Bracken v. *Miller*, 4 Watts and Serg., 102, was an action of assumpsit for money had and received. In March, 1816, Bracken conveyed to one David Pride certain property in trust, to be by him sold and the proceeds applied to the repayment to Pride himself of certain moneys advanced to Bracken, the remainder to be applied to payment of other debts of the latter. Pride became insolvent a number of years after, and the property was sold at a sheriff's sale, and bought in by Marian Pride, a sister of David Pride. The plaintiffs contended that by the transaction between Bracken and Pride in March, 1816, Pride became the trustee of Bracken as to this land, and that any person purchasing the land with notice of the trust, took subject to it. It was also claimed that David Pride, being the agent of Marian Pride at the sheriff's sale, was bound to give her notice of the trust, and that the presumption was that he did so. Upon this point the court say, page 110, SERGEANT, J.: "Even supposing David "Pride was but a trustee, and held the lands conveyed to "him by Thomas Bracken in 1816, subject to certain "trusts expressed in the paper signed by David Pride "two days after the conveyance, yet the alleged purchase "by Marian Pride was not made till the year 1823, and "was a separate and distinct transaction from that of 1816, "to which David Pride was a party; and brings the case, "we think, clearly within the rule cited by the court be-"low from *Hood* v. *Fahnestock*, 8 Watts, 489, that to visit "the principal with constructive notice, it is necessary that "the knowledge of the agent or attorney should be gained "in the same transaction."

Smith's Appeal, 47 Pa. St., 128, was an appeal by William Smith & Co. from a decree of the Common Pleas on the distribution of the proceeds of a sheriff's sale

of the real estate of P. W. McFall and Joseph Martin, partners, doing business as McFall & Martin. It was claimed that Wm. H. Armstrong, an attorney, had been informed that McFall & Martin had given William Smith & Co. a judgment note. At this time no professional relation had been established between Armstrong and appellees, who subsequently acquired the property in question.

The court say (p. 140) as to the question of notice: "Actual notice of a mortgage or judgment supplies a de-"fective or omitted index of the registry, but to be actual "notice the subsequent encumbrancer must be himself per-"sonally informed of the specific prior lien before his "rights as a lien-creditor attach. It is not enough to give "notice to his counsel of the existence of a judgment "note, on which judgment may or may not have been "entered, but if the gentleman of the bar to whom such "an insufficient notice is given, has not yet become the "counsel of the subsequent encumbrancer, it is idle to in-"sist that their employment of him afterwards affects "them with even such notice as he had received."

Meehan v. *Williams*, 48 Pa. St., 238, was an action of ejectment to recover five acres of land. It was claimed that Williams was charged with notice of Meehan's title to the premises through one Jenkins, who sold to the former. To this the court below say (page 242):

"It Jenkins purchased as agent of Williams, Williams "would not be affected with any knowledge of Jenkins, "except such as he acquired in the course of his agency, "and information acquired otherwise would not affect "Williams."

STRONG, J., endorsing the above says (same page):

"The judge was right in saying the knowledge of the "agent would not affect his principal unless it was ac- "quired in the course of his agency, that is in the transac- "tion of purchase."

Houseman v. *Girard Mutual B. & L. Association*, 81 Pa. St., 256, was an action instituted by the defendant in error to recover from the plaintiff in error damages for a false certificate of search issued by him, or by his authority. The contention grew out of the fact that the search in this case, by the request of the conveyancer of the defendants, was ordered and paid for by the owner of the premises, in order that he might obtain a loan of money on mortgage from the defendants, and the certificate was so used and the money so obtained.

The court say, page 262: "It is urged that by the em- "ployment of the owner as the agent for this purpose, the "defendants are affected with his knowledge of the ex- "istence of the mortgage, which was omitted in the cer- "tificate. This is a very familar principle and well settled. "But it is equally well settled that the principal is only to "be affected by knowledge acquired in the course of the "business in which the agent was employed. * * * "It was incumbent on the plaintiff to show that the knowl- "edge of the agent, to use the accurate language of one "of our cases, 'was gained in the transaction in which he "was employed.' There was not only no evidence of "this offered by the plaintiff, but it was plain that it had "been gained before, and in an entirely different trans- "action."

In *Hayward, Assignee* v. *National Ins. Co.*, 52 Mo., 181, the main question was, "whether notice of a subsequent in- "surance to the agent who effected the risk for defendant "should be considered as notice to the defendant. The "court held that the company must be considered as "having received sufficient notice, but say, page 191, 'no- "tice must be given to the agent while his agency exists, "and it must refer to business which comes within the "scope of his authority."

So in Story's Equity, § 408, the rule is laid down as follows: "Notice to bind the principal should *be notice in "the same transaction or negotiation;* for, if the agent, "attorney or counsel was employed in the same thing by "another person, or in another business or affair, and at an- "other time, since which he may have forgotten the facts, "it would be unjust to charge his present principal on "account of such a defect of memory."

A careful examination of the authorities has disclosed no case in which a contrary doctrine is held, and without wearying the court with further extracts from the authorities, we content ourselves with citing the following American cases in which the same doctrine has been affirmed:

Howard Ins. Co. v. *Halsey*, 8 N. Y., 271.
Day v. *Wamsley*, 33 Ind., 145.
Martin v. *Jackson*, 3 Casey, 508.
General Ins. Co. v. *United States Ins. Co.*, 10 Md., 517.

And in the case last cited (page 527) the court affirm the general rule in these words: "That notice given to "a director of an incorporated institution privately, or "which he acquires from rumor, or through channels open

"to all alike, and which he does not communicate to his "associates at the board, will not bind the institution."

The English authorities are ample upon the same point, and leave no room for doubt as to the insufficiency of such notice as that under consideration.

The case of *Lowther* v. *Carlton*, 2 Atk., 242, was a bill brought to impeach a purchase made years previous to the commencement of the suit, the defendant being a purchaser with notice from a third party who bought without notice. Lord HARDWICKE says: "If a counsel "or attorney is employed to look over a title, and by some "other transaction, foreign to the business in hand, has "notice, this shall not affect the purchaser; for if this was "not the rule of the court it would be of dangerous con- "sequence, as it would be an objection against the most "able counsel, because, of course, they would be more "likely than others of less eminence to have notice, as "they are engaged in a great number of affairs of this "kind."

Likewise, in *Warrick* v. *Warrick and Kniveton*, 3 Atk., 291, which was a bill for an account of rents and profits, and for possession under a marriage settlement, the question of sufficiency of notice to Kniveton, who had made a loan upon the premises, was considered. Mr. John Hawkins was the agent of Warrick, the father, and also of an original mortgagee, and knew of the incumbrances upon the property, and the conditions under which it was held, having prepared the case in which the settlement was recited. Lord HARDWICKE says, p. 294: "I take the case to be, that Hawkins was concerned on "both sides. * * * Mr. Hawkins had not notice at "the time of the assignment, nor relative to this business,

"but before, even before the original mortgage. In the "case of *Fitzgerald* v. *Falconberg* (Fitzgib., 211), it was "held, the notice should be in the same transaction. This "rule ought to be adhered to, otherwise it would make "purchasers' and mortgagees' titles depend altogether on "the memory of their counselors and agents, and oblige "them to apply to persons of less eminence as counsel, as "not being so likely to have notice of former trans- "actions."

So in *Worsley* v. *Earl of Scarborough*, 3 Atk., 392, notice of a decree entered against an estate, the same being ended, was attempted to be established against the defendant, who afterwards employed as his counsel an attorney who knew of the decree through his employment by another person. Lord HARDWICKE says (p. 392): "It is settled, that notice to an agent or counsel who was "employed in the thing by another person, or in another "business, and at another time, is no notice to his client, "who employs him afterwards; and it would be very "mischievous if it was so, for the man of most practice "and greatest eminence would then be the most danger- "ous to employ." And to the same effect are the following cases:

Hiern v. *Mill*, 13 Ves., 114.
Fuller v. *Benett*, 2 Hare, 394.
Fitzgerald v. *Fauconberge*, Fitzgib., 207.

Compounding of Interest.

In this case, a note was given, dated September 1, 1866, for $75,000, which drew interest at the rate of eight per cent. per annum, payable semi-annually. Another note, for $25,000, was given July 6, 1869, with

interest at eight per cent. per annum, also payable semi-annually. On the 8th day of February, 1876, about $13,000 or $14,000 more was borrowed, and the mortgage in question was made. Interest on the notes was compounded, and the interest on the payments compounded, and the result was put with the new principal, in a new note, and herein we affirm:

X.

LAWFUL INTEREST MAY BE COMPOUNDED WHEN NOT PAID AS IT BECOMES DUE, OR ADDED AS A NEW PRINCIPAL IN A NEW NOTE, AND WHEN THUS ADDED MAY BE COLLECTED.

The general doctrine upon this subject is laid down in Parsons on Contracts, 7th Ed., Vol. 3, p. 151, as follows:

"On the other hand, if an agreement is made to convert "interest already due into principal, or if accounts between "parties are settled by rests, and therefore in effect upon "the principle of compound interest, which may be done "by an express accounting, or under a custom of for-"warding accounts quarterly, half-yearly or yearly to the "debtor who acquiesces in them by his silence, these "transactions are valid and sanctioned by the law; and such "a method of computation is sometimes even directed by "the courts and the words 'the interest is to be paid an-"nually' are held to entitle the creditor to interest on in-"terest not paid. If compound interest has accrued, even "under a prior bargain for it, and been actually paid, it "cannot be recovered back, nor are the penalties affixed "to the crime of usury annexed to such taking, *and if a "note be given for such payment the note is a sufficient legal "consideration to sustain the action upon it.*"

One of the earliest English cases is that of *Ossulston* v. *Yarmouth*, 2 Salk., 449. (Decided December, 1707.)

The Earl of Yarmouth made a mortgage to Lord Ossulston with a proviso that if the interest was behind six months, the interest should be accounted principal and carry interest. The Lord Chancellor said:

"No precedent had ever carried the advance of inter-"est so far that an agreement made at the time of the "mortgage will be sufficient to make the future inter-"est principal; but to make interest principal, *it is requisite "that interest be first grown due, and then an agree-"ment concerning it may make it principal.*"

In *Chamberlain* v. *Chamberlain*, Cases in Chancery, 257 (decided 1674), is appended a note saying (p. 258):

"This Hillary vacation, a little before Michaelmas term, "the Lord Keeper declared it should be a rule, that the "mortgagee forfeit should have interest for his interest "* * * and that it was always the rule that the mort-"gagee assigning, the assignee should have interest for "the interest then due, and was never contradicted, but in "Porter & Hobart's case in the time of Lord Shafts-"bury."

In the case of *Thornhill* v. *Evans*, 2d Atkins, 330 (decided July, 1742), the facts were as follows: A bill was brought by a plaintiff, as mortgagor, to be relieved against the defendant, the mortgagee, for turning interest into principal at the end of every six months at five per cent., whereas, the original mortgage was only four and one-half, and for insisting at the time the mortgage was paid off, upon an advance of six months' interest over and above the interest which was due upon the mortgage,

notwithstanding the mortgagor had given the defendant six months' notice of his paying off the mortgage. Lord Chancellor HARDWICKE says:

"The first relief prayed for is 'in respect to the com-
"'putation of interest by turning it into principal, and
"'charging five per cent. interest upon interest at the end of
"'every six months.' * * * As to the first, the excuse of
"the defendant is that if a mortgagor does not pay inter-
"est regularly *the mortgagee may, upon agreement, turn*
"*the interest into principal;* but then it must be done
"fairly, and it is generally upon an advance of fresh
"money. * * *"

In a note we find the following statement:

"In the taking of which account the Master was to in-
"quire what arrears of interest were from time to time
"agreed by the plaintiff, in writing, to be turned into
"principal, after such arrears became due, and such arrears
"to be considered as principal from the respective times
"of such agreement. * * * * *"

In the case of *Childers* v. *Deane*, 4 Randolph, 406, decided July, 1826, the facts were as follows:

The defendants pleaded a special plea, setting out the various considerations on which the note was given, the mode of calculating interest, and concluding with an averment that the transaction was usurious. Judgment was given for the plaintiffs, and in the Court of Appeals the judgment was sustained. Upon the question of usury, the court say:

"It is next contended that the evidence supports the
"plea of usury upon two grounds. First, because in the
"annual settlements, interest is added to the principal, and

"this balance is made an interest-bearing fund from that
"time forward, thus taking compound interest. * * *
"There are still some special circumstances under
"which compound interest is allowed, *as where a settle-*
"*ment of accounts takes place after interest has be-*
"*come due, and an agreement is then made that the interest*
"*due, shall thereafter carry interest.*"

The court also cite the case *Ex parte* Bevan, 9 Vesey, 223, decided in 1803, in which Lord ELDON remarks:

"As to the question of compound interest, it is clear,
"you cannot, *a priori*, agree to let a man have money
"for twelve months, settling the balance at the end of six
"months: * * * that is, you cannot contract for
"more than five per cent., agreeing to forbear for six
"months. *But if you agree to settle accounts at the end*
"*of six months, that not being a part of the prior contract,*
"*and then stipulate that you will forbear for six months*
"*upon those terms, that will be legal.*"

We next cite the case of *Forbes et al* v. *Cantfield*, 3 Ham. (Ohio), 17. (Decided 1827.)

In the year 1801 the defendant was indebted to the plaintiff as security for some friends who had not paid, and executed his individual note for the amount, payable at short dates, bearing interest at the rate of six per cent. In the year 1807, the principal and interest being unpaid, an agreement was made that interest should be cast to that date, and from that time the defendant should pay interest on the aggregate amount annually. In 1818, all still remaining unpaid, the defendant agreed to give the mortgage in question to secure the payment, and agreed that simple interest should

be calculated to 1807, and compound interest from that time. The amount due upon this calculation was ascertained, and several notes and the mortgage were given to secure payment. The question was whether this was usurious under the laws of Connecticut, where the contract was made. The court say:

"The sum of money due for interest is as justly and "fairly due as for any other consideration, and an agree- "ment to pay interest upon it after it is due cannot be "deemed usurious. Courts have been indisposed to com- "pute interest upon interest where the contract between "the parties was silent, but if when the interest is due "and payable and constitutes a then subsisting debt, the "debtor ask to retain it, and paying interest upon the "amount at the legal rate of interest, the agreement is not "usurious. It is nothing more than an agreement to pay "legal interest for the forbearance of enforcing the collec- "tion of a debt then actually due and demandable. Such "was the case before us. In 1807, the debtor agreed that "upon the principal and interest then due he would pay "the interest annually. This agreement he failed to perform. "In 1812, he acknowledged the existence and obligation "of the agreement, and settled the account according to it, "and gave his notes for the account, and the mortgage to "secure the payment. If, instead of giving the notes and "mortgage in 1812, he had, when the amount was ascer- "tained, paid it in money, he certainly could not have sus- "tained an action to recover back what he now calls the "usury. Neither can he now set it up to avoid the mort- "gage or to escape from the payment. It was but the "compliance with his agreement to pay the interest "annually, and did not put the party in the same condi- "tion he would have been in had the interest been annually

"paid, for the receipt of the money might be worth more "than the engagement to pay it. The contract was fair, "free from injustice or oppression, and not touched by "the statute. We are therefore of opinion that the "plaintiffs are entitled to a decree for the whole debt "claimed."

Otis v. *Lindsley*, 10 Fairfield, Me., 315, decided June, 1873, was an action of assumpsit on a promissory note for $72.36, given by the defendant to the plaintiff in payment of two smaller notes which had been standing two years, and for a small sum of money lent. It appeared that on ascertaining the amount for which the new note should be given, the sum due on the old notes was paid upon the principle of compound interest. This the defendant insisted was usurious, and the right of the plaintiff to recover was resisted upon that ground. A verdict was returned for the plaintiff. The court say:

"The note declared on in this case is clearly not usuri- "ous. Compound interest is not usury. In the note "before us nothing more than lawful interest was cast "upon interest which had become due. No law prohibits "such a transaction." * * * "*Yet after interest has "accrued, the parties may, by settling an account, or by "a new contract, turn it into principal.* That was done "in the present case. It is true that the interest on the "old notes was not payable annually, but still if at the "end of each year a note had been given for the interest "on each of those notes, and carrying interest, surely they "might all have been recovered, and why should the "principle be different because the same amount of inter- "est was all cast at one time, and inserted in the new note "now in suit. It is only a different and more simple

"process by which the same result is produced. The "defence is wholly insubstantial."

In the case of *Wilcox* v. *Howland*, decided 1839, 23 Pick., 167, the court in commenting upon the question under discussion, say: (p. 169.)

"The result of the doctrine upon this subject seems to "be that a contract to pay compound interest is not usu- "rious, or void; that an agreement to pay interest annual- "ly or semi-annually is valid and may be enforced by ac- "tion; that a claim for interest upon such interest is an "equitable claim, but that on an action brought, interest "will not be allowed on interest from the time it fell due, "because it would savor of usury, and because the holder "of the note, by forbearing to call for his interest when it "became due shall be deemed to have waived his right "to have the interest converted into capital. *But if a* "*party will deliberately give a new note on that consider-* "*ation, we cannot say that it is illegal, or made without* "*consideration.* It is very analogous to those cases where "there is a good demand, but where the law upon con- "siderations of policy will raise no implied promise to pay "it. We can perceive no difference in principle between "the case of such a note and that of where the parties "have settled an account upon the principle of making "annual or semi-annual rests, and thus computing interest "on interest and an express promise to pay the balance. "That an action will lie to recover such balance, includ- "ing the compound interest, the above cited case of *Eaton* "v. *Bell*, 5 Barn. and Ald., 34, is an authority directly in "point."

In the case of *Meeker* v. *Hill* et al., 23 Conn., 574, the facts were as follows:

A bill in chancery was brought to foreclose the defendant of the right of redemption in certain mortgaged premises. The bill stated that on the 14th day of August, 1849, Frederick W. Meeker, since deceased, and Francis Meeker, were indebted to Jno. S. Hill, since deceased, by their joint and several notes in the sum of $1,788, payable on demand, with interest annually, and to secure the payment of the note on the date aforesaid, they mortgaged to said Hill the land in question. The defendant in his answer averred that the note was void, because it was given by the Meekers to the payee in consideration of the interest accrued upon two other notes then held by Hill against one Ezra Meeker, both dated August 14, 1840, one for the sum of $3,000, and the other for the sum of $2,900, payable on demand, with interest. At the time of the making of the note mentioned in the bill, the interest on said two notes was calculated by Hill at compound interest, which the defendant claimed was unlawful and usurious, and at a greater rate than six dollars for one hundred dollars. On the trial the court found that the note was not in any part thereof usurious or void, and passed a decree of foreclosure. The case came to the Supreme court on motion in error by the defendant. The court, after commenting upon the case of *Camp* v. *Bates*, 11 Conn., 487, say:

"But we believe with the court in that case, that the "taking of compound interest cannot, *per se*, bec onsidered "usurious, and an agreement to pay it, made after the in- "terest has become due, on a contract reserving interest to "be paid annually, or at stated periods, is not only legal, "but is generally just and equitable, as founded upon a "moral and equitable consideration."

The case of *Kellogg* v. *Hickok*, 1 Wend., 521, decided October, 1828, was an action of assumpsit on four prom-

issory notes. On the trial of the cause the making of the notes was proved. The defendant then produced an account current, stated by the plaintiff, showing a balance of $2,643.85, with a receipt thereto attached for the notes declared on of the same date with the notes, which account was made up as follows: On the 23d of November the defendant was charged with a bill of goods amounting to $2,211.49, and after charging interest and deducting some items of credit, a balance was struck on the 5th of February, 1821, of $2,219.31, the interest of which sum was charged to the 5th of February, 1822, and added to the principal, making $2,374.64, on which last sum, composed of principal and interest, interest was charged for one year, seven months and thirteen days, up to the 18th of September, 1823, the date of the notes, and added to the last sum, making altogether $2,643.85, for the payment of which the defendant gave the notes declared on. The counsel for defendant insisted that the evidence thus produced showed the notes to be usurious, and so ruled the judge, who for that cause non-suited the plaintiff. By the court:

"The simple question is whether notes given for the "balance of an account, on which account interest has "been cast annually and added to the principal, are "usurious. Compound interest has nothing to do with "the question of usury. It is illegal upon a different prin-"ciple. Interest annually compounded and added to the "principal does not give the creditor more than seven per "cent. per annum for his money, and unless a rate of in-"terest greater than that be taken there is no usury. "* * * Interest is justly and equitably due at the "end of each year, if payable annually, and if the debtor, "instead of paying it, gives his note or bond for it, there

"is no legal objection to his enforcing its payment. If "the interest is carried into an account current and the "debtor gives his note for the balance of the account, it "stands in principle upon the same footing."

The facts in the case of *Quimby* v. *Cook*, 10 Allen, (Mass.), 32, decided in January, 1865, are as follows: This was a bill in equity to redeem land from a mortgage. The question was referred to an auditor to state the account between the parties, and he reported the following facts:

"On the 21st of July, 1830, the plaintiff gave to Samuel "Cook, defendant's testator, his promissory note for "$500, secured by a mortgage of real estate; that prior "to the 21st of July, 1855, there had been partial pay-"ments made by the plaintiff to said Cook, but never in "excess of the interest due; that on the 21st of July, "1855, the plaintiff and said Cook accounted together, "and found that there was then due on said note—prin-"cipal and interest together—the sum of $950; that then "and thereupon it was agreed by and between them, "in consideration of said Cook forbearing to foreclose "said mortgage, or to put said note in suit, that said sum "of $950 should thereafter stand as the principal of said "note, and that the plaintiff should thenceforth annually "pay interest on said sum; that in accordance with said "agreement the plaintiff has annually paid the interest on "said sum of $950 down to July 21, 1861, that date being "a few months prior to the decease of said Cook; that the "agreement as to interest since that time being executory, "interest from that time can only be reckoned upon the "original principal of $500, and that, as the result of the "foregoing, there is now due on said note from said plain-"tiff to said defendant, or her heirs, the sum of $950,

"together with interest on $500 from July 21, 1861, to "the present time.

"The account was stated accordingly. The plaintiff "moved that the report be recommitted to the auditor; "and the case was thereupon reserved for the determina- "tion of the whole court."

The court say (p. 34):

"The agreement to pay interest on the accrued interest "was not invalid, and the auditor was right in recognizing "such agreement, and stating his account according to it, "allowing interest upon interest, so far as it had been "executed between the parties. *Eaton* v. *Bell*, 5 B. & "Ald., 34. *Wilcox* v. *Howland*, 23 Pick., 167."

The same principle is laid down in the case of *Bainbridge* v. *Wilcocks*, 1 Bald., U. S. C. C. Reports, 536, decided October, 1832.

In the case of *Haworth* v. *Huling*, 87 Ill., 23, decided September, 1877, the court say:

"This bill was to foreclose a mortgage. The cause "was referred to the master in chancery to compute the "amount due on the notes secured by the mortgage to be "foreclosed. On the coming in of the report defendants "filed exceptions to it, some of which seem to have been "sustained, and others overruled, as we understand the "record. On careful consideration the master's report "appears to be correct in respect to his findings of fact on "the testimony, but the rule adopted for making the com- "putation of interest, it seems to be conceded, was not "the rule sanctioned by the decisions of this court.

"The point made, that complainant was allowed com- "pound interest, is not well taken. The principal debtor

"had agreed to pay annual interest, and on the settlement "made July 11, 1865, there may have been interest "allowed on annual interest maturing on the notes, and "not paid when due, but that is not certain under the evi- "dence. But if there was, the transaction was not ille- "gal. The mortgagor could pay interest on interest "previously due on his indebtedness under his contract, if "he chose."

We are not required to multiply authorities forever. In this investigation, we have found no cases to the contrary of this position; we therefore stop, citing, if the court wishes more literature, the following cases:

Hollingsworth v. *The City of Detroit*, Mc Clean Rep., v. 3, p. 472.
Forwell v. *Sturdivant*, 37 Me., 308.
Stickney v. *Jordan*, 58 Me., 106.
Hill v. *Meeker*, 24 Conn., 211.
Morey v. *Bishop*, 5 Paige, 98.
Townsend v. *Corning*, 1 Barb., 627.
Tylee v. *Yates*, 3 Barb., 222.
Stewart v. *Petree*, 55 N. Y., 621.
Fitzhugh v. *McPherson*, 3 Gill. (Md.), 408.
Scott v. *Saffold*, 37 Geo., 384.
Pinckard v. *Ponder*, 6 Geo., 253.
Consolidated Association v. *Hughes*, 10 La. An., 610.
Brander v. *Lum*, 11 La. An., 217.
Hale v. *Hale*, 1 Cold. (Tenn.), 233.
Sinclair v. *Peebles*, 5 Cald., 584.
Mosher v. *Chapin*, 12 Wis., 453.
Oliver v. *Decatur*, 4 Cranch (C. C.), 461.
Meyer v. *Muscatine*, 1 Wall., 384.

XI.

The Illinois Revised Statutes, chapter 74, page 854 (Cothran), Sec. 11, provide that "no corporation shall "hereafter interpose the defense of usury in any action." The defendant in this case is a corporation. Therefore it cannot interpose the defense of usury.

In the case of *Hartford Fire Ins. Co.* v. *Hadden*, 28 Ill., 260, CATON, J., says: "The language of the "statute is so express and positive that it leaves no room "for the court to make exceptions to it. It is this, 'that "no corporation shall hereafter interpose the defense of "usury in any action.'"

In *Hurd* v. *Marple*, 2 Bradwell, 405, the court say: "But it is provided by the statute that such corporations "as the Highland Park Building Company cannot avail "themselves of the usury laws, and therefore its agree- "ment to pay eighteen or any other per cent. in the ab- "sence of fraud is a binding and valid obligation against "it."

And the same doctrine is held in *American C. R. R. Co.* v. *Niles*, 52 Ill., 174.

XII.

WAS THE DEED OF TRUST EXECUTED BY THE PROPER PARTIES, AND DID IT CONVEY THE TITLE OF THE BOARD OF TRUSTEES?

The point is made by the answer of the university, and we are advised will be gravely argued upon the hearing, that because Douglas made his conveyance to the board of trustees of the university, instead of to the university *eo nomine*, and because the deed of trust purports to run from the university to Levi D. Boone, therefore it does not operate to convey the title of the trustees in the premises. The proposition fitly illustrates the straits to which counsel are reduced by the exigencies of a desperate defense. It assumes, first, what is not true as a matter of fact, that the university and its board of trustees are distinct corporate entities. By the charter the incorporators named are constituted a body corporate by the name of "The "University of Chicago," and at one and the same time, and by the same legislative enactment, they are created trustees of that university. By the very act of their incorporation, therefore, the trustees and the university are so blended that it is impossible to distinguish the one from the other, and a conveyance to or by the one is, in effect, a conveyance to or by the other. In other words, Douglas, Ogden and their associates, being by the charter constituted a body corporate and politic under the name of the university, and being at the same time and by the same legislative act constituted a board of trustees of the university, the two terms are synonymous, and the deed from Douglas to the trustees was a conveyance to the university.

But, if the board of trustees is, under the charter, a separate corporate entity, distinct from the other body politic and corporate thereby created, namely, the university, and if the title became vested in the board as such separate body instead of the university, the deed of trust was properly executed in exact conformity with the instructions and authority of the trustees themselves, and of their executive committee, and signed by their vice-president and secretary. By section three of the charter, the board is authorized to dispose of its real estate with the consent of a majority of all the trustees. By the same section the board may appoint of its members an executive committee of not less than five, and may delegate to such committee all the powers of the board, including that of alienation. As early as May 21, 1857, this executive committee was appointed in accordance with the provisions of the charter, and "on motion of Charles Walker it was "voted that the executive committee, in the absence of the "board, shall possess all the powers of the board, except "when expressly instructed to the contrary." July 1, 1864, the trustees provided by resolution as follows: "Resolved, that any three of the executive committee of "the board, with the chairman thereof or vice or tempo- "rary chairman, shall form a quorum for business, and "their acts shall be official and binding upon this board "and the corporation it represents." Section one of the by-laws in force when the deed of trust was executed provides: "The executive committee, in the absence of "the board, shall have all the powers of the board, and "its acts shall have full effect and be binding upon the "university until disapproved by the board of trustees." Here is a direct and unbroken chain of authority from the state to the executive committee, by which that committee

is empowered to convey the real estate of the university, and, *pro hac vice*, the committee is the board itself. The executive committee by its resolutions of January 25, 1876, the board of trustees not then being in session, directed that either of the vice-presidents and secretary of the board execute the notes and trust deed in controversy. A majority of the trustees, by the document, Exhibit C, authorized and approved the action of the executive committee of January 25, 1876. The trust deed was thereupon executed by Carter as vice-president of the board, and Barrett as secretary, and attested by the corporate seal. It was therefore executed by the proper officers of the board of trustees, in strict accordance with the resolution of the executive committee and the approval thereof by the majority of the trustees, and in the usual form in which such instruments are executed by corporate bodies.

It is true that in the body of the trust deed the university is named as the grantor instead of the board of trustees. But whether any grantor or no grantor is named in the body of the instrument, it is fully operative to convey the title of the board of trustees, if executed by their proper officers, in accordance with their instructions and by their authority, and if, taking the instrument as an entirety, their intention to alienate their title clearly appears. In other words, the title being in the board of trustees, the board being empowered by the charter to convey any and all its real estate, all powers of the board being merged in the executive committee in accordance with the charter, that committee having directed the conveyance to be executed by the vice-president and secretary of the board, the action of the committee having been ratified and approved by a majority of the trustees, and the

conveyance having been in fact executed by the vice-president and secretary in accordance with the authority thus conferred, the title of the board is absolutely divested, whether the university or the board be named as grantor in the body of the conveyance, or whether indeed the name of any grantor be inserted.

Citation of authorities would seem superfluous upon this branch of the case, but the case of the *Board of Trustees* v. *Shulze*, 61 Ind., 511, is so *apropos* that we cannot forbear citing it. The action was brought to foreclose a mortgage, the granting clause of which was as follows: "This indenture witnesseth, that the Methodist "Episcopal Church of Kendalville, of Noble county, in "the State of Indiana, mortgage and warrant to E. N. S.," etc. The attesting clause was as follows: "In witness "whereof, the said mortgagor has hereunto set her hand "and seal, this 18th day of October, 1875. Methodist "Episcopal Church of Kendalville, by John Weston, "president of board of trustees, James Colegrove, secre-"tary of board of trustees." Then follow the signatures of three others of the trustees. The statute under which the church was incorporated provided that the trustees "shall be deemed a body politic and corporate, under "such name and style as the society may elect." It was objected that the mortgage was improperly executed, the answer denying that the board of trustees who made the mortgage had any title to the property. The court say, upon this point, page 515:

"Section 9 of the act touching societies and lodges, 1 "Revised Statutes 1876, page 838, contains the following: "'Such trustees shall be deemed a body politic and cor-"porate, under such name and style as the society may "elect.' It is not shown what name was given to the

"corporation. It may be mentioned that it was that in "which the mortgage was executed. At all events, the "trustees were the corporation. They constitute, when "elected and qualified, a board of trustees. Section 14 "of the act cited. The trustees, the real corporation, "executed the note and mortgage in suit."

Even in the absence of express authority from the executive committee or board of trustees directing the form in which the trust deed should be executed, the long established usage of the corporation to execute such instruments in this manner would be a sufficient sanction of the form employed. It is hardly an exaggeration to say that from a time whereof the memory of man runneth not to the contrary, the trustees of the University of Chicago had been accustomed to execute mortgages to the Union Mutual Life Insurance Company in precisely the same form, and attested in the same manner adopted in this case. A long and unbroken array of precedents in the transactions between these same parties so firmly established the usage as to the mode in which mortgages of the university should be executed, that the execution of such an instrument in another or different form might well have excited the suspicions of the insurance company. Whether, therefore, we look to the express authority from the executive committee and from the trustees to execute the mortgage in this particular form, or to the long and unbroken usage sanctioning such form, the instrument was executed by the proper grantor, and duly attested with all usual and necessary evidence of the authority for such execution.

XIII.

THE LANDS OF THE UNIVERSITY ARE NOT EXEMPT FROM SPECIAL ASSESSMENTS, AND COMPLAINANT IS ENTITLED TO A DECREE FOR THE AMOUNT PAID BY IT ON ACCOUNT OF SUCH ASSESSMENTS.

In 1872 special assessments were made upon the property of the university embraced in the deed of trust for the erection of lamp posts, and in 1877 a further assessment was made for curbing and paving University Place, adjacent to the grounds of the university. These special assessments being unpaid by the university, the premises were sold at tax sales and purchased by the city, and tax deeds were regularly issued to the city under such sales. May 16, 1883, complainant paid to the city $2,114.61 for quit claim deeds releasing the title acquired by the city under the tax sales for non-payment of these special assessments. The sum thus paid, with interest at ten per cent. from the date of payment, should be embraced in the amount found due the complainant under the deed of trust.

The deed of trust contains a covenant that in case of default in the payment of either of the notes thereby secured, or in case of non-payment of taxes or assessments by the university, the trustee may at once sell the premises, and out of the proceeds of the sale pay all moneys advanced for insurance, taxes and other liens, or assessments, with interest thereon at ten per cent. per annum; and in the event of a foreclosure by suit, it is provided that out of the proceeds of the sale all moneys advanced, with interest, shall be repaid in like manner as provided in

the event of sale by the trustee under power. The deed contains a further covenant that the university will in due season pay all taxes and assessments on the premises.

The sole objection made to the allowance of the amount paid by complainant on account of these special assessments is based upon section 10 of the charter of the university, which provides that the tract of land on which the university is erected "is hereby declared exempt from "taxation or assessment for all or any purpose whatever." That the language thus used does not exempt the university from special assessment for improvements of the nature of those under consideration is apparent upon two grounds, either of which is a fatal objection to the position of the university upon this point:

First. If the language here quoted from the charter is to be construed as applicable to special municipal assessments for betterments or local improvements, then it is plainly repugnant to the constitution of 1848, in force at the time of the enactment of the charter. Section 3 of article 9 of that constitution provides as follows: "The "property of the state and counties, both real and per- "sonal, and such other property as the general assembly "may deem necessary for school, religious and charitable "purposes, may be exempt from taxation."

This section constitutes the sole warrant or authority under which the legislature was empowered to grant exemption from the burdens of taxation. It will be observed that it is expressly limited to the power to exempt from taxation, and does not extend to exemption from special assessments. If, therefore, it was within the legislative intent in the enactment of section 10 of the charter of the university in 1857 to exempt the property of the univer-

sity from special assessments, that section is clearly repugnant to the constitution and void. Nor can the language of the constitution of 1848 be enlarged by intendment to include anything not expressly embraced within its term. It is a well-settled rule that exemptions of this nature are to be strictly construed. The doctrine is well stated by Cooley in his work on taxation, 146, as follows:

"All exemptions are to be strictly construed. They "embrace only what is within their terms. This general "rule has many illustrations, one of the most striking of "which is found in the case of exemption of church and "school property. The general exemption of such prop- "erty from taxation, it is held, will not exempt them from "special assessment for local improvements such as the "paving and repairing of the streets on which they stand, "and the like."

Second. The courts have uniformly recognized a distinction between taxes, which are burdens imposed upon property for the purpose of raising revenue for public necessities, and assessments for local improvements, which are not regarded as burdens, but as betterments to the property, and therefore not embraced within the general term taxation. This distinction is clearly stated in *Canal Trustees* v. *City of Chicago*, 12 Ill., 405, by Chief Justice TREAT as follows:

"The case presents the question whether the real es- "tate belonging to the trustees of the Illinois and Michi- "gan canal is liable to assessments of this character, "and, as both parties are desirous that the question "may be settled, I shall proceed briefly to state "the conclusions of the court on the subject. The "thirteenth section of the act, by virtue of which the

"canal lands were granted to the trustees, declares that "'the said lands and lots shall be exempt from taxation "'of every description, by and under the laws of this "'state, until after the same shall have been sold and "'conveyed by the said trustees as aforesaid.' It is con- "tended that the assessment in question falls within this "exemption. In our opinion, the exemption must be held "to apply only to taxes levied for state, county and mu- "nicipal purposes. A tax is imposed for some general or "public object. It is an exaction made for the purpose of "carrying on the government directly, or through the "medium of municipal corporations, which are but parts "of the machinery employed in conducting the operations "of the government. It is a charge on an estate that "lessens its value. In the proportion in which the owner "is required to pay, is his pecuniary ability diminished. "This is the sense in which the term taxation is used and "understood. A reference to two or three adjudged cases "will not be inappropriate. In the matter of the mayor of "New York, 11 Johnson, 77, an exemption in favor of "churches from being 'taxed by any law of the state,' was "held to refer only to general taxes for the benefit "of a town, county or the state at large, and not to ex- "tend to special assessments on the property of churches, "for benefits resulting thereto by the opening, enlarging "or improving of streets. In *Blecker* v. *Ballou*, 3 Wend., "263, a covenant on the part of a lessee to pay 'all "taxes' on the demised premises, was held not to em- "brace a special assessment for pitching and paving a "street in front of the property. In the case of the *Northern* "*Liberties* v. *St. John's Church*, 13 Penn. State Rep., 104, "a general law exempting churches 'from all and every "county, road, city and school tax,' was construed not to

"extend to an assessment for laying water pipes along "the grounds of a church deemed to be benefited there- "by. Those cases cannot be distinguished in principle "from the one before us. The assessment in question "has none of the distinctive features of a tax. It is im- "posed for a special purpose, and not for a general or "public object. It is not a charge on the estate which re- "duces it in value. It subtracts nothing from the means "or resources of the canal. The improvement is made "for the convenience of a particular district, and the "property there situated is required to bear the expense "in the proportion in which it is benefited. The assess- "ment is precisely in the ratio of the advantages accru- "ing to the property in consequence of the improvement. "It is but an equivalent or compensation for the increased "value the property derives from the opening of the "street."

In *City of Ottawa* v. *Trustees of the Free Church*, 20 Ill., 424, the same distinction is recognized and in a case substantially analogous in all respects to that at bar. It was a proceeding to enforce a special assessment levied by the city of Ottawa, in 1858, upon certain church property for the construction of a sewer in an adjacent street. The power of exemption in that case, as in this, was derived from the constitution of 1848. Objection was made that the assessment was levied upon church property, but the court, BREESE, J. say, page 425:

"The additional objection that church property was "assessed is not tenable. Though not liable for ordinary "taxes, it is for local assessments of this character."

In *City of Peoria* v. *Kidder*, 26 Ill., 357, which was a bill to restrain the city of Peoria from collecting an assess-

ment for the payment of damages occasioned by opening a street, the court, WALKER, J. say, page 357:

"The first objection urged is, that the law authorizing "the city to levy an assessment to make compensation for "injury sustained by opening a street, is repugnant to our "constitution. The provisions of that instrument, which "declare and regulate the taxing power, are referred to "as sustaining this position. In answer to the objection, it "is enough to say that it is the established doctrine of this "court that assessments of this character are not taxes. "It is not, therefore, embraced in or regulated by the "provisions of the constitution, to which reference has "been made."

In *Mix* v. *Ross*, 57 Ill., 124, the distinction is stated in the opinion of the court by Mr. Justice SHELDON, as follows:

"There is a plain distinction between taxes, which are "burdens or charges imposed upon persons or property to "raise money for public purposes, and assessments for "city or village improvements, which are not regarded as "burdens, but as an equivalent or compensation for the "enhanced value which the property of the person "assessed has derived from the improvement."

Even in cases where the language of the exemption expressly includes assessments, the courts have nevertheless held that charges imposed upon the property for local improvements, such as pavements, are not embraced within the exemption. Thus, in *Buffalo City Cemetery* v. *Buffalo*, 46 N. Y., 506, the land of the cemetery was by statute exempt from "all public taxes, rates and assessments." The court, nevertheless, held that this language did not

exempt the cemetery from an assessment for paving. Upon this point FOLGER, J., says:

"We think that the current of authorities in this and "some of the sister states runs to this result: That public "taxes, rates and assessments are those which are levied "and taken out of the property of the person assessed, for "some public or general use or purpose, in which he has "no direct, immediate or peculiar interest, being exactions "from him towards the expense of carrying on the gov-"ernment either directly, and in general that of the whole "commonwealth, or more immediately and particularly to "the intervention of municipal corporations, and that those "charges and impositions which are levied directly upon "the property in a circumscribed locality to effect some "work of local convenience, which in its result is of pecu-"liar advantage and importance to the property especially "assessed for the expense of it, are not public, but are "local and private, so far as this statute is concerned."

So in *Baltimore* v. *Cemetery Co.*, 7 Md., 517, it was held that an exemption from "any tax or public imposition "whatever," applied only to taxes or impositions levied for the purpose of revenue, and did not exempt the cemetery from such charges as an assessment for paving an adjacent street. To the same effect is *Patterson* v. *The Society*, 24 N. Y., 385, where an exemption from "taxes, charges and impositions" was held not to relieve the property from an assessment for grading and paving a street, and in *State* v. *Newark*, 27 N. J., 185, the same court held that an exemption from "charges and impo-"sitions" did not relieve the property from an assessment for street paving. Authorities to the same point might be multiplied indefinitely, but we forbear wearying the court with further quotations, and a full collection of

the cases will be found in a note to Cooley on Taxation, page 147. We therefore submit, with confidence, that, whether we look to the grant of power under the constitution of 1848 to exempt from taxation, or to the language employed by the legislature in section 10 of the charter of the university, such exemption cannot be held to extend to or embrace special assessments for local improvements and betterments upon the property, and the amount thus paid by complainant should be included in the decree.

XIV.

CONCLUSION.

This defense is repudiation, nothing more or less. And whose names are thus dishonored and whose contract is thus repudiated? The trustees who made the mortgage of 1866 for $75,000 were: J. Young Scammon, Samuel Hoard, J. C. Burroughs, James H. Burtis, J. H. Woodworth, Charles Walker, William Jones, Thomas S. Dickerson, E. J. Goodspeed, L. D. Boone, Cyrus Bentley, Charles Hill Roe, James Otis, Lyman Trumbull, James E. Tyler, Edwin H. Sheldon, Thomas H. Beebe, E. D. Taylor, J. A. Smith, J. K. Pollard, William Shannon and Thomas Hoyne. Those who made the mortgage of February 8, 1876, for $150,000, were: Thomas Hoyne, Horatio O. Stone, J. A. Smith, Robert Harris, George Walker, L. H. Smith, J. R. Doolittle, William N. Coolbaugh, Joseph F. Bonfield, Henry Greenebaum, Artemas Carter, Levi D. Boone, Fernando Jones, J. M. Thompson, J. C.

Burroughs, D. B. Cheney, E. Nelson Blake, Norman T. Gassette, H. H. Rust, J. K. Pollard, John M. Van Osdell, O. W. Barrett, A. B. Meeker and F. E. Hinckley.

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

They have undervalued this property to the Auditors of States in which the complainant transacts business, and by anonymous and personal communications have sought to ruin the credit of the company which lent them this money, in their sore distress. They have caused the astronomical department of their college to file a bill claiming to hold, by a distinct title, a tower of the university building. They have stimulated the heirs of Judge Douglas to claim the estate as forfeited, because of the making of a trust deed, in part, to pay off a mortgage executed by Judge Douglas himself, as president of the board of trustees, nine days after changing his bequest and

making his deed to such trustees, unconditional in its terms. They have caused to be filed, by persons holding their unrecorded written obligation, binding the university to teach a student free of charge, a bill asking that such document be declared a first lien upon the property, and prior to the mortgage to complainant, of whom they have been borrowing since 1861, and to whom they now owe, under this mortgage, more than $300,000. The chief claim, that the scholarship is a first lien, lies in the fact that it has a picture of the university on it. They also, in the year 1881, filed a bill in the name of the People and Regents of the University, seeking, as they now seek by their answer in this case, to cancel this mortgage and wipe out utterly this debt, without proposing to pay back anything even of the principal which they had borrowed.

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

keeping far in the background, and if possible, wholly out of sight, their own personal example.

In conclusion, we beg leave most respectfully and kindly to suggest, that "honesty is the best policy," even in a Christian minister and the President of a college.

SWETT, HASKELL & GROSSCUP,
Solicitors for Complainant.

LEONARD SWETT,
JAMES L. HIGH,
Of Counsel.

CHICAGO, October 29, 1884.

ARGUMENT OF WILLARD & DRIGGS IN FORECLOSURE CASE.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

UNITED STATES CIRCUIT COURT.

UNION MUTUAL LIFE INSURANCE COMPANY
vs.
UNIVERSITY OF CHICAGO ET AL. } IN CHANCERY.

POINTS IN ORAL ARGUMENTS

ON BEHALF OF DEFENDANT UNIVERSITY, BEFORE JUDGE H. W. BLODGETT.

I.

THE DEFENDANT HAD NO POWER TO BORROW MONEY AND MORTGAGE THE TRACT IN QUESTION TO SECURE IT, NOR HAD IT POWER EITHER TO BORROW OR TO MORTGAGE.

The university is erected on the tract of land in question, which is therefore exempted from taxation under the 10th section of the charter, which is as follows:

"Section 10. The tract of land, not to exceed one "hundred and sixty acres, on which the university is "erected, belonging to the said university, is hereby de- "clared exempt from taxation or assessment, for all and "any purpose whatever."

It is proven in this case that the corner stone of the university was laid July 4, 1857, upon this tract, and prior to that, work had been done upon the ground to fit it for

the purposes of the institution. Judge Douglas gave the tract upon condition that the university should be erected upon it, and that no part of it should be alienated, but complainant denies notice of the papers embodying these conditions. The first alleged loan was in September, 1858, taken up by the second in 1861. Apart from the question of notice of the particular papers expressing Judge Douglas' condition, the question is:

Had the defendant the power to borrow money and, to secure it, to mortgage the tract of land already dedicated to the occupancy of the university and already actually occupied by it?

The object of the corporation was declared by its charter to be "the promotion of general and professional edu- "cation, the application of science to agriculture and "manufactures, and the cultivation of the fine arts."

Its board of trustees, under section 3, could acquire "by gift, grant or devise, or purchase, any real or personal "property; and may use, sell, lease or otherwise dispose "of any and all property belonging to the university, in "such manner as they may deem most conducive to its "interests; provided, that real estate shall not be sold "without the consent of a majority of the trustees." And under the first section the corporation is declared to have "perpetual succession, with power to sue and be "sued, contract and be contracted with; to make and "use a common seal, and to alter the same at pleasure; "to buy and sell, and to take and hold real and personal "property."

Section 8 is as follows:

"No gifts, grants or devise, made to the university for "a particular purpose, shall be applied *to any other pur-*

"*pose*, and every grant, gift or devise, made with the in- "tent of benefiting the said university, shall be liberally "construed in the courts, according to the intent of the "grantor, donor or devisor."

The rule as to corporate powers is settled in *Thomas* v. *Railroad Co.*, 101 U. S., 71. The court, on page 82, says:

"We take the general doctrine to be in this country, "though there may be exceptional cases and some "authorities to the contrary, that the powers of corpora- "tions organized under legislative statutes are such and "such only as those statutes confer. Conceding the rule "applicable to all statutes, that what is fairly implied is as "much granted as what is expressed, it remains that the "charter of a corporation is the measure of its powers, "and that the enumeration of these powers implies the "exclusion of all others."

But on page 83 the court declares that by the latest decision of the House of Lords the "broad doctrine" is established "that a contract not within the scope of the "powers conferred on the corporation cannot be made "valid by the assent of every one of the shareholders, "nor can it by any partial performance become the foun- "dation of a right of action."

And the court continues:

"It would be a waste of time to attempt to examine "the American cases on the subject, which are more or "less conflicting, but we think we are warranted in saying "that this latest decision of the House of Lords represents "the decided preponderance of authority, both in this "country and in England, and is based upon sound prin- "ciple."

Applying this rule, it is clear the defendant had no power whatever to borrow money or to mortgage any of its property.

The power to sell or otherwise dispose of its property granted in this charter means, upon every principle of construction applicable in like cases, the power to sell and dispose of "out and out."

In Sugden on Powers, page 553 (star page 513), the rule is stated as follows:

"A power to sell and raise a sum of money implies, it "seems, a power to mortgage, which is a conditional sale, "although this cannot be treated as a general rule, for "the intention of the parties and the nature of the case "may render it apparent that a sale out and out only and "not a mortgage is within the authority."

Haldenby v. *Spofforth*, 1 Beav., 390, and cases generally, cited for complainant.

And in *Stronghill* v. *Antsey*, 1 DeG., M. & G., 645, Sugden (as Lord ST. LEONARDS) says:

"*A power of sale out and out for a purpose or with "an object beyond the raising of a particular charge does "not authorize a mortgage;* but where it is for raising a "particular charge, and the estate is settled subject to that "charge, then it would be proper, under the circumstances, "to raise the money by mortgage," etc.

The property in reference to which these powers were to be excercised is manifestly property given to the university by way of enabling it to obtain funds, and not property to be preserved.

Still less had the defendant the power to mortgage the property given to it for a particular purpose and already subjected to that purpose. The university was in actual occupancy and all parties were put upon inquiry. That occupancy was a visible state of things inconsistent with the right of the university to mortgage, for it was an

occupancy for a particular purpose under a gift, which was made for that purpose.

Reference to churches or religious corporations has no application on the question of power to mortgage, because that power is *expressly* given them by statute.

R. S., Chap. 32, Secs., 41, 43.

In reference to the power to borrow money, the rule is that if *the business of a corporation be of such* a kind that it is not necessary or usual in the conduct of it to borrow money, then it cannot do so without an express authority in that behalf.

Green's Brice's Ultra Vires (1st Ed.), p. 119.
Same (2d Ed.), p. 219.
Morawitz on Private Corporations, Secs. 171, 172.

And Mr. Brice gives, on page 215 (Green's Brice's, 2d Edition), instances where an implied power to borrow was denied. Thus it does not exist in the case of a cost book mining company, *Hawtayne* v. *Bourne*, 7 M. & W., 295; of a tin or copper mining company, *Dickinson* v. *Valpy*, 10 B. & C., 128; *Ricketts* v. *Bennett*, 4 C. & B., 686; of a firm of farmers, *Greensdale* v. *Dower*, 7 B. & C., 635; of a firm of attorneys, *Foster* v. *Mackreth*, L. R. 2 Ex., 263; of a partnership for a single definite enterprise, *In re Worcester Corn Ex. Co.*, 3 DeG., M. & G., 187.

The rule is extremely well settled as to partnerships. One partner cannot bind another in matters outside the scope of the usual business of the partnership, and the

limitations which the nature and custom of a particular trade place upon the power of a partner are held operative as to third persons.

Parsons on Part. (2d Ed.), star p. 99.

When a partnership is not strictly a trading partnership, and the use of negotiable paper neither customary nor necessary, one partner has no implied authority to bind the partnership by putting the firm name to bills or notes.

Parsons on Part. (2d Ed.), star p. 199, note A and cases.

And so as to corporations. Authority to borrow money cannot be implied whenever the borrowing is not a reasonable method of carrying out the particular purposes for which the company is chartered.

Ex parte Williamson, L. Rep., 5 Ch. App., 312, 331.
Laing v. *Reed*, L. R. 5 Ch., 4.
In re German M. Co., 4 DeG., M. & G., 19.
Foster v. *Mackreth*, L. R., 2 Ex., 163.
In re Worcester Corn Ex. Co., 4 DeG., M. & G., 187.

In England, a corporation whose business does not require the issue of negotiable paper under ordinary circumstances, has no *implied* authority to issue it under any circumstances.

Bateman v. *Mid-Wales R. R. Co.*, L. R., 1 C. P., 499, 509.

In the United States, the rule is generally held otherwise, but it is not material to attempt to reconcile the difference, as the question does not arise here.

In re German Mining Company, 4 DeG., M. & G., 19, Lord Justice TURNER says that the distinction between the borrowing of money and the contracting of debts is established and rests upon sound principles, and he cites and comments on the cases. It is easy to see that the fact that an indebtedness may have been created does not prove an original power to create it, nor does the fact that a corporation, having actually obtained money, may be compelled to return it or be cast in judgment for it, establish that it had authority to obtain it.

The defendant was chartered for the "promotion of "general and professional education, the application of "science to agriculture and manufactures, and the culti- "vation of the fine arts."

It had and has no "business" in the sense of mercantile transactions or traffic in general.

The language of Mr. Justice BRADLEY, in reference to a municipal corporation, *The Mayor* v. *Ray*, 19 Wall., 475, is applicable here:

"It is instituted for public purposes only, and has none "of the peculiar qualities and characteristics of a trading "corporation, instituted for the purposes of private gain, "except that of acting in a corporate capacity. Its ob- "jects, its responsibilities and its powers are different. "* * * * The legislature vests it with such powers "as it deems adequate to the ends to be accomplished."

See also *African Methodist Church* v. *Conover*, 27 N. J. Equity, 159, where the chancellor says: "The lands" * * * "were used for purposes" a church in this in-

stance, "which gave notice to the world that they were "not held in individual proprietorship or for purposes of "*gain* or *business*."

The general assembly did not give to the defendant the power to borrow money, and the *enumeration of the powers that were given excluded it.*

Thomas v. *Railroad Co., supra.*

An examination of the discussion in *Bissell* v. *R. R. Co.*, 22 N. Y., 285, which is exhaustive, will show that the United States Supreme court, in Thomas' case, substantially concurs in the opinion of Judge Seldon. And see

Pearce v. *Railroad Co.*, 21 How., 441.
Davis v. *Old Colony R. R.*, 131 Mass., 275.
Franklin v. *Inst. Savings*, 68 Maine, 43.

II.

THE RIGHT TO USE AND OCCUPY THE TRACT OF LAND IN QUESTION VESTED IN THE TRUSTEES AND THE PUBLIC FOR THE PURPOSES OF THE UNIVERSITY BEFORE THE DEED IN FEE FROM DOUGLAS WAS EXECUTED, AND HE COULD NOT CHANGE THE TERMS OF THE CONDITION AGAINST ALIENATION AS EXPRESSED IN THE AGREEMENT WITH BURROUGHS.

Subscriptions were secured by Burroughs upon the faith of the original agreement prior to August 30, 1858, the date of the deed from Douglas, to the amount of $250,000, and payments in cash and real estate were

made before that date, under the subscriptions, or as donations directly, to the amount of at least $24,000, exclusive of "other lots" referred to by Dr. Burroughs, on page 201 of the abstract, the value or number of which we have no means of estimating (Abst., 176–7–8–181, 193, 196, 201, 206, 214, 291); nor have we any means of ascertaining how much has been paid upon these subscriptions since the said date.

The gift of Douglas possessed all the attributes of a charity, and is entitled to protection as such.

Perry on Trusts, Vol. 2, page 302.
Vidol v. *Gerard, Ex.*, 2 How., 127.
Inglis v. *Trustees of Sailors' Snug Harbor*, 3 Pet., 99.
Gliman et al. v. *Hamilton*, 16 Ill., 230, and cases cited.
Hensor et al. v. *Harris, Ex.*, 42 Ill., 425.
Erke v. *Powell*, 25 Ohio State, 229.
Donohugh's Appeal, 86 Pa. St., 313.
Am. Academy v. *Howard*, 12 Gray, 594.
McCord v. *Ochiltree*, 8 Blackf., 15.

III.

THE NOTES AND MORTGAGES CANNOT BE VALIDATED BY ESTOPPEL.

The mere fact that a corporation has received the consideration of, or otherwise derived advantage from, a contract *ultra vires*, does not involve it in any liability upon such contract. But though the corporation cannot be sued directly upon a contract which does not bind it, yet

it should account for the benefits which it has received under the *ultra vires* transaction.

Green's Brice's Ultra Vires (2nd Ed.), pp. 715–6–7.
Morawitz Priv. Cor., Secs. 114, 121, 122, 123, 124, 125 and cases.
Davis v. *Old Colony R. R. Co.*, 131 Mass., 275.

There was in the case at bar a total absence of power to make this contract, and that being so there could be no estoppel.

Bank v. *Porter Township*, 110 U. S., 608.
Dickson Co. v. *Field*, 111 U. S., 83.

But the money actually received and six per cent. interest should be returned.

Chapman v. *Douglas*, 107 U. S., 356.
Manville v. *Belden M. Co.*, 17 Fed. R., 425.

The amount of money in the case at bar less the money paid, and with interest to November 1, 1884, is	$155,716 06
Paid for insurance	2,962 46
" for special assessments	2,114 61
Total	$160,793 13

If the university had filed an original bill against the complainant for the cancellation of these notes and mortgages, tendering this sum of $160,793.13, would not the court grant the relief prayed? And so if it filed a cross-bill in the pending suit.

Hence, if the court sustains defendant's contention that

it is liable only for the amount actually received, etc., the filing of a cross-bill may be directed upon which the decree can go.

Considering the equitable rights of the parties in a case like this, where, in our judgment, the want of power to borrow money, and pledge the estate under a mortgage, like the one now sought to be foreclosed, is clearly shown, it is interesting to observe that the complainant is out of pocket, in cash, but $71,583.91, and that the item of interest alone (arrived at by compounding the same semi-annually at eight and ten per cent.) amounts to $220,-667.03, thus:

It has advanced from time to time since June 29, 1861, to February, 1876, for or on account of the university (Abst., 235)	$90,831 90	
Amount paid at about the date of execution of $150,000 mortgage, in 1876 (Abst., 236)	13,143 84	
Amount paid by insurance company, about same time, to L. D. Boone, as commissions, *which amount ought not to be charged to university* (Abst., 236 and 253)	500 00	
		$104,475 74
Amount paid for insurance, 1878-1883	2,962 46	
Amount paid for assessments in 1883	2,114 61	
		5,077 07
		$109,552 81

The university has paid to the insurance company, on account of interest and principal, since September 1, 1862 (Abst., 253 and 262–263).....	37,968 90
Total cash advanced by insurance company	$71,583 91
Interest claimed by insurance company....	229,667 03
Total amount claimed by insurance Co.	$301,250 94

The university labors under great difficulty in the premises, as it cannot make any effort to raise the required amount until that amount shall have been determined. As for paying $301,000, as demanded by complainant, that is believed to be impossible, but it is understood that the other amount named can be raised.

IV.

THE COMPLAINANT WAS CHARGEABLE WITH NOTICE OF THE CHARITY, AND OF THE CONDITIONS UPON WHICH THE GIFT WAS MADE, NOT ONLY THROUGH ITS AGENT, BOONE, BUT FROM THE TERMS OF THE DEED, THE CHARTER OF THE UNIVERSITY AND SURROUNDING CIRCUMSTANCES.

Wade on Law of Notice, p. 313, etc., and cases cited.

Distilled Spirits case, 11 Wall., 356.

Story on Agency (9th Ed.), Sec. 140, *note*.

Of Boone's agency there can be no doubt, nor is there any doubt, as shown by the correspondence read upon the hearing (and not contained in the printed abstract of

record), that while he may not have been specifically authorized to negotiate loans, he did act in that capacity, and was recognized by the company as its agent for that purpose. Upon this subject attention is invited to the printed abstract of the correspondence attached hereto.

See also *Union Mutual Life Ins. Co.* v. *Spaids*, 99 Ill., 264.

At the very time of the negotiation of the sale of the first bonds, as seen by his letters, Boone was in correspondence with the insurance company with respect to the loaning of money. And here it is proper to suggest that the mortgage which was given as a security for these bonds has not been produced, and we are not advised as to the terms or conditions of the document.

We know, however, that these bonds were specially guaranteed by individuals, and it is probable that their value as an investment depended largely upon the security thus attached to them. See Boone's letter to Crocker, dated October 18, 1864, as to the rule of the complainant in this regard. (Abst. of correspondence, 5.)

If it is the rule that a party put, by the circumstances, upon inquiry as to a fact is affected with constructive notice, surely the complainant was, under such rule, bound to know of the intentions of Douglas and the subscriptions above referred to when it purchased the first bonds.

There can be no doubt of Boone's knowledge of these subscriptions, for he was one of the subscribers; neither is there any doubt of his knowledge of the contract with Douglas.

The charter with its conditions was a public act. The deed from Douglas was on record showing a nominal

consideration. The trustees under the charter were in the possession of the premises described in the deed, and the foundation of the buildings was in progress of construction.

How were the bonds to be met at maturity? Were there any donations other than this land? An inquiry would have discovered the subscriptions to the extent of $250,000, made before the deed was executed. If made before the deed, upon what condition or understanding? The answer would have been found in the agreement between Douglas and Burroughs, which was the contract exhibited to subscribers, and upon which the entire enterprise was founded, and from which it derived its life.

The University of Chicago has not been dependent for its existence upon the Union Mutual Life Insurance Company.

Aside from the testimony of Dr. Burroughs (Abst., 211, 213 and 214), President Anderson and Professors Howe and Hough, we have a statement in the record showing that the receipts from all sources from June, 1866 (the books were destroyed by fire prior to that date) to February 8, 1876, were.....$381,766 99
The insurance company had actually advanced up to that date (Abst., 236, 242), 90,831 90

Balance obtained in ten years from sources other than the insurance company.....$290,935 09

The court will find sufficient answer to the charges and insinuations of complainant respecting repudiation, in the position assumed by the university before this court, and on pages 247 and 255 of the abstract of record, where appears the agreement to compromise this debt in 1878,

and evidence of the payment to the complainant of the first installment under the terms thereof.

The unwarranted attack upon the President of the University and his associates, may be passed with the remark that such a parade may be worth something as an advertising scheme to an insurance company which is able to hire such a production, but it can hardly be expected to affect a chancellor in his decision upon facts disclosed in a record before him.

WILLARD & DRIGGS,
Solicitors for Defendant.

MELVILLE W. FULLER,
Of Counsel.

Oral Argument of Mr. Swett in Foreclosure Case.

IN THE

Circuit Court of the United States,

FOR THE NORTHERN DISTRICT OF ILLINOIS.

1884.

UNION MUTUAL LIFE INSURANCE COMPANY

vs.

THE UNIVERSITY OF CHICAGO.

} BILL TO FORECLOSE A MORTGAGE.

STATEMENT.

MAY IT PLEASE THE COURT:

On the second day of April, A. D. 1856, Judge Stephen A. Douglas made a contract with John C. Burroughs by which it was agreed, among other things, that Burroughs should have immediate possession of the ten acres of land on which the university of Chicago now stands, provided he would procure the organization of a board of trustees under the law of 1845, of certain persons named, and assign his contract to them, and that such board would erect a university building on the premises to cost $100,000,