

IN CHANCERY OF NEW JERSEY.

BETWEEN SETH W. MAGIE, *Complainant*,
AND
THE GERMAN EVANGELICAL LUTHERAN CHURCH
AND CONGREGATION OF THE CITY OF NEWARK,
CONNECTED WITH THE EVANGELICAL LUTHERAN
MINISTERIUM OF THE CITY OF NEW YORK, &c. and
others, *Defendants*.)
BILL TO
FORECLOSE.

FILED DEC. 27, 1855.

*To his Honor, Benjamin Williamson, Esquire, Chancellor of the
State of New Jersey :*

Humbly complaining, sheweth unto your Honor, your orator, Seth W. Magie, of the city of Newark, in the County of Essex, and State of New Jersey, that on or about the twenty-second day of December, in the year of our Lord one thousand eight hundred and fifty-four, The German Evangelical Lutheran Church and Congregation of the city of Newark, connected with the Evangelical Lutheran Ministerium of the State of New York and adjacent parts, a body corporate under the laws of the said State of New Jersey, was or pretended to be seized in fee simple of all that certain lot, tract or parcel of land and premises hereinafter 10 particularly described, situate, lying and being in the said city of Newark.

And your orator further sheweth unto your Honor, that the said corporation being on the day and year aforesaid justly and truly indebted to one John Laible, of said city of Newark, in the sum of four hundred and twenty-eight dollars of lawful money of the United States of America, did then, to wit, on the day and year aforesaid, in due form of law, duly make, execute and deliver to said John Laible, in order to secure to him the repayment of said money with lawful interest thereon, their certain bond or 20 obligation in writing, duly sealed with their corporate seal and signed by Frederick G. Maschop then being President of the board of Trustees of said Corporation, and dated the same day and year aforesaid, whereby the said Corporation became held and firmly bound unto the said John Laible in the sum of eight hundred and fifty-six dollars, lawful money of the United States of America, to be paid to the said John Laible, or to his certain

attorney, executors, administrators or assigns, to which payment well and truly to be made the said Corporation did bind themselves and their successors firmly by said bond or obligation. Under which said bond or obligation a condition was written that if the therein above bounden Corporation or their successors or any of them should well and truly pay, or cause to be paid, unto the therein above named John Laible, or to his certain attorney, executors, administrators, or assigns, the just and full sum of four hundred and twenty-eight dollars, lawful money aforesaid, in one
 10 year from the date of said bond or obligation, with lawful interest for the same at the rate of seven per cent. per annum, payable semi-annually, without any fraud or other delay, then said obligation to be void, or else to be and remain in full force and virtue, as in and by the said bond or obligation, being in the possession and custody of your orator ready to be produced and proved as the Honorable Court shall direct, may and will on reference thereto more fully and at large appear, and to which for greater certainty your orator prays leave to refer.

And your orator further sheweth, that in order further to secure
 20 the payment of the said sum of four hundred and twenty-eight dollars together with lawful interest thereon, the said Corporation, on or about the year aforesaid, did duly in due form of law make, execute and deliver to the said John Laible their certain Indenture of Mortgage, dated said day and year, and by which said Indenture of Mortgage (which was made between the said Corporation of the first part, and said John Laible of the second part,) it was witnessed that the said party of the first part thereto for and in consideration of the sum of four hundred and twenty-eight dollars, lawful money of the United States of America, to
 30 them in hand well and truly paid by said party of the second part thereto, at and before the ensealing and delivering of said Indenture of Mortgage, the receipt whereof was thereby acknowledged, and the said party of the first part thereto therewith fully satisfied, contented and paid, had given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by said Indenture of Mortgage did give, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said party of the second part thereto, and to his heirs and assigns forever, all that certain lot, tract or parcel of land and premises hereinafter particularly
 40 described, situate, lying and being in the city of Newark, in the county of Essex and State of New Jersey, beginning at the northeasterly corner of a lot now or lately John Gardner's, lying on the south side of Mechanic street, thence running southerly along his line one hundred and five feet more or less to the burying ground, thence easterly along the line of said burying ground thirty-five feet to (late) Abner Warren's line, thence northerly along his line one hundred and five feet more or less to Mechanic street aforesaid, thence westerly along the line of said street thirty-five feet to the place of beginning; being the same land and premises
 50 conveyed to the said party of the first part thereto, by Samuel

H. Congar and wife, by deed dated the thirty-first day of October, A. D. 1839, recorded in Book K of Deeds for Essex county, in pages 142, 143 and 144, together with all and singular the profits, privileges and advantages, with the appurtenances to the same belonging or in any wise appertaining; and also all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part thereto, of, in and to the same, and of, in and to every part and parcel thereof, to have and to hold all and singular the therein above described tract or parcel of land and premises, with the appurtenances, unto the said party 10 of the second part thereto, his heirs and assigns, to the only proper use and benefit and behoof of the said party of the second part thereto, his heirs and assigns forever: Provided always, and it was thereby declared to be agreed by and between the parties to said Indenture of Mortgage, that if the said party of the first part thereto, or their successors, did and should well and truly pay or cause to be paid to the said John Laible, or to his certain attorneys, executors, administrators or assigns, the just and full sum of four hundred and twenty-eight dollars, lawful money aforesaid, in one year from the date of said Indenture of Mort- 20 gage, with lawful interest for the same at the rate of seven per cent. per annum, payable semi-annually, agreeably to the condition of said bond or obligation, without any deduction or defalcation for taxes, assessments, or any other imposition whatsoever, that then and from thenceforth the said Indenture of Mortgage and said bond or obligation, and every thing in said bond or obligation and Indenture of Mortgage contained, should cease and be void, anything in said Indenture of Mortgage and bond or obligation contained to the contrary in any wise notwithstanding; and the said party of the first part thereto, for themselves and their 30 successors, did thereby covenant and grant to and with the said John Laible, his heirs and assigns, that he the said John Laible, his heirs and assigns, should and might from time to time and at all times after default should be made in the performance of the proviso or condition in said Indenture of Mortgage contained, peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy all and singular the therein above granted and bargained premises, with the appurtenances, without the let, suit, hinderance, trouble or denial of the said party of the first part thereto, or their successors, or any person or persons whatsoever: 40 as in and by the said Indenture of Mortgage, duly made and executed and delivered by said Corporation to said John Laible, sealed with the corporate seal of said Corporation, and signed by said President of said board of Trustees, now in the custody and possession of your orator and ready to be produced and proven as this Honorable Court shall direct, and to which when produced, your orator for the greater certainty prays leave to refer, may and will on reference thereto more fully and at large appear.

And your orator further sheweth unto your Honor, that the execution and delivery of said Indenture of Mortgage were in 50

- due form of law proved, that is to say, on the twenty-sixth day of December, in the year of our Lord one thousand eight hundred and fifty-four, personally appeared before Stephen R. Haines, Esquire, then one of the Judges of the Court of Common Pleas, in and for said County of Essex, Mads Graah, who being by said Judge, duly sworn, did depose and say : that Frederick Maschop was President of the Board of Trustees of the Corporation of the German Evangelical Lutheran Church and Congregation of the City of Newark, connected with the Evangelical Lutheran Ministerium of the State of New York and adjacent parts, and that he, the deponent, was their Secretary ; that he saw said Frederick Maschop affix their corporate seal and subscribe his name to said indenture of mortgage, and that he affixed said seal and subscribed his name in obedience to a resolution of the Board of Trustees of said corporation ; and that said deponent did at the execution thereof subscribe his name as a witness thereto as in and by a certificate of said proof duly made and endorsed on said indenture of mortgage, and signed by said Stephen R. Haines, Esquire, Judge as aforesaid, more fully and at large appears, and to which certificate, your orator, for greater certainty, prays leave to refer.

- And your orator further sheweth unto your Honor, that afterwards, to wit, on the fourth day of January, in the year of our Lord one thousand eight hundred and fifty-five, at forty-five minutes after eleven o'clock, in the forenoon, said indenture of mortgage was received in the office of the Clerk of said Court of Common Pleas, and Registered in Book H. 3. of Mortgages for said County of Essex, in pages 71 and 72, by James J. Terhune, Clerk of said Court of Common Pleas, as in and by the registry now remaining in said Clerk's office, and a minute thereof endorsed on said indenture of mortgage, and signed by said James J. Terhune, Clerk as aforesaid, sufficiently appears, and to which said registry and minute thereof, so as aforesaid endorsed on said indenture of Mortgage and signed as aforesaid, your orator, for greater certainty, prays to refer, if it be necessary so to do.

- And your orator further sheweth unto your Honor, that on the thirtieth day of December, in the year of our Lord one thousand eight hundred and fifty-four, the said John Laible by his certain deed of assignment of that date, under his hand and seal, duly made and executed did, for and in consideration of the sum of four hundred and twenty-eight dollars, lawful money of the United States of America, to him in hand paid by your orator, at and before the ensembling and delivery of said deed of assignment, the receipt whereof was thereby acknowledged, grant, bargain, sell, assign, transfer and set over unto your orator, said tract or parcel of land and premises, and said indenture of mortgage, together with said Bond or obligation and the money due and to grow due thereon, with the interest, to have and to hold the same unto your orator, and to his heirs, executors, administrators or assigns forever, subject only to the proviso in the said indenture

of mortgage mentioned, and the said John Laible did thereby make, constitute and appoint your orator, his true and lawful Attorney, irrevocable in his name or otherwise, but at your orator's proper costs and charges, to have, use and take all lawful ways and means for the recovery of all the said money and interest, and in case of payment, to discharge the same as fully as he might or could do, if said deed of assignment were not made, and said John Laible did thereby covenant, promise and agree to, and with your orator, that there was, on the day of the date of said deed of assignment, due and owing upon said Bond 10 and Mortgage, the sum of four hundred and twenty-eight dollars, and thereby did guarantee the payment thereof, as in and by the said deed of assignment, now in the custody of your orator, ready to be produced and proven as this Honorable Court shall direct, and to which, when produced, your orator for greater certainty prays leave to refer, may and will more fully and at large appear.

And your orator further sheweth unto your Honor, that the execution and delivery of said deed of assignment were in due form of law duly acknowledged by said John Laible, on the day of the date of that deed, that is to say, on that day before said 20 Stephen R. Haines, Esquire, Judge as aforesaid, personally appeared said John Laible, and said Judge being satisfied that he was the grantor in said deed of assignment named, and having first named known the contents thereof to him, said John Laible did thereupon acknowledge that he signed, sealed and delivered the same as his voluntary act and deed; as in and by a certificate of said acknowledgment endorsed on said deed of assignment and signed by said Stephen R. Haines, Judge as aforesaid, may and will more fully and at large appear, and to which certificate your orator for greater certainty prays leave to refer. 30

And your orator further sheweth unto your Honor, that on the fourth day of January, in the year of our Lord one thousand eight hundred and fifty-five, said deed of assignment was received in said Clerk's office, and recorded by said Clerk, in Book No. 1. of Assignments of Mortgages, for said Essex County, in page 466, as in and by the record thereof, and a minute thereof endorsed on said deed of assignment and signed by said Clerk sufficiently appears, and to which for greater certainty your orator prays leave to refer, if necessary.

And your orator further sheweth unto your Honor, that on or 40 about the thirty-first day of October, in the year of our Lord one thousand eight hundred and thirty-nine, as appears by the record or Registry of Mortgages of said Essex County, said corporation gave upon said tract of land and premises to Samuel H. Congar, a mortgage to secure the payment of eight hundred dollars or some other sum of money; and as appears by said record or registry afterwards, and on or about the first day of July, in the year of our Lord one thousand eight hundred and forty-eight, said corporation gave to the said Samuel H. Congar, another mortgage of and upon said tract of land and premises to 50

secure the payment of the sum of three hundred dollars, or some other sum of money; by reason of which mortgages, or one of them, said Samuel H. Congar may claim to have some estate, right, title or interest in or to the said mortgaged land and premises or some part of the same: But whether anything, and if anything, how much is now due on said mortgages, your orator is ignorant, and prays a discovery thereof from the said Samuel H. Congar.

And your orator further sheweth that all the principal money
10 mentioned in the said bond or obligation and secured thereby and by the said deed of mortgage of your orator, with large arrears of interest, still remains due and owing to your orator, no part thereof having been paid to said John Laible before the recording of said deed of assignment, or since then to your orator so that your orator is greatly delayed and disappointed in the receipt of the said moneys, by means of which said several premises the said deed of mortgage of your orator, and the estate thereby mortgaged as aforesaid, have become absolute in your orator and his heirs.

20 And your orator further sheweth, that the said Corporation since the execution of your orator's said mortgage, have possessed and enjoyed, and that they do still possess and enjoy the said mortgaged premises, with the appurtenances, and that they have always received, and still do receive, the rents, issues, and profits thereof.

And your orator further sheweth, and expressly charges that the said mortgaged premises are a slender and scanty security for the payment of the said principal monies and arrears of interest so do to your orator as aforesaid, and that he or some other person
30 or persons for him, has frequently and in a friendly manner applied to the said Corporation and Samuel H. Congar, or one of them, and requested them, or one of them, to pay and discharge the said principal and interest moneys so due to your orator on the said bond or obligation and deed of mortgage given by the said Corporation, and assigned to your orator; and your orator well hoped that the said Corporation and Samuel H. Congar, or one of them, would have complied with such reasonable requests of your orator, and would have paid to him the said principal and interest moneys so as aforesaid due to your orator on the said
40 bond or obligation and Deed of Mortgage, as in equity and good conscience they ought to have done. But now so it is, may it please your Honor, that the said Corporation and Samuel H. Congar, combining and confederating together, and to and with divers other persons at present unknown to your orator, but whose names, when discovered, he prays may be inserted herein, with proper and apt words to charge them, how to injure and aggrieve your orator in the premises, and to defraud him of the said principal and interest moneys, so as aforesaid due to your orator on the said bond or obligation and Deed of Mortgage herein before
50 mentioned, and assigned to your orator, as aforesaid, sometimes

give out and pretend, that although your orator's estate in the said mortgaged premises, contained in the mortgage assigned to him as aforesaid, may have become absolute at law, yet that your orator cannot dispose of the same to any purchaser in any manner, and that the same will be subject to an equity of redemption; and at other times the said confederates pretend that the said mortgaged premises are charged or chargeable with other encumbrances prior to your orator's said mortgage, but when and to whom given, and for what consideration, they refuse to discover; whereas your orator charges and insists that if any such pretended incumbrances do exist, they are fraudulent and void, and given for no good or valuable consideration, or are paid and satisfied, and kept on foot by fraud, to injure and aggrieve your orator, and ought to be delivered up to be cancelled, or declared to be of no effect against your orator, who had no notice of any such pretended encumbrances. All which actings and doings of the said Corporation and Samuel H. Congar, and their confederates are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator. In tender consideration whereof, and for as much as you orator has not a complete and safe remedy in the premises at and by the strict rules of the common law, nor can foreclose the equity of redemption of the said mortgaged premises or safely sell the same for the payment and satisfaction of the said principal monies and arrears of interest, so as aforesaid due to your orator on said bond and obligation and deed of mortgage, given to said John Laible, and by him assigned to your orator, without the aid and decree of this honorable Court. 10 20

To the end, therefore, that the said Corporation and Samuel H. Congar and their confederates, when discovered, may, said 30 Congar, upon his corporal oath, and said Corporation, according to law and the practice of this Court, true, full and perfect answers make to all and singular the premises, as fully and particularly as if the same were here again repeated, and they and each of them thereto particularly interrogated, according to the best of their respective knowledge, information, remembrance, and belief; and that the said Corporation and Samuel H. Congar, or some one of them, may be decreed to pay to your orator, the said principal sum of four hundred and twenty-eight dollars, herein before mentioned and expressed, so due to him on the said 40 bond or obligation and deed of mortgage herein before mentioned, and set forth and assigned to your orator, as aforesaid, and all the interest money now due and to grow due thereon, together with all your orator's costs and charges in equity in this behalf sustained, by a short day, to be appointed by this honorable Court; and in default thereof that the said Corporation and Samuel H. Congar, and each of them, and all persons claiming or to claim under them, or any or either of them, may be foreclosed of and from all equity of redemption, or claim of, in, and to the said mortgaged premises, and every part and parcel thereof, with the 50

appurtenances, and may deliver over unto your orator, all deeds, demises, and writings whatever relating to or concerning the same, or that all and singular the said mortgaged premises, with the appurtenances, may, by the order and decree of this honorable Court, be sold, and out of the moneys arising from the sale thereof, your orator may be paid the full amount of the said principal sum of money, herein before mentioned and expressed, so due to your orator on the said bond or obligation and Deed of Mortgage, assigned to your orator, as aforesaid, and all the
 10 interest now due and to grow due thereon, together with all your orator's costs and charges in equity, in this behalf sustained; and that your orator may have such further or other relief in the premises as to your Honor may seem meet and shall be agreeable to equity and good conscience, may it please your Honor, the premises considered, to grant unto your orator a writ or writs of subpœna, issuing out of and under the seal of this honorable Court, to be directed to the said The German Evangelical Lutheran Church and Congregation of the City of Newark, connected with the Evangelical Lutheran Ministerium of the State
 20 of New York and adjacent parts, and said Samuel H. Congar, herein and thereby commanding them, and each of them, on a certain day and under a certain penalty, therein to be inserted, to be and appear before your Honor in this honorable Court, then and there to answer all and singular the said premises, and to stand to, abide by, and perform such order and decree therein as to your Honor shall seem meet and shall be agreeable to equity and good conscience. And your orator, as in duty bound, will ever pray, &c.

THEODORE RUNYON,
Solicitor and of counsel with complainant.

ANSWER.

FILED JUNE 3, 1856.

The several answer of The German Evangelical Lutheran Church and Congregation of the city of Newark, connected with the Evangelical Lutheran Ministerium of the State of New York and adjacent parts, defendants to the bill of complaint of Seth W. Magie, complainant.

These defendants now and at all times reserving to themselves all benefit and advantages and exceptions to the said bill of complaint, for answer thereunto say, that the said Corporation (these defendants) were never indebted to John Laible, or to any other persons, as stated and alleged in the said bill of complaint, and ¹⁰ they deny that the said bond and mortgage in the said bill of complaint mentioned, were ever lawfully executed by these defendants; and they further say that the said mortgage was not and could not be a valid instrument, or binding against these defendants, inasmuch as the mortgaged premises in the said bill of complaint mentioned were conveyed to these defendants in such way and manner and under such conditions and restrictions, that these defendants had no power to execute a mortgage thereof: as in and by the deed of conveyance thereof by which the same were conveyed to these defendants, bearing date the thirty-first ²⁰ day of October, in the year of our Lord one thousand eight hundred and thirty-nine, and recorded in the Clerk's office of the county of Essex in Book K 5 of deeds for said county, pages 142, 143 and 144, may more fully appear, which deed or certified copy thereof these defendants are to produce and prove before this Honorable Court.

And these defendants further answering say, that by the said deed the said mortgaged premises were conveyed to these defendants in fee simple by one Samuel H. Congar, the other defendant, to have and to hold the same as an Evangelical Lutheran Church ³⁰ forever, with a proviso that these defendants should not by deed, mortgage, or by any other ways or means, alienate, dispose of, or otherwise charge or encumber the said property, except the mortgage then given to said Congar to secure part of the purchase money of said premises, as by the said deed or certified copy thereof may also appear.

And these defendants further say, that the said mortgaged premises, at the time of the said pretended execution of the said mortgage, were held by these defendants under and by virtue of the said deed above mentioned for a charitable use, to wit, for ⁴⁰ a church as above expressed, and subject to the condition above

expressed, and further say, that if the said mortgage or bond ever were or was actually executed by the application of the common seal of these defendants, it was so done by collusion between the said John Laible and some other person or persons, and without authority of these defendants.

And these defendants further say, that the said indebtedness, if ever due or owing to the said John Laible by any person, has been paid and satisfied; and these defendants deny all confederacy charged in said bill, and all other matters alleged therein, not herein denied or sufficiently answered, and they pray that they may be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

JOSEPH P. BRADLEY,

Solicitor for and of Counsel with defendants.

{ L. S. } JOHN DISCH,
President of the German E. Luth. Ch., &c.

20 STATE OF NEW JERSEY, ESSEX COUNTY, ss. The answer of the defendants, The German Evangelical Lutheran Church and Congregation of the city of Newark, connected with the Evangelical Lutheran Ministerium of the State of New York and adjacent parts, was taken this twenty-ninth day of May, in the year of our Lord one thousand eight hundred and fifty-six, before me, under the common seal of the said Corporation, as by their said seal affixed appears.

AMZI DODD, *Master in Chancery.*

EXHIBIT FOR DEFENDANTS.

This Indenture, made the thirty-first day of October, in the year of our Lord one thousand eight hundred and thirty-nine, between Samuel H. Congar and Hannah J. his wife, of the city of Newark, in the county of Essex and state of New Jersey, of the first part, and "The German Evangelical Lutheran Church and Congregation of the city of Newark, connected with the Evangelical Lutheran Ministerium of the State of New York and adjacent parts," of the second part, witnesseth, That the said party of the first part, for and in consideration of the sum of one thousand and dollars, lawful money of the United States of America, to 10 them in hand well and truly paid by the said party of the second part, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged and the said party of the first part therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said party of the second part and to their successors forever, all that certain lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the city of Newark, 20 in the county of Essex and state of New Jersey,

Beginning at the north easterly corner of a lot now or lately John Gardner's, lying on the south side of Mechanic street, thence running southerly along his line one hundred and five feet more or less to the burying ground, thence easterly along the line of said burying ground thirty-five feet to Abner Warren's line, thence northerly along his line one hundred and five feet more or less to Mechanic street aforesaid, thence westerly along the line of said street thirty-five feet to the place of beginning, being the same premises conveyed to the said Samuel H. Congar, 30 by William S. Chapman and wife by deed, dated April the sixth, A. D. 1831, and recorded in Book H 3 of deeds for Essex County, pages 78 and 79.

Together with all and singular the houses, buildings, trees, ways, waters, profits, privileges and advantages, with the appurtenances to same belonging or in any wise appertaining. Also all the estate, right, title, interest, property, claim and demand of the said party of the first part of, in and to the same and of, in and to every part and parcel thereof. To have and to hold all and singular the above described tract or parcel of land and premises 40 with the appurtenances unto the said party of the second part and their successors to the only proper use, benefit and behoof of the

said party of the second part and their successors forever. And by "successors" is meant only such persons as have been publicly received by confession of faith into the church as members, under Article III, and annotation to the same of present constitution of the church. To have and to hold the said property as an Evangelical Lutheran Church forever in which the doctrines of the Augsburg confession and Luther's Smaller Catechism shall be taught and adhered to. And provided that if necessary the privilege of preaching in the English language besides the German, shall be granted to the rising generation until such a time that a separate church can be provided for an English congregation, so however that the Germans shall always have the right to select their time for worship. And provided further that the said party of the second part shall not by deed, mortgage or by any other ways, or means alienate, dispose of, or otherwise charge or encumber said property, excepting the mortgage now given to Samuel H. Congar to secure part of the purchase money of said premises, and provided further that in case these conditions be violated, then any one or more regular members shall have the right of applying to the Evangelical Lutheran Ministerium of the State of New York and adjacent parts, with which the congregation is connected, to take possession of, hold and keep said property in trust, for carrying out the above named purposes, and in case said conditions be violated, and no appeal made to the said Evangelical Lutheran Ministerium of the State of New York and adjacent parts, then the officers of the said Ministerium shall constitute a board of Trustees with full power to secure said property for the above named purposes. And the said Samuel H. Congar doth, for himself, his heirs, executors and administrators, covenant and grant to and with the said party of the second part and their successors, that he, the said Samuel H. Congar; is the true, lawful and right owner of all and singular the above described land and premises and of every part and parcel thereof, with the appurtenances thereunto belonging, and that the said land and premises or any part thereof, at the time of sealing and delivery of these presents, are not incumbered by any mortgage, judgment or limitation, or by any incumbrance whatsoever by which the title of the said party of the second part hereby made or intended to be made for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever. And also that the said party of the first part now have good right, full power and lawful authority to grant, bargain, sell and convey the said land and premises in manner aforesaid. And also that he, the said Samuel H. Congar, will warrant, secure and forever defend the said land and premises unto the said party of the second part, and to their successors forever, against the lawful claims and demands of all and every person and persons freely and clearly freed and discharged of and from all manner of incumbrances whatsoever.

50 In witness whereof, the said Samuel H. Congar and Hannah J.

his wife have hereunto set their hands and seals, the day and year first above written.

Signed, sealed and delivered } in the presence of	SAMUEL H. CONGAR. [L. S.]
ASA WHITEHEAD. }	HANNAH J. CONGAR. [L. S.]

NEW JERSEY, ss. Be it remembered, that on this seventeenth day of July in the year of our Lord one thousand eight hundred and forty, before me, Asa Whitehead, one of the masters of the Court of Chancery, personally appeared Samuel H. Congar and Hannah J. his wife who are I am satisfied the grantors in the within deed of conveyance named, and they thereupon severally acknowledged that they signed, sealed and delivered the same as their voluntary act and deed. And the said Hannah J. on a private examination, separate and apart from her said husband, acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, freely, and without any fears, threats or compulsion from her said husband, I having first made known to the said Samuel H. Congar and Hannah J. his wife the contents thereof. 10 20

ASA WHITEHEAD,
Master in Chancery of New Jersey.

Received in the office the 17th day of July, A. D. 1840.

JOHN P. JACKSON, *Clerk.*

EXHIBIT FOR COMPLAINANT.

[The following paper was admitted on the argument before the Chancellor, for the purpose of showing the items composing the amount of the bond and mortgage—but for no other purpose.]

TRANSLATION.

Trustees meeting on the 21st of December, 1854.

Opened and closed with prayer.

From all the members present, Bernhard Baum and Mads Graah were unanimously elected secretaries of the Board of Trustees.

Mads Graah laid before the meeting, on request, the following report :

First, for the year 1853. In that year he had paid, as per receipt, to Rev. Fridrick G. Maschhop the sum of \$264 25.

Therefore the Church owe him on that year, 1853, the sum of \$185,75.

Second, for the year 1854. He had received up to this time for pew rent the sum of - - - - - \$132 50

Further there had been paid to the minister a collection of 11 00

Further he had received an advance from John Laible
of - - - - - 292 93

10

Therefore the minister Fr. G. Maschhop had received, \$436 43

Thus that still remains due to the minister from the Church for this year is the sum of \$13 57, consequently for both years (1853 and 1854) \$199 32.

This report of Mads Graah was by the meeting of the Church Trustees unanimously adopted as correct.

John Laible further reported that he has advanced to the Church the following sums:

20	1. For the minister's salary, - - - - -	\$292 93
	2. For street pavement to the city paid, - - - - -	42 44
	3. For side-walk to the city paid, - - - - -	10 50
	4. For Fire Insurance on the Church, - - - - -	38 00
	5. For Interest to Mr. Congar, - - - - -	41 34
	6. For Wood, - - - - -	25

\$425 46

This account also was found for correct and unanimously adopted. But as the Church at present is not able to pay such advances to him; and as John Laible has shown himself not unfavorable to the Church in making such advances of 425 dollars 46 cents, nor by any means to charge the security of the Church, it was therefore unanimously resolved, that the Church give to the said John Laible a bond and mortgage for the before mentioned sum, with three dollars expenses, so that we, the Church, to the amount of four hundred and twenty-eight dollars, give security to said Laible.

FR. G. MASCHHOP, *Pastor.*

MADS GRAAH, *Secretair.*

INTERLOCUTORY DECREE.

FILED NOV. 14, 1860.

This cause having been argued before the Chancellor in the Court of Chancery at Trenton, at the term of May, eighteen hundred and sixty, by Theodore Runyon, of counsel for the complainant, and Joseph P. Bradley, of counsel for the defendants, The German Evangelical Lutheran Church and Congregation of the city of Newark, connected with the Evangelical Lutheran Ministerium of the State of New York and adjacent parts, upon the pleadings in the cause, and the pleadings, exhibits and proofs being read, and the arguments of the respective counsel being heard and considered, and the Chancellor having taken time to advise thereon, and now, on this tenth day of November, in the year of our Lord eighteen hundred and sixty, it appearing to the Chancellor that the complainant is entitled to the relief sought and prayed for by him in his said bill of complaint, It is ordered, adjudged and decreed that the complainant is entitled to have and receive of and from the said The German Evangelical Lutheran Church and Congregation of the city of Newark, connected with the Evangelical Lutheran Ministerium of the State of New York and adjacent parts, and out of the mortgaged premises in the said bill of complaint and in said complainant's mortgage in said bill set forth, mentioned and described, the amount which remains unpaid on his said mortgage, and what hath accrued for principal and interest; and it further appearing to the Court that process of subpoena for the appearance of the defendants hath been duly issued and returned, served by the sheriff of the county of Essex, and that the said defendant, Samuel H. Congar, hath neglected to file any plea, answer or demurrer to the complainant's bill within the time limited by law, or at any other time, It is thereupon further ordered, adjudged and decreed that the said bill of complaint be taken as confessed as against the said defendant, Samuel H. Congar, and that it be referred to Theodore Frelinghuysen, Junior, one of the Masters of this Court, to ascertain and report the amount due to the said complainant for principal and interest, upon the mortgage held by him upon the premises mentioned and described in the said bill of complaint, and also the amount due if anything to the said Samuel H. Congar on his mortgage, and to report accordingly, and also to ascertain and report the order and priority of the said several mortgages respectively, and whether they both embrace the same or what part of the said mortgaged premises, and whether the

whole or a part and what part of the said mortgaged premises should be sold for the payment and satisfaction of the said two mortgages, and if all the said premises ought to be sold together or in parcels, and if in parcels in what order, and that the said Master do make his report thereon with all convenient speed.

HENRY W. GREEN, C.

MASTER'S REPORT.

FILED AUGUST 1, 1861.

In pursuance of an order of this Court, made in the above cause, bearing date the tenth day of November, in the year of our Lord one thousand eight hundred and sixty, I issued summons for the complainant and defendants in above cause to appear before me, at my office, in the City of Newark, New Jersey, on the tenth day of April, A. D. 1861, at ten o'clock in the forenoon of said day, at which time and place, I was attended by the complainant's Solicitor, Theodore Runyon, and by the complainant in person, and by Samuel H. Congar, one of the defendants
 10 in person, and by John Whitehead, Esquire, of Counsel for the defendants, and by the Reverend Mr. Ebert, Fred'k Piel, and B. Henry Notte and by Mads Graah, and George Bauer, John Disch, Henry W. Ganss, John Siemon, Gotlieb Kilgus, Philip Helminger, formerly or now Trustees and Members of the defendant, The German Evangelical Lutheran Church and Congregation of the City of Newark, connected with the Evangelical Lutheran Ministerium of the State of New York and adjacent parts, and in the presence of all the parties, I proceeded to take the depositions of witnesses produced before me, both by the
 20 complainant and also by the defendants, and which depositions accompany this my Report, and having adjourned from time to time, until the eighteenth day of June, A. D. 1861, at which time I heard the depositions read on the part of the complainant and the defendants, and having considered the same, and having heard the arguments of Counsel for complainant and defendants, I have considered of the matters in and by the aforesaid order referred to me.

And the defendant, Samuel H. Congar, produced before me the mortgage in the complainant's Bill referred to, bearing date the
 30 thirty-first day of October, in the year of our Lord one thousand eight hundred and thirty-nine, and made and executed to said Samuel H. Congar, by the defendants, The German Evangelical

Lutheran Church and Congregation of the City of Newark, connected with the Evangelical Lutheran Ministerium of the State of New York and adjacent parts, and sealed with the corporate seal, and signed by Gotthart Schmidt, their President, which said Mortgage was duly acknowledged according to law, and registered in the Clerk's Office in the County of Essex, in Book G 2 of mortgages for Essex County, pages 515, &c., on the second day of November, A. D. 1839, as appears by endorsements thereon, and the said Samuel H. Congar also produced to me the Bond intended to be secured by the said mortgage, which said 10
bond and mortgage are marked Exhibits Nos. 1 and 2, on part of Samuel H. Congar in above cause, and I find there is due to the said Samuel H. Congar on his said mortgage for principal and interest on this day, the sum of five hundred and four dollars, and I do certify and report, that the Schedule, hereunto annexed, marked No. 1, and making part of this my report, contains a statement of the principal and interest money due to the said Samuel H. Congar, on his said mortgage, and to which for greater certainty I refer.

And I do further report, that the said Samuel H. Congar also 20
produced before me the mortgage in the complainant's bill referred to, being said Samuel H. Congar's second mortgage, made and executed to the said Samuel H. Congar by the same defendants, The German Evangelical Lutheran Church and Congregation of the City of Newark, connected with the Evangelical Lutheran Ministerium of the State of New York and adjacent parts, and sealed with their corporate seal on the thirty-first day of July, in the year of our Lord one thousand eight hundred and forty-eight, and signed by Mads Graah, then their President, and duly acknowledged according to law, and registered in the Clerk's 30
office of the County of Essex, in Book R 2 of mortgages for Essex County, pages 61 and 62, on the same day and year last aforesaid, as appears by endorsements thereon; and the said Samuel H. Congar also produced to me the bond intended to be secured by the said mortgage, being said Congar's second bond, and which last mentioned bond and mortgage are marked Exhibits Nos. 3 and 4 on part of said Samuel H. Congar, in above cause, and I find there is due to the said Samuel H. Congar, on his said second mortgage, for principal and interest on this day, the sum of one hundred and ninety dollars and fifty-six cents, 40
and I do certify and report that the schedule hereunto annexed, marked No. 2 and making part of this my report, contains a statement of the principal and interest money due to the said Samuel H. Congar, on his said second mortgage, and to which for greater certainty I refer.

And I do further certify and report, that the solicitor for the complainant produced before me the mortgage in his bill mentioned, bearing date the twenty-second day of December, in the year of our Lord one thousand eight hundred and fifty-four, and made and executed to John Laible by the defendants, The Ger- 50

man Evangelical Lutheran Church and Congregation of the City of Newark, connected with the Evangelical Lutheran Ministerium of the State of New York and adjacent parts, and sealed with their corporate seal, and signed by Frederick G. Maschop their President, and duly proved according to law by Mads Graah, the subscribing witness thereto, before Stephen R. Haines, Esquire, a Judge of the Court of Common Pleas in and for the County of Essex aforesaid, in the State of New Jersey aforesaid, on the twenty-sixth day of December, in the year of our Lord one thousand eight hundred and fifty-four, and registered in the Clerk's office of the County of Essex, in Book H 3 of mortgages for Essex County, pages 71 and 72, on the fourth day of January, in the year of our Lord one thousand eight hundred and fifty-five, forty-five minutes after eleven o'clock in the forenoon, as appears by endorsements thereon, and the said solicitor for the complainant also produced to me the bond intended to be secured by the said mortgage, and which said bond and mortgage are marked exhibits A and B, on the part of the complainant, and the solicitor for the complainant also produced to me the deed of assignment of the said bond and mortgage made and executed by the said John Laible to Seth W. Magie, the complainant, dated December 20, 1834, assigning said complainant the said bond and mortgage and all the monies due and to grow due on said bond and secured to be paid by said mortgage, and also assigned said complainant said mortgage, which deed of assignment of said bond and mortgage was duly acknowledged by the said John Laible before Stephen R. Haines, Esquire, Judge of the Court of Common Pleas in and for the County of Essex aforesaid, and recorded in Book No. 1 of assignments of mortgages for Essex County, page 446, as by endorsements thereon appear, and which said deed of assignment of said bond and mortgage is marked Exhibit C. on part of complainant.

And I find there is due to the said complainant on his said mortgage for principal and interest on this day, the sum of six hundred and twenty-two dollars and forty six cents, (\$622.46) and I do certify and report that the Schedule hereunto annexed, marked No. 3 and making part of this my report, contains a statement of the principal and interest money due to the said Seth W. Magie the complainant, on his said mortgage, and to which for greater certainty I refer.

And I do further certify and report, that the same premises comprised in the complainant's mortgage, are also comprised in both of the aforesaid mortgages of the said Samuel H. Congar, and that both of the said mortgages to the said Samuel H. Congar, were made and executed and also registered prior to the said mortgage of the said John Laible, and by him assigned as aforesaid to the said complainant, and now held by the said complainant, and due and payable to the said complainant, and that the said mortgages of the said Samuel H. Congar are both entitled to priority in payment; and that it is necessary and advisable that

the whole of the mortgaged premises should be sold to raise and pay in the first place the money so due to the said Samuel H. Congar on both of said mortgages to said Samuel H. Congar, and in the next place to raise and pay the money so as aforesaid due to the complainant on his said mortgage respectively, together with the costs of this suit.

All which is respectfully submitted.

Dated June, 18, 1861.

THEO. FRELINGHUYSEN, JR.,
Master in Chancery of New Jersey 10

SCHEDULE No. 1, referred to in preceding Report.

Bond made and executed by The German Evangelical Lutheran Church and Congregation of the City of Newark, connected with the Evangelical Lutheran Ministerium of the State of New York and adjacent parts, to Samuel H. Congar, dated October 31st, 1839, in the penal sum of \$1600, conditions for the payment of \$800, as follows, viz: \$300 thereof in 6 months from the date thereof, and the residue \$500, in 5 years from the date thereof, with lawful interest on said sum of \$500 annually, secured by mortgage in complainant's bill referred to.

\$200, principal paid and endorsed on said Bond. Interest also paid up to April 30, 1861.

April 30, 1861. Balance of Principal due on said Bond, \$500 00

June 18, 1861. To 1 month 18 days, interest on \$500,
from April 30, 1861, - - - - 4 00

June 18, 1861. Amount due Samuel H. Congar, for
Principal and Interest, - - - - \$504 00 30

500.
6

1 1-12 30.

15 ½ 2.50

3 1-5 1.25
.25

\$4.00 Interest for 1 month, 18 days on \$500.

June 18, 1861.

THEO. FRELINGHUYSEN, JR., M. C. C. 40

SCHEDULE No. 2, referred to in preceding Report.

Bond made and executed by same parties as last above mentioned to Samuel H. Congar, dated 21st July, 1848, in the penal sum of \$600, conditioned for the payment of \$300, on or before 31st day of July, 1849, with lawful interest for the same, secured by the mortgage in complainant's bill referred to. Paid and Endorsed of Principal, \$111. Interest paid and endorsed up to April 30, 1861.

June 18, 1861. Balance of Principal due,	- - - -	189 00
June 18, 1861. To 1 mo. 19 ds. Interest due on \$189,		
from April 30, 1861,	- - - -	1 56

June 18, 1861. Amount due Samuel H. Congar for,		
Principal and Interest on his 2d Mortgage, -		\$190 56
	189	
	6	

10	1 1-12	11 34
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15 $\frac{1}{2}$	94
4 $\frac{1}{2}$	47
	15

\$1 56, Interest on \$189, for 1 mo. 19 ds. from April 30, 1861, to June 18, 1861.

THEO. FRELINGHUYSEN, JR., M. C. C.

SCHEDULE No. 3, referred to in preceding Report.

20 Bond made and executed by same parties last above mentioned to John Laible, dated December 22, 1854, in the penal sum of \$856, conditioned for the payment of \$428, in one year from the date thereof with lawful interest at 7 per cent. per annum, payable semi-annually from the date thereof, secured by mortgage in complainant's bill mentioned.

Said Bond and Mortgage duly assigned to the complainant.

Amount of Principal due on said Bond, - - - -	428 00
1861, June 18. Interest for 6 years, 5 mos. 27 days on	
\$428, at 7 per cent. from date of Bond,	
Dec. 22, 1854, - - - -	194 46

30

June 18, 1861. Amount due complainant for Principal	
and interest, - - - -	\$622 46

428
7

4 $\frac{1}{2}$	29 96
1 $\frac{1}{2}$	6

179 76

40	15 $\frac{1}{2}$	9 98
	10 $\frac{1}{2}$	2 49
		1 24
	2 1-5	83
		16

\$194 46 Interest 6 yrs. 5 mos. 27 ds.
All which is respectfully submitted.

THEO. FRELINGHUYSEN, JR.,
Master in Chancery of New Jersey.

50 Dated June 18, 1861.

DECREE.

FILED AUG. 1, 1861.

This cause coming on to be heard in the presence of Theodore Runyon of counsel for the complainant, and John Whitehead of counsel with the defendants, The German Evangelical Lutheran Church and Congregation of the City of Newark, connected with the Evangelical Lutheran Ministerium of the State of New York and adjacent parts. The complainant's bill having been taken as confessed as against the defendant and Samuel H. Congar, and it having been heretofore decreed by this Court that the complainant is entitled to the relief sought and prayed for by him in his said bill of complaint and is entitled to have and receive of and from the said The German Evangelical Lutheran Church and Congregation of the City of Newark, connected with the Evangelical Lutheran Ministerium of the State of New York and adjacent parts, and out of the mortgaged premises in the said bill of complaint and in said complainant's mortgage set forth and described, and it having been referred to Theodore Frelinghuysen, Junior, Esquire, one of the masters of this Court, to ascertain and report among other things the amount due to the complainant for principal and interest on his said mortgage, and the amount due, if any thing, to the said Samuel H. Congar on his mortgages, and the order and priority of the said several mortgages respectively. Whereupon and upon opening of the bill and reading the proofs and exhibits in the cause and the report upon file made by the said Theodore Frelinghuysen, Junior, Esquire, one of the masters of this Court, pursuant to the order of this Court, bearing date on the eighteenth day of June, in the year of our Lord eighteen hundred and sixty-one, from all which it appears that there was due to the said Samuel H. Congar on his mortgages in the said bill mentioned, for principal and interest on the day of the date of the said report, the sum of six hundred and ninety-four dollars and fifty-six cents, and to the complainant for principal and interest on his mortgage in the said bill mentioned and set forth, the sum of six hundred and twenty-two dollars and fifty-six cents, that the mortgages of the complainant and said Samuel H. Congar embrace the same premises, and that both the mortgages of the said Samuel H. Congar are prior in date and registry to the mortgage of the complainant and are entitled to priority in payment, and it further appearing by the said report that it is necessary and advisable that the whole of the mortgaged premises should be sold to raise and satisfy in the first place the money so reported to be

due to the said Samuel H. Congar, and in the next place to raise and pay the money so reported to be due to the complainant as aforesaid, together with the costs of this suit, and no cause being shown or appearing against confirming the said report, It is on this first day of August, in the year of our Lord eighteen hundred and sixty-one, by Henry W. Green, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor doth, by virtue of the power and authority of this Court, hereby order, adjudge and decree that the said master's

10 report do stand ratified and confirmed, and that the land and premises in the said mortgages and bill mentioned and described with the appurtenances be sold to raise, pay and satisfy the said sum of six hundred and ninety four dollars and fifty-six cents, reported to be due to said Samuel H. Congar as aforesaid, together with lawful interest thereon from the date of said report, and also the sum of six hundred and twenty-two dollars and forty-six cents, reported to be due to the complainant as aforesaid, together with lawful interest thereon from the date of said report, and also the costs of said suit to be taxed with lawful interest thereon

20 from the date of this decree, and that a writ of Fieri Facias do issue for that purpose out of this Court directed to the Sheriff of the County of Essex, commanding him to make sale according to law, of the said mortgaged premises, and that out of the money arising from such sale he pay to the said Samuel H. Congar, his said debt and interest as aforesaid in the first place, and that in the next place he pay to the complainant or his solicitor his said debt, costs and interest as aforesaid, and that in case more money should be raised by the said sale than shall be sufficient to answer such payment, that such surplus be brought into this Court to

30 abide the further order of the Court, unless otherwise previously disposed of by the order of this Court, and that the said Sheriff make return without delay of his proceedings by virtue of the said writ, and it is further ordered, adjudged and decreed that the defendants be absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises, when sold as aforesaid by virtue of this decree.

HENRY W. GREEN, C.

Court of Errors and Appeals in the last Resort.

BETWEEN

THE GERMAN EVANGELICAL LUTHERAN CHURCH AND CONGREGATION OF THE CITY OF NEWARK, CONNECTED WITH THE EVANGELICAL LUTHERAN MINISTERIUM OF THE STATE OF NEW YORK AND ADJACENT PARTS, *Appellants*,

AND

SETH W. MAGIE, *Appellee*.

To The Honorable the Court of Errors and Appeals, in the last resort in all causes of Law :

The humble Petition of the German Evangelical Lutheran Church and Congregation of the City of Newark, connected with the Evangelical Lutheran Ministerium of the State of New York and adjacent parts, the appellant above named, respectfully shows, that your petitioners find themselves aggrieved by a final Decree, made in the Court of Chancery, by the Honorable Henry W. Green, Chancellor of New Jersey, bearing date the first day of August, one thousand eight hundred and sixty-one, wherein the Seth W. Magie was complainant, and these appellants and Samuel H. Congar were defendants, in this respect, to wit : That the said Decree adjudged that a certain instrument, called in said Decree, a Mortgage assigned to and held by said Seth W. Magie, was and is an existing and valid incumbrance upon the mortgaged premises in the pleadings of this cause mentioned. 10

And your Petitioners humbly appeal from that part of the said Decree of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous ; for the said instrument called a mortgage is not an incumbrance upon the said premises, but is absolutely unlawful, null and void.

Your Petitioners therefore pray that the said Decree of the said Chancellor may be in the particulars aforesaid, reversed, set aside and for nothing holden, and that your Petitioners may have such relief in the premises, as to this Honorable Court shall seem meet. 20

Dated this first day of October, one thousand eight hundred and sixty-one.

PARKER & KEASBEY,
Solicitors and of Counsel for Appellants.

CORTLANDT PARKER,
Of Counsel.

CHANCELLOR'S OPINION.

The only question submitted for the consideration of the Court is the power of the Corporation to encumber the premises by mortgage. For the purpose of the present inquiry, the existence and bona fides of the debt, and the due and formal execution of the mortgage by authority of the Corporation, is conceded. The defendants, being an organized religious society or congregation, were incorporated under the act to incorporate trustees of religious societies. Nix. Dig. 686. The mortgaged premises were conveyed to them by Samuel H. Congar and wife, by deed dated the 31st of October, 1839, for the consideration of one thousand dollars, upon which the defendants have erected a house of worship. The deed is an absolute conveyance in fee upon the following trust, viz : "to have and to hold the said property as an Evangelical Lutheran Church forever, in which the doctrine of the Augsburg Confession and Luther's Smaller Catechism shall be taught and adhered to ; and provided that, if necessary, the privilege of preaching in the English language, besides the German, shall be granted to the rising generation, until such a time that a separate church can be provided for an English congregation, so, however, that the Germans shall always have the right to select their time for worship, and provided further that the said party of the second part shall not, by deed, mortgage, or by any other ways or means, alienate, dispose of, or otherwise charge or encumber said property, excepting the mortgage now given to Samuel H. Congar, to secure part of the purchase money of said premises. And provided further, that in case these conditions be violated, then any one or more regular members shall have the right of applying to the Evangelical Lutheran Ministerium of the State of New York and adjacent parts, with which the congregation is connected, to take possession of, hold, and keep said property in trust for carrying out the above named purposes : and in case said conditions be violated, and no appeal made to the said Evangelical Lutheran Ministerium of the State of New York and adjacent parts, then the officers of said Ministerium shall constitute a board of trustees, with full powers to secure said property for the above named purposes."

No evidence has been taken in the cause. These facts and the terms of the trust have been derived from the admissions of counsel upon the argument and from the allegations of a bill filed by the defendants against Maschop, (2 Stockt.) which is used by consent as evidence for the purposes of the present investigation.

Independent of the character of a trust impressed upon the property by the terms of the conveyance, the condition annexed to the grant that the property shall be unalienable, is clearly void:

An unlimited power of alienation is an inseparable incident of an estate in fee simple, and cannot be restrained by any provision or condition whatever.

1 Cruise's Dig. Tit. 1, § 53.

4 Cruise's Dig. Tit. 32, Ch. 23, Sec. 1, § 2.

Co. Litt. 206, C. 223 a, Litt. Sec. 360.

A condition repugnant to the nature of the estate to which it is annexed as that a tenant in fee shall not aliene, is void in its creation.

2 Cruise's Dig. Tit. 13, Ch. 1, § 19, § 32.

But it is urged that the principle is not applicable to the conveyance now under consideration, inasmuch as the property is conveyed by the grantor, to a religious corporation for a charitable use, upon this special trust among others that it shall be held "as an Evangelical Lutheran Church forever," and shall not be alienated, disposed of, charged or encumbered by deed, mortgage, or by any other ways or means.

The trust was not created by *gift* or *devise*. The land was purchased by the corporation for a valuable consideration, and the church has been erected, it must be presumed by the funds of the corporation. The trust therefore in the deed, it is fair to assume, was inserted by the defendants at their own instance and for their own benefit and protection.

Nor is the trust created or protected, the alleged inability to convey imposed by the Charter of the defendants as a body corporate; on the contrary by their act of incorporation the defendants are authorized not only to purchase and hold lands for the use of the congregation, but "the same or any part thereof, to sell, grant, assign, demise, alien and dispose of."

The inquiry then results in this, May the Trustees of a religious, literary or other benevolent association, irrespective of any special power conferred by their act of incorporation, purchase and hold real estate under trusts of their own creation, which shall protect their property from the reach of their creditors, and shield it against appropriation for the payment of their just debts? Is that a charitable use which a court of equity is bound to protect? When property is given to a corporation in trust for a charitable use, the trust is the creature of the donor. He may impose upon it such character, conditions and qualifications as he may see fit. The property being a gift, no wrong is thereby done to the creditors of the corporation, and a court of equity may well protect and enforce all the conditions of the gift, but the case is widely different where a corporation attempts by means of its own devising, however honest and well intentioned, to place its own property beyond the reach of its creditors. This certainly 50

is not a charitable use, which a court of equity can be called upon to protect and enforce.

So far as this deed, by means of the trusts contained in it, dedicates the property to the exclusive enjoyment of the religious society for whose use it was designed, and limits and regulates the terms of that enjoyment, the trusts will be protected and enforced by the Court. The Corporation had a clear right to specify the purposes to which the property should be dedicated and the uses to which it should be appropriated, but the attempt to restrain
10 the powers of alienation for the necessary uses of the Corporation, is illegal, and the condition imposing such restraint is inoperative and void.

The Corporation had the legal title to the land, and the power at law of executing the mortgage. There is no equity in refusing to enforce the mortgage for the payment of the honest debts of the Corporation, under color of protecting a charitable use.

For Clerk's Desk.

The German Evangelical Lutheran Ch. (on
App. 1st. App.
Seth W. Majie
Responsible Secy. of
Mo. to dism.

COURT OF ERRORS AND APPEALS.

THE GERMAN EVANGELICAL LUTHERAN CHURCH, NO. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

IN THIS APPEAL, COUNT TO THE APPEALANT:
1. Because it is really an appeal from an interlocutory decree, and not from a final decree, it is not brought from the Court of Errors, but from the Court of Appeals, which is brought with reference to the decree of the Court of Appeals of 1860.
Now unless that decree was a final decree, this appeal is not brought within the time fixed by law for appealing from it.
All appeals except from final decrees shall be brought within forty days after filing the order or decree appealed from.
Was this a final decree?
A final decree is defined to be "one which finally settles and fixes the whole merits of the cause, and reserves no further questions or directions for the future judgment of the Court; so that it will not be necessary to bring the cause before the Court for its final decision." With 5, 1860, 7, Page 18.
The usual decree in mortgage cases for the sale of the property and the distribution of the fund among the parties, and finally the fixing of the question of costs is a final decree as between the plaintiff and the defendant.
Chief Justice Savage defined a final decree to be the last decree which is necessary to be entered to give to the parties the full and entire benefit of the judgment of the Court. 1861.
A decree which does not dispose of the whole merits of the case, but leaves important questions for further examination and the future judgment of the Court is not a final decree. 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000.

COURT OF ERRORS AND APPEALS.

BETWEEN

THE GERMAN EVANGELICAL LUTHERAN
CHURCH, &C., *Appel'ts*,

AND

[SETH W. MAGIE, *Respondent*.

} Argument of
Theodore Runyon,
for *Respondent*.

I. THIS APPEAL OUGHT TO BE DISMISSED :

1. Because it is really an appeal from an *interlocutory decree made in Nov. 1860*. It is very evident that it is not brought from the *final decree*, filed Aug. 1, 1861, but it is brought with reference to, and for the reversal of the *interlocutory decree of 1860*.

Now unless that decree was a *final decree*, this appeal is not brought within the time fixed by law for appealing from it.

"All appeals except from final decrees shall be brought within *forty days* after filing the order or decree appealed from." *Nix. Dig.*, 106.

Was this a final decree ?

A final decree is defined to be "one which finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the Court; so that it will not be necessary to bring the cause before the Court for its final decision." *Mills v. Hoag*, 7 *Paige* 18.

The usual decree in mortgage cases for the sale of the property and the distribution of the fund among the parties, and finally disposing of the question of costs is a final decree as between the complainant and the defendants. *Ibid.*

Chief Justice Savage defines a final decree to be the last decree which is necessary to be entered to give to the parties the full and entire benefit of the judgment of the Court. *Ibid.*

A decree which does not dispose of the whole merits of the case, but leaves important questions for further examination and the future judgment of the Court is not a final decree. *Newark Plank Road vs. Elmer & al.*, 1 *Stock*. 787.

"A decree is *interlocutory*, when it happens that some material circumstance or fact, necessary to be made known to the Court, is either not stated in the pleadings, or so imperfectly ascertained by them, that the Court by means of that defect, is unable to determine finally between the parties; and therefore, a reference to, or an inquiry before, a Master, or a trial of the facts before a jury, becomes necessary to have the doubts occasioned by that defect removed. The Court, in the meantime, suspends its final judgment, until, by the Master's report, or the verdict of a jury, it is enabled to decide finally." *Harrison's Practice in Chancery*, 420.

This decree of Nov. 1860, did not dispose of the whole merits of the case.

It determined that the complainant was entitled to have and receive from the corporation and out of the mortgaged premises the amount which remained unpaid on his mortgage and which had accrued thereon for principal and interest, and that is all that was determined thereby. For the purpose of enabling the Court to make a final decree between the parties it ordered by that decree a reference to a Master to ascertain the amounts due on this mortgage and the mortgage of Samuel H. Congar on the same premises, the order and priority of those mortgages, whether they both embraced the same premises, &c., whether the whole or only a part of the mortgaged premises, should be sold, and if all the property should be sold, whether it should be sold together or in parcels.

To the insistent that the appeal from the final decree draws after it the examination of all the proceedings which have preceded that decree, I answer :

That if the distinction between interlocutory and final decrees be admitted at all on a question of right of appeal, there must be a limitation to the extent to which the appeal from the final decree draws into the consideration of the Court the interlocutory decrees made in the cause. The extent to which that insistent is true, is this :

All antecedent proceedings must be brought up and may be considered by the Court because it may become indispensable to reverse, alter or modify them, in order to make them consistent with the decree to be pronounced. When the decree to be pronounced *upon the matter distinctly and appropriately appealed from* requires the modi-

fication of some previous order in order to make it consistent with such decree, the Court of Appeals, must, from the necessity of the case, have the right so to modify it. *Sutherland, J., in Kane v. Whittick*, 8 Wend. 233.

The rule, however, cannot be carried to the length which must be claimed for it in order to warrant the review by this Court of the decree of Nov. 1860, without giving indirectly the same time for appeal from all interlocutory decrees as from final decrees.

2. The appellants are estopped from complaining of the decree of Nov. 1860, by their own action in submitting to it by appearing before the Master, and taking testimony under it; suffering the report to be made under it; final decree to be entered on the report; execution to be issued on the decree, and the premises advertised under the execution before they took any appeal.

"On general principles applicable to the course of legal proceedings, a party ought not to be permitted to lie by and subject his antagonist to the expense and delay of a reference, and then on the coming in of the report object to the principles on which it was conducted." *Kane v. Whittick*, 8 Wend. 234.

3. The appellants have no right to any review of this final decree, because they made no question as to its propriety when it was entered, and it was entered by default.

No review will be allowed in the Court of Appeals of a decision or judgment, where the question has not been *actually passed upon or distinctly presented* to the court below. *Colden vs. Knickerbacker*, 2 Cow. 31; *Kane vs. Whittick*, 8 Wend. 219.

They made no complaint of the decree until October 1, 1861, two months after it was issued, and then they appealed.

II. THE DECREE OF NOV., 1860, IS NOT ERRONEOUS.

The question now presented for consideration is of far more moment to the community that it is to the appellants.

To the latter it is, as it stands before the Court, a dispute as to whether they shall be required to pay a debt whose justice is not for the purposes of this argument, denied, but admitted.

If the decision shall be adverse to establishing the mortgage, the appellants will not only have avoided the payment of this debt, but

will have received the assurance that it is lawful in this State for a corporation (it is not so for an individual) to secure by a single clause or condition in the deed, land which they may purchase in fee simple, and all improvements which they may subsequently put upon it, to their use, *forever, against appropriation to any creditor, or for any claim, however just and honest, which they or their successors may contract, and against all possibility of alienation, directly or indirectly, by them or their successors.*

But if the decision be in favor of the validity of the mortgage, no novel or startling doctrine will have been enunciated. It will be adjudged that the land so purchased is like the land of any other owner, liable to those incidents of alienation and encumbrance which are attached by law to tenure in fee simple and that the land of corporations for benevolent, religious or educational purposes is subject in New Jersey to the same law as the land of individuals.

The decision of this question is obviously of greater moment to the citizens of the State, as a matter of public policy, for by it will be determined whether in the absence of express authority of the Legislature, corporations for religious or philanthropic objects, of other purposes of general advantage, may secure to themselves beyond all chance of alienation or appropriation for the payment of just debts, whatever land, (for there would be no limit,) they may be able to acquire, and they and their successors *hold it in dead hand forever.*

It interests all religious denominations, the Roman Catholic, the Episcopalian, the Methodist, the Presbyterian, the Baptist, the Universalist, the Jew; all benevolent societies, all lodges of Freemasons, all lodges of Odd Fellows, Sons of Temperance, and all other philanthropic associations, all societies for the promotion of education, art and science, all library associations, all who are interested in schools, whether agricultural, academical, or collegiate, as affecting their perpetuity and power in all the future; for it will assure them whether they may, by the simple and ready means of a clause or condition in the deed for property which they may purchase, secure it to the uses of their corporations for their peculiar purposes forever. It is hardly necessary to remark that it is against the policy of our

law to establish the inalienability of land in the hands of individuals. It must also be so to declare in favor of it on the ground that the owners have seen fit to dedicate it on purchasing it, to a religious use, in the hands of themselves and their successors. While such an adjudication would secure to religious societies a thorough protection for their property, and render it certain that their cathedrals, their churches, their monasteries, and other religious houses, would by reason of the favor which their religious character had found in the eyes of the courts be stamped with a permanence invaluable to denominational interests, it would nevertheless introduce a discrimination in the tenure of real estate at variance not only with the law of real property, but also with the long received and well approved views of the danger to republican institutions, of a policy which would thus invite and furnish the means of an indefinite increase of power.

It will not be pretended that a private individual, or a railroad corporation, or a political association, can lawfully purchase land in fee simple in New Jersey, and by condition in the deed secure it against alienation or appropriation for their debts, but it is argued that it is lawful for a religious corporation to do so, because it is a *religious corporation*. Where is the authority for this distinction? Does it lie in the character of the purposes to which the property is to be devoted? Then it will extend to property dedicated to any object of general advantage, or of worthy character.

It will be perceived that no authority of express law is claimed for this discrimination in favor of religious corporations and their property:

The deed for the mortgaged premises was taken by the corporation, on a purchase of the land by them from Samuel H. Congar, for a valuable consideration (\$1,000) paid by them, as the deed itself declares.

It conveys the property to the corporation *in fee simple*, but "to hold the said property as an Evangelical Lutheran Church forever, in [which the doctrines of the Augsburg Confession and Luther's Smaller Catechism shall be taught and adhered to;" and with provisos as follows: "And provided that if necessary the privilege of

preaching in the English language besides the German shall be granted to the rising generation, until such a time that a separate church can be provided for an English congregation; so, however, that the Germans shall always have the right to select their time for worship. *And provided further, that the said party of the second part* (the corporation) *shall not by deed, mortgage, or by any ways or means, alienate, dispose of, or otherwise charge or encumber said property*—excepting the mortgage now given to Samuel H. Congar to secure part of the purchase money of said premises. And provided further, that in case these conditions be violated, then any one or more regular members shall have the right of applying to the Evangelical Lutheran Ministerium of the State of New York and adjacent parts, with which the congregation is connected, to take possession of, hold and keep said property in trust for carrying out the above-named purposes. And in case said conditions be violated, and no appeal made to the said Evangelical Lutheran Ministerium of the State of New York and adjacent parts, then the officers of the said Ministerium shall constitute a board of trustees, with full power to secure said property for the above-named purposes.”

This is no case of *gift or devise*, with trust or condition imposed by donor or deviser, but it is a case of purchase with trust and condition dictated by the purchaser, the grantee.

The trust, if the condition against alienation, &c., be considered part of it, is in contravention of the statute of Frauds.

By section 1, of that statute (Nix. Dig., p. 327), it is declared that every deed of gift in trust to the use of the grantor is void. By this provision the Legislature intended to put it out of the power of the owner of property to secure it to himself by the contrivance of a conveyance. Will he be permitted to effect the same illegal end by the easier method of taking the conveyance for land, which he has purchased to himself in fee simple, with condition that he “shall not by deed, mortgage or by any other ways or means alienate, dispose of or otherwise charge or encumber the property?” Assuredly not. In such case the Courts would declare the condition void, not only as being in contravention of the statute, but as being against sound policy and honesty.

Will not the Court do the same thing in respect to the property purchased by corporations, however meritorious the object to which the property is dedicated?

The condition against alienation and incumbrance is void, as being repugnant to the estate conveyed by the deed.

McWilliams v. Nisly, 2 Serg. and Raw., 507.; *Jackson v. Shultz*, 18 John., 184.; *Taylor v. Mason*, 9 Wheat., 350.; *Newkirk v. Newkirk*, 2 Caines., 345.; *Hallet v. Thompson*, 5 Paige, 586.

Williams on Real Property, 72, 73., (Marg.) "So inherent is the right of alienation of all estates, (except estates tail in which the right is only of a modified nature), that it is impossible for any owner by any means, to divest himself of the right. So long as any estate is in the hands of any person, so long does his power of disposition continue. When, however, lands are given by one person for the benefit of another, it is possible to confine the duration of the gift within the period in which it can be personally enjoyed by the grantee. But, though another person may make such a gift for A's benefit, A would not be allowed to make such a disposition of his own property in trust for himself."

Conditions are not sustained when they are repugnant to the nature of the estate granted, or infringe upon the essential enjoyment and independent rights of property, and tend manifestly to public inconvenience. A condition annexed to a conveyance in fee, or by devise that the purchaser or devisee should not alien, is unlawful and void. 4 *Kent's Comm.*, 131.; *Depeyster v. Michael*, 4 Seld., 468.; *Schermerhorn v. Negus*, 1 Denio, 448.

It is worthy of remark that the restraint of alienation, &c., in this deed is not qualified or limited to the necessities of the Church or even to the necessary improvement or repairs of the premises themselves, but is absolute and unqualified. So that as in the present case, in which it is attempted to enforce a mortgage given ~~partly~~ for advances to pay for paving the street and sidewalk in front of the property, in default of which the property must have been sold under the Charter of Newark, (unless the conditions of the deed might have been interposed even against that liability), partly for premiums for Fire Insurance upon the buildings on the property, partly for interest on the

mortgage to Mr. Congar for purchase money, (a payment necessary to save the property from foreclosure of the first mortgage), partly for fuel to warm the Church, and the rest for the arrears of salary due the minister, it is insisted that the condition prohibits all manner of appropriation of the property, not only for the necessities incident to its use for the very purposes mentioned in the trust, but also to its very preservation against involuntary alienation under the Charter of Newark to the utter destruction of the trust itself.

But, is not the mortgage good even if the condition were held to be valid?

The proviso is that the grantees shall not mortgage the property; but suppose they do mortgage it, what then? At most, the grantees forfeit their title to the premises, and the property reverts to Mr. Congar, or if it does not so revert, (as evidently it was not intended it should), the Ministerium of New York may take the property into their hands, and by their management save it from further mortgage. The mortgage is good. The effect of the violation, (already complete by the mere giving of the mortgage,) whatever it may be, whether it be the one result or the other, whether it does or does not affect the title to the land, is to be met by the purchaser of the premises under the execution. That effect is clear enough from the proviso in the deed. If the property is mortgaged, the Ministerium is to have the right to take charge of it for the future. That is all.

This is not an application by *cestui que trusts* to restrain the corporation from giving the mortgage on the ground of the obligations, if any, of the trust; it is an application to the Court to refuse to give effect to a mortgage, "the due and formal execution of which, by the authority of the congregation, and the existence and bona fides of the debt which it purports to secure, are for the purposes of the present enquiry conceded." *Ch. Green's Opinion in this cause.*

Can the corporation which thus gave the mortgage now come into Court and ask that it be relieved from it because it professes not to have had authority to make it?

Is it not thoroughly estopped by its own act in thus executing the instrument?

Were the case that of a mortgage given by an individual owning

land in fee simple, with condition not to make such mortgage, and further condition, that if he did, a designated friend might take the property into his possession and keep it for the benefit of the owner, would a Court of Equity hesitate to say that not only was the condition void as repugnant to the title of the mortgagor, but that, by the obvious rules of justice he was estopped from setting up that defence?

The allegation of the corporation is not that they are prohibited by Charter from making the mortgage, for the general law under which they are incorporated expressly gives to them power not only to hold lands for the use of the congregation, but also "the same or any part thereof to sell, grant, assign, demise, alien and dispose of"; not that the debt is not a just one and due to the respondent as assignee of the mortgagee, or that the mortgage was not duly executed according to law, (for the justness of the debt and the due execution of the instrument are admitted for the purposes of this inquiry,) but that when they purchased the property they took care to provide by the conveyance to them for the security of the property in their hands against all appropriation for the payment of their debts.

Such a defence could not avail them at law, assuredly it will not in equity.

