

"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 performance of an act *ultra vires* has been accomplished. But while a contract remains executory, it is perfectly true that the powers of the corporation cannot be extended beyond their proper limits, for the purpose of enforcing a contract. Not only so, but upon the application of a stockholder, or of any other person authorized to make the application, a court of chancery would interfere and forbid the execution of a contract *ultra vires*. So, too, if a contract, *ultra vires*, is made between a corporation and another person, and, while it is yet wholly unexecuted, the corporation recedes, the other contracting party would probably have no claim for damages. But if such other party proceed in the performance of the contract, expending his money and his labor in the production of values which the corporation appropriates, we can never hold the corporation excused from payment, on the plea that the contract was beyond its power. * *

"We are aware that cases may be cited in apparent conflict with the principles here announced, but the tendency of recent decisions is in harmony with them. While courts are inclined to maintain with vigor the limitations of corporate action, whenever it is a question of restraining the corporation in advance from passing beyond the boundaries of their charters, they are equally inclined on the other hand, to enforce against them contracts, though *ultra vires*, of which they

"have received the benefit. This is demanded by the plainest principles of justice."

Citing: 2 Kent, 11 Ed. 381, note.

Zabriskie v. C. C. C. R. R. Co., 23 How., U. S., 381.

Bissell v. M. S. & N. I. R. R. Co., 22 N. Y., 258.

Cary v. Cleveland & Toledo R. R. Co., 29 Barb., 35.

Parish v. Wheeler, 22 N. Y., 494.

Groff v. Amer. Lin. Th. Co., 21 N. Y., 124.

Argenti v. San Francisco, 16 Cal., 255.

McCluer v. Manchester & L. R. R. Co., 13 Gray, 124.

Chapman v. M. R. & L. R. R. Co., 6 Ohio, 137.

Hall v. Mut. Fire Ins. Co., 32 N. H., 297.
R. R. Co. v. Howard, 7 Wall., 413.

In *Peterson v. Mayor and Common Council of New York*, 17 N. Y., 449, decided June, 1858, an architect was employed by a member of one of the committees of the common council of New York city, to draw plans and specifications for rebuilding Washington market. The committee finally reported the plans to the common council, and they awarded the contract in accordance with them. The market, however, was not rebuilt, and the architect brought suit. The city replied that a member of a committee, and even the committee itself, had no authority to make the contract, but the court held that though this was true, there was subsequent ratifica-

tion that bound the city. The court use the following language:

"Assuming, then, that these services might have been lawfully performed, at the expense of the city, by a person employed by a resolution of the common council, and that they have in fact been performed by the plaintiff under an officious employment by a committee of one of the boards, the question is whether the adoption of the plans, and using them to the extent which has been shown, binds the city to pay for them. As regards individuals, the principle is familiar that if one, with the full knowledge of the facts, ratifies the doings of another, who has assumed to act in his name or behalf, he will be bound thereby as fully as if he had originally conferred authority upon him in the premises. This ratification may be by the express assent or by acts or conduct of the principal, inconsistent with any other supposition than that he intended to adopt and own the acts done in his name."

"I am of opinion that the principle is as applicable to corporations as to individuals," Chancellor KENT says, "and the doctrine that corporations can be bound by implied contracts to be deduced by inference from corporate acts without either a vote or deed or writing, is generally established in this country with great clearness and solidity of argument."

Citing:

Bank of U. S. v. Dandridge, 12 Wheat., 74.

Perkins v. The Washington Ins. Co., 4 Cow., 645.

Randall v. Van Vechten, 19 John., 60.

In *City of Memphis v. T. E. Brown*, 1 Flippin, 194, decided March, 1872, a city, upon common law principles, irrespective of special clauses in its charter, was held bound by all "acts through such agents as it has accredited by ordinance, or where the charter does not forbid, by all such as it has held out to the public as competent, and whom it has suffered to perform them."

In this case suit was brought to recover pay by contractors for street paving against the city itself, where the charter provided that it should be recovered by special assessments against the property owners. The court held that under the special circumstances of the case the city had made such a contract as bound itself, and say:

"Deeming every one of them to refer to powers which the city had in some form and in some mode full right to exercise, and being referred to no express statutory prohibition forbidding the performance in the manner which is shown to be usual in its administration, and this whole class of duties, we consider them all answered by the familiar doctrine that corporations, like individuals, are bound by acts of those whom they have suffered to act as their agents, and by such modes of action, with or without vote, as they have by common usage sanctioned as proper. We repeat, after carefully reconsidering, the doctrines in this regard contained in *Ray v. Nashville*, in the Middle District of Tennessee, 1871." "We had in that case the benefit of a most careful and learned argument. The securities of the city had been, in violation of its ordinances, put upon the market much below their par value. The court, after explaining to the jury the distinction between acts and contracts which were not authorized at all by the charter, and those

"which were so authorized but required the performance of official acts in order to render them regular, said that the latter, even though made and performed without the formalities demanded by the statute, bound the corporation as to all parties not having actual notice of the irregularity. That this principle was applicable alike to negotiable securities, to municipal as well as to private corporations."

In *Zabriskie v. R. R. Co.*, 23 Howard 381, decided December, 1859, 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 superinduced."

The exact language is quoted in the following cases:

City of Memphis v. Brown, 1 Flippin, 99.

Bissell v. City of Jeffersonville, 24 How., 300.

Rogers v. Burlington, 3 Wall., 668.

In *Allegheny City v. McClurken & Co.*, 14 Penn. St., 81, decided September 1850, the court say: "The charter or act of assembly incorporating the city of Allegheny was not produced or read on the argument, but I take it for granted that it contains no express authority to the corporation to issue such notes as those embraced in this action, but it does not follow that the corporators are therefore not answerable for them in their corporate capacity. They have received value for them in the various public works and improve-

ments made and erected in the city, through their instrumentality, and it hardly comports with fair dealing that they should seek to exonerate themselves from a debt on this account constructed by and through their accredited agents, and with their silent acquiescence. It is no universally true that a corporation cannot bind the corporators beyond what is expressly authorized in the charter. There is power to contract undoubtedly, and if a series of contracts have been openly and palpably within the knowledge of the corporators, the public have a right to presume that they are within the scope of the authority granted. A bank which has long been in the habit of doing business of a particular description would not be exonerated from liability, because such business was not expressly authorized in its charter."

"The object of all law is to promote justice and honest dealing, when that can be done without violating principle. I cannot perceive that any principle is violated by holding a corporation liable for contracts of its accredited agents, even not expressly authorized, when these contracts for a series of times were entered into publicly, and in such manner as by necessary and irresistible implication to be within the knowledge of the corporators. It was the acquiescence of the corporators and the habit and custom of business of the corporation which induced the public to give credit to the scrip or notes, which was evidence of contract; but when to this circumstance we add that the corporators themselves received the value of these notes or contracts in the erection of improvements in the city and enjoyed, and still enjoy the value of them, the conclusion is irresistible that the corporators ought to pay them by the assessment of taxes on the corporators, if

"it has no other available means. The debt is due by
 "positive engagement. It is due *ex æquo et bono*—in the
 "forum of conscience and the forum of law. One rule of
 "law is often met and counter checked by another of equal
 "force, so that although the corporators are, in general,
 "protected from unauthorized acts of their agents, yet at
 "the same time a rule of equal force requires that they
 "should not deceive the public, or lead them to trust and
 "confide in unauthorized acts of their agents. If they
 "receive the avails and value of those acts, it is implicit evi-
 "dence that they consented to and authorized them. They
 "adopt the act, and are responsible to those who, on the
 "faith of such acquiescence and approbation, trusted their
 "agents. * * * Although the issuing of the notes
 "may not be authorized, yet the corporation is bound,
 "having received value and deluded the public into a
 "belief that they were good and valid."

In *Society for Savings v. City of New London*, 29 Conn.,
 174, decided September, 1860, bonds had been issued by
 the city of New London to aid in the completion of a
 railroad. Interest had been paid for a number of years,
 when the city relying on some non-compliance with the
 requirements of the statute, authorizing the issue of the
 bonds, refused payment. Suit was thereupon brought to
 compel the payment of interest.

The court say:

"If all this was without authority, why, we ask, did not
 "the citizens then make their objections? Why did they
 "not enjoin the city agents from further proceedings?
 "At least, why did they not give notice to the public and put
 "the purchasers on their guard, when they knew that a

"grievous loss must ensue if the bonds were unauthorized?
 "We must believe that after such acquiescence it would be
 "an outrage upon morality and justice, and an impeachment
 "of the integrity of the citizens of New London to allow the
 "city to repudiate its obligations for such a cause. Many
 "of the citizens, we well know, disapprove of and con-
 "demn such a repudiation, and we trust all of them
 "would do so were it a simple transaction between man
 "and man, where the culpability could not be thrown off
 "upon a municipal corporation. But it is this very cir-
 "cumstance which enhances the impropriety of the act of
 "repudiation, for the integrity of a public body is its prin-
 "cipal virtue. To violate or impair this is to undermine
 "government itself, and to destroy the very institutions of
 "the civil state. Such repudiation cannot receive the
 "countenance of this court of justice. Hitherto repudia-
 "tion has not anywhere been countenanced among us, and
 "we trust it would not have received favor in this
 "instance with any of the citizens of New London, had
 "they carefully considered the consequences of the act,
 "and the precedent they were establishing for other less
 "favored communities. * * *"

Citing:

The State v. Van Horne, 7 Ohio St. Rep.,
 327.

Knox County Comrs. v. Aspinwall, 21
 How., 539.

Tash v. Adams, 10 Cush., 252.

Graham v. Maddox, 6 Amer. Law Reg-
 ister, 595-618.

Gould v. Town of Venice, 29 Barb., 442.

1 Jones on Mortgages, section 130, says:

"Although not bound by the act of an agent in giving a mortgage, the principal may ratify it by taking the benefit of it, or may otherwise so act with reference to the exercise of the power as to preclude himself from attempting to invalidate the security." Citing, *Perry v. Hall*, 2 Gif., 138.

In *Rogers v. Burlington*, 3 Wall., 654 (decided December, 1865), the city of Burlington was authorized by its charter to borrow money for any public purpose, whenever, in the opinion of the city council, it should be deemed expedient to exercise that power. It lent its bonds to the amount of \$75,000 to aid in the construction of a railroad, and took a mortgage on a section of the road as security. It subsequently sought to evade payment of the bonds on numerous grounds, one of which was that the contract was one of lending and not of borrowing money, as provided in the charter.

The court say:

"A perfect acquiescence in the action of the officers of the city seems to have been manifested by the defendants until the demand was made for the payment of the interest. They never attempted to enjoin the proceedings, but suffered the bonds to be issued and delivered to the company, and when that was done it was too late to object that the power conferred in the charter had not been properly executed.

In *Tash et al. v. Adams*, 10 Cush., 252, decided October, 1852, the town of Natick made an appropriation of \$50,000 to celebrate the second centennial anniversary of the settlement of the town. Some of the citizens subse-

quently applied for an injunction to restrain the treasurer from paying the contractors who had done the work by virtue of the appropriation. The court concede that the appropriation was entirely void, and could have been set aside before any liabilities had been incurred by the town in consequence of it, but use the following language in regard to the citizens applying for the injunction:

"With a full knowledge of the vote of the town, and the proceedings of the committee, they permitted contracts to be made, and expenditures to be incurred, not only by the committee, but by third parties who acted in good faith, relying on the credit of the town. They took no measures to enforce their rights until after the celebration had taken place, and innocent parties had come under liabilities which they would not have assumed if the petitioners had seasonably sought redress for the impending grievances. To issue an injunction restraining the payment by the town of the bills thus incurred, would be manifestly most inequitable."

In *State ex rel. Garrett v. Van Horn*, 7 Ohio St., 327, decided December, 1857, a town had subscribed for the capital stock of a railroad company in payment of bonds of the railway company, under a provision of its charter which required as a pre-requisite that a vote should be taken by the legal voters of the township, "and also that no such subscription could be made until after the road was actually completed through the town."

The court say:

"We are of the opinion that, conceding the location would have been necessary before an election, the acts of the parties interested have been such as to preclude them from now denying the authority and power of

"the trustees of the township to issue the township bonds."

"If the location of the road should have been first made, any tax-payer, for himself and all others interested, could at any time before the issuing or negotiation of the bonds have intervened and enjoined their issue as unauthorized on account of the road not being located. They, however, either intentionally or from neglect to assert their legal rights, and without protest or interference, suffered the election to take place, and their public agents, the trustees, to subscribe for stock, to issue the bonds and receive the proceeds. They, also, afterwards, and for a period of three or four years, paid the interest by taxation, and thus gave credit to the bonds of the township, and they now desire to retain the money of the original bondholders, refuse to pay the interest, deny their obligations to pay back the principal, disaffirm the acts of their public agents, who, under the forms of law, and by their direct instigation, through the ballot box, issued and negotiated these bonds. They had an opportunity, before innocent third persons could be injured, or committed to the acts of their public agents, to enjoin their proceedings and protect themselves. They did not seek that protection, and now, when they have received all the fruits of the contracts of their agents from third parties who have acted upon their recognition of the authority of their agents, they ask the privilege of denying this recognition, and thus escape from their obligations. It is too late for them to do so."

Graham et al. v. Muddox et al., 6 Amer. Law Register, 589, decided April, 1858. This was an application for a mandamus on the part of the plaintiffs holding certain

bonds of the city of Maysville, Ky., issued in part for its subscription to the capital stock of the M. & L. R. R. Co., to compel the city council to levy and collect a tax to pay the installments of interest due and in arrears upon said bonds. The defense was a non-compliance with the statute authorizing the issuing of the bonds. The court say:

"There is a well recognized difference in law between an individual and a corporation. * * * 'A city is a corporation.' * * * But while these definitions are well defined in law, and are acknowledged by the court, the inquiry arises, can a corporation claim immunity from the ordinary rules of right and justice, which constitute the basis of law, and which its provisions are intended to establish and promote? Are the provisions of the statute organizing it intended or so arranged as that they can be used as means by which it may impose upon the rights of others? Can it do an act to-day imposing an obligation upon itself for substantial benefits conferred, and repudiate the obligation to-morrow, after the receipt of the consideration, because it has not acted in literal, though in substantial, compliance with the law? Is there any such mysterious and potent significance in the relations between an incorporated city and its constituent members or citizens, that it can act for them, in their name, and under their unanimous instruction, in incurring a debt as a consideration for great and important rights received; and then, after the consideration is obtained, fall back on the legal principles that the city and its citizens are distinct, and throw off the burden in their name and by their authority upon some technical, formal, ministerial objection, or because it is regarded as inconvenient and onerous."

1 Jones on Mortgages (3d Ed.), Sec. 127, says:

"The directors of a corporation, without authority, either expressly or impliedly derived from the stockholders, have no right to execute a mortgage, or to authorize any one to do so; but even if the directors exceed 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 mortgages 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. A corporation ratifies a mortgage made by its directors, by issuing bonds under it and by paying interest on them. The ratification may be through any acts which show that the corporation accepts the acts of its officers or agents, such as receiving and using the proceeds of such mortgage."

Citing:

Hotel Company v. Wade, 97 U. S., 13.
Aurora Agr. & Hort. S'y. v. Paddock, 80 Ill., 263.
Otto Nor. Plank Road Co. v. Murray, 15 Ill., 336.
Bradley v. Ballard, 55 Ill., 413.
McCurdy's Appeal, 65 Pa. St., 290.
Holbrook v. Chamberlain, 116 Mass., 155.
Cook v. Watson, 30 N. J. Eq., 345.

Angell & Ames on Corporations, 9th Ed., 240, note a, says:

"The courts of New York have gone very far in enforcing contracts made by corporations, although they are not justified by their charters, and the law in that state now appears to be that such a contract which is purely executory on both sides, and where no wrong will be done if the parties are left in their previous situation, should not be enforced, but that the executed dealings of corporations must be allowed to stand for and against both parties, when the plainest rules of good faith so require."

Citing:

Parish v. Wheeler, 22 N. Y., 494.
Bissell v. Mich. Cent. R. R. Co., 22 N. Y., 258.
DeGross v. Amer. L. Thread Co., 21 N. Y., 124.

The above doctrine is followed in

State Board of Agriculture v. Citizens R. Co., 47 Ind., 407, decided November, 1874.

The court quotes Sedgwick Stat. & Const. Law, 73, 2d Ed., as follows:

"It must be further borne in mind that the invalidity of contracts made in violation of statutes, is subject to the equitable exception that, although a corporation in making a contract acts in disagreement with its charter, where it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a party

"who has had the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract, the fruits of which he retains."

VI.

REAL ESTATE HELD UPON TRUSTS FOR CHARITABLE USES
MAY BE ALIENATED.

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 intention 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 trustee. The definition of a trust for charitable uses given by Lord Camden, and 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 the poor as well as the rich." Mr. Binney, in the Girard will case, defines it as "whatever is given for love of God, or for the love of your neighbor." Chief Justice Grey 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 concedes 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 all held to be alienable by the trustees and by the courts under proper circumstances. And not only is the property changeable, but the charity to be benefited may be changed also, 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 and proper administration of the trust, even though alienation was prohibited in the deed. 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.

The master of the rolls in *Attorney General v. Warren*, 2 Swanst., 306, very truly states the doctrine. This was an information to set aside a lease for 980 years, of lands held in trust for charitable uses. The master of the rolls says: "The principle that governs all the cases is this: that trustees are bound to a provident administration of the fund for the benefit of the charity. There is no positive law which says that in no instance shall there be an absolute alienation."

"So in *Attorney General v. Hungerford*, 8th Bligh, 437, which was an information by the attorney general to set aside a perpetual lease of lands, held in trust for educa-

tional purposes, Chancellor BROUGHAM, for the House of
 "Lords, says (P. 457): 'Each case must depend on its
 "peculiar circumstances.' I could put a case where
 "even an alienation might be fit, not merely justifiable,
 "not only harmless as regards a trustee, not merely es-
 "caping a charge of breach, or abuse of trust, but that it
 "might be a fit course for trustees to adopt. I can well
 "conceive a case where they would not do their duty to
 "the charity, if they did not alienate a part of the land.
 " * * * The charity are bound to do what a prudent
 "and provident landlord, with his own estate would do,
 "and I think a prudent and provident landlord, acting at
 "the time in question, would have granted this lease. 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. Al-
 "though the event has proved that it would have been
 "more prudent not to have granted such lease, we are not
 "to judge the transaction by the state of things now, but
 "as they were at the time. * * * Events
 "have happened to alter the value of the land; but
 "who was to know that they would happen? Con-
 "sequences 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 *Attorney General v. South Sea Company*, 4th
 Beav., 453, in which property held for charitable uses
 was leased for 999 years, the court say: "The object of
 "this information is to set aside a lease granted by trus-
 "tees of a charity to the South Sea Company. * *
 "It is the duty of the trustees of a charity so to man-
 "age and dispose of the property entrusted to them as

"may best promote and maintain the charitable purposes
 "of the founder. 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. The law has not
 "forbidden the alienation, and this court upon various
 "occasions, with a view to promote the interest of chari-
 "ties, has not thought it necessary to preserve the prop-
 "erty in specie, but has sanctioned alienation. That
 "which the court might have done upon its own con-
 "sideration of what might have been beneficial to the
 "charity, might have been done by the trustees upon their
 "own authority in the exercise of their legal powers; and
 "however imprudent it may have been in the trustees to
 "take so great a risk upon themselves, and in other per-
 "sons to contract with them, and take conveyances from
 "them, under such circumstances; yet, if upon consider-
 "ation 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 trans-
 "action."

So in *Attorney General v. Mayor of Newark*, 1 Hare,
 395, the court say (p. 400):

"It was established in the argument that the court had
 "clearly power to direct a sale of the land of the charity.

"I do not doubt the existence of the power in the court.
 "The trustees have the power to sell at law. They can
 "convey the legal estate, and it is only a court of equity
 "that can regulate the property, and if that court should
 "sanction a sale it would be bound to protect the pur-
 "chaser."

The same rule has been held in America in cases where the trust is held for charitable uses, under a conveyance containing a restriction against alienation. In *Brown v. Meeting Street Baptist Church Society*, 9 R. I., 177, the purposes of the trust were defined in a 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 for the said people of color forever."

The court, in affirming the right of alienation in this case, say:

"The correct doctrine is, we presume, that the trustees have the power when the interest of the charity "manifestly requires, to alienate the charity estate, and "that the court is called upon to sanction the alienation, "not because without such sanction the alienation may "not be valid, but because without such sanction it is "open to impeachment, and also, perhaps, that the trustees may have the benefit of the advice which the court, "enlightened by its inquiries, can so properly afford."
 * * * "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 principal, and the use of 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."

See also the following cases, in which the doctrine, as above discussed is affirmed:

Griffitts v. Cope, 17 Pa. St., 96.

Attorney General v. Green, 6 Ves., 452.

Lydiatt v. Foach, 2 Vern., 410.

Attorney General v. Owen, 10 Ves., 555.

Attorney General v. Brooke, 18 Ves., 319.

Tudor's Law of Charitable Trusts, 297.

Attorney General v. Archbishop of York,
 17 Beav., 495.

In the case of *Jackson v. Philips*, 14 Allen, 591, one of the trusts in the will was for "the preparation and circulation of books and newspapers, the delivery of speeches, lectures, and such other means as in their (the trustees') judgment will create a 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 his 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, *cy pres*, 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.

Our inquiry should, therefore, not be 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 had power to make it, and to bind the university.

VII.

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?

Dr. Burroughs, by his first contract with Judge Douglas, was to do certain things, and upon their performance within the time named, Judge Douglas was to make the deed. Dr. Burroughs not complying, Judge Douglas was released, and he thereupon made, as lawfully he might, the restriction and limitation of November 10, 1856. On August 31, 1858, he made to the board of trustees of the University of Chicago a deed in fee simple, absolutely without limitation or restriction.

The first question, (conceding for the sake of argument, that Boone was agent of the company and a member of the board of trustees, and that knowledge in Boone of this unrecorded limitation was *ipso facto* knowledge in the company) is, whether the limitation and restriction is to be considered as carried forward and as constituting a part of the absolute deed, without, in fact, being so carried forward or actually being made a part of the deed. The limitation is as follows:

"This extension is granted on 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 be sold or alienated, or used for any other purpose."

Upon principle, it is difficult to discern any satisfactory reason why a condition inserted in a prior instrument, affecting title to realty, of less dignity than a grant, should be annexed to and construed as an integral part of an absolute grant, when such grant is subsequently executed without the condition. 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 the 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 were 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 10 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 beneficial 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.

Nor can the university be heard to complain of this construction of the grant, since it is a construction wholly in its favor, and by virtue of which it received a larger estate than that to which it was entitled. Having covenanted to convey a limited fee, restricted to certain uses, Douglas voluntarily enlarged the grant by conveying an absolute fee simple, unrestricted either as to uses, or as to the right of alienation. The act itself is the highest

and best evidence of his intent, and through that act alone the university acquired title.

Again, the agreement of April 2, 1856, is a contract between Judge Douglas and Mr. Burroughs, by which the former agrees to donate the land upon the condition that Mr. Burroughs should procure the organization of a board of trustees; that the contract should be assigned to such board; that the board should procure the plan of a suitable building to be erected on the premises at a cost of not less than \$100,000, which sum should be expended within the time prescribed; and upon the completion of the building Judge Douglas agreed to execute a deed in fee simple to the board for the purposes of a university. This organization was to be under the statutes of 1845, then authorizing such organization.

In July following, the trustees organized under the law of 1845 and accepted this trust. On November 10, 1856, Douglas made the extension of time above set forth. The evidence shows no acceptance of the extension by the old board of trustees, and at that time no charter like that under which the university has since been acting had been granted. The board was to do certain things in a certain time, as conditions precedent, and they being done within the time prescribed, Douglas agreed to make the conveyance. In this state of things the old board lapsed, and the first contract made with Mr. Burroughs, and the extension of time lapsed also. That is, the first contract with Burroughs was never executed, the contract giving the extension of time was never executed, and the board referred to lapsed out of existence. On January 30, 1857, the same persons composing the old board became, by the act of the legislature a body

corporate, and possessed of certain powers in reference to the university. On the 30th of August, 1858, a year and seven months after this new board was organized, Douglas made to it a deed of conveyance without limitation of the land in question.

To ascertain what powers these trustees have in reference to this land we have to consider the powers derived from Douglas' deed, and the powers derived from the legislature in reference to any lands that might be deeded to them. The provisions of the two instruments, to wit: the charter and the deed, are to be considered together as though one instrument. The deed grants, bargains and sells the land in question, together with "all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever of the said party of the first part, either in law or in equity," and then follows the usual clause guaranteeing that Judge Douglas has a good title to the land, and the same is free and clear of all incumbrances, and conveyed by this deed to the peaceable possession of the party of the second part. The party of the second part in this instance was a creature of the law, and by that law clothed with the following powers: It had "power to sue and be sued; to contract and be contracted with; * * * and to buy and sell, and take and hold real and personal property."

In reference to the university itself, this board possessed most ample power.

"The board is charged with the superintendence and

"government of the university, with power to create different departments in addition to the usual collegiate departments, 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 prescribe the duties and fix the salaries of each; * * * 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 or all property belonging to the university in such manner as they may deem most conducive to its interest. Provided, that real estate shall not be sold without the consent of a majority of the trustees."

Considering the clauses in the deed and the clauses in the charter as contained in one instrument, let us see what we have. The trustees take from Judge Douglas all he possessed in reference to the land, and he imposes no restrictions. The party to whom he thus deeds may "sue and be sued;" may "contract and be contracted with;" may "buy and sell" land, and may "use, sell, lease or otherwise dispose of all property, etc., belonging to the university in such manner as they may deem most conducive to its interest. Provided that real estate shall not be sold without the consent of a majority of the trustees."

How could the powers of the board from these two sources be larger, and how could they have more powers than the right to sell, use, lease or otherwise dispose of real estate, and how could they have these powers, and at the

same time be limited to the rights of non-alienation as provided in the limitation of November 10, 1856? If that clause is carried forward without being carried forward, then Douglas has parted with all his rights, without limitation, and the board at the same time have power to sell and do not have power to sell, and have power to lease and do not have power to lease, and have power to dispose of in any way they may think best, and do not have power to dispose of at all. The two things are inconsistent, and cannot exist in the same party, and at the same time.

And why is this clause of November 10th said to be carried forward, without being carried forward? Why does it not stand like other similar instruments under similar circumstances? Suppose on August 31, 1858, Judge Douglas had granted a 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 law to do anything with the land it thought best, and after the lease had expired, it had made to the complainant the deed of trust in question, what would have been the real condition? Could Douglas or his heirs revoke the license, and take the property from under the lease, the deed and the deed of trust? 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 a 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. Therefore, in this case the corporation may do anything with the property it may see fit. This is true of all instruments where one of greater dignity follows one of less dignity. Suppose two men, one in Chicago and the other in New York, agree by correspondence to form a co-partnership, with the time limited to five years. They come together and enter into articles providing the partnership may be terminated at will. Can the letters be invoked to show the original intention, and 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. If a party contract 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.

Nor are we without authority in this state on this subject. In *St. Louis, Jacksonville and Chicago Railroad Company v. Mathers*, 71 Ill., 592, Mathers and others conveyed certain lands to trustees, as recited in the deed, in consideration of the benefits to be derived by the grantors from the construction of a railroad, and in trust, first, to secure the payment of the bonds of the railroad company; and, second, for the erection or improvement of station houses for the company. By a resolution of the company adopted a month prior to the execution of the deed, it was recited that certain persons proposed donating lands in aid of the completion of the road, but were not willing to make such donations unless the directors would agree that no depot should be established on the line of the road within less than three miles of certain towns named. It was therefore resolved "that this company will accept such donations upon the express condition that, provided such donations be made, no depot or station shall be established within three miles of either of said towns." Mathers filed his bill setting up these facts, and alleging that the sole consideration for the execution of the deed by himself and his co-grantors was the agreement in the resolution above set forth; that such agreement had been violated by the location of a depot within three miles of one of the towns, and praying a reconveyance of the premises. The court below decreed that the land be reconveyed, but the decree was reversed upon appeal. Mr. Justice SCHOLFIELD, delivering the opinion of the court, says, p. 566:

"The deed for the property which is the subject of

"this litigation professes upon its face to have been
 "executed in consideration of the benefits to be derived
 "by the grantors from the construction of the Tonica and
 "Petersburg Railroad, and of one dollar. It purports to
 "invest the trustees therein named and their successors
 "with the fee simple title to the property, which is to be
 "sold and conveyed by them, 'at either public or private
 "sale, in such parcels, at such times, and upon such
 "terms as to them shall seem meet.'

"It will be observed that there is nothing in the
 "language of the deed, nor in any wise connected with
 "the title of record, whereby a *bona fide* purchaser from
 "the trustees 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 facts entirely inde-
 "pendent of the deed. Under these circumstances, the
 "burden was upon appellee to show such facts as render
 "it inequitable for the title to remain where it was vested
 "by the operation of the deed, and, until this was done,
 "the appellant was justified in relying alone upon the
 "deed."

In *Adams v. The County of Logan*, 11 Ill., 336, the
 plaintiffs had proposed, but whether in writing or by
 parol does not appear, to donate certain lands to the
 county to erect a building thereon for use as a court-
 house and other county purposes, upon condition that the
 county seat should be located at Postville. The com-
 missioners for that purpose made the location temporarily
 at Postville, and the grantees erected a building as pro-
 posed. A subsequent act of the legislature authorized
 the permanent location of the county seat at Postville,
 on condition that the proprietors of the town should

donate \$3,000 therefor. The proprietors then proposed
 that they be allowed the amount already paid for building
 the court-house, and for the lots previously given to the
 county, the sum of \$3,000, in addition to which they
 offered to give three additional lots. Other conditions
 were inserted which have no bearing upon this case.
 This proposition was accepted by the county com-
 missioners by an order entered upon their records. Upon
 the same day deeds were executed by the proprietors,
 the plaintiffs in the action, of the lands given to the
 county with the court-house, but these conveyances con-
 tained no conditions or reservations different from ordinary
 deeds in fee simple. Under a subsequent act of the legis-
 lature the county seat was removed to another town.
 The county afterwards sold the lots and the court-house,
 and the plaintiffs brought an action to recover the amounts
 received by the county upon the sale of the lots.

The Supreme court say, page 339:

"We are of opinion that this action cannot be main-
 "tained. * * * When the money was paid, and the
 "land conveyed, the donees knew that the county seat
 "might, when the good of the community 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 agreement or reservation
 "to that effect, in the deed. So far from that, they made
 "an absolute conveyance without any reservation what-
 "ever. Even had an express agreement been made at
 "the time of the conveyance, that the lands should re-
 "vert, in the case of the removal of the county seat, it
 "could not be proved by parol, but should have been ex-
 "pressed on the face of the deed, or at least in a separate

"writing. But here we are asked, in the absence of a
 "a parol agreement, to infer one from the circumstances
 "of the case. Had the deed upon its face contained a
 "reservation, or had any specific purpose for which the
 "land was conveyed been declared, from which a reserva-
 "tion might be implied, then we should have something
 "upon which we could act, and we might, possibly, so far
 "disregard the literal expressions of the conveyance as to
 "give effect to the spirit and the intent of the transac-
 "tion."

This case was followed and approved in *Harris v. Shaw*, 13 Ill., 456, where a somewhat similar question was involved, although the facts of the latter case render it less analogous to the point under discussion than the cases above cited.

But upon established principles of evidence, it is plain that the courts will not permit the absolute conveyance by Douglas to the university to be construed in the light of his previous agreement of November 10, 1856, as indicating his intention that the property should be inalienable. Such a construction would be a departure from the elementary rule which rejects all external evidence in determining the intention of the parties to a plain and unambiguous instrument. It is true that external evidence, either parol or in writing, is admissible to explain ambiguity, to show the real consideration of a contract, and to make plain matters which are not plain by the instrument, such as descriptions, persons, places and amounts; but such evidence is never admissible to construe and interpret a plain and unambiguous contract. The deed by Douglas to the university is a plain and unmistakable instrument, couched in language which has been employed in conveyances for hundreds of

years, the meaning of every covenant and line of which has been settled by repeated adjudications of the courts for centuries. There is no room for construction, for explanation, for interpretation, or for evidence of intention. The question is not what Douglas may have intended years before the conveyance, or years afterwards, but what was his intention then.

"It is also to be kept in mind, that though the first
 "question in all cases of contract is one of interpretation
 "and intention, yet the question, as we have already re-
 "marked, is not what the parties may have secretly and
 "in fact intended, but what meaning did they intend to
 "convey by the words then employed in the written in-
 "strument."

1 Greenleaf's Evidence, Sec. 282.

It is true that it is competent to examine all contemporaneous writings to determine the intention of the contracting parties, but the rule is limited to contemporaneous instruments, and does not permit the introduction of documents written years before, and of less solemnity and dignity than the absolute grant which is to be construed.

"It is in the first place to be observed," says Greenleaf, "that the rule does not restrict the court to the perusal
 "of a single instrument or paper; for while the contro-
 "versy is between the original parties, or their represen-
 "tatives, all their *contemporaneous writings* relating to the
 "same subject matter are admissible in evidence."

The italics are the author's, and sufficiently indicate that the writing must be contemporaneous to be admissible.

In 2 Parsons on Contracts, 547, the doctrine is stated in these words:

"It is very common for parties to offer evidence external to the contract, in aid of the interpretation of its language. The general rule is that such evidence cannot be admitted to contradict or vary the terms of a valid written instrument; or, as the rule is expressed by writers on Scotch law, 'writings can not be cut down or taken away by testimony of witnesses.' There are many reasons for this rule. One is the general preference of the law for written evidence over unwritten; or, in other words, for the more definite and certain evidence over that which is less so—a preference which not only makes written evidence better than unwritten, but classifies that which is written. For if a negotiation can be conducted in writing, and even if there be a distinct proposition in a letter, and a distinct assent, making the contract; and the parties then reduce this contract to writing, and both execute the instrument, this instrument controls the letters, and they will not be permitted to vary the force and effect of the instrument, although they may sometimes be of use in explaining its terms." * * *

"The declaration of the parties as to what their meaning was is never admissible to control the meaning of the words they have used in their contract. And this exception extends not only to their declarations made at and before the making of the contract, but to any declaration of that kind made afterwards."

Dunbar v. Stickler, 45 Iowa, 384, was an action to set aside a deed containing an express condition. Plaintiff endeavored 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, page 386:

"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. To engraft upon a condition expressed in a deed another by parol, would be to vary by parol the legal effect of the deed."

And in *Vandervoort v. Smith*, 2 Caines, 155, it is said:

"Where an agreement is reduced to writing, all previous treaties are resolved into that."

So in *Vermont Central Railroad Company v. Estate of Hills*, 23 Vt., 681, the court say:

"It is very obvious that parol evidence of conversations between the parties previous to the execution of the deed, cannot, in a court of law, be allowed to control the deed. The party must be content to abide by the deed as he has given it."

It is true, that the claim of the university is not to introduce parol evidence of the intention of the grantor prior to his deed, but written testimony of such intention. Nevertheless, the principle excluding parol testimony to vary a written instrument, is believed to be equally applicable; especially where, as here, it is sought to defeat the operation of an instrument of the highest dignity and formality known to the law, by a memorandum signed by the grantor nearly two years before. We have searched the books in vain for any authority which would warrant

the introduction of such testimony or such construction to vary an absolute conveyance, or to diminish the estate thereby conveyed; and it is believed that neither principle nor authority can be found to justify such a proposition.

VIII.

JUDGE DOUGLAS MADE HIS DEED OF AUGUST 31, 1858, ABSOLUTE AND UNCONDITIONAL FOR THE VERY PURPOSE OF ENABLING THESE TRUSTEES TO MAKE A LOAN. THE TRUSTEES HAVE REPEATEDLY RATIFIED AND RENEWED THE LOAN, THE BOARD OF REGENTS HAVE ACQUIESCED IN IT, AND THE LOAN WAS MADE AND HAS BEEN RENEWED UNDER SUCH CIRCUMSTANCES OF NECESSITY THAT A COURT OF EQUITY WOULD APPROVE IT, EVEN IF THE PROHIBITION IN REFERENCE TO ALIENATION HAD BEEN INSERTED IN THE BODY OF THE DEED.

Judge Douglas granted the extension and created the limitation on November 10, 1856. By its terms the foundation of the university was to be laid May 1, 1857. About \$250,000 of subscriptions had been obtained before that date, but nearly all them went by the board in the financial storm of 1857, and only seven thousand of this amount was collected prior to August 31, 1858. The university was then the owner by contract of ten acres of valuable land, near a great and rapidly improving city. On that land a hole had been dug, a foundation was laid, and the whole \$7,000 expended. The corner stone had been laid with great ceremony, July 4, 1857, Judge Douglas himself being there to make a speech, and thus it stood until August 31, 1858, with little or no more than the foundation. Subscriptions had become comparatively

valueless. No new help could be obtained. The ten acres of ground, with a foundation on it, had stood there without advancement, from May, 1857, to August, 1858, and the trustees either had to complete the building by mortgaging the land, or no building was ever to be completed, and the charity was absolutely to lapse.

It is under such new circumstances that a court of equity permits alienation even when prohibited, because the court looks to the furtherance of the charity, in the mind of the donor, and if it can best accomplish that purpose by doing directly contrary to the donor's instructions in 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 his donation which were designed simply as means to the charity.

Happily Judge Douglas was then alive and himself could see the situation, so he acted as chancellor for himself and changed the character of the grant, and made on August 31, 1858, an absolute deed of the premises. He did this for the express purpose and with the intention of enabling the trustees to make the mortgage, and himself being then president actually, as Dr. Burroughs says, signed the first mortgage about ten days thereafter, and the following significant record was entered upon the minutes of the board:

"Resolved, That the thanks of this board be presented to the Hon. 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 of the land donated by him for the university.

"Resolved, That the executive committee of the board

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

These surrounding circumstances throw a flood of light upon the transaction and the intention of the parties. How had Judge Douglas been liberal? He had made no new gift. The resolution itself is not silent in this regard. He had been liberal in releasing them from the condition of November 10, 1856. His liberality was "in waiving the terms of the original contract for the conveyance of the university grounds, and giving us a deed to the land by him donated to the university." In consideration of this liberality and this change "in waiving the terms of the original contract," the trustees propose to do something which shall assure Judge Douglas that the fruits of his munificence shall not be lost, and therefore they propose to give him a bond in which they shall personally bind themselves to carry out the university enterprise "*according to the spirit of the original contract.*"

At the same meeting at which the above resolutions were passed, on the seventh day of September, A. D. 1858, eight days after the unconditional deed was made by Douglas, the following resolution was also passed, in which Douglas, as president, was authorized to execute a mortgage, and the purposes of the loan were expressed "*to secure the erection of the university building*":

"*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 of money not exceeding the sum of twenty

"five thousand dollars, and for a term not exceeding five years, *to secure the erection of the university buildings*; and that *the president*, or 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 and after a rate not exceeding ten per cent. per annum, payable semi-annually, the principal and interest to be made payable at the city of New York, interest coupons to be attached, and to be signed by the secretary of said board."

"*Resolved*, That L. D. Boone, James H. Woodworth, and William Jones, or either of them, be a committee to negotiate the sale of said bonds, and that the executive committee pay any reasonable expenses that may be necessary in perfecting the said loan."

"*Resolved*, That in order to place the security of our loan beyond question the members of the board, and other friends of the university, be requested to guarantee the payment of the bonds and coupons above authorized, and that the financial agent of the university be directed to place in the hands of William Jones, Esq., thirty thousand dollars of his bills receivable to indemnify said guarantors against loss upon said guarantee."

This loan, thus made, in time fell due, and provisions were made for its payment. It fell due in 1861, and at that time the following action was had:

Hon. L. D. Boone, Hon. Thomas Hoyne and Charles Walker, Esq., were appointed a committee to negotiate a loan of \$25,000 for the purpose of taking up bonds of the university for that amount, issued September 1, 1858.

(Barrett's testimony, page 99; also on page 100.) Dr. Boone, from the committee on loan, reported that he had succeeded in negotiating a loan of \$25,000, in Boston, with the Union Mutual Life Insurance Company, for five years, at ten per cent. interest. The record further shows (page 128): "It was thereupon resolved that the loan of \$25,000 negotiated by Dr. Boone with the Union Mutual Life Insurance Company, of Boston, for five years, at ten per cent. interest per annum, be accepted, from September 1, 1861, and the president and secretary of this board be, and they are hereby, instructed, authorized and directed to execute the necessary mortgage or trustee deed, with bonds and coupons for the completion of the negotiation."

This is the record of the first \$25,000 borrowed from the company, and, as the resolution expresses it, was for the purpose of taking up the \$25,000 of bonds issued in 1858 and used in erecting the building. Dr. Burroughs says that the building cost \$32,000. Seven thousand was from the subscription and \$25,000 was borrowed. The complainants, therefore, stand as though they had borrowed the first money of the complainants, and it had gone into the building.

In 1864 a second loan was made, and the following is the record of the board of trustees in reference to it: Barrett's testimony (page 129). A majority of the board being present and organized in regular meeting, the following resolution was adopted:

"Whereas, the university building is now in process of construction, and it is highly important to have the same put under roof before the approaching winter; and whereas the subscription made to pay for said work cannot be col-

lected 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 situate 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, inst., at the rate of eight per cent. per annum, and that the president or vice-president and secretary of the board be, and they are hereby authorized and directed to execute a note to said company for said sum, also a mortgage in the name of the University of Chicago, upon said tract of land, to secure the same and to affix the corporate seal of the University of Chicago to said mortgage."

The following resolution was also passed: "That the president or vice-president and secretary of the board be authorized to execute title to any real estate which the executive committee may deem it necessary to use toward the erection of the university buildings."

Suppose, under this resolution and under this necessity, a portion of the land had been laid off into lots and sold, could any one doubt the power of the trustees to make such sale, and put the money to the covering of the building, or could any one doubt that the purchaser would have acquired a good title.

Pursuant to this action a loan was made of the complainant for \$15,000, dated October 20, 1864.

These resolutions speak for themselves and show the necessities of the institution. Would it have been a wise administration to keep all the ten acres of land and leave the building unroofed for the winter? Would it have been wise to let in the storms and destroy what had been done? The institution had literally nothing but a lot of worthless subscriptions. These could not be collected, and there was no way in which the building could be put under roof, except by making this loan. Was this wise, or was it wise to keep the land and abandon the trust?

The \$25,000 borrowed in 1861 and the \$15,000 borrowed in 1864 ran until August, 1866, when, with the interest accumulating over and above the payments made, and further sums advanced, they amounted to the sum of \$75,000, whereupon the following proceedings were had:

"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 situate in the city of Chicago, Illinois, upon which the buildings of the university are situated, with all the improvements thereon, to the Union Mutual Life Insurance Company, of Maine, to secure the payment of a sum not exceeding \$75,000, to be loaned by said company to said university for five years from the first day of September next, at the rate of eight per cent. per annum, and that the president or vice-president and secretary of the board, be and they are hereby authorized and directed to execute a note to said company for said sum, and also a mortgage or trust deed in the name of the university upon said tract of land to

secure the same, and affix the corporate seal of the University of Chicago to said mortgage.

"I hereby certify, that at a regular meeting of the executive committee of the board of trustees of the University of Chicago, held August 6th, A. D. 1866, the foregoing resolution was unanimously adopted.

"Given under my hand at Chicago this, the sixth day of August, A. D. 1866.

"CYRUS BENTLEY,
"Secretary of the Ex. Com.

"We, the following named members of the board of trustees of the University of Chicago, do hereby consent to the foregoing resolution, and the execution and delivery of the note and mortgage therein mentioned."

Signed by twenty-three trustees, which constituted a majority of the board.

This loan was made and another mortgage for \$75,000 executed in pursuance of these resolutions.

The next loan is in July, 1869. The following is the resolution authorizing it. (Page 131, Barrett's testimony.) The following resolution, offered by Dr. Boone, was adopted:

"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, it is intimated by the executive committee in its report, that it may be necessary or advisable to secure an additional loan, in order to defray existing liabilities, in anticipation of collections of subscriptions already obtained and to be obtained for that purpose, therefore, resolved, that the proper officers of this board be and they are hereby authorized

to negotiate a loan not to exceed \$25,000, and to execute and deliver the necessary note or notes and mortgage, or trust deed, on the property of the university, to secure the payment of such loan."

By this resolution twenty-five thousand more was borrowed. All these sums run along together, the \$75,000 standing for the \$25,000 and the \$15,000 and other sums advanced, and the \$25,000 borrowed in 1869 until 1876, when, lacking about \$14,000 of ready money, a new loan was made for \$150,000, and the old papers *were held as collateral*, and the notes and trust deed now in controversy were made.

A *resumé* of this subject is as follows:

The first loan, made in 1858, was to build the side walls of the university building, the amount realized from subscriptions being only \$7,000, and only sufficient for the foundation and the commencement of the building. The second loan of 1861, of \$25,000, or first of complainant's, was used to take up the bonds issued under the first. The third loan, and second of the complainant's, was for \$15,000, in 1864, and was used to put on the roof and enclose the building, as the winter was coming on, and the building could be covered and preserved in no other manner. Dr. Burroughs and Mr. Wain swear that about \$20,000 was loaned in 1866, which, with the \$25,000 and the \$15,000, and interest unpaid, made \$75,000. This \$20,000 was borrowed, and used in paying the back bills incurred in the construction of the building, and in relieving the building from suits for mechanics' liens already begun. The rush for this money, by persons holding claims, was so great that it was thought that there was a run on the bank of the treasurer, Mr. Woodworth. The \$25,000 loan in 1869 also went

to pay back bills upon the building, and the \$13,000 advanced in 1876, when the deed of trust in controversy was made, was to pay the professors, they having determined to stop unless paid. They had no other money sufficient to build the building and run the university, except this. These loans were therefore essential to the very existence of this university, and without it, it would have been composed of the ground and a foundation, and would have had neither building, nor professors, nor students.

Since 1878, nothing has been paid upon any of the numerous advances of the complainant, and we have been compelled to file, with our principal claim, claims for the insurance of their building, which our money built; for lamp posts which give them light at night, and for the very pavement the professors walk over in going to their building. The complainant has waited and waited, hoping for payments, and has commenced suit only when the alternative was presented, of filing this bill, or of changing its business to that of a benevolent institution, and of building colleges and insuring them, and making pavements and paying professors, without compensation.

Acquiescence, Payment and Ratification.

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 become involved by that act. In the case at bar, if the loan and deed of trust were *ultra vires*, every act done by the corporation since, in acknowledgment of these loans, is dropped into the scale of binding the corporation. The negotiation of the first mortgage

made in 1858, the honorable recognition of the power to make it, and the payment of it by the loan of 1861, the making of the first mortgage of \$25,000 to complainant in 1861, the recital in the resolution that the object was to pay off the first mortgage, the making of the second mortgage in 1864 for \$15,000, the making of the third mortgage in 1866 for \$75,000, twenty-four payments of interest made on these obligations, the making of the trust deed of 1869, and the making of the deed of trust in question in 1876, in which the old papers were held as collateral, and the waiting for more than twenty years before repudiation, are all held in the authorities cited in the former part of this brief to be acts in confirmation of the mortgage, and all tend to bind the corporation, even though at first, and before the rights of third parties attached, it might be held *ultra vires*.

The following are the payments, in detail, as shown on Exhibit "D," being the note for \$75,000 of 1866.

March 1, 1867, interest, \$3,000; September 1, interest, \$3,000; April, 1868, \$60; April, 1869, \$2,620. Interest paid to March 1, 1869; interest to September 1, 1869; to March 1, 1870, \$1,600 on account, March, 1872; on April, 1872, on account, \$1,400. In 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 "Exhibit F," being the note for \$25,000, dated in 1869, are the following payments:

"Int. to July 6, 1870, \$489.65; Jan. 6, 1875, Feb., 1875, \$102.86; Aug., 1875, \$3,485.31."

On the note for \$150,000 in this case are the following credits:

Seventh month, 1876, interest, \$100; tenth month, 1876, \$100; tenth month, 26th day, 1876, \$13.80; no date, \$80; and paid on account of principal, March 28, A. D. 1878, \$5,000. The period covered by these payments is about eleven years, and the payments amount to over \$34,333.

Imagine a cross-bill filed in this case requiring the repayment of this sum to the university, and, if *ultra vires*, why not?

What the Board of Regents have done.

A perusal of the whole charter will show that all powers for controlling the property, and for the management of the university were lodged in the board of trustees, and all powers of visitation were lodged in the 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 the 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 violations of the charter to the legislature. This board was a tribunal created by law,

within the corporation, to decide this very question. We, therefore, respectfully 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.

IX.

L. D. BOONE ACTED IN MAKING THE FIRST LOAN AS AGENT OF THE UNIVERSITY, AND NOT OF THE COMPLAINANT. HE FIRST BECAME AGENT OF THE COMPLAINANT TO SOLICIT LIFE INSURANCE IN 1859, AND NEXT IN 1864, WITH POWERS CONFERRED IN WRITING, AND NOT BEING AGENT TO LOAN MONEY, AND IF HE THEN REMEMBERED THE UNRECORDED EXTENSION OF NOVEMBER 10, 1856, IN REFERENCE TO ALIENATION, HE FAILED TO COMMUNICATE THAT FACT TO THE COMPLAINANT, BUT ON THE CONTRARY GAVE CERTIFICATES OF COMPLETE TITLE IN THE CORPORATION, AND THE COMPLAINANT FIRST LEARNED OF THE LIMITATION AFTER THE LAST LOAN WAS MADE.

It has been proven 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 of November 10, 1856, and knew of

the limitation at that time. The question therefore arises whether this knowledge in Boone came to the company in 1861, 1864, 1866, 1869 and 1876, or at either of these periods through Dr. Boone, or whether the complainant became chargeable with such notice. Let us first see what the rule of law is on the subject of knowledge of the agent being knowledge of the principal.

Story on Agency, 9th Ed., Sec. 140, says:

"Upon similar grounds, notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from or is connected with the subject matter of his agency. * * * 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; and then the principal would be affected by his want of memory at the time of undertaking the agency. Notice therefore, to an agent, before the agency is 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 exercised by the corporation, and Dr. Boone seems to have acted a prominent part in reference to it. On page 125 of Barrett's testimony are resolutions previously quoted, and found on pp. 86, 87 and 88, *ante*.

Dr. Boone was appointed an agent of the Union Mutual Life Insurance Company *to solicit insurance* on the fourth day of May, 1859. Therefore, when the loan of 1861 was made, he was, as to this transaction, clearly *the agent*

of the university, as is shown by the terms of its resolution above set forth, and was not the agent of the Union Mutual Life Insurance Company. On the making of the loan of October 11, 1864, Dr. Boone was an agent of the complainant with especial powers defined in writing, in which he was authorized to do almost everything, except to loan money. On October 29, 1864, Dr. Boone gave to the company the following certificate in reference to the title of the university to the lands covered by its deed of trust:

"October 29, '64. 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."

On July 8, 1876, Dr. Boone issued to the Union Mutual Life Insurance Company, in reference to the title of the university, the following:

"Chicago, July 8, 1876. This is to certify that I have carefully examined the title to the property conveyed by the trust deed No. 1,768 (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, *Ex. Titles and Conv'r.*"

There have been produced on the hearing before the master all the letters ever written by Dr. Boone to the complainant in which the subject of the university loan is in any manner mentioned, and in none of these letters does Dr. Boone mention or allude to the fact that there

ever was a limitation made by Judge Douglas. The last loan of 1876 was negotiated between a committee of the university, consisting of Messrs. Rust, Jones and Barrett, on behalf of the university, and Mr. Secomb, on behalf of complainants. (See page 114 of Barrett's testimony.) Mr. Secomb has been upon the stand, and swears that he never heard of the limitation during all his negotiations, and so far as he knows or is informed, it was never communicated to the complainant. Mr. De Witt, the present president of the company, and Mr. Wain, who has the charge of the department of loans for the company, have been upon the stand, and they swear that 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 such limitation. In fact, the first knowledge of the limitation actually came from Kendall, the attorney of the company, in March, 1877, more than a year after the last loan was made, and in letters, which are put in evidence.

Assuming then that Boone knew of the limitation on November 10, 1856, therefore did he know it as the agent of the complainant? He was then simply a trustee of the university, and knew it as such. He did not become the agent of the company for any purpose until 1859, or three years afterward, and then had nothing to do with any money transactions, but was its agent only to solicit life insurance. Boone then knew that Douglas had made a limitation and taken it back and given an absolute deed, and he was a party to the vote of thanks to Douglas.

Dr. Boone also saw that the board of regents did not object to the first mortgage as *ultra vires*. As it came due he saw the corporation make proper arrangements to pay it. He saw, therefore, no necessity to tell his principals in

1864, that eight years before, Douglas had granted the extension, incorporating into it a limitation in reference to alienation, and then when the board became embarrassed he took it back, and made his deed unconditional, and received the thanks of the board for it. It is to be presumed that Dr. Boone lived and died never thinking this limitation was material, for he lived and died knowing the limitation was waived by Douglas, and never knowing the power of the board to make the deed of trust questioned, or repudiation thought of. In no sense of Boone's knowledge can it be said that it "arises from, or is connected with the "subject matter of his agency." No case goes to the length of holding that the principal is chargeable with notice under such circumstances.

The case of the *New Haven, Middletown & Willimantic Railroad Co. v. The Town of Chatham*, 42 Conn., 466, is in point on this question. In this case an act of the legislature authorized the town of Chatham to guarantee the bonds of a railroad company, provided that at a town meeting the vote upon the question of guaranteeing the bonds "shall be taken by ballot, and the ballot remain open for the reception of such ballots not less than two hours." The call of the town meeting provided that: "The meeting will be opened at 1 P. M. The book will be open at 2 P. M., and remain open until 5. Those in favor of the propositions and conditions presented to said meeting will deposit a ballot with the word 'yes' upon it, and those opposed will deposit a ballot with the word 'no' upon it." At the town meeting held pursuant to this notice, a vote was taken upon the question, but it was by division of the house and not by ballot; 178 voting for it and 86 against it. The clerk of the meeting in making up the record used the following language: "Voted,

"that the resolution prescribed in the warning be adopted. "178 yes; 86 no." Several years afterwards a petition for a mandamus was filed against the town to compel it to issue the guarantee.

The court say: (p. 480.)

"The case finds also that Allan M. Colegrove was, on the 14th of October, 1871, the treasurer and a managing business director of the railroad company, and that he was present at the town meeting held on that day, and knew that the vote was taken otherwise than by ballot; but that he was not there in his official capacity and character, and that his personal knowledge of the fact was not communicated to or known by the other directors of the company, but that they all had knowledge of the form of the vote as it was originally recorded. The respondent insists that by reason of this, the company had knowledge at the time of the passage of the vote that it was not taken in accordance with the legislative requirement. 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; moreover, the town intended that all other directors should, and knew that they did, believe the vote to have been taken by ballot. For these reasons we think the corporation should not be affected by this knowledge of Mr. Colgrove."

This case is wondrously similar in the analysis of its facts, to the one in question. The dissimilarity is, that at the very day of the meeting, Colgrove was the treasurer and managing business director of the company. In the case at bar, when Boone acquired the knowledge of the

limitation of November 10, 1856, he was not an agent of the Union Mutual Life Insurance Company in any character whatsoever, but was simply a trustee of the university. It was three years before he became the agent of the company in any capacity. At the expiration of the three years he was simply a solicitor for life insurance, and had nothing to do with loans. In June, 1864, he became the agent of the Union Mutual Life Insurance Company, with certain defined powers, not including that of loaning money, and the question is, whether the company is chargeable, after 1864, with notice which Boone acquired November 10, 1856? It can therefore be said that Boone did not acquire this information "in his official capacity and character." It can be asserted of him that his personal knowledge of the fact was not communicated or known to the company. It can also be asserted that he did communicate to the company that the title was good and in the university.

McCormick v. Wheeler, 36 Ill., 114, is directly in point. This was an action of ejectment to secure possession of certain lands purchased at an execution sale, under a judgment in favor of McCarn & Scott, which sale was subsequent to an order of sale in favor of William L. Lee. The latter, under his judgment, had attempted a sale of land belonging to one Marshall, and the record showed his judgment satisfied. The firm judgment in favor of McCarn & Scott was then satisfied upon property of Marshall, after which it was discovered that the sale under the Lee judgment had been cancelled and set aside, the minutes on a private docket of the judge being the only record. It was insisted that Curtis was acting for both Lee and McCarn & Scott, and that thus

the latter had notice of the intention of the court to set aside the Lee sale.

Upon this point the court say, LAWRENCE, J., p. 121: "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."

So in *Hood v. Fahnestock*, 8 Watts, 489, ejectment was brought to recover certain lands purchased, *bona fide*, for a valuable consideration. It was claimed that the employment of an attorney by Hood to draw a deed to him, when at the time of drawing such deed, the attorney had knowledge of a trust arising out of the land, from the fact that he had previously drawn a deed between other parties interested, was legal notice of the trust to Hood.

Upon this point the court, SERGEANT, J., say, p. 491:

"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 reason is, that no man can be supposed always to carry in his mind the recollection of former occurrences; and, moreover, in the case of the attorney or counsel, it might be contrary to his duty to reveal the confidential communications of his client. To visit the principal with constructive notice, it is necessary that the knowledge of the agent or attorney should be gained in the course of the same transaction in which he is employed by his client."