THE MORTGAGE?

The title to the property in question passed to the university by the conveyance of August 31, 1858, and by nothing else. The original agreement of April 2, 1856, between Douglas and Burroughs, it is true, placed Douglas in the position of a trustee of the legal title, for the benefit of the university, when it should have organized under statutes then in force, a board of trustees, and when certain other conditions should be complied with. Had these conditions been duly performed within the time fixed by that agreement, the extension need not, and probably would not, have been executed. In that event the university could have enforced conveyance of the legal title, unfettered by the conditions which were inserted in the agreement of extension of November 10, 1856. All rights under the contract as against Douglas, however, having been lost by the failure to comply with the conditions of the original agreement within the time specified, Douglas might, as he did, properly impose such conditions as he deemed reasonable, as a consideration for an extension of the agreement. These conditions he saw fit to recite in the shape of a declaration of the trust upon which the property should be forever held, coupled with a restriction against its alienation.
A vital point to be constantly borne in mind in determining the construction of these conditions, as well as whether they are annexed to the subsequent grant, is that they are conditions restricting and not enlarging the estate which it was proposed by the original agreement to create. If by the agreement of November 10, Douglas had bound himself to convey a larger estate than that which he subsequently conveyed, or than that which he originally agreed to convey, there can be no doubt that he himself could not have escaped that obligation without the consent of the university, and that a subsequent conveyance granting a less estate would have been an insufficient compliance with the agreement of extension. The university in that event could have insisted upon and enforced the execution of a grant as broad in its effects and terms as Douglas had agreed to execute. But since the restrictions concerning the use and alienation of the property contained in the agreement of November 10, limit the estate which is to be conveyed, as compared with the estate which Douglas had agreed to convey by the former agreement, it is plain that he had the unquestioned right to waive those conditions and to convey a larger and more beneficial estate. In other words having covenanted by the agreement of November 10th to convey to the university upon the performance of certain acts an estate which should be limited both as to its use and as to the right of alienation, he himself, having created these limitations, might lawfully waive them, and the highest and best evidence of such waiver is found in the absolute and unconditioned grant which he afterwards made. The restrictions contained in the agreement of November 10th, both as to the use of the estate and against alienation, fettered, limited and diminished the estate granted as well as the power of the grantee to control that estate. These were important limitations which the grantee itself could not waive or dispense with without the consent of the grantor. The contract was, then, a contract to convey a limited fee, fettered with certain restrictions as to the use and control of the estate. The grantee, upon full compliance with the terms of the contract, could compel a conveyance fettered with these restrictions, and could compel nothing more. In other words, had there been a full, complete and literal compliance on the part of Burroughs and the university with all the requirements which had been exacted of them, and a refusal on the part of Douglas to execute his agreement, the university could have enforced a decree for a specific performance of the contract, by requiring of Douglas not an absolute conveyance, such as he did give, but only a conveyance with such limitations as he had covenanted to give. In one way, and in one way only, could the estate ultimately granted be enlarged from that which Douglas had undertaken to grant, and that was by his own voluntary action. That the estate was thus enlarged, and that it was so intended to be enlarged, is evidenced by the terms of the absolute grant, which is the highest and best evidence of which the case admits.

The truth of this position is that Douglas concluded to waive his condition in reference to alienation, and requiring a university building costing $100,000, and concluded to give the university an unconditional deed, in order that it might make the mortgage in question. The university building had been fourteen months simply with a hole in the ground and the foundation. It had nothing except this ten acres of ground. Consequently, he made the un-
conditional deed waiving all previous conditions, and received the thanks of the board of trustees “for his liberality in waiving the terms of the original contract for the conveyance of the university ground, and giving us a deed of the land donated by him for the university.”

About the same time that this resolution was passed by authority of the board, Douglas himself signed the first mortgage. He therefore made the limitation, he gave the unconditional deed, and acted under that deed as president of the board of trustees in making the first mortgage of the land. Suppose on August 31, 1858, Judge Douglas had granted license to the university to occupy the land, which license should be revocable at will, by himself or heirs. Suppose on the 31st of August, 1859, he had leased it to the university for five years, they agreeing to restore the property at the termination of the lease. Suppose he had deeded all his rights to the land in 1860, to the university, an artificial person, authorized by the laws of the state to alienate land upon the consent of a majority of the trustees, and after this these trustees made the complainant the deed in question. Could Douglas or his heirs revoke the license and take the property under the lease, or the deed, or the trust deed? Would that license enter into the construction of the deed and destroy that deed, or after the expiration of the lease would the covenant to restore possession be in force to negative the deed? Each of these instruments is of a higher nature than its predecessor, and each destroys its predecessor when made. Upon the making of the license it is revocable at will; but when the lease, an instrument of higher nature attaches, the rights of the university are complete for the five years. Upon making the deed absolute and without condition all the rights of the grantor pass to the grantee, and from that moment it can exercise upon the property all the rights it possesses. In this case such rights extend to any and all manner of disposition which in its discretion it may think best.

Again, suppose two men, one in New York and the other in Chicago, agree by correspondence to form a partnership with the time limited to five years. They come together and enter into articles providing for the partnership which may be terminated at will. Can the letters be invoked to show the original intention and to contradict the articles of partnership and extend it to a term of years? Or if a party agrees by contract to warrant only against himself and his heirs, and afterwards gives a deed of general warranty, can his contract for a limited warranty be introduced to contradict or construe his deed of general warranty?

In this case Judge Douglas contracted to give the land to a board of trustees, except as to the power of alienation. He afterwards made an absolute deed to a board possessing the powers of alienation, and therefore gave the right of alienation. Immediately afterwards he exercised the powers which that board possessed by himself making the first mortgage. If a party contracts with a natural person to give a deed, reserving the power of alienation, and thereafter gives an unconditional deed, the grantee by virtue of his rights under the law possesses the power of alienation. If Judge Douglas contracted with an artificial person to make a conveyance, reserving the right of alienation, and then gave an unconditional deed, such artificial person possessing under the law powers of alienation, then the right of alienation attaches.
Happily we are not without adjudicated cases. In *Steiger v. Earhart*, 83 Ind. (Dice), 174, the defendant subscribed to stock of the Lafayette, Muncie and Bloomington railroad, payable one-third when the road was located on a particular described route, one-third when the bridging and ties were done to Frankfort, one-third when the cars were running to Frankfort, and concluded with the following clause: "If the road is not "built upon the above described route prior to January "first, this contract is to be void." The answer averred "that the railroad was not finished as required by the first "day of January, 1873. It was insisted by the appellant "that the notes subsequently given for the stock, and on "which suit was brought, were based upon this contract, "and if the road was not built by the time named they "should become void.

The court say:

"This might be true if the notes had made the con "tract a part of them, or required the road to be finished "within that time, but the notes did neither of these "things; they, in express terms, cut off all limit to time "when the bridges and ties should be down to Frankfort, "and when the cars should run to Frankfort, and conse "quently, when the road should be built, and directly "promised to pay when these things should be done, re "gardless of any definite time for their completion. We "think the notes change the contract in this particular, "and waive any definite time for the performance of the "conditions precedent."

So, in this case, if Douglas intended the limitation in reference to alienation to apply, he should have brought it forward and incorporated it in his deed. Not having

brought it forward and incorporated it in the deed, having made the deed abandoning the limitation, and especially having made the first mortgage for $25,000 himself, and received the thanks of the board for the change in the gift, the presumption is conclusive, that he intended to abandon it, and intended to make the gift absolute.

So, in the *St. Louis, Jacksonville & Chicago Railway v. Mathers*, 71 Ill., 592, the court say, in reference to a certain provision which was left out in a deed of conveyance:

"It will be observed that there is nothing in the lan "guage of the deed, nor in anywise connected with the title "of record, whereby a *bona fide* purchaser from the trust "ees would have been charged with constructive notice "of the condition subsequent upon which it is now claimed "the deed was executed, and that the relief sought is "based upon evidences of fact entirely independent of "the deed."

To the same effect is *Adams v. The County of Logan*, 11 Ill., 336, in which the court say: "When the money "was paid and the land conveyed the donee knew that "the county seat might, when the good of the commu "nity required it, be changed; and it must be presumed "that they acted in view of such a contingency. Had "they intended to guard against the consequences of such "a removal, they should have made an express agree "ment or reservation to that effect, in the deed. So far "from that they made an absolute conveyance without "any reservation whatever."

In *Dunbar v. Stickler*, 45 Ia., 384, the plaintiff endeav "ored to show that there was another condition not expressed
in the deed, which had not been performed, and that the estate reverted by reason of such non-performance. The court say:

"When a conveyance is made upon a condition, the condition expressed in the deed must be conclusively presumed, in the absence of fraud or mistake, to be the only condition, and if that condition is kept, the title cannot be successfully assailed."

The short of these facts therefore is that Douglas left out of the deed the condition of November 10, 1856, in reference to alienation, because he wanted to leave it out. He saw that the university had nothing but his gift. He thought the better way was to mortgage the land and not sell it absolutely. Consequently he himself made the change, and he himself became a party to the first conveyance.

The condition of November 10, 1856, as well as the original contract of April 2, 1856, were unrecorded instruments. The deed was recorded when it was executed, and consequently the complainants had notice of that, but they had no notice of the limitation of November 10th, except actual or constructive notice was brought to them; and herein, we consider:

IX.

IS NOTICE TO BOONE, THE AGENT OF THE COMPANY, NOTICE TO THE COMPLAINANTS?

It has been proved that Boone, afterwards and for some purposes an agent of the Union Mutual Life Insurance Company, knew on November 10, 1856, the fact that Douglas made the limitation in reference to alienation. Dr. Boone was one of the first trustees of the University of Chicago before the present charter was obtained. He was also made a trustee by the act of incorporation of 1857. He was therefore a trustee at the time Douglas made the limitation on November 10, 1856, and knew of the limitation at that time. The question therefore arises whether this knowledge in Boone came to the company either actually or constructively in 1861, 1864, 1866, 1869 and 1876, when the various loans were made.

The rule of law on the subject of the knowledge of the agent being the knowledge of the principal is stated by Story on Agency in the 9th Ed., Sec. 140, as follows:

"But unless notice of the facts come to the agent while he is concerned for the principal and in the course of the very transaction, or so near before it that the agent must be presumed to recollect it, it is not notice thereof to the principal; for otherwise, the agent might have forgotten it. * * * Notice, therefore, to an agent before agency has begun or after it has terminated will not ordinarily affect the principal."

On the 8th day of September, 1858, the power of the trustees to mortgage the land was for the first time exer-
cised by the corporation, and Dr. Boone was one of the committee appointed by the university to negotiate the loan, and also one of the committee appointed by the university to negotiate the first loan of $25,000 of the Union Mutual in 1861 to pay off the loan of 1858.

Dr. Boone first became the agent of the Mutual Union Life to solicit insurance, he having no duties but those of a solicitor, and having nothing to do with monetary transactions, in May, 1859, or two years and a half after the limitation, and nine months after Douglas had made his deed unconditionally.

On the making of the loan on October 11, 1864, Dr. Boone was the agent of the complainant with especial powers defined in writing, such as the collection of debts, the change of one form of debt to another, and authority to do most everything, but no authority to loan money. He then gave to the Union Mutual the following certificate of title:

"October 29, 1864. I have examined the title of the property upon which the former loan of $25,000, and the present loan of $15,000 are made, and find the same to be good in the University of Chicago, and do hereby certify that said property is worth at least $140,000."

In reference to the last loan of 1876, Dr. Boone gave the following certificate:

"CHICAGO, July 8, 1876.

"This is to certify that I have carefully examined the title to the property conveyed by the trust deed No. 1768 (our number), of the University of Chicago to the Union Mutual Life Insurance Company of Maine, dated February 8, 1876, and find the title good in said

"University of Chicago, at the date of said trust deed, and that I consider the fair valuation of said property to be $400,000.

"(Signed) L. D. Boone, "Examiner of Titles, and Conveyancer."

In making the loans of 1866 and 1869 it does not appear who was the agent who made the loan, and in that of 1876 it appears positively that it was made between a committee consisting of Rust, Jones and Barrett, who acted for the university, and Mr. Seccomb who acted for complainants. In none of these loans, therefore, does it appear that Dr. Boone acted for the complainants in making them.

There have been produced on the hearing of this case before the master all of the letters ever written by Dr. Boone to the complainant in which the subject of the university loan is in any manner mentioned; also all of the letters written by the company to Boone in which the same subject is mentioned, and in none of these letters does Boone or the company mention or allude to the fact that there was ever a limitation made by Judge Douglas. The last loan of 1876 was negotiated, as previously stated, between a committee of the university, consisting of Messrs. Rust, Jones and Barrett, acting on behalf of the university, and Mr. Seccomb, acting on behalf of the complainant. Mr. Seccomb has been upon the stand, and has sworn that at that date he was the only person authorized to make loans in Illinois, and he came here, and on the application of Dr. Boone, who was acting for the university, the committee men, Rust, Jones and Barrett, were introduced to him, and the transaction was closed between himself and said committee. He swears that he never heard of the limita-
tion during all these negotiations, and, so far as he knows or is informed, it was never communicated to the complainant. He is the only living survivor of the old trustees of the dates of 1851, 1864, 1866, 1869 and 1876. He was a director of the company during all this time, and it is a significant fact that the limitation was never talked about and that he never heard about it. Mr. DeWitt, the present president of the company, and Mr. Wain, who has charge of the department of loans for the company, have been upon the stand, and they swear they knew nothing of the limitation previous to the loan, and that nothing on file with the company in any way points to a knowledge of the limitation. It is also affirmatively and indisputably in evidence that the first knowledge of the limitation came from Mr. Kendall, the attorney of the company in Chicago, in March, 1877, more than a year after the last loan was made, he sending to Mr. DeWitt a copy of the limitation which he obtained from Dr. Burroughs, and his letters conveying this information have been introduced in evidence in the case. Mr. DeWitt, the president of the company, also swears that this was the first information he had of said limitation, and, so far as he knows, the first information had by any person connected with the company. Assuming, then, that Boone knew of the limitation on November 10, 1856, he did not know it as the agent of the complainant. He was then simply a trustee of the university, and knew it as such.

The presumption therefore is, that if Boone ever knew of this limitation, he also knew that Douglas, on the 1st of August, 1858, waived it, and made his deed unconditional. He knew that Douglas received the thanks of the board for it; therefore, he saw no necessity to, and never did, in fact, communicate the knowledge of the limitation to the complainant. He was not the agent of the complainant in making the loans, and therefore did not acquire the knowledge in the discharge of his duties as agent of the complainant. He did send to the company certificates that the title in the university was good, and the complainant relied upon them and kept them among their title papers.

The case of the New Haven, Middletown and Willimantic Railroad Co. v. The Town of Chatham, is very strikingly in point in considering this question. There a town meeting voted aid to a railroad by a division of the house, when the law required it should be by ballot. Allen M. Colgrove, the treasurer and managing business director of the railroad, was present at the town meeting, and knew the vote was taken otherwise than by ballot. The question was, was knowledge in him knowledge in the railroad company? The court say Colgrove was not at the town meeting in his official character, and that his personal knowledge of the fact was not communicated to, or known by other directors of the company, but that they all had knowledge that the form of the vote was as originally recorded. The court say:

"But Mr. Colgrove was not at the meeting otherwise than in his private individual capacity; in that capacity he received and retained the information; he was not substituted, and did not in any sense act for the corporation on that occasion."

In this case the unconditional deed being the only one on record, that is the only instrument the knowledge of which came to complainant.

On the same question, in McCormick v. Wheeler, 36 Ill., 114, Lawrence, J., says:
“All that need be said in regard to this is, that Mr. Curtis is not held to notice of facts as attorney of McCarn & Scott, of which he acquired knowledge while acting as attorney of Lee. This principle is so familiar as hardly to need the citation of authorities.”

Also in Hood v. Fahnstock, 8 Watts, 489, the court say:

“It is now well settled that if one, in the course of his business as agent, attorney, or counsel for another, obtain knowledge from which a trust would arise, and afterwards become the agent, attorney, or counsel of a subsequent purchaser in an independent and unconnected transaction, his previous knowledge is not notice to such other person for whom he acts.”

The authorities upon this subject are compiled in our brief between pages 96 and 109.

X.

TRUSTS FOR CHARITABLE USES.

It may be conceded for the purposes of the argument that Judge Douglas deeded the land mortgaged for charitable uses, but that does not affect the question of the right to mortgage it to the complainant. Whether property is held for charitable uses depends upon the intentions of the donor, and not the manner in which he may make his gift, or whether he makes it alienable or non-alienable by his trust deed. The definition of trusts for charitable uses as given by Lord Camden, adopted by Chancellor Kent, Lord Lyndhurst and the Supreme court of the United States, is “a gift to the general public use which extends “to poor as well as rich.” Mr. Binney, in the Girard will case, defines it as “whatever is given for love of God or “for love of your neighbor.” Chief Justice Gray says, “it is a gift to be applied consistently with existing laws “for the benefit of an indefinite number of persons.”

It may be conceded that the gift in this case comes under any and all definitions of gifts for charitable uses, but this conceives nothing, because gifts for charity are both alienable and non-alienable by the trustees holding them, and whether made alienable or non-alienable in the trustees by the grant they are held to be alienable by the trustees and by the courts under proper circumstances; and not only the property, but the charity to be benefited may also be changed under peculiar circumstances, although the use to which such property is to be applied is definitely named in the grant. At common law property held in trust for charitable uses might be alienated, provided such alienation was a wise administration of the trust, even though alienation was prohibited in the trust. The trustees might act, but their action was subject to revision by the courts. If the sale was a violation of the purposes of the trust, the court would set it aside and continue the property in furtherance of the trust, but if an honest discretion had been exercised and the trustees had done what was best or what at the time seemed best, the court would affirm their action, even though in the light of subsequent events, it turned out to have been unwise.

In Attorney General v. Warren, 2 Swanst., the court say: “There is no positive law which says that in no “instance shall there be an absolute alienation.”
Lord Brougham said in *Attorney General v. Hungerford*, 8 Bligh, 437: "Each case must depend on its peculiar circumstances. **The charity are bound to do what a provident and prudent landlord with his own estate would do.** **No trustee is bound to be a prophet; he is liable to act with prudence and foresight to a reasonable extent, but he is not bound to an absolute foreknowledge which no man can have of events that afterwards may occur.** Events have happened to alter the value of the land, but who was to know that they would happen? Consequences have taken place unfavorable to the charity, but who could state that such would be the result of the course which has been adopted."

So in the case of *Attorney General v. South Sea Co.*, 4th Bevan, the court say:

"It is plain that in ordinary cases the most important part of this duty is to preserve the property; but it may happen that the purposes of the charity may be best maintained and promoted by the alienation of the specific property. **If upon consideration it should appear upon subsequent investigation, that the transaction was fair and beneficial to the charity at the time, it does not appear to be the duty of the court to set it aside, merely because circumstances have occurred, in which at the time of the inquiry and after the lapse of many years it may be supposed that a greater revenue might have been derived from this specific property than for the property substituted on the alienation complained of. The court must consider the original fairness and the prudence of the transaction."

All these were cases of trusts for charitable uses, and the doctrine drawn from them seems to be that good faith in the exercise of the duties of the trust is all that is required.

The same doctrine is held in the United States, in *Brown v. Meeting Street Baptist Church Society*, 5 R. I., 177. The purposes of the trust were defined in the deed to be for divine worship for the people of color, "that now are or that may hereafter be in this town, and for no other use, but said people of color forever." In reference to this trust the court said:

"We think, therefore, it is no infringement of the contract implied in the acceptance of the trust, for the trustees to alienate the estate or for the court to sanction its alienation in a proper case, for the reason that the charity being the principal, and the use of the land as it is stated merely the incidental, purpose of the grant, the trustees may have by implication, the power to sell or exchange the land, if thereby the charity will be greatly benefited."

So in *Jackson v. Phillips*, the very object of the charity was changed. In that case a will set apart property "for the preparation and circulation of books and newspapers, the delivery of speeches, lectures, and such other means as in their judgment will create public sentiment that will put an end to negro slavery in this country, and for the benefit of fugitive slaves escaping from the slave holding states."

After the death of the testator, but while the litigation upon the will was in progress, the amendment to the constitution of the United States, abolishing slavery, was adopted. The immediate purpose for which the bequest was designed having thus failed, the case was referred to
a master, to report a scheme *ex profeso* for the application of the testator's bounty, and the fund was ultimately applied to the New England branch of the American Freedmen's Union Commission.

The inquiry should therefore be, not whether this property was held for charitable uses, but whether it was such property and held under such circumstances that at the time the mortgage was made the trustees acted in good faith, and especially whether they had power under the charter to mortgage it and bind the university. The necessities of the university have been shown in a previous part of this argument. In substance, they were that the university had obtained and could obtain but $7,000 for the erection of the university building. They never did obtain any more than that sum for it, and no more than that sum of their money ever went into that building. Under these facts, what was a wise administration of this trust? and what was an administration expressly permitted by the charter? Was it to keep all of the ten acres of land and have nothing for a building? Did not the wise administration of this trust require the rental of this land or the sale of it, or the mortgaging of it, to procure money with which to erect the university and pay professors and the incidental expenses of running it? How could ten acres of ground teach anybody anything? Of what possible use was it to the university? How could it proceed without the alienation of this property? Would not the charity have lapsed had nothing been done? It is under such circumstances that a court of equity permits alienation, even without authority in the charter, after the death of the testator or donor, even when prohibited, because the court looks to the furtherance of the charity originally in the mind of the donor, and if it can best accomplish that purpose by doing directly contrary to the donor's instructions with reference to the disposition of the property, it will do it, because he will be held to have intended that the charity should be carried out, rather than his wishes in reference to the donation, which was designed simply as a means to the charity.

Happily, Judge Douglas was then alive, and himself could see the situation, and so he acted as chancellor for himself, and changed the character of the grant, and made, on August 31, 1858, this absolute and unconditional deed of the premises. He did this for the express purpose, and with the intention, of enabling the trustees to make the mortgage, as is evidenced by the fact that it was made immediately afterwards, and that he made the mortgage himself, and by the thanks of the board of trustees, rendered to him in this behalf.

What property in our times, and here where we live, is held for charitable uses? Of such are the churches, the public schools, hospitals, insane asylums, asylums for the deaf and dumb, etc.; and the question of this case applied to each of these is, when the trustees or board acquires property, does that property become inalienable forever by reason of its use?

Who does not know that a church which has become inappropriate by reason of its location can be sold and another site bought with the proceeds, or is the church fixed forever wherever first located? Is the school site fixed by the first purchase in a changing and growing city, or may it be alienated for another and better, procured as the growth of the city renders the first useless? Can the proposition be doubted that either may be alien-
ated or exchanged according to the changes and needs this use may require? Who of the 3,000,000 of people in Illinois can say he has not in his life worshiped in a mortgaged church? Are not mortgages the rule, and a church erected and paid for the exception? In the mortgaged church, the mortgage has been made simply for fun, has it, and in the location of churches of our city which have mortgages almost as often as spires, can we say no obligation is incurred by them? If so, why does good Dr. Kittridge pass his plate and appeal Sunday after Sunday with pathetic energy for that dear old mortgage? Who does not know that the sale of such property is made whenever required, and mortgages are everywhere found, and that this is the first time in the history of the State of Illinois in which repudiation has been attempted?

Therefore, by reason of the powers especially conferred upon the board by the legislature, by the action of the board in furtherance of the trust in making the mortgage, by its recognition for twenty-two years, and by the good faith of the board in the exercise of the duties of this trust, this mortgage is not ultra vires, but within their powers and valid.

X I.

THE DUTY OF THE COMPLAINANTS IN THE PREMISES.

The interest upon the $150,000, at eight per cent., by the terms of this contract and as evidenced by the coupon notes, amounted to $60,000 within the five years, but they have not paid even one of them. The overdue interest now amounts to more than $95,000, and the university has paid out of this sum $293,08. The principal of $150,000 fell due in 1881, and they have paid upon that principal, in 1878, $5,000, and there is now due on it $195,250.40. The deed of trust provides that the university shall pay all assessments upon its property, and in the event of failure to do so the Union Mutual might make such payments and add it to the amount of the mortgage. An assessment was made against this property of about $2,000, for the construction of sidewalks and lamp-posts. The university neglected to pay it. The property was sold for this assessment, and bid in by the city, and the deed taken up by the complainant. The deed of trust also provides that the university shall keep its buildings insured, and in the event of failure to do so, the complainant may pay the amount and add the same to their mortgage. For five years last past nothing has been done by the university in reference to the insurance of their building, but the complainant has paid over $1,000 for that purpose. In short, the university has simply laid down under its load, and the question is, shall the complainant give to it this debt, now by lapse of time and a total neglect of its obligations, grown to an enormous sum. We finally file this bill for a foreclosure, and the university by its answer repudiates this entire debt. They did not even propose to refund the principal or pay any interest, but to take what money had been advanced to them, and give nothing for it. The money which has been loaned them is money belonging to widows or orphans, in present existence or yet to be. It is of the surplus of the complainant; a fund by them held in trust for a specific purpose; and the question is, shall the company lose this amount, and shall the widows and orphans lose it, or shall the university be compelled to pay it.
And whose obligation is thus dishonored, and whose contracts are thus repudiated?


There never was a debt of this magnitude in this state repudiated before. By this proceeding Chicago's greatest and best men are made to become Chicago's greatest repudiators. In these lists we recognize the oldest citizens, the most honored, and the dead. What a turning over in their graves this defense must have made! These men came to this city, many of them, when the Indian was here, and the wolf, and by the faithful recognition of commercial obligations, laid broadly the foundations of personal fortunes, and built, in what was a wilderness, the central city of an empire. And yet, without a voice from them approving it, the president and some of the professors of this college, chartered by the state, to teach the youth good principles, have inaugurated and now prosecute this scheme of repudiation.

They have under-valued this property to the auditor of states in which the complainant transacts business, and by anonymous and personal communications have sought to ruin the credit of the company which lent them this money in their sore distress. They have caused the astronomical department of their college to file a bill claiming to hold, by a distinct title, a tower of the university building. They have stimulated the heirs of Judge Douglas to claim the estate as forfeited, because of the making of a trust deed, in part, to pay off a mortgage executed by Judge Douglas himself, as president of the board of trustees, nine days after changing his bequest and making his deed to such trustees, unconditional in its terms. They have caused to be filed by persons holding their unrecorded written obligation, binding the university to teach a student free of charge, a bill asking that such document be declared a first lien upon the property, and prior to the mortgage to complainant, of whom they have been borrowing since 1861, and to whom they now owe under this mortgage, more than $300,000. The chief claim that the scholarship is a first lien lies in the fact that it has a picture of the university on it. They also, in the year 1881, filed a bill in the name of the people and regents of the university, seeking, as they now seek by their answer in this case, to cancel this mortgage and
wipe out utterly this debt, without proposing to pay back anything even of the principal which they had borrowed.

And yet this institution professes to stand for the great Baptist church of America! An ordinary uncircumcised sinner who expects, in the next world, the quantum meruit of his deserts, would not dare do such a thing. It is reserved for the elect, the predestinate, the foreordained, to borrow other people's money, to build the walls of their building, to roof it in from the storms of winter, to pay bills long past due for its construction, to insure that building from year to year, to erect lamp-posts to light them at night, to build pavements and walks to walk over, and even, lastly, to borrow $13,000, to pay their own salaries, and then repudiate the debt, and still to believe that such election will not be contested. It is to be hoped when this president and these professors teach moral philosophy and the evidences and principles of Christianity to the youth of our land, that they teach solely the principles laid down in the text books, keeping far in the background, and if possible wholly out of sight, their own personal example.

In conclusion, we beg leave most respectfully and kindly to suggest, that "honesty is the best policy," even in a Christian minister and the president of a college; and to ask for such a decree as will give to the complainants the uttermost farthing.

Leonard Swett.
James L. High.

Chicago, November 25, 1884.
UNITED STATES CIRCUIT COURT.

THE CHICAGO ASTRONOMICAL SOCIETY

v.

THE UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE.

ARGUMENT FOR THE COMPLAINANT.

IF THE COURT PLEASE:

I was away from home when much of the testimony in this case was taken, and I was unaware until I arrived home a few days ago, of the extent to which the gentlemen on the other side had gone in taking testimony, and was unaware of the remarkable character of some of the testimony. Nor was I prepared to hear it asserted here, as it has been with so much pertinacity, that the Chicago Astronomical Society had no equitable rights which must be recognized and protected, whatever disposition might be made of this case, so far as the Union Mutual Life Insurance Company and the University were concerned.

The gentleman who concluded the argument on the other side said, in conclusion, that he wished the court to lay aside all equitable considerations in hearing this case,
and to try it upon the strict, legal, well known rules of law. He well might say so, because, in his argument, he seemed not only to ignore the rights of the public, the rights of this society, and the equities which had been known and acknowledged by all parties for more than twenty years.

Now in order that there should be an honest and fair understanding of the case, and to shorten my argument, I think it proper to state, and I shall endeavor to do so in a few words, what is the actual history of the Astronomical Society. I don’t know whether this report of Mr. Hoyne, the secretary, which was published in 1874, and called a history and full report of the secretary from the organization, with the proceedings, so far as recollected, of the society, the foundation of the Dearborn Observatory, and the mounting of the great telescope built by Clark & Son, at Chicago, in 1864, has been incorporated in this book; but I presume that it ought to be there, for I suppose that everything that has occurred in relation to the University, and in relation to the Astronomical Society for the last twenty-five years should be in it. But the history is very simple.

Mr. High: That report is not in evidence, the report of Mr. Hoyne to the Astronomical Society of 1874.

Mr. Scammon: Whether the report is in evidence or not, the substance of it is in evidence, and if there is no objection on the other side, I will read from it, because it will make the statement shorter than if I should undertake to make it from word of mouth.

The first movement toward the foundation of an observatory, which led to the organization of this society, took place in December, 1862. It originated in the

“University of Chicago. A gentleman named Fory came to Chicago with authority to make sale of a telescope, manufactured in New York by Mr. Fitz, the optician, for the sum of $8,000. In order to awaken a proper interest in the establishment of an observatory in connection with the university, it was determined upon consultation with Dr. Burroughs, the president, Professor Mixer and others, that Mr. Fory should lecture upon astronomy in what was then known as Bryan Hall. The lecture came off, and at the close of the meeting a call was made for subscribers to purchase the Fitz glass, organize a society, and take the initiatory steps for building an observatory in Chicago.

Among the principal names now recollected as being subscribers at that first meeting, were the following gentlemen:


On motion a committee on subscriptions was appointed to draw up the necessary papers for circulation, and make certain conditions, which offered to subscribers certain privileges, proportioned to the sum of money subscribed, with power to purchase a suitable telescope, with a view to the founding of an astronomical observatory in Chicago. The committee consisted of