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THE GIFT OF
Mr. William W. Cook,
Law '83
THE

Law of Charitable Uses,

TRUSTS AND DONATIONS

IN

NEW YORK

45 71

BY

ROBERT LUDLOW FOWLER

COUNSELLOR AT LAW

NEW YORK

THE DIOSSY LAW BOOK COMPANY

Publishers

1896
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by
ROBERT LÜDLOW FOWLER.
"An Act relating to real property, constituting chapter forty-six of the general laws" (Chap. 547 Laws of 1896), became a law May 12, 1896. As this new "general law" entirely changes the ancient references to the Revised Statutes concerning real property, it is deemed best to subjoin a Table which will show the references made in these pages to the new form of the law of real property. By this means the references in this Treatise are fully adapted to the order of things which will ensue in this State after October 1, 1896, when the new law takes effect.

The former law of New York relating to Charities was greatly modified by Chapter 701, Laws of 1893. This act is discussed in this Treatise: it is not repealed by Chapter 547, Laws of 1896. On the contrary, the new Article on Uses and Trusts (Article III. of Chapter 46, General Laws) distinctly tolerates and even strengthens the reform contemplated by Chapter 701, Laws of 1893. The Legislature, by inserting a portion of the law of 1893 in the new article on Uses and Trusts, manifestly restores Charitable Uses to a situation which they have not enjoyed in the law of this State since the Revised Statutes first went into effect (Sections 72, 93, Chap. 46, General Laws). This is a great gain for charity.

No apology seems necessary for the appearance of this book, however imperfect it may be; for there is no other treatise dealing with precisely the same topics. The English books do not go back of the Statute of Charitable Uses (43 Eliz.). The American books make scant reference to the particular features of the law of this State.

The law of charities forms no exception to the rule, that in the early stages it demands a separate investigation of the principles governing land and of those principles governing movable property. It also requires an investigation of the doctrines acted on in the courts of law, as contrasted with those applied in the extraordinary tribunals, or the courts of equity. It is only in the most advanced stage of a nation's jurisprudence that all these rules and principles become uniform.1

In New York the law relating to charitable gifts presents features which are peculiar to its own jurisprudence and the product of its own sovereignty. But even the existing law may be best understood in the light of history, which alone shows the nature of the changes wrought in its fabric by revolution and by statutes. When we become familiar with the history of the law of charities in this State, the doctrines established at the present day are less difficult of application to a given case.


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The reader will note that the references on page XXVI infra to 1 R. S. 725, sec. 45, should be 1 R. S. 727, sec. 45, and that the reference to 1 R. S. 729, sec. 142, should read 1 R. S. 739, sec. 142; while the reference on page 144 note, to 1 R. S. 73, sec. 16, should be to sec. 65.
The law relating to charitable donations, uses, and trusts in New York is discussed in no extended manner in any single treatise with which the writer is familiar. The subject is commonly regarded by the practitioner as obscure, and the great number of adjudged cases always requires unusual attention at his hands, as they are seldom grouped according to any very definite scheme or principle. The present treatise may, therefore, be considered as the first attempt in this State to array the authorities upon some historical and definite plan. In view of this fact the writer confidently relies upon the kindly indulgence of the Profession of the Law. He even hopes, in view of the recent important Act regulating charitable gifts (Chap. 701, Laws of 1893), that this treatise may be found useful, at least by those whose opportunities for investigation have been somewhat less than his own.

The origin of the law of charitable uses is extremely ancient and yet the purely English books rarely carry their investigations to a point of time back of the Statute of Charitable Uses (43 Eliz., c. 4) which in that country has long superseded the necessity of any earlier reference or investigation. In this country the exigencies of the political situation occasioned by the application of the common law of England as contrasted with the statute law of that country, have made constant references to the original law of England necessary. This necessity has often produced investigations of the early or common law of England, of very great value to jurisprudence; as instances in point two, perhaps, are most noteworthy, the decision of Mr. Justice Baldwin, of the United States Circuit Court, in the case of Sarah Zane's will, and the exposition by Mr. Binney, of counsel, in the case of Vidal
Girard's Executors. But the courts of our own State have not always adopted the principles announced in those cases, preferring—in view of the very early revision of the statute laws of this State and the consequent subordination of the common law relating to land and uses and trusts to the rules set out in that revision—to investigate the sources of the common law of charities for themselves. The cases in New York are of final authority for the New York lawyer, at least within the sphere of their exclusive influence. Remembering this fact, the writer has refrained from citing those adjudications of other States which can only confuse a plain principle announced by the great courts of this State.

The law of charities forms no exception to the rule, that in its early stages it always demands a separate investigation of the principles governing land and those principles governing movable property. It also requires an investigation of the doctrines acted on in the courts of law, as contrasted with those applied in the extraordinary tribunals, or the courts of equity. It is only in the most advanced stage of a nation's jurisprudence that all these rules and principles become uniform.¹

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New York, April 15, 1896.

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CHAPTER I.

EARLY ENGLISH LAW OF CHARITIES.

As by constitutional limitation the common law of England and the statute law of Great Britain were sub modo made the law of the State of New York in the year 1777, our early law of charities is, in legal theory at least, now determined by the state of the law in England in 1775;\(^1\) for, in point of fact, little of such law had then been applied in the Province of New York. We must, therefore, begin our consideration of this branch of the law, with a brief account of the law of England, and next, consider what part of it was applicable to the Province of New York, and is to be regarded as the law of such Province; for only that part of the law of England which was in force or applicable here in colonial days, became a part of the law of the State of New York.\(^2\) Since 1777 a new law of charities has arisen here;\(^3\) but the new law is not wholly independent of the older law.

Limitations, settlements or gifts, intended to benefit the public, or which have some educational, benevolental, charitable or religious end, usually present two characteristics: they are permanent in operation and they are indefinite or uncertain in respect of the real or individual beneficiaries.\(^4\) In the Roman law such beneficiaries are designated personae

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\(^1\) Const. of 1777, Sec. xxxv.
\(^2\) Const. of 1777, sec. xxxv; Williams v. Williams, 8 N. Y., at p. 541.
\(^3\) Levy v. Levy, 33 N. Y., 97, 108; Holland v. Alcock, 108 N. Y., 312, 336, and cases cited below in Chapters III. and IV.
\(^4\) Yates v. Yates, 9 Barb., at p. 334; Williams on Executors, 1055, note; "Uncertainty is indispensable to all charities. If any one has a right to claim by law, it ceases to be a charity." Mr. Horace Binney in Vidal v. Girard's Exrs., 2 How., at p. 149; Levy v. Levy, 33 N. Y., at p. 104; cf. Tyssen Char. Bequests, 5; Fontain v. Ravenel, 17 How., at p. 384.
The fact that such settlements or limitations are permanent in operation, usually involves a corporate donee, or one whose life shall last beyond the span of a single human existence. But, so dominant is the idea of a trust in connection with the law of charities, that it has been said that a charity necessarily involves a trust. It is undeniably true that the "charitable use" of English law does involve the conception of a trust. But charity may take another form; the gift may be absolute to an eleemosynary or civil corporation, whose charter or constitution itself supplies the elements of a trust. An absolute gift to an eleemosynary corporation is not, however, a "charitable use," or trust, although it may come under the law of charity. Hence we shall briefly survey the law respecting gifts to uncertain persons, the law concerning charitable uses, and then the law governing gifts to ecclesiastical, civil and eleemosynary corporations. In England the law of uncertain gifts, or gifts in abstracto, and the law of charitable uses blend in the course of their development. The third branch is, however, distinct. By the Roman Christian law, which to some extent grafted itself on the English law of charities, all donations of land or movable estates, if made for religion or charity, were upheld, however indefinite the object of the gift. The law of charities is, therefore, primarily concerned with a class of indefinite or uncertain uses and gifts. But it is not exclusively so concerned, for it also involves donations absolute to char-

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1 *infra*, p. 15.
2 Owens v. Missionary Society of M. E. Church, 14 N. Y., at p. 384.
3 Owens v. Missionary Society, *ibid. supra*.
4 Cf. Tyssen, Char. Requests, I; In the Matter of the First Presbyterian Society of Buffalo, 106 N. Y., 251.
5 Andrew v. N. Y. Bible & Prayer Book So., 4 Sandf., at p. 179. Grant on Corporations, 4, states, by means of corporations "charitable trusts were secured to the objects of them so long as such objects should continue to be found." But real property devised to them is not inalienable. Shotwell, Exr., v. Mott, 2 Sandf. Ch., at p. 55; Owens v. The Miss. So. of M. E. Church, 14 N. Y., at p. 386.
7 Cottman v. Grace, 112 N. Y., at p. 306; Wright v. Trustees of Meth. Epls. Church, 1 Hoffman's Ch., at p. 244. An ambiguous trust was, however, no trust, even if for charity. *Vid. infra.*
itable foundations or corporations, as well as gifts in trust to charitable foundations and corporations.\(^1\)

It may be well to observe at this point that the term gift or donation (donatio) has long ceased to bear the strictly technical signification which it enjoyed in the older law, where it refers only to the creation of an estate tail.\(^2\) The term in the jurisprudence of New York has a much more extended meaning, and is applied to both lands and personal estate.\(^3\) It is authoritatively defined as a voluntary transfer of property by one to another, without any consideration or compensation therefor.\(^4\) As the maxim, that charities are favored, seems to have now no very well-defined place in the present law of New York, the rules relating to donations between the living (donatio \textit{inter vivos}) or even to a donatio mortis causa,\(^5\) do not appear to be relaxed in favor of charitable donations or gifts. The general rules of law applicable to other donations seem now to apply to charitable donations.\(^6\)

The term "charitable use" as employed in England, until very recently, referred exclusively to the uses mentioned in the Statute of Charitable Uses;\(^7\) none others were charitable except that by construction, others might fall within that statute.\(^8\) The term "charitable use" is thought to have gained its original significance as a technical term only after the Reformation in England, or in the reign of King Edward VI., and then to have been employed to distinguish certain uses of a public or non-private character from those uses then first condemned as superstitious by the Statute of Superstitious Uses.\(^9\) But

\(^1\) Williams v. Williams, 8 N. Y., at p. 535. This case was subsequently departed from, but a great many statements in the opinion are obviously continuing truths. Owens v. The Miss. So. of M. E. Church, 14 N. Y., at pp. 386, 387.
\(^2\) Cruise, D., Tit. 32, c. 4, sec. 33.
\(^3\) Curtiss v. Barrus, 38 Hun, 165.
\(^4\) Gray v. Barton, 55 N. Y., 68, 72.
\(^5\) 2 Kent's Comm., Chap. 38.
\(^6\) \textit{Infra}, Chapters IV., V.
\(^7\) 43 Eliz., c. 4; \textit{Vid. infra}, Appendix I.
\(^8\) \textit{Infra}, Chapter II.; Ayres v. The Meth. Church, 3 Sandf., at p. 376 seq.
at the present day in this State, "charitable use" has acquired a merely negative meaning in contrast with private uses and trusts, and in this sense is almost equivalent to a public trust, though the latter term has sometimes reference to a trust concerning the sovereign. The term "charitable use" since the abrogation of the Statute of Charitable Uses, has a larger signification than formerly.

But before considering in detail this species of trust, let us briefly survey the history of uses and trusts in English jurisprudence. The generic term "use" as employed in England and the states derived from her empire, is most ancient. It is now claimed by legists, that when it is employed technically in legal documents, it comes from the Latin "opus" and not from the Latin word "usus." The scribes, they say, wrote in an ancient charter conveying land to the use of John, "ad opus Johannis," or "ad usus Johannis" indifferently. In this sense "use" primarily denotes an agency of some kind. Be this as it may, step by step the conceptions conveyed by "opus," "fiducia," and "usus" in Anglo-Latin law were developed by the chancellors out of this primitive agency into the great doctrines of English equity relating to trusts.

When the feudal system, including the restraints on alienation of lands, had become too rigorous for the conditions of English life, uses or equitable estates were superimposed on the ancient law governing feuds. The tertennant or feoffee to uses alone remained subject to the old law; cestui que use obtained the beneficial estate, which possessed greater adaptation to social wants. The tertennant or feoffee to uses simply held the land in conscientia boni viri. The cestui que use enforced his equitable rights


2 Magill v. Brown, 16 Fed. Cas., at pp. 437, note, and p. 444 seq.; Ayres v. The Meth. Church, 3 Sandf., at pp. 376, 377; Cf. 3 Sharswood & Budd's Leading Cases in the Amer. Law of Real Prop., pp. 332, 333, 336; and see below in Chapter III.


4 Bacon's Essay on the Use of the Law; and "Reading on the Statute of Uses."
in foro conscientiae; but his estate was perfected only in the time of King Henry V. ¹

The gradual growth of the jurisdiction of the English chancellors over definite uses at the suit of the beneficiary, or cestui que use, is within the knowledge of all students ² of our judicial history. At the end of the reign of Henry V. (A. D. 1430) a Court of Chancery was one of the established courts of the realm. Down to the end of the same reign there is, however, no evidence of the English chancellors having enforced any substantive doctrines different from those which were recognized in the courts of law, except two—one of these exceptions related to conveyances made to the use of others besides the feoffee or grantee. This assumption of a jurisdiction over uses at the suit of the beneficiary, is the parent of our modern law of trusts.³

When the definite cestui que use thus obtained in the reign of Henry V. relief in a court of equity for a violation of his beneficial interest, the time could not be far distant in English Jurisprudence when such interest would be regarded as an estate, quite apart from the legal estate. Whether the development of these doctrines relative to equitable estates in England, depended on the analogies found by the chancellors in the Roman law relating to ususfructus, or fidei commissa, we need not stop to consider.⁴ It is sufficient for this place to know positively that a use was finally protected by the English Chancellor at the suit of a definite cestui que use. How or when a charitable use or one for an indefinite cestui que use ⁵ was so protected where no legal interest vested, is the vexed historical question of many of the greatest litigations in this country and will be considered hereafter.

¹ Infra.
² Digby, History of the Law of Real Prop., Chap. VI., and other institutional writers treat the subject very adequately.
⁵ Cf. Wright v. Trustees Meth. Epis. Church, ¹ Hoffman’s Ch., at p. 244, seq. and Cornish on Uses, Chap. I.
LAW OF CHARITABLE DONATIONS.

The Statute of Uses, 27 Hen. VIII., c. 10 (A. D. 1536), converted the beneficial estate of *cestui que use* into the legal estate, and henceforth those uses which the statute vested in possession were cognizable in the courts of common law. The narrow construction, by the common law courts, of a use in Tyrrel's Case¹ (A. D. 1557) led to the cognizance of many secondary uses, or of a use upon a use, by the Court of Chancery as trusts.² The uses upon which the Statute operated retained their original name; those upon which the Statute did not operate obtained the name of trusts, with the exception of charitable trusts, which singularly enough, even in our own day, continue to be called "charitable uses," although they always differed in some respects from the common use anterior to the Statute of Uses. The common use of English jurisprudence and the one referred to as so great an evil in the Statute of Uses, was a trust or confidence of a private character, having no public or charitable significance. When the use was charitable, or for the benefit of the public or a class, it was never supposed to be affected by the Statute vesting uses in possession.³ In short it is not difficult to detect that the English law of charities, including charitable uses, was always differentiated from the law relating to gifts or trusts for the benefit of persons certain—*personae certae*.⁴

As is well known, one of the effects of the Statute vesting private uses in possession was to take away the ancient right of transferring the vested use by means of a last will.⁵ This evil was soon remedied by the Statute of Wills.⁶ The power of devising lands was very ancient. It existed among the Saxons and was interrupted in England only by the perfection of the feudal system, which

¹ Dyer, 155 a; *held*, that there could not be a use upon a use.
² Tomlin's Lyttleton, 521; Wright v. Trustees Meth. Epis. Church, r Hoffman's Ch., at p. 237.
³ Cruise's Dig., Tit. 11, c. 3, sec. 7; Bacon's Essay on Statute of Uses, Montagne's Edit., vol. XIII., p. 340; *sed cf.* Minister, Elders, etc., of Dutch Church of Schenectady v. Veefer, 4 Wend., 494; Ayres v. The Meth. Church., 3 Sandf., at p. 373.
⁵ Powell on Devises, 1., 5.
⁶ 32 Hen. VIII., c. 1; 34 & 35 Hen. VIII., c. 5
excluded the power of alienating fiefs without the consent of the lord. But the introduction of inalienable feuds did not take away the right of disposing of terms of years or chattel interests by will. After the chancellors had developed the system of uses, which were regarded as things—res incorporalis—apart from the lands, uses freely passed by will.

We have observed that the Statutes of Uses did not vest charitable uses in possession. It may be, therefore, that the power of transferring uses to charity by will was not intended to be affected at all by the Statute of Uses. But as the Statute of Wills enabled devises of socage lands to be freely made, without the contrivance of uses, when the chancellor had again taken jurisdiction of those uses not vested by the Statute of Uses charitable uses were gradually confused with other trusts, and the law touching charitable uses and trusts then first began its history of approximation to the law of non-charitable uses.

How far the chancellors, after the reign of Henry V. (A.D. 1430) and before the Statute of Charitable Uses (43 Eliz., c. 4), assumed jurisdiction over indefinite, permanent charitable uses or trusts, at the suit of private persons, and without the direct intervention of the crown, is, as we have already stated, the historical question generally discussed in some way in the American cases decided in this century. The question was of very little importance in England after the Statute of Charitable Uses for by judicial construction, that statute was made to answer most of the purposes of a complete and salutary jurisdiction in cases involving existing conceptions of charities.

When we come to apply the law of England relating to charities to the conditions of this country, we shall find several fundamental questions discussed in the leading cases: (1) How far did the former jurisdiction of the Lord

1 By particular custom, certain lands always passed by will.
2 Powell on Devises, I., 4.
3 Cornish on Uses, 34; Williams on Executors, I., 1.
4 Infra, p. 9, seq.; et cf. Powell on Devises, I., 362 et seq.
5 Dutch Church in Garden Street v. Mott, 7 Pai., 77, 79.
High Chancellor over charities depend on the Statute of Charitable Uses (43 Elizabeth, c. 4)? (2.) If independent of that Statute, how far was it dependent on the royal prerogative? (3.) What portions of the English law touching charities and charitable uses became the law of the English in America, and survived the establishment of a republican form of government by the Anglo-Americans?

Until the Record Commissioners published, in 1827-1832, the three volumes of Calendars of Proceedings in Chancery in the reign of Queen Elizabeth, there were few reported adjudications of the Lord Chancellors, who held the great seal prior to 43 Elizabeth. Very seldom were chancery cases reported in the Year Books. Consequently the precise nature of the Lord Chancellor's primitive jurisdiction over Charitable Uses was not easily discernible prior to the year 1832, and even since then it has been involved in much doubt by reason of the unsatisfactory character of the reports.

Although the Court of Equity in Chancery had taken its place as one of the regular courts of the Kingdom in the reign of Henry V. (1413-1422), the theory that it was purely a court of conscience ceased with the clerical chancellors. Subsequently and until the reign of Queen Elizabeth and, indeed, until after the Statute of Charitable Uses (43 Eliz.), the jurisdiction of the lay Lord Chancellors must have been on uneasy and revolutionary foundations. Unfortunately the regular reports in chancery begin only with Lord Ellesmere, who was made chancellor by James I. in the year 1603, and few of his decisions remain. The printed data relating to prior equity cases and jurisdiction are of a most inadequate character. If we reflect that it

2 Spence, Eq. Jurisdict., I., 446, 447.
4 Lord Campbell, Lives of the Lord Chancellors, II., 368.
5 Kerly, Equity Jurisdiction, 98.
6 Lord Campbell, "Lives of the Lord Chancellors," II., 368; Magill v. Brown, 16 Fed. Cas., at p. 435; the Cases in the Calendars consist only of bills, answers, etc., or abstracts thereof.
was not until Lord Nottingham’s time, or until about 1673, when the Province of New York had been nearly a decade under English rule, that modern equity jurisdiction began to be placed on settled foundations, we may easily discern why the origin, the extent and the scope of the Lord Chancellor’s jurisdiction over charities prior to 43d Elizabeth, were debatable matters in this country. The publication of the Calendars of Proceedings in Chancery in the reign of Elizabeth, by the Record Commissioners in 1827 to 1832, naturally revised to some degree, preconceived conceptions of the nature and the extent of the Lord Chancellor’s jurisdiction over charities.¹ These records were forcibly used by Mr. Binney in the great case of Vidal v. Girard’s Executors, in 1844,² and more voluminously by Professor Dwight, in the case of the Rose Will in 1863,³ both counsel claiming an inherent jurisdiction in the Court of Chancery over charities independently of the Statute of Charitable Uses.

Before the publication of the Calendars of Cases in Chancery prior to 43 Elizabeth, the question indicated appears to have come up for discussion for the first time in the Federal Supreme Court, in the year 1819.⁴ The Chief Justice, Marshall, who delivered the opinion of the Court, maintained that the jurisdiction of the Lord Chancellor over vague and indefinite charitable uses where no legal interest vested could not be upheld independently of the Statute, 43 Eliz., c. 4. Mr. Justice Story prepared an opinion to the same effect, which the reporter, Mr. Wheaton, published anonymously as an Essay in the appendix to the fourth volume of Wheaton’s Reports. This opinion Mr. Justice Story, in the year 1835, incorporated almost literally in the first edition of the celebrated Com-

¹ Kniskern v. The Lutheran Churches, etc., 1 Sandf. Ch., at pp. 561, 562; Shotwell, Exr., v. Mott, 1 Ibíd., 50.
³ 4 Abb. Ct. App. Decis., 108. Consult his Statistics and cases published separately at New York, in 1863, as “Dwight’s Charity Cases;” although im-methodical they are most valuable to the legal profession.
mentaries on Equity Jurisprudence, and it remains the basis of the original text of the chapter on Charities. ¹

The opinion in Baptist Association v. Hart's Exrs., however, was not generally acquiesced in, especially in New York.² In 1844, after an examination of the records of cases in Chancery anterior to 43 Elizabeth, the Supreme Court itself appears to have altered its judgment on the general historical question of equity jurisdiction over charitable uses in the great case of Vidal v. Girard's Executors,³ Mr. Justice Story delivering the unanimous opinion of the Court. The opinion on this point, however, has been since in this State, at least, called a dictum.⁴

In 1850 in the case of Wheeler v. Smith,⁵ and in 1854 in the case of Fontain v. Ravenel,⁶ the Federal Supreme Court plainly attribute the Lord Chancellor's jurisdiction over charities of an indefinite nature to the prerogative whenever such jurisdiction was exercised before the Statute of Elizabeth.⁷

The revised opinion of Mr. Justice Story, in Vidal v. Girard's Executors, is clearly not acquiesced in either in Wheeler v. Smith or Fontain v. Ravenel. Thus the later expression of the Court on the historical question of the Lord Chancellor's jurisdiction appeared to be to the effect, that even if it was independent of the Statute of Charitable Uses (43 Eliz.), it could not be asserted in the case of indefinite, permanent charities, where no legal interest vested, except by virtue of the Lord Chancellor's functions of a non-judicial nature—or in short, of the prerogatives of the Crown. But a later expression of the Court seems to recur to the opinion in Vidal v. Girard's Executors.⁸

The advocates of the doctrine that equity jurisdiction depends on the Statutes of Charitable Uses (39 and 43 Eliz.,

¹ Chap. XXXI.
² Potter v. Chapin, 6 Pai., 639; McCartee v. Orphan Asylum Society, 9 Cow., 437, 470; Shotwell v. Mott, 2 Sandf. Ch., 46, 50.
³ 2 How., 127, 196.
⁴ Bascom v. Albertson, 34 N. Y., 584, 603
⁵ 9 How., 55.
⁶ 17 How., 369.
⁷ Ibid., pp. 388, 394.
⁸ Ould v. Wash. Hospital, 95 U. S., 303, 309.
c. 4) conceded that before the Statute the Chancellor's jurisdiction was complete \textit{when the trust was certain in its object and not perpetual}. But they claim that there is no evidence that before the Statute, uncertain or indefinite trusts intended to be perpetual were enforced by the Chancellors.\footnote{See brief of Mr. Cadwallader, of Counsel, on the Cases in Chancery prior to 39 Eliz., 2 How., U. S., at p. 179, note; brief of William Curtis Noyes, printed as an Appendix to 23 N. Y. Reports; Owens \textit{v.} Miss. So., 14 N. Y., at p. 398.}

They assert also, that independently of this Statute there was no mode of enforcing in equity a charitable use for the benefit of the public, and that the practice of filing informations by the Attorney-General in the interest of the Crown grew up subsequently to the Statute, and had no place in English jurisprudence before that time.\footnote{McCratee \textit{v.} Orphan Asylum, 9 Cow., 437, 472, 473, 481; Vidal \textit{v.} Girard's Exrs., 2 How. U. S., at p. 193.} But both contentions are now negatived.\footnote{\textit{Infra.}} They are, however, closely connected with the extent of the adoption of the English law of charities in this country.

In New York the purely historical question concerning the extent of the Lord Chancellor's jurisdiction over charitable uses has undergone some fluctuation. The opinion in Baptist Association \textit{v.} Hart\footnote{4 Wheat., 1.} not only was not acquiesced in,\footnote{\textit{Supra}, p. 10.} but there was a very distinct intimation in accord with that of Mr. Justice Story in Vidal \textit{v.} Girard's Executors,\footnote{2 How., at p. 194.} that such jurisdiction over charitable uses might be wholly supported by reference to the well-known jurisdiction over trusts and without reference to the Chancellor's exercise of the prerogative in cases where there was no trust.\footnote{McCratee \textit{v.} Orphan Asylum Society, 9 Cow., pp. 474 seq.; Potter \textit{v.} Chapin, 6 Pal., 639; Dutch Church in Garden Street \textit{v.} Mott, 7 Pal., 77; Wright \textit{v.} Trustees of Methodist Church, 1 Hoff. Ch., 202, 241, 263; Kniskern \textit{v.} Lutheran Churches, 1 Sandf. Ch., 439, 562; Shotwell, Exrs., \textit{v.} Mott, 2 Sandf. Ch., 50; Yates \textit{v.} Yates, 9 Barb., at p. 336.} This general opinion was confirmed at first in the Court of Appeals.\footnote{Williams \textit{v.} Williams, 8 N. Y., 525.} But in 1856 in Owens \textit{v.} the Mission-
ary Society of the Methodist Episcopal Church,¹ the opinion on the historical question denoted, seems the other way. In Beekman v. Bonsor, the historical divergence between the two cases last referred to was noticed by the Court, although no solution was offered. In Levy v. Levy² in 1865, it was, however, assumed that the Chancellor’s jurisdiction may have been independent of the Statute of Charitable Uses; but again nothing of consequence was contributed to the discussion on the historical question. But in Bascom v. Albertson³ in 1866, the Court said, “we are convinced by the able and lucid demonstration of Professor Dwight, that it (the jurisdiction) might have been sustained * * prior to and irrespective of the Statute” (43 Eliz., c. 4); “but we think it would have been in the exercise of its jurisdiction, as enlarged and aided by the royal prerogative and the cy pres power, which do not appertain to our judicial tribunals, in the absence of a special grant from the legislative department of the government.” This conclusion is not very clear as no distinction was made between cases of trusts and charitable donations to uncertain persons, personae incertae, where alone the royal prerogative is exercised.⁴ But in 1874, in People v. Ingersoll,⁵ the opinion on the historical question seems finally to coincide with that in Vidal v. Girard’s Executors. But as all trusts not saved by the Revised Statutes were abolished in 1830,⁶ and equity had plenary jurisdiction over the statutory trusts, the historical question after that time was not important and never has been the crucial question of the adjudged cases.

In England the historical question has been partly considered by Lord Redesdale and by Lord St. Leonards (Sir E. Sugden) and the general conclusion reached, that the

¹ 14 N. Y., 380; commented on to this effect in Beekman v. Bonsor, 23 N. Y., at p. 309.
² 33 N. Y., at p. 106.
³ 34 N. Y., 584, 592.
⁴ Infra.
⁶ Infra, Chapters III., IV. and V.
Statute of Charitable Uses (43 Eliz., c. 4) did not supersede the prior law, but that it simply gave liberty to proceed on the old jurisdiction in a summary manner.¹

The historical divergence of the American cases may be due either to inadequate Chancery data, as stated above, or to too great emphasis of a very striking incident in the history of English law. The Reformation destroyed the ancient foundations of English equity. The clerical Chancellors no longer sat in foro conscientiae, but English lawyers, in an extraordinary though regular tribunal, independent of all external dictates. Mr. Hargrave attributes the rise of modern law in England to the reign of Henry VIII.² But it was the expulsion of the clerical Chancellors, trained in the civil and canon law, which best marks the dawn of new equitable conceptions. Yet the lay Chancellors never subverted ancient institutions; they built slowly on the existing edifice, and with regard to precedent and practice if possible.³ The new régime found fully established a great system of charities, regulated by a law very different from the ordinary law of the land. It is now quite certain that they took up this law concerning charities just where they found it; and wherever they could apply it without disobedience to the statutes⁴ destroying old pious uses or institutions, they applied it freely until the Statute of Charitable Uses⁵ afforded a new and distinct basis for the entire jurisdiction over charitable uses. It is interesting to inquire into the origin of the differences noticeable in the law of charities and pious uses

² Preface to 13th Edit. Coke on Litt., p. xxiv. The reader will hardly need this reminder if he will think of the Statute of Uses or Wills.
⁴ 23 Hen. VIII., c. 10; 1 Edw. VI., c. 14.
⁵ The proofs are to be found in the Calendars in Chancery, in the Reports of the English Charity Commissions, and in the Chancery cases taken from the Ducatus Lancastriæ, or pleadings in the Duchy Court of Lancaster. See citations infra; and Mitcheson, History of Charity Commissions, 1, 2.
Mr. Justice Story, in his Commentaries on Equity Jurisprudence, only conjectures that the English Law of Charities must have been founded on the civil law. He admits that there is a chasm in the law prior to 43 Elizabeth. This chasm he subsequently attempted to fill up as far as the Elizabethan records in Chancery permitted. He never went farther. Although there are no systematic treatises relating to the law of charities in England prior to the reign of Queen Elizabeth, the evidences are quite sufficient to enable the inquirer to assume that charitable donations and uses then stood on a legal footing quite different from donations and uses not pious or charitable. If there were no such evidences, the practice of the clerical lawyers in regard to other uses in lands would in itself almost justify an inference that uses for the benefit of holy church or of the poor would not be allowed easily to fail for want of a compliance with the ordinary rules of law. Such records as we have of proceedings in Chancery prior to the Reformation in England, or to 39 Elizabeth, tend to confirm the accuracy of such an inference. Without attempting to exhaust the field of inquiry, let us now glance backward to ascertain, if possible, the early law touching charities, its probable origin, and the reason why in respect of charities we perceive a state of things with which the ordinary law of England is at variance.

When, before the Norman Conquest, the clergy introduced in England the method of disposing of estates by will or testament, they naturally applied the only system

1 Sec. 1137.
2 Sec. 1142.
4 Lord Thurlow and Lord Eldon attributed these differences to the adoption of the Roman law; White v. White, 1 Bro. Ch. Cas., 12; Moggridge v. Thackwell, 7 Ves., 36, 69; Mills v. Farmer, 1 Meriv., 55, 94, 95.
5 Cf. Dutch Church in Garden St. v. Mott, 7 PaL at p. 79.
6 The reader who cares to verify this established fact may consult Kemble, "The Saxons in England," Palgrave, and the early English chronicles, Bede, Ingulph; Freeman, Norman Conquest, I., 20, or more original sources in the early archives of Great Britain, such as Diplomatarium Anglicum Aevi Saxonici, by Thorpe.
of law with which they had any familiarity to gifts to charity. This system was the Roman law as it had been modified in Christian times.\footnote{1} The early Roman law did not permit devises to uncertain persons, \textit{incertae personae}\footnote{2} or trusts for their benefit,\footnote{3} so that devises, or bequests, to the poor generally, or to societies or corporations not having a legal existence, as well as trusts for their benefit, were void. Under Christian legislation, \textit{pia corpora}, pious foundations were made capable of taking by devise, and a trust for uncertain persons acquired validity from the pious purposes of the disposition.\footnote{4} By the time of Justinian, municipal bodies were permitted to take as heirs, or under a trust—\textit{fidei-commissum}.\footnote{5} The “Saviour,” an archangel, or a martyr could be appointed heir,\footnote{6} and these were construed as gifts to the church or shrine in the place where the testator lived.\footnote{7} The Roman law relating to charitable, pious, or public gifts \textit{in abstracto}, or those of an indefinite and permanent nature, was complete in the sixth century of our era.

It is unnecessary to dwell upon the history of land in England before the Conquest further than to call to the reader’s recollection the familiar conversion of the folk land into boc land and \textit{terra regis}.\footnote{8} When the folk land was chartered and became book land, or boc land, it was alodial, and from its inheritable quality was sometimes designated \textit{terra haereditaria}.\footnote{9} The important point to our inquiry is that boc land could be settled on any condition desired.\footnote{10} Hence donations of land to pious or charitable institutions or purposes were, before the
Conquest, probably *donationes sub conditione*, or conditional donations. But it was not always easy to determine when the grant was conditional, or when *locus* was personal land of the ecclesiastics, or when it belonged to the church. When any condition or qualification was expressed in the deed it was generally a causal or moving one, and indicated only that the lands were given for free alms or *in libera eleemosina*. Now conditions are said to have been the predecessors of the English notions of uses or trusts. When the judicial power of the Chancellor was confirmed over uses the donations *sub conditio* consequently became cognizable as uses, and after the Statute of Uses as trusts.

We should not anticipate the historical narrative, but proceed to the time long prior to the rise of uses or equitable estates, for there is a singular connection and relation in the law of charities. While much land was held by monasteries and other ecclesiastical bodies before the Conquest, there were many fictitious donations to them, by the terms of which the donors reserved the power of revocation or personal benefits of asylum. Consequently, the charities then existing were ripe for change at the Conquest.

After the conversion of England, the Roman Christian lawyers evidently applied the principles of the Roman law to donations to charity, and some time before the Conquest the possessions of the clergy for free alms or for divine service were not inconsiderable. The land chronicles show that ecclesiastical bodies, lay persons, and even

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1 Cf. Bracton, f. 19 b.
4 See Mr. Butler's admirable note, 239, Co. on Litt., 290 b.
5 Lingard, History of England, I., 517; Finlay, Byzantine Empire, 96.
6 Wright v. Trustees Meth. Epis. Church, 1 Hoff. Ch., 201, at p. 244; Monasticon Anglicanum, I., 11-22; Kemble, The Saxons in England, I., c. 11; II., c. 9; Anglo-Saxon Chronicles, 557; Bede, c. 19; Newcomb, History of the Abbey of St. Albans, 19, 20.
women, held lands for free alms or charitable purposes. In Domesday, the "Saints" are recorded as holding lands, and in at least one instance an accusation of wrong-doing was brought against a Saint in respect of his use of property. It is not easy to determine in what manner lands possessed by "Shrines" and "Saints" in *libera eleemosina*, or for free alms, were after the Conquest converted into the tenures by divine service and frankalmoigne. The great authorities on the military tenures are very silent about this change. But there are internal evidences that it was gradual. The Conqueror refrained from meddling much with church property, and, in all probability, with all property held for pious or charitable purposes. Obviously no other portion of the ancient law suffered less change at his hands than that regulating: gifts to charity. That property held *in libera eleemosina* was before the Conquest really trust property and inalienable, is evident from a very ancient document, in which it is said of certain lands, "*Vendere non potuerant, quia semper jacuerunt in eleemosina Regis Eduardi tempore et omnium antecessorum suo-rum.*" After the holdings for free alms were converted into tenures by frankalmoigne, the laws relating to donations of lands seem to have undergone modification at one time or another. We have seen that at first laymen and

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1 Smith's Beda, 767, 876; Allen on the Royal Prerogative, 141; cf. Exon. Domesday, 178, 179.
2 Anglo-Saxon Chronicles contain a donation to St. Peter and Abbot Sex- wolf, and see *Diplomatarium Ang. Aevi Sax.*
3 Those lands were originally probably conditional donations to *quasi* corporations; cf. Elton, Origins of English Hist., 215; Ingulph, History of Abbey of Croyland, 67; Allen on the Royal Prerogative, 145, 146.
5 *Vide* Freeman, Norman Conquest, V., 17, 20, 87, 253; Stubbs, I., 299; cf. Kemble, I., c. 11, and II., c. 9.
6 *Cf.* Freeman, Norman Conquest, V., 87, 253; Stubb's Const. Hist., I., 299.
7 Freeman, Norman Conquest, IV., 14, 17; V., 2.
8 Freeman, Norman Conquest, V., Appendix B., 498. Such ancient evidence as this could seldom be brought up in the case of lay holdings.
9 Shotwell v. Mott, 2 Sandif. Ch., at p. 55, showing that lands dedicated to charity became alienable *sub modo.*
women held lands for free alms;\textsuperscript{1} but by Littleton's time, and probably before, tenure both by frankalmoigne and divine service were confined to spiritual persons\textsuperscript{2} and ultimately to corporations \textit{de jure};\textsuperscript{3} unincorporated associations not being able in modern times to acquire lands by purchase,\textsuperscript{4} as anciently they might do.\textsuperscript{5}

When we come to the reign of Edward I. (A. D. 1272), gifts "to God" remained valid.\textsuperscript{6} Glanvill states that every person may give a certain part of his lands to a religious establishment in free alms.\textsuperscript{7} Bracton recognizes that gifts "to God" are in a secondary sense to the canons or monks or parsons.\textsuperscript{8} Property thus held remained inalienable.\textsuperscript{9} It is evident, therefore, that the common law had all the characteristics of the Roman law relating to property held in trust for \textit{incertae personae}; for gifts "to God," or "to a saint," were, in reality, only gifts to juristic persons for the well-being of the public or the poor at large. The important point to our inquiry is that such indefinite trust donations were anciently valid by the law of England, and fully regulated by principles very analogous to those of the Roman law.

It is also obvious that the early English law relating to charitable donations was less affected than the law relating to other gifts, by the stricter feudalization of lands which followed the Conquest. Before there were regular notions of corporations\textsuperscript{10} in English law, the legal \textit{status} of a "Saint," and of \textit{pia corpora}, was worked out by

\textsuperscript{1} \textit{Supra}, p. 17.
\textsuperscript{2} Litt., sec. 133.
\textsuperscript{3} Co. on Litt., 94 b; Wood's Institutes, 176.
\textsuperscript{4} Owens v. Miss. So. of M. E. Church, 14 N. Y., at pp. 385, 407; Atty. Gen'l v. Tancred, 1 W. Bl., 90; s. c. Ambler, 351; Jackson \textit{ex dem.}, etc., v. Cory, 8 Johns., 385; Hornbeck \textit{v.} Westbrook, 9 Johns., 73; Wright \textit{v.} Trustees Meth. Epis. Church, 1 Hoffman's Ch., at p. 248.
\textsuperscript{5} Co. on Litt., 3 a.
\textsuperscript{6} Pollock & Maitland, Hist. of Eng. Law, I., 122, 481.
\textsuperscript{7} L. VII., c. 1.
\textsuperscript{8} f. 12, f. 286, b.; \textit{cf.} Ingulph, Histy. of Abbey of Croyland, 67.
\textsuperscript{9} Glanvill, L. 7, c. 1; Doctor and Student, Dialogue II., c. 39; Bracton, f. 12; and p. 17, \textit{supra}, "\textit{Tempore Regis Edwardi}," etc.
\textsuperscript{10} The law of corporations in England developed long subsequent to notions of \textit{status}. A corporation by prescription is only a juristic person \textit{de facto}. 
the English ecclesiastics on the analogies afforded by the "collegia" and "templa" of the Roman Christian code—the universal code of Christendom. It is thus possible to account for future notable exceptions to the course of the common law of England on the assumption that pious or charitable donations, even of land, always differed in principle from donations not pious or charitable.

After centuries had intervened, Coke observes, without any explanation, that in "ancient times" parishioners, inhabitants, or probi homines of Dale, might purchase lands. The explanation is simple. He undoubtedly refers to a period when feudal notions of land transfer and late conceptions of corporate status had not absolutely obtained in English law in respect of charitable or pious donations. That such donations were not always subjected to the strict law of tenures is also apparent from the fact that escheats were sometimes taken away where lands were held to pious uses, and this, moreover, at a time when the idea of tenure had become all-pervading in English law. What both Littleton and Coke say of "tenure by frankalmoine" shows scant investigation of its origin. They do not even hint that it was probably a survival or adaptation of the Roman trust donations to pia corpora. They deal with existing phenomena only. After the Statute of Quia Emptores no private person could create the tenure by frankalmoine; the charitable donee held the lands by the same tenure which the donor held them. But by the time this was law the notion of a use—a new equitable estate—had dawned on lawyers and subsequently the importance of tenure and of legal estates diminished as

1 Bracton, f. 13; f. 27, b.
2 Co. on Litt. 3 a.; cf. Lewin on Trusts (1st Edit.), 143.
3 Contrasted with inheritance and includes "'devise.'"
4 Laws go out of fashion, or by reason of irrelevancy cease to be of universal application; cf. Sir Matthew Hale, Hargrave's Law Tracts, 269.
5 17 Edw. II. "De Terris Templarium."
7 Litt. Sec. 140. For twenty years in reign of Ph. and Mary, aliter by statute 1 and 2, Ph. and Mar. c. 8. This tenure, though accepted out of the Stat. 12, Car. II., c. 24, ultimately went out of use; Wood, Institutes of Laws of England, 177.
that of uses and equitable estates increased. It is probable that the indefinite characteristics of the Roman Christian code of charities survived all the inflections of the laws of England until the Statute of Charitable Uses.\textsuperscript{1}

Having now traced rapidly the early history of charitable donations, we are prepared to discuss the dawn of a system which grew up when lands became undivisible by reason of feudal restrictions. When lands became once more easily devisable,\textsuperscript{2} the new system of trust donations was firmly seated in the habits of the people, and charitable uses became lasting modes of limiting estates in lands to charity.

\textsuperscript{1} \textit{Infra}, Appendix No. 1.
\textsuperscript{2} \textit{Infra}, p. 21.
CHAPTER II.

CHARITABLE USES AND GIFTS IN ENGLISH JURISPRUDENCE.

We now approach familiar ground—the history of uses. With the development of the equitable doctrines relating to uses and the gradual perfection of these embryo trusts, it is evident that donations of lands for charitable purposes, or the spiritual welfare of the donor, took the form of conveyances to feoffees for pious uses, or else of donations to civil, eleemosynary, or ecclesiastical corporations in fee by license of the crown.¹ It has been intimated that a definite cestui que use could enforce the use in the time of Henry V., and that thus trust estates were established by the side of the legal seisin.² It has been apparent also, since the publication of cases in Chancery that before the reign of Elizabeth, and before the Statute of Charitable Uses (43 Eliz.), an indefinite pious use, or one for the benefit of personae incertae, could be enforced or redressed in Chancery.³ This was for a long time a very uncertain point of equitable jurisdiction. Wills or devises of uses were commonly enforced by the Chancellors at the suit of a definite or certain cestui que use before the Statute of Wills,⁴ while even after the Statute of Wills (34 and 35 Hen. VIII., C. 5, which made devises to corporations invalid), a will of lands to a corporation, if for charitable or

¹ Wakerying v. Baille, temp. Hen. VI.; Calendar of Proceedings in Chancery, I., pp. lixii., lxiii.; ibid, I., 81, case 54.
² Supra, p. 5, and see case cited by Edgerton in Robes v. Bent, Moore, 552.
³ Holland v. Alcock, 108 N. Y., 312, 324; see the cases taken from the Calendars cited by Mr. Binney, p. 156, 2 How., Note; and Dwight, Charity Cases, passim.
⁴ Tomlin’s Note to his “Lytleton,” Sec. 585; Rostianhale v. Wychingham, Cal. II., p. iii. (temp. Hen. V.); Cal. II., pp. xxiii., li.; Cal. I., p. xlvi.
public purposes, was good in equity.\(^1\) Thus, before the statutes (39 and 43 Eliz.) relating to charitable uses, it is quite apparent that in equity a use or trust for the benefit of the poor (\textit{incertae personae}) was good as a charity, and that such uses were freely cognizable in Chancery.\(^2\) In short, charitable uses preserved all the features of the early Romano-Christian law relating to charitable gifts and trusts for uncertain persons.\(^3\)

When uses became a distinguishing feature of the law of England, public or charitable uses\(^4\) retained the characteristics of the old law of pious donations. They were never subjected to the ordinary rules of law. It was no objection to their validity that they were expressed in vague and indefinite terms, if they were not ambiguous; and as the rule against perpetuities did not apply to such donations, it was no objection that the use or trust was intended to have a perpetual, or indefinite, continuance.\(^5\)

The Reformation first tended to revolutionize the old law of charities and to disturb early conceptions of pious, or charitable, uses.\(^6\) By the Statute, 23 Henry VIII., c. 10, commonly called the "Statute of Superstitious Uses," many gifts and settlements common in Roman Catholic England were declared within the mischief of the earlier statutes directed against conveyances in mortmain. The uses thus condemned, though formerly good as pious uses,

\(^1\) Cal. in Chan., I., p. 308, case 18; Cal. in Chan. I., p. 81, case 54; \textit{cf.} Ch. J. Marshall in Bap. Assoc'n \textit{v} Hart, 4 Wheat., at p. 40; Tyssen Char. Bequests, 10.


\(^3\) \textit{Cf.} Tudor, Char. Trusts, 29, 30, 56.

\(^4\) Public and charitable uses are synonymous, Jones \textit{v.} Williams, Ambler, 651; Atty.-Genl. \textit{v.} Craig, 2 My. & C., at p. 623.


\(^6\) \textit{Cf.} Owens \textit{v.} Miss. Society, 14 N. Y., at p. 393.
are henceforth known to English law as "Superstitious Uses." The statute thus restricting charitable, or pious, uses, by the excision of those thus condemned as superstitious, was followed by the drastic acts confiscating much of the lands settled by Catholics to pious uses. It is unnecessary for us to consider these various acts in detail for they had no particular effect upon the general law of charities; they were of local application, directed against the Roman Catholic foundations in England. The "Statute of Superstitious Uses" was soon decided not to take away the uses now known as charitable uses. This act would seem to be of the first historical importance in determining the condition of the Law of Charities prior to the reign of Elizabeth: it recites that, "by reason of feoffments, fynes, recoveries and other estates and assurances made of trusts * * * to the use of parishe churches, chapels, church wardens, guildes, fraternities, comminalities, companyes or broderhedes erected and made of devotion or by common consent of the people without any corporacion" inconvenience is afforded to the King and to other Lords. The important point in the recital is its admission of a state of things which shows that gifts to the use of unincorporated societies or in trust for them must have been regarded as valid for a long space of time.

Prior to the reign of Henry V., breaches of trusts of a charitable nature were remediable only in the spiritual courts. But subsequently and long prior to 39 Elizabeth, as is now the better opinion, charitable uses, at least those of a lay nature, were cognizable in the Court of Chancery at the suit either of the King or a private person interested

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1 Porter's case, 1 Rep., 22b, argument of Queen's Counsel, "Distinguenda sunt tempora."
2 27 Hen. VIII., c. 28; 31 Hen. VIII., c. 13; 32 Hen. VIII., c. 4; 1 Edw. VI., c. 14. In the time of Philip and Mary there was a temporary suspension of the policy of confiscation. 1 and 2 Philip and Mary, c. 8.
3 Porter's Case, 1 Rep., 24; Gibbons v. Maltyard, Popham, 6, 7; Shotwell Exr. v. Mott, 2 Sandf. Ch., at p. 52; Wright v. Trustees Meth. Epis. Church, 1 Hoffmann, 201, at p. 248, seq.
in the trust.1 But the authorities on this proposition must be reserved for a future discussion.

Having briefly referred to the authorities which show that the Roman Christian Code of Charities prevailed in England before the Statute of Charitable Uses (43 Eliz.), the enquirer should next consider cursorily the early laws affecting the cases where donors chose to give their lands to civil, eleemosynary or ecclesiastical corporations engaged as it were in the business of charity. It is very evident that a peculiar set of principles will apply to this form of charitable donations and that in cases of this character we are more concerned with the laws regulating absolute conveyances and devises of lands to corporations, in mortua manu, than with the law relating to uncertain trusts or donations such as those for the poor.2

In the modern law, a corporation, having such power, may be a trustee3 and even a charitable corporation may act in that capacity, although it has been said that formerly a corporation could not be seised to a use.4 It may be doubted though, whether before the Statute of Uses (27 Hen. VIII.) this last doctrine prevailed in the case of Charity.5 But be this as it may, the law regulating absolute gifts to charitable bodies, or corporations, is now considered to be a part of the law touching charities.6

The early statutes directed against the transfer of lands ad manum mortuam7 were intended to prevent religious bodies, pia corpora, from absorbing the greater part of the lands of the

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1 See the cases cited from the Calendar of Cases in Chancery, vols. I., II., III., in note 2 How., at p. 155 seq. and Dwight's very complete collection of Prae-Elizabetian data for charity cases taken from the Reports of the Commissioners of Charities in England; "Dwight's Charity Cases;" et infra.

2 Sugra, pp. 15, 16.

3 Cruises's D., Tit. XII., c. 1, sec. 84; Tucker v. St. Clement's Church 3 Sandf., 242, 249; infra, pp. 116, 117.

4 Cruises's D., Tit. XI., c. 2, sec. 15; Sugden on Uses, 10; cf. Holland v. Alcock, 108 N. Y., at p. 324.

5 Reg., Lib. A. 1594, fol. 734. In several instances the Chancellors enforced uses against corporations before the Statute of Uses in charitable cases. Spence, Ex Jurisdict., I., 588, note i.

6 This is noticeably so in the modern Law of New York. Vide chapters III. and IV., infra.

7 Infra, p. 26.
Kingdom. It has been doubted whether there were any corporations, in the modern sense, before the reign of Richard II. (1377–1399). But religious bodies in the early law of England had the status of juristic persons. This is shown by the language of Magna Charta, non liceat alicui de cetero dare terram suam alicui domui religiosae, etc., etc., and also by the act which took away escheats (an essential of tenure) where the land, was held "ad pios usus" as well as by frequent passages in Bracton.

As the ecclesiastics were the first almoners of England, the law of charities is much concerned both with corporations and with the ecclesiastical government of England prior to the reign of King Henry VIII. Ecclesiastical bodies were the earliest corporations aggregate known to English law; cities and boroughs were recognized as juristic persons only at a later period. Naturally in most cases these ecclesiastical corporations were the public almoners, the guardians of pious and charitable wishes and donations in England; and subsequently to the Conquest, the amount of property, real and personal, held by them, attracted the attention of the governing authority. The possession of such vast landed properties strengthened the ecclesiastical power to an undesirable extent, while the conveyance of lands to religious orders often deprived the feudal lord of the fruits of his tenure. Restraints on alienation to such bodies (at a later day called corporations) were consequently attempted at an early period in English History.

2 Supra, p. 18.
3 Editions of 1217; and see much earlier instances supra.
4 17 Edw. II., De terris Templarium.
5 Corporations in England existed by the common law, by prescription, by act of parliament, by charter or by implication. But as late as the reign of King Hen. VIII., it was recognized that the Pope might incorporate bodies of Friars in England. Grant on Corp., 6, 11.
6 Merewether & Stephen, History of Corporations, 728.
7 It is said there is some doubt whether there were any corporations proper before the reigns of Richard II. or Henry IV. (1377–1413); vide Mr. Anstey in Report of Select Com. of House of Commons on the Laws of Mortmain, p. 4. But there certainly were aggregations of persons having a juristic status as one person, in very early times in England. Cf. Tyssen, Char. Bequests, 1.
Magna Charta (9 Hen. III., c. 36) forbade alienations of lands to religious houses. The statute 7 Edw. I. *de viris religiosis*, extended the prohibition to all persons aiding in any way lands to come into mortmain. 13 Edw. I., c. 32, attempted to prevent conveyances to religious houses, by means of fictitious suits and recoveries. 15 Rich II., c. 5, prevented trusts or uses for the benefit of religious houses, and also extended the statutes directed against conveyances to religious bodies, to other bodies which then began to be recognized in the law as corporations or juristic persons.¹

Notwithstanding these enactments, as they did not make alienations in mortmain (or to corporations) void, but only a cause of forfeiture by the King and mesne lords, charitable designs continued until the reformation to draw much land into mortmain. The King and the mesne lord too commonly dispensed with the forfeiture⁸ when the gift was to some charitable or ecclesiastical corporation of body. Even after the dispensing power of the crown was in England declared illegal,⁴ it was thought prudent to except the statutes against mortmain from the general condemnation of the dispensing power; and so the crown was expressly authorized by act of Parliament to “amortize lands,” as it was called, or in other words, to license corporations to hold them.⁵ A practice also grew up before the reign of James I. of empowering corporations by special acts of Parliament, to take and to hold lands without

¹ These statutes are set forth sufficiently in Bridgman’s Edit. of “Duke’s Charitable Uses” (London, 1805), pp. 192–201; Dwight’s Charity Cases, Appendix No. 1. and in the first chapter of “Shelford on Mortmain.” They are commented on in Owens v. Miss. So. of M. E. Church, 14 N. Y., 380, 383; matter of Sarah Zane’s will in Magill v. Brown in 1833, 16 Fed. Cas., 408, 412; Brightly, N. P., 346; 14 Haz. Reg. Pa., 305; Matter of McGraw, 111 N. Y., 66, 93; and see note on Restrictive Statutes, 3 Sharswood & Budd’s Leading Cases, Real Prop., 385.

⁸ Tyssen, Char. Bequests, 10; Wright v. Trustees Meth. Epis. Church, 1 Hoff. Ch., at p. 264; Matter of McGraw, 111 N. Y., 66, 93.

⁴ I W. & M., c. 2.

⁵ 7 & 8 Will. III., c. 37: the consent of the mesne lord was rendered unnecessary by this statute.
licensure of mortmain and notwithstanding the mortmain
acts.  

The general policy of the Mortmain Acts, was, however,
pursued as late as the Statute of Wills; for although the
Act, 32 Hen. VIII., c. 1, enabled socage tenants to devise
all their lands, the Act for the Explanation of the Statute
of Wills, 34 Hen. VIII., c. 5, qualified this right by provid-
ing that "the devise may be to any person or persons, ex-
cept Bodies Politick and Corporate." But certain lands
in England were always devisable to corporations by
custom, notwithstanding the Statutes of Uses or Wills. 
When the Statute of 12 Car. II., c. 24, turned all lay ten-
ures into the tenure by free and common socage, all lands
became devisable, but the restriction on wills of lands to
corporations remained as before.

The Plantagenet mortmain acts had no reference to con-
veyances of real or personal estates to lay individuals, or
natural persons, for charitable uses, or to charitable dona-
tions of chattels or personal estates to bodies corporate.

If land was conveyed to natural persons to the use of a
non-corporate charity equity, would, no doubt, protect
any violation of the trust and keep up the succession of
trustees. But, as a matter of fact, eleemosynary corpora-
tions were in Roman Catholic times the usual vehicle of a
charitable foundation. Yet there was no apparent legal
restriction upon the right of donors after the development
of uses to transfer or convey lands to natural persons to be

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1 Cf. 4 Jac. I., c. 7. This practice subsequently grew up in New York sub-
stantially.

2 McCartee v. Orphan Asylum, 9 Cow., at pp. 452, 519.

3 Tyssen, Char. Bequests, 17.

4 By the Statute of Frauds, 29 Car. II., c. 3, the execution of wills was
regulated.

5 This seems to have been assumed in the minutes of evidence taken before
the Select Committee of the House of Commons on the Law of Mortmain in
1851; Vivie their Report, pp. 2, 6, 10, 16, including the concurrence of Mr.
Shelford, the author of the celebrated work on Mortmain, at p. 30, ibid.;
Lewin on Trusts, 528; Holland v. Alcock, 108 N. Y., 312, 324, 325.

6 23d Report of Commissioners of Charities, p. 304; Holland v. Alcock,
108 N. Y., 312, 324.

7 See Short's History of the Church of England, c. 5, appendix, for amount
of their revenue before their destruction in that country.
held for charitable or pious uses in perpetuity. Such uses, as it was said, always contemplated a species of perpetuity as much as a conveyance to a corporation. The rules directed against perpetuities, all originated subsequent to the Statute of Uses, and the rise of executory limitations or legal estates possessing the quality of the old use. Before that Statute the common law rules directed against abeyance of the seisin had to some extent the effect of rules against perpetuities, which must always relate either to the time of the vesting of estates or to the suspension of the power of alienation. But the modern rules against perpetuities were formulated long after charitable uses had been validated and vitalized in the law of England.

In this connection let us briefly survey the history of perpetuities. A conveyance to a religious body or a corporation always tended in one sense to a perpetuity. This tendency was checked as far as was expedient by the Statutes directed against Mortmain. A strictly feudal estate was also inalienable without the consent of the Lord, but from the reign of Henry I. property acquired by purchase, "feudum novum," was alienable. The Statute Quia Emptores terrarum conferred a general power of alienation of lands held in fee simple and did away with subinfeudation. The Statute De Donis Conditionalibus soon led to the peculiar estates tail which were inalienable until Taltarums' Case in 1472, pointed the way to barring issue in tail by a judicial recovery. From this time until after the Statute of Uses and the subsequent rise of the doctrines

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2 27 Hen. VIII., c. 10; et infra.
3 Lewis on Perpetuity, 689.
5 A. D. 1100-1135.
7 A. D. 1292.
8 A. D. 1287.
9 12 Edw. IV., pl. 25, f. 198.
10 A. D. 1536.
relative to executory limitations, there was no mode of creating a perpetuity in the sense of rendering land inalienable, except by a gift to charity or charitable use—always a general exception to the whole course of the common law. Even a gift to a corporation did not necessarily render land inalienable. But a conveyance for charitable uses certainly did so. The rules against perpetuities are comparatively modern and were adopted long after charities and charitable uses had been subjected to a systematic and complete set of rules, having no real relation to transactions not public or charitable. At the present day in England a charitable use created by an executory limitation, must vest within the time specified by the rule against perpetuities. But other modern rules directed against suspension of the power of alienation had in their origin very little relevancy to the uses or trusts called charitable. And if by judicial decision they have since been made applicable, it is because the older law has been changed by the supposed necessities of modernization.

Prior to the Reformation and even prior to 43 Elizabeth (when the Statute of Charitable Uses was passed), there is abundant evidence that a person might convey lands to feoffees for the use of charity, or for the use of the poor, and that such indefinite and permanent uses were enforceable in the Court of Chancery without the intervention of the

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1 At common law the only legal limitation over was by way of a remainder which never created a perpetuity. Challis 159; sed. cf., Lewis on Perpetuities, 97; Tudor's Leading Cases, Real Prop. 472; Jarman on Wills, II., 731.


4 Tudor, Char. Trusts, 56.


7 Lane's Charity, 32d Report of Commissioner of Charities, Part I., p. 57; Preamble to Stat. 23 Hen. VIII., c. 10.
crown. So devises of the use to the poor were good before the Statute of Wills, and although these statutes excepted bodies politic and corporate, a devise of land to them for charity remained good in equity. As until subsequent to the Statute of Charitable Uses (43 Eliz.), trust estates were not clearly recognized as valid even in equity, it is not surprising that we do not find cases of express charitable trusts arising between the Statute of Uses, 27 Hen. VIII. and 43 Eliz. Trusts were not on a good foundation until Lord Nottingham's time—long after the Statute of Charitable Uses. Then they were governed by all the law which had been applied by the chancellors to uses before the Statute of Uses. So that charitable uses and charitable trusts, if we abstract the latter from the Statute of Charitable Uses, are resolved by the same principles. For this reason also, we have considered somewhat at length the nature of charitable uses prior to the Statute of Charitable Uses.

The reader is of course familiar with the fact that after the Statute of Frauds no trust in lands could be created or assigned except in writing. This statute applied to charitable trusts in lands equally with those of a private or non-charitable nature. The Statute of Frauds was ex-

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2 *Supra*, 19.

3 *Supra*, p. 21.

4 Tyrrel's Case (*supra*, p. 6) arose only in Mich. Term., 4 & 5 Phil. and Mar.

5 *Cf.* Dutch Church in Garden Street v. Mott, 7 Pai., at p. 79; McCartee v. Orphan Asylum, 9 Cow., at p. 474.

6 Burgess v. Wheate, 1 Eden, 177, 223; Lord Nottingham took the Great Seal in 1673.

7 Cruise, D., Title 12, c. 2, sec. 1; Fisher v. Fields, 10 Johns., 495; *cf.* Downing v. Marshall, 23 N. Y., p. 378.

8 Fisher v. Fields, 10 Johns., 495.

9 *Cf.* Tyssen, Char. Bequests, 1.

10 29 Car. II., c. 3, secs. 7, 9.

tended to the Province of New York, though passed after the Province was subjected to English law.

Donations of personal or movable property to charity were, before the Conquest, under the adopted Roman Christian law, on much the same footing as other charitable donations. The stricter feudalisation of land which followed the Conquest and the relative unimportance of personal estates ultimately brought about qualifications in the English law of charitable donations of personal property. But as the English law of wills and the status of an executor are both concerned with the Roman law, charitable donations of personal or movable property were never suffered under any mutation, to lose that principle of the Roman law validating uncertain gifts for charity, even though as a general principle in English law uncertain donations of chattels were void. By the old common law a man could dispose, by will, of a third part only of his goods, and this in Roman Catholic times he usually left for pious uses. In the event of intestacy the King, it is said, as parens patriae and general trustee might seize on the goods as bona vacantia. This prerogative of administration finally went to the ordinary, who disposed of a third, pars rationabilis, to charity and pious uses. This course of administration was, however, changed by statute, so as to compel the ordinary to commit the adminis-
tration to the next of kin. Then we arrive on familiar ground.

The reports of the Commissioners of Charities in England\(^1\) disclose that, before the Reformation, testators disposed of some part of their small personal property to such pious uses as the poor. Others created a rent charge in favor of town authorities for the benefit of the poor. As such indefinite bequests were administered, we may infer that the law sanctioned indefinite charitable donations long before the Statute of Charitable Uses.\(^2\) The Statute of Uses, vesting uses in possession, was intended to destroy the practice of willing the use or usufructuary estate in lands as \textit{res incorporalis}, and it had that effect until the Statute of Wills, in so far as lands were concerned. But the Statute of Uses could not have vested uses in chattels nor have contemplated abrogating the power of making wills of goods or chattel for pious uses;\(^3\) for it makes no reference to them in its preamble, reciting the evils intended to be put an end to by the statute. The Courts of Chancery administered indefinite trusts of personal estates for charity, as trusts, and side by side with confidences or uses in lands, before the Statute of Uses,\(^4\) and, consequently, before the jurisdiction over trusts was at all on its present foundation. After trusts in lands arose in the place of uses, there was little difference in principle between trusts of lands and trusts of chattels.\(^5\)

The destruction under the Tudor dynasty of the numerous corporations and kindred institutions, administered by the Roman Catholics,\(^6\) threw the English law of charities out of harmony, and the reign of Queen Elizabeth in particular was much occupied with erecting a new system

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\(^1\) See Mitcheson, "Charity Commission Acts" (pp. 1–28), for history of these Commissions.

\(^2\) Babington v. Gull, Cal., I., pp. lvi., lvii., lviii.; \textit{temp.} Hen. VI.; Wright v. Trustees Meth. Epis. Church, 1 Hoff, Ch., 246, \textit{seq.}

\(^3\) Cf. Powell on Devises, 1., 4. on the effect which the law of inalienable feuds had on wills of chattels. It is very analagous to the effect of the Statute of Uses on wills of chattels.

\(^4\) \textit{Vide} Babington v. Gull, Cal., I., pp. lvi., lvii., lviii., \textit{temp.} Hen. VI.

\(^5\) Lewin on Trusts, 4.

\(^6\) Cf. Short's History of the Church of England, c. v., Appendix.
of poor laws, with the attendant charitable institutions, such as hospitals and like. The Acts 39 Eliz., c. 6; superseded by 43 Eliz., c. 4, commonly called the "Statute of Charitable Uses," are the only acts necessary for us to consider here. The latter has been often regarded in this country as conferring a jurisdiction on the Court of Chancery, not otherwise maintainable over certain charitable uses, or trusts of an indefinite and perpetual character.

The Statute of Charitable Uses, although it introduced no new principle was undoubtedly a convenient source of jurisdiction for the lay chancellors who administered the court subsequent to the Reformation. It was determined to sanction indefinite permanent trusts for charity without regard to the form of the gift and in the same large measure that the clerical chancellors were accustomed to sanction them; while it served to dispense with the necessity of placing the later jurisdiction on any other foundation than the statute itself. It was even held to operate as a repeal of the statutes directed against mortmain when donations to charity were concerned. In this respect this statute seemed to restore the law of charitable donations to corporations to the position it occupied before the acts directed against mortmain. But in point of fact such claims are too general. The Statute of Charitable Uses is said to have been drawn up by Sir Francis Moore, who made a very valuable dissertation or exposition of the statute.

1 14 Eliz., c. 5; 14 Eliz., c. 14; 35 Eliz., c. 7; 39 Eliz., c. 4; 39 Eliz., c. 5; c. 6; c. 12; c. 18; c. 21; 43 Eliz., c. 2; c. 3; c. 4.
2 Williams v. Williams, 8 N. Y., at pp. 541, 542; Baptist Assn. v. Hart's Exrs., 4 Wheat. at pp. 29, 30; et infra.
3 Wright v. Trustees of Meth. Epis. Church, 1 Hoff. Ch., at p. 263; Atty. Genl. v. Mayor of Dublin, 1 Bligh, (N. S.), 312, 347; cf. Higgins v. Town of Southampton, Dickens, 146, where, in 22 Car. II., the Statute of Char. Uses is called an enabling act; Ould v. Washington Hospital, 95 U. S., p. 309.
4 This Act is the starting point of all the English law of Charitable Uses. Vide Mitcheson's Charity Commission Acts, p. 1; McCartee v. Orphan Asylum Society, 9 Cow., at p. 476.
5 3 Atk., 150.
6 Supra, pp. 25, 26; Infra, p. 36; McCartee v. Orphan Asylum Society, 9 Cow., at p. 475.
7 His Essay is printed in Boyle's "Law of Charities," 465 seq., and in
The Statute 43 Eliz., c. 4, is entitled "an Act to redress the mis-employment of land, goods, and stocks of money heretofore given to certain charitable uses." It authorizes the Lord Chancellor or the Chancellor of the Duchy of Lancaster within his jurisdiction, to award commissions to the Bishop of every diocese, his chancellor and two other persons at least, to inquire of the abuses, breaches of trust, etc., of any lands limited to the charitable or Godly uses specified in the act. The mode of such inquiry is carefully prescribed by the act. Thereupon the commissioners were to "set down such orders, judgments and decrees, as the said lands, tenements, rents, etc., may be duly and faithfully employed, to and for such of the charitable uses and intents before rehearsed for which they were given, limited, assigned or appointed by the donors and founders thereof." Such orders were to be certified into the Court of Chancery (or that of the Duchy of Lancaster) and executed by the chancellor, if fit and convenient. The Statute contained one clause of great historical importance. The commissioners were authorized to inquire into all limitations, assignments and appointments to charity and then to make such orders, etc., "as the said lands, tenements, rents, annuities, goods, chattels, money and stocks of money may be duly and faithfully employed, to and for such of the charitable uses and intents before rehearsed, respectively, for which they were given, limited, assigned, or appointed by the donors and founders thereof, which orders, etc., shall stand firm." 

Animated probably by the general desire to restore an efficient system of non-Catholic charitable foundations, the judges of England made an extraordinary con-

Bridgman's Duke, c. VII.; McCartee v. Orphan Asylum Society, 9 Cow., at p. 475.

1 Commonly called the Statute of Charitable Uses.

2 Spence, Eq. Jurisdiction, I., 589, gives an admirable précis. of the Statute. The Statute is given in extenso in 'Boyle on the Law of Charities," and in the Appendix I. to this Treatise.

struction of this statute. Under the clause quoted in the
preceding paragraph, they tolerated without any order of
the commissioners several classes of charitable donations
as "appointments," under the statute, although such dona-
tions would not have been valid even for charity's sake
before that time. Livery of seisin was no longer necessary
when the donation of land was for charity. This was
clearly an innovation. Settlement by tenant in tail was good
as an appointment to charity without a fine or recovery
and even a devise of the whole of lands by tenant in
tail in capite by knight service was good, though the
Statute of Wills allowed such tenants to devise only two-
thirds of their lands until the statute 12 Car II., c. 24,
turned them into socage lands. So a devise to a corpora-
tion for a charity was good as an appointment under the
statute, though corporations were excepted out of the
Statute of Wills. The 43 Eliz. was, however, held not to
operate as a repeal of the Statute of Wills in the case
of a charitable devise to corporations, but to authorize an
appointment to them by will in the instance of a charity
mentioned by the Statute of Charitable Uses; a devise to
an unincorporated association, and even an inscription
on a tombstone might be good as an appointment under
the statute. It is unnecessary for us to consider at large the con-
struction of 43 Eliz., c. 4; it will be sufficient to point out
that since the passage of the Statute of Charitable Uses the
following principles have been established in England:

1 Boyle, Law of Charities, 18.
5 Bridgman's Duke, 363; Hob., 136; Duke, 78.
6 Hob., 136 pl. 184, Hob., 183; Duke's Char. Uses, 80 pl. 23; Bridgman's
7 Supra, p. 27.
374. Boyle and Duke contain very full references to the authorities
bearing on 43 Eliz.
10 Duke, 33; Bridgman's Duke, 360.
(1) That the intent of the act was to aid all defects in charitable assurances where the donors had capacity to donate.  

(2) That the statute specified all the uses which in equity were called "charitable."  

(3) That in a case to establish a charitable use the chancellor could give relief by bill without first granting a commission as directed by the statute.  

(4) That a proceeding by information, in behalf of the king as pater patriae to establish a charity lay both before and after the statute.  

(5) That the statute was retrospective in operation as well as prospective.  

It is also said in England, that an information being found more effectual than proceedings by bill, or by a commission under the statute, caused the latter mode of establishing a charity soon to drop out of general practice.  

In so far as the Statute of Charitable Uses justifies trusts in lands for the benefit of uncertain persons, or bequests to executors or trustees for the benefit of the poor, it should be regarded as simply declaratory, for such indefinite donations were certainly tolerated in England from
the earliest times. The practice of centuries is not to be dismissed as illegal because it may conflict with certain late canons of the Court of Chancery touching the definite quality of trusts of a private or non-charitable character. The considerations of Courts of Equity about permanent and indefinite charitable donations, uses, and trusts are very modern. Mr. Binney in the Girard College case showed that the Statute of Charitable Uses introduced no new principle in the law of charities, and he refuted the error in the contrary notion. Though the Statute of Charitable Uses was said to have repealed the Statute of Enrolments, 27 Hen. VIII., c. 16, that statute had been held inapplicable to charitable uses before 43 Elizabeth. So, though devises to corporations were sustained by reference to the Statute of Charitable Uses as appointments, it was held that before that statute a devise to corporations for charity was a good appointment in equity. The statutes of Mortmain were likewise said to have been repealed in part by the Statute of Charitable Uses, though before that statute they were inapplicable to a charitable use.

The Statute of Charitable Uses contained a very complete enumeration of such uses; so complete as to be regarded in England as final. Shelford classifies the charitable uses enumerated by the Statute of Charitable Uses under four heads: (1) The relief of the poor; (2) The advancement of learning; (3) The advancement of religion; (4) The advancement of objects of general public utility. In England no uses were regarded as charitable

1 Supra, pp. 18, 22; Fin., 245; Cooper's Public Records, 355.
3 Symon's Case, Duke, 163; Shandor v. Brownlow, 2 Ridg. P. C., 428; Shep. Touchstone, 224, ch. 10.
4 Jesus College Case, Duke, 363; Hillam's Case, Ibid., 375; Mayor of Bristol v. Whitton, Ibid., 377.
6 Hobart, 136; Collison's Case, cited in Christ's Hospital v. Hawes, Bridgman's Duke, 370.
7 Atty.-Genl. v. Master of Brentwood School, 1 Mylne & K., 376.
9 Law of Mortmain, p. 61.
other than those falling within the four genera divisions just mentioned.\(^1\)

Thus stood the law of charities in England, prior to the ninth year of the reign of King George III., when the purely English law of charities was much affected by a statute commonly, although it is said quite erroneously,\(^2\) called the "Statute of Mortmain."\(^3\) This statute provided in substance, that after June 24th, 1736, neither lands, tenements and hereditaments nor personal estates to purchase lands should be given, granted, appointed or any ways conveyed to charitable uses except by deed indented, sealed and delivered in the presence of at least two credible witnesses at least twelve calendar months before the donor's or grantor's decease. This Act was intended to restrain devises or bequests of lands, etc., by persons in extremity of death, or languishing,\(^4\) for since the reign of Elizabeth new charitable foundations had flourished sufficiently,\(^5\) and now it was good policy that the natural claims of kindred should be regarded by the legislature. The preamble of the act expressly states that such was the purpose of this statute. Hereafter lands could not in England be devised on charitable uses,\(^6\) nor could moneys be devised in order to purchase lands to be held for charitable uses.\(^7\) It was not intended by this act, though, to prohibit charitable donations, but merely to regulate them.\(^8\) It is, however, quite unnecessary to consider this act or its application and construction, for it did not extend to the

\(^1\) Supra, p. 36.


\(^3\) 9 Geo. II., c. 36, "An Act to restrain the Dispositions of Lands whereby the same become unalienable."

\(^4\) Attorney-General v. Day, 1 Ves., 223; Owens v. The Miss. So. of M. E. Church, 14 N. Y., at p. 407.

\(^5\) Levy v. Levy, 33 N. Y., at p. 110.

\(^6\) Corby v. French, 4 Ves., 418.

\(^7\) Atty.-Genl. v. Davies, 9 Ves., 535, 543; McCartee v. Orphan Asylum, 9 Cow., at p. 450; Matter of Will of O'Hara, 95 N. Y., pp. 420, 421.

colonies of England. Its text is peculiarly local, and it was intended to remedy a local mischief. The object of the real Statutes of Mortmain (generally called the Plantagenet Statutes of Mortmain) passed in ancient times was to prevent the Crown from being deprived of feudal services. The object of the act now under consideration was to prevent the locking up of land and the disinheritance of heirs by those in extremity. This Georgian Statute in the main affects real property only, but in some instances gifts of personalty—hence called impure personalty in the English books.

We cannot leave the history of the English law of Charities without some reference to the judicial doctrines applied to the construction of defective or indefinite charitable donations. It is an ancient maxim of construction "that charities are favored" and as this doctrine was part of the Roman law of charities we may well imagine that it passed with charitable or pious uses from the clerical chancellors to their lay successors. This doctrine of general import led to another of like origin, known as "cy pres," or when applied to charities as the doctrine of charitable approximation. As the doctrine has but a modified acceptance in the State of New York, it


3 Bacon, Abr. Amer. Edit., II., 228.

4 Supra, 38.

5 Tyssen, Char. Bequests, C. XXVI.


7 White's Roper on Legacies, II., c. xix., sec. 5.

8 De usu et usufructu legatorum. D., 33, 2, 16, 17; Wilmot, 53, 54.

9 One of the clearest expositions of the judicial cy pres which I have seen is contained in Mitcheson's Char. Com. Acts, 56, seq. Boyle is prolix in his "Law of Charities."

will be very lightly touched; the more especially that the

text writers are very comprehensive on this doctrine, and

it would be idle to repeat what is so fully and ably said by

the masters of the law.\(^1\)

The doctrine of judicial \textit{cy pres}, or approximation, is a
doctrine of judicial construction and not limited to char-
itable donations.\(^2\) It has no application to a charitable
donation by deed.\(^3\) But in the case of a devise or bequest
for charity where there is an indefinite donation in trust,
subsisting with a general purpose, the Court will give
effect to the general trust purpose by a construction \textit{cy
pres}, or as nearly approximate as may be.\(^4\) This doctrine
is subject to the limitation, that where the testator's object
is sufficiently defined, there is no room for the application
of \textit{cy pres}, and the Court will not depart from it upon a
notion of more extended utility.\(^5\)

In the application of the doctrine of judicial \textit{cy pres
there are many cases where the trust purpose is so
ambiguous as to be incapable of resolution by the Chan-
cellor.\(^6\) In such cases judicial \textit{cy pres} has no application,
and the trust fails.\(^7\) But where the Court takes jurisdicti-
on of a vague and indefinite charity as a trust, it will some-
times refer it to a master to report a suitable scheme upon
the suggestion of the trustee,\(^8\) and upon the confirmation

\(^1\) Kent, Com., II., 285, 288; IV., 508; Story, Eq. Jur., II., sec. 1169, \textit{seq.}
Pomeroy, Eq. Juris., sec. 1027; Perry on Trusts, II., sec. 717, \textit{seq.}; Woerner,
Amer. Law of Administration, II., sec. 432; Boyle on the Law of Charities,
II., chaps. iii., iv.; Spence, Eq. Jurisdc., I., 531; Jarman's Powell on Devises,
I., 366; White's Roper on Legacies, II., 1204, \textit{seq.}

\(^2\) Cruise, VI., Tit. xxxviii., c. 19, s. 40; Jackson v. Brown, 13 Wend., 437.

\(^3\) Brudenel v. Elwes, 7 Ves., 382, 390; Lewis on Perpet., 440; \textit{cf.} Wright
\textit{v.} Trustees Meth. Epis. Church, 1 Hoff. Ch., at p. 256.

\(^4\) Atty.-Genl. \textit{v.} Davies, 9 Ves., 399, 405; and see the cases cited in
Pomeroy, Eq. Juris., sec. 1027, note 2; Boyle on the Law of Charities, II.,
169. White's Roper on Legacies, II., c. 19, sec. 5 and sec. 6.

Bro. C. C., 444 \textit{n.}; Boyle, Law of Char., II., chap. iii., sec. 2.

\(^6\) Browne \textit{v.} Yeall, note, 7 Ves., 50, and Lord Eldon in 10 Ves., 27; Morice
\textit{v.} Bishop of Durham, 9 Ves., 399, 10 Ves., 522.

\(^7\) Vesey \textit{v.} Jamson, 1 Sim. & Stu., 69; Boyle, Law of Charities, II., c. V.

\(^8\) Widmore \textit{v.} The Governors of the Corp. of Queen Anne's Bounty, 1 Bro.
C. C., p. 13 \textit{n}; Paice \textit{v.} Archbishop of Canterbury, 14 Ves., 364, 372; Boyle,
of the report, apply the doctrine of approximation or judicial *cy pres*. A trust is not allowed to fail for want of a trustee.\(^1\)

The principle of *cy pres* is also applied by the Crown in cases of a different character from those mentioned, viz.: Where no trust is created and no object specified, but there is apparent a general intention of donating to charity. In such cases the Crown steps in and by virtue of the prerogative,\(^2\) or as *parens patriae*\(^3\) applies the donation itself to some charitable purpose expressed under the sign manual.\(^4\) But this administrative *cy pres*, or approximate application, never takes place when the donation is void for any reason other than uncertainty.\(^5\) It is apparent that the administrative *cy pres* is quite distinct from the judicial *cy pres* noticed above.\(^6\) This prerogative of the Crown is almost that of general escheator; but with this essential difference, that the charitable donation results to the public and not to the Crown itself. Hence, the Crown is sometimes termed the general trustee of charities.\(^7\) The function which the Crown fulfils by sign manual is not, however, to be confused with the superintending authority which the Crown exercises as protector of charities,\(^8\) over partly executed charitable donations or trusts.

In order to support limitations to charitable uses *cy pres*, the great doctrine of the courts of equity, that a trust is never allowed to fail for want of a trustee, was invented or adopted, and from public trusts passed into the realm of private trusts.\(^9\) In this way a trust became almost a

\(^1\) *Infra*.

\(^2\) Chitty, Prerogatives of the Crown, 161, 162; Gower *v.* Mainwaring, 2 Ves., Sr., 89; 2 Perry on Trusts, sec. 718.

\(^3\) Bla. Com., 427, *cf.* Fonblanque T. *Eq.*, II., 206; Cary *v.* Berty, 2 Vern., 333.


\(^5\) Rex *v.* Portington, 1 Salk, 162.

\(^6\) *Cf.* Pomeroy *Eq.* Jurisp., sec. 1027; Perry on Trusts, II., sec. 717, *seq*.

\(^7\) Boyle, Law of Charities, II., c. iv., sec. 1, p. 237.

\(^8\) Mitcheson, Char. Commission Acts, p. 3.

\(^9\) McCartee *v.* Orphan Asylum Society, 9 Cow., at p. 484.
quasi corporation existing quite apart from the legal estate on the individual beneficiaries—one of the most beneficent and far reaching conceptions of equity or the English Jus Honorarium.

In England charities are now regulated by legislation of recent date. This can have only a scientific interest for the lawyer of this country. The Statute of Charitable Uses has been wholly repealed in England by the Mortmain and Charitable Uses Act of 1888.¹

¹ Tudor, "Charitable Trusts," 2; Tyssen, "Charitable Bequests," 34.
CHAPTER III.

LAW OF CHARITIES IN NEW YORK.

The English law of charities in some form, in common with the rest of the English law, became by prerogative action of the Crown the constitutional law of the Province of New York in the seventeenth century. The common law of England was introduced in the dependencies of the Crown only provisionally, or in so far as it was suited to the new political and social conditions, and there was much uncertainty in the seventeenth and eighteenth centuries about the authority of particular institutes. This same uncertainty was also observable in the region of statute law—it being doubtful what statutes of England were in force in the Province of New York, until the Judiciary had passed on particular statutes. The Privy Council in England, which acted as the Court of Appeal for the Province, laid down certain general principles to the effect that statutes of England passed anterior to the settlement or the conquest of the American plantations

1 Jackson *ex dem.* Hammond, 2 Cai Cas., 337; Yates *v.* Yates, 9 Barb., at p. 337. In my "History of the Law of Real Property in New York," and also in "The Historical Introduction" to the bicentennial reprint of Bradford's New York Laws of 1694, the mode in which the laws of England were introduced in New York, is attempted to be delineated. The authorities are there collated, and reference is now made to them generally.

8 Williams *v.* Williams, 8 N. Y., at p. 548.

8 Lessees of Levy *v.* McCartee, 6 Peters, 102, 110; Patterson *v.* Winn, 5 Peters, at p. 241; Journeymen Cordwainers' Case, Yates' Select Cases, 111; Bogardus *v.* Trinity Church, 4 Pai., 178, 198.

4 Bogardus *v.* Trinity Church, 4 Pai., 178, 198; Smith's History N. Y., I., 243; Dane's Abr., VI., art. 7, sec. 2, p. 606.


*Appeals lay to the King in Council from the Colonies.*
were, if declaratory of the common law, in force there.\footnote{Forsythe's Opinions, chap. I., and note; 2 Peere Williams, 75; Appendix to Burton's Compendium of the Law of Real Property.} This was the opinion of the Chief Justice of New York in the year 1700,\footnote{Documents rel. to Col. Hist. N. Y., IV., 828.} and it may be regarded as final in that period. But modifications of even that rule existed; the statutes must be advantageous to the Province, or they were rejected.\footnote{3 Bin., 596; Magill v. Brown, 16 Fed. Cas., 408, 412.}

In the preceding chapter we have seen that the Statute of Charitable Uses introduced no new principle in the common law of charities,\footnote{Supra, p. 37.} but that it afforded a new basis for judicial construction,\footnote{Supra, p. 37.} and ultimately defined all charitable uses.\footnote{Supra, p. 36.} It has been said that this statute never was in force in the Province of New York.\footnote{Downing v. Marshall, 23 N. Y., at p. 385. The Court says, "in this State," but the context shows that it meant in the "Province of New York"; Dutch Church in Garden Street v. Mott, 7 Pai., 77, 79.} But the remark is perhaps obiter.\footnote{Levy v. Levy, 33 N. Y., at p. 110; cf. Yates v. Yates, 9 Barb., 324.} It would be difficult to show any good reason for thus rejecting the authority of the Statute of Charitable Uses (43 Eliz., c. 4).\footnote{Magill v. Brown, 16 Fed. Cas., at p. 412; Ayres v. Meth. Epis. Church, 3 Sandf., at p. 367.} It was declaratory of the common law and introduced no new principle. It was a beneficent statute,\footnote{Magill v. Brown, 16 Fed. Cas., at p. 412; cf. Lewis on Perpetuity, 691, where it is said this statute is not generally relevant to English colonies.} and even though the new Jurisdiction referred to in the English cases as created by it was local, and commissions issued under it ran to the Bishop of every several diocese (in case there was any), his chancellor, and four or more other persons, it was not impossible to adapt even this provision to the Province. New York was part of the Diocese of London in partibus extrins.\footnote{Notes and Observations on the Laws of N. Y. in Grolier-Bradford's N. Y. Laws of 1694, p. cxxix.; Doc. rel. Col. History N. Y., V., 849; Doc. Hist. of N. Y., III., 213, 224, 307; cf. Williams v. Williams, 8 N. Y., 525.} But as there were prior to the War of
LAW OF CHARITABLE DONATIONS.

Independence few charities established in the Province of New York, the remedial procedure of the statute in question could have had little relevancy here. The declaratory portions only could have had a practical application.

Whether the Law of Charities in the Province of New York was, or was not, dependent upon the Statute of Charitable Uses, the English law in some form became a part of the law of the Province. Either the common law regulated charities existing here, or the Statute of Elizabeth. Before Independence numerous institutions existed here and required the application of some positive law: Schools, churches, grave-yards, Kings College, a hospital, and a public library. The poor of the towns and cities had long been recognized as an object of charity. Public or municipal corporations existed here from the earliest period, charged with relieving the poor often-

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1 Williams v. Williams, 8 N. Y., 525, 546; Owens v. The Miss. So. of M. E. Church, 14 N. Y., at p. 387.
5 Smith's Hist. N. Y., I., 257.
6 Incorporated 1754.
7 "Governors of the Society of the Hospital of the City of New York," c. 61, Laws of 1775.
8 Smith's Hist. N. Y., II., 262.
9 Note 5 to Grolier-Bradford's N. Y. Laws of 1694.
10 The New Netherland, or Dutch, corporations were recognized by the English, Denton v. Jackson, 2 Johns. Ch., 320, 324; note 18, Grolier-Bradford's N. Y. Laws of 1694. The first trading corporation was incorporated in New York in 1676. Doc. rel. Col. Hist. N. Y., XIV., 711. It was within the power of the Lord Proprietor of New York to create corporations, as he had all the jura regalia of a county patriline, Grant on Corp., 11.
times as well as with public functions. The Dongan Charter to the City of New York in 1686 expressly recognizes certain pious and charitable uses as then existing, and not to be disturbed.

In the absence or omission of express judicial authority, the usage or practice in the Province of New York is the best indication of its law of charities. Otherwise the question becomes too abstract or too academic for practical purposes. There can be no doubt that the Court of Chancery of the Province of New York took cognizance of charitable uses, or trusts. In 1707 the Attorney-General of the Province filed an information in the Court of Chancery against William Cullen to enforce a bequest in trust to distribute to the poor people of New York and Albany. The bequest was enforced as a public or charitable use. But as an information by the Attorney-General in behalf of the Crown was not dependent on the Statute of Charitable Uses this case sheds no light upon the question, whether that Statute was extended to New York. There are numerous instances of feoffments to private persons for public or charitable uses in the Province and it is impossible to suppose that these uses were not enforceable here as in England. The case of Attorney-General v. Cullen just cited is a conclusive adjudication by the Court of

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2 Section 17, N. Y. Consolidation Act, p. 887.
3 In my History of the Law of Real Prop. in N. Y., Chap. VII., the jurisdiction of the Court of Chancery of the Province is outlined with reference to the authorities. The adoption of the fundamental courts of England was very potent in establishing the common law; cf. Lord Redesdale in Atty.-Genl. v. Mayor of Dublin, 1 Bligh. (N. S.), 312, 347, 348.
4 Cited in Williams v. Williams, 8 N. Y., at pp. 553, 554; Dwight, Charity Cases, pp. 343-352.
5 McCutcheon v. Orphan Asylum, 9 Cow., at p. 473; et infra, pp.
6 Reformed Dutch Church in Garden St. v. Mott, 7 Pai., 77; Cottman v. Grace, 112 N. Y., at p. 307. Minister, Elders, etc., of Dutch Church v. Veeder, 4 Wend., 494. Here Schermerhorn and others in 1716 were trustees for the town of Schenectady; Miller v. Gable, 2 Denio, 492, 494: and see recital in the Act of April 6, 1784 (1 J. & V., 104; 1 Gr., 71), showing that charitable estates were often vested in private trustees for charitable uses; Smith's Hist. N. Y., I., Appendix, pp. 304-6.
7 Supra, pp. 22, 32.
Chancery that a bequest of personality in trust to be distributed to the poor at large—*persona incerta*—was valid as a charitable use in the Province of New York.

When independence of the Crown was declared, the State of New York adopted provisionally the former law of the Province of New York, but subject to a legislative right and power to alter it. Section XXXV. declared "that such parts of the common law of England, and of the Statute Law of England and Great Britain, and of the acts of the Legislature of the Colony of New York, as together did form the law of the said colony on the 19th day of April," 1775, should continue the law of the State. This provision has been thrice confirmed without material alterations. The Constitution of 1821-3 omits any reference to the Statute Laws of England, such statute laws having been then fully revised and re-enacted, the residue being repealed. The Constitution of 1846 omits the reference to the acts of the colonial legislature, such acts being repealed in the year 1828. The present Constitution repeats the language of that of 1846 with an exception relating to a once contemplated codification of substantive law.

By express provision of the Constitution, the law of charities established in the Province of New York passed into the republican era of government; but subject to the great modification that it must be fitted to the new order of things. Political revolutions are conceded at first to create little change in the private law, but they sow the seed which bears later the fruit of change. So it was with

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1 Const. of 1777; the proviso relates to that part of the common law and Statute Law affecting the church of England or the supremacy and prerogatives of the Crown. *Cf.* 1 J. & V., 128, as to Trinity Church in the City of New York.

2 Const. of 1821-3, Art. VII., section 13.

3 C. 46, Laws of 1788; *vide* Hist. of the Law of Real Prop. in New York, for the authorities on Jones & Varick's Revision, pp. 77, 103, 104.

4 C. 21, Laws of 1828-9, sec. 4; Hist. Law of Real Prop. in N. Y., 103.

5 Const. of 1894-5, Art. 1, sec. 16.

6 Const. of 1777, sec. XXXV.; *cf.* Andrew v. N. Y. Bible & Prayer Book So., 4 Sandf., at page 181.

7 *Cf.* Introduction to Ortolan, Hist. Rom. Law.
the law of charitable donations. The State judiciary soon interpreted the statutes of the State in a manner hostile to the continuation of permanent, indefinite charitable trusts and bequests to the poor at large or uncertain persons—\textit{personae incertae}.\textsuperscript{1} Their reasons will be considered at a subsequent place in this treatise. There is no ground to suspect that such reasons were regarded with favor until subsequent to the Constitution of 1846 and the dethronement of the Chancellor as the great judicial officer of the State.\textsuperscript{2}

Not long after the definitive treaty of peace with England, the State Legislature authorized a revision of the statute laws adopted by the Constitution of 1777.\textsuperscript{3} This led to the legislative consideration and redaction of the English Statutes deemed to extend here\textsuperscript{4} and to the repeal of those not so revised.\textsuperscript{5} The English statutes thus revised were not new statutes, but old laws, re-enacted in a form more suitable to the new republican condition and authority.\textsuperscript{6} Yet the old laws thus revised sometimes received a new construction, and the departure in the common law of charities may be said to date from this revision.\textsuperscript{7} Thus the revised law of wills,\textsuperscript{8} which only re-enacted the English statutes\textsuperscript{9} before in force in New York, was held at law to exclude a devise to a church corporation,\textsuperscript{10} though

\textsuperscript{1} Bascom \textit{v.} Albertson, 34 N. Y., at p. 610; Levy \textit{v.} Levy, 33 N. Y., at p. 112, and other cases cited below.

\textsuperscript{2} Willard, Eq. Jurisp., chap. 7. This chapter states accurately the old law before the case of Williams \textit{v.} Williams, 8 N. Y., was overthrown by the later cases in the Court of Appeals.

\textsuperscript{3} C. 35, N. Y. Laws of 1786.

\textsuperscript{4} Laws of New York by Jones and Varick, vols. I. and II. See my History of Law of Real Prop. in N. Y. for authorities on this revision (pp. 77–80).

\textsuperscript{5} C. 46, N. Y. Laws of 1788; 2 J. & V., 282.

\textsuperscript{6} Corning \textit{v.} McCullough, 1 N. Y., at p. 74; People \textit{v.} Clarke, 9 N. Y., 349, 362; Van Rensselaer \textit{v.} Hayes, 19 N. Y., at p. 74; Jackson \textit{v.} Schutz, 18 Johns., at p. 186; 4 Kent's Comm., 494; Revisers' note to Art. I., tit. I., c. I., part II., R. S.

\textsuperscript{7} Levy \textit{v.} Levy, 33 N. Y., 97, 110; White \textit{v.} Howard, 46 N. Y., 144, 163; Holland \textit{v.} Alcock, 108 N. Y., 312, 334.

\textsuperscript{8} 2 J. & V., 93.

\textsuperscript{9} 32 Hen. VIII., c. 1; 34 & 35 Hen. VIII., c. 5; 29 Car. II., c. 3: McCartee \textit{v.} Orphan Asylum, 9 Cow., at p. 452.

\textsuperscript{10} Jackson \textit{ex dem. v.} Hammond, 2 Cal. Cas., 337.
a church then clearly came within the law of charities. Nor could the devise have been supported in equity by the Statute of Charitable Uses, for that statute was not then in force, not being revised by Jones and Varick, and having been clearly repealed by the general repealing clause of the act of 1788. The question whether the devise was good in equity was not considered. The decision in Jackson ex dem. etc. v. Hammond was very influential in this State in the subsequent consideration of the law of charities, for in England a devise to a charitable corporation was good at law, both before and after the Statute of Wills and independently of the Statute of Charitable Uses. Consequently, the decision marked a departure, more or less distinct, from the common law of charities. At a later day and subsequently to the adoption of the Revised Statutes of 1829 it was also intimated, that the species of charitable use called "pious" had no technical or juridical significance in New York after religious freedom was established by the Constitution of 1777. Indeed, it is now the opinion, that the repeal of the English Statutes, including the Statute of Charitable Uses, in 1788, abrogated the English law of charitable uses. But as we shall perceive it is very clear that the Chancellors and the equity bar of the State did not concur in this opinion, although it finally triumphed and the law of charitable donations was placed on the same footing as donations not charitable.

1 Supra, p. 37.
3 2 Cai. Cas., 337.
4 Supra, pp. 30, 33, 37; Tyssen, Char. Bequests, 11.
5 Ayres v. The Meth. Church, 3 Sandf., at p. 373.
6 Andrew v. N. Y. Bible and Prayer Book So., 4 Sandf., at p. 181; sed cf. the Revised Act of 1813 relative to religious incorporations, 2 R. L. of 1813, sec. IV., ch. 60.
8 Willard, Eq. Jurisp., 575.
We have already seen that in some instances in New York charitable uses or trusts in lands were reposed in private persons. The estate of the trustees being joint, survived the death of one, or if there was only one, holding in fee, it descended or devolved subject to the trust. There was no principle then invalidated by this species of charitable uses and trusts and no violation of a rule against perpetuities; for at common law trusts for charitable purposes were sui generis, and might be permanent without contravening the rules against perpetuities. Nor were such charitable uses vested in possession by the Statute of Uses. But when the English Statute of Uses was included in Jones and Varick's Revision, it received at the hands of the Supreme Court a construction which must in itself have put an end in law to most charitable uses or trusts reposed in a succession of private persons, for it was held to vest a charitable use in possession at least when the use was purely passive. Now, this decision was directly opposed to the construction which charitable uses had anciently received, and from this time on, without regard to the Revised Statutes, limitations for charity when in trust to a succession of private persons must have disappeared in practice from the law of New York, notwithstanding that the Court of Chancery evidently did not entertain the same opinion as the courts of law.

We have now arrived at a point where we may survey

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1 Supra, p. 46.
2 Minister, etc., of Reformed Dutch Church v. Veeder, 4 Wend., 494; Cottman v. Grace, 112 N. Y., at p. 307.
3 Ibid. et Fisher v. Fields, 10 Johns., 495; Welch v. Allen, 21 Wend., 147; Dutch Church in Garden street v. Mott, 7 Pai., 77, 83.
4 Supra.
6 Supra, p. 6; Shotwell, Exr., v. Mott, 2 Sandf., ch. 46, 52.
7 This was just before the R. S.; The Minister, etc., Dutch Church v. Veeder, 4 Wend., 494, 497, on 1 R. L., 72, which was 2 J. & V., 68, or the English Statute of Uses, 27 Hen. VIII., c. 10, with the recital left out.
8 Supra, p. 6.
9 Infra.
10 Shotwell, Exr., v. Mott, 2 Sandf. Ch., 46, 52.
the law of the State of New York relating to charities as it stood prior to the Revised Statutes, which made important changes in the law relating to all uses and trusts.\(^1\)

The cases are not many, for the reason that charitable donations were then few; the well-being of the people at large was such as to attract little attention to the few poor, while fortunes for the most part were still inconsiderable. The complications and suffering incidental to older communities were almost unknown in this prosperous State. The most valuable lands of the State were held by the socage tenure of the abstraction called "the State," which had by legislative action been substituted for the Crown in all its relations to the fundamental common law tenure;\(^2\) but lands patented under the great seal of the State since the War of Independence were alodial, and so were the lands confiscated during the war for independence.\(^3\) There was no great difference between estates in alodial lands and in the lands held by the socage tenure,\(^4\) and for all purposes of the present treatise charitable uses in both kinds of lands may be regarded as identical.

In 1821 Chancellor Kent held, that a pecuniary legacy to the town of New Rochelle for the purpose of erecting a town-house for transacting town business was valid as a charitable bequest. It is evident that Chancellor Kent regarded the common law relative to charitable donations as then part of the law of this State, for here was a bequest to an incorporated body supported as a charity.\(^5\) There was, however, in this case an act of the Legislature authorizing particular persons to receive the legacy, but the question of capacity was independent of the act.\(^6\)

\(^1\) *Infra.*

\(^2\) *Journ. Prov. Conv.,* i, 554; *Const. of 1777, Sec. 35; c. 25, Laws of 1779, sec. 14; *1 J. & V.,* Sec. 14, p. 44.

\(^3\) *2 J. & V.,* 67.

\(^4\) This subject is discussed at length with reference to the authorities in Chap. IV. of my Hist. of Law of Real Prop. in New York.


\(^6\) *Owens v.* The Miss. So. of M. E. Church, *14 N. Y.,* at p. 384.
In the case of McCartee v. Orphan Asylum, 1 Chancellor Jones, who was admirably fitted for an exposition of the subject, 2 stated the general proposition that “devises to charitable uses are not prohibited by our law,” and, irrespective of the particular devise to a corporation, this was then regarded generally as an accurate proposition of law. Charitable uses were enforceable in equity quite independently of the Statute of Charitable Uses, 43 Eliz., c. 4, which had been then repealed in New York. 3 Having regard to these cases and to the chancery cases decided before the time when it was firmly established, that charitable uses fell with the enactment of the Revised Statutes, 4 it is impossible to escape from the conclusion that the common law relating to charitable uses and donations was part of the jurisprudence of the State of New York prior to the year 1830. But even at that time it was somewhat modified by the tendency of the courts to construe the statutes of England, contained in Jones and Varick's Revision of 1788, 5 in a manner different to that which prevailed at Westminster Hall before the autonomy of New York was complete. 6

The other cases pointing to the conclusion, that the common law of charities (which here includes the doctrines of equity relative to charitable uses 7) was confirmed by the constitutions of 1777 and 1821, will be briefly considered; although some doctrines there enunciated became obsolete or without authority when the legal effect of the Revised Statutes was better understood in the State. In

1 9 Cowen, 437, 451. This case in 1827, in the Court of Errors, held that a devise to a corporation even for charity was prohibited by the New York Statute of Wills. This case is one of the few charity cases in New York referred to by Chancellor Kent, Com. II., 288, IV., 508. The subject had then been little considered since the erection of the State government over New York.

2 Willard, Eq. Jurisp., 575.

3 Dutch Church in Garden St. v. Mott, 7 Pai., 77, 79: Shotwell, Exr., v. Mott, 2 Sandf. Ch., 46.

4 Infra.

5 Supra.

6 Supra, p. 50.

7 Manning v. Manning, 1 Johns. Ch., 527, 531.
Shotwell, Exr., v. Mott, Vice-Chancellor Sandford said, "that the legal restrictions against perpetuities were never directed against gifts for charitable uses or even for eleemosynary purposes"; and he distinguishes between the degree of certainty required for individual or non-charitable donations and that for those of a charitable nature. In consequence of this distinction a bequest in 1835 for the use of the poor of the town, and one to an unincorporated religious association were both adjudged valid; the Revised Statutes relative to uses and trusts being held quite inapplicable to charitable donations. But the most notable case favoring charitable uses is that of Williams v. Williams, in 1853, when the majority of the justices of the Court of Appeals held that a legacy to the Presbyterian Church and congregation of the village of Huntington, and also a legacy to the trustees of a fund for the gratuitous education of poor children, were both valid as charitable donations. The justice delivering the opinion concluded in these words: "That the law of charitable uses as it existed in England, at the time of the Revolution, and the jurisdiction of the Court of Chancery over these subjects became the law of this State on the adoption of the Constitution of 1777; that the law has not been repealed, and that the existing Courts of the State having equity jurisdiction are bound to administer that law. * * *" There were other cases which could only be supported by the same assumption. But, subsequently, judicial opinion upon the points indicated was precisely reversed. The history of the reversal is the history of the modern law of charities in New York.

1 2 Sandf. Ch., 53; regarded as overruled, 34 N. Y., 584, 610; 52 N. Y., 337—by reason of the Revised Statutes; for it had been at first approved, 8 N. Y., at p. 557. The case is now restored in part by the provisions of c. 701, Laws of 1893.

2 8 N. Y., 525; aff'd in Owens v. The Miss. So. of M. E. Church, 14 N. Y., at p. 405; and matter of the N. Y. Prot. Epis. School, 31 N. Y., 574; but subsequently repudiated by later decisions, vide infra. The Act, c. 701, Laws of 1893, tends to restore the authority of Williams v. Williams.

3 Hornbeck's, Exr., v. American Bible Society, 2 Sandf. Ch., 133; Banks v. Phelan, 4 Barb., 80; cf. Manice v. Manice, 43 N. Y., 303, 388, with the case in 4 Barb., 80, if trust is to be executed out of the State.

4 Infra.
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If we assume that those great lawyers, the Chancellors of the State of New York, determined that the common law of charitable donations was part of the law of this State prior to the Revised Statutes, then we may briefly *ex hypothesi* consider the extent and the condition of such law prior to 1830. The Statute of Charitable Uses had been repealed in 1788.¹ Now the Statute of Charitable Uses had given a legislative definition of such uses, and none other was cognizable in Chancery.² So, with the fall of that Statute in New York, other uses, cognizable before the reign of Elizabeth, would here come under the denomination of charitable,³ while superstitious uses ceased to be such with the Constitution of 1777.⁴ The domain of charity was only extended by the legislative action thus far taken, and there was greater room for the application of an enlightened system of charitable principles, easily ascertainable in the ancient law. But the ultimate construction, following the Revised Statutes of 1829, stifled the discernible tendency, and after 1846 the law of charities had to be judicially reconstructed, as it were, in New York, to the regret of many public-spirited persons and the ruin of many perpetual charities.

Had the modern view of the law of charities not finally prevailed after the Constitution of 1846, the New York Code of Trusts might have been less harmonious, but many beneficent schemes of charity which have utterly failed in consequence of the rigidity of the application of the Revised Statutes of 1829, would have flourished forever in this State.⁵ Uses or trusts in lands, for the benefit

² *Supra*, p. 36; Wright v. Trustees of Meth. Epis. Church, 1 Hoff. Ch., at p. 264.
⁴ *Vide* General Index, *sub voce* "Superstitious"; and Andrew v. N. Y. Bible & Prayer Book Society, 4 Sandf., at p. 184; Ayres v. The Meth. Church, 3 Sandf., at p. 377.
⁵ Dammert v. Osborn, 140 N. Y., 30, 43.
of the public or for charitable purposes,\(^1\) would have been enforced, even if no trustee had been designated, for the lands would have then descended cloaked with the trust.\(^2\) The rules against perpetuities would have had no application to charitable trusts,\(^5\) while indefinite schemes of charity which would have been supported in England, as trusts without regard to the prerogative or administrative *cy pres*,\(^4\) would have been carried out here by the courts of equity upon a feasible and logical plan.\(^6\) Only those trusts which were so ambiguous or complicated as to be impracticable need have failed absolutely.\(^6\) Bequests to unincorporated societies for charitable purposes would have been perfectly valid.\(^7\) And where a charitable trust was clearly intended by the testator, but the purpose or object expressed lacked precision, definiteness or completeness, it would not, perhaps, have been altogether shocking to the purest republican prejudices to apply the doctrine of judicial *cy pres*,\(^8\) and approximate the trust by decree to the holy and benign wish of the dead.

Is it true that the *cy pres* doctrine is foreign to republican institutions? Is it not as applicable to republican as to other wills and testaments?\(^9\) Republican legislatures often direct the judicial department of government to apply the

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\(^1\) Williams v. Williams, 8 N. Y., at p. 549; cited in Owens v. Miss. So. of M. E. Church, 14 N. Y., at p. 406.

\(^2\) McCartee v. Orphan Asylum Society, 9 Cow., at p. 490; Potter v. Chapin, 6 Pai., 639.

\(^3\) Shotwell, Exr., v. Mott, 2 Sandf. Ch., at p. 54; Adams v. Perry, 43 N. Y., at p. 498; Cottman v. Grace, 112 N. Y., at p. 306.

\(^4\) *Supra* p. 40.

\(^5\) Coggeshall v. Pelton, 7 Johns. Ch., 202; Shotwell, Exr., v. Mott, 2 Sandf. Ch., 46; Williams v. Williams, 8 N. Y., at p. 548.

\(^6\) *Supra*, pp. 40, 41; King v. Woodhull, 3 Edw. Ch., 79, 89; cf. 3 Sharswood & Budd's Lead. Cas. Real Prop., p. 370.


\(^8\) *Supra*, pp. 40, 41; 3 Sharswood & Budd's Lead. Cas. Real Prop., 367, *seg.*

principles of _cy pres._ Nor were informations by the Attorney-General to enforce indefinite permanent trusts for charity unfit for republican institutions. It was at first thought that the Attorney-General should intervene in all cases of charity, as the public had an interest in a trust _pro bono publico._ It would have been quite competent for the Legislature to regulate such informations, and to permit even a private citizen, having no particular or vested interests, to act as relator upon filing proper security. Yet by some misadventure an information in a charity case seems to have been thought during the formative period of our present law of charities a particularly royal and obnoxious proceeding.

But to continue the hypothesis, by way of illustration only. Until the passage of the Revised Statutes, trusts for the benefit of charity were lawful. As the Statute 9 Geo. II., c. 36, had never been in force in the Province of New York, wherever a charitable corporation had power to take by devise, _non obstante_ the Statute of Wills, there was no restraint upon the capacity or powers of testator to devise to them until the year 1848.

It is not always easy to perceive why the royal prerogative, or the executive function of the Crown, as _parens patriae_, was once deemed, in cases of charity, to be in abeyance after the War of Independence. A successful revolu-

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1 Coster _vs._ Lorillard, 14 Wend., at pp. 308, 309; and see Magill _vs._ Brown, 16 Fed. Cas., at p. 438; and note to Kent's Comm. IV., p. 508.
2 Andrew _vs._ The N. Y. Bible, &c., Society, 8 N. Y., 559, 563; Owens _vs._ The Miss. So. of M. E. Church, 14 N. Y., at p. 408.
4 _Infra._
5 Yates _vs._ Yates, 9 Barb., at p. 343; Williams _vs._ Williams, 8 N. Y., at p. 554; Cottman _vs._ Grace, 112 N. Y., at p. 307.
6 _Supra_, pp. 38, 39; it is quite erroneous, therefore, to say that the Stat. 9 Geo. II., c. 36, was repealed by the general repealing act of 1788. Downing _vs._ Marshall, 23 N. Y., at p. 392; _cf._ Ayres _vs._ The Meth. Church, 3 Sandf., p. 370; Stebbins, Sen., in McCartee _vs._ Orphan Asy. So., 9 Cowen, at p. 520; Williams _vs._ Williams, 8 N. Y., at p. 546; Levy _vs._ Levy, 33 N. Y., at p. 110.
8 _Cf._ Beekman _vs._ Bonsor, 23 N. Y., at p. 307.
tion subverts all former political powers and dominion and presumably vests them at once in the victor. As the federal sovereignty of the United States makes no inherent pretensions to the powers of the Crown in cases of charity, they must remain in the people of a particular State, except in so far as they have been delegated to the federal establishment,\(^1\) unless the prerogative is foreign to republican institutions. It is conceded, however, that the State may vest most of the former royal powers in the appropriate tribunals or in the executive of this country.\(^2\) As the judiciary have the judicial \textit{cy pres} power either inherently or by means of some statute, and its application is frequently made mandatory upon them,\(^3\) there seems to be no valid reason why the executive or the Courts of this country should not be directed by statute to prevent the failure of any donation to charity or \textit{pro bono publico}. In a republic, of all governments, gifts to the public, or for their use, ought to be highly favored by the law.\(^4\) Certainly, if the State has succeeded to all the powers of the Crown over charities and to those exercised by the Crown as \textit{paren\ae patriae}, as is said by the authorities, it is quite competent for the legislature to impress property with a new use and to declare that in future, charitable donations shall not fail, or that where such donations are so indefinite as to require external aid that then the Governor of the State, or any other officer, may with the advice of the Attorney-General, appoint the same to a public use.\(^5\) In the cases where the beneficiaries of a charitable donation are uncertain, the Attorney-General may represent them by virtue of his common law powers,\(^6\) and if these powers are deemed

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2 Bascom \textit{v.} Albertson, 34 N. Y., 610, 617; Mormon Church \textit{v.} United States, 136 U. S., 1, 56, 57; People \textit{v.} Ingersoll, 58 N. Y., at p. 16; but not as against vested rights; People \textit{v.} Powers, 147 N. Y., at p. 109; Losey \textit{v.} Stanley, 147 N. Y., at p. 571.
5 Mormon Church \textit{v.} United States, 136 U. S., I., 1, 56, 57.
doubtful, the legislature may define them as in a recent instance. This theory of the prerogative over charities is not novel. In the year 1834, the legislature of this State by an act, permitted the funds of one charitable corporation to vest in another of a like nature. These funds were held to a charitable use and the legislature simply exercised a general superintendence over charities as parvis patriae. There is no likeness between a public and a private use, and here no rights vested so that they could not be divested, at least with the consent of the corporation administering the estate. Nor would such a law be an interference with vested rights, for no rights vest in the property of others, except subject to such rules as the State prescribes. As the law now stands, if a charitable use is void the property limited descends to the heir or passes under some residuary devise or bequest. But that the legislature may change the rule for the future so as to provide for the application of the cy pres doctrine to subsequent indefinite devises and bequests to charity, seems undoubted and where no interest has already vested an inherent attribute of sovereignty.

Notwithstanding what was said in several cases about the abolition of the English law of charities in 1788, there can be little doubt that had it not been for the Revised Statutes of 1829, the common law relating to charitable donations would have ultimately been held to be a part of the law of the State of New York. The Revised

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1 People v. Ingersoll, 58 N. Y., at pp. 15, 16; cf. People v. Simonson 126 N. Y., 299.
2 C. 701, Laws of 1893.
3 C. 148, Laws of 1834; so in 1795, the legislature passed an act in reference to a legacy to a charity school (18th Sess., chap. 29), directing it to be paid over to the Overseers of the Poor; cf. Dammert v. Osborn, 140 N. Y., 30.
6 Supra, p. 49.
7 Nearly all the subsequently overruled cases were cited with approval by Kent in his Commentaries, and great names in our juridical history supported
Statutes devised and enacted a new scheme relating to uses and trusts in lands,1 carefully prescribing the instances where express trusts in lands might be created,2 and distinctly abolishing all uses and trusts not then authorized in the statutes.3 Charitable uses were nowhere mentioned, and thus were neither expressly saved nor abolished by this revision. Consequently one school of juridical scholars, recollecting that charitable uses were saved out of the Statute of Uses, was in favor of excepting charitable uses from the operation of the Revised Statutes. This construction was stoutly opposed and the conflict of opinion extended over many years. Chancellor Kent regretted that the revisers themselves had not settled the question:4 and when Mr. Lalor sent his book to press in 1855 he announced that the controversy had ended,5 although, in fact, it had hardly begun. In Shotwell, Executor v. Mott,6 it was most pointedly held that the Revised Statutes abolishing the uses not expressly saved, had no reference to charitable or public uses. In Tucker v. St. Clement's Church this question was left open.7 But there was a very strong and highly intelligent opinion abroad, that the Revised Statutes had not abolished public or charitable uses, and that such uses ought to be regarded as beyond the contemplation of the makers of the Revised Statutes.8

In Ayres v. The Methodist Church,9 Andrew v. New York Bible and Prayer Book Society;10 Yates v. Yates,11 King v. Rundle12 and Voorhes v. Presbyterian Church,13 the

the common law of charities, sed cf. Andrew v. N. Y. Bible, etc., Society, 4 Sandf., 156, as to pious uses; Bascom v. Albertson, 34 N. Y., at p. 610.

1 Art. I., Tit. 2, Chap. I., Part II., R. S.
2 1 R. S., 728, sec. 55.
3 1 R. S., 725, sec. 45.
4 4 Comm., 508, note.
6 2 Sandf. Ch., 46, 49, 52.
7 3 Sandf., 242; 8 N. Y., 558.
8 American Law Register, I., 558.
9 3 Sandf., 351.
10 4 Sandf., 156
11 9 Barb., 324, 340.
12 15 Barb., 139.
13 17 Barb., 105.
Revised Statutes were held to have destroyed charitable uses, if any such were tolerated in the State, after the repeal of the English statutes in 1788. But the case of Andrew v. N. Y. Bible and Prayer Book Society was reversed on appeal after these other cases had been decided; thus leaving the matter open in the year 1853. In October of that year, in Williams v. Williams, the Court of Appeals validated several legacies as charities, although they were of a most indefinite character; and the Court at the same time took occasion to express its opinion, that charitable uses were still valid in this State notwithstanding the Revised Statutes. This opinion was then thought to be final, but it was not. The decision did not necessarily involve uses in lands; the opinion was therefore largely obiter and historical. With the case of Owens v. The Missionary Society of the Methodist Episcopal Church began a process of differentiation, which ultimately overthrew the doctrines clearly enunciated in Williams v. Williams; although in the Owen's case the William's case was only distinguished by the majority, but in such a way as to shake its authority. In Leonard v. Burr, there was still an intimation that charitable uses stood on a footing quite distinct from uses not charitable. But in Dodge, Executor, v. Pond, it was said, "the peculiar doctrines of the English Court of Chancery having never been adopted in this State, trusts for such purposes cannot be sustained, unless the object of the trust is defined with clearness and precision." In Beekman v. Bonsor, the Court observed the discrepancy between Williams' case and Owen's case in so far as the historical question of equity jurisdiction over charitable uses was concerned, but did not think it of fundamental importance. Nothing was said directly upon the subject of

1 Supra, p. 49; Yates v. Yates, 9 Barb., at p. 337.
2 8 N. Y., at p. 559; note.
3 N. Y., at pp. 554, 555, 556, 557, 558.
4 Lalor's Real Property in New York, p. 130.
5 14 N. Y., 380.
6 18 N. Y., 96.
7 23 N. Y., 69.
8 Ibid., p. 77.
9 23 N. Y., at p. 309.
the destruction of charitable uses by the Revised Statutes; but in Downing v. Marshall, it was made very clear that a charitable use, if valid at all, was only valid as a power in trust, and that the Revised Statutes specified all the cases where express trusts in lands were permitted. In Levy v. Levy, it was, however, admitted that there was still a diversity of opinion amongst judges, whether the article of the Revised Statutes on Uses and Trusts applied to charitable or public uses, and three of the judges clearly were of the opinion that it did apply, while the majority were silent on this point. Thus, in 1865, the main question was still open. Two years earlier the same Court, by the same Justice, Wright, then delivering the opinion in the Levy case, had held in Rose v. Rose, that charitable donations of a public nature formed no exception to the law against perpetuities, when the donations were contingent and executory. The opinion in Levy v. Levy, although very much the same as the opinions in Ayres v. Trustees of the Methodist, etc., Church, and in Andrew v. New York Bible, etc., Society, denoted the qualifications of future charitable donations in New York. In the Levy case there was no pretense of adhering to the doctrines of Williams v. Williams. It remained for Bascom v. Albertson to complete the overthrow of charitable uses in lands: In the judgment of the Court the Revised Statutes embraced charitable uses in the abolition of uses. At a subsequent day, or in 1871, the learned reporter was encouraged by a statement in the opinion, that it was not then "proper to decide the question, whether the peculiar system of charitable uses, as it existed in England has, or ever had, in any of its features any foothold in this State," to append a note, intimating that the question, whether the

1 23 N. Y., 366.
2 33 N. Y., 97, 134.
3 4 Abb. Ct. of Appeal Decis., 108.
4 33 N. Y., 97.
5 3 Sandf., 351.
6 4 Sandf., 156; reversed, 8 N. Y. 559.
7 8 N. Y., at p. 525.
8 34 N. Y., 584, 619.
9 34 N. Y., at p. 615.
English system of charitable uses exists in this State must be regarded as still open. But in Holmes v. Mead, in 1873, the Court disapproved of the reporter’s note in Burrill v. Boardman, and the announcement was made that the controversy was definitely closed—the Revised Statutes had, at last, abrogated charitable uses in lands. Henceforth charitable trusts must be subject to all the rules of the Revised Statutes relating to express trusts, or to powers in trusts, perpetuities and the limitations of future estates—it made no difference that the old rules concerning perpetuities had no possible bearing on charitable or public trusts, or that the old rules concerning the vesting and the definite quality of private estates had little reference to charitable bequests or public foundations; the Revised Statutes had changed the ancient law, established in the early ages of Christianity. For the propriety of this legislation the Courts were not responsible. In a short time it was well understood that charitable donations of personalty in trust were equally within the rules of the Revised Statutes relating to perpetuities and future estates. But as we shall observe later on, the legislature has now become restive under doctrines so destructive to charitable donations, and a late law validating donations for the benefit of uncertain beneficiaries has restored in part the ancient law of charities.

The long contention over charitable uses in which opposing forces were marshaled by the courts and styled “champions,” as if there had been some tournament or

2 52 N. Y., 332.
5 Shotwell, Exr., v. Mott, 2 Sandf. Ch., at p. 54, seq.
6 Supra, pp. 58, 61.
7 The Legislature has now returned to one principle of the ancient law, uncertainty in the beneficiaries of the use; vide infra and c. 701, Laws of 1893.
8 Infra.
9 C. 701, Laws of 1893; Dammert v. Osborn, 140 N. Y., 30, 43.
10 Holmes v. Mead, 52 N. Y., at p. 337.
pageant passing in the courts of justice, demands some brief recapitulation in an elementary treatise of this character. It will be seen by reference to the reports that the Chancellors prior to 1846,¹ and Judge Denio after that year regarded the English law of charities as part of the fundamental law of New York, and that Judge Duer, Judges Wright, Selden and Porter were the influential minds in reaching the opposite conclusion. The points involved in this notable discussion were briefly these:

(1). Did, or did not, the English law of charities and the jurisdiction of the Lord Chancellor over charitable uses depend on the Statute of Charitable Uses?

(2). In the case of indefinite charities where no interest vested, did, or did not, the ordinary means of enforcing them by information filed by the Attorney-General depend on the Statute of Charitable Uses, or the royal prerogative?

(3). Did the English law of charities fall in New York with the repeal of all the English statutes, not re-enacted in 1788, or continue here independently of that statute?

(4). Were charitable uses in lands abolished by the Revised Statutes?

(5). Were charitable bequests and donations of personalty governed by the rules of the Revised Statutes relating to perpetuities and future estates?

As all the preceding pages have been devoted to a discussion of the questions just summarized above, it is only necessary to repeat briefly what is believed to be the answers finally given by the tribunals to the questions themselves:

(1). It was practically conceded, in Bascom v. Albertson, that the English law of charities existed antecedently, to and independently of, the Statute of Charitable Uses; and that the jurisdiction of the Lord Chancellor over charitable uses was independent of the Statute of Charitable Uses.²

¹ Willard, Eq. Jurisp., p. 575.
The same result has been reached in England,¹ and in the Federal Supreme Court of this country.²

(2). It is now apparently conceded that informations in charity cases were filed by the Attorney-General prior to the passage of the Statute of Charitable Uses, and, therefore, that such informations were independent of that statute.³ Nor did such informations depend on the royal prerogative—they were filed in behalf of the public, and the duty of filing them devolved on the Crown as executive or parens patriae.⁴ At the present time in England any one may act as relator in a charity⁵ case. It is apparent that the Court of Appeals thought at first, that the Attorney-General could adequately protect the interests of the public in indefinite charitable or public trusts where no interest vested.⁶ There would thus appear to be no royal privilege involved in filing an information; at least so as to preclude the American Chancellor from exercising jurisdiction over indefinite public trusts, even if an information were the sole remedy.⁷ The argument on this point in Baptist Association v. Hart’s Exrs.⁸ is therefore not conclusive

¹ Atty.-Genl. v. Mayor of Dublin, 1 Bligh. (N. S.), 312, 347; Incorporated Society v. Richards, 1 Drury & Warren, 258.
⁴ Atty.-Genl. v. Mayor of Galway, 1 Moll., 95; Atty.-Genl. v. Flood Hayes, 611; Wellbeloved v. Jones, 1 S. & S., at p. 43.
⁵ Atty.-Genl. v. Vivian, 1 Russ., 236.
⁶ Andrew v. The N. Y., Bible, etc., Society, 8 N. Y., 559, 563; Owens v. The Miss. So. of M. E. Church, 14 N. Y., at p. 408.
⁷ People v. Ingersoll, 58 N. Y., 1, 14, 15; People v. Powers, 83 Hun, 449; 29 N. Y. Supp., 951; cf. c. 701, Laws of 1893.
⁸ 4 Wheat., 1.
of the jurisdiction of the Chancellor of the State of New York over indefinite permanent charitable trusts.\textsuperscript{1}

(3). The chancellors of New York and other jurists have repeatedly held that the English law of charities did not fall with the repeal of the Statute of Charitable Uses (43 Eliz., c. 4) in 1788, but that the jurisdiction over charitable trusts continued and was independent of that statute.\textsuperscript{2} But the later opinion of the courts, discussed at length in these pages, is to the effect, that as it was commonly thought both in England and in this country until the exhumation of ancient documents in chancery that the Chancellor’s jurisdiction did depend upon the Statute of Charitable Uses, the repeal of that statute in 1788 is conclusive evidence of an intention by the Legislature to abrogate the entire English law of charities.\textsuperscript{3}

(4). The fourth question, formulated above, has been fully answered in the affirmative.\textsuperscript{4}

(5). The fifth question will be answered at a subsequent stage of this treatise.\textsuperscript{5}

We have now arrived at a point in our history where it is apparent that the ancient law of charities affords little or no light on the validity of charitable donations in the State of New York. The early cases to the contrary disappear as precedents, and henceforth counsel and conveyancers must proceed in the light of the Revised Statutes; or charitable donations might fail. The adumbrations of the present learning are contained in the following decisions: In Ayres v. the Methodist Church,\textsuperscript{6} Judge Duer announced a theory in effect, that although he could not refer to any positive evidence he had no doubt that when the Statute of Charitable Uses was repealed in 1788 the former law

\textsuperscript{1} Supra, p. 9.
\textsuperscript{2} Supra, pp. 51–54.
\textsuperscript{4} See the discussion at pp. 58–62, supra.
\textsuperscript{5} Chaps. IV., V., infra.
\textsuperscript{6} 3 Sandif., 351, 367.
of charities was intended to be abrogated. This theory was enlarged by Wright, J., in Yates v. Yates, who said "trusts are unnecessary for public charities; direct grants are much better," and the learned justice proceeded to adumbrate the scheme of charities which he thought the legislature of the State of New York intended. It seemed to be founded on a scheme of juristic persons, in the shape of eleemosynary or religious corporations, subjected to the Revised Statutes and all the regulations of business corporations.¹ By this theory, the law of charities was clearly shorn of two of the most ancient characteristics of charitable donations, uncertainty and permanence; or rather, it reverted to one phase of the ancient law—that relating to charitable corporations, and this modified by the statutes of the State. In Owens v. The Missionary Society of the M. E. Church, Selden, J., while saving charitable bequests where the fund was given to a competent trustee, animadverted on charitable trusts.² In Levy v. Levy, Wright, J., was able to formulate his theory in a somewhat more conclusive manner. He said "an attentive study of the legislative history of the State will lead to the conclusion, that if the legislative power has not succeeded in extirpating the Law of Charitable Uses as it prevailed in England in 1775, and establishing a State policy and system of her own in respect to indefinite uses either for charity, or religion, or any other purpose, the intention has plainly existed to do so." The learned judge then proceeds to review the legislation, which accords with his theory.³ In Holland v. Alcock, the Court of Appeals carefully considered the opinion of Wright, J., in Levy v. Levy, and sums up the result in New York as follows: "The law [of charities] has been simplified, and that is all. Instead of the huge and complex system of England, for many generations the fruitful source of litigation, we have substituted a policy which offers the widest field for enlightened

¹ Yates v. Yates, 9 Barb., 324; King v. Rundle, 15 Barb., 139.
² 14 N. Y., pp. 407, 408.
³ 33 N. Y., 97, 108; and see Bascom v. Albertson, 34 N. Y., 584.
benevolence."¹ The opinion in Bascom v. Albertson outlines the system of charities which superseded in New York the ancient system, and leaves nothing more to be said concerning the doctrine² prevailing up to the year 1893 when the legislature restored part of the ancient law laid down in the case of Williams v. Williams.³

Accepting the judicial encomium on the substituted system, it is impossible not to observe, that the theory until lately dominant in regard to the law of charities indicates an unusual continuity of legislative intention both in deeds of omission and in the disjecta membra of legislation.⁴ The theory in question wholly escaped the Chancellors of the State of New York; at least until one of them tentatively suggested that the Revised Statutes might have abolished charitable uses in lands.⁵ But it must be admitted by the candid enquirer, that the doctrines finally adopted are not unfounded, and if they do not convince him, they ought to cause him to respect the learning and force with which they are presented.⁶ Many great judges have differed upon the points indicated, and it is impossible to dogmatize where the best intellects are at variance. It is quite accurate to say that the application to America of the English law of charities has occasioned more difficulty than any other one department of the common law. Yet it is open to everyone to express the preference that New York had been found on the other side of the controverted question, settled only after half a century of conflict. That the legislative branch of government is dissatisfied with the logic of the final determination, is obvious from the act

¹ 108 N. Y., 312, 336; Cottman v. Grace, 112 N. Y., 307; Fosdick v. Town of Hempstead, 125 N. Y., 581.
² 34 N. Y., at pp. 612, 613.
³ 8 N. Y., 525; c. 701, Laws of 1893; Dammert v. Osborn, 140 N. Y., 30, 43; et vide infra, c. IV.
⁴ Wright, J., in Levy v. Levy, 33 N. Y., p. 111; note that the general Repeal of English statutes was in 1788, and the Religious Incorporation Act in 1784, c. 18; cf. c. 701, Laws of 1893.
⁵ Potter v. Chapin, 6 Pai., at p. 650.
⁶ Bascom v. Albertson, 34 N. Y., at pp. 612, 613.
designed to restore charitable uses and trusts for indefinite beneficiaries.\textsuperscript{1} This important act will be noticed at a subsequent place.\textsuperscript{2}

\textsuperscript{1} C. 701, Laws of 1893.
\textsuperscript{2} Chap. V.
CHAPTER IV.

CHARITABLE DONATIONS NOT IN TRUST.

The indication in Yates v. Yates,¹ that direct grants for public charity were the better way to establish charities in New York, dictates that we should first consider donations to corporations, as that is now the more important, or primary mode adopted in this State. Indeed, since charitable donations have been subjected to the common rules of the Revised Statutes against perpetuities,² and since certainty, until 1893, was required in respect of the beneficiaries of a charitable donation or trust,³ corporate donees engaged in the business of charity have been regarded as the safest conduits of benevolence or benefactions.⁴

As since the repeal of the Statute of Charitable Uses we have no legislative definition of charity,⁵ let us consider for a moment what a charitable donation now means. Sir William Grant, M. R., intimates that independently of the Statute of Charitable Uses, charity denotes all the good affections men ought to bear toward each other, and in its more restricted sense, relief of the poor.⁶ Mr. Binney’s celebrated definition is more comprehensive: “Whatever is given for the love of God or for the love of our neighbour—in the catholic and universal

¹ 9 Barb., 324, 343, approved Bascom v. Albertson, 34 N. Y., at p. 620.
² Supra, pp. 58–62.
³ Infra, Chap. V.
⁴ Bascom v. Albertson, 34 N. Y., at p. 612.
⁵ Andrew v. N. Y. Bible, etc., So., 4 Sandf., at p. 181; Ayres v. The Meth. Church, 3 Sandf., at p. 377; Levy v. Levy, 33 N. Y., at p. 115; cf. c. 701, Laws of 1893.

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sense—given from these motives and to these ends, free from the stain of everything that is personal, private or selfish—is a gift for charitable uses. ¹ Another definition is given by Mr. Justice Gray in Jackson v. Phillips.² But Lord Camden's definition is the more concise, technical and relevant to present conditions: "A gift to a general use which extends to the poor as well as the rich."³ In New York at the present day, a charitable donation denotes one which is intended as a benefit to the public or for the well-being of a class, and not for the use of a particular person.⁴ In this sense it is contrasted with a private donation. No more specific definition would seem adapted to present conditions.⁵ Mr. Shelford's classification of charitable uses would, however, seem still applicable to a classification of charitable donations:⁶ (1) The relief of the poor; (2) The advancement of learning; (3) The advancement of religion; (4) The advancement of objects of general public utility.

At common law charities were judicially favored,⁷ and there is reason to believe that this well-established maxim is still highly obligatory and part of the common law of the State.⁸ Certainly this principle of the common law has never been expressly abrogated, and it would at least be difficult to point out the moment of its extinction. But favor denotes an established contrast, and it would, perhaps, be equally difficult to point out wherein, under the Revised Statutes, charitable donations have been judicially favored in cases where, if private donations, they

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¹ Vidal v. Girard's Exrs., 2 How., 127.
² 14 Allen (Mass.), 539; Sharswood & Budd's Leading Cases in Amer. Law of Real Prop., III., 332, 333.
³ Williams on Executors, 1070, note; Jones v. Williams, Amb., 651. The word "use" at the present day in a non-technical sense is, however, confusing.
⁴ Sherwood v. American Bible Society, 1 Keyes, 561.
⁶ Supra, p. 37.
⁷ Williams on Executors, 1055.
LAW OF CHARITABLE DONATIONS.

must have failed. Unless charitable donations are construed more liberally than private donations, it would be futile to regard the maxim as still controlling. It is no answer to say that charities are favored by the general legislative policy of this State. In this sense "favored" is equivalent to promoted, which is not the meaning of the maxim. Nor is it a judicial application of the maxim in question to apply to charitable donations that well-known principle of construction—ut res magis valeat quam pereat; for it is applicable to all acts or deeds alike. The present doctrine of the Courts in regard to charities seems fully stated in a recent case: "The argument that gifts for "the promotion of charity, education and religion, should "be encouraged, and should not be diminished by exac- "tions of the state, presents a moral and political rather "than a judicial question. It is the duty of the courts, in "the interpretation of Statutes, to declare the law as it is, "and the interests of society are best subserved by a close "adherence by courts to what they find to be their plain "meaning, neither narrowing the application on the one "hand, nor extending the meaning on the other, to meet "cases not specified, which may seem to be within the "reason of the law."

Juristic persons, or corporate donees, have from time out of mind been favorite instruments of charity. Even when the ordinary rules of law relative to transactions of a private character were greatly relaxed in favor of public or charitable donations, religious, eleemosynary and civil corporations, were the prominent almoners of the pious, the benevolent, and the public-spirited. By this means charitable donations were entrusted to a corporate succession of private persons in endless continuity, all animated by the trust spirit and subordinate to the rules of the


3 Supra, Chap. I.

4 Cf. Grant on Corporations, 5.
foundation over which the Crown or the State exercised a judicious, and oftentimes a vigilant supervision. Conveyance of lands to a charitable corporation always contemplated a perpetuity,¹ but there was once no policy of the law violated in any instance when such perpetuity was charitable.² So while the property donated to a corporation is impressed in the hands of a charitable corporation, with a permanent trust character, such character is impressed by the State³ in the instrument of incorporation, and not by a private donor—a distinction of some consequence where the State assumes to regulate charitable donations on the basis of common trusts.⁴ A gift to a charitable corporation for its corporate purposes is not a trust in the eye of the law.

In this State, where there is no church establishment, no legal distinction is made between a religious corporation and a lay eleemosynary corporation,⁵ in the construction of charitable donations; but the laws of the State take notice of the objects of certain incorporations and classify corporations accordingly.⁶

In the preceding chapter we have briefly indicated that the abrogation of the old law, in New York, of indefinite permanent charitable trusts has been said to be evidenced by the substitution of a system of religious and charitable foundations or corporations.⁷ The history of this policy is also said to begin in the year 1784⁸ with the Act to enable

¹ Lewis on the Law of Perpetuity, 688, 689; cited in Williams v. Williams, 8 N. Y., at p. 534; Wetmore v. Parker, 52 N. Y., at p. 458.
² Supra, pp. 28, 29; Shotwell, Exr. v. Mott, 2 Sandf. Ch., p. 54, seq. This case is no longer authority upon the point involved. But its statement of this point is uncontroverted and incontrovertible.
³ Supra, p. 29, as to alienability of the property of a charitable corporation.
⁴ Fosdick v. Town of Hempstead, 125 N. Y., at p. 595; Bird v. Merklee, 144 N. Y., 544; cf. Matter of will of Ingersoll, 131 N. Y., 573.
⁵ Williams v. Williams, 8 N. Y., at p. 533; Stephenson v. Short et al., 92 N. Y., 433, 446.
⁶ E. g., The Act of 1784, c. 18; The General Corporation Law, c. 687, Laws of 1892, sec. 2; c. 672, Laws of 1895.
⁷ Supra, pp. 49, 65.
Religious Denominations to appoint trustees who shall be a body corporate, etc.\(^1\) This act, which was passed at the first really constructive session of the Legislature of the State, was intended to enable unincorporated religious societies to become bodies corporate. Prior to Independence, the Church of England and the Dutch churches were the only religious corporations in the Province; the other religious bodies being unincorporated and holding their property by trustees, under the general law of charities then in force—the English uniformity acts not extending here.\(^2\) In 1801\(^3\) and in 1813\(^4\) the act was revised. As thus revised, it continued until recently to contain the general charter of new religious corporations,\(^5\) being repealed only in 1895,\(^6\) when the acts concerning religious corporations were generally remodeled.\(^7\) The Act of 1784 is important to our subject, because it is commonly regarded as the starting point of the new policy of this State in regard to charities, and as evidential of an intention to abrogate the former law of charities, substituting a corporate scheme.\(^8\)

Perfect charitable donations to corporations now involve a donor who is \textit{capax} or capable,\(^9\) and a donee having capacity to take and hold the donation. Before the repeal of the Statute of Charitable Uses, the capacity of the donee in a charity case was a question of very secondary consideration.\(^10\) But it is not so now in New York; the donee

\(^1\) C. 18, Laws of 1784; 1 J. & V., 104; 1 Greenleaf, 71.
\(^2\) Supra, p. 45.
\(^3\) 1 K. & R., 336.
\(^4\) 1 R. L., 212.
\(^6\) 3 R. S., 292.
\(^7\) C. 723, Laws of 1895, being c. 42, General Laws.
\(^9\) The Statute of Charitable Uses was never held to affect the capacity of the donor. The capacity of the donor is determined by rules applicable to all his transactions and by several statutes noticed below, e. g., 1 R. S., 719, sections 8, 10; cf. Boasberg v. Cronan, 30 State Rep., 483; s. c. 9 N. Y. Supp., 664, as to what person may impress a trust on property.
\(^10\) Supra, p. 36; Tudor, Char. Trusts, 3d edit., 377.
must have legal capacity to take or accept and hold the donation.\(^1\)

The capacity of the donor is determined not only by the common law, but by statutes of general import, relating to lands, estates, trusts and the like.\(^2\) If the donation consist of lands the donor must be of sound mind and of full age, or *sui juris*.\(^3\) So the quality and quantity of the legal estate created must conform to the provisions of the Revised Statutes, as there is now but one exception to the general rules of law made in favor of charities.\(^4\) If the subject matter of the limitation is personal property, and the mode of transfer adopted is a last will and testament, a testator of eighteen has capacity and a testatrix of sixteen.\(^5\)

The statutes which most directly affect donors in limitations to charity are those relating to wills. By chapter 360 of the Laws of 1860, "no person having a husband, wife, child, or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious, or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts (and such devise or bequest shall be valid to the extent of one-half and no more)."\(^6\) This act repeals most other acts restricting devises or bequests to less than one-half.\(^7\) It is peremptory and may be insisted on by any one affected thereby.\(^8\) By sec-

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\(^2\) Chap. 1, part II., R. S.

\(^3\) R. S., 719, sec. 10.

\(^4\) C. 701, Laws of 1893.

\(^5\) 2 R. S., 60, sec. 21, as amended by chap. 782, Laws of 1867.


\(^7\) Lefevre v. Lefevre, 59 N. Y., 434, 449; Dowd's Will, 8 Abb. N. C., 118; 3 Sharswood & Budd's Lead. Cas. Real Prop., 387.

\(^8\) Note to 3 Sharswood & Budd's Lead. Cas. Real Prop., 387 et seq.; Harris
tion 6 of chapter 319 Laws of 1848: "An act for the incorporation of benevolent, charitable, scientific and missionary societies," it is provided among other things, "that any corporation formed under the act shall be capable of taking, holding or receiving any property, real and personal, by virtue of any devise or bequests contained in any last will or testament, * * * the clear annual income of which shall not exceed the sum of ten thousand dollars; provided no person leaving a wife, or child, or parent, shall devise or bequeath to such institution or incorporation more than one-fourth of his or her estate after the payment of his or her debts,1 * * * * * and no such devise or bequest shall be valid in any will which shall not have been made and executed at least two months before the death of the testator."2 Restrictions on the amount of property devisable or bequeathable are contained in other acts relating to different classes of corporations; clubs,3 libraries,4 and bar associations.5 The act of 1848 should be read in connection with the act of 1860 and the other acts just mentioned.6 These acts affect the capacity of both the testator and the devisee or legatee.7 A provision in a charter subjecting a domestic corporation to prior laws regulating similar corporations will sometimes subject it to the disabilities created by chapter 319, Laws of 1848.8 The act of 1848 has no reference to bequests to foreign corpora-

1 Amended by c. 360, Laws of 1860.
2 Simmons v. Burrell, 8 Delehanty, 388; Hollis v. Drew Theological Sem., 95 N. Y., 166; et infra.
3 C. 368, Laws of 1865; c. 267, Laws of 1875.
4 C. 343, Laws of 1875.
5 C. 317, Laws of 1887.
6 Lefevre v. Lefevre, 59 N. Y., 434; Kerr v. Dougherty, 79 N. Y., 327; Stephenson v. Short and The Ontario Orphan Asylum, 92 N. Y., 433; Hollis v. The Drew Theological Seminary, 95 N. Y., 166; People's Trust Co. v. Smith, 82 Hun, 494; Matter of Kavanagh, 125 N. Y., 418.
7 Lefevre v. Lefevre, 59 N. Y., 434.
8 Matter of Kavanagh, 125 N. Y., 418.
tions. These acts are discussed in several treatises, and other authorities are there cited.

Concerning corporations, the general rule of the common law is, that the right to take and grant property, real or personal, is of the essence of every domestic corporation; and in the absence of any statutory prohibition, they may take by all the usual modes of acquiring property. So at common law there were no restrictions on their power to alienate their property without limitation or restriction. But corporations being juristic persons, or existing only in contemplation of law, have their faculties and powers prescribed by law. In England the right or power of corporations or religious bodies was materially affected by the Statutes of Mortmain. These statutes are said to have been in force in the Province of New York. But it must be observed that in view of the very few corporations then existing here, they would seem to have been irrelevant to the colonial epoch. If these statutes were so in force by judicial or prerogative extension, they fell with the general repeal of the English statutes not then revised in 1788. But other prohibitions on the right of corporations to take and hold lands were substituted in their place, and are sometimes characterized as Mortmain Statutes, although the construction of our statutes, unlike that of the English statutes, prevents the taking, as well

1 Hollis v. Drew Theological Seminary, 95 N. Y., 166; Matter of Estate of Prime, 136 N. Y., 347.
2 Chaplin Suspens. Power Alienation, sections 461-463; Redfield on Surrogates, 231 and notes.
4 Dutch Church in Garden Street v. Mott, 7 Pai., 83.
5 Supra, pp. 24-26.
8 Supra, pp. 48-50.
9 Infra, p. 77 seq.
as the holding, of property in cases where no express authority exists.\(^1\)

The restrictions in this State upon the capacity of charitable corporations to take and hold property are claimed to have been made for the benefit of the heirs of the donor, and not to find their origin in any State policy similar to that which animated the Plantagenet acts directed against conveyances in mortmain\(^2\) Such would seem to be the opinion in Hollis v. The Drew Theological Seminary.\(^3\)

In the State of New York the charter commonly restricts the amount of property which a corporation may take and hold.\(^4\) The history of the restriction is not obscure. In 1783, the legislature incorporated by a special act the Dutch Church of Tappan, Orange County. This act contained a restriction limiting the corporate property to £500 per annum.\(^5\) So the subsequent general act to enable all religious denominations to appoint trustees who shall be a body corporate passed in 1784, limited such corporations to £1,200 per annum income.\(^6\) The act incorporating the Regents of the University in 1787 limited the revenue of any institution of learning formed under that act to the value of four thousand bushels of wheat.\(^7\) These early restrictions survived the statutory revision of 1813,\(^8\) being included in some form in the Revised Statutes of 1829.\(^9\) In New York no corporation may possess, or exercise any power except such as shall be necessary to the exercise of powers expressly conferred.\(^10\) The general laws now being codified will in the future regulate

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\(^1\) Matter of McGraw, 111 N. Y., 66.
\(^3\) 95 N. Y., 166, 175; cf. Trustees v. Rich, 91 Hun, 509; Redfield on Surrogate's Practice, 232; Rich v. Tiffany, 2 App. Div., 25 (Hun).
\(^5\) C. 17, Laws of 1783; 1 J. & V., 90.
\(^6\) C. 18, Laws of 1784; 1 J. & V., 104.
\(^7\) C. 82 Laws of 1785; 2 J. & V., 142.
\(^8\) 1 K. & R., 336; 1 R. L., 212, 260, 265.
\(^9\) 1 R. S., 460, 599, 600; Matter of McGraw, 111 N. Y., 66, 84.
\(^10\) 1 R. S., 600, sec. 3.
such charitable corporations as derive their powers from those acts.¹

The charter of a corporate donee is the usual criterion of its power, or capacity, to take and hold the donation, whether land, or chattel interest.² The charter must consist of an act, or acts, of the legislature,³ as there are no common law corporations in this State, although there are some very ancient charters. In at least one instance in this State, the early Dutch government, preceding the English dominion established in 1664, has been recognized as a proper source of corporate power and existence.⁴ Other corporations were erected when New York was under the authority of the Crown and both their estates and charters are protected⁵ by the State and Federal constitutions. But the vast majority of the domestic corporations owe their existence to the sovereignty of the State, being created since Independence, under general laws, or special acts where there are no general laws.⁶ Corporate charters granted since 1846 are subject to legislative alteration or repeal.⁷ It is unnecessary to consider here in detail the great variety of acts under which charitable, religious and eleemosynary corporations are formed in New York.⁸ Nor would these complete the list, for civil or municipal corporations are not infrequently employed as the instruments of charity or private beneficence.⁹ The same general principles apply in New York to all corporations.

² Betts v. Betts, 4 Abb. N. C., 317, 397; 1 R. S., 599, sec. 1, sec. 3; Riker v. Leo, 115 N. Y., at p. 102.
³ The certificate of corporation is only evidential and not conclusive on a question of power. The charter in New York now usually consists of a general act, e. g., C. 559, Laws of 1895.
⁴ Denton v. Jackson, 2 Johns. Ch., 320, 324.
⁵ N. Y. Const. of 1777, sec. xxxvi.; Const. U. S., art. I., sec. 10.
⁶ Const. 1846, art. viii., sec. 1; Const. 1894-5, art. viii., sec. 1.
⁷ Const. 1846, art. viii.; Const. 1894-5, art. viii.; c. 723, Laws of 1895.
⁸ There are several hand-books, or compilations, of the various laws: Cumming & Gilbert's Religious Corporations; Snyder's Laws relating to Benevolent, Charitable, Scientific, etc., Societies.
⁹ Le Couteulx v. City of Buffalo, 33 N. Y., 333.
Besides the act of incorporation, or the charter of the corporation, we have often to look to other statutes, such as the Revised Statutes, which serve as enabling, or constating instruments, and confer additional or modified powers.¹ Thus, in 1840, the legislature provided that real and personal property might be granted and conveyed to any incorporated college, or other literary and incorporated institution in this State, in trust, (1) to establish and maintain an observatory; (2) to found and maintain professorships and scholarships; (3) to provide and keep in repair places for burial of the dead; (4) for any other specific purposes, comprehended in the general objects authorized by their respective charters.² And in 1841, they provided that devises and bequests of real and personal property in trust for any of the purposes for which such trusts were authorized under the Law of 1840, and to such trustees as were therein authorized, should be valid, in like manner, as if such property had been granted and conveyed according to the provisions of that law.³ In some instances the charter of a particular corporation is vitally affected by subsequent legislation of an enabling character, such as the acts increasing the amounts of property which it may take and hold.⁴ In other cases the legislation is of a restrictive character.⁵

Donations to charitable corporations may be made by any of the appropriate modes of transferring a use or the dominion or ownership of property.⁶ The donor may convey lands directly to the corporation, in his lifetime, provided it have the capacity to take and hold the same;⁷ or he may give and deliver goods and chattels, or other per-

¹ R. S., 599, 600; Matter of McGraw, 111 N. Y., 66, 84; and see Chaplin, Suspension Power Alienation, p. 256, note.
² C. 318, Laws of 1840; Adams v. Perry, 43 N. Y., 487.
³ C. 26, Laws of 1841.
⁴ C. 191, Laws of 1889, fixed the amounts for non-business corporations at $2,000,000, and the annual income at $100,000; c. 497 and c. 553, Laws of 1890, and c. 400, Laws of 1894, increase the amounts to $3,000,000, and the income to $500,000.
⁵ Kerr v. Dougherty, 79 N. Y., 327.
⁷ R. S., 599, Sections 1 and 3.
sonal estate, to such corporation, subject to the like qualification. But in each case there must be a delivery and some act of acceptance on the part of the corporation, for one can not thrust property on corporations, any more than on any other persons, against their will;¹ at least when they are *sui juris*. It would, however, hardly seem to be desirable for the trustees of a charitable corporation to refuse an unrestricted or absolute donation, if the corporation clearly had capacity to take and hold the same, and the purposes of such corporation would be promoted thereby. And as acceptance is usually presumed where the donation is highly beneficial, it is probable that the burden of proving a declination would rest, in such a case, upon the trustees of a charitable or even a religious corporation. But donors to charity usually prefer posthumous gifts, or that their donations should take effect after their death, by means of a last will and testament.

The power of a corporation to acquire lands by will has always been affected by the Statutes relating to Wills.² In one case, however, it is said that at common law a corporation may take by devise.³ This statement must refer to the very early common law, for after the perfection of the feudal system in England, no person could acquire lands by will until after the Statute of Wills which expressly excepted corporations.⁴ Nor for a long time could a corporation be seised to a use.⁵ In the first Statute of Wills, enacted in New York, the proviso contained in the English Statute of Wills was retained, and bodies politic and corporate could not take by devise.⁶ This exception was retained in the Revision of 1813,⁷ and thence passed into the

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³ In the Matter of McGraw, 111 N. Y., 66, 84.
⁴ *Supra*, p. 30; Downing *v.* Marshall, 23 N. Y., at p. 384.
⁵ *Supra*, p. 24.
⁷ 1 R. L., 364.
LAW OF CHARITABLE DONATIONS.

Revised Statutes of 1829, with a variance of phrase amounting to a prohibition:¹ "but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter or by statute to take by devise."² Thus, the power of a corporation in New York to take by devise now depends wholly on its charter, or on a statute, and if it thus lacks capacity the devise is void, and the land goes to the heir as undevised, or to the residuary devisee.³ This is a different construction from that accorded to the English Statutes of Mortmain which prohibited the holding and not the taking of land.⁴ In New York, the restraint goes as well to the taking as to the holding of lands.⁵ The restraints upon the capacity of certain corporations, imposed by the acts of 1848 and 1860 and other acts to take by devise or will, have been noticed above.⁶

It does not now make any difference that the devise to a corporation is for charity,⁷ although formerly a devise to a corporation, if for charity, was good,⁸ contrary to the general rule of law.⁹ The statute prohibiting a corporation to take by devise includes trusts as well as legal estates in lands, and prohibits their receipt of the rents during the trust term.¹⁰ But a power to sell the lands and pay over the proceeds to a corporation does not fall within the prohibition of the statute. It is not a taking by devise.¹¹

¹ Downing v. Marshall, 23 N. Y., at p. 386.
² 2 R. S., 57, sec. 3; Matter of McGraw, 111 N. Y., 66, 84; King v. Rundle, 15 Barb., at p. 149; Yates v. Yates, 9 Barb., at p. 343.
⁴ Shelford on Mortmain, 8; cf. as "to taking and spending," and not holding, Betts v. Betts, 4 Abb. N. C., 317, 403.
⁶ Supra, p. 75.
⁸ Supra, p. 37.
⁹ Supra, p. 21.
¹¹ Downing v. Marshall, 23 N. Y., 388, 391 et seq.
It is, however, true that at common law there was no restriction upon the power of a corporation to acquire personal, or movable, property by bequest under a last will and testament—the disability related wholly to land.¹ The same construction was accorded to the first Statute of Wills in New York, and subsequently to the Revised Statutes relating to Wills.² But, as at the present day a corporation, charitable or otherwise, has expressly no power to take or to hold personal or immovable property in excess of the amount limited by its charter;³ the restraint extends to the capacity of a charitable corporation to take personal property by bequest or under a last will and testament.⁴ The restraints upon the capacity of certain corporations to take by bequest, contained in the acts of 1848 and 1860, have been mentioned.⁵

In determining the capacity of a corporation of this State to take and hold property, real or personal, its debts must be deducted from its assets.⁶ The limit is said to be fixed by the statute in force at the time of vesting,⁷ and not by any subsequent legislation. This would seem to concur with the decision in the case of Cornell University, where a devise or bequest to a corporation lacking capacity is distinctly said to be void,⁸ although it was strenuously contended there that the disability went only to the holding, and that the bequest was not void. This decision is in conformity with those which hold that the policy of the acts is to be found in the protection of the family and not in that which animated the enactment of the Plantagenet statutes directed against mortmain.⁹

¹ Grant on Corporations, 98 and supra, p. 27.
³ 1 R. S., 599, sec. 1; sec. 3.
⁵ supra.
⁶ Chamberlain v. Chamberlain, 43 N. Y., 424, 439; Wetmore v. Parker, 52 N. Y., 450; Hollis v. The Drew Theological Sem., 95 N. Y., 166; Chaplin Susp. Power Alienation, sections 461, 463.
⁸ Matter of McGraw, 111 N. Y., 66, 94.
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It is to be observed that the amount or value of the property held by the corporation is a subject of judicial inquiry when such amount is put at issue, by reason of the acts in question. Under the Act of 1860, the bequest or devise is valid to the extent of one-half of the testator's estate and no more. As to the excess over this one-half there is an intestacy unless there is some valid limitation over in the event of any failure of such devise or bequest.

When it is desired to limit, devise or bequeath property to a charitable or religious corporation having capacity to take and hold, it is certainly best to rely on the chartered purpose of the corporation and make the donation absolute in terms; otherwise questions of doubt and difficulty may arise as to the power of the corporation to take in trust or concerning the correspondence of the trust with the requirements of the Revised Statutes relating to uses and trusts. But the gift may be subject to a lawful condition.

The new policy in this State, or rather the revival of a very ancient policy, does not destroy indefinite permanent charitable donations, but it vests their execution or fulfillment of the use in a corporation whose powers, duties and existence are determined by the State and not by the donor. The real beneficiaries of a fund held by a charitable or religious corporation remain as uncertain as ever, while the implication of a trust or use which attaches to all gifts to charity is not effaced because the donation is absolute. The State supplies the trust features by laws relating to the administration of corporate property.

4 Wetmore v. Parker, 52 N. Y., 450, 458; Fosdick v. Town of Hempstead, 225 N. Y., 581, 595; Iseman v. Myres, 26 Hun, 651.
6 Supra, p. 15 et seq.
Donations not in trust are of necessity unqualified and absolute. Absolute charitable donations can be made only to charitable corporations,¹ for if made to private persons such donations are beneficial and not charitable.² A gift not in trust to a charitable corporation is none the less absolute because such corporation is engaged in the business of charity and is bound to distribute the income of the donation in perpetuity to the use, or for the benefit, of the public or some portion of it.³ Yet such donations ordinarily fall under the law of charities, because the constitution or charter of the juristic person or corporation limits its functions to charitable undertakings. But the trust features and the perpetuity incidental in such cases are dehors the terms of the donation;⁴ they affect the holding and not the taking, and are raised by the donee’s relations to the State and not by the settler or donor. While the donor may contemplate both a perpetuity and a trust, he does not impose them. In this State he is not the visitor of the corporation and retains no control. He has nothing to do with the execution of its chartered obligation by the corporation: his gift is none the less absolute, because the corporate donee has, as it were, promised the State perpetually to use all its property only in the undertakings for which it was created. Nor is the donation rendered the less absolute, or converted into a trust, because the donor specifies that the donation shall be employed for one of the uses or purposes for which the corporation was chartered.⁵

It has been already pointed out that modern terminology no longer confines the term “gift” (donatio) to the creation of estates tail, or to gifts of chattels, and that it has acquired

¹ Supra, p. 69.
² Supra, p. 70; cf. Lewin on Trusts, 171 et seq. (1st edit.).
³ Tyssen, Char. Bequests, 1; In the Matter of the First Presbyterian Society of Buffalo, 106 N. Y., 251.
⁴ Wetmore v. Parker, 52 N. Y., at p. 458; Bird v. Merklee, 144 N. Y., 544, 550; In the Matter of the First Presbyterian Church of Buffalo, 106 N. Y., at p. 254.
⁵ Bird v. Merklee, 144 N. Y., 544, 550; cf. Matter of Ingersoll, 59 Hun, 571; 131 N. Y., 573; infra, Chap. V.
a larger significance in modern law.\footnote{Supra, p. 3.} The term "gift" or
donation is therefore used throughout this essay in its
modern sense, by authority, as the equivalent of a volun-
tary transfer made without other consideration than
its end, which since the abolition of charitable uses
creates no sanction or even presumption favorable to
the donee.\footnote{Supra, sed cf. Edson v. Bartow, N. Y. Law Journal, XIV., 811.}
Gifts are commonly classified as gifts \textit{inter vivos} and
gifts \textit{causa mortis}. \textquoteleft Gifts \textit{inter vivos} have no reference to
the future, and go into immediate and absolute effect.
Delivery is essential, both at law and in equity, to the
validity of a parol gift of a chattel or chose in action; and
it is the same whether it be a gift \textit{inter vivos} or \textit{causa mortis}.
Without actual delivery, the title does not pass.\footnote{Kent's Comm., II., 438.}
Gifts \textit{causa mortis} are conditional, to take effect after death,
and are made in peril of death and by reason of its near
approach. If the donor recover, the gift is void.\footnote{Kent's Comm., II., 444; Ridden v. Thrall, 125 N. Y., 572.}
It is
obvious that the principles of gifts \textit{inter vivos} and \textit{causa mortis} must apply to donations to a corporation existing or
\textit{in esse}. It has been said that delivery or assent is essential
to a perfect gift \textit{inter vivos}.\footnote{Supra, p. 80.}
Now, in the case of a dying
person, a formal assent by a charitable corporation might
be difficult to procure. But until procured, the donor has
\textit{a locus panitentiae},\footnote{Kent's Comm., II., 438.}
and if death intervene before assent or
delivery, the gift fails. For this reason various devices
have been resorted to in many cases, but the prudent
adviser will always exercise great care in regard to such
dispositions, while the lofty one will refuse to aid in cir-
sumventing the express policy of the State, however much
he may disagree with its wisdom.

An absolute donation to a corporation—that is, a gift
without qualification—may be effectuated either by means
of a last will or testament\footnote{1 R. S., 599; supra, pp. 80, 81; The N. Y. Inst. for the Blind v. How's
Exrs., 10 N. Y., 84.} (provided the corporation has
capacity to take and to hold the devise, or bequest, as stated in chapter III.), or if it is to take effect before the donor's death, by any mode appropriate to the transfer of title between the living. But in any case, the corporate donee must have capacity to take and hold the property, as the gift is, in this State, not valid even inter sese, or as against every one but the sovereign. The statutory disability is absolute and prohibitory. But the restrictions imposed on donations of persons approaching death, by section 6, of chapter 319, Laws of 1848, and by chapter 360 of the Laws of 1860, apply only to wills; and there is no special restriction upon a donation effected by other modes of transfer, even if such donor is in articulo mortis; provided he retains his faculties, or is compos mentis and under no personal restraint. But under such circumstances courts of justice will inquire carefully regarding the surroundings and the capacity of the donor.

It is not always easy to determine when a bequest is absolute or beneficial and when in trust. In "Matter of Ingersoll," the testatrix authorized her executor to expend through the agency of the Baptist Church and its societies $1,000, and, in order that he might do so without hindrance, bequeathed that sum to him and his assigns forever for the uses and purposes stated. The Supreme Court held that the bequest was an absolute gift. But the Court of Appeals reversed the decision, concurring in the dissenting opinion below.

A corporate donee of this State must always have ca-

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1 Supra, pp. 48, 81, et infra, chap. V.
2 Supra, pp. 76, 79.
3 Supra, pp. 74, 75, 76, 80.
4 Supra, pp. 75, 76
5 Supra, p. 75.
6 Supra, p. 74.
8 Ibid., supra.
9 Foose v. Whitmore, 82 N. Y., 405; Matter of Look, 26 State Repr., 745;
   Fosdick v. Town of Hempstead, 125 N. Y., at p. 595; Bird v. Merkle,
   144 N. Y., 554; infra, chap. V.
10 Matter of Ingersoll, 59 Hun, 571; cf. Rushmore v. Rushmore, 35 State
   Repr., 845.
11 131 N. Y., 573.
pacity to take and to hold the property or thing donated; but having such capacity, a juristic person may take such future legal estates in lands as a natural person may take by the existing law and none other. A donation of land to a corporation aggregate, having capacity to take and hold lands, carries a fee simple in New York without the word “successors.” Such a corporation may also take a future estate in lands by way of remainder, provided such remainder vest in possession within the time prescribed by the Revised Statutes for the vesting of estates. A vested remainder to a corporation may be limited on lives in being at the creation of the estate. A contingent remainder, as it now suspends the power of alienation, must vest in possession in the corporation at the expiration of two lives in being at the creation of the estate. If a remainder to a charitable corporation is limited upon a trust estate, the trust must terminate at the expiration of two lives in being at the creation of the estate and the remainder vest in possession, or it is void.

A corporation having the proper capacity to take and to hold personal property may of course take as residuary legatee. It is also capable of taking a future legal interest in personal estate, in conformity with the law limiting future and contingent interests in personal property. The future interest may be limited to take effect

1 Supra, pp. 81, 82.
2 Chaplin, Suspens. Power Alienation, sec. 450, note 5.
3 Bla. Comm., II., 209; Cruise, Tit. 32, c. 21, sec. 9.
5 1 R. S., 723, sec. 17.
8 Infra, Chap. V.; Rainey v. Laing, 58 Barb., 453.
10 1 R. S., 773, sections 1, 2; Inglis v. Sailors' Snug Harbor, 3 Peters, 99.
after a trust for two lives in being at the date of the instrument containing the limitation, or if such instrument be a will after two lives in being at the death of the testator.\(^1\) In this State a remainder may be limited upon a bequest of personal property or money.\(^2\) When a life estate is bequeathed in money with remainder over, the primary legatee is entitled to the income only, and the principal subject to the life estate belongs to the remainderman. The executor may pay over the principal to the life tenant upon receiving security for the repayment of the principal at death,\(^3\) or may confide the principal to the life tenant or primary legatee without security, in which case the recipient becomes trustee of the principal for the remainderman.\(^4\)

The term "executory interest" was formerly used to denote those interests which were not limited by way of remainder.\(^5\) At an early period in the development of the common law, future estates in personal property were not permitted; then a distinction was raised between the gift of the thing itself, and a bequest for the use only for life (Plowd., 521: Cro. Jac., 346), but this distinction was finally laid in Hyde v. Parrat (1 P. Wms., 2), and for more than a century and a half executory bequests of personal property have been permitted by the law of England, under the same rules of limitation as apply to executory devises of land.\(^6\) It is well settled, in this State, that a limitation over after a devise or bequest, in fee or where the primary devisee has the absolute power of disposition is void.\(^7\) But if the \textit{jus disponendi} of the primary devisee is partial, or qualified, then the limitation over is not void,\(^8\) even though its enjoyment in possession may be defeated

\(^1\) 1 R. S., 773, sec. 1.
\(^3\) Tyson v. Blake, 22 N. Y., 558.
\(^4\) Smith v. Van Ostrand, 64 N. Y. 278.
\(^6\) Van Horne v. Campbell, 100 N. Y., at p. 305.
\(^7\) Jackson v. Robbins, 16 Johns., 537; Van Horne v. Campbell, 100 N. Y., 287; Crozier v. Bray, 120, N. Y., at p. 373.
\(^8\) Matter of Cager, 111 N. Y., 343, 349; Crozier v. Bray, 120 N. Y., 366, 375.
by the first taker.\textsuperscript{1} In other words, the primary devise and the limitation over may be inconsistent, but they must not be wholly repugnant. By the Revised Statutes, it will be remembered, it is provided, that no future estate, otherwise valid, shall be void on the ground of the probability or improbability of the contingency on which it is limited to take effect.\textsuperscript{2} This rule applies to future or contingent interests in personalty.\textsuperscript{3}

A devise or bequest to a corporation to be formed or created in this State, after the death of the testator, is also valid, provided the estate limited, or the bequests, vest or take effect in possession, within the time prescribed by the Revised Statutes.\textsuperscript{4} Lord Chief Justice Wilmot held where lands were devised to purchase a piece of ground and erect a college, and the will contained a direction to obtain a charter—that the devise was good on the same principle as a devise for the benefit of an unborn child.\textsuperscript{5} This principle was approved in Burrill v. Boardman,\textsuperscript{6} and there would seem to be no ground to question the validity of such a devise or bequest at the present day in this State; provided the estate vest in possession in the corporation, or the bequest take effect within the time allowed for the vesting of future estates.\textsuperscript{7} The Revised Statutes provide that no future estate otherwise valid shall be void on the ground of the probability or improbability of the contingency on which it is limited to take effect.\textsuperscript{8} While at common law a limitation of a legal estate to a corporation

\begin{footnotes}
\item[1] Leggett v. Frith, 132 N. Y., 7.
\item[3] I R. S., 773, sec. 2.
\item[5] Wilmot's Opins., p. 16.
\end{footnotes}
not in esse, was void as potentia remota, the section of the Revised Statutes just quoted permits all sorts of contingencies, provided they do not contravene our statute against perpetuities. Consequently, a limitation to a corporation to be formed is valid in this State, provided the estate vest as provided in the Revised Statutes.

A devise or bequest to a corporation, or juristic person, having capacity to take, may be given in the same manner as to a natural person, either by name or by description. If by the former, the legatee “need not be called idem syllabis seu verbis. It is sufficient if it be idem re et sensu.” A bequest to the trustees of a corporation is a bequest to the corporation itself.

At the present day a devise to an unincorporated association of this State is void. So is a bequest to such an association; at least, independently of the late “Act to Regulate Gifts for Charitable Purposes,” which, by its terms, would seem to be confined to cases where a trust or charitable use is created, and, therefore, not to apply to the present law of charitable bequests. At common law, charitable gifts and bequests in trust and for the use of unincorporated associations were valid. Even devises or feoffments to such associations were valid, and they were certainly good after the Statute of Charitable Uses. It has been stated, at some length, that at first, in this State,

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1 Inst. 25, b, 184 a; 2 Reports, 51 a.
2 Lougheed v. The Dykeman’s Baptist Church, 129 N. Y., 211, 215.
3 Infra, chap. V.
5 The N. Y. Inst. for the Blind v. How’s Exrs., 10 N. Y., at p. 92; infra, chap. V.
8 C. 701, Laws of 1893.
9 Supra, pp. 15, 23; Wright v. Trustees of Meth. Epis. Church, 1 Hoffman, at p. 249.
10 Supra, p. 36.
such bequests were regarded as good by the Chancellors, but that after the establishment of the Court of Appeals and the abolition of the Court of Chancery, it was finally established that the English law of charitable uses and trusts was abrogated and a new system of charities erected by legislative action.\textsuperscript{1} While every legacy of chattels has all the elements of a trust, because an executor is interposed and charged with distribution, yet in the eye of the law, no trust exists unless the executor has a discretion to give or withhold. The historical and scientific jurists see a common origin in uses and executorship, and, indeed, trace trustees and executors to the same source, the Salman of the early German law.\textsuperscript{2} As the recent law regulating "Gifts for Charitable Purposes," seems wholly confined to trusts, it can hardly aid a bequest to an unincorporated association, as such bequests were clearly void by the law of New York when the act of 1893 was passed.

A bequest to a priest or to an ecclesiastical corporation having capacity to take, if absolute in terms, ought not to be invalidated by the expression of a wish that the donation may be expended or employed in masses for the dead, or in some religious observance.\textsuperscript{3} But the tendency in this State has been to raise a trust by reason of the wish or direction of a donor that the gift should be employed otherwise than to the donee's use.\textsuperscript{4} This would undoubtedly be accurate reasoning if the request were such as to vest a beneficial interest in a person or even in a class other than the donee. But as a matter of fact, where the directed expenditure is pro anima, or for the benefit of no other person than the donor, it would seem academic or technical to raise a trust for an indefinite third person or class, and then to declare such a trust illegal. The fact is the dona-

\textsuperscript{1} \textit{Supra}, p. 66.
\textsuperscript{2} Mr. Justice Holmes, \textit{Law Quar. Rev.}, I., 162 \textit{seq.}
\textsuperscript{3} \textit{Cf.} Matter of Hagenmeyer's Will, 12 \textit{Abb. N. C.}, 432; Vandever v. McKane, 24 \textit{Abb. N. C.}, 105, 107; Matter of Black, 1 Connolly, 477, s. c. 24 \textit{State Rep.}, 341.
tion is outside of the entire range and scope of ordinary trusts. Yet it is not easy to combat the logic which holds that a gift must be either absolute or in trust. The trust feature might, however, in most cases have been entirely ignored in this class of donations and the bequests held absolute. The priest or church is not in fact agent, trustee or donee; the gift, in the donor's intention, is in reality to God, and the law which meets the case is as old as Christendom. But as gifts of this character are now clearly declared to be trusts in this State, the act regulating charitable gifts would seem to preclude their failing in the future because the beneficiary is indefinite or uncertain. A bequest to a member of a religious order, who has taken vows of poverty and the like, is valid in this State, as he is not *civilius mortuus*.

A foreign corporation, which by the laws of its own State has capacity to take, may take personal property by bequest under a will probated here, there being no law of this State prohibiting gifts to foreign corporations. While the courts of this State will not administer a foreign charity, they will direct money devoted to it to be paid over to the proper parties, leaving it to the courts of the State where the charity is to be established to provide for its due administration. In such a case the courts of this State will not interpose its laws to arrest the disposition made by the testator; but it seems will simply inquire: first, as to whether all the forms and requisites necessary to constitute a valid testamentary instrument have been complied with, and second, whether the foreign trustees

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1 All trusts are subject in this State to the rules of the R. S., which are inflexible.


3 *Supra*, pp. 15-17.

4 *Infra*, chap. V.

5 C. 701, Laws of 1893.

6 Lynch v. Loretta, 4 Dem., 312; *cf.* Avery v. Everett, 110 N. Y., 317, on the general law of civil death.

7 Manice v. Manice, 43 N. Y., 303, 387, 388; Matter of Huss, 126 N. Y., 537.

are competent to take the gift for the purposes expressed, and to administer the trust under the law of the country where the gift is to take effect.¹ So a foreign municipality may take if it has power to take by the laws² of the legatee’s domicile.

A devise to the Government of the United States for the purposes of charity is void.³ The word “person” in the Statute of Wills of the State of New York, authorizing devises to be made to any person capable by law of holding real estate,⁴ does not include a State or a Nation. The testamentary capacity given by said statute extends only to devises to natural persons, and to such corporations as are authorized by the law of the State of New York to take by devise.

Personal property is subject to the law of the owner’s domicile, both in respect to a disposition of it by act inter vivos, and to its transmission by will or by succession upon the owner dying intestate.⁵ A leasehold estate of lands situate here, owned by a resident of another State, will be considered as personal estate and as such, as to its transmission by last will and testament, will be governed by the law which governs the person of its owner.⁶ The validity of a devise of lands in this State and all questions relating to the title stand on another footing and are determined by the laws of this State, even if the devise is for a charitable use, to be executed in a foreign State;⁷ but if by the terms of the will the land be equitably converted into money a gift of the latter is valid.⁸

It is no part of the policy of the courts of this State to

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² Matter of Huss, 126 N. Y., 537.
⁴ 2 R. S., 57, sec. 3.
interdict gifts in mortmain or perpetuities in other States. Each State must determine its own policy in that regard.¹ So although unincorporated associations may not take a charitable bequest under the laws of this State, an unincorporated association of another State may take a bequest here, if the law of its domicile permit it to take and receive property by bequest.²

² Matter of Bullock, 6 Dem., 335.
CHAPTER V.

CHARITABLE USES AND TRUSTS IN NEW YORK.

Charitable uses and trusts being finally held to be abrogated by the provisions of the Revised Statutes, and the universal application of the article on uses and trusts,¹ it remains to enquire how far the law of this State now sanctions uses and trusts of a charitable, religious, benevolent, or public character. The article on uses and trusts abolishes all express trusts in lands excepting those categorically saved.² As the express trusts thus saved can rarely be appropriate for charitable limitations, most public or charitable trusts in lands are valid only as trust powers.³ The enumeration in the Revised Statutes of the instances where express trusts may be created and the legal title taken by the trustee has, however, not materially abridged the jus disponendi, or deprived property owners of the power of impressing upon their real property other limitations having the general characteristics of a trust. But such trusts survive as powers in trust, unless they contravene the general policy of the law or the rule against perpetuities.⁴ Where the trust is valid as a power, the lands to which the trust relates remain in, or descend to the person otherwise entitled, subject to the execution of the trust as a power.⁵

¹ Supra, Chapters III., IV.
² R. S., 727, sec. 45; ibid., 728, sec. 55; Willard, Real Est. and Conv., 240.
⁵ R. S., 729, sec. 59; Booth v. Baptist Church, 126 N. Y., 215, 239.
It is not to be presumed that the recent act of 1893 relative to gifts for charitable purposes has revived all charitable uses, although the language employed in that statute would be susceptible of the construction, that charitable uses were thitherto as completely valid as at common law, excepting in the single respect remedied by the statute. In fact, "charitable uses" were abolished by the Revised Statutes, and such charitable trusts as thereafter remained enforceable were ordinarily valid only as powers. Yet, in one sense, wherever there is still a trust for the benefit of any charity there is a charitable use within the meaning of the ancient law, which, after the Statute of Uses, refers to all uses not executed by the statute, either as charitable uses or, if private, as trusts. Therefore, whenever the term "charitable use" is now employed it still designates an unexecuted use, or a trust or confidence for charity, as contradistinguished from a charitable gift not in trust.

There is one marked difference, at the present day in New York, between express trusts in real property and express trusts in personal property. Express trusts in real estate are by the Article of the Revised Statutes regulating uses and trusts in lands limited to four trust purposes: (1) To sell lands for the benefit of creditors; (2) To sell, mortgage or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon; (3) To receive the rents and profits of lands, and apply them to the use of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in the first Article of this title. (4) To receive

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1 C. 701, Laws of 1893, discussed infra.
2 Supra, pp. 61, 62.
3 Infra, p. 97.
4 Owens v. The Miss. So. of M. E. Church, 14 N. Y., at p. 385; Ayres v. The Meth. Church, 3 Sandf., at p. 375; People v. Powers, 83 Hun, at p. 458.
5 Supra, p. 6.
6 Owens v. The Miss. So. of M. E. Church, 14 N. Y., at p. 385; Bird v. Merklee, 144 N. Y., 544, 550, 551; People v. Powers, 83 Hun, at p. 458.
7 Article second, Tit. II., Chap. I., Part II., R. S.; particularly sec. 55, 1 R. S., 728; Chaplin, Suspens. Power Alienation, sec. 450.
8 Title II.
the rents and profits of lands, and to accumulate the same, for the purposes and within the limits prescribed in the first Article of this title.\textsuperscript{1} But the enumeration of these trust purposes has not abridged the rights of owners to make other limitations of real property, which shall possess all the general characteristics of a trust. But in all instances other than the four express trust purposes specified above, the trust is a power in trust,\textsuperscript{2} provided it does not contravene any principle of public policy,\textsuperscript{3} create a perpetuity,\textsuperscript{4} or violate equity or good morals.\textsuperscript{5} On the other hand express trusts\textsuperscript{6} in personal property may be created for any purpose which was lawful at common law or before the Revised Statutes, except charity.\textsuperscript{7}

The fact that trusts in personality may be created for any equitable purpose must not mislead the conveyancer. Charitable and public trusts of personality are subject in New York to all the restrictions and rules applicable to non-charitable trusts of personal estate.\textsuperscript{8} It was after the Revised Statutes at first believed that charitable trusts of personal estate were to some extent an exception to the ordinary rules governing trusts of personal estates.\textsuperscript{9} But this conception was finally negativised and charitable trusts of personal property were held to be subject to all the appropriate rules of the Revised Statutes relating to

\textsuperscript{1} Title II.
\textsuperscript{3} Belmont v. O'Brien, 12 N. Y., p. 403; Tilden v. Green, 130 N. Y., 29, 54.
\textsuperscript{4} Belmont v. O'Brien, 12 N. Y., 394, 403; Everett v. Everett, 29 N. Y., 39, 78; Booth v. Baptist Church, 126 N. Y., at p. 239.
\textsuperscript{5} Read v. Williams, 125 N. Y., 560, 569; Sweeney v. Warren, 127 N. Y., 426.
\textsuperscript{6} By an "express trust" is meant here one in express terms as contrast distinguished from an "implied trust"; it may be created by parol in personality.
\textsuperscript{8} Williams v. Williams, 8 N. Y., 525; Owens v. The Miss. So. cf M. E. Church, 14 N. Y., 380; Chaplin, Suspens. Power Alienation, sec. 450.
\textsuperscript{9} Willard, Eq. Jurisp., 586; et infra.
trusts of personalty,\(^1\) and to future or contingent interests in lands.\(^2\)

In respect of such trusts, the Revised Statutes provide that "the absolute ownership of personal property shall not be suspended by any limitation or conditions whatever for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or if such instrument be a will, for not more than two lives in being at the death of the testator."\(^3\) Charitable trusts are within the purview of this section and such trusts must not contravene this rule, or they fall.\(^4\) How it ever happens that trusts in personalty may offend against the rule against perpetuities depends in New York wholly on the Revised Statutes and the construction accorded to them by the Judiciary.\(^5\)

Originally in the jurisprudence of this State, property held in trust was not inalienable.\(^6\) Indeed the analogies between legal and equitable estates were complete, excepting that the wife had no dower in a husband's trust estate, although\(^7\) he had curtesy in hers. The Revised Statutes first made certain trusts in lands inalienable,\(^8\) and thereby suspended the power of alienation.\(^9\) In the instances where the trust estate is by statute thus rendered inalienable, the trust must terminate at the expiration of two lives in being at the creation of the estate, or it is void.\(^10\) It was

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\(^2\) I R. S., 773, sections 1, 2.

\(^3\) I R. S., 773, sec. 1.

\(^4\) Bascom v. Albertson, 34 N. Y., 584, 619, 620; Chaplin, Suspens. of Power of Alienation, sec. 450.

\(^5\) See next paragraph.

\(^6\) Everitt v. Everitt, 29 N. Y., at p. 90; cf. Ram on Wills, 6, 16; Lewin on Trusts, 138.

\(^7\) Before the Statute of Uses there was, however, neither curtesy, nor dower, in a use. Cornish on Uses, 20, 30.

\(^8\) I R. S., 730, sec. 64; Hillen v. Iselin, 144 N. Y., at p. 379; cf. Losey v. Stanley, 147 N. Y., at p. 571.

\(^9\) I R. S., 723, sec. 15; if the settler restrained alienation by beneficiary before this Statute, the trust was bad. Lewin on Trusts, 138.

\(^10\) I R. S., 723, sec. 15, 16.
for a long time after the Revised Statutes took effect very questionable whether any trust in personalty was also subject to these restraints and inalienable, thus becoming subject to the section against perpetuities quoted in the preceding paragraph. Chancellor Walworth held that the Revised Statutes clearly made trusts of personalty created by a third person and designed to secure a support for the beneficiary inalienable, and such is now the established law of this State. Therefore every such trust in personal estate must terminate at the end of two lives in being as stated in the preceding paragraph, or it is void under the Revised Statutes. Trusts in personalty for the benefit of charity or a charitable corporation can form no exception to this rule.

We must, however, remember that the mere creation of a trust in real estate does not ipso facto suspend the power of alienation; it is only suspended where a sale by the trustee during the trust term would be in contravention of the trusts. The analogy which now exists, under the Revised Statutes, between trusts of real and trusts of personal estate makes the same principle applicable to trusts of personalty. Consequently if the power of alienation is not suspended during a trust term, the length of the term is inconsequential. It has been shown that most trusts in lands for the benefit of charity are not express trusts, but are powers in trust under the Revised Statutes. It has been claimed that a power cannot suspend the power of alienation. But this argument was shown to be fallacious in the Vassar will case. A trust power is as clearly subject to the rules relating to perpetuities as an express trust, and whenever a limitation in trust, although operative as a power, suspends the power of

3 Graff v. Bonnett, 31 N. Y., 9; Campbell v. Foster, 35 N. Y., 361, 371; Williams v. Thorn, 70 N. Y., 270, 278.
4 Fosdick v. Town of Hempstead, 125 N. Y., 581, 595.
6 Supra, pp. 95, 97.
7 Booth v. Baptist Church, 126 N. Y., 215.
alienation beyond the lawful term, the power in trust is 
bad and the trust void.\textsuperscript{1}

The conveyancer will readily observe the difference 
between a condition and a trust. Anciently or before the 
rise of trusts, trusts were usually conditions, but now the 
distinction is at once obvious. A deed of lands \textit{habendum} 
to trustees of a religious society in trust to keep erected a 
"church dedicated to the worship of Almighty God" to be 
used in a manner prescribed, but on the express condition 
that if at any time said land shall be left vacant for two 
successive years then the same to revert to the grantor, is a 
grant in fee upon a condition subsequent and not a trust.\textsuperscript{2}

The Revised Statutes relating to uses and trusts are 
occasionally modified by the legislature in favor of partic-
ular charitable institutions so as to tolerate trusts quite 
at variance with the general rules stated above.\textsuperscript{3} Thus 
chapter 174 of the Laws of 1839\textsuperscript{4} in relation to the people 
called "Shakers", tolerated permanent, indefinite trusts at 
variance with all the rules stated as prevailing since the 
Revised Statutes in respect of charities;\textsuperscript{5} thus constituting 
this denomination a sort of stated exception. There are 
other exceptions, which will be noticed at a subsequent 
place.

The characteristics of a charitable use before the Re-
vised Statutes were indefiniteness\textsuperscript{6} and permanence:\textsuperscript{7} in-
definiteness in that the trust was for the benefit of a class 
or the public and not for a particular person; permanence 
in that the rules relating to perpetuities had no relation to 
charity, unless the execution of the charity was postponed. 
By subjecting charitable uses to the ordinary rules relating

\textsuperscript{1} Booth \textit{v.} Baptist Church, \textit{ibid. supra.}
\textsuperscript{2} Erwin \textit{v.} Hurd, 13 Abb. N. C., 91; \textit{cf.} Livingston \textit{v.} Gordon, 7 Abb. N. 
C., 53.
\textsuperscript{3} Chaplin, \textit{Susp. Power Alienation}, sec. 450, note 8; Rector, etc., \textit{Church of 
Redemption \textit{v.} Grace Church}, 68 N. Y., 570.
\textsuperscript{4} Amended c. 373, \textit{Laws of 1849.}
\textsuperscript{5} White \textit{v.} Miller, 71 N. Y., 118.
\textsuperscript{6} \textit{Supra}, pp. 1, 6, 15, 16; 2 Perry \textit{on Trusts}, sec. 710; Williams \textit{on Execu-
tors, 1055, note 6th Amer. Edition.}
\textsuperscript{7} \textit{Supra}, pp. 27, 28; Williams \textit{on Executors, 1055, note to 6th Amer. Edition.}
\textsuperscript{8} \textit{Supra}, p. 29.
to private or non-charitable uses, the two characteristics mentioned were taken away by the Revised Statutes. The Courts held that the legislature had instituted an entirely new scheme of charities, based upon franchises to corporations of a non-business character, and in substance that the execution of all indefinite uses was intended to be vested in such corporations by systematic acts of the State and not to be created at the will of donors. Consequently all charitable uses were abolished by the Revised Statutes and charitable trusts were regulated by the provisions of the Revised Statutes. Hence, the most ancient characteristics of charitable uses—indefiniteness and permanence—disappeared with that Revision if not before; all statutes sanctioning such anomalies having been finally abrogated and repealed. Precisely the same degree of certainty required in an express trust, under the Revised Statutes, was, prior to the act of 1893, required in respect of those charitable trusts which survived the Revised Statutes as powers in trust. At an early day it was attempted to make a distinction between charitable uses in lands which were clearly abolished by the Revised Statutes and charitable trusts of personal estate. But the distinction was negatived in the cases holding that the ancient law of charities was intended to be wholly superseded by the legislative policy of creating charitable corporations, and by the subjection of all charitable trusts to the general rules relating to future estates and perpetuities. Thereafter there was no distinction between the rules touching a charitable trust in lands and those concerning trusts in personalty. Equal certainty must prevail in both and

2 Levy v. Levy, 33 N. Y., at p. 117.
3 C. 701, Laws of 1893.
4 Tilden v. Green, 130 N. Y., 29.
5 Williams v. Williams, 8 N. Y., 545; Beekman v. Bonsor, 23 N. Y., at p. 310; McCaughal v. Ryan, 27 Barb., 376; supra, pp. 60, 97.
6 Supra, p. 98.
neither may contravene the statutory rules against perpetuities. Yet trusts in personality may be raised by parol; but not so in reality.¹

Before the legislature finally repudiated the doctrine of the courts, that all charitable trusts must be for definite beneficiaries,² sixty-three years elapsed since the adoption of the Revised Statutes, and in this period the judiciary had about perfected the following doctrines: (1) To constitute a valid trust, charitable or non-charitable, public or private, in either real or personal estate, there must be a definite and certain beneficiary in whom the equitable title or interest must vest,³ and who must be entitled to enforce the trust,⁴ having capacity to take and hold some interest therein and not resting under a disability.⁵ But in determining who were such beneficiaries common certainty was sufficient and a misnomer did not vitiate the bequest or devise.⁶ (2) There must be a use or trust clearly defined and worked out by the settler and not by the Courts of Equity;⁷ for in this State the *cy pres* power

¹ Infra.
² C. 701, Laws of 1893, discussed below.
was long since repudiated, or attributed wholly to a royal prerogative, which had not been vested in the Courts of Justice.\(^1\) (3) Where a well defined use, tolerated by the Revised Statutes, and a definite beneficiary co-exist, the designation or the non-designation of a trustee of the legal estate is immaterial, as the Court follows the legal estate and fastens the trust upon it.\(^2\) At an early stage in the notable discussion relating to the law of charities in New York the notion gained ground that where there was an indefinite charitable use, the trustee must be designated by the settler.\(^3\) This notion arose, in all probability, from a correlated conception that the *cy pres* doctrine had no place in our jurisprudence, and therefore that an indefinite trust rested essentially in the discretion of a trustee designated by the settler.\(^4\) But the doctrine itself was wholly repudiated when indefinite uses ceased to be tolerated,\(^5\) and the designation of a trustee is not now material to any valid trust.\(^6\) This doctrine has been lately affirmed by a statute of great significance in the law of charities.\(^7\) (4) It was also determined that any limitation of lands situated in this State for a charitable use or purpose was governed by all the provisions of the Revised

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\(^1\) Thompson v. Thompson, 95 N. Y., 76, 81; Adams v. Perry, 43 N. Y., at p. 498; Wheaton v. Byrne, before J. Barnard, anno 1896; Ramsay v. De Remer, 65 Hun, 212; Pell v. Folger, 23 N. Y., 42.


\(^5\) Beekman v. Bonson, 23 N. Y., 298, 310, 311.

\(^6\) Levy v. Levy, 33 N. Y., at pp. 120, 121; Holland v. Alcock, 108 N. Y., 312.

\(^7\) C. 701, Laws of 1893; cf. c. 555, Laws of 1864, Art. II., sec. 16.
Statutes in relation to legal estates and uses and trusts:¹ that trusts in personality were now inalienable,² and by express provision of the Revised Statutes, that future or contingent interests in personality were subject to the rule in relation to future estates in lands.³ Even the article on powers was held applicable to personal estates.⁴ The main distinction, therefore, is that trusts in personality may be raised by parol.⁵ But our peculiar doctrines of trusts have no reference to testamentary disposition of personal property in trust by persons domiciled in other States and valid by the law of the testator's domicile.⁶

It is a curious fact that one doctrine which the courts have decided with so much elaboration to be the traditional policy of the legislative branch of government—certainty in the beneficiaries of charitable trusts—has been lately renounced by the legislature itself.⁷ In 1893, the legislature enacted the following law, Chap. 701: "An Act to regulate gifts for charitable purposes.

"Sec. 1. No gift, grant, bequest or devise to religious, educational, charitable, or benevolent uses, which shall, in other respects be valid under the laws of this State, shall or be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the

⁵ Gilman v. McArdle, 99 N. Y., 451; Cochrane v. Schell, 140 N. Y., 516; Hirsh v. Auer, 140 N. Y., 13; et vide infra this chapter.
⁷ Dammert v. Osborn, 140 N. Y., 30, 43.
instrument creating such a gift, grant, bequest, or devise, there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the Supreme Court.

“§ 2. The Supreme Court shall have control over gifts, grants, bequests and devises in all cases provided for by section one of this act. The attorney-general shall represent the beneficiaries in all such cases and it shall be his duty to enforce such trusts by proper proceedings in the Court.

“§ 3. This act shall take effect immediately.”

It must be very obvious that the “Act to regulate gifts for charitable purposes,” mentioned in the preceding paragraph, has seriously affected those decisions of the courts of New York which require great certainty or a vested interest in the beneficiaries of a charitable trust. The act in this respect only is designed to restore the ancient law touching charitable uses for uncertain persons—personae incertae, and to this extent to relieve charitable trusts from the narrow boundaries prescribed by the Revised Statutes for private uses in lands. Had the legislature gone a step farther and relieved charitable or public uses from the previous application of the rules relating to perpetuities which have no reference to public trusts, and also directed the application of the maxim “that charities are favored,” the ancient law would have been almost revived by the legislature, as the Attorney-General by this act is now, in all cases where the beneficiaries are uncertain, charged with the duty of representing them pro bono publico.

The only cases not then provided for would have been those which in England are supplied by the executive cy pres, under the sign manual. Even this omission, it is said, the legislature has the power to supply. But such an

1 Dammert v. Osborn, 140 N. Y., 30, 43.
2 Supra, pp. 28, 29.
3 C. 701, Laws of 1893.
4 Supra, pp. 40, 41.
5 Supra, pp. 56, 57.
extensive restoration of the ancient law as that suggested is not effected by the recent act of 1893. Indeed, it is clear from the reservation of that act, that the law of charities, as it stood in 1893, is rather confirmed in all respects save one only—that which required certainty in respect of the beneficiaries of a charitable use. It cannot be said, therefore, that this act of 1893 restores the ancient law in its entirety; but it does restore one feature of it, that which permitted a charitable use for uncertain persons—\textit{personae incertae}.\footnote{Supra, pp. 2, 6, 22.} The effect of this act must be to set aside those decisions of the courts which, after the Owen’s case in 1856,\footnote{14 N. Y., 380.} hold that a charitable use or trust cannot be created for uncertain persons.\footnote{Supra, p. 60 et seq.} In all other respects the law of charities, so painfully erected since the Revised Statutes, stands by the terms of the act itself.

The act of 1893, to regulate gifts for charitable purposes, refers to gifts to religious, educational, charitable and benevolent uses. As we have no statute defining what are religious, educational and charitable uses,\footnote{Supra, pp. 3, 44, 45, 69.} and this statute refers to none other than such as may be so classed, the courts must now determine what gifts are within the statute. The statute in question seems to recognize a class of preexisting charitable uses, notwithstanding all such have been held to be abolished by the Revised Statutes.\footnote{1 R. S., 727, sec. 45; 1 R. S., 728, section 55, as amended by c. 320, Laws of 1830; supra, pp. 61, 62.} The uses referred to are, therefore, those which existed before the Revised Statutes and independently of the Statute of Charitable Uses.\footnote{Supra, p. 70.} This act does not expressly revive charitable uses and, therefore, cannot be held to modify the article of the Revised Statutes relating to uses and trusts. It can, in view of the state of the law of charities when it was passed, refer only to those charitable trusts which are operative as powers in trust.\footnote{Supra, p. 97.}
LAW OF CHARITABLE DONATIONS.

The act of 1893 relates to gifts, grants, bequests or devises to certain specified uses. This language seems to cover all modes by which trusts may be raised. The term "grant" refers only to conveyances of land inter vivos, or of a power, but the word "power" is not employed in the statute. How far this statute justifies conveyances, devises and bequests to private persons in trust for uncertain persons, the poor, or incertae personae, during two lives and a remainder over to a charitable corporation, or to a private person, in fee, has not yet been resolved; but there would seem to be no principle violated by the restoration of a trust conforming to our statute of perpetuities. But as every such trust would render the trust property inalienable and thus suspend the power of alienation, the trust can be created for not more than two lives in being or it would be void.

The uses specified in the "Act to regulate gifts for charitable purposes" are "religious, educational, charitable or benevolent." In the prior pages of this Essay we have seen that there is no precise definition of a charitable use since the repeal of the Statute of Charitable Uses. The whole subject is therefore relegated to the judiciary to determine according to the best light attainable. All the uses mentioned in the act of 1893 may be contrasted with private uses or uses for private persons, and therefore may be classed as species of public or non-private uses. "Religious uses" in the larger sense are a species of charitable use. A "religious use" may be everything in our system but an irreligious use. But of religion we have no standard. The uses known in England since the Reforma-

1 C. 701, "An act to regulate gifts for charitable purposes;" supra, p. 104.
2 I. S., 729, sec. 142.
3 I. S., 735, sec. 106.
5 I. S., 723, sec. 15.
6 C. 701, Laws of 1893.
7 Supra, pp. 4, 69, 70.
9 2 Perry on Trusts, sec. 701.
tion as "superstitious uses," therefore are clearly embraced in the class of religious uses mentioned in the statute of 1893.1 In countries where the English church-establishment had no privileged existence such uses were denominated "pious," and not superstitious, uses, 2 and such would be the case here after the disestablishment of the English Church and the constitutional declaration of religious toleration and freedom.8

Whether such uses would have been "superstitious" uses, before the War of Independence, in New York, depends partly on that very doubtful question, the status of the English church in this Province.4 As a rule, the English statutes relating to superstitious uses were not extended to the trans-marine empire of Great Britain.5 If they did extend to the Province of New York, they were repealed in 1788, with the residue of the English statutes not then re-enacted.6 The term "educational use" is not one known to the common law; it evidently includes all charitable uses which have education or instruction for the end, purpose or object of the trust.7 "A benevolent use" would formerly have included a larger scheme than a charitable use; 8 but since then the term "charitable use" has acquired a more extended meaning than formerly given it.9 What uses are religious, educational, charitable or


5 Yeap Cheah Neo v. Ong Cheng Neo, L. R., 6 P. C., 381.

6 Supra, pp. 44, 49.

7 2 Perry on Trusts, sec. 700.


9 Supra, pp. 3, 22, 37, 70; Sharswood & Budd’s Leading Cas. Real Prop., 372, sep.; 2 Perry on Trusts, sec. 705, People v. Powers, 147 N. Y., 104, 110.
benevolent must now be determined by the courts for this statute aids no other uses.¹

The second section of the act to regulate gifts for charitable purposes,² providing that the Supreme Court shall have control over gifts, grants, etc., in all cases provided for in section one, is no doubt declaratory in so far as the original jurisdiction of the Court is concerned; for it is not competent for the legislature to disturb the jurisdiction of a court whose jurisdiction is fixed by the Constitution of the State.³ But it certainly is competent for the legislature to regulate charitable uses and donations.⁴ As the Court is expressly made trustee of those charitable trusts where no trustee is nominated by the settler, this section is probably designed to justify the court's management of the trust fund during the time that it necessarily remains actually in its custody. It is in this respect a vesting act.

The Act of 1893 affects the procedure in cases involving charitable uses where no interest vests, and directs that the Attorney-General shall represent the beneficiaries in such cases. This is the revival of a very ancient practice;⁵ but it may be questionable oftentimes whether the State or the Attorney-General is the real party in interest under this act. In one respect the act sets at rest a doubt which arose in People v. Ingersoll,⁶ for it makes it the duty of the Attorney-General to enforce all such uses as are validated by the act.⁷

The future effect of the Act of 1893, and it is not retroactive in operation,⁸ depends wholly on the construction accorded it. If it is so construed as to effectuate charitable donations, and as the Statute of Charitable Uses was con-

² C. 701. Laws of 1893.
³ Alexander v. Bennett, 60 N. Y., 204.
⁴ Supra, pp. 55, 57.
⁵ Supra, pp. 11, 16, 57.
⁶ People v. Ingersoll, 58 N. Y., 1, 16.
⁷ Sec. 2; cf. Willard, Eq. Jurisp., 583; et ut supra, pp. 46, 105.
⁸ Simmons v. Burrell, 8 Deleahany, 388; Dammert v. Osborn, 140 N. Y., 31; People v. Powers, 147 N. Y., 104; Butler v. Trustees, 92 Hun, 96.
strued, it will validate a large class of donations hitherto regarded as invalid, at least since 1846. Not being in derogation of the common law, for the common law permitted the gifts referred to in the statute, it ought not to be construed strictly but so as to remedy the mischief and destruction resulting from the application of the Revised Statutes to charitable uses. But in view of the state of the law of charities in New York when this act was passed, it restores by its terms no more than a single feature of the ancient law of charities, that which tolerated gifts and trusts to uncertain persons, personae incertae. The other principles of the late law of charities, already pointed out, would seem to be unaffected by this act.

As charitable gifts in trust for indefinite, or uncertain persons, are made valid by the Act to Regulate Gifts for Charitable Purposes, there would seem to be no reason why a gift in trust for an unincorporated charitable association should not be considered now also valid, within the limits prescribed by the Revised Statutes for the duration of all trusts, even though the association might not be competent to take the legal estate at the termination of such trust. Before this act it is very clear that after 1846 in this State an unincorporated charitable association could not be the beneficiary of a trust. But the reason such associations were then declared incapable of taking as beneficiaries of a trust seems wholly referable to the uncertain character of their constituents. This objection would seem to be removed by the Act of 1893, regulating charitable gifts. When a corporation of this State may be a beneficiary of a charitable use or trust, is

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1 Dammert v. Osborn, 140 N. Y., at p. 43.
2 Supra, pp. 2, 15, 22.
3 Supra, Chap. IV.
4 C. 701, Laws of 1893.
6 Infra.
discussed below in this chapter while treating of the capacity of charitable corporations both as trustee and as cestui que trust.

A donation in trust for a charitable corporation to be formed is good, within the limits pointed out in respect of absolute gifts to a corporation not in esse. But as limitations in trust for charity cannot violate the statute against perpetuities, the gift must vest within the time fixed by the rule, or the trust for a corporation not in esse is void.

Prior to the Act of 1893 relative to charitable gifts in trust, donations for masses or prayers for the repose of the souls of deceased persons were in this State void as trusts, not because they were superstitious uses, as in England (where every use which has for its object the propagation of a religion not tolerated by the law is void), but because they contravened the statute against perpetuities or conflicted with the now obsolete judicial canon against indefiniteness and uncertainty. The Act of 1893 has not validated those trusts which conflict with the rules directed against perpetuities. But when a use or trust does not conflict with those rules, it is by statute now no longer void because the beneficiaries are indefinite or uncertain. A member of a religious order who has taken vows of poverty and the like is not civiliter mortuus or a person incapax in this State and may now take as beneficiary of a trust.

Before leaving the question—who may be the beneficiaries of a charitable use or trust?—we should consider a class of cases where a power of selection is conferred on executors or the donees of a power in trust. In Power v.

1 Supra, p. 89.
2 Chaplin, Suspens. Power Alienation, sections 453-457, and cases cited there.
3 C. 701, Laws of 1893.
6 C. 701, Laws of 1893.
7 Lynch v. Loretta, 4 Dem., 312; cf. 2 Bla. Comm., 122, as to estates for natural life determining by civil death.
8 I R. S., 734, sections 96, 97.
Cassidy the testator gave and devised certain property, real and personal, to his "executors, to be divided by them among such Roman Catholic charities, institutions, schools or churches in the City of New York as a majority of my executrix and executors shall decide, and in such proportion as they may think proper." The disposition was adjudged to be valid. But in Pritchard v. Smith the Court limited the right of testators to dispose of their estate by the grant of a power authorizing the selection of institutions embracing the whole civilized world or even within the limits of the United States; intimating that there must be sufficient finiteness in the beneficiaries as a class to enable some one of them to enforce the trust. The trust therefore failed for uncertainty, and probably because it could not be said that any equitable interest vested. This power, the Court say, is "not to be construed as a power of attorney," but rather as a limitation to a definite class existing within a small area and easily ascertainable by the Court. Since the decision in Power v. Cassidy the Court has declined to extend the instances where the beneficiaries may be a class and has tended to revert to the doctrine that a certain and definite beneficiary is necessary to a valid trust or power in trust.

But now the "Act to regulate gifts for charitable purposes" has provided that no charitable use in other respects valid, shall be deemed invalid by reason of the indefiniteness or uncertainty of the beneficiaries; the Attorney General being authorized and directed to enforce such trusts. As every trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee is imperative, and imposes a duty on the grantee, the performance of which may be compelled in equity, for the bene-

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1 79 N. Y., 602.
2 95 N. Y., 76.
3 Matter of Will of O'Hara, 95 N. Y., at p. 418.
5 Fosdick v. Town of Hempstead, 125 N. Y., at p. 592; Tilden v. Green, 130 N. Y., 29; People v. Powers, 147 N. Y., 104.
6 C. 701, Laws of 1893, supra, p.
fit of the parties interested, even where the grantee has the right to select any and exclude others of the persons designated as the objects of the trust, it would seem that the Attorney-General might now enforce the execution of the power in all cases where a class was designated and a definite use or trust purpose is created in other respects in conformity to the law of the State.

Having outlined the law relating to those who may be beneficiaries of a charitable use or trust, we should consider next for a moment, what trust purposes are sanctioned by the courts. It is said "that a charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man." So trusts of personality may be created for any purpose not forbidden by law. But the courts of justice in this State require a well-defined use, or trust purpose, worked out by the settler and not by the courts possessing equitable powers, as they are held not now to possess the cy pres power of supplementing defective charitable trust purposes by approximation. We have already seen that most charitable trust purposes are now, under the Revised Statutes of Uses and Trusts, operative only as powers in trust. Powers in trust are as imperative as active trusts, and under the "act to regulate gifts for charitable purposes," charitable uses or trusts may now be enforced by the Attorney-General in cases where the beneficiaries are indefinite and uncertain. But no trust purpose is good as a trust power, if such purpose conflict with pub-

1 R. S., 734, sec. 96.
2 R. S., 734, sec. 97.
4 Quoted with approval in Tilden v. Green, 130 N. Y., at p. 46, from sec. 637, Perry on Trusts.
6 Supra, p. 12.
7 Supra, p. 97.
8 R. S., 734, sec. 96; Smith v. Floyd, 140 N. Y., 337, 342; Delaney v. McCormack, 88 N. Y., 174, 181.
9 C. 701, Laws of 1893; supra, p. 104.
lic policy, tends to disloyalty, irreligion or is violative of good morals. In short, the ends of every trust power must be such as equity sanctions and not wholly inofficious, or it will be nugatory. No perpetuity can be created by means of a trust power;¹ and for the same reasons equity can not interpose when the trust purpose is such as is contrary to justice, fair dealing or the plain policy of the State. This principle lies at the basis of equity jurisdiction and may be detected in cases where the Crown disposed of the estate by sign manuall because the charity intended was in conflict with public policy or some statute.²

What language raises a charitable use or trust is a question oftentimes of very nice construction under the Revised Statutes,³ where so many lawful trust purposes take effect as powers.⁴ Even the words "in trust" are not conclusive of an intention to create an express trust. Nor is their omission conclusive of an intention not to create a trust.⁵ No particular language is required to create a trust or power in trust.⁶ It is sufficient if the intention may be inferred,⁷ or that the exigencies of the directions are such as to require the court to presume

² Cf. De Costa v. De Pas, Ambler, 228.
⁶ 2 R. S., 134, sections 6, 7; Leggett v. Perkins, 2 N. Y., 297; Wright v. Douglass, 7 N. Y., 564; Dillaye v. Greenough, 45 N. Y., 438, 445; Vernon v. Vernon, 53 N. Y., 351; Heermans v. Robertson, 64 N. Y., 332; Moore v. Hegeman, 72 N. Y., 376, 384; Donovan v. Van De Mark, 78 N. Y., 244; Morse v. Morse, 85 N. Y., 53.
⁷ But an intention to create an express trust will not be inferred where the purpose may be accomplished as a power. Heermans v. Robertson, 64 N. Y., 332; Henderson v. Henderson, 113 N. Y., 1, 11.
that a trust was intended.\textsuperscript{1} Charitable gifts form no exception to the rules indicated,\textsuperscript{2} and the difficulties of determining when a gift to a corporation is absolute, and when in trust are quite as great as in the cases of private or non-charitable trusts.\textsuperscript{3} When a charitable corporation has power by its charter to take and hold property to various uses, a gift to one of such uses will not create a trust,\textsuperscript{4} notwithstanding the query in the case of Fosdick \textit{v.} Town of Hempstead. In Wetmore \textit{v.} Parker, the court distinctly said, "a corporation created for charity may take and hold personal property, limited by the donor to any of the corporate uses of the donee; and a direction of the donor that the principal shall be kept inviolate and the income only expended will not invalidate the gift; provided, of course, that the same is immediate and vested;"\textsuperscript{5} and such is now the better opinion.\textsuperscript{6} If charitable donations are ever worthy of favor, the maxims "\textit{valeat quantum valere potest,}" and "\textit{ut res magis valeat quam pereat,}" ought at least to be applied to posthumous dispositions capable of two constructions, one validating them; the other invalidating them.

It is beyond the purposes of this Essay to discuss the rules and principles governing a perfect \textit{jus disponendi}, which attaches to all complete dominion over property. It can only be stated generally that the complete ownership of property by a person \textit{sui juris} involves the right to create a trust. We have already stated that charitable uses and trusts in lands are subject to all the rules and regulations

\textsuperscript{1} Toronto, etc., Trust Co. \textit{v.} C. B. & O. R. R. Co., 123 N. Y., 37; \textit{cf.} Booth \textit{v.} Baptist Church, 126 N. Y., 215, 238.

\textsuperscript{2} Fosdick \textit{v.} Town of Hempstead, 125 N. Y., at p. 595; Bird \textit{v.} Merklee, 144 N. Y., 544; Erwin \textit{v.} Hurd, 13 Abb. N. C., 91.

\textsuperscript{3} Matter of Ingersoll, 59 Hun, 571; reversed on dissenting opinion below, 131 N. Y., 573; Wetmore \textit{v.} Parker, 43 N. Y., at p. 458; Robert \textit{v.} Corning, 89 N. Y., at p. 241; Williams \textit{v.} Williams, 8 N. Y., 525; 26 Hun, 651.

\textsuperscript{4} Matter of Look, 26 State Repr., 745; s. c. 7 N. Y. Supp., 298; \textit{cf.} Fosdick \textit{v.} Town of Hempstead, 125 N. Y., at p. 595; \textit{cf.} Robertson \textit{v.} Bullions, 11 N. Y., at p. 255; Matter of Isbell, 93 Hun, 158.

\textsuperscript{5} Wetmore \textit{v.} Parker, 52 N. Y., at p. 458; Isemann \textit{v.} Myres, 26 Hun, 651.

\textsuperscript{6} Bird \textit{v.} Merklee, 144 N. Y., 544; Matter of How., 1 Pai., 214; Holmes \textit{v.} Mead, 52 N. Y., 332; Matter of Bailey, 24 Abb. N. C., 206; 3 Sharswood & Budd's Lead. Cas. Real Prop., 376; Williams \textit{v.} Williams, 8 N. Y., 525.
of the Revised Statutes touching uses and trusts in lands; and that limitations of future or contingent interests in personal property are subject to the rules prescribed in the Revised Statutes in relation to future estates in lands. But the absolute ownership of personal property can not be suspended for a longer period than during the continuance and until the termination of, not more than two lives in being at the date of the instrument creating the trust, or if the instrument be a will for not more than two lives in being at the date of the death of the testator. It will, therefore, suffice to point out at this place that the impress of a trust upon the disposition of property necessarily presupposes a property right and interest upon which the trust may fasten; where that fails, the whole is nugatory.

What persons may be trustees of a charitable use should be next considered. A charitable corporation in this State has no power to take and hold as trustee of a charitable trust, unless such power is expressly given by its charter, or by some constating act affecting its chartered powers. But where the corporation has power to take and hold the property under its charter, a direction of the donor that the principal shall be kept inviolate and the income only expended will not invalidate the gift if the same is immediate and vested. So it is said that where property is granted or devised to a corporation, partly for its own use and partly for the use of others, the power of the corporation to take and hold for its own use, carries with it, as a necessary incident, the power to execute that part of the trust

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* Supra, pp. 102, 103.
* 1 R. S., 773, sec. 2, supra, p. 97.
* 1 R. S., 773, sec. 1, supra, p. 98.
* Boasberg v. Cronan, 30 State Rep.; s. c. 9 N. Y., Supp. 664.
* Wetmore v. Parker, 52 N. Y., at p. 458; cf. 3 Sharswood & Budd's Lead. Cas. Real Prop., 376, as to law of other States; Rainey v. Laing, 58 Barb., 453.
which relates to others.1 Where a corporation has power to hold to various uses and one only is specified by the terms of the gift, which is to be applied to such use only, the gift, it is said, may be in trust and not absolute.2 But such a construction certainly would not be in favor of charities or according to that fundamental maxim of the common law favoring charities.8 A corporation can not be trustee for itself4 any more than a private or natural person can be his own trustee; the equitable interest and the legal estate merge in the one case as in the other.6

The legislature has, however, authorized certain charitable corporations to take and hold property in trust for certain purposes, cognate to the objects for which they were organized or chartered. Trust companies are often given special powers in this regard.6 By an act of 1840, real and personal property may be granted and conveyed7 (1) to any college or literary corporation in trust to establish and maintain an observatory. (2) To found and maintain professorships and scholarships. (3) To repair and keep in repair places for burial of the dead. (4) For any other specific purpose, comprehended in the general objects, authorized by their respective charters. So, also, real estate and personal property may be granted to municipal corporations in trust for any purpose of education, or the diffusion of knowledge, or the relief of distress, or for parks, gardens or other ornamental grounds, or grounds for the purposes of military parade and exercise, or health and recreation, within or near such incorporated city or village; the trusts to continue for such time as may be necessary to

1 In the Matter of Howe, 1 Pai., 241; Sheldon v. Chappell, 47 Hun, 99; Currin v. Fanning, 13 Hun, 408.
3 Cruise D., Tit. XII., c. I., s. 84; supra, p. 39.
4 Wetmore v. Parker, 52 N. Y., at p. 459.
5 Woodward v. James, 115 N. Y., 346, 357; Greene v. Greene, 125 N. Y., 506; Rose v. Hatch, 125 N. Y., 427; Steinway v. Steinway, 10 Misc., 563.
6 C. 545, Laws of 1887.
7 C. 318; amended so as to include devise; c. 261, Laws of 1841, amended, c. 74, Laws of 1848; c. 432, Laws of 1855.
accomplish the purposes for which they are created. So by
the same act, real and personal property may be granted
to commissioners of common schools of any town, and to
trustees of any school district, in trust for the benefit of the
common schools of such district.1 By chapter 555, Laws of
1864, real and personal estate might be granted, conveyed,
devised and bequeathed and given in trust and in perpetuity
or otherwise to the State, or to the Superintendent of
public schools, or to any county, city or any board of offi-
cers thereof, or to any school commissioner, district or its
commissioners, or to any town or supervisor, school dis-
trict or its trustee or trustees, for the support or benefit of
the common schools of the State or any particular school.2
The acts mentioned expressly authorize species of charita-
table uses, excepting them from the ordinary laws or rules
relating to perpetuities. So the act, chapter 337, Laws of
1880, relating to trusts for the benefit of the meetings of
the religious Society of Friends, seems to contemplate an
endless succession of private persons holding in trust. As
these corporations can not, on the principle stated, be trus-
tee for themselves, it is apparent that such laws expressly
sanction certain charitable uses for indefinite and uncertain
beneficiaries in whom no interest vests.3 Thus in these
particular instances, the general policy of the legislature,
as indicated in some decisions, is interrupted, or can not
be said to be either harmonious or single.

The incapacity of a corporation of this State to take and
hold as trustee does not vitiate the trust. The proper
court will not allow the trust to fail because the trustee is
under a disability, but will appoint a new one.4

An unincorporated association can not take as trustee.5

1 C. 318, Laws of 1840; Fosdick vs. Town of Hempstead, 125 N. Y., 593;
Iseman vs. Myres, 26 Hun, 651; cf. Will of Underhill, 6 Dem., 466.

2 C. 555, Laws of 1864, Act II., sec. 15; c. 160, Laws of 1890; c. 25,
Laws of 1892, as to public parks.

3 Cf. Chaplin, Suspension of the Power of Alienation, p. 256, note 8; Willard
Real Estate and Conveyance, 240.

4 Perry on Trusts, 4 Edit., sec. 38; Cross vs. U. S. Trust Co., 131 N. Y.,
330, 350; Sheldon vs. Chappell, 47 Hun, 59; McCartee vs. Orphan Asylum,
9 Cowen, p. 484.

5 Hart vs. Hamburger, 1 State Rep., 293.
Only citizens are capable of holding lands within this State. But by special acts passed after the War of Independence aliens were in particular cases authorized to take and hold lands; and in such instances they might take and hold in trust as well as for their own use. If an alien be made trustee of lands, and they escheat, the State now takes them subject to all trusts, incumbrances and charges.

As all charitable uses are abolished by the Revised Statutes, and as charitable corporations in New York have no power or capacity except those expressly conferred, an express trust in lands for the benefit of a charitable corporation can be valid only under the Article of the Revised Statutes relating to Uses and Trusts, or as a trust power; and then when the corporation has capacity to take and hold the property so limited in trust. It is well understood that no principle of public policy may be subverted by means of a trust or a power in trust.

Nor can a trust of personal estate, even though limited for the benefit of a corporation having power to take and hold the property, violate the rules laid down against perpetuities because it is a charitable use. The rules relating to powers, and to future uses and trusts in lands and to powers and future trusts in personality are now generally uniform, with one exception. In some instances,

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1 R. S., 719, sec. 8.
3 R. S., 718, sec. 2.
4 Supra, p. 61.
5 Supra, p. 77.
6 Art. II., Chap. 1, Part II., R. S.; R. S., 727; Chaplin, Susp. Pow. Alienation, sec. 450.
8 Supra, pp. 95, 97.
trusts for charitable associations have been authorized by special laws.\(^1\) A bequest in trust for a corporation need not name the corporation, or be certain to every intent.\(^3\) A bequest to the officers of the Protestant Episcopal Church into the fund to support the episcopacy of the church, has been held sufficient to carry the bequest to the trustees for the management and care of the fund for the support of the Episcopate of the Diocese of Central New York, the testator residing within the diocese and knowing the existence of the corporation.\(^8\)

When a corporation has the power to take and hold the property, a gift to the trustees of the corporation is a gift to the corporation,\(^4\) and if there is no active or statutory express trust, the use is vested in possession in the corporation, by virtue of the Statute of Uses as revised and embodied in the Revised Statutes of New York.\(^5\)

A trust in lands for the benefit of any charity can only be created in writing, whether it is intended to take effect as an express trust or as a power.\(^6\) As most charitable trusts in lands now take effect as powers in trusts,\(^7\) they must be contained in some conveyance of an estate, or in a last will and testament.\(^8\) A trust in personalty may be raised by parol;\(^9\) but if the trust is intended for charity the same rules are applicable, as in the case of private trusts in personalty; at least until the year 1893, when the

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\(^1\) *E. g.* trusts for Society of Friends, c. 184, Laws of 1839; c. 209, Laws of 1878; c. 337, Laws of 1880; *supra*, pp. 117, 118.

\(^2\) *Supra*, p. 90.

\(^3\) Trustees for Episcopate v. Colgrove, 4 Hun, 362; s. c. 6 Sup. Ct. (T. & C.), 614; Erwin v. Hurd, 13 Abb. N. C., 91.


\(^6\) 2 R. S., 134, sec. 6; Hutchins v. Van Vechten, 140 N. Y., 155.

\(^7\) *Supra*, pp. 95, 97.

\(^8\) 1 R. S., 735, sec. 106.

Act considered above was passed. In other respects there is no difference between public or charitable trusts in personal property and trusts not, charitable and not public. The absolute ownership of personal property may in no case "be suspended by any limitation or condition whatever, for a longer period than during the continuance and until the determination of not more than two lives in being at the date of the instrument containing such limitation or condition; or if such instrument be a will for not more than two lives in being at the death of the testator."

In all other respects, limitations of future or contingent interests in personal property are subject to the rules prescribed in the Revised Statutes in relation to future estates in lands.

The difficulty attending the creation of charitable devises and bequests in New York has led to a class of donations which ought to be classed with precatory trusts. The donor on the face of the will gives the property absolutely to persons in whom confidence is reposed; but with directions, written or verbal, appealing to the conscience of those who so take. In foro conscientiae such directions are, when assented to, as binding and as effectual to create a trust or confidence as if contained in the limitation, or deed of gift itself, and under most circumstances of the kind indicated equity presumes an assent when the donee occupies a situation which inspires confidence in the donor.

In a late case the will contained this clause: "If for any reason any legacy or legacies left by my will or by any codicil either pecuniary or residuary shall lapse or fail, or for any cause not take effect in whole or in part, I give and bequeath the amount which shall lapse, fail or not take effect, absolutely to the persons named as my executors. In the use of the same I am satisfied that

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1 C. 701, Laws of 1893; supra p. 104.
3 1 R. S., 773, sec. 1.
4 1 R. S., 773, sec. 2.
5 Matter of O'Hara, 95 N. Y., 403; The Trustees of Amherst College v. Ritch, 91 Hun, 509; Inglis v. Trustees of Sailors' Snug Harbor, 3 Peters, 99, 119.
"they will follow what they believe to be my wishes. I "impose upon them, however; no conditions, leaving the "same to them personally and absolutely, and without "limitation and restriction." Under this clause the executors took and conveyed to certain charitable institutions. In an action brought to have the arrangement declared invalid and the testatrix declared intestate as to the property passing under the clause quoted, the learned Justice who heard the cause sustained the will. The case is so recent as to preclude any discussion.\(^1\) A like arrangement was involved in the litigation attending the will of Fayerweather, a merchant of the City of New York, who died in November, 1890, leaving a large estate to charitable institutions or involved in a trust not wholly expressed on the face of the will.\(^2\)

It is beyond our present purpose to discuss the remedy of a donee where charitable uses or trusts are misapplied. The question is discussed from one point of view in several treatises of authority.\(^3\) The Court of Errors first laid it down as a general principle, that in case of a clear violation of a well-defined trust of this character, the Court of Chancery would be bound to interfere.\(^4\) Whether such interference may be at the suit of a private person, or only by the State, is a question perhaps depending on particular circumstances of a given case.\(^5\) The new constitution has made the State Board of Charities visitor of certain charitable foundations, and thus has possibly introduced a new element in the former law.\(^6\) By the "Executive Law" the Attorney-General is now required to prosecute all actions and proceedings in which the State is interested.\(^7\)

\(^1\) Cf. Inglis v. The Trustees of Sailors' Sung Harbor, 3 Peters, at p. 119.
\(^2\) The Trustees of Amherst College v. Ritch, 91 Hun, 509.
\(^3\) \textit{E. g. Willard, Eq. Jurisp.}, p. 589, \textit{et seq.} The residue of that writer's chapter on charities is superseded by many decisions changing the law. \textit{Supra.}
\(^4\) Miller v. Gable, 2 Denio, 492; \textit{cf.} Bowden v. M'Leod, 1 Edw., 588; Baptist Church v. Witherell, 3 Pai., 296.
\(^5\) Church of Redemption v. Grace Church, 68 N. Y., 570, 582; People v. Powers, 83 Hun, 449, 457; rev'd above on another point, 147 N. Y., 104.
\(^6\) Art. VIII.; \textit{cf.} c. 319, Laws of 1848, sec. 8.
\(^7\) Chap. 683, Laws of 1892; c. 821, Laws of 1895; Code Civ. Pro., sections 1797–1804.
This duty is made more clear by the act of 1893, in respect of charities.1

As most permanent and indefinite charitable donations are by the past policy of the State now required to be made to charitable corporations,2 the remedies for a breach of the terms of the founders' or donors' gifts are generally to be sought in the laws of the State regulating charitable corporations, or in the law relating to a breach of common law conditions. The terms of the gifts ordinarily merge, as it were, in the charter of the donee corporation. If the true intent and purpose of the franchise of such a corporation is violated the State has an interest in suppressing the corporation, and may take away its charter.3 The legislature may, by a special act or otherwise, direct that proceedings be instituted to annul the charter of any corporation created by the State where general laws are inadequate.4 Otherwise the creature would be above the sovereign. But such action is subject to constitutional restrictions touching vested rights, even where the power to revoke the charter was reserved to the State at the time when such corporation was chartered or incorporated.5 These principles are beyond the plane of this discussion.

By exceptions contained in the acts regulating succession taxes, property devised or bequeathed to any person who is a bishop, or to any religious corporation, is exempt from the tax.6

1 C. 701, Laws of 1893; supra, p. 104.
2 Supra, p. 69.
3 People v. Dispensary and Hospital Society, 7 Lansing, 304; People v. North River Sugar Ref'g Co., 121 N. Y., 582.
5 People v. O'Brien, 111 N. Y., 1.
6 C. 398, Laws of 1890; c. 399, Laws of 1892.
CHAPTER VI.

FORMS AND COMMENTARY.

The following forms are either in common use or are so drawn as to afford an opportunity for the discussion of certain points involved in a series of litigations over charitable donations. A concrete example affords the best basis for a practical discussion of a doubtful branch of the law. The forms do not purport to be complete; they may be readily amplified by the practical lawyer with good results. Few set forms are adapted to the exigencies of practice, for they do not always meet the testator’s wishes or circumstances.

[FORM OF BEQUEST TO A CHARITABLE OR A LITERARY ASSOCIATION]

I give and bequeath to “The New York Historical Society,” founded in the year 1804, and incorporated by the Legislature of New York, in the year 1809, the sum of ______________________ dollars.¹

[OR THIS]

I give and bequeath to the __________ Hospital, a body corporate, maintaining a hospital in the City of New York,² its successors and assigns for its or their own use,

¹ This form is often used in practice. It is very precise in its description of the corporation intended to be made legatee [vid. pp. 90, 102, supra]. A body corporate should always be mentioned by its proper corporate name, if possible [vid. next note].

² It is not always possible to obtain in a short space of time the requisite data concerning the incorporation of a particular body cor-
benefit and advantage forever, the sum of ................

........................................thousand dollars.

[FORM OF BEQUEST OF A "REMAINDER," IN PERSONAL
ESTATE, TO A CHARITABLE CORPORATION.]

Item: I give and bequeath the sum of ........thousand
dollars to A and B (hereinafter nominated and appointed
executors of this my will¹), to hold the same in trust, to
keep the same invested during the life of my daughter,
C,² and to collect and receive the income thereof, and the
same to apply to the use of said C during the term of her
natural life; and on the death of the said C, forthwith to
pay over the principal of said ...........thousand dollars,
unto the New York Historical Society, a body corporate
[etc., etc.³].

And for the better effectuating of this bequest, I hereby
now give and bequeath the remainder⁴ in said sum of

porate. In the absence of precise instructions, the draftsman of a
will may then add matter of description which tends to identify the
corporation: such as the street on which its building is located [vid.
supra, pp. 90, 102, and form of description adopted in Wetmore
v. Parker, 52 N. Y., at p. 452; and in Booth v. Baptist Church, 126 N,

¹This clause in brackets is optional. The trustees need not be
made executors of the will.

²At common law, a bequest of the remainder or residue of per-
sonal estate could not be limited on a gift of personality for life
[supra, p. 88; Van Horne v. Campbell, 100 N. Y., at p. 305]; but
wherever there is now a clear bequest for life, at least without words
indicating that the life tenant is to have the absolute power of
spending the money, a "remainder" may be limited after the interest
for life [ibid., supra, et Tyson v. Blake, 22 N. Y., 558; Norris v. Beyea,
13 N. Y., 273; Matter of Cager, 111 N. Y., at p. 349; Crozier v. Bray,
120 N. Y., 366, 380; Leggett v. Firth, 132 N. Y., 7, 11]. The courts
will, however, if possible, construe a life tenant's power to dispose
of the property as a power under the R. S., and not jus disponendi
[Leggett v. Firth, 132 N. Y., 7, 11]; and thus save the remainder
from being repugnant to the prior interest,

³See the first form [supra, p. 124].

⁴As under the R. S. all expectant interests in personal property
are subjected to the rules prescribed in Chapter I., Part II. of the
thousand dollars, so limited as aforesaid, in trust, for the life of my daughter C, unto the said New York Historical Society, for its own use, benefit and advantage forever.

[DEVISE OF REMAINDER TO CHARITABLE CORPORATION.]

Item.—I devise the dwelling-house, in which I now reside, situate in the town of, together with the garden and all actual and reputed appurtenances [or say simply, the house and lot known as street-number], West street, in the City of New York, being the same premises derived by me by purchase from ; or inherited from my father, to my wife Elizabeth, for her life without impeachment of waste, with remainder to the Sheltering Arms of the City of Brooklyn, a body corporate under Chapter of the laws of New York, for the sole use, benefit and advantage of such body corporate forever.

R. S., in relation to future estates in lands [supra, pp. 62, 96, 97, 98, 99, 100], an interest limited after a life estate in personalty, may be accurately termed a “remainder” and may now be created and transferred by that name [1 R. S., 723, sec. 11; Crozier vs. Bray, 120 N. Y., at p. 380].

1 Either of these clauses in the brackets, according to the fact, tends much to certainty in devises.

2 This may well be added to prevent contentions with those entitled to the remainder [1 R. S., 750, sec. 8; Code Civ. Pro., sec. 1651].

3 An estate by way of remainder where a conversion is directed vests only at the death of the wife [Shipman vs. Rollins, 98 N. Y., 311]. But the devise of the remainder in the above form vests at the death of the testator, and the capacity of the body corporate to take in possession by devise must then exist under the law of New York [supra, pp. 73, 79]; or the devise of the remainder is void, and the estate goes to the heirs of the testator [supra, pp. 58, 83], unless there is a devise over [supra, pp. 58, 83]; or it falls into the residuary under the present law [infra, p. 146]. The subject of devises and bequests to corporations not in being at the testator's death is considered at length in the text [supra, pp. 89, 111], and in the notes on the subsequent forms [infra, pp. 134, 149].

The converse of this form, a remainder on an estate for a corporate life is not good in New York. The reader will note that a gift
LAW OF CHARITABLE DONATIONS.

[FORM OF BEQUEST TO RELIGIOUS CORPORATION, WITH
ALTERNATIVE BEQUEST OVER ON A CONTINGENCY.]

I give and bequeath to the Rector, Church Wardens
and Vestrymen of St. Episcopal Church, a
body corporate, in communion with the Protestant Episcopal Church, in the United States of America, and now maintaining a church for Divine worship, in the city of

[or at the corner of. and. streets in. city\(^a\)] the sum of

And if it happen that the said corporation of St. Episcopal Church may not, at the time of my decease, be

over after an estate to a charitable corporation in fee has been held good in England, no matter on how remote an event it may be limited, as its effect is to render property alienable again and thus take land out of mortmain. [Christ's Hospital v. Grainger, 1 Mac. & G., 460; see also re Randall, 38 Ch. D., 213]. But a future estate, limited after a fee simple absolute to a body corporate, would not be so consonant with the New York Revised Statutes. A lease of urban lands to a body corporate on a nominal rent for a long term of years, would be a settlement better adapted to the law of New York. The inheritance could then be dealt with independently of the demise.

\(^1\) The Rector of a Church of England in the Colonies had the right to the temporalities of the church after his institution and induction. In the Province of New York, the institution and induction were at first in the Latin tongue, but afterwards in English. These instruments are usually recorded in the older counties of New York. After independence of the Crown, the rector, churchwardens and vestrymen of the parish, as such, were usually incorporated under the Act of 1784 [1 J. & V., 104; 1 K. & R., 336], revised in the Laws of 1813, Chap. 60 [cf. The Rector, Church Wardens, etc., of The Church of the Redemption v. The Rector, Churchwardens, etc., of Grace Church, 68 N. Y., 570]. The new incorporation law [Chapter 723, laws of 1895, sec. 31] permits this custom to continue or any other designation which may be selected for the body corporate. The name in the form is the usual corporate name under the old laws, but under the new law “St. James’ Church” or “St. James’ Episcopal Church” would be a sufficient designation for a church body corporate.

\(^a\) The description must be such as to identify the corporation [supra, pp. 124, 125 notes].

\(^b\) Under the law of New York a corporation must have the power to take and hold by bequest as well as by devise [supra, pp. 74-79, 82; both rights are given by Ch. 687, sec. 11, Laws 1892].
empowered by law, or, for any other reason, entitled to take and hold the sum so bequeathed to it, or any part thereof, then and in that event, I give and bequeath such sum, or such part as such corporation shall not be entitled to take and hold, to "the Cathedral Church of Saint John the Divine," in the City of New York, a body corporate pursuant to Chapter 222, New York Laws of 1873.

[FORM OF BEQUEST TO CHARITY SUBJECT TO ANNUITIES.]

Item: I give to Vassar Brothers' Home for Aged Men, seven thousand dollars; but upon the express condition that the said Home pay the following annuities, viz.: one hundred and fifty dollars, annually, in half-yearly payments, to the Rev. Edward Van Kleeck, for and during the term of his life; and two hundred dollars, annually, in half-yearly payments, to James Van Kleeck, for and during the term of his natural life.

[BEQUEST OF MONEY TO CHARITABLE CORPORATION FOR SPECIFIC PURPOSES, OR A SINGLE CORPORATE USE.]

Item: I give and bequeath the sum of $25,000 to the Utica Orphan Asylum (now having its buildings on the road from Utica to New Hartford), to be perpetually invested by the trustees or managers thereof in the public stocks of the United States, or of the State of New York,

1 A contingent limitation over to take effect in the event that the primary bequest is defeated, is valid provided that it vest in interest within the time prescribed by the R. S. against perpetuities [supra, pp. 87, 88, 89]; Van Horne v. Campbell, 100 N. Y., at p. 306, seq.

2 A bequest, in this form, to a charitable corporation, subject to three annuities, was sustained in Booth v. Baptist Church, 126 N. Y., 215. The power of a charitable corporation to take subject to an annuity was there discussed and decided affirmatively.

3 This is to identify the corporation [supra, pp. 124, 125 notes]. The form itself is taken from the will sub judice in the leading case of Wetmore v. Parker, 52 N. Y., at p. 452. The court sustained the will in that case.
or in bonds and mortgages upon real estate, the fair value of which shall in all cases be at least double the amount secured by the mortgages, exclusive of the value of the buildings; and the interest and the income of which sum (and only the interest and income) shall be expended by the trustees or managers, in their discretion, for the support and maintenance of said asylum, having special reference to the suitable and comfortable care of and provision for the orphans in their charge; it being my will, however, that a sufficient portion of the interest and income first derived from said investment [shall be expended] in procuring, affixing and finishing suitable outside blinds for the windows of the asylum buildings, provided that such blinds shall not have been furnished before this bequest shall take effect.

1 The question was made on this bequest whether such a restriction upon the use of a donation to a body corporate constituted a trust or a donation absolute, unaccompanied by a trust. If it was on trust, the trust clearly violated the Revised Statute against perpetuities. But the Court of Appeals held that a “corporation created for charity, etc., may take and hold personal property to any of the corporate uses of the donee; and a direction of the donor that the principal shall be kept inviolate, and the income only expended, will not invalidate the gift: provided, of course, that the same is immediate and vested” (Wetmore v. Parker, 52 N. Y., at p. 458). Much more is stated by the court on p. 459 to the same effect. The principle of this case has been frequently cited with approval [supra, pp. 83, 84, 115, 116; but compare the briefs of counsel in Rainey v. Laing, 58 Barb. 453, 481, as to effect of testator’s restrictions upon corporate use of a donation, and see Matter of Isbell, 1 App., Div. 158].

* On reading this form doubts will at once occur to the minds of most professional men whether or not this bequest is in trust, or simply a donation on condition subsequent; and in either case what the remedy is, if the legacy shall be accepted, and then the condition, or intended use of the money, afterwards broken, ignored or violated by the donee. It will be observed that the language of the Court of Appeals in Wetmore v. Parker is such as to lead to the inference, that the bequest in this form is absolute, and that the corporate user of the fund is subject only to the restrictions prescribed by the corporate franchises or charter. In so far as the donor’s direction about the investment of the fund is concerned it is to be disregarded if inconvenient [p. 459]. The decision to a like effect in Williams v. Williams, 8 N. Y., 525, is approved. The gift, then, in Wetmore v.
Law of Charitable Donations.

(Form of Bequest to Charitable Corporation on Condition.)

Item: I give and bequeath to the Baptist Church (situated in Mill street) in the City of Poughkeepsie, the sum of ten thousand dollars, upon the express condition that the same shall be employed only in the maintenance of the existing church edifice.¹

Parker was absolute to the corporation, and any violation of the terms of such gift by the corporation was entirely inconsequential [vid. Bird v. Merklee 144 N. Y., at p. 549] as long as the use of the fund conformed to the charter of the corporation [supra, pp. 79, 86, 100, 114, 116, 117, 118]. If a charitable corporation has not the power to hold on trusts, it is very clear in this State that it can not take [supra, pp. 114, 115, 116], and it is equally clear that if the gift in this case to the Utica Orphan Asylum had been on trust for poor orphans, it would have been void for indefiniteness as well as because in conflict with the statute against perpetuities [supra, pp. 101, 102]. But it was held not to be a gift to a trustee on trusts in the principal case. Was it then a legacy subject to a condition subsequent, and if so, what is the remedy for a breach of such a condition? This consideration we may reserve for the notes on the next form.

Ordinarily a conveyance in fee, for a specified use without any words of condition or covenant against any other use, is ineffectual to restrict the use [see note to Erwin v. Hurd, 13 Abb. N. C., at p. 106, and cases cited].

¹ In Booth v. Baptist Church, 126 N. Y., 215, 241, a legacy subject to a condition precedent, was held void because it did not vest in interest within the time prescribed by the Revised Statutes [1 R. S., 723, sec. 15]. But the above form presents an example of a condition subsequent. No precise form of words is necessary to create conditions in wills; any expressions disclosing the intention will have that effect. Thus a devise "to A, he paying" or "he to pay £500 within one month after my decease" would be a condition, for breach of which the heir might enter unless the property were given over by way of executory devise [2 Powell on Devises, 251]. Such was the common law.

Is there any essential change made in the law touching common law conditions by the R. S. or any subsequent legislation? It is thought not.

Conditions are still either subsequent or precedent. In New York a future estate or a future interest must vest within, or at the expiration of, two lives in being [with one single exception relative to the vesting of a remainder. 1 R. S., 723, sec. 16]. Consequently a
LAW OF CHARITABLE DONATIONS.

[FORM OF DEVISE TO CHARITABLE CORPORATION ON CONDITION.]

Item: I hereby give and devise my dwelling house, garden, and lands appurtenant and heretofore used by me in connection therewith (said premises being situate on ______ street in the town of ________) unto St. James' Episcopal Church, a body corporate now maintaining an institution for Divine worship in said town of _______; for the use, benefit and advantage of said St. James' Church forever; provided that the premises hereby devised shall vest at my death in the said body corporate in fee, subject to the following express conditions: that is to say, the said St.

future interest limited to take effect upon a condition precedent must vest within the rule, or it is void [Booth v. Baptist Church, 126 N. Y., 215, 241]. Conditions subsequent operate to defeat estates or interests vested and existing [Shep. Touchstone, 117; Towe v. Remsen, 70 N. Y., at p. 309]. The distinction between conditions precedent and conditions subsequent is not always clear [Nicoll v. N. Y. and Erie Railway, 12 N. Y., 130; Bennett v. Cuver, 97 N. Y., 250]. Conditions subsequent as they defeat estates are construed strictly [Woodworth v. Paine, 74 N. Y., 156; Graves v. Deterling, 122 N. Y., 447] and are often relieved against in equity [2 Story, Eq. Jurisp. sec. 1319 et seq.] Conditions subsequent may, at common law, be reserved only for the benefit of the grantor and his heirs, and no others may take the benefit of a breach [Nicoll v. N. Y. & Erie R. R., 12 N. Y., at p. 131; Hoyt v. Dillon, 19 Barb., 644, 651; Towe v. Remsen, 70 N. Y., at p. 312; Countryman v. Deck., 13 Abb. N. C., 112]. If a condition subsequent be rendered impossible to be performed by some extrinsic circumstance, the gift is discharged from the condition and becomes absolute [Thomas v. Howell, 1 Salk, 170]. Unless there is a limitation over on breach of a condition, it may be held in certain cases by the courts to be in terrorem only [2 Powell on Devises, 254 seq.]. But it will be observed that a limitation over, under the R. S., will be the creation of a future or contingent interest, and such new interest so to arise must vest within or at the expiration of not more than two lives in being or it will be void [1 R. S., 723, sec. 15; Booth v. Baptist Church, 126 N. Y., 215]. While the present rule against perpetuities does not refer to conditions [infra, pp. 133, 139] it certainly does refer to conditional limitations, or to limitations over, on a determinable fee.

1 See note supra, p. 127, as to designation of corporation.

2 Similar language in a deed was held in Erwin v. Hurd, 13 Abb. N. C., 91, to create a condition subsequent.
James' Church shall erect with the fund hereinafter bequeathed to it on the lot aforesaid a good, sufficient and convenient edifice, dedicated to the worship of Almighty God, which edifice shall at all times be maintained as a church or chapel according to the rites and ceremonies of the Protestant Episcopal Church in the United States of America. *Provided always,* and the said devise is subject to the further condition, that if at any time after the erection of said edifice the said lot, piece or parcel of land hereby devised in fee, shall be left vacant for the space of two successive years, without any religious ministrations, Divine service, or other Divine office being held thereon, by some person duly inducted or admitted for such purpose by the Bishop of the Diocese of New York, then and in that event the estate of St. James' Episcopal Church, in the premises hereby devised, and bequeathed, shall absolutely cease and determine and my heirs may re-enter upon said premises, and the same have again, hold, repossess and enjoy.¹

¹ Such a limitation in a devise creates a determinable fee [Challis, 44]. A determinable limitation of a fee is one expressed to be made until the happening of some future event which never may happen, for it is an essential characteristic of all fees that they may endure forever [Challis, 197; Preston, Estates, l., 479]. A determinable limitation is ordinarily self-executing. The fee determines on the event [Challis, 206; Plowden, 242]. There are few examples of a determinable fee in the later New York books. In Leonard v. Burr, 18 N. Y., 96, the devise was "to the use of 'A' until Gloversville shall be incorporated as a village," and then a devise over in the nature at the present day of a conditional limitation. Had the devise in this case been to "A" and his heirs, until, etc., etc. with no devise over, the case would by the common law have presented an excellent example of a determinable fee. On principle the decision in Leonard v. Burr, as it is since the R. S., is not very satisfactory and the case need not be pursued in connection with this subject. A determinable fee is classed with common law fees [Challis, 43; Preston's Shep. Touch., 203], and on principle must still exist in this State [Chaplin, Suspens. Power of Alienation, sec. 131]. A base, impure or determinable fee may be created also by a grant or devise in fee subject to a condition subsequent; at least, when such condition is made quite irrespective of any limitation over. Indeed, any limitation over upon the happening of the event, expressed in the condi-
Item: I hereby give and bequeath unto said Saint James' Episcopal Church, a body corporate as aforesaid, the sum of twenty thousand dollars wherewith to erect the edifice mentioned in the next preceding clause of my will.

Item: I hereby give and bequeath unto said Saint James' Episcopal Church the further sum of five thousand dollars, to be kept well invested at interest, in such security or investments as may be approved by the Church Wardens of said Church, and the Bishop of the Diocese, and my will is and I so direct and declare that the clear net annual income derived from such investment and security, shall be expended only in the repair and adornment of the building or its appurtenances so to be erected with the fund bequeathed by the next preceding clause of this my will.  

1 It is assumed that these last two bequests work a conversion and are not trusts of personality, stricti juris, but donations on condition. [Supra, pp. 129, 130.] But they may be validated beyond question as trusts of personality by a direction that the expenditure be in the lifetime of A and B, and that dying A and B, the corpus vest in the church corporation absolutely.
LAW OF CHARITABLE DONATIONS.

FORM OF BEQUEST AND DEVISE OF RESIDUARY ESTATE, REAL
AND PERSONAL, TO TRUSTEES OF AN EXPRESS TRUST FOR
TWO LIVES (OR THE SHORTEST POSSIBLE PERIOD WITHIN
SUCH LIVES), FOR THE ULTIMATE BENEFIT OF A HOS-
PITAL CORPORATION, DIRECTED TO BE FORMED AFTER
THE TESTATOR'S DEATH.]

FIRST.—All specific devises and bequests, and directions for
payment of debts, etc., out of property.

SECOND.—I hereby give, devise and bequeath to my ex-
ecutors and trustees (hereinafter nominated and appointed)

1 This note should be read in conjunction with those below, on the
succeeding forms. These forms are intended as outlines only for
the practitioner's consideration in connection with the notes. The
skilful counsel will readily improve on any forms and, indeed, in
practice, can rarely adapt set forms to the circumstances of a testator.
A charitable corporation to be formed may unquestionably take, by
means of a trust, an executory devise or a remainder [Booth v. Bapt-
ist Church, 126 N. Y., at p. 237; and cases cited supra, pp. 89, 111;
cf. Hayes v. Pratt, 147 U. S., 557, 567]. The leading cases involving
devises or benefactions to corporations to be formed after a testator's
death, may be said to be Inglis v. Sailors' Snug Harbour, 3 Peters, 99;
Burrill v. Boardman, 43 N. Y., 254; Shipman v. Rollins, 98 N. Y., 311;
Tilden v. Green, 130 N. Y., 29; and Ould v. Washington Hospital for
Foundlings, 95 U. S., 303. The devise in Inglis v. The Trustees of
the Sailors' Snug Harbour, was, under the old law, before the Re-
vised Statutes of New York, held to be a valid executory devise, not
violating the rule then directed against perpetuities (lives in being
and a term of twenty-one years in gross). It cannot be doubted that
by the common law a present devise to a corporation not in esse at
the time the will became operative was wholly void. The reason was
that the law did not contemplate a possibility upon a possibility,
called a double possibility (Cholmley's Case, 2 Rep., 50; Challis, 91).
But the Court in the case of the Sailors' Snug Harbour, held that the
devise was not a present devise to a corporation not in being, but a
devise to take effect in futuro upon the corporation being created
(Ould v. Washington Hospital, 95 U. S., 313). The Revised Statutes,
as it will be remembered, took away the feudal rules of the common
law, prohibiting any abeyance of the seizin, and a legal limitation
upon a double possibility (1 R. S., 724, sec. 24; 1 R. S., 725, sec. 34).
But in Burrill v. Boardman, 43 N. Y., 258, the Court still adheres to
the reasoning in the Sailors' Snug Harbour case, holding the bequest
there to be valid, not as a present bequest, but as one taking effect
in futuro (citing Fearne, Conting. Rem., 536). At the present day, it
and to their successors in the trusts hereby created, and to the survivor or survivors of them, all the rest, residue and remainder of my estate, real, personal and mixed, of whatever name or nature, and wheresoever situated, of which I may die seised or possessed, or to which I may be entitled at the time of my decease, *in trust nevertheless* for the uses and purposes following, that is to say: Upon trust⁴ to invest and keep invested the personal estate, and in case of the sale of any real estate (under the power herein contained), to invest the proceeds thereof so that it may be be productive of interest; to let or lease the said real estate, or any part thereof, from year to year; to sell, dispose of and convey any or all of my real estate not hereinbefore specifically devised, at such time or times as the trustees hereunder may deem advantageous to my estate; and to collect and receive the rents, issues, dividends and profits of said residuary estate, and after deducting all taxes, assessments, water rates, liens and charges, including all the lawful expenses of management of the estates hereby devised and bequeathed, to apply the

cannot be doubted, although executory devises are wholly abolished by the Revised Statutes (130 N. Y., p. 47), that a present devise to a corporation to be formed, if it must vest within the time prescribed by the Revised Statutes, is good in New York (Tilden v. Green, 130 N. Y., at p. 47; Shipman v. Rollins, 98 N. Y., 311; supra, pp. 89, 111). As the existing restrictions upon the form of devises are never referable to the old rules touching the feudal seisin, but emanate from the Revised Statutes against perpetuity, the rule thus announced, in Tilden v. Green, must meet the approval of the profession, especially after the decision in Shipman v. Rollins, 98 N. Y., 311. The former rules of law about vesting of estates had, *first*, a relation to the common law rule forbidding abeyance of the seisin, and *next* to the rule subsequently directed against perpetuities. Under the R. S. the former rule has disappeared and it ought to be quite sufficient now for most purposes, if the estate must actually vest within the lawful time [cf. p. 351, Cruikshank v. Home for Friendless, 113 N. Y., about present immateriality of where the fee meantime lodges].

⁴ This form of devise of an estate to executors and trustees with ordinary powers of sale has been before the Court of Appeals, and is in common use in this State, in connection with an estate to support a trust to receive the rents and profits of lands and apply them to the use of any person during the life of such person, etc., etc.
sum remaining out of the rents, issues, dividends and
profits of the said residuary estate to the use of A and B,
as joint tenants, and not tenants in common, until the
body corporate hereinafter mentioned shall be incorpo-
rated under the laws of the State of New York relating
to Hospital Corporations; which incorporation I direct
shall be in the life time of the said A and B, or either of
them, and as speedily as may be possible after my decease,
without any regard to the detriment or loss occasioned to
said A and B by reason of such speedy cessation of the
trusts for their benefit. And I further direct and declare

1 Such a limitation is common even in trusts of personality, 1 Powell
on Devises, 673. Where a trust is now made for the life of any person,
the income of the estate may be given to as many persons as the
testator chooses (Schermerhorn v. Cotting, 131 N. Y., 48). But this
is undesirable in the case of an ultimate limitation to a corporation
not in esse, in derogation of the prior limitation.

A and B may be any two persons not trustees under the will.
The R. S. does not tolerate an express trust in lands excepting in one
of the four instances enumerated in the 55th Section (1 R. S., 728, as
amended in 1830). A trust in lands for the ultimate benefit of a corpora-
tion not in esse is therefore valid only as a power (supra, pp. 95,
97), and the lands descend to the heirs or devisees subject to the
power (1 R. S., 729, sections 56, 59). As there can be no accumula-
tion of the rents and profits of lands and personal estate, except for
minors (1 R. S., 726, sec. 37; 1 R. S., 773, sec. 3), there can be no direc-
tion to accumulate them for the benefit of a corporation not in esse.
It may not be desirable that they should pass as undevised to
the heirs-at-law or next of kin, even for a brief space. Nor is it desir-
able that the lands should descend subject to the execution of
the power, for the rents follow the fee unless otherwise disposed of. The
whole residuary estate should, therefore, be vested in the trustees if
possible; but subject to being divested as soon as the body corporate
comes into being. The plan of the form above, while tentative,
seems to be open to less objection than those adopted in some nota-
ble cases where the devisees have wholly failed.

This provision seems necessary in order to rebut any presump-
tion that the active trusts for their benefit are to endure for any ap-
preciable space of time; the real intention of the testator being that
the trusts shall cease as soon as a hospital corporation can be formed
under the general laws of New York, living A and B or the survivor.
The form above outlined is intended for use only in cases where no
general conversion of the real estate is contemplated. Where an im-
that immediately upon the incorporation of the said body corporate, the trusts for A and B heretofore created and limited shall cease and determine, and that the trustees under this, my will, shall stand seised and possessed of the said residuary estate only to and for the sole use and benefit and advantage of such body corporate, and to and for no other use, trust and purpose whatsoever; and the said residuary estates shall then be the estate of the said body corporate forever, free and discharged of the said trusts for A and B and of any trusts whatever. The better to effectuate the said estates in the possession of said body corporate, I do hereby direct and empower the trustees under this will, to convey, assign, transfer and set over the said residuary estate unto said body corporate, in due form of law by such proper assignments, transfers, assurances, deeds and conveyances as counsel learned in the law may advise are necessary or expedient.

THIRD.—I hereby request and direct my executors and trustees, hereinafter named, and their successor and successors in the trusts created by this will, to forthwith, after my decease, or as soon as conveniently may be, living A and B, or either of them, to cause to be incorporated a

mediate conversion is contemplated a limitation for the benefit of a corporation to be formed would be much simpler.

1 The trust estate ceases when the trust purposes cease (1 R. S., 730, sec. 67), and our Statute of Uses as revised (1 R. S., 727, sec. 47), vests the use in the persons next entitled to possession (Selden v. Vermilyea, 3 N. Y., 525; Wright v. Douglass, 7 N. Y., 564, 570; Ring v. McCown, 10 N. Y., 268, 271; Kip v. Hirsch, 103 N. Y., 565, 570; Helk v. Reinheimer, 105 N. Y., at p. 475; Matter of Livingston, 34 N. Y., 555, 567; Watkins v. Reynolds, 123 N. Y., 211).

2 In a will a devise of an "estate" to one, is equivalent to a devise of a fee simple [Jarman’s Powell on Devises, II., pp. 411, 412]; but these words do not constitute a present devise.

Notwithstanding the Statute of Uses, as contained in the Revised Statutes, vests the use in possession of the hospital immediately upon the cessation of the trusts for A and B, yet it is often desirable that there shall be a formal conveyance of an outstanding title, and the Court has the power to compel such conveyance [Anderson v. Mather, 44 N. Y., 249]. In respect of the trusts of personality, stocks, etc., this direction is especially expedient for many purposes.
body corporate under the laws of the State of New York, for the purpose of founding, conducting and maintaining a hospital in the city of . . . . . for the care of the needy sick or maimed of such city, and for the purpose of forthwith taking over and receiving in possession and holding in perpetuity my said residuary estate, real, personal and mixed; wherewith to found, conduct and maintain such hospital, as aforesaid.

And I hereby request and direct that the executors and trustees under this will, and such other persons as they in their discretion shall nominate and appoint, shall act as founders, incorporators and the first board of managers or trustees of the said body corporate, with the usual powers and duties prescribed by the laws of the State of New York in respect of Hospital Corporations, and subject to such by-laws and regulations as may be legally imposed and adopted by the said incorporators and their successors. I request that the said Hospital shall be maintained especially for the sick and the maimed of said city without regard to the religious belief or nationality of any applicant for relief; subject, however, to the by-laws of said body corporate regulating the admission and the occupancy of those who may become, or at any time be, the inmates of such Hospital.

I earnestly request that the trustees under this Will may see to it, that the body corporate so to be formed for the purpose of taking over the said residuary estate shall be known by the name of . . . . . . . . . . . . Hospital; or by some kindred appellation permitted by the laws of the State of New York. I request also that the by-laws of

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1 See the importance of providing that the incorporation may be under general laws, Cruikshank v. Home for the Friendless, 113 N. Y., at p. 352; Booth v. Baptist Church, 126 N. Y., 215.

2 The rule against perpetuity has no reference to the duration of any donations absolute to bodies corporate. [Supra, pp. 55, 72, 100.]

3 In the absence of any statutory provision, the persons first forming the body corporate, have the power of electing their successors [Angell & Ames on Corp., 70]. Under the Membership Corp. Law of New York [Chap. 559, Laws of 1895, sections 8, 9], a like power is conferred on Hospital Corporations.
such corporation shall, as far as may be consistent with the laws in such cases made and provided, conform to my desire in the following respects:† *(Here insert them.)*

**FOURTH.—** If it shall transpire for any cause unforeseen, that both the said A and B shall die before the said Hospital Corporation, so intended to be formed, shall be empowered by law to take said residuary estate; or if it happen that when, five years* after my decease shall have elapsed, living A or B, the Hospital Corporation to be formed pursuant to the preceding clause of my will, shall not be vested and possessed of the said residuary estate, or have capacity to receive the same, in whole or in part, in possession, then and in either of those events, whichever first happen, I give, devise and bequeath all the said

† Here may follow such other precatory directions concerning the future management of the corporation as the testator may desire. Stephen Girard’s will was in this regard most precise; the will of Captain Randall, founder of the Sailors’ Snug Harbor, less so. In both cases the directions of the founders have been most carefully followed. But as in this State the founder’s heirs have no visi- torial power, the corporation endowed by his will is usually quite independent of any such directions, unless they may be embodied as conditions subsequent in a conveyance executed under a power contained in a will. It is, therefore, needless to disguise that directions in a will, in regard to a corporation to be formed, are generally devoid of authority, as the law stands at present. A present devise on condition to a corporation in esse stands on quite a different footing. Conditions are made great use of in conveyances since the abolition, in this State, of tenure and most uses and trusts [Van Rensselaer v. Dennison, 35 N. Y., 393, 400; see legacies on condition, Booth v. Baptist Church, 126 N. Y., p. 217].

As the statute now directed against perpetuities can have no reference to common law conditions [Challis, 152, 207; Gray, Restraints on Alienation, 30, *cf. dictum* Gibert v. Peteler, 38 N. Y., at p. 169; and see as to condition precedent, Booth v. Baptist Church, 126 N. Y., p. 241], this species of limitation offers a large field for conveyances, when drafting benefactions to charity.

*“A limitation of a trust estate for an arbitrary period of time, such as fifty years, is valid, provided a termination at an earlier period is called for by the expiration of two lives in being at the creation of the trust.” Schermerhorn v. Cotting, 131 N. Y., at p. 58; Deegan v. Wade, 144 N. Y., 573, 576; Montignani v. Blade, 145 N. Y., 111.*
residuary estate heretofore devised and bequeathed, or intended so to be, for the benefit of such Hospital Corporation to be formed, unto the Hospital, a body corporate, maintaining and conducting a hospital in the said city for the sole corporate use, benefit and advantage of said Hospital forever. ¹

FIFTH.—I do hereby nominate and appoint executors and trustees of this my will; hereby revoking and annulling all former and other wills by me made, and declaring this to be my last Will and Testament. ²

¹ An alternative devise and bequest over was attempted and sustained in Cruikshank v. Home for the Friendless, 113 N. Y., 337, 353; but in Booth v. Baptist Church, 126 N. Y., 215, another form of alternative devise over was held bad, and so conceded to be. In Tilden v. Green, 130 N. Y., 29, the alternative devise failed. But even if an alternative devise be now limited upon a trust estate for two lives, by way of remainder it must be good. “At common law several fees might be limited in the alternative by way of remainder upon the same particular estate, upon such contingencies that not more than one of them could by possibility happen. Lodddington v. Kime, 1 Salk, 224; 1 Ld. Raym., 203; Fearne, Conting. Rem., 373; doe v. Burnall, 6 T. R., 30; re White and Hindle’s Contract, 7 Ch. D., 201;” Challis, 61. The R. S. (1 R. S., 723, sec. 16) have not affected this rule.

² The selection and appointment of executors and trustees under a will intended to establish a charitable foundation is of the first importance. Heirs presumptive and next of kin may be adverse to the charity. The duties of executors and of trustees are not always identical; but where they are authorized to do some act falling under the express trust purposes [1 R. S., 728], executors may be regarded as trustees of an express trust [Wood v. Brown, 34 N. Y., 337, 340]. The will of Captain Randall, the munificent founder of “The Sailors’ Snug Harbour,” selected a number of public officials and was in this form: “And, Lastly, I do nominate and appoint the Chancellor of the State of New York for the time being at the time of my decease, the Mayor of the City of New York for the time being, the President of the Chamber of Commerce for the time being, the President and the vice-President of the Marine Society of the City of New York for the time being, the Senior Minister of the Episcopal Church in the City of New York, and the Senior Minister of the Presbyterian Church in the said city, for the time being, and their successors in office after them, to be the Executors of this
IN WITNESS WHEREOF, I, the said ________________, have
to this my last Will and Testament (consisting of ____________
pages, written on both sides; each written page being
signed by me¹), subscribed my name and set my seal this
________ day of ___________, 189.

Signature, __________________________ [L. S.]

[Attest the will in the presence of at least two wit-
tesses.²]

¹ "my last Will and Testament, hereby revoking, etc." Stephen
Girard nominated five prominent citizens as executors. In both
cases the trusts were carried out. An executor may be appointed
by the name of dignity, office and the like, e.g., "The Episcopal
Bishop of the Diocese of New York," would be a good description of a de-
vicee and à fortiori of an executor [Co. on Litt, 3 a; Hob., 32; ¹
Powell on Devises, 265; cf. Hartnett v. Wandell, 60 N. Y., 346].

It may be well, in a will devoting property of great magnitude to
charity, to provide for a failure of a set of executors to qualify as well
as for their failure to form the body corporate, designed by the testa-
tor to be his residuary legatee and devisee. A testator may even
delegate the power of naming an executor of his will. [Hartnett v.
Wandell, 60 N. Y., 346.]

² This in brackets may be omitted, but as in one case a will failed
where new pages were inserted by the testator after the original will
had been executed according to the statute, it is regarded as always
desirable to provide for proof or identification of all the pages of a
will, as well as for its subsequent custody.

² The usual form under the R. S. is thus:

"Subscribed by the testator in the presence of each of us [or ac-
knowledged by the testator to each of us to have been subscribed by
him] and at the same time declared by him to us, to be his last Will
and Testament; and thereupon we, at the request of the testator, do
sign our names hereto as witnesses, in his presence and in the
presence of each other, this ______ day of ____________, 189.

Signatures and addresses of witnesses:"

While an executor is not now an incompetent witness [The Chil-
dren's Aid Society v. Loveridge, 70 N. Y., 387], it is highly desirable,
for obvious reasons, to have no person witness the execution of a
will whose name is mentioned in the will itself.
[FORM OF BEQUEST AND DEVISE OF RESIDUARY REAL AND
PERSONAL ESTATE (WITHOUT ANY EXPRESS TRUST) FOR
THE BENEFIT OF A HOSPITAL CORPORATION TO BE
FORMED.]

FIRST: Specific bequests and devises.

SECOND: I hereby give, devise and bequeath to my ex-

1 The scheme of this form is substantially that adopted in the will
in Tilden v. Green, 130 N. Y., 29; but in that case the court de-
clined to decide [p. 53] whether the executors took the legal estate to
the lands, or a power in trust under the R. S. The intention in this
form was to draft a devise which does not depend on an ex-
press trust. At the threshold of such an undertaking, counsel will,
perhaps, be confronted with the following doubt: Is it possible to
devise an estate to a corporation not in esse [but to be formed within
two specified lives] without limiting also some intermediate or par-
ticular estate? There is something said in Booth v. Baptist Church,
126 N. Y., at p. 237, which tends to hold that a devise to a body cor-
porate not in existence, can be effected only by means of a trust, or
by creating a future estate by way of executory devise or contingent
remainder. Before the R. S. a devise to a corporation not in esse
could be effected by an executory devise [Inghis v. Sailors’ Snug
Harbour, 3 Peters, 99], or by a springing use. Such limitations were
valid, although contrary to the well-known rule of legal limitations,
that an estate of freehold could not take effect in futuro, except by
way of remainder. If before the R. S. a limitation took the form of
an executory devise and there was no disposition of the freehold be-
fore the executory limitation was to be executed as an estate, the
estate descended until the executory devise took effect [Cruise, D.,
Tit. xxxviii., c. 18, s. 1; 2 Bla. Comm., 173]. So before the R. S. if a
limitation took the form of a conveyance to uses [and even in a will,
the imputation might take this form, for the better opinion is that the
Statute of Uses operated on uses created by will, although the
Statutes of Wills were enacted after the Statute of Uses, 1 Sand. Uses,
195; 2 Fonbl. Treat. Eq., 24; 1 Sugden on Powers, 238; 1 Jarman’s
Powell on Devises, 214, note 2; ibid. 217, note 3; Ram on Wills, 254],
and there was no disposition of the intermediate use, or of the use
prior to the use limited to the corporation to be formed; in that case
a use must have resulted until the springing use arose [Cornish on
Uses, 68 et seq.]. It is not possible that the R. S. which declared feudal
tenures abolished and entirely abrogated the fundamental principles
applicable to common law conveyancing, intended to prevent a limi-
tation to a corporation not in esse [if such estate is made to vest
within the period of two lives in being], unless some intermediate
ecutors and trustees and to their successors in the trusts hereby created, and to the survivor and survivors of them, all the rest, residue and remainder of all the property, estate is also limited by the same instrument. Such a result would not be consistent with the reform intended by the R. S. The R. S. say, that a freehold estate may be created to commence at a future day [1 R. S., 724, sec. 24] and that no remainder valid in its creation shall be defeated by the determination of the precedent estate before the happening of the contingency on which the remainder is limited to take effect [1 R. S., 725, sec. 34]. There is, moreover, no provision of the R. S. which invalidates a limitation which would formerly have been good as a springing use, provided it now take effect as an estate within the time prescribed by the new rule against perpetuities. The intention of the R. S. was to consolidate all the rules relating to uses, executory devises and legal limitations and subject them to one uniform principle [see Revisers' Notes to Article 1, Chap. 1, Part II. R. S.], free from feudal reasons and dependent only upon the reasoning applicable to all property, personal as well as real [ibid., supra]. It is therefore clear that on principle a devise at the present day to a corporation not in esse, or to one to be formed, is now valid, if the estate is made to vest in possession of such corporation within or at the expiration of two lives in being when the will takes effect [1 R. S., 723, sec. 15; 1 R. S., 726, sec. 41]; even though the testator wholly fails to dispose of the estate for the period prior to the time prescribed for the ultimate vesting of such estate in the new corporation.

To hold the contrary would be to restore the feudal rule of the common law, exacting that a seizin must be continuous [vid. Challis, Rule 1, p. 80; and ibid., Rule 4, p. 88]. It would be counter to the express provision of the R. S., that a freehold estate may be created to commence at a future day [subject only to the rule against perpetuities] [1 R. S., 724, sec. 24], and to the other rule taking away the common law necessity of a particular estate to support a remainder [1 R. S., 725, sec. 34]. Now when a valid expectant estate is limited and the ownership is in abeyance and there is no valid direction for accumulation, the rents go to the persons presumptively entitled to the next eventual estate [1 R. S., 726, sec. 40].

It is very clear that by the Article of the Revised Statutes (Art. II. of Tit. II., Part II., R. S.) relating to trusts, it is intended, that a trustee of real property shall take the legal title only in one of the four instances prescribed by the statute (supra, pp. 95, 97; 1 R. S., 728, sec. 55; 1 R. S., 729, sec. 58). In every other case, where the trust is valid only as a power, the lands to which the trust relates remain in, or descend to the persons otherwise entitled, subject to the execution of the trust as a power (1 R. S., 729, sec. 59).
real and personal, of whatever name or nature, and where-
soever situated, of which I may be seised or possessed, or
to which I may be entitled at the time of my decease,

These provisions, separating the trust from the legal title, in all but
four instances, have not, however, deprived owners of property of
the power of imposing upon their estates most other limitations
having the general characteristics of a former trust (supra, p. 97;
Downing v. Marshall, 23 N. Y., at p. 377). It matters little, therefore,
whether executors take the legal title to lands as trustees, or a
power in trust, under the Revised Statutes, without the legal estate
(Brandow v. Brandow, 66 N. Y., 401, 406; Cruikshank v. Home for
the Friendless, 113 N. Y., at p. 351). We should remember that a
trust at common law, excepting one to accumulate, did not create a
perpetuity; there was nothing in a trust estate which made it in-
alienable per se (Hillen v. Iselin, 144 N. Y., at p. 379). Indeed, any
restraint upon the power of alienation might vitiate the trust (Lewin
on Trusts, Last Edit., 98; ibid. (1st Edit.), 138), before the Revised
Statutes; excepting in the case of a trust for a married woman
(Lewin on Trusts, p. 693, and chap. xxvii., sec. 6, Estate of a feme
coevert cestui que trust; Mr. Sandford’s brief, 6 N. Y., at p. 574 et seq.).
Trust estates in New York were in two cases first made inalienable
by force of the Revised Statutes (1 R. S., 730, sec. 66; Leonard v.
Burr, 18 N. Y., at p. 107; Hillen v. Iselin, 144 N. Y., at p. 379; Robert
v. Corning, 89 N. Y., 225). Where the trust estate is now made
alienable beyond two lives in being, it offends the present statute
against perpetuities. A trust to receive the rents and profits of
lands and apply them to the use of a person generally, or a trust to
accumulate for the benefit of one or more minors, renders the estate
inalienable (Radley v. Kuhn, 97 N. Y., 26, 31). In the cases of other
trusts of lands, the trust estate is not inalienable, and therefore does
not offend the statute against perpetuities (ibid., supra; 1 R. S., 728,
sec. 55).

It has been strenuously contended that an express trust under the
3d subdivision of the 55th Section (1 R. S., 728), “to receive the rents
and profits of lands, and apply them to the use of any person, during
the life of such person, or for any shorter term,” authorized only a
trust term based upon the lives of the designated beneficiaries, not
exceeding two (1 R. S., 723, sec. 15), and that a trust to apply rents of
lands to other than two persons designated as beneficiaries, for the
lives of such beneficiaries or any shorter term, necessarily contra-
vened the section of the statute directed against perpetuities and was
void (1 R. S., 723, sec. 15). But the contention is now at rest, and it is
held that this trust purpose does not require the estate to be limited as
to its duration upon the lives of beneficiaries alone. A devise, there-
fore, in trust, to receive the rents and profits of lands, terminable
which may remain after making provision for the specific legacies and bequests hereinbefore devised and bequeathed, to have and to hold the same unto my said exec-
during or at the expiration of two lives in being, is valid even if the rents are payable to any number of _cestuis que trustent_ during the trust term (Crooke _v_. County of Kings, 97 N. Y., 421; Bailey _v_. Bailey, 97 N. Y., 460; Schermerhorn _v_. Cotting, 131 N. Y., 48). And it is also held that the two lives measuring the trust term need not be connected with the estate (Crooke _v_. County of Kings, 97 N. Y., 421). These decisions on the R. S. seem to place the law of trusts upon less arbitrary foundations than was formerly thought by many to be consistent with the text of the Revised Statutes. Such decisions certainly reconcile the new law to the essential principles of the common law, which regulated trusts in England after the Statute of Uses (27 Hen. VIII.), and in New York until 1830.

It is very obvious that in all the cases last cited the trustees took the legal estate, and so now wherever there is in fact a trust to receive the rents and profits of lands and apply them to the use of any person, the trustee takes the legal estate. Where no trust purpose specified in the 55th section is limited by a will, the trustees nominated in the will have a power in trust only [supra, pp. 95, 97; 1 R. S., 729, sec. 56]. In this form no express trust purpose is declared.

But although trustees nominated in the will take the inheritance, or estate, only in the instances provided for in the 55th section of the Article on Trusts, executors _qua_ executors may still take the legal estate by devise in some cases (1 R. S., 728, sec. 55; _ibid._, sec. 56). At common law a devise to executors to receive the rents commonly carried the inheritance to them [see 1st Ed. of Mr. Jarman's Powell on Devises, I., 221, note, and cases there cited]. So a devise _in trust_ to sell, or a devise "to executors to sell lands," but not a devise "that executors shall sell the lands," carried the fee to them [1 Sugden on Powers, 129 et seq.]. The real question then was: Had the testator intended to cut a power only out of a fee and let that only pass by his devise? Now, since the Revised Statutes, a trust to executors as trustees carries a fee only in the instances declared in the Article on Trusts [sec. 55].

By the following section of the Article on Trusts (sec. 56), it is provided that "a devise of lands to executors or other trustees, to be sold or mortgaged, where the trustees are not also empowered to receive the rents and profits, shall vest no estate in the trustees; but the trust shall be valid as a power, and the lands shall descend to the heirs, or pass to the devisees subject to the execution of the power." This last section expressly excludes another class of cases where executors might formerly have taken a fee by implication. Before its enactment the cases were pretty liberal in extend-
utors and trustees, and to their successors in the trusts hereby created, and the survivors or survivor of them, in trust, to possess, hold, manage, and take care of the same during a period not exceeding two lives in being, that is to say, the lives of my niece A and my grand niece B, giving fees to executors by implication [Tucker v. Tucker, 6 N. Y., 416]. Yet it has been said that this section hardly altered the pre-existing law [Moncrief v. Ross, 50 N. Y., at p. 435] in this respect, although the instances where executors take a fee by devise, or by implication, independently of limitations of express trusts, will be found now very rare [Kinnier v. Rogers, 42 N. Y., 531, 534; Manice v. Manice, 43 N. Y., 303, 363; Cooke v. Platt, 98 N. Y., 35; Chamberlain v. Taylor, 105 N. Y., 185; Booth v. Baptist Church, 126 N. Y., 215, 237, 238; notwithstanding that it may often be more convenient that the executors with a power of sale should have the legal estate [Robert v. Corning, 89 N. Y., 225, 236, 237]. In case they do not take the estate, the title to lands descends to the heirs, who take the rents and profits until the power of sale is executed [Lent v. Howard, 89 N. Y., 169; Sweeney v. Warren, 127 N. Y., 426], unless there is some limitation disposing of them otherwise.

1 It is always most important that the entire residuary estate should be clearly disposed of by a will, or embarrassing questions arise. The former rule of law was, that the heir took that part of the residuary realty not specifically disposed of, without regard to a general residuary clause, which was presumed to operate only on personalty [2 Powell on Devises, with Jarman's notes, p. 102; Burton, Real Prop., 98, 99]. This rule is not wholly abrogated [Vernon v. Vernon, 53 N. Y., 351; Lent v. Howard, 89 N. Y., 169], although much changed by the R. S., which make a will of land take effect from the death of testator and not as formerly from the execution of the will [2 R. S., 57, sec. 5]. The heir now may be excluded from the residuary realty, even by implication [1 R. S., 727, sec. 40; Lent v. Howard, 89 N. Y., 169; Cruikshank v. Home for the Friendless, 113 N. Y., at p. 355]. Yet a case may be imagined where it would be unjust to a tenant by the curtesy, to make realty pass by implication under a general residuary clause. Formerly a residuary devise was a specific devise, and it was required to be a perfect devise, or the land went to the heir [2 Powell on Devises, 102]. Lapsed devises did not then fall into the residuary realty, but went to the heir as undisposed of; but this rule has been changed by the R. S., and lapsed devises now fall into the residuary devise [2 R. S., 57, sec. 5; Cruikshank v. Home for the Friendless, 113 N. Y., 337; note that the last edition of Gerard's Titles, anno 1896, p. 398, Tit. viii., fails to state the rule accurately].
and until the decease of the survivor of said two persons,¹ and after deducting all necessary and proper expenses, to

¹ The draftsman of Mr. Tilden’s Will evidently intended at this point to provide against a perpetuity, having due regard to the following rule of the R. S. [1., p. 723, sec. 15]: “The absolute power of ‘alienation, shall not be suspended by any limitation or condition ‘whatever, for a longer period than during the continuance of not ‘more than two lives in being at the creation of the estate, except ‘in the single case mentioned in the next section.” [The next section of the statute refers to the vesting of a contingent remainder limited upon a prior remainder which fails]. We have already stated in what manner the creation of a trust term came to suspend the power of alienation, and was thus rendered obnoxious to the foregoing section [supra, pp. 144, 145]. The new rule against perpetuities, now in force in New York, is only a modification of the former rule, which was formulated in England subsequently to the Statute of Uses [27 Hen. VIII.], and was in reality especially directed against what were then new modes of conveyance, uses and executory devises. It had no reference to the older legal limitations by remainders [vide Challis, 158, 159]. Remainders had a set of principles of their own designed to prevent a perpetuity. [See Mr. Butler’s note to Fearne, Conting. Rem., 562.] Nor had the rule against perpetuities any real relation to those trust estates, which were freely alienable [supra, pp. 98, 144]. The creation of trust estates was, however, subjected to all the rules then relating to legal estates. The legal estate of the trustee and his heirs was alienable; provided that if the purchaser had notice of the trusts, they followed the legal estate.

With this reference to the leading principles [and of course each was subject to rules applicable to exceptional instances] of the former law, let us pass next to the statement of the general rule regulating perpetuities in New York before the Revised Statutes: “Property could not be rendered inalienable beyond a live or lives in being and twenty-one years afterwards, without reference to the infancy of any person whatever;” a person en ventre sa mère was for the purposes of the rule considered as in existence [Armitage v. Coates, 35 Beav., 1; Cadell v. Palmer, 1 Clark & Finnelly, 372; Inglis v. The Sailors’ Snug Harbor, 3 Peters, 99, 114]. The last fact stated has given rise to the erroneous impression that the period of gestation might be added to the term in gross [21 years]; but this was not the case. [See note to Cadell v. Palmer, Tudor, Lead. Cas. Real Prop. and Conv., 464.] We, however, find this period of gestation added to the term in gross, both in early and late cases in New York [Coster v. Lorillard, 14 Wend., 265, 295; Chwatal v. Schreiner, 148 N. Y., 683, 693], and it may be, therefore, that the common law rule in this respect stood quite differently in England and in New York. It
apply the same and the proceeds thereof,\(^1\) to the objects and purposes hereinafter mentioned, that is to say, for the advantage and use of the corporation to be formed during

was certainly open to the Courts here to decide the period of suspension for themselves, as the English rule received its final modification only subsequently to the War of American Independence. But it seems doubtful whether the Courts intended to prescribe a period for this State longer than that allowed in England. However this may be, the Revised Statutes reduced this period from any number of lives in being to two, and the twenty-one years in gross to the period of actual minority. This reform prevented the selection of a great number of lives in being in order to attain the longest possible span of human existence as a lawful measure of suspending the power of alienation [See Thelluson’s Will, based on 28 lives, 4 Ves., 227, 342; 11 Ves., 112, 149; and Mr. Hargrave’s Treatise on The Thelluson Act, 39 and 40 Geo. III., c. 98].

The effect of the existing rule of the R. S. must be to shorten materially the period formerly allowed for suspending the power of alienation, for even the average duration of groups of two lives must be less than the average duration of greater groups of lives, while the term in gross is now completely cut off. But the law as to what constitutes a perpetuity [1 R. S., 723, sec. 14], is not now different from the former law on the same subject: “A perpetuity exists only where “there are no persons in being, by whom an absolute fee in possession can be conveyed” [1 R. S., 723, sec. 14]. The old law raised no objection to estates granted in perpetuity, provided there was a power to bar them or destroy them, so as to render them alienable [Sir Edward Sugden in Cadell v. Palmer]; the same principle prevails now under the R. S. [Williams v. Montgomery, 148 N. Y., 519, 526]. Where there are living parties who have unitedly the entire right of ownership, the statute has no application [Norris v. Beyea, 13 N. Y., 273, 289]. But lives alone are now the standard of any valid limitation suspending the power of alienation [Yates v. Yates, 9 Barb., at p. 346; Beekman v. Bonsor, 23 N. Y., at p. 316; Cruikshank v. Home for the Friendless, 113 N. Y., at p. 351]; the term in gross has been cut off, and a trust term where the power of alienation is suspended by the R. S., must end at the expiration of two lives in being at the time of the creation of the estate [Booth v. The Baptist Church, 126 N. Y., 215, 238].

\(^1\) Up to this point of this draft there is no purpose specified which, under the R. S., carries a fee to the executors; calling the executors “trustees” will not now in itself carry a fee, nor indicate an intention to create an express trust under the 55th Section of the Statute on Trusts [Freeborn v. Wagner, 2 Abb. Ct. App. Decis., 175, 179]. On the other hand, an estate will sometimes go to the executor as
the two lives aforesaid,¹ as hereinafter more precisely pro-
vided.

And for the better effectuating of said residuary devise
and bequest to said corporation, I do now request and
direct the executors and trustees of this my will to obtain
as speedily as possible after my decease the incorporation
of a body corporate to be known as the
Hospital, or by some kindred appellation permissible by
law, with power to found, maintain and conduct a hospital
in the city of ; such corporation to have the
usual powers and duties of hospital corporations in the
State of New York, including the power to take and hold
the residuary estate herein devised and bequeathed or in-
tended so to be.² And when and as soon as the said body
corporate shall be incorporated I empower and direct my
executors and trustees to convey and apply all the said re-

trustee of an express trust, without any express limitation of an
estate to him, for no particular words are now necessary to consti-
tute an express trust. [Leggett v. Perkins, 2 N. Y., 297; Wright v.
Douglass, 7 N. Y., 564; Dillaye v. Greenough, 45 N. Y., 438, 445;
Vernon v. Vernon, 53 N. Y., 351; Heermans v. Robertson, 64 N. Y.,
332; Moore v. Hegeman, 72 N. Y., 376, 384; Donovan v. Van De Mark,
78 N. Y., 244; Morse v. Morse, 85 N. Y., 53; Ward v. Ward, 105 N.
Y., 68. The general principles are perspicuously stated in Toronto
General Trust Co. v. The Chicago, B. & Q. R. R., 123 N. Y., 37, and
in Foose v. Whitmore, 82 N. Y., 404.] The distinction between exec-
cutors and trustees is well pointed out in Wood v. Brown, 34 N. Y.,
337. In some cases where the same person is appointed both exec-
utor and trustee, he may qualify as executor without accepting the

¹ Burrill v. Boardman, 43 N. Y., 254; Cruikshank v. Home for the
Friendless, 113 N. Y., at p. 352; cf. Shipman v. Rolls, 98 N. Y., 311,
as to remainder to corporation not in esse at the testator's decease
limited on a single life estate. The vice in many of the devises to
corporations to be formed is the failure to provide, that they shall take
effect absolutely in possession within or at the expiration of two lives in
being at the creation of the estate. [1 R. S., 723, sec. 15; Booth
v. Baptist Church, 126 N. Y., 215, 236, Cruikshank v. Home for the
Friendless, 113 N. Y., 337, 350, 352; Tilden v. Green 130 N. Y., 29].

The incorporation should be directed to be formed under general
laws, and not by a special act [Cruikshank v. Home for the Friend-
less, 113 N. Y., at pp. 350, 351, 352, Booth v. The Baptist Church, etc.,
126 N. Y., 215].
siduary estate to the absolute uses and purposes of the said corporation forever, in order that such corporation may devote the same, under the laws of the state of New York, to the charitable uses and purposes hereinbefore specified.\(^1\)

**THIRD.**\(^2\)—If there shall be any appreciable time consumed

\(^1\) Although at least one of the objections to the will of Mr. Tilden [130 N. Y., pp. 43, 44], has been obviated by the recent act, Chapter 701, Laws of 1893, it is not now lawful to leave it discretionary with executors to apply the residuary to the use of the corporation to be formed [cf. 5 Harvard Law Rev., pp. 389, 402]. Every trust or power in trust presupposes a definite use worked out by the settler himself and not by the courts [supra, pp. 102, 103]. The administration of charitable uses, permanent and indefinite in nature, now belongs to the State by means of charitable corporations organized under general laws [supra, pp. 66, 72, 81]. A mere discretion not obligatory might carry the estate to the executors in fee. Lewin on Trusts, 171 et seq.

\(^2\) Such a provision may be necessary to prevent a partial intestacy [supra, pp. 142, 146]. There may now be no valid objection to a limitation in a will, which provides that “such accrued rents, income “and profits shall follow the trust devises and bequests hereinbefore “limited to a hospital corporation to be formed” [1 R. S., 726, sec-40]. But as the R. S. provides that there shall be no accumulation directed except for the benefit of one or more minors [1 R. S., 773, sections 3, 4; 1 R. S., 726, sections 37, 38] there may be some question made about a bequest of income to a corporation which may possibly not be in esse during the whole of two designated lives. Yet such a bequest of income is entirely without the reason of the statute against accumulations. Two lives, presumably at their longest, do not equal the whole period of minority, which in the old statutes was assumed to always equal three lives [“21 years or three lives,” *vid.* Statute, 32 Hen VIII., c. 28]. Yet, as there clearly cannot now be in this State an accumulation for even two lives, this argument about the normal length of two lives goes for little. But a direction in a will that “the income, profits, etc., before incorporation shall follow the devise and bequest to the hospital corporation to be formed,” may be supported on other grounds. In the first place, the incorporation under general laws consumes no appreciable space of time, as it should be presumed to be done at the moment of testator’s death. Such a presumption often supports devises *prima facie* in conflict with the sections of the R. S. now directed against perpetuities [cf. Manice v. Manice (Mr. O’Conor), 43 N. Y., at p. 332, Deegan v. Wade, 144 N. Y., 573, 576; Matter of Nesmith, 140 N. Y., 609]. In the next place, a devise to a corporation “non in esse,” but to be called into being by executors is in reality, if not in legal contemplation, a devise to executors as a *quasi*.
in the formation of the body corporate, mentioned in the preceding clause of my will, or any delay attending the same (which delay I deprecate and do not intend shall take place), then in that event only, I give, devise and bequeath the income, rents and profits which may accrue on said residuary estate between the time of my decease and such incorporation to (better to specify an existing body corporate) the same, payable as a sum in gross, but not to be accumulated for this purpose.

1 Fourth.—Here may follow such other directions as the testator may wish to prescribe touching the corporation to be formed, but they should not be made a sine qua non. Testators cannot contravene the laws of the State in regard to the formation, powers or duties of corporations, and an impossible requirement as a condition precedent to vesting may vitiate the devise and bequest (see the preceding form and the Girard Will, 2 How., 127).

corporation [see the modus operandi under Captain Randall's will. Inglis v. Sailors' Snug Harbour, 3 Peters, 99, and the printed pamphlet in re, published by Robert Carter, at New York, in 1848]. And lastly, there is no direction for an accumulation for the benefit of persona non in esse, but a direction that the income shall follow an estate which may now in some form lawfully be limited, devised and bequeathed (cf. Mr. O’Conor's 3d subdiv. of Fourth Point, Manice v. Manice, 43 N. Y., at p. 335); yet, as such an estate cannot be vested in a corporation not in esse, it may be unwise to give at present to such a corporation the income arising on the residuary estate before incorporation; although as a corporation not in esse may now take an expectant estate [supra, pp. 87, 88, 89, 111.], it would seem that the accruing rents and profits not disposed of ought to belong to it as the person presumptively entitled to the next eventual estate [1 R. S., 726, sec. 40].

1 Formerly it was best to provide for trusts of real and personal estates by two different sets of limitations; it being deemed impossible to combine such limitations, by reason of the diverse nature of real and personal property; but this course is not usual or necessary now in this State. It is true that the executors may hold the personal property as trustees, while they do not hold the lands at all, but only a power in trust. This distinction is now firmly rooted in the law of New York. But is the distinction between an express trust and a power in trust in a case where the rents are disposed of by the will now very important? It is thought not (Brandow v. Brandow, 66 N. Y., 401, 406; cf. the words
FIFTH.—It may be well to provide here for the contingency
used in Cruikshank v. Home for the Friendless, 113 N. Y., at p. 391.)
The above form contains no provision which gives the executors
the legal estate in the lands under the R. S. of New York. There is
no trust under the 55th Section (t R. S., 728), and no devise to execu-
ators to receive the rents and profits of lands, no power of sale and
no direction for an immediate conversion. There may, however, be a
trust power to the executors (Booth v. Baptist Church, 126 N. Y., 215).
Now a trust power is as imperative as an express trust (t R. S., 796
sec. 96; Smith v. Floyd, 140 N. Y., 337; Farmers' L. & T. Co. v. Car-
roll, 5 Barb., at p. 653; Downing v. Marshall, 23 N. Y., at p. 380), ex-
cepting where it is made to depend wholly on the will of the grantee
(t R. S., 796, sec. 96). Then its resemblance to a trust ceases. On
the death of the grantee of a trust power it is not extinguished (t R.
S., 734, sections 100, 101, 102; Greenland v. Waddell, 116 N. Y., 234,
242; Delaney v. McCormack, 88 N. Y., 174, 182). No perpetuity may
be accomplished by means of a power, and any attempt so to do will
contravene the statute against perpetuities as completely as if at-
tempered by the medium of an express trust (Belmont v. O'Brien,
12 N. Y., 394, 403; Everitt v. Everitt, 29 N. Y., 39, 78; t R. S., 737,
sections 128, 129; and such was the common law rule: Duke of
Marlborough v. Earl Godolphin, t Eden, 404).

It is not the case under the R. S. that where there is only a trust
power there is no perpetuity, because lands descend subject to
be divested by the execution of the power. The power of aliena-
tion is thereby suspended (Booth v. Baptist Church, 126 N. Y.,
215, 238, 239). Such a power is designed to bring a future estate
into existence, and therefore the creation of such estate by means
of the power limited in trust relates back and must have regard
to the present statute against perpetuities (ibid., p. 240). It was
formerly doubted whether a power of this character created by
a will ever operated by way of use, or under the Statute of Uses
(see Mr. Booth in Hargrave's Collect. Jurid., I., 427; t Sugden on
Powers, I; and cf. Powell on Devises, I., 214, note by Mr. Jarman).
Under the R. S. a power now clearly takes effect by virtue of the
articles on Powers and Wills. The entire law of real property has
been remodeled by the R. S. on different foundations, and in re-
spect of the present law of powers, even the old analogies have
ceased to be verisimilitudes (Root v. Stuyvesant, 18 Wend., at p. 271;
Jennings v. Conboy, 73 N. Y., 230, 233; Cutting v. Cutting, 86 N. Y.,
522, 530, 537; Delaney v. McCormack, 88 N. Y., 174, 180). The statute
against perpetuities may be set a-running by means of a trust power
in a will (Booth v. Baptist Church, 126 N. Y., at p. 238), whenever the
ownership of land is thereby "left swinging in abeyance" until a
contingency arise (Cruikshank v. Home for the Friendless, 113 N.
Y., at p. 352).
that a corporation to be formed may not be able to take, living A and B [See the preceding form, p. 139].

SIXTH.—Here may follow some provision designed to provide for a contingency where executors refuse to take any steps towards the formation of the corporation intended to take the benefit of the residuary devises and bequests.

SEVENTH—Nomination and appointment of executors as in the preceding form.

[FORM OF DEVISE TO TRUSTEES IN TRUST FOR TESTATOR’S SON, WITH POWER TO LATTER TO APPOINT TO CHARITY ON FAILURE OF ISSUE.]

Item: I hereby give and devise all that certain piece or parcel of building1-land, lying on the northerly side of the Western Turnpike between the City of New Burgh and the Town of Walden [being the same freehold property which I purchased in 1863 from Captain James Stebbins], together with the improvements and appurtenances thereunto belonging or appertaining, to A and B, as trustees of the uses and trusts now herein expressly declared by me, that is to say: First: To receive the rents and profits thereof and apply them to the use of my second son John, during his life.2 Second: To lease the said parcel of land for terms of years not exceeding twenty-one years in possession; and to that end I hereby empower the said trustees or the survivor of them, and their successors or successor in the said trusts, to make and grant leases of the said hereditaments for any term of years, not exceeding twenty-one in possession,3 in such parcels and on such terms as to them may seem best calculated to produce the largest permanent in-

1 See power to demise for terms of twenty-one years [note 3 infra].
2 This trust purpose creates an express trust [1 R. S., 728, sec. 55], and carries the fee to the trustees for the life of the son.
3 Leases of urban or building-lands [supra] may be made in New York State for terms of indefinite duration; but by the Constitution leases of agricultural lands cannot exceed twelve years [Art. 1, sec. 13].
come, during the life of my said son John,\textsuperscript{1} with remainder to such uses,\textsuperscript{2} for the life of any present or future wife of my said son John, as he may appoint by any last will and testament; and subject thereto remainder in fee to the issue of the body of my said son John. And in the event that my said son John shall not leave issue of his body, I empower\textsuperscript{3} him by last will and testament to appoint the said hereditaments\textsuperscript{4} for the benefit in fee simple of all, or any one or more, of the following bodies corporate in the City of New York: (1) the Sheltering Arms; (2) The New York Juvenile Asylum; (3) The Hebrew Orphan Asylum; hereby directing that such appointment shall be operative only in the event that my said son John shall die without issue him surviving. And in default of appointment or partial appointment, remainder to the said bodies corporate in fee, for the equal use, benefit and advantage of said bodies corporate forever.\textsuperscript{5}

\textsuperscript{1} The real object of the trust term is the testator's son. The estate of the trustees ceases when the son dies, and then the use for the benefit of the widow becomes operative by virtue of the exercise of the power of appointment. This use for her involves the second life permissible by the R. S. A contingent remainder in this State tends to a perpetuity since the abolition of the necessity of a particular estate and the common law rules respecting legal limitations [\textit{supra}, pp. 87, 143].

\textsuperscript{2} In view of the adoption and revision of the Statute of Uses in the R. S. [1 R. S., 727, 728], the former language conveying and dealing with the use as a definite thing is not only convenient, but accurate, and the only one consistent with the decisions.

\textsuperscript{3} A power now takes its effect from the R. S. and the Article on Powers.

\textsuperscript{4} "Hereditaments" is still the most comprehensive term of description in the law of New York, involving lands, appurtenances, and in short everything heritable [Canfield \textit{v.} Ford, 28 Barb., 336].

\textsuperscript{5} The Revised Statutes [1 R. S., 723, sec. 16] tolerates the limitation of a contingent remainder in fee after a lawful trust term for two lives; such remainder to take effect in the event that the person to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age.
APPENDICES, NOTES AND COMMENTS.

A great number of adjudged cases in New York make persistent reference to the Statute of Charitable Uses, 43 Elizabeth, c. 4. Yet how few lawyers are familiar with the text of this celebrated act! There is good reason for this oversight in the fact that few private law libraries contain the English Statutes at large. A republication of the leading English Statutes with notes, in one volume, is a great disideratum for the science of law.¹ In the absence of any such publication the text of this law is given in Appendix No. 1, to this Essay. A perusal of the statute for the first time often excites amazement that the act itself could ever have been deemed so influential upon the question of equity jurisdiction.² The surprise is not lessened by a study of the rise and growth of the law of charities in England. The law of charities has, however, alway been more or less within the influence of statute law. The ancient Roman Law needed very great modification before gifts to incertae personae were tolerated.³ The clerical lawyers of England applied the Roman Law only after it had been thus ameliorated. But the influential form of charity in feudal and mediaeval England was by gifts to bodies of friars, churches and other ecclesiastical foundations.⁴ The English schism or secession from Rome destroyed these revered and most kindly almoners and guardians of the poor, and then the ancient law of charity was reconstructed and a new jurisdiction created, without affecting sensibly the ancient jurisdiction of the Chan-

¹ Many of those acts were incorporated verbatim in Jones & Varick's Revision of 1787-88; and in some form are contained in the Revised Statutes of New York.
² Ould v. Washington Hospital, 95 U. S., at p. 309.
³ Supra, pp. 15, 16.
⁴ Supra, pp. 16-19.
The great monument of this reform is the Statute of 43d Elizabeth contained in the Appendix No. 1. In the Province and State of New York history has only repeated itself. There can be no doubt that until the dethronement of the Chancellor of New York as the great judicial officer, the common law of charities flourished here. Subsequently the new appellate tribunal built an elaborate theory of charitable dispensation based on the statutes of the State, or those laws enacted after our independence of the Crown had been achieved. The theory depended wholly on a system of charitable corporations which began in New York only in 1784. It may be a question, whether such a creation of corporate persons, justified the triumphant judicial inference, that all forms of private or non-corporate charity were thereby intended to be destroyed. Upon this question we need have no opinion; the matter is laid at rest by final authority.

The statute law of this State, after these decisions, became at once paramount in the realm of permanent and indefinite forms of charity, for in order to avoid the statute against perpetuities, which was applied by the courts to charitable donations in trust, corporate agencies were necessarily invoked. The intention in the course of the text of this Essay has been to trace the fluctuations of the judicial doctrines in New York, as well as the rise of the new law of charities, and the ruling motive. This attempt need hardly be repeated at this place.

The Appendices II. and III. are subjoined in order to show in a tabular form the growth of statutory influences on the law of charities in New York. It has been stated in the preceding pages that the Courts of this State have attributed to the legislature a policy of substituting a great system of corporate charities, instead of the former indefinite and permanent charitable uses and trusts. The legislature has now consoli-

1 Supra, pp. 32-33.
2 Infra, p. 160.
3 Supra, pp. 43-54.
4 Supra, pp. 66-67.
5 Supra, pp. 66, 67.
dated and revised most of the acts relating to non-business corporations generally, including Cemeteries, Christian Associations and Societies for the Prevention of Cruelty, Hospital Corporations, Bar Associations, Veteran Soldiers' and Sailors' Associations, and Soldiers' Monument Corporations, in "The Membership Corporations Law," constituting chapter forty-three of the General Laws [Chap. 559, Laws of 1895]. The same act repeals a great number of old laws on the same subjects. See schedule of laws repealed at the end of c. 559, Laws of 1895.

"The Religious Corporations Law," chapter 723, Laws of 1895, constituting chapter forty-two of the General Laws, is intended to be a substitute for all existing general laws for the creation and temporal administration of religious corporations. All the provisions of the laws repealed thereby are now contained either in "The General Corporation Law," being chapter thirty-five of the General Laws [Chapter 687, Laws of 1892], or in "The Religious Corporations Law," except Chapter 323, Laws of 1853, and section 9 of chapter 90, Laws of 1835, relating to a change of name of religious corporations.¹

The revisers of "The Religious Corporations Law," in their report to the legislature gave a somewhat extended account of the early laws of the State relating to religious corporations, which may be useful to the practitioner.²

By section 27 of the University Law [c. 378, Laws of 1892], the Regents of the University of the State of New York may incorporate any university, college, academy, library, museum, or other educational institution, under such name, with such number of trustees or other managers, and with such powers, privileges and duties, and subject to such limitations and restrictions in all respects as the regents may prescribe in conformity to law. Chapter 43, Laws of 1786, c. 395, Laws of 1853, and c. 333, Laws of 1875, authorizing the creation of library corporations, are repealed by "The Membership Corpora-

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¹ *Vid.* Report of the Revisers to the Legislature with draft of "The Religious Corporations Law."

tions Law” [c. 559, Laws of 1895], and are not re-enacted. Corporations, therefore, incorporated under such laws, will be subject to “The Membership Corporations Law.” Library corporations can hereafter be incorporated only under the University Law [c. 378, Laws of 1892].

“The Membership Corporations Law” is intended to apply to the large class of corporations which are organized for non-business purposes, excepting religious corporations, which are governed by The “Religious Corporations Law,” educational corporations, which are regulated by the University Law (chap. 378, Laws of 1892), and medical, dental and veterinary corporations, the laws relating to which, in the scheme of the revision, are to be inserted in the Public Health Law.

In the future, the formation of charitable corporations may be largely referred, then, to the General Laws and the practitioner will need to consult “The Statutory Construction Law,” constituting chapter one of the General Laws [chap. 677, Laws of 1892], The General Corporation Law (chap. 687, Laws of 1892), besides those laws named above. In seeking the powers and duties of a Membership Corporation, for example, he will refer, first, to “The General Corporation Law,” which is applicable to all corporations; second, to Article I. of “The Membership Corporations Law,” which is applicable to all membership corporations, and thirdly, to the special provisions contained in the article of “The Membership Corporations Law,” relating to the class of corporations under investigation. If there is no such Article, a reference to “The General Corporation Law” and to Article I. of “The Membership Corporations Law” will be sufficient. Article II. of the latter law provides for the incorporation of all non-business corporations not provided for in Articles III. to XII., or in any other law. Articles III. to XII. provide for the incorporation of various classes of corporations, concerning which there are special provisions which could not properly be applied to all Membership Corporations.¹

Corporations heretofore incorporated under laws re-

¹ Notes of the Commissioners of Statutory Revision.
pealed by "The Membership Corporations Law," will be subject to the provisions of the new law, which is in effect a modification, or an amendment of the law repealed (see The General Corporation Law, Sec. 36; The Statutory Construction Law, Sec. 32).
APPENDIX No. I.

STATUTE OF CHARITABLE USES.

43 Eliz., c. 4.

AN ACT to redress the mis-employment of Lands, Goods, and Stocks of Money heretofore given to certain Charitable Uses.

WHEREAS divers lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money, have been heretofore given, limited, appointed and assigned, as well by the Queen's most excellent Majesty, and her most noble progenitors, as by sundry other well-disposed persons; some for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, sea-banks and highways, some for education and preferment of orphans, some for or towards relief, stock, or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed, and other for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes; which lands, tenements, rents, annuity, profits, hereditaments, goods, chattels, money, and stocks of money nevertheless have not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver and employ the same; (2) for redress and remedy whereof, be it enacted by authority of this present parliament, that it shall and may be lawful to and for the Lord Chancellor, or
keeper of the great seal of England, for the time being, and for the chancellor of the duchy of Lancaster, for the time being, for lands within the county palatine of Lancaster, from time to time to award commissions under the great seal of England, or the seal of the county palatine, as the case shall require, into all or any part or parts of this realm respectively, according to their several jurisdictions, as aforesaid, to the bishop of every several diocese and his chancellor (in case there shall be any bishop of that diocese at the time of awarding the same commissions), and other persons of good and sound behaviour, (3) authorizing them thereby, or any four or more of them, to inquire as well by the oaths of twelve lawful men or more of the county, as by all other good and lawful ways and means, of all and singular such gifts, limitations, assignments, and appointments aforesaid, and of the abuses, breaches of trusts, negligences, mis-employments, not employing, concealing, defrauding, mis-converting or mis-government of any lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money or stocks of money, heretofore given, limited, appointed or assigned, or which hereafter shall be given, limited, appointed or assigned, to or for any the charitable and godly uses before rehearsed: (4) and after the said commissioners, or any four or more of them (upon calling the parties interested in any such lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money) shall make inquiry by the oaths of twelve men or more of the said county (whereunto the said parties interested shall and may have, and take their lawful challenge and challenges) (5) and upon such inquiry, hearing and examining thereof, set down such orders, judgments and decrees as the said lands, tenements, rents, annuities, profits, goods, chattels, money and stocks of money, may be duly and faithfully employed, to and for such of the charitable uses and intents before rehearsed, respectively, for which they were given, limited, assigned or appointed by the donors and founders thereof: (6) which orders, judgments and decrees, not being contrary or repugnant to the orders, statutes or decrees of the donors or founders, shall by the authority of this present
parliament stand firm and good, according to the tenor and purport thereof, and shall be executed accordingly, until the same shall be undone or altered by the Lord Chancellor of England, or lord keeper of the great seal of England, or the chancellor of the county palatine of Lancaster, respectively, within their several jurisdictions, upon complaint by any party grieved to be made to them.

II. Provided always, That neither this act, nor any thing therein contained, shall in any wise extend to any lands, tenements, rents, annuities, profits, goods, chattels, money or stocks of money, given, limited, appointed or assigned, or which shall be given, limited, appointed or assigned to any college, hall or house of learning within the universities of Oxford or Cambridge, or to the colleges of Westminster, Eton or Winchester, or to any of them, or to any cathedral or collegiate church within this realm.

III. And provided also, That neither this act, nor any thing therein, shall extend to any city, or town corporate, or to any the lands or tenements given to the uses aforesaid, within any such city or town corporate, where there is a special governor or governors appointed to govern or direct such lands, tenements or things disposed to any the uses aforesaid, neither to any college, hospital or free school, which have special visitors or governors, or overseers appointed them by their founders.

IV. Provided also, and be it enacted by the authority aforesaid, That neither this act, nor any thing therein contained, shall be in any way prejudicial or hurtful to the jurisdiction, or power of the ordinary, but that he may lawfully in every cause execute and perform the same, as though this act had never been had or made.

V. Provided also, and be it enacted, That no person or persons that hath or shall have any of the said lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, or stocks of money in his hands or possession, or doth or shall pretend title thereunto, shall be named a commissioner or a juror for any the causes aforesaid, or being named, shall execute or serve in the same.

VI. And provided also, That no person or persons which hath purchased or obtained, or shall purchase or obtain
upon valuable consideration of money or land, any estate or interest of, in, to, or out of any lands, tenements, rents, annuities, hereditaments, goods or chattels that have been, or shall be given, limited or appointed to any the charitable uses above-mentioned, without fraud or covin, having no notice of the same charitable use, shall not be impeached by any decrees or orders of the commissioners above-mentioned, for or concerning the same, his estate or interest: (2) and yet nevertheless, be it enacted, that the said commissioners, or any four or more of them, shall and may make decrees and orders for recompence to be made by any person or persons who being put in trust, or having notice of the charitable uses above-mentioned, hath or shall break the same trust, or defraud the same uses by any conveyance, gift, grant, lease, demise, release or conversion whatsoever, and against the heirs, executors and administrators of him, them, or any of them having assets in law or equity, so far as the same assets will extend.

VII. Provided always, That this act shall not extend to give power or authority to any commissioners before-mentioned, to make any orders, judgments or decrees, for or concerning any manors, lands, tenements, or other hereditaments assured, conveyed, granted, or come unto the queen’s Majesty, to the late king Henry the Eighth, king Edward the Sixth, or queen Mary, by act of parliament, surrender, exchange, relinquishment, escheat, attainder, conveyance, or otherwise: (2) and yet nevertheless, be it enacted, that if any such manors, lands, tenements, or hereditaments, or any of them, or any estate, rent, or profit thereof, or out of the same, or any part thereof, have or hath been given, granted, limited, appointed or assigned to or for any the charitable uses before expressed, at any time since the beginning of her Majesty’s reign, that then the said commissioners, or any four or more of them, shall and may, as concerning the same lands, tenements, hereditaments, estate, rent or profit so given, limited, appointed or assigned, proceed to inquire, and to make orders, judgments and decrees, according to the purport and meaning of this act, as before is mentioned; the said last mentioned proviso notwithstanding.
VIII. And be it further enacted, That all orders, judgments and decrees of the said commissioners, or of any four or more of them, shall be certified under the seals of the said commissioners, or any four or more of them, either into the Court of Chancery of England, or into the Court of the Chancery within the county palatine of Lancaster, as the case shall require respectively, according to their several jurisdictions, within such convenient time as shall be limited in the said commission.

IX. And that the said Lord Chancellor or lord keeper, and the said chancellor of the duchy, shall and may within their said several jurisdictions, take such order for the due execution of all or any of the said judgments, decrees and orders, as to either of them shall seem fit and convenient.

X. And that if after any such certificate or certificates made, any person or persons shall find themselves grieved with any of the said orders, judgments or decrees, that then it shall and may be lawful to and for them, or any of them to complain in that behalf unto the said Lord Chancellor or lord keeper, or to the chancellor of the said duchy of Lancaster, according to their several jurisdictions, for redress therein: (2) and that upon such complaint, the said Lord Chancellor or lord keeper, or the said chancellor of the duchy, may according to their said several jurisdictions, by such course as to their wisdoms shall seem meetest, the circumstances of the case considered, proceed to the examination, hearing and determining thereof; (3) and upon hearing thereof, shall and may annul, diminish, alter or enlarge the said orders, judgments and decrees of the said commissioners, or any four or more of them, as to either of them in their said several jurisdictions shall be thought to stand with equity and good conscience, according to the true intent and meaning of the donors and founders thereof; (4) and shall and may tax and award good costs of suit by their discretions, against such persons as they shall find to complain unto them without just and sufficient cause, of the orders, judgments and decrees before-mentioned.
APPENDIX No. II.

TITLES OF THE PRINCIPAL STATUTES RELATING TO BE-NEOLOENT, CHARITABLE, SCIENTIFIC AND MISSIONARY CORPORATIONS.¹

Enacted.

1848. CHAP. 319. An Act for the incorporation of benevolent, charitable, scientific and missionary societies. Passed April 12, 1848.

1849. CHAP. 273. An Act to amend "An act for the incorporation of benevolent, charitable, scientific and missionary societies. Passed April 7, 1849.

1853. CHAP. 487. An Act to amend chapter three hundred and nineteen of the laws of eighteen hundred and forty-eight, entitled "An act for the incorporation of benevolent, charitable, scientific and missionary societies." Passed April 12, 1848.

1854. CHAP. 50. An Act to authorize the mortgaging of real estate of benevolent, charitable, scientific and missionary societies. Passed March 8, 1854.

Repealed.

C. 559, Laws of 1895, repeals all but sec. 6.

C. 559, Laws of 1895.

C. 559, Laws of 1895.

C. 559, Laws of 1895.

¹ Although most of the Acts mentioned in this Appendix are now superseded by the provisions of the recent Act entitled "The Membership Corporations Law" (Chapter 559, Laws of 1895), a reference to the early laws, bearing on these auxiliaries of charity, may be found still useful, in connection with the text of this treatise.
Enacted.

1860. CHAP. 242. An Act for the incorporation of fine art associations and to amend "An act for the incorporation of benevolent, charitable, scientific and missionary societies," passed April twelfth, eighteen hundred and forty-eight. Passed April 10, 1860.

1861. CHAP. 58. An Act to authorize the leasing or sale and conveyance of the real estate of benevolent, charitable, scientific, missionary societies and orphan asylums. Passed March 19, 1861.

1861. CHAP. 239. An Act to amend an act entitled "An act to amend an act for the incorporation of benevolent, charitable, scientific and missionary societies, passed April twelfth, eighteen hundred and forty-eight; passed April seventh, eighteen hundred and forty-nine; passed April seventh, eighteen hundred and fifty seven. Passed April 15, 1861.

1866. CHAP. 136. An Act to amend the fourth subdivision of fourth section of first part of chapter thirteen, part first of the Revised Statutes in relation to exemption from taxation upon real and personal property of religious and benevolent institutions. Passed March 9, 1866.

1870. CHAP. 51. An Act to amend the "Act for the incorporation of benevolent, charitable, scientific and missionary societies," passed April twelfth, eighteen hundred and forty-eight. Passed March 8, 1870.
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Enacted.

1872. CHAP. 104. An Act in relation to trustees and directors of charitable and benevolent institutions. Passed March 12, 1872.


1875. CHAP. 452. An Act further to amend chapter three hundred and nineteen of the laws of eighteen hundred and forty-eight, entitled "An act for the incorporation of benevolent, charitable, scientific and missionary societies" and the several acts amendatory thereof Passed May 28, 1875.

1876. CHAP. 190. An Act further to amend chapter three hundred and nineteen of the laws of eighteen hundred and forty-eight, entitled "An act for the incorporation of benevolent, charitable, scientific and missionary societies. Passed April 28, 1876.


Repealed.

C. 559, Laws of 1895.

C. 559, Laws of 1895.

C. 559, Laws of 1895.

C. 559, Laws of 1895.
1882. CHAP. 367. An Act to restrict the formation of corporations under chapter three hundred and nineteen of the laws of eighteen hundred and forty-eight, entitled "An act to provide for the incorporation of benevolent, charitable, scientific and missionary societies" and the acts amendatory thereof, and to legalize the incorporation of certain societies organized thereunder, and to regulate the same. Passed June 29, 1882.

1883. CHAP. 446. An Act to amend chapter three hundred and nineteen of the laws of eighteen hundred and forty-eight, entitled "An act for the incorporation of benevolent, charitable, scientific and missionary societies" and the several acts amendatory thereof. Passed May 18, 1883.

1884. CHAP. 415. An Act to regulate the deposit of funds received by charitable and benevolent institutions supported in whole or in part by public moneys. Passed May 31, 1884.

1885. CHAP. 38. An Act to amend chapter three hundred and nineteen of the laws of eighteen hundred and forty-eight, entitled "An act for the incorporation of benevolent, charitable, scientific and missionary societies. Passed March 28, 1885.

1886. CHAP. 547. An Act to protect corporations duly incorporated under chapter three hundred and nineteen of the laws of the State of New York,
Enacted.

passed April twelfth, eighteen hundred and forty-eight, entitled "An act for the incorporation of benevolent, charitable, scientific and missionary societies" and the acts amendatory thereof and supplementary thereto, and to punish offenders. Passed June 2, 1886.

1889. CHAP. 191. "An Act to limit the amount of property to be held by corporations organized for other than business purposes."

1890. CHAP. 425. An Act to authorize corporations organized under Chap. 319 of the laws of 1848, or its amendments, to extend their business and objects

1890. CHAP 497. An Act to amend chapter one hundred and ninety-one of the laws of eighteen hundred and eighty-nine, entitled "An act to limit the amount of property to be held by corporations, organized for other than business purposes."

— CHAP. 518. "An Act to amend chapter fifty-one of the laws of eighteen hundred and seventy," etc.

— CHAP. 553. An Act to amend chapter one hundred and ninety-one of the laws of eighteen hundred and eighty-nine, entitled "An act to limit the amount of property to be held by corporations for other than business purposes," and relating to such corporations.

1892. CHAP. 197. An Act to authorize the increase or reduction of the number of directors of benevolent, charitable or hospital corporations.
Enacted.

1892. CHAP. 333. An Act to facilitate the filling of vacancies in the office of trustees of corporations organized for charitable and benevolent purposes.

1893. CHAP. 180. An Act to amend chapter one hundred and ninety-seven of the laws of eighteen hundred and ninety-two, entitled "An Act to authorize the increase or reduction of the numbers of directors of benevolent, charitable or hospital corporations."


— CHAP. 709. "An Act to authorize the appointment of incorporators of charitable or benevolent corporations."

1895. CHAP. 125. An Act to incorporate the Missionary Society of the Calvinistic Methodist Church in the United States of America.

— CHAP. 559. AN ACT RELATING TO MEMBERSHIP CORPORATIONS, CONSTITUTING CHAPTER FORTY-THREE OF THE GENERAL LAWS.

RECENT LAWS.

1896. CHAP. 53. AN ACT to amend chapter one hundred and sixty of
the laws of eighteen hundred and ninety (as amended by chapter twenty-five of the laws of eighteen hundred and ninety-two) entitled "An Act to authorize gifts, devises and bequests of real and personal property to trustees and their successors in perpetuity as a corporation in trust for the purposes of creating and maintaining public parks."

APPENDIX No. III.

TITLES OF THE PRINCIPAL STATUTES RELATIVE TO RELIGIOUS CORPORATIONS AND TO INCORPORATED CEMETERIES, BURIAL PLACES OR GRAVEYARDS.¹

Enacted. Repealed.

1693. CHAP. 36. An Act for settling a Ministry, and raising a maintenance for them in the City of New York, County of Richmond, Westchester, and Queens County. Passed the 24th of March, 1693.

C. 21, Laws of 1828-9, Sec. 4; C. 677, Laws of 1892.

CHAP. 141. An Act for granting sundry privileges and powers to the Rector and Inhabitants of the City of New York, of the Communion of the Church of England, as by law established. Passed 27th of June, 1704.

C. 21, Laws of 1828-9, Sec. 4; C. 677, Laws of 1892.

1784. CHAP. 18. An Act to enable all the Religious Denominations in this State to appoint Trustees, who shall be a Body Corporate, for the Purpose of taking care of the Temporalities of their respective Congregations, and for other Purposes

Cf. C. 189, Laws of 1801.

¹ Although "The Religious Corporations Law" (chapter 723, Laws of 1895) is a substitute for all existing general laws for the creation and temporal administration of religious corporations, it is thought that the professional reader may desire to glance over the titles of the more significant of the earlier acts on the same subject, as it enables him the more easily to follow a particular line of investigation.

Article III. of "The Membership Corporations Law" (chapter 559, Laws of 1895) has superseded many of the earlier laws relating to burial places.
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Enacted.

therein mentioned. Passed April the 6th, 1784.*

1801. CHAP. 79. An Act to provide for the incorporation of religious societies. Passed 27th March, 1801.

1813. CHAP. 60. (R. L.) An Act to provide for the Incorporation of Religious Societies. Passed April 5, 1813.

1814. CHAP. 1. An Act to alter the name of the corporation of Trinity Church in New York, and for other purposes. Passed January 25, 1814.

1819. CHAP. 33. An Act to amend the act entitled “An act to provide for the incorporation of religious societies.” Passed March 5, 1819.

1819. CHAP. 110. An Act to incorporate the General Synod of the Reformed Protestant Dutch Church. Passed April 17, 1819. [Amended, C. 171; Laws of 1869, which see.]

1822. CHAP. 187. An Act supplementary to the act entitled “An act to provide for the incorporation of religious societies,” passed April 5, 1813. Passed April 12, 1822.

1825. CHAP. 303. An Act to amend an act passed April 5, 1813, entitled

Repealed.

C. 262, Laws of 1813.

C. 723, Laws of 1895.

Sec. 6 repealed by C. 723, Laws of 1895.

C. 723, Laws of 1895.

C. 723, Laws of 1895.

C. 723, Laws of 1895.

*The Act of 1784 contains the following preamble: “And whereas many of the churches, congregations and religious societies in this State (while it was a colony) have been put to great difficulties to support the public worship of God by reason of the illiberal and partial distribution of charters of incorporation to religious societies, whereby many charitable and well-disposed persons have been prevented from contributing to the support of religion, for want of proper persons authorized by law, to take charge of their pious donations, and many estates purchased and given for the support of religious societies, now vest in private hands, to the great insecurity of the society, for whose benefit they were purchased or given, and to the no less disquiet of many of the good people of this State:” etc., etc.
"An act to provide for the incorporation of religious societies."
Passed April 21, 1825.

1826. CHAP. 47. An Act to amend an act entitled "An act to provide for the incorporation of religious societies," passed April 5, 1813. Passed February 15, 1826.

1834. CHAP. 78. An Act to amend article seventh, title eighth, chapter twentieth, part first of the Revised Statutes, entitled "Of the disturbance of religious meetings." Passed April 8, 1834.

1835. CHAP. 90. An Act to amend the charter of the minister, elders and deacons of the Second Protestant Reformed Dutch Church of the city of Albany. Passed April 15, 1835.


—— CHAP. 184. An Act in relation to trusts for the benefit of the meetings of the religious society of Friends. Passed April 17, 1839.


1844. CHAP. 158. An Act to amend an act entitled "An act to provide for the incorporation of religious societies," passed April 5, 1813.
Passed April 16, 1844, by a two-thirds vote.

1845. CHAP. 195. An Act in relation to stocks in moneyed corporations held by the State or by literary or charitable institutions. Passed May 13, 1845.

1847. CHAP. 133. An Act authorizing the incorporation of rural cemetery associations. Passed April 27, 1847.


CHAP. 464. An Act to authorize persons to change their names. Passed December 14, 1847.


1850. CHAP. 122. An Act to amend the act entitled "An act to provide for the incorporation of religious societies," passed April 5, 1813, and the several acts amendatory thereof. Passed March 30, 1850.

1851. CHAP. 544. An Act to incorporate academies and high schools in this State. Passed July 11, 1851.


— CHAP. 280. An Act further to amend the act entitled "An act authorizing the incorporation of rural cemetery associations," passed April 27, 1847. Passed April 14, 1852.

— CHAP. 282. An Act defining the ex-
emptions from taxation on public building in the City of New York. Passed April 14, 1852.

1853. CHAP. 323. An Act to authorize religious corporations to change their names. Passed June 4, 1853.

1854. CHAP. 112. An Act for the incorporation of private and family cemeteries. Passed April 1, 1854.

— CHAP. 218. An Act for the incorporation of societies to establish free churches. Passed April 13, 1854.

— CHAP. 238. An Act to amend an act passed April 14, 1852, entitled "An act further to amend the act entitled 'An act authorizing the incorporation of rural cemetery associations.'" passed April 27, 1874. Passed April 15, 1854.

1860. CHAP. 80. An Act to amend chapter four hundred and sixty-four of the laws of eighteen hundred and forty-seven. Passed March 17, 1860; three-fifths being present.


1863. CHAP. 45. An Act supplementary to the act entitled "An act to provide for the incorporation of religious societies," passed April fifth, eighteen hundred and thirteen. Passed March 25, 1863.
1863. CHAP. 287. An Act relative to certain religious societies in the City of New York. Passed April 29, 1863.

1865. CHAP. 393. An Act to amend the charter of the Sisters of Charity of St. Vincent de Paul. Passed April 13, 1865.

1866. CHAP. 136. An Act to amend the fourth subdivision of fourth section of first part of chapter thirteen, part first of the Revised Statutes, in relation to exemption from taxation upon real and personal property of religious and benevolent institutions. Passed March 9, 1866.

___ CHAP. 414. An Act to amend an act entitled "An act to provide for the incorporation of religious societies," passed April 5, 1813. Passed April 6, 1866.


___ CHAP. 265. An Act to authorize the formation of corporations to secure parsonages and other property for the use of presiding elders of the Methodist Episcopal Church. Passed April 5, 1867.

___ CHAP. 656. An Act to amend "An act to provide for the incorporation of religious societies," passed April fifth, eighteen hundred and thirteen. Passed April 23, 1867.
Enacted.

1867. CHAP. 657. An Act to authorize the erection of free churches or chapels in certain cases. Passed April 23, 1867.


— CHAP. 402. An Act to authorize the trustees of incorporated rural cemeteries to impose a tax upon the lot owners in said cemeteries. Passed April 27, 1868.


— CHAP. 471. An Act for the relief of certain religious societies in the city and county of New York, and in the counties of Kings and Westchester. Passed April 29, 1868.

— CHAP. 784. An Act to amend an act entitled "An Act to authorize the formation of corporations to secure parsonages and other property for the use of presiding elders of the Methodist Episcopal Church," passed April fifth, eighteen hundred sixty-seven. Passed May 9, 1868.

— CHAP. 803. An Act to amend the acts to provide for the incorporation of religious societies, so far as the same relate to churches in connection with the Protestant Episcopal Church. Passed May 9, 1868.

1869. CHAP. 171. An Act to amend "An Act to incorporate the General Synod of the Reformed Dutch Church," passed April seventh,
eighteen hundred and nineteen, and

to enable said synod to hold prop-
erty to a greater amount. Passed
April 14, 1869.

1869. CHAP. 197. An Act to change the
corporate title of the General Synod
of the Reformed Protestant Dutch
Church, to that of the General
Synod of the Reformed Church in
America. Passed April 15, 1869.

— CHAP. 727. An Act authorizing
cities and villages to acquire title
to property for burial purposes,
and to levy taxes for the pay-
ment of the same. Passed May 8,
1869.

1870. CHAP. 527. An Act to authorize rural
cemetery associations to accept con-
veyances from religious societies
and trustees of any grounds held
by such societies or trustees for
burial purposes. Passed May 2,
1870.

— CHAP. 760. An Act to amend chap-
ter seven hundred and twenty-seven
of the laws of eighteen hundred and
sixty-nine, entitled “An Act autho-
izing cities and villages to acquire
title to property for burial purposes,
and to levy taxes for the payment
of the same,” passed May eighth,
eighteen hundred and sixty-nine.
Passed May 9, 1870.

1871. CHAP. 12. An Act supplementary
to the act entitled “An Act to pro-
vide for the incorporation of rel-
gious societies,” passed April fifth,
eighteen hundred and thirteen.
Passed January 31, 1871.
1871. CHAP. 68. An Act to amend "An Act for the incorporation of private and family cemeteries," passed April first, eighteen hundred and fifty-four. Passed March 6, 1871.

CHAP. 164. An Act to amend an act passed April fourteenth, eighteen hundred and fifty-two, entitled "An Act further to amend an act entitled 'An Act authorizing the incorporation of rural cemetery associations,' passed April twenty-seventh, eighteen hundred and forty-seven." Passed March 24, 1871.


CHAP. 401. An Act to incorporate the Synod of Western New York. Passed April 11, 1871.

CHAP. 419. An Act to authorize the sale of unoccupied lands for burial grounds and rural cemetery associations. Passed April 12, 1871.

CHAP. 696. An Act to amend an act entitled "An Act to amend chapter seven hundred and twenty-seven of the laws of eighteen hundred and sixty-nine, entitled "An Act authorizing cities and villages to acquire title to property for burial purposes, and to levy taxes for the payment of the same," passed May eighth, eighteen hundred and sixty-
Enacted.
nine,” passed May ninth, eighteen
hundred and seventy. Passed April
25, 1871.

1871. CHAP. 750. An Act to incorporate
“The Trustees of the Estate belong-
ing to the Diocese of Long Island,”
and to authorize said corporation
to acquire and hold land for reli-
gious, charitable and benevolent
purposes. Passed April 26, 1871.

— CHAP. 776. An Act to authorize
religious corporations, created by
special charter, to exercise the same
powers as are given to religious
societies incorporated under the
general act to provide for the in-
corporation of religious societies,
passed April fifth, eighteen hun-
dred and thirteen, and the acts
amendatory thereof or supplemen-
tary thereto. Passed April 27, 1871.

1872. CHAP. 104. An Act in relation to
trustees and directors of charit-
able and benevolent institutions.
Passed March 12, 1872.

— CHAP. 424. An Act to provide for
the dissolution of religious societies,
except in the City and County of
New York, and for the sale and dis-
position of the proceeds of the
property of such societies. Passed
April 27, 1872.

— CHAP. 534. An Act for the relief of
certain religious societies in the
County of Kings. Passed May 6,
1872.

— CHAP. 644. An Act to incorporate
the Trustees of the Presbytery of
Westchester. Passed May 11, 1872.
Enacted.


— CHAP. 762. An Act to incorporate the German United Evangelical Synod of the East. Passed May 17, 1872.

1873. CHAP. 46. An Act to provide for the laying out, improvement and preservation of burial grounds in the several towns of the State. Passed March 5, 1873.

— CHAP. 197. An Act incorporating the Trustees of the Northern New York Conference of the Methodist Episcopal Church. Passed April 10, 1873.


— CHAP. 452. An Act to amend section one of chapter seven hundred and sixty of the laws of eighteen hundred and seventy, in reference to acquiring title to real estate for burial purposes. Passed May 8, 1873.

1874. CHAP. 26. An Act authorizing the formation of corporations to secure
camp-grounds and other property connected therewith for the use of the Methodist Episcopal Church. Passed February 20, 1874.

1874. CHAP. 37. An Act Supplementary to an act entitled "An act to provide for the incorporation of religious societies," passed April fifth, eighteen hundred and thirteen, and the several acts amendatory thereof. Passed February 27, 1874.

— CHAP. 121. An Act to incorporate the Western New York Conference of the Methodist Episcopal Church. Passed April 3, 1874.


1875. CHAP. 79. An Act supplementary to chapter sixty of the laws of eighteen hundred and thirteen entitled "An act to provide for the incorporation of religious societies," Passed March 29, 1875.

— CHAP. 206. An Act to amend chapter four hundred and fifty-two of the laws of eighteen hundred and seventy-three, entitled "An act to amend section one of chapter seven hundred and sixty of the laws of eighteen hundred and seventy in reference to acquiring title to real estate for burial purposes." Passed April 20, 1875; three-fifths being present.
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Enacted.

1875. CHAP. 209. An Act supplementary to chapter sixty of the laws of eighteen hundred and thirteen, entitled "An act to provide for the incorporation of religious societies." Passed April 29, 1875.


CHAP. 325. An Act to amend chapter twenty-six of the laws of eighteen hundred and seventy-four entitled "An act authorizing the formation of corporations to secure camp-grounds and other property connected therewith, for the use of the Methodist Episcopal Church." Passed May 14, 1875.

CHAP. 354. An Act to amend chapter forty-seven of the laws of eighteen hundred and twenty-six, entitled "An act to amend an act entitled 'An act to provide for the incorporation of religious societies.'" Passed May 15, 1875.

CHAP. 381. An Act supplemental to an act entitled "An act to provide for the incorporation of religious societies," passed April fifth, one thousand eight hundred and thirteen, and of the several acts amendatory thereof. Passed May 17, 1875.

CHAP. 408. An Act in relation to parsonages in certain cases. Passed May 21, 1875.

Repealed.

C. 723, Laws of 1895.
Enacted.

1875. CHAP. 443. An Act to amend an act entitled "An act to amend an act entitled 'An act to provide for the incorporation of religious societies,' passed April fifth, eighteen hundred and thirteen, and supplementary thereto," passed March twenty-ninth, eighteen hundred and seventy-five. Passed May 28, 1875.

— CHAP. 597. An Act to amend an act entitled "An act to provide for the incorporation of religious societies," passed April fifth, one thousand eight hundred and thirteen. Passed June 18, 1875.

1876. CHAP. 110. An Act supplemental to chapter sixty of the laws of eighteen hundred and thirteen, entitled "An act to provide for the incorporation of religious societies," and of the several acts amendatory thereof. Passed April 11, 1876.

— CHAP. 176. An Act supplementary to chapter sixty of the laws of eighteen hundred and thirteen, entitled "An act to provide for the incorporation of religious societies, and the acts supplementary thereto." Passed April 26, 1876.

— CHAP. 329. An Act securing to Baptist churches of the State of New York the benefits of incorporation, and repealing chapter six hundred and thirty-three of the laws of eighteen hundred and seventy-three, entitled "An act to authorize the incorporation of Baptist churches in the State of New York, and supplementary to an act en-
Enacted.


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C. 723, Laws of 1895.

CHAP. 177. An Act to amend chapter three hundred and eighty-one of the laws of eighteen hundred and seventy-five, entitled "An act supplemental to an act entitled 'An act to provide for the incorporation of religious societies,' passed April fifth, eighteen hundred and thirteen, and of the several acts amendatory thereof. Passed April 25, 1877.

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C. 559, Laws of 1895.

CHAP. 426. An Act to amend chapter four hundred and two of the laws of eighteen hundred and sixty-eight, entitled "An act to authorize the trustees of incorporated rural cemeteries to impose a tax upon the lot owners in said cemeteries." Passed June 6, 1877.

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C. 593, Laws of 1886, Sec. 1, ¶ 52.


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CHAP. 472. An Act to authorize the trustees of incorporated rural cemeteries to register the lots thereof, and to impose a tax upon the lot owners in said cemeteries, in the
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Enacted.


CHAP. 209. An Act to amend chapter one hundred and eighty-four of the laws of eighteen hundred and thirty-nine, entitled "An act in relation to trusts for the benefit of the meetings of the religious society of Friends, passed April seventeen, eighteen hundred and thirty-nine." Passed May 2, 1878.

CHAP. 349. An Act to facilitate the removal of human remains from burying grounds within the limits of cities. Passed May 23, 1878.

1879. CHAP. 24. An Act to amend section thirteen of article three of title five of part four of the Revised Statutes, entitled "Of offenses against public decency." Passed February 14, 1879; three-fifths being present.


CHAP. 117 An Act to amend chapter one hundred and twenty-two of the laws of eighteen hundred and fifty, entitled "An act to amend the act entitled 'An act to provide

Repealed.

C. 593, Laws of 1886, Sec. 1, ¶ 53.

C. 723, Laws of 1895.

C. 723, Laws of 1895.

C. 559, Laws of 1895.

C. 559, Laws of 1895.

C. 723, Laws of 1895.
for the incorporation of religious societies, 'passed April five, eighteen hundred and thirteenth,' and the several acts amendatory thereof. Passed March 27, 1879.

1879. CHAP. 136. An Act to amend chapter three hundred and twenty-nine of the laws of eighteen hundred and seventy-six, entitled "An act securing the Baptist churches of the State of New York the benefits of incorporation, and repealing chapter six hundred and thirty-three of the laws of eighteen hundred and seventy-three, entitled 'An act to authorize the incorporation of Baptist churches in the State of New York, and supplementary to an act, entitled An act to provide for the incorporation of religious societies, passed April fifth, eighteen hundred and thirteenth.'" Passed April 2, 1879.

1879. CHAP. 310. An Act to prevent the sale of land used for cemetery purposes. Passed May 17, 1879.

CHAP. 411. An Act to further amend chapter four hundred and two of the laws of eighteen hundred and sixty-eight, entitled "An Act to authorize the trustees of incorporated rural cemeteries to impose a tax upon the lot owners in said cemeteries." Passed May 29, 1879.

CHAP. 463. An Act to amend an act entitled "An Act supplementary to chapter sixty of the laws of eighteen hundred and thirteen, entitled "An Act to provide for the
incorporation of religious societies,'" passed March twenty-ninth, eighteen hundred and seventy-five. Passed June 3, 1875.

1880. CHAP. 55. An Act to amend section three of chapter one hundred and ten of the laws of eighteen hundred and seventy-six, entitled "An Act supplemental to chapter sixty of the laws of eighteen hundred and thirteen," entitled "An Act to provide for the incorporation of religious societies, and of the several acts amendatory thereof." Passed March 10, 1880.

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CHAP. 337. An Act to amend chapter one hundred and eighty-four of the laws of eighteen hundred and thirty nine, entitled "An Act in relation to trusts for the benefit of the meetings of the religious society of Friends." Passed May 20, 1880.

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1881. CHAP. 22. An Act requiring all certificates of incorporations, hereafter filed pursuant to law, either in the office of the Secretary of State, or in the office of any county clerk to be recorded therein, and regulating the fees therefor. Passed March 2, 1881; three-fifths being present.
Enacted.

1881. CHAP. 139. An Act to give certain powers to corporations holding cemeteries. Passed April 22, 1881.

CHAP. 327. An Act supplementary to chapter sixty of the laws of eighteen hundred and thirteen, entitled "An Act to provide for the incorporation of religious societies." Passed May 20, 1881.

CHAP. 501. An Act to authorize religious corporations holding lands for the purposes of a cemetery to sell and convey lots and plots. Passed June 13, 1881; three-fifths being present.

1882. CHAP. 23. An Act to amend section one of chapter fifty-five of the laws of eighteen hundred and eighty, entitled "An Act to amend section three of chapter one hundred and ten of the laws of eighteen hundred and seventy-six, entitled 'An Act supplemental to chapter sixty of the laws of eighteen hundred and thirteen, entitled 'An Act to provide for the incorporation of religious societies, and of the several Acts amendatory thereof.'" Passed March 21, 1882; three-fifths being present.


Enacted.

1883. CHAP. 501. An Act to amend an Act entitled "An Act to amend the charter of the Minister, Elders and Deacons of the Second Protestant Reformed Dutch Church in the city of Albany," passed April fifteen, eighteen hundred and thirty-five. Passed June 2, 1883; three-fifths being present.

1884. CHAP. 198. An Act to authorize religious corporations to take and hold title to burial plots in trust for the owners or proprietors thereof, and to care for the same, and for other purposes. Passed April 23, 1884.


—— CHAP. 433. An Act to amend an act entitled "An Act to amend the act entitled 'An act authorizing the incorporation of rural cemetery associations,'" passed April twenty-seventh, eighteen hundred and forty-seven, being chapter one hundred and sixty-three of the laws of eighteen hundred and sixty. Passed May 31, 1884.

1885. CHAP. 19. An Act to amend chapter one hundred and eighty-two of the laws of eighteen hundred and sixty-nine, entitled "An act to establish and incorporate the board of education of the Methodist Epis-
Enacted.
copal Church.” Passed February 17, 1885.
1885. CHAP. 171. An Act to authorize rural cemetery associations to re-
duce or increase the number of their trustees. Passed April 27, 1885; three-fifths being present.

—— CHAP. 197. An Act to amend chapter two hundred and thirty-five of the laws of eighteen hundred and forty-two, entitled “An act to amend the act entitled ‘An Act to incorporate the Baptist Education Society of the State of New York,’” passed March five, eighteen hundred and nineteen. Passed May 1, 1885; three-fifths being present.

—— CHAP. 208. An Act to amend chapter six hundred and thirty-three of the laws of eighteen hundred and seventy-three, entitled “An act to authorize the incorporation of Baptist Churches in the State of New York, and supplementary to an act entitled ‘An act to provide for the incorporation of religious societies,’” passed April fifth, eighteen hundred and thirteen, and to amend the title of the same. Passed May 1, 1885.

—— CHAP. 251. An Act for the relief of certain religious societies in the County of Kings. Passed May 9, 1885.

1886. CHAP. 16. An Act to allow any Evangelical Lutheran Church or Congregation in this State, now or hereafter incorporated, to incor-
porate itself under the provisions of C. 723, Laws of 1895.
Enacted.

section two of chapter sixty, of the laws of eighteen hundred and thirteen, entitled "An act to provide for the incorporation of religious societies." Passed February 15, 1886; three-fifths being present.

1886. CHAP. 98 An Act to amend chapter sixty of the laws of eighteen hundred and thirteen, entitled "An act to provide for the incorporation of religious societies," as amended by chapter eight hundred and three of the laws of eighteen hundred and sixty-eight. Passed April 5, 1886; three-fifths being present.

—— CHAP. 209. An Act to amend chapter one hundred and ten of the laws of eighteen hundred and seventy-six, entitled "An act supplemental to chapter sixty of the laws of eighteen hundred and thirteen, entitled 'An act to provide for the incorporation of religious societies and of the several acts amendatory thereof.'" Passed April 24, 1886.

—— CHAP. 305. An Act further to amend chapter one hundred and thirty-one of the laws of eighteen hundred and fifty-five, entitled "An act to incorporate the trustees of the church erection fund of the general assembly of the Presbyterian Church in the United States of America." Passed May 10, 1886; three-fifths being present.

—— CHAP. 358. An Act to amend section two thousand seven hundred and forty-six of the Code of Civil Pro-
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Enacted.

cedure. Passed May 13, 1886; three-fifths being present.

1886. CHAP. 547. An Act to protect corporations duly incorporated under chapter three hundred and nineteen of the laws of the State of New York, passed April twelfth, eighteen hundred and forty-eight, entitled "An act for the incorporation of benevolent, charitable, scientific and missionary societies," and the acts amendatory thereof and supplementary thereto, and to punish offenders. Passed June 2, 1886; three-fifths being present.

1887. CHAP. 81. An Act in relation to the corporation called the Baptist Missionary Convention of the State of New York.

— CHAP. 236. An Act to amend chapter two hundred and thirty five of the laws of eighteen hundred and forty-two, entitled "An act to incorporate the Baptist Education Society of the State of New York." Passed March fifth, eighteen hundred and nineteen.

— CHAP. 239. An Act to amend an act entitled "An act to incorporate the Western New York Conference of the Methodist Episcopal Church.

1888. CHAP. 46. An Act to amend an act entitled "An act to incorporate the Missionary Society of the Most Holy Redeemer in the City of New York.

— CHAP. 61. An Act in relation to the amount of property to be held by the Baptist Home Society of the State of New York.

Repealed.
Enacted.

1888. CHAP. 105. An Act to amend chapter three hundred and sixty of the laws of eighteen hundred and seventy-two, entitled "An act to amend the charter of the American Bible Society."

— CHAP. 308. An Act in relation to the trustees of the parochial funds of the Protestant Episcopal Church in the diocese of Western New York.

1889. CHAP. 395. An Act to amend an act entitled "An act to incorporate the American Missionary Association."

— CHAP. 460. An Act to incorporate the American Baptist Education Society.

— CHAP. 559. An Act to amend chapter three hundred and ninety-two of the laws of eighteen hundred and seventy one, entitled "An act to incorporate the Southern New York Baptist Association."

1890. CHAP. 53. An Act to amend an act entitled "An act to incorporate the American Home Missionary Society."

— CHAP. 113. An Act to incorporate the General Conference of Free Baptists.

1892. CHAP. 135. An Act in relation to the Board of Home Missions of the Presbyterian Church.


— CHAP. 557. An Act in relation to
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1894. CHAP. 326. An Act to amend an act entitled "An act to incorporate the Board of Foreign Missions of the Presbyterian Church of the United States of America."

— CHAP. 634. An Act to incorporate the Home Church Extension Board of Onondaga Conference, Methodist Protestant Church.

— CHAP. 635. An Act to enable the Board of Church Extension of the Methodist Protestant Church to take, hold and convey property in the State of New York.

— CHAP. 649. An Act to incorporate the American Baptist Missionary Union.

1895. CHAP. 559. An Act relating to membership corporations, constituting chapter forty-three of the general laws.

[Art. 3 of this Act consolidates the laws relating to cemetery associations.]

— CHAP. 607. An Act authorizing religious corporations to establish and maintain a home for the aged poor of their membership or congregation, and to take and hold property therefor.

— CHAP. 723. THE RELIGIOUS CORPORATIONS LAW (Chap. 42 of the General Laws).

1896. CHAP. 16. An Act making an appropriation for the purchase of grounds for burial purposes for the use of the Syracuse State
Enacted.

Institution for Feeble-Minded Children.

1896. CHAP. 35. An Act to amend sections sixty-one and eighty of chapter seven hundred and twenty-three of the laws of eighteen hundred and ninety-five, entitled "An act in relation to religious corporations."

CHAP. 56. An Act to amend chapter seven hundred and twenty-three of the laws of eighteen hundred and ninety-five, known as the religious corporations law, in relation to the consolidation of incorporated churches.


CHAP. 324. An Act to amend chapter seven hundred and twenty-three, laws of eighteen hundred and ninety-five (became a law April 18, 1896).


CHAP. 327. An Act to amend chapter six hundred and eighteen of laws of eighteen hundred and ninety-four (became a law April 18, 1896).

CHAP. 336. An Act to amend chapter seven hundred and twenty-three of the laws of eighteen hundred and
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ninety-five (became a law April 21, 1896).

CHAP. 337. An Act to amend chapter seven hundred and twenty-three, laws of eighteen hundred and ninety-five.
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