IN THE

UNITED STATES CIRCUIT COURT,

NORTHERN DISTRICT OF ILLINOIS.

THE UNION MUTUAL LIFE INSURANCE CO.

vs.

THE UNIVERSITY OF CHICAGO.

BILL TO FORECLOSE.

ARGUMENT FOR COMPLAINANT.

SWETT, HASKELL & GROSSCUP,

Complainant's Solicitors.

LEONARD SWETT,
JAMES L. HIGH,
OF COUNSEL.

BARNARD & GUNTHORP, LEGAL PRINTERS, 104 RANDOLPH STREET, CHICAGO.
BEACH, BARNARD & CO
1884

Contents.

MAY IT PLEASE THE COURT:

We shall first consider the documents in this case. The vital papers of those now in existence are:

The note for $150,000, dated February 8, 1876, payable to the Union Mutual Life Insurance Company, five years after date, with interest at the rate of eight per cent. per annum, payable on the 8th days of August and February of each year. The note contains the following clause:

"And in case this note is not paid at maturity, * * "* then this note shall bear interest at the rate of ten "per cent. per annum until fully paid. * * * "The several installments of interest aforesaid for said "period of five years are further evidenced by ten interest "notes, or coupons, of even date herewith."

The following payments have been made and are credited upon this note:

"Seventh month, 1876, $100 interest; tenth month "17th day, 1876, $100 interest; tenth month, 26th day, "1876, $13.80 interest; another payment of interest (no "date), $80; March 28, 1878, $5,000 principal."

The following is a coupon or interest note:

"CHICAGO, Ill., Feb. 8th, 1876.

"Due to the order of the Union Mutual Life Insurance "Company of Maine, six thousand ($6,000) dollars, on "the eighth day of August, 1876, without grace, at the "office of said company, in the city of Chicago, with ex-

" change on New York, *with interest at the rate of 10 per* " *cent. per annum after maturity*, being for an installment " of interest due on that day upon a certain promissory " note of even date herewith, payable to the order of the " Union Mutual Life Insurance Company of Maine, five " years after its date, for the sum of one hundred and fifty " thousand ($150,000) dollars, secured by a trust deed " upon real estate in the city of Chicago, Ills., and made " by the University of Chicago."

Notes of the same purport as the interest note set forth above were given at the same date and for the same amount, payable on the 8th of February, 1877, and on the 8th of August, 1877; on the 8th of February, 1878, and on the 8th of August, 1878; on the 8th of February, 1879, and on the 8th of August, 1879; on the 8th of February, 1880, and on the 8th of August, 1880, and on the 8th of February, 1881. These notes are secured by a trust deed, dated the 8th of February, 1876, upon the following property:

" That part of the south half of the north-east quarter " of Section 34, Town 39, North of Range 14, east of the " third Principal Meridian, bounded as follows, to wit: " Beginning at a point in the center of Cottage Grove " avenue, 50 feet due south of the south line of the lots in " Oakenwald's Subdivision, lying next north of Groveland " Park, running thence west parallel with said south line " of lots, and 50 feet from said line, if extended a distance " of 627 feet; thence due south 615 feet; thence east par- " allel to and 50 feet north of the north line of lots in said " Oakenwald's Subdivision, lying next south of Woodland " Park, a distance of 790 feet to the center of Cottage " Grove avenue; thence north-westwardly along the cen- " ter of Cottage Grove avenue 636 feet to the place of

" beginning, containing ten acres, more or less, to the " center of surrounding streets, being the same land " deeded by Stephen A. Douglas to said University of " Chicago."

This deed of trust, by its terms, purports to be between " the University of Chicago, a corporation under " an act of the legislature of Illinois, and located in the city " of Chicago, in the State of Illinois, and Levi D. Boone, " of the city of Chicago, county of Cook, and State of Illi- " nois, party of the second part as trustee, as hereinafter " specified, and in case of the death, absence, or removal " from the said county of Cook, refusal or inability to act of " the said party of the second part, then Samuel S. Boone, " of said city of Chicago, shall be, and is hereby ap- " pointed and made successor in trust to said party of the " second part, under this deed, for the uses hereinafter " expressed, with the same power and authority as said " trustee."

This deed of trust and these notes were all executed by Artemas Carter, vice president, and O. W. Barrett, secretary, and the deed of trust is under the seal of the corporation.

From these facts we conclude that the University of Chicago now owes the Union Mutual Life Insurance Company the principal sum of one hundred and fifty thousand dollars, less the payment credited upon said note, and it not being paid at maturity draws ten per cent. thereafter. The interest at eight per cent. is evidenced by ten coupon notes, each of which fell due every six months, commencing August 8, 1876, with ten per cent. interest upon said amounts, after they became due, if not paid when due.

AMOUNT DUE NOVEMBER 1, 1884.

There is due upon the principal note on November 1, 1884, $150,000, less $5,000 credited upon it, with ten per cent. interest from February 8, 1881, the time it became due, to November 1, 1884, and the calculation is as follows:

Principal	$150,000 00
Credit	5,000 00
Balance due	$145,000 00
Principal	145,000 00
Interest for three years, eight months and twenty-four days, to November 1, 1884, at ten per cent	54,133 00
Total due on principal note	$199,133 00

AMOUNT DUE ON COUPON NOTES.

No. 1 Coupon note, November 1, 1884	$10,494 49
No. 2 " " " " "	10,639 99
No. 3 " " " " "	10,339 99
No. 4 " " " " "	10,039 99
No. 5 " " " " "	9,739 99
No. 6 " " " " "	9,439 99
No. 7 " " " " "	9,139 99
No. 8 " " " " "	8,839 99
No. 9 " " " " "	8,539 99
No. 10 " " " " "	8,239 99
Total	$294,587 40

DISBURSEMENTS UNDER THE DEED OF TRUST.

The deed of trust provides that the trustee, whether the sale shall be by advertisement or foreclosure, shall pay: "All other expenses of this trust, including all moneys "advanced for insurance, taxes and other liens or assess- "ments, with interest thereon at the rate of ten per cent."

Under this clause we have paid for special assessments as follows: (See testimony of Lyman B. Tichenor, page 186. All references herein are to the original testimony, and not to printed abstract.)

On May 16, 1883, to the city for a quit-claim deed for assessments for lamp posts, levied in 1872, at the intersection of University place and Rhodes avenue, and one lamp post 150 feet east, and for warrant No. 1842, levied in 1872, for three lamp posts on Rhodes avenue, and for warrant No. 2646, levied in 1877, for curbing and paving University place (page 168)	$2,114 61
Interest on this sum at ten per cent	308 37
Total for lamp posts and paving	2,422 98

We have also paid for insurance (see Barrett's testimony, pp. 147, 148):

February 1, 1878, for insurance on University buildings	$500 00
Interest on the same at 10 per cent. to November 1, 1884	337 50
Total	$837 50
April 7, 1879, for insurance on University buildings	$431 23
Interest on this sum at 10 per cent	240 04
Total	$671 27
May 27, 1880, for insurance on University buildings	$325 00
Interest at 10 per cent	143 90
Total	468 90
May 7, 1879, insurance on University buildings	$431 23
Interest at 10 per cent	236 43
Total	$667 66
May 5, 1881, insurance on University buildings	$425 00
Interest at 10 per cent	143 32
Total	$573 32
May 6, 1882, insurance on University buildings	$425 00
Interest at 10 per cent	105 65
Total	$530 65
April 10, 1883, insurance on University buildings	$425 00
Interest at 10 per cent	66 26
Total	$491 26

Principal note and coupon notes and interest on each at 10 per cent. after maturity	$294,587 40
Amount paid for special assessments for lamp posts and paving	$2,422 98
Total amount paid for insurance on the University buildings	$4,240 56
Total amount due the complainants on November 1, 1884	$301,250 94

The trust deed executed on the 8th day of February, 1876, contained the following recital:

"*The above indebtedness is for a loan of money author-*
"*ized 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 this conveyance*
"*is executed and delivered in pursuance of such resolution*
"*and consent.*"

The question of law now arises as to the effect of this recital under the powers conferred by the charter of the university.

And herein we affirm that

I.

WHERE THE LEGISLATURE HAS CONFERRED POWER UPON A CORPORATION TO CONTRACT AND BE CONTRACTED WITH, AND TO SELL OR OTHERWISE DISPOSE OF ITS LANDS, OR ISSUE BONDS UPON CERTAIN CONDITIONS PRECEDENT, SUCH CORPORATION IS TO DECIDE WHEN THOSE CONDITIONS PRECEDENT HAVE BEEN PERFORMED, AND THE EXERCISE OF THE POWER GRANTED RAISES CONCLUSIVELY THE PRESUMPTION THAT SUCH CONDITIONS PRECEDENT HAVE IN FACT BEEN PERFORMED; AND WHERE THE OBLIGATION CONTAINS A CLAUSE, LIKE THE ABOVE, TO THE EFFECT THAT SUCH CONDITIONS HAVE BEEN COMPLIED WITH, A PRESUMPTION OF LAW ARISES, AND THE PARTY WILL BE HELD ESTOPPED FROM DENYING THE FACTS SET FORTH IN THE RECITAL, EVEN THOUGH SUCH RECITAL DOES NOT CONTAIN THE TRUTH.

The Royal British Bank v. *Turquand*, 6 Ellis & Blackburn, 88 English Common Law, 327.

A deed of settlement authorized the directors to borrow money upon the bonds of the corporation, provided a resolution of the company to that effect was first passed. A declaration was framed upon such a bond, and a plea filed denying that the authority to borrow money was based upon a resolution of the corporation. Upon this question the court say:

"We may now take for granted that the dealings with
"these corporations are not like the dealings with other
"partnerships, and that the parties dealing with them are
"bound to read the statute and the deed of settlement.

"But they are not bound to do more. 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 legit- "imately done."

Concurred in by Pollock, C. B; Alderson, B.; Creswell, J., Crowder, J., and Bramwell, B.

The leading case in the United States on this subject is *Knox County Commissioners* v. *Aspinwall*, 21 How., 539, decided in 1858, and affirmed in *Knox County Commissioners* v. *Wallace*, 21 How., 546. This case also cites and approves *Royal British Bank* v. *Turquand.*

The facts of the case were in substance as follows: A statute of Indiana authorized the county commissioners of Knox county, through which the Ohio and Mississippi railway passed, to subscribe for the stock of said railway company, payable in the bonds of the county, provided a majority of the legal voters should vote for the same. The statute further prescribed certain requirements in regard to notices to be given to the electors of the county, previous to the election. The commissioners of Knox county subscribed for a large amount of the stock, and issued bonds in payment. Suit was finally brought on coupons attached to these bonds. The commissioners set up as a defense that the requirements of the statute in regard to notices had not been complied with, and that consequently the commissioners had no authority to execute the bonds, and could not bind the county.

The court, in discussing this question, say:

"Who is to determine whether or not the election has "been properly held, and a majority of the votes of the "county cast in favor of the subscription? Is it to be de- "termined by the court in this collateral way, in every suit "upon the bond, or coupon attached, or by the board of "commissioners, as a duty imposed upon it before mak- "ing their subscriptions?"

"The court is of the opinion that the question belonged "to this board. The act makes it the duty of the sheriff "to give the notices of the election for the day mentioned, "and then declares, if a majority of the votes shall be "given in favor of the subscription, the county board "shall subscribe the stock. The right of the board to "act in execution of the authority is placed upon the "fact, that a majority of the votes had been cast in favor "of the subscription; and to have acted without first "ascertaining it, would have been a clear violation of "duty; and the ascertainment of the fact was necessarily "left to the inquiry and judgment of the board itself, as "no other tribunal was provided for the purpose. This "board was one, from its organization and general du- "ties, fit and competent to be the depository of the trust "thus confided to it. The persons composing it were "elected by the county, and it was already invested with "the highest functions, concerning its general police and "fiscal interests."

"We do not say that the decision of the board would "be conclusive in a direct proceeding to inquire into the "facts previously to the execution of the power, and "before the rights and interests of third parties had "attached; but after the authority had been executed, "the stock subscribed, and the bonds issued, and in the

"hands of innocent holders, it would be too late, even in "a direct proceeding, to call it in question. Much less "can it be called in question to the prejudice of a *bona* "*fide* holder of the bonds in this collateral way."

"Another answer to this ground of defense is, that the "purchaser of the bonds had a right to assume that the "vote of the county, which was made a condition to the "grant of the power, had been obtained, from the fact of "the subscription by the board, to the stock of the "railroad company, and the issuing of the bonds. The "bonds on their face import a compliance with the "law under which they were issued. 'This bond,' we "quote, 'is issued in part payment of a subscription of "two hundred thousand dollars, by the said Knox county, "to the capital stock, etc., by order of the board of com- "missioners,' in pursuance of the third section of act, etc., "passed by the general assembly of the State of Indiana, "and approved 15th January, 1849. The purchaser was "not bound to look further for evidence of a compliance "with the conditions to the grant of the power. This "principle was recently applied in a case in the court of "Exchequer in England."

In *Bissell* v. *City of Jeffersonville*, 24 How., 287, decided December, 1860, a statute of Indiana authorized cities under certain circumstances to subscribe for the capital stock of railroad companies, and issue bonds in payment therefor, provided that three-fourths of the legal voters should first petition the common council to make the subscription.

Bonds were issued and delivered to the railroad company, and the stock of the railroad company was delivered to the city. The bonds on their face recited that

the requirements of the statute had been complied with, and appeared to be regular in every respect. It also appeared on examining the records of the city that the proceedings of the council were regular, and that all the requirements of the statute had been complied with. Subsequently the city refused payment. Suit was brought, and the court allowed the city to introduce parol testimony to show that the names of three-fourths of the legal voters were not subscribed to the petition, and the jury found a verdict for the city. The Supreme court, on appeal, found this to be error, and decided that where the bonds on their face recited that the requirements of the statute had been complied with, and where the proper authorities had decided that a sufficient number of the legal voters had signed the petition, it could not afterwards be inquired into, but was conclusive against the city. Mr. Justice CLIFFORD, in delivering the opinion of the Supreme court of the United States (p. 300), says:

"Citation of authorities to this point is unnecessary, as "the whole subject has been examined by this court re- "cently, and the rule clearly laid down, that a corporation "quite as much as an individual is held to a careful adhe- "rence to truth in their dealings with other parties, and "cannot by their representations or silence involve others "in onerous engagements, and then defeat the calculations "and claims, their own conduct had "superinduced." (*Zabriskie* v. *The Cleveland, etc., R. R. Co.*, 23 How., 400.)

Van Hostrup v. *Madison City*, 1 Wallace, 291, decided December, 1863: "Another objection taken is, that the pro- "viso requiring the petition of two-thirds of the citizens "who are freeholders of the city, was not complied with. As "we have seen, the bonds signed by the mayor and clerk of

"the city recite on their face that they were issued by "virtue of the ordinance of the common council of the "city, passed September 2, 1852. This concludes the city "as to any irregularities, that may have existed, in carry- "ing into execution the power granted to subscribe for "the stock and issue the bonds, as has been repeatedly "held by this court."

In *Moran* v. *Commissioners of Miami County*, 2 Black, 722 (decided December, 1862), the court say:

"But the real point in this case, as made by the counsel "for the plaintiff in error, and sustained in argument by "numerous adjudicated cases was, that as it is declared in "the bonds that they were issued by the board of com- "missioners of Miami county, by order or resolution, "pursuant to the statute authorizing the county to borrow "money, passed at a regular meeting of the board, to be "used by the Peru and Indianapolis railroad, payable "to the company or bearer, for the loan to the county, "that the *bona fide* holders of the bonds, whether so by "endorsement or delivery, had a right to infer that the "bonds had been lawfully issued, by which the county of "Miami is estopped in a suit for recovery of the interest, "from denying by pleas that its bonds had been issued to "the Peru and Indianapolis railroad, for a loan of money "to the county of Miami. We think and adjudge that "the recitals in the bonds are conclusive, constituting an "estoppel *in pais* upon the defendants in this suit."

In *Mercer County* v. *Hackett*, 1 Wall., 83 (decided December, 1863), the facts were as follows:

By an act of assembly, passed in 1852, the legislature of Pennsylvania authorized the commissioners of Mercer county in that state to subscribe to the stock of the Pitts-

burg and Erie railroad, which road, if built, would pass through their county, and benefit it. That act, however, contained this proviso:

"'*Provided*, That the subscription shall be made sub- "'ject to the following restrictions, limitations and condi- "'tions, and in no other manner or way whatever, "'namely: All such subscriptions shall be made by the "'county commissioners, and shall be made by them "'after, and not before, the amount of said subscription "'shall have been designated, advised and recommended "'by a grand jury of such county, and such bonds shall "'in no case, or under any pretense, be sold, assigned, "'or transferred by the said railroad company at less "'than the par value thereof.'"

Bonds were issued to a large amount in violation of the provisions of the act above quoted. There were irregularities in the proceedings of the grand jury, and the bonds were sold at about forty per cent. below par. But the Supreme court of the United States held the county liable.

Mr. Justice GRIER, in delivering the opinion of the court, used the following language:

"The bonds declare on their face * * * that in "pursuance of said act the bonds were signed by the "commissioners of the county. They are, on their face, "complete and perfect; exhibiting no defect in form or "substance, and the evidence offered is to show the re- "citals on the bonds are not true; not that no law exists "to authorize their issue, but that the bonds were not "made 'in pursuance of the acts of assembly' authoriz- "ing it. We have decided, in the case of *Commissioners of* "*Knox County* v. *Aspinwall*, that where the bonds on

"their face import a compliance with the law under "which they were issued, the purchaser is not bound to "look further. The decision of the board of commission- "ers may not be conclusive in a direct proceeding to in- "quire into the facts before the rights and interests of "other parties had attached, but after the authority has "been executed, the stock subscribed and the bonds is- "sued, and in the hands of innocent holders, it would "be too late, even in a direct proceeding, to call it in "question."

In *Lynde* v. *The County*, 16 Wallace, 7, decided December, 1872, a statute authorized the county judge "to "provide for the erection and reparation of court-houses, "etc." It also provided:

"And the county judge may submit to the people of his "county at any regular election, or at a special one called "for that purpose, the question whether money "may be borrowed to aid in the erection of public build- "ings." It also provided: "The county judge of each "county having a seal is required to obtain, as soon as "practicable, for his county, a new seal." * * *

Section 111 provided: "In case of a vacancy in the "office of county judge, and in the case of the absence, "inability or interest of that officer, the prosecuting at- "torney of the county shall supply his place."

The office of "prosecuting attorney of the county" was afterwards abolished. These provisions of the code being in force, Robert Clark, the county judge of Winnebago, submitted to the voters of that county, at a special election, held on the 6th day of March, 1860, the question of levying a tax of seven mills on the dollar for the purpose of building a court-

house, the said tax to be levied annually, not exceeding ten years, until a sufficient amount was raised for the said purpose. The whole number of votes at the election was twenty-nine, of which twenty-four were in favor of the proposition. No proposition was ever submitted to the voters to borrow money, or issue bonds for that or any other purpose.

The county judge then made a contract with one Martin Bumgardner, to build a court house for the county, and on account of the contract, made and delivered to him, on the 9th day of March, 1860, bonds in the name of the county-for $20,000, the amount for which the court-house was to be built. Afterwards, he went to New York with Bumgardner, and professing to act as county judge of the county, made and issued to Bumgardner new bonds for $20,000, which new bonds differed in the amount of each, in time of payment, and in amount of coupons, and in other particulars; he had a seal made in New York, which he called "the "seal of the county." He then and there signed the said bonds and affixed the said seal to them, and delivered them to Bumgardner. The bonds thus issued, and which, by their terms, were payable to Martin Bumgardner, or bearer, contained this recitation on their face:

"The said bonds are issued in accordance with a vote "of the people of said county, and in pursuance of an "order of the County court of Winnebago county, legally "entered of record in the office of the county judge, on "the 9th day of March, 1860, in the fulfillment of a con- "tract entered into with said Martin Bumgardner, for the "erection of a court-house for said county of Winnebago. "And the people of said county have voted the levying of "sufficient taxes, from year to year, to pay the principal

"and interest of each and all of said bonds, as the same "mature and become payable."

The court, in deciding this case, says, page 13:

"But if the authority were doubtful, there are other "facts bearing upon this point, which, in our judgment, "are conclusive. The county judge is the officer desig- "nated by the statute to decide whether the voters have "given the required sanction. He executed and issued "the bonds, and the requisite popular sanction is set forth "upon their face. It is a settled rule of law that where a "particular functionary is clothed with the duty of deciding "such a question, his decision, in the absence of fraud or "collusion, is final. It is not open for examination, and "neither party can go behind it."

In *St. Joseph Township* v. *Rogers*, 16 Wallace, 644, decided in 1872, the statute authorized towns lying along a railroad in Illinois to subscribe to the stock of such road, but provided that no subscription should be made until the question had been submitted to the legal voters of such town. Bonds to the amount of the subscription were issued, bearing date the 1st October, 1867, signed by the supervisor, countersigned by the clerk, and each bond contained a recital that it was issued by and under the aforesaid law of the state. The bonds also contained a recital that they were issued in accordance with the vote of the legal voters of said township at a special election, held August 14, 1866, in accordance with said act, and the question before the court was whether the defendants could contradict these recitals, and disprove the facts which they contained.

Clifford J., in delivering the opinion of the court, says:

"Bonds payable to bearer, issued by the municipal cor- "poration to aid in the construction of a railroad, if issued "in pursuance of a power conferred by the legislature, "are valid commercial instruments; but if issued by such "corporation, which possessed no power from the legis- "lature to grant such aid, they are invalid, even in the "hands of innocent holders. Such power is frequently "conferred to be exercised in a special manner, or sub- "ject to certain regulations,conditions, or qualifications; but "if it appears that the bonds issued show by their recital that "the power was exercised in the manner required by the "legislature, and that the bonds were issued in conformity "with those regulations, and pursuant to those conditions "and qualifications, proof that any or all of those recitals "are incorrect, will not constitute a defense to the corpora- "tion in a suit upon the bonds, or coupons, if it appears "that it was the sole province of the municipal officers "who executed the bonds to decide whether or not there "had been an antecedent compliance with the regulation, "condition, and qualification, which it is alleged was not "fulfilled."

The court quotes and approves *Knox County* v. *Aspinwall; Royal British Bank* v. *Turquand.*

Marcy v. *Town of Oswego*, 92 U. S., 2 Otto, 637, decided October, 1875. This case decides the same principles, and the court say:

"These provisions of the legislative act make it evi- "dent, not only that the county board was constituted the "agent to execute the power granted, but that it was "contemplated the board should determine whether the "facts existed which, under the law, warranted the issue "of the bonds. The board was to order the election, if

"it certified the facts existed, and only then. It was re-
"quired to act, if fifty freeholders, who were voters of
"the township, petitioned for the election; if the petition
"set out the amount of stock proposed to be subscribed;
"if that amount was not greater than the amount to
"which the township was limited by the act, and if the
"petition designated the railroad company; if it pointed
"out the mode and terms of payment. Of course the
"board, and it only, was to decide whether these things
"precedent to the right to order an election were actual
"facts. No other tribunal could make the determination,
"and the members of the board had peculiar means of
"knowledge beyond what any other persons could have.
"Moreover, these decisions were to be made before
"they acted, not after the election and after the bonds
"had been issued."

In reference to the purchase of the bonds, the court say:

"He was therefore not required when he purchased
"to look beyond the act of the legislature, and the recitals
"which the bond contained."

Humboldt Township v. *Long*, 92 U. S., 2 Otto, 644. Upon exactly the same question, the court say, speaking of *Marcy* v. *Town of Oswego*, given above:

"We held in that case that by its provisions the board
"of county commissioners, who caused the bonds to be
"issued, were constituted the authority to determine
"whether the conditions of the fact made by the statute
"precedent to the exercise of the authority granted to
"execute and issue the bonds had been performed, and
"that the recital in the bond issued by them was conclu-
"sive in a suit against the township brought by a *bona*

"*fide* holder. In so ruling we but decided what often
"had been decided before, and what ought to be regarded
"as a fixed rule."

Speaking of the conditions precedent the court say:

"Whether that step had been taken or not, and whether
"the election had been regularly conducted with sufficient
"notice, and whether the requisite majority of votes had
"been cast in favor of the subscription and consequent
"bond, issue were questions which the law submitted
"to the board of county commissioners, and which it was
"necessary for them to answer before they could act.
"In the present case, the board passed upon them and
"issued the bonds, asserting in their recitals that they
"were issued in pursuance of and in accordance with the
"act of the legislature."

Town of Venice v. *Murdock*, 92 U. S., 2 Otto, 494. The condition precedent to the issue of the bonds was that the supervisor and the commissioners should have no power to issue the bonds until after the written assent of two-thirds of the resident tax-payers, as appearing on the assessor's assessment roll of such town, next previous to the time when such money may be borrowed, should have been obtained by such supervisor, or commissioner. The court held the recital of the fact in the bond to be sufficient, and say:

"It is very obvious that if the act of the legislature
"which authorized and issued the bonds in aid of the
"construction of the railroad on the written assent of two-
"thirds of the resident tax-payers of the town intended
"that the holder of the bonds should be under ob-
"ligations to prove by parol evidence that each of the
"259 names signed to the written assent was the genuine

"signature of the person who bore the name, the proffered "aid to the railroad company was a delusion. No sane "person would have bought a bond with such an obliga- "gation resting upon him whenever he called for pay- "ment of principal or interest."

In *Commissioners* v. *Bolles*, 94 U. S., 4 Otto, 106, decided in October, 1876, the following was the recital in the bond:

"This bond is executed and issued by virtue of and in "accordance with the act of the legislature of the State "of Kansas, entitled, 'An act to authorize counties and "cities to issue bonds to railroad companies,' approved "April 11, 1865, and other laws of said state, and in pur- "suance of and in accordance with the vote of a majority "of the qualified voters of said county of Douglas, at "the special election regularly held September 12, 1865."

The court held that this recital was conclusive evidence of the facts therein set forth, which were conditions precedent to the rightful execution of the bonds.

In *Commissioners of Johnson County* v. *January*, 94 U. S., 4 Otto, 202, exactly the same doctrine was held. The court, speaking of the county authorities, say:

"They were thus constituted a tribunal for the adjust- "ment of all questions touching the subject (meaning the "conditions precedent), they were clothed with the power "and charged with the duty to decide them, and no appeal "or review was provided for."

In *County of Warren* v. *Marcy*, 97 U. S., 7 Otto, 96, the following was the recital:

"This bond is issued in conformity with the vote of the

"electors of said county, cast at an election held the 23d "of December, 1869."

The court say:

"We have substantially held that if a municipal body "has lawful power to issue bonds, or other negotiable se- "curities dependent only upon the adoption of certain pre- "liminary proceedings, such as a popular election of the "constituent body, the holder, in good faith, has a right to "assume that such preliminary proceedings have taken "place, if the facts be certified upon the face of the bonds "themselves, by the authorities whose preliminary duties "it is to ascertain it."

We are tired of citing cases, and if the court wishes more, we refer them to *Pana* v. *Bowler*, 107 U. S., 17 Otto, 529; as also to *Sherman County* v. *Simons*, 109 U. S., 735, decided January 7, 1884, in both of which cases the same doctrine is held. The foregoing cases clearly establish the rule in reference to recitals in the United States courts. This is a United States court, and the rule established by the higher tribunal is imperative. In the case at bar, the board were the judges in reference to whether or not the trustees assented to this loan and the making of this trust deed. They were presumed to know, and the company were not. They certify in the recital above set forth that all the requirements were complied with, and the law binds them by this recital, whether true or not.

The next question is, what are the real facts back of the recital, supposing such facts could be contradicted, and herein we maintain that:

II.

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

And herein, we inquire into the powers which the board of trustees possessed under the charter, the powers which that board might delegate to the executive committee, the powers which they did so delegate, and what the board of trustees themselves did, what the executive committee did in reference to this loan.

Powers of the Executive Committee, and what it did.

The charter provides that "The board may appoint, of "its own number, 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."

On May 6, 1857, on page 134 of the record, in Mr. Barrett's evidence, we find the following record of the board of trustees:

"On motion, it was resolved to appoint seven persons "as an executive committee, in accordance with the pro-"visions of the charter. The following persons were "elected by ballot: Samuel Hoard, L. D. Boone, R. H. "Clarkson, J. C. Burroughs, H. A. Decker, James H. "Woodworth and J. K. Burtis."

On page 134 of Mr. Barrett's testimony, is the following:

"On motion of Charles Walker, it was voted that the "executive committee, in the absence of the board, shall "possess all the powers of the board, except when "expressly instructed to the contrary."

On page 135 of Mr. Barrett's testimony, is the following:

"The board met pursuant to adjournment Friday morn-"ing, July 1, 1864. The following resolution, offered by "Mr. Thomas Hoyne, was adopted:

"*Resolved*, That any three of the executive committee "of the board, with the chairman thereof, or vice or tem-"porary chairman, shall form a quorum for business, "and their acts shall be official and binding upon this "board, and the corporation it represents."

On page 136 of Mr. Barrett's testimony, is the following:

"Saturday, October 31, 1874. The board met at the "hour fixed by the vote of adjournment.

"*Resolved*, That the standing resolutions reported by "the committee on rules and regulations, the same having "been compiled and revised from the records of the "trustees and of the executive committee, be hereby "declared to be standing resolutions of the board, now in "force, and that all resolutions, votes or orders which "appear on the record in conflict with the same, be "hereby repealed."

This refers to the new rules which Mr. Barrett says were in force on the 7th day of February, 1876, or from

the time he came into office, and these rules (page 137) are as follows:

"*Powers and Duties of the Executive Committee:*

"SECTION 1. 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."

As to quorum of the executive committee, we find the following on page 137 of Mr. Barrett's testimony:

"Any three of the executive committee of the board, "with the chairman thereof, or vice or temporary chair-"man, in addition thereto, shall form a quorum for "business."

December 4, 1875 (page 122 of record book of the executive committee, page 139 of Mr. Barrett's testimony):

"Moved by Dr. Burroughs, and seconded by Mr. Jones, "that a committee of three be appointed to devise ways "and means for raising money for immediate wants. "Carried; and Messrs. Jones, Rust and Barrett were "appointed such committee."

The record shows that Burroughs, Boone, Thompson, Jones, Rust and Barrett were present.

On page 139 of Mr. Barrett's testimony is his evidence of the record of a meeting of December 7, 1875:

"Present, Messrs. Burroughs, Jones, Rust, Barrett, "Boone and Thompson."

On page 140 is the report of Mr. Rust, and it is as follows:

"Report of Mr. Rust, chairman of the committee on "ways and means, appointed December 4th, was as "follows: Your committee have had an interview with "Mr. Secomb, chairman of the finance and investing "committee of the Union Mutual Life Insurance Company, "who expressed a willingness to report in favor of loan-"ing the University twenty thousand dollars. Upon "motion of Dr. Burroughs, seconded by Mr. Jones, the "committee were instructed to take immediate steps and "secure a loan of twenty thousand dollars."

On page 141 is the following:

"January 25th, 1876. Executive committee met at the "Brevoort House, at 3:30 o'clock, pursuant to the call "of the chairman. Present: Boone, Burroughs, Blake, "Cheney, Thompson, Jones, Gassette. Gassette elected "secretary *pro tem.* Minutes of the meetings of Decem-"ber 4th, 7th, 21st and 24th read and approved. The "following resolutions were offered by Mr. Jones and "seconded by Mr. Blake:

"*Resolved*, That a loan negotiated by H. A. Rust, O. "W. Barrett and Fernando Jones, a committee of this ex-"ecutive committee, appointed on the 4th of December, "1875, with the Union Mutual Life Insurance Company "of Maine, for the sum of $150,000, for a period of five "years, be and the same is hereby approved, and that "the president or either of the vice-presidents and secre-"tary of the board of trustees be and are hereby author-"ized to make, execute and deliver to the said insurance "company the note or notes of the university of Chicago, "and a trust deed to secure the payment thereof, upon "the ground upon which the university stands, together "with the improvements thereon, and also to secure the

" written consent of a majority of the trustees to this loan
" and execution of the above specified papers."

" *Resolved*, That so much of the above authorized loan
" as is necessary shall be appropriated to the payment of
" the two loans now due to said insurance company for
" an aggregate sum of $100,000, and the unpaid interest
" thereon, and the balance to the general wants of the
" university."

" *Resolved*, That the notes and mortgages now in the
" hands of L. D. Boone, agent, as collateral security for
" the payment of the indebtedness now due to said insur-
" ance company, be held by him, or by said insurance
" company, and that all payments made on said securities
" to be applied on the payment of interest or interest and
" principal of the loan now authorized. Carried unani-
" mously."

The foregoing paper was offered as " Exhibit B."

On page 142 of record, at the annual meeting held on January 11, 1877, a full report is made by the executive committee to the board of trustees of making the loan in question, and the proceedings are as follows:

There were present at the meeting Messrs. Abernethy, Hoyne, Burroughs, Sherer, Bacon, Carter, Pollard, Barrett, Thompson, Jones, Boone, Greenebaum and Doolittle.

Mr. Barrett says:

" The report of the executive committee is as follows:

" CHICAGO, ILL., January 11, 1877.

" The Executive Committee of the Board of Trustees
" of the University of Chicago respectfully submit to the
" board the following report of business done by them

" since the semi-annual meeting of 1876.
" Meetings have been held by the committee on January
" 25, 1876, February 1st, 3d and 7th, March 30th, June
" 28th, July 3d and 10th, August 8th, October 3d, De-
" cember 3d and January 11, 1877. At the meeting in
" January last steps were taken to obtain an extension of
" the loan from the Union Mutual Life Insurance Com-
" pany acccording to the instructions of this board,
" ordered at its meeting a few days previous, and an
" arrangement was finally concluded between that com-
" pany by which the two loans outstanding and matured
" with accrued interest were merged into one loan for
" five years, at eight per cent. interest, and the note
" of the university for $150,000, secured by the trust
" deed of the university site and buildings was given to
" the insurance company."

Dr. Burroughs, who was present at this meeting, states in his testimony, page 179, that this report was approved by the board of trustees, but whether or not it was so approved is wholly immaterial, because the rules in force on the 8th of February, 1876, provided that the action of the committee should be binding upon the corporation, unless its action was disapproved.

The Powers of the Board and What it Did.

The charter provides that " real estate shall not be sold
" without consent of a majority of the trustees."

" Exhibit C " is the consent of a majority of the trustees, and is in words and figures following:

" The undersigned, being a majority of the trustees of
" the University of Chicago, hereby express our consent

"to and approval of the loan of one hundred and fifty "thousand dollars, with the Union Mutual Life Insurance "Company of Maine, authorized and approved by exec- "utive committee of the board of trustees on the 25th day "of January, 1876, and also give our approval and con- "sent to the execution of the note or notes and trust deed "for the security of said loan. T. H. Hoyne, Horatio O. "Stone, J. A. Smith, Robert Harris, G. W. Walker, L. "H. Smith, J. R. Doolittle, William F. Coolbaugh, Jos. "F. Bonfield, Henry Greenebaum, Artemas Carter, Levi "D. Boone, Fernando Jones, H. M. Thompson, J. C. "Burroughs, D. B. Cheney, E. Nelson Blake, Norman "T. Gassette, H. A. Rust, J. K. Pollard, John M. Van Os- "dell, O. W. Barrett, A. B. Meeker, F. E. Hinckley."

Said Exhibits "B" and "C" are offered in evidence on page 3, and on page 146 of complainant's testimony.

The gentlemen composing the board of trustees of the University of Chicago, and their signatures, were so well known that we did not expect to be required to furnish proof of their signatures. As we proceeded with the case we found that we were mistaken. Consequently we hired carriages and summoned a large number of prominent citizens, and the following is the result of our proof on this subject:

Norman T. Gassette proves his own signature, and his certificate to "Exhibit B," which is the action of the executive committee in reference to the loan to the Union Mutual Life Insurance Company. We also introduced this same document from the records of the executive committee. Mr. Gassette then identifies the signatures of the following members of the board of trustees: Jos. F. Bonfield, p. 8; Levi D. Boone, Fernando Jones, J. C. Burroughs, Norman T. Gassette, p. 8 and 9; H. A. Rust, O. W. Barrett, p. 10.

Oscar W. Barrett, p. 27, identifies the signature of Thos. Hoyne, p. 28; Wm. F. Coolbaugh, Henry Greenebaum, p. 28; J. C. Burroughs, E. Nelson Blake, p. 29; H. A. Rust, p. 30; O. W. Barrett, p. 30.

William H. Holden, p. 36. This witness identifies the following signatures: Thos. Hoyne, J. A. Smith, p. 36; J. R. Doolittle, p. 38; Jos. F. Bonfield, p. 39; Levi D. Boone, p. 40; J. C. Burroughs, p. 40; D. B. Cheney, p. 41; E. Nelson Blake, p. 42; Norman T. Gassette, p. 43; John M. Van Osdell, p. 43; O. W. Barrett, p. 43.

J. A. Smith, p. 45, identifies the signatures of J. C. Burroughs and D. B. Cheney, pp. 45 and 46; J. R. Doolittle, Levi D. Boone, H. M. Thompson, H. A. Rust, O. W. Barrett, F. E. Hinckley, 47; O. W. Barrett, pp. 47 and 48. "The gentlemen signing this paper were trustees of "the university. "This paper, as I understand it, is a "paper signed by the trustees of the university. The "paper was circulated among the individual members of "the trustees at their residences. I was aware at the "time I signed it that it might involve the title of the "university to the real estate."

Joseph A. Sleeper identifies the signatures of J. R. Doolittle and J. F. Bonfield, p. 53; Levi D. Boone, J. C. Burroughs, Norman T. Gassette, p. 53; Fernando Jones, and J. K. Pollard, p. 54; O. W. Barrett, p. 55.

George W. Stanford identifies the signatures of Henry Greenebaum and L. D. Boone, p. 56; Fernando Jones and E. Nelson Blake, p. 57; Norman T. Gassette, p. 58.

George Nichols identifies the signature of H. O. Stone, p. 59.

E. Nelson Blake identifies the signature of E. Nelson Blake. "I was acting as one of the trustees of the Uni-"versity of Chicago when I signed it."

O. H. Horton, identifies the signatures of Thomas Hoyne, p. 62; Wm. F. Coolbaugh, Henry Greenebaum, p. 63; O. W. Barrett, p. 63.

Thomas Hoyne, Jr., identifies the signatures of Thomas Hoyne, and Fernando Jones, p. 64.

Henry Greenebaum identifies the signatures of Thomas Hoyne, p. 65; H. O. Stone, p. 65; J. A. Smith, J. R. Doolittle and Wm. F. Coolbaugh, p. 66; J. F. Bonfield; Henry Greenebaum; Artemas Carter, and L. D. Boone, p. 66; Fernando Jones, p. 68; H. M. Thompson, p. 68; J. K. Pollard, p. 69; John M. VanOsdell, p. 70; O. W. Barrett, p. 70; A. B. Meeker, p. 70; "I was one of "the members of the board of trustees when I signed the "paper. The other members were also members of "the board of trustees at that time. They constituted a "majority of the board. There are twenty-four signers, "and they constitute a majority. (p. 71.) My best "recollection is that all these persons were members of "the board at that time."

George W. Kretzinger identifies the signature of F. E. Hinckley, p. 76.

E. P. Good identifies the signature of Fernando Jones, p. 77.

John M. Van Osdell testifies (p. 78): "I was one of the "trustees of the Chicago University in 1876, and signed "this paper of that date."

Henry McKey identifies signature of J. R. Doolittle, p. 80.

A. B. Meeker identifies his own signature, p. 81. "At "the time I signed it I was one of the trustees of the uni-"versity. I signed it at my office, and my impression is "it was brought in by Mr. Barrett. It was signed at "about the time of the giving of the mortgage for "$150,000."

Lafayette Smith (p. 83) identifies his own signature, and says he was one of the trustees of the university at the time of signing. "I knew the making of a mortgage "to the UNION MUTUAL LIFE INSURANCE COMPANY for "$150,000, was then under consideration." Identifies the signature of J. K. Pollard, p. 85.

J. J. P. Odell identifies the signature of H. O. Stone, p. 86; G. C. Walker, p. 88; J. R. Doolittle, p. 89; Wm. F. Coolbaugh, p. 90; J. F. Bonfield, p. 91.

William Cox identifies the following signatures: Robert Harris, page 91; George C. Walker, page 91.

James R. Doolittle identifies the signature of James R. Doolittle, page 91*a*. He signed "Exhibit C," as trustee of the university. "I recognize also as trustees of the uni-"versity, Thomas Hoyne, H. O. Stone, J. A. Smith, Rob-"ert Harris, George C. Walker, William F. Coolbaugh, "Joseph F. Bonfield, Henry Greenebaum, Artemas Car-"ter, Levi D. Boone, Fernando Jones, H. M. Thompson, "J. C. Burroughs, D. B. Cheney, E. Nelson Blake, Nor-"man T. Gassette, H. A. Rust, J. K. Pollard, John M. "Van Osdell, O. W. Barrett, A. B. Meeker, Lafayette "Smith, F. E. Hinckley." (page 91*b*.)

Witness is shown a catalogue of the university for 1875-6, and by it identifies, "J. K. Pollard, Lafayette Smith, "John M. Van Osdell. I understood there was some clause "of the charter which required the assent of a majority "of the trustees to pass the title, or to encumber the title. "I understood the mortgage was to be $150,000." (p. 95.)

H. M. Thompson identifies his own signature, and was acting as trustee of the university (page 98). "I recog- "nize most of the other names as also being trustees. I "recognize the names of Thomas Hoyne, Horatio O. "Stone, J. A. Smith, Robert Harris, L. H. Smith, J. R. Doo- "little, William F. Coolbaugh, Joseph Bonfield, Henry "Greenebaum, Artemas Carter, Levi D. Boone, Fernando "Jones, J. C. Burroughs, D. B. Cheney, E. Nelson Blake, "Norman T. Gassette, H. A. Rust, J. K. Pollard, John "M. Van Osdell, O. W. Barrett, A. B. Meeker, F. E. "Hinckley."

It will be observed that Mr. Thompson identifies himself and every other member of the board who signed the paper except Geo. C. Walker (p. 98), while James R. Doolittle (p. 91*a*) identifies himself and all the other members who signed the paper. (p. 91*b*.) "I think I signed "the paper before the deed of trust was executed."

John C. Burroughs identifies the signature of J. C. Burroughs, (p. 105); Robert Harris, (p. 106); F. E. Hinckley, (p. 106); George C. Walker, (p. 106).

"Q. State in what relation these gentlemen stood to "the university during the years of 1875 and 1876, whose "names you see affixed to the document "Exhibit C?"

"A. I believe all these gentlemen were trustees of the "university in 1876."

O. W. Barrett testifies (p. 125): "I have been secretary "of the board of trustees since the 7th of February, "1876."

The execution of the deed of trust by Artemas Carter vice-president, and O. W. Barrett, secretary, is proved by O. W. Barrett; also the note for $150,000, and the ten coupon notes. The signatures are proved and they are offered in evidence. (page 144.) "Exhibit B" is also offered in evidence. (p. 146.) Also the written consent of the board of trustees is offered in evidence. (p. 146.) Also the insurance paid by Mr. Barrett. (pp. 147 and 148.)

These witnesses prove the signatures of all the signers to the consent of the trustees, that all the parties signing were trustees, and that they composed a majority of the board. In addition to this we also introduced in evidence the catalogue of the university for the year 1875–6, which includes all the names signed to this consent as being trustees during that period. This catalogue was proven to be the official catalogue of the university for that year, issued by the board of trustees, and many thousand copies were circulated throughout the country.

III.

CONSENT OF TRUSTEES NEED NOT BE OBTAINED AT A FORMAL MEETING.

This is especially true in the case at bar. The language of the charter is: "Provided, that real estate shall "not be sold without the consent of a majority of all the "trustees." It does not mention the board of trustees, nor require the action of a board meeting. No vote is

required. It is simply the assent of more than half of the trustees. No mode is pointed out how this shall be given. It may be in writing, or it may be by parol, but what more appropriate way could there be than to express it in writing, as was done in this case, and give it to the party interested in preserving the evidence.

Crowley v. *The Genessee Mining Company*, 55 Cal., 273. (Decided April, 1880.) This was an action in assumpsit for services rendered to a mining company on a contract made with the president of the company. The defense was that no authority had been given to the president to make such a contract by the board of directors, and that he had not even reported to them that such a contract had been made, but the corporation had received the benefits of the contract, and the court held that the fact of the president's authority to make the contract would be inferred from his admitted relations to the corporation. The court say:

"The common law rule that a corporation has no ca-
"pacity to act or to make a contract except under its
"common seal has been long since exploded in this country.
"Even in England it has been found to be impracticable,
"so that the class of cases which constitute exceptions to
"the rule have become so numerous that the exceptions
"have almost abrogated the rule. In the United States
"nothing more is requisite than to show the authority of
"the agent to contract. *That authority may be conferred*
"*by the corporation at a regular meeting of direc-*
"*tors, or by their separate assent, or by any other*
"*mode of their doing such acts.* 'If this were not so,'
"says Mr. Chief Justice REDFIELD, 'it would lead to very
"great injustice, for it is notorious that the transaction of
"the ordinary business of railways, banks and similar cor-

"porations in this country without any formal meetings or
"votes of the board, hence there follows a necessity of
"giving effect to the acts of such corporations according
"to the mode in which they choose to allow them to be
"transacted. If this were not done, it would become im-
"possible to dispose of such contracts, with any hope of
"reaching the truth and justice of the rights and duties
"of the several parties involved.' * * 'This is merely
"holding corporations to such rules of action as they see
"fit to adopt for their own guidance, and the transaction
"of their business.'" Citing: *Bank of Middlebury* v. *Rutland R. R. Co.*, 30 Vt., 159; *Goodwin* v. *Union Screw Co.*, 34 N. H., 378; *Boyington* v. *Wilson Sewing Mch. Co.*, 73 Ill., 534; 29 Ala., 21; 7 Cranch., 309; 8 Wheat., 338; 12 Wheaton, 648.

Twoney v. *East Warren Lumber Co.*, 43 N. H., 343, decided December, 1861. This was an action to foreclose two mortgages made by a corporation, the charter of which provided that the president and treasurer and three directors should constitute a board of directors, and that they might buy and sell real estate upon the consent of a majority of the board. The president and treasurer executed two mortgages, and it appeared on trial that the required consent of the majority was not given at a regular meeting of the board, but by the individual members separately. The court quotes *Edgerly* v. *Emerson*, 23 N. H. 555, as follows:

"And if by charter a certain number are made a
"quorum, the corporation is bound by the concurrence
"and consent of that number, at a casual meeting, without
"notice, unless notice is required by the by-laws."

The court say:

"In Vermont it is held that the directors, in the absence "of restriction in the charter or by-laws, have all the "authority of the corporation in the conduct of its ordi- "nary business, and it is not important that this authority "be exercised at a meeting of the directors, unless that is "the usual mode of doing such acts. If they adopt the "practice of giving a separate assent to the execution of "contracts by their agents, it is of the same force as if "done at a regular meeting of the board. (30 Vt., 170, "*Foote* v. *R. R. Co.*, 37 Vt., 637.) In the cases cited in this "state a doubt was expressed upon this point; but we "think it is competent evidence for a stranger, of the con- "currence of a quorum of the board of trustees, to show "their acts of assent separately."

In *Bank of Middlebury* v. *Rutland & Wash. R. R. Co.*, 30 Vt., 159, decided January, 1858, the court say:

"The case shows the expressed consent of a majority "of the board of directors. The directors, in the absence "of restrictions in the charter or by-laws, have all the "authority of the corporation itself in the conduct of its "ordinary business, and it is not important that this au- "thority be conferred at an assembly of the directors, un- "less that is the usual mode of their doing such acts. If "they adopt the practice of giving a separate assent to "the execution of contracts by their agents, it is of the "same force as if done at a regular meeting of the board. "If this were not so it would lead to very great injustice, "for it is notorious that the transaction of the ordinary "business of railways, banks and similar corporations in "this country, is without any formal meetings or votes of "the board. Hence there follows a necessity of giving "effect to the acts of such corporations according to the

"mode in which they choose to allow them to be trans- "acted. If this were not done it would become impos- "sible to dispose of such contracts, with any hope of "reaching the truth and justice of the rights and duties of "the several parties involved,and this is certainly nothing of "which the corporation can complain. It is merely hold- "ing them to such rules of action as they see fit to adopt "for their own guidance, and the transaction of their busi- "ness. The cases are numerous where the consent of a "majority of the directors, given separately, has been "held binding upon the company, and if it were not so "held it would enable the majority of the business cor- "porations of the country to escape from many contracts "which require the action of the directors for their exe- "cution, whenever they choose to do so."

Waite v. *Mining Company*, 37 Vt., 608, decided February, 1865. A treasurer was elected at a meeting of a corporation, at which one director was absent. He performed the duties of his office for two years and a half, when the corporation refused to pay for his services, on the ground that he was illegally elected.

The court say:

"It is not found that the director who was not present, "was not notified so that he might have been present, if "necessary, but we are not prepared to say that the "action of the majority was not legal, although one mem- "ber was not notified, *nor do we deem it necessary that "there should be any formal meeting of the directors, in "order to enable them to do any act which was properly "within their power to do.*"

In *Foote and Hodges* v. *R. & W. R. R. Co.*, 32 Vt., 633, decided January, 1860, the court say:

"It has been frequently settled, and needs no citation of "authorities to say that corporations are bound by the "acts of their agents and servants in their employment, "and within their ordinary line of duty, without any "formal *vote* conferring such authority; and that the "action of directors, though acting separately, if in the "usual sphere of directors, binds the company."

In *Edgerly* v. *Emerson*, 23 N. H., 555, decided December, 1851, the court say:

"It has never been supposed, as far as we are aware, "that it is necessary selectmen should have stated "meetings for the transaction of business, though that "is perhaps usually done as a matter of conven- "ience, nor that the whole must be present, or "notified, in order to enable a majority to act. "On the contrary, we conceive that the very ob- "ject of the statute, giving power to a majority of the "selectmen, or making a certain number a quorum, was "designed to obviate the strict requirement of the law "common, that all business must be done at stated meet- "ings, or that all must be notified. In managing the pru- "dential affairs of towns, and in the transactions of busi- "ness corporations, many things are required and deter- "mined to be done, and determined at times when there "could be no stated meetings, and when it might be diffi- "cult to procure the attendance, or even to notify all the "members of the board."

Goodall v. *The New England Fire Ins. Co.*, 25 N. H., 169, decided July, 1852. This was an action in assumpsit on a policy of insurance. The charter of the insurance

company provided that where a policy had been issued by the company, and the owner of the property then obtained a second policy of insurance from another company, the first policy would be void, unless he first notified the secretary of the company, and obtained the consent of the majority of the directors. The court held that this did not mean that the consent must be given by vote, but that it might be given separately, and that it need not be in writing.

IV.

THE EXECUTIVE COMMITTEE WAS FULLY EMPOWERED TO AUTHORIZE THE EXECUTION OF THE DEED OF TRUST, WITHOUT THE CONSENT OF A MAJORITY OF ALL THE TRUSTEES, OR WITHOUT ANY ACTION ON THEIR PART.

The rule is that corporations may contract by and through agents, notwithstanding their charters are silent upon the subject. This charter especially authorizes the delegation by the board of trustees of all or any portion of their powers to the executive committee. The language of the charter is: "The board may appoint of its "own number 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 com- "mittee, and delegate to it all or any portion of the "powers of the board." Mr. Barrett says he became secretary on the 7th of February, 1876, and the following was the rule then in force: "The executive com- "mittee, 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 deed of trust was made on the 8th of February, 1876.

In this case the executive committee, the board of trustees having delegated to them all its powers, negotiated the loan, and authorized the making of the note and deed of trust, and reported that fact to the next annual meeting in January, 1877, and this action was never disapproved by the board of trustees. Therefore, every step taken by the executive committee was authorized by the charter and by the rules of the corporation, without any consent of the trustees or action on their part.

The following cases show that without any such provision in the charter the action of the executive committee would bind the corporation.

Burrill v. *Nahant Bank*, 2 Met., 163, decided November, 1840. This was an action to forclose a mortgage where a board of bank directors authorized a committee of its members to "sell and transfer any real estate owned by "the bank." The court say:

"It was contended that a board of bank directors, "exercising themselves a delegated authority, had no "power to delegate an authority to any committee to "alienate or mortgage real estate, and that if the author- "ity of the committee was to convey, they had no power "to mortgage. To both parts of this objection we think "there is an answer. In the first place, we think the ex- "ception takes much too limited and strict a view of the "powers of bank directors. A board of directors of "the banks of Massachusetts, is a body recognized by

"law. By the by-laws of these corporations, and by usage "so general and uniform as to be regarded as part of the "law of the land, they have the general superintendence and "active management of all concerns of the bank, and con- "stitute, to all purposes, in dealing with others, a corpora- "tion. We think they do not exercise a delegated au- "thority in the sense in which the rule applies to agents "and attorneys, who exercise the power especially conferred "upon them, and no others. We think, therefore, that a "board of directors may delegate an authority to a com- "mittee of their number to alienate or mortgage real es- "tate; that an authority to convey necessarily implies an "authority to execute suitable and proper instruments for "that purpose, and in case of a corporation, to affix the "corporate seal to an instrument requiring it."

Hoyt v. *Thompson's Executor*, 19 N. Y., 207. (Decided June, 1859.) The management of the business of the Morris Canal and Banking Company was laid by its charter in a board of twenty-three directors. Authority was given it to establish such by-laws as might be deemed convenient or necessary for the transaction of its business. A by-law was passed providing that the "ordinary business" of the board might be transacted by a *quorum* thereof, consisting of five directors and the president, during the intervals between the meetings of the board. The company was in embarrassed circumstances, and owed the State of Michigan eight hundred thousand dollars. The president entered into negotiations with the State of Michigan for the assignment of a large amount of the assets belonging to the company, to secure this indebtedness, thus enabling the company to proceed with its business. At a meeting of the directors where there was just a *quorum* present, as provided by the by-law, the president mentioned the

fact of the negotiation, but no action was taken in relation thereto. He, however, completed the negotiation, and assigned the assets, a part of which subsequently were assigned by the State of Michigan to a citizen of New York. At a subsequent meeting of the board of directors, where only a *quorum* was present, a formal resolution was passed, confirming the assignment.

On the trial, the authority of the board of directors to pass a by-law, constituting less than a majority of the whole board as a *quorum* was denied. It was also claimed that an assignment of the assets of the association by this *quorum* of directors was not within the "ordinary business" of the corporation, and that consequently the *quorum* had exceeded the powers conferred upon them by the full board of directors.

The court held that the authority of the board of directors was not delegated authority in the sense of principal and agent. "In corporate bodies the powers of directors "are in a very important sense original and undelegated." And the board of directors have authority to delegate all the powers conferred upon them by charter to agents or committees, or a *quorum* of any number they choose to constitute, *unless it is is expressly forbidden to do so by its charter.*

The court also held that the assignment of the assets of the corporation for the purpose of enabling it to proceed with its business was within the "ordinary business" of the corporation, and that although the assignment was not authorized at the first meeting of the *quorum* of the directors, it was ratified at a subsequent meeting, and consequently bound the corporation; and also that the mere magnitude of the transactions was no ground for impeaching their validity.

The court also held that the acquiesence of a corporation in the unlawful or unauthorized acts of its agents operates as a ratification of retroactive efficacy which is equal to an original authority.

We have established, in the previous portions of this argument, that the power to contract and be contracted with, was conferred upon the corporation in question; that such powers were by the charter vested in the board of trustees; that such board had power to delegate any or all of the powers they themselves possessed to an executive committee; that the board, before the time of the loan in question, created such executive committee, fixed the number larger than was required by the charter, named the number constituting a quorum, and provided, that such committee should possess "all the powers of the "board, except when expressly instructed to the con- "trary; that their acts should be official and binding upon "the board and the corporation it represents," and that such committee "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."

We have shown that the committee thus empowered, entered into negotiations, perfected the loan in question, authorized the execution of the notes and trust deed, and reported what it had done to the next annual meeting of the trustees; and the board spread the report upon its records, and did not disapprove the action of the committee in making such loan; and according to the recollection of Mr. Burroughs, and contradicted by no one, actually approved the action of such committee.

As all powers of the corporation were vested in the trustees, and as the trustees were permitted to delegate all such powers, as they did delegate all their powers, reserving only the right of disapproval by the board, it follows that the action of the executive committee reported and not disapproved, must be binding upon the corporation. Therefore, the loan was made and was binding upon the corporation by the action of the executive committee alone.

The corporation also, by the action of the trustees, gave its consent to tne loan, and its approval and consent to the execution of the notes and trust deed, and their acts are binding upon the corporation, independent of the action of the executive committee. It has also ratified the loan by receiving the money, using and disbursing it, by payments made upon the loan, and the Union Mutual Life Insurance Company are entitled to repayment of the amount, because they have in good faith paid it to the university.

V.

IT IS, THEREFORE, INEQUITABLE AND TOO LATE NOW FOR THE UNIVERSITY TO PLEAD THAT THE TRUST DEED WAS IRREGULAR OR ULTRA VIRES THE POWER OF THE CORPORATION.

In *Bradley* v. *Ballard*, 55 Ill., 414, decided September, 1870, the facts were, in brief, as follows: A corporation was organized in Chicago for the purpose of carrying on a mining business in the city of Chicago and county of Cook. The corporation borrowed large sums of money, giving its notes, which was used in mining operations in Colorado, and the persons lending the money knew that

it was to be so used, and that the corporation was exceeding the expressed purposes of its organization. Suit was brought on the notes, and a bill in chancery was filed to enjoin their collection at law, on the ground that the corporation had no power to engage in mining operations in Colorado.

LAWRENCE, C. J., in deciding the case, said:

"It is said by counsel for complainant, that a corpora-
"tion 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 pow-
"ers might be indefinitely enlarged. While the contract
"remains unexecuted on both sides, this is undoubtedly
"true, but when under cover of this principle a corpora-
"tion seeks to evade the payment of borrowed money, on
"the ground that although it had power to borrow money
"it expended the money borrowed in prosecuting a busi-
"ness 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 application 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 insuperable