13FED.CAS.—61

Case No. 7,465.

JONES ET AL. V. HABERSHAM ET AL.

[3 Woods, 443.][1]

Circuit Court, S. D. Georgia. April Term, 1879.[2]

CHARITY—PERPETUITY—UNCERTAINTY—PROVIDING OF TRUSTEE BY COURT OF CHANCERY—HOLDING PROPERTY BEYOND A CERTAIN AMOUNT—VIOLATION OF CHARTER—CORPORATION AS A TRUSTEE.

1. Where there is an immediate gift to trustees for a general charity, but the particular application of the fund will not of necessity take effect within any assignable limit of time, and can never take effect at all except on the occurrence of events in their nature contingent and uncertain, the gift is valid, and the court will hold up the fund a reasonable time to await the happening of the contingencies.

2. Certain devises and bequests in a will were made substantially in the following form: I hereby give, devise and bequeath to N. W. Jones all that lot (describing it), to him and his heirs forever. I hereby give, devise and bequeath to the trustees of the Independent Presbyterian Church, in Savannah, all that full lot of land (describing it and declaring the purposes for which the devise was made). The devises were followed by an item which declared: "It is my wish and I hereby direct that none of the legacies, bequests or devises in any of the clauses of this, my will, shall be executed or take effect until the building and other improvements on the lot on the corner of Gaston and Whitaker streets, and known as the 'Hodgson Memorial Hall,' which I have conveyed in trust to the Georgia Historical Society, shall be completed and entirely paid for out of my estate." *Held,* that the gifts themselves were not suspended, but only the payment thereof.

[See note at end of case.].

3. The law of charities is fully adopted in Georgia, as far as is compatible with a free government, where no royal prerogative is exercised.

[See note at end of case.]

4. There was devised by the will of the testator to the trustees of the Independent Presbyterian Church, in Savannah, a certain lot of land in that city, with the buildings thereon, upon terms and conditions stated as follows: First. That the trustees of the said Independent Church shall appropriate annually out of the rents and profits of said lot and improvements the sum of one thousand dollars to one or more Presbyterian or Congregational churches in the state of Georgia, in such destitute and needy localities as the proper officers of said Independent Presbyterian Church may select, so as to promote the cause of religion among the poor and feeble churches of the state. Second. This gift and devise is made on the further condition that neither the trustees nor any other officers of said Independent Presbyterian Church will have or authorize any material alteration or change made in the pulpit or galleries of the present church edifice on the corner of Bull and South Broad streets, but will permit the same to remain substantially as they are, subject only to proper repairs and improvements; nor shall they sell or alien the lot on which the Sabbath schoolroom of said church now stands, but shall hold the same to be improved in such manner as the trustees or pew-holders may direct. Third. Upon the further condition that the trustees of said Independent Presbyterian Church will keep in good order and have thoroughly cleaned up every spring and autumn my lot in the cemetery of Bonaventure, and that no interment or burial of any person shall ever take place either in the vault or within the inclosure of said lot; and for the purpose of having the same protected and cared for. I hereby give, devise

and bequeath my said lot in the Bonaventure cemetery to the trustees of the Independent Presbyterian Church and their successors." *Held,* (a) that the devise was not void for uncertainty; (b) that the condition not to allow any alteration in the pulpit and galleries of the church, but to hold the same to be improved, and not to alien the sabbath school lot, did not render the bequest void; the condition for the improvement of the pulpit, etc., was a proper charity, and the others were conditions subsequent which could not affect a charitable gift; (c) that the church named as trustee was capable of taking and executing the trust.

{Cited in Kelly v. Nichols (R. I.) 21 Atl. 908.}

{See note at end of case.}

5. A will contained the following devise: "I give and devise to the Union Society of Savannah all that lot or parcel of land in the city of Savannah on the north side of Bay street, and at or near its intersection with Jefferson street extended or prolonged, known in the plan of said city as lot letter 'B,' with the buildings and improvements thereon, but on the express condition that said society shall not sell or alienate said lot but shall use and appropriate

the rents and profits of the same for the support of the school and charities of said institution, without said lot being at any time liable for the debts or contracts of said society." *Held,* (a) that the condition expressed is a condition subsequent, which, if void, does not vitiate the gift; (b) that a condition against alienation annexed to property devoted to charity does not render it void; (c) that the fact that the Union Society had already a surplus of funds does not vitiate the gift.

[See note at end of case.]

6. A will contained the following devise: "Twelfth. I give, devise and bequeath to the Widows' Society of Savannah, all that lot or parcel of land in Savannah on the corner of President and West Broad streets, on which the improvements now consist of four brick tenement buildings, the rents and profits of the same to be appropriated to the benevolent purposes of said society." *Held,* that the Widows' Society being incorporated for the relief of indigent widows and orphans, the gift was not too general, and was for charitable purposes, and not for indefinite benevolence.

[See note at end of case.]

7. Where a will devised, on certain conditions, a gift over, of devises and bequests already made: *Held,* that said provision did not vitiate said devises and bequests.

[See note at end of case.]

8. A gift for a library and academy of arts and sciences is for an "educational purpose," and is authorized by section 3157 of the Code of Georgia.

[See note at end of case.]

9. Where a charity is definite, the court of chancery will provide a trustee if none is named, or if the one named is incompetent to act.

[See note at end of case.]

10. A general power was given to the Georgia Historical Society to take and hold goods and lands, with a proviso that the clear annual income should not exceed a stated sum: *Held,* that a devise which increased the income of the society beyond the sum limited, was not void; if the society accepted the trust, that might be cause for forfeiting its charter.

[See note at end of case.]

11. Where a corporation has power to hold property, and is forbidden to hold beyond a certain amount, the matter being one of degree merely, it is not a question of ultra vires, but of violation of its charter.

12. That provision of the constitution of Georgia of 1868 (Code 1873, § 5068) which declares that the general assembly shall have no power to grant corporate powers and privileges to private companies, except to banking and other business companies named, but shall prescribe by law the manner in which such powers shall be exercised by the courts, does not take away from the general assembly the power to make amendments to existing charters, or give that power to the courts.

[See note at end of case.]

13. A corporation may be a trustee, if not prohibited; with the qualification, perhaps, that the object of the trust shall be germane to, or in harmony with, the objects of the corporation.

[See note at end of case.]

14. The requirement, in the devise, of a building to be used for the purposes of a library, that the name of the testator should be engraved on a marble slab to be placed and kept over the main entrance, does not render the devise void.

15. A devise for the "building and erection and endowment of a hospital for females within the city of Savannah, on a permanent basis, into which sick and indigent females are to be admitted and cared for," is not void for uncertainty as to the beneficiaries of the charity.

{See note at end of case.}

16. The devise mentioned in the preceding head-note directed that the income and profits of the residuum of the testator's estate should be applied to the erection and endowment of a hospital, and the testator expressed a desire that an act of incorporation should be obtained for the hospital, but no time was fixed for the erection of the building or the obtaining of the charter. *Held,* that the devise was not void for uncertainty in these respects.

{See note at end of case.}

17. If a devise for a charity cannot be carried out in the particular manner contemplated by the testatrix, a court of equity can and will provide proper trustees to carry it out

{See note at end of case.}

18. The state of Georgia has not inadvertently or otherwise deprived itself of the power of creating a charitable corporation.

19. A devise to trustees for a charitable purpose, which is to be carried on by them until a building, to be erected for the charity, shall be completed, which is then to be handed over by the trustees, with the funds to support it, to a corporation to be created, creates no perpetuity.

{This was a bill in equity by Wallace S. Jones and Noble W. Jones, executors of the will of George N. Jones, and others, against William N. Habersham and William Hunter, executors of the will of Mary Telfair.}

Heard on demurrer to the bill. Mary Telfair was a maiden lady, a resident of Savannah, Georgia. She died June 1, 1875, leaving a will by which she disposed of her entire estate. Her nearest relatives were the great-grand-children of a brother, the grand-children of a paternal uncle, and the grand-children of a maternal aunt. The probate of the will was resisted by representatives of each of these classes of relatives. The result of the litigation was that the will was established as the last will and testament of Miss Telfair, and was duly admitted to probate as such. See Wetter v. Habersham, 60 Ga. 193, and Jones v. Habersham, Id. 203. The bill in this case was filed by the representatives of certain persons claiming to be of kin to the testatrix, to attack and annul certain devises and bequests in the will contained, on various grounds fully set out in the bill. The clauses of the will assailed, and the grounds on which they were claimed to be void, will appear in the opinion of the court. The defendants, executors of the last will of Miss Telfair, demurred to the bill, and upon the demurrer the cause was argued and decided.

W. W. Montgomery and J. R. Saussy, for complainants:

1. The tenth item of the will is void for uncertainty. Code Ga. §§ 2468, 3155, et seq. The trust is ultra vires, and the devise being indivisible, the whole fails. Cherry v. Mott, 1 Mylne & C. 123. A bequest which is void in part fails altogether. Attorney General v. Davies, 9 Ves. 535; Chapman v. Brown, 6 Ves. 404; Fontain v. Ravenel, 17 How. {58 U. S. 369;}

Wheeler v. Smith, 9 How. [50 U. S.] 55. An illegal condition annexed to a gift is void. Code Ga. § 2661. Prohibition of alienation voluntary or involuntary, in a devise, is void, as repugnant to the estate devised. Blackstone Bank v. Davis, 21 Pick. 42; Hall v. Tufts, 18 Pick. 455; Taylor v. Sutton, 15 Ga. 109. The church which is made a trustee under this item of the will is not capable of taking or holding the real estate thereby devised. Charter Act 1806, § 4; Code Ga. §§ 2267, 2466. Conditions in terrorem (see second condition of tenth item) are void, and render the devises void. Code Ga. § 2466; 1 Jarm. Wills, 836; Levy v. Levy, 33 N. Y. 97; Van Nostrand v. Moore, 52 N. Y. 12; Van Kleeck v. Dutch Church of New York, 20 Wend. 457.

2. The eleventh item is void, because it must appear that property left to corporations' by will is necessary to the purposes of their organization, and the contrary affirmatively appears as to the Union Society.

3. The twelfth item is void, because the legatee is uncertain, and benevolent are not necessarily charitable purposes. The charter of the Widows' Society of Savannah does not show the purposes of the incorporation, except as the name may indicate. Charter Acts 1837, p. 220. The name does not indicate the purpose. In re Deveaux, 54 Ga. 673. The trust is, therefore, ineffectually declared, and results to the heirs. Code Ga. § 2316, par. 4.

4. The legatee under the thirteenth item cannot take until the happening of the condition provided for. 1 Jarm. Wills, 836; 1 Story, Eq. Jur. § 287. It may never happen, hence a perpetuity.

5. Fourteenth item: The Georgia Historical Society is incapable of taking any property whose income is over five thousand dollars, and only that much for the purposes specified in the preamble of the charter. The trust is foreign to the purposes of the society; hence the society cannot accept it. Ang. & A. Corp. 104; Andrew v. New York Bible & Prayer-Book Soc, 4 Sandf. 156; Morice v. Bishop of Durham, 10 Ves. 521; Attorney-General v. Davies, 9 Ves. 535; Cherry v. Mott, 1 Mylne & C. 123. A corporation whose charter forbids it doing more than is granted, cannot take as trustee. American Colonization Soc. v. Gartrell, 23 Ga. 448. The amendment to the charter, made since the beginning of this litigation, does not help the charter. The law at the death of testatrix must govern. Bennett v. Williams, 46 Ga. 399; Hargroves v. Redd, 43 Ga. 146. An executory devise is never created per verba de presenti, but always per verba de futuro. Goodright v. Cornish, 1 Salk. 226; Inglis v. Trustees of Sailors' Snug Harbor, 3 Pet. [28 U. S.] 99. The devise to the Georgia Historical Society is not when they shall have their charter amended so as to render them capable of taking, but per verba de presenti. Again, under Code, § 5146 (Const 1877, art 12, par. 4), it is impossible to amend the charter of 1839. It is, constitutionally, petrified. Even if the amendment by the court were valid, it would not avail the society for another reason—the whole intention of the testatrix was to intrust

the property to a corporation with a perpetual charter. The court could only grant one for twenty years. What is to become of the property at the end of that time? Code, § 1688. Nor is the amendment by the legislature valid. Id. § 5068 (Const. 1877, art. 3, § 7, par. 18). It was never accepted. Ang. & A. Corp. 51–55. If good, it does not confer power to act as trustee. Nor can the legislature now grant power to one corporation to buy shares in another. Const. 1877, art 4, par. 4. Again, the devise is uncertain. Who are "the proper officers," and who "the public?" The, devise is also specific, and cannot, therefore, be executed cy pres. Or, if general, there is no trustee capable of taking, and no beneficiaries sufficiently certain to enable them to maintain a suit for the enforcement of the charity. Hence the bequest is too indefinite, and must lapse. Grimes' Ex'rs v. Harmon, 9 Am. Rep. [35 Ind. 198] 690 et seq. If the devise lapse, it does not fall into the residuum. Because: 1st. The property is, for the purposes of descent, to be regarded as realty. $30,000 worth is realty. Heirs may sue for and recover railroad shares in their own name without intervention of administrator. Southwestern R. Co. v. Thomason, 40 Ga. 408. As to personalty generally they cannot. Land, when held by a partnership, is treated in equity as personalty. Nevertheless, a sale of his interest by a member of the firm is within the statute of frauds. Black v. Black, 15 Ga. 445. On the death of one partner, his legal representative must join in a deed of the realty by the surviving partners. Is not land treated as personalty when owned by a corporation or firm only for business or commercial purposes, but for purposes of descent, or where the statute of frauds is involved, is it not subject to the ordinary rules governing realty in such cases? Rent is due for some purposes at sundown; for others at midnight. If the landlord die between sunset and midnight, the rent goes to the heir, not to the executor. 2 Bouv. Law Dict. "Rent." Again, the lease of the A. & S. R. R. to the C. R. R., disposes of the entire franchise, and is, therefore, an assignment. 2 Bl. Comm. 317. And "rent" only is reserved. Rent issues out of realty alone. 2 Bouv. Law Dict. "Rent;" Code, §§ 2218, 2237. 2d. Even if personalty, the terms of the residuary clause are so narrowed as to exclude it. Tucker v. Tucker, 5 N. Y. 408; Hughes v. Allen, 31 Ga. 483; Williams v. Whittle, 50 Ga. 523. 3d. The property is not necessary for the purposes of the organization of the corporation contemplated in the residuary clause. Code, § 1676, par. 5, § 1679. If the value has shrunk since the death of testatrix

that will not open the residuary clause to take in enough to supply shrinkage. Again, the supreme court has decided that lapsed devises do not fall into the residuum, but go to the heirs. Williams v. Whittle, 50 Ga. 523. The rules of construction as to both realty and personalty shall be the same. Code, § 2245. The Georgia Historical Society was evidently selected as trustee for the Telfair Academy, because it has a perpetual charter. No such charter can now be granted. Hence, if the bequest in the fourteenth item is to be considered a general charity, it would, if in England, be executed by sign manual, because it is out of the power of the courts to give effect to the intention of testatrix. It follows that it must fail in this country. Again, the devise is not to charity, the charity is incidental only. It is "a monument of vanity" to perpetuate donee's name. It is no charity at all. Mellick v. President & Guardians of the Asylum, 4 Eng. Ch. (1 Jac.) 180. Nor will trustees be appointed to give effect to a perpetuity. Bequest to buy books to promote virtue and religion, void for uncertainty. Browne v. Yeall, cited in 7 Ves. 56.

6. The twenty-first item is void for uncertainty. What females are meant? White or black? Whence must they come? Grimes' Ex'rs v. Harmon, 9 Am. Rep. [35 Ind. 198] 690 et seq. And here is another reason why neither this item nor the fourteenth can be enforced at the instance of the attorney-general, in Georgia. If it be conceded that he has such power in behalf of the citizens of Georgia, he certainly has no such power in behalf of the "public" at large, or of the "females" of the world. Grimes' Ex'rs v. Harmon, supra, is exactly in point here. Again, who is to determine what sort of hospital is "suited to the wants of Savannah?" This item is also void as against the law of perpetuity. When are the executors or "their successors" to build the Telfair hospital? When is the "act of incorporation" to be obtained, and from what "tribunal?" The legislature cannot pass such an act. Code, § 5068; Const. 1877, art. 3, § 7, p. 18. No power existed under the constitution of incorporating churches, etc., until in 1872 the legislature, perceiving the defect, provided for incorporating academies and churches (Code, § 1677), and in 1876 extended the section so as to allow incorporations of church organizations whose operations extended over more than one county (Acts 1876, p. 34). At the same session (1876) the legislature passed the act under which the Georgia Historical Society has sought to amend its charter by application to the court. Id. p. 33. As that act only provides for amendments by the courts of such legislative charters as belong to the class "contemplated" by section 1676, and as that section contemplates business corporations alone, it follows that the attempt to amend the charter of the society under that act is futile. But if good, the law at the death of testatrix must govern. Hargroves v. Redd, 43 Ga. 142. This, then, is the extent to which the legislature has yet gone under the present constitution in conferring power upon the courts to grant charters. So here again the law against perpetuities applies. First, the legislature must pass an act authorizing some court to grant the desired charter, and then the court may or may not (as in Re Deveaux, 54 Ga. 673), in its discretion, grant it. Provision in a

will impossible to fulfill under existing laws void. Adams v. Bass, 18 Ga. 130. A gift to a corporation to be created, which cannot be incorporated under-existing laws, must fail. Perry, Trusts, § 730; Zeisweiss v. James, 63 Pa. St. 465. Note in case last cited, distinction between an unincorporated society already in existence, and for definite purposes, and a corporation hereafter to be formed and incorporated out of persons not yet associated for any purpose. Some of the decisions say that a devise or bequest to a society to be incorporated, is good by way of executory devise, if the incorporation must necessarily take place within the legal limit; i. e., a life or lives in being, and twenty-one years. Holmes v. Mead, 52 N. Y. 332; Fontain v. Ravenel, 17 How. [58 U. S.] 360. Otherwise, the devise is void. Leonard v. Bell, 58 N. Y. 676. The corporation to be created is the residuary legatee. "The trustees, managers, or directresses," as the will calls them, must first be incorporated before they can act. The executors are only the trustees, to build and turn over. This does not make them trustees of the charity. Zeisweiss v. James, supra; Beekman v. Bonsor, 23 N. Y. 298. The gift of the entire income being to the future corporation, carries corpus. Code, § 2455; Smith v. Dunwoody, 19 Ga. 237. When is the bequest to take effect? (1) Not until a law is passed authorizing the court to grant the charter. (2) Not until the charter is granted by the court. (3) Not until the hospital is built by the executors, "or their successors." (4) Not until the ladies named "consent" to become corporators. (5) Not until some one (who?) determines what the wants of Savannah are in this respect. (6) Not until the Hodgson Memorial Hall is completed and paid for out of the estate of testatrix. Is it not possible that one or more of the conditions may be unfulfilled at the end of a life or lives in being and twenty-one years, and a portion after? Suppose the present executors decline to build the hospital. Will a court of chancery compel them to do so? May they not, by the terms of the will, leave it to their successors, and they to their successors? A bequest to build hospital and get charter in two years, "provided two lives named in will should continue so long," not void for remoteness. Burrill v. Boardman, 43 N. Y. 254. It follows, that the building of the hospital is illegal: 1st Because no reasonable time (a life

or lives in being, etc.) is limited within which it must necessarily be built 2d. No definite persons are pointed out who are to build the hospital. 3d. No persons are indicated who are to determine what the wants of Savannah are in this respect, and how much is to be expended on the building. This being so, the balance of the residuary bequest fails, for another reason, to wit: It is impossible to say what may be "the portion of the residuum of my estate, as may not be expended in the building, erection and furnishing said hospital." And the whole bequest fails. Chapman v. Brown, 6 Ves. 404. Again, the intention of the testatrix is evidently to create a corporation, with perpetual succession. It is to be established on a "permanent basis." No court can create such a corporation, and the charity, if general, would, in England, fall to the crown, to be effectuated by sign manual; and hence fails here. Moggridge v. Thackwell, 7 Ves. 36. But, we submit, that under the decisions, this, as well as all the other charitable bequests in the will, is specific, and not general. If this be so, and the intention of testatrix cannot be carried out, the bequests fall altogether. Cy pres does not apply. Even in general charities, unless the English courts can give substantial effect to the donor's intention cy pres, they will not enforce the charity. Routledge v. Dorril, 2 Ves. Jr. 357. Is it likely that the testatrix intended that, at the expiration of the charter, twenty years after granted, the property should be divided among the members? Code, § 1688.

7. The twenty-third item is void for uncertainty, and as against the law of perpetuities. In no event can the bequest in this item fall into the residuum. It comes after the residuary clause, and is thus excepted out of it.

A. R. Lawton, W. S. Chisholm, and W. Grayson Mann, for defendants.

The complainants have not stated a case which entitles them to any relief. As heirs at law, they claim there is a resulting trust in their favor.

Code Ga. § 2312, provides as follows: "Resulting Trust: An implied trust is sometimes for the benefit of the grantor or his heirs, or heirs or next of kin of a testator, and is then a resulting trust."

Section 2316. "Implied Trusts: Trusts are implied." Paragraph 4. "When a trust is expressly created, but no trusts are declared, or are ineffectually declared, or extend only to a part of the estate, or fail from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs." See, also, Code, §§ 2445, 3194.

Code, § 2456. "Intention of Testator: In the construction of all legacies, the court will seek diligently for the intention of the testator, and give effect to the same as far as it may be consistent with the rules of law." And if this test is applied to the will, there cannot be extracted from it an intention that there should be a resulting trust in favor of the heirs. In fact, if there is one controlling intention pervading the whole will, it is that no one as heir at law shall inherit. An effect may be given to this intention which "will be consistent

with the rules of law" in the state of Georgia. The particular devises which the bill attacks are charitable bequests.

Code Ga. § 3157, provides: "Subjects of Charity: The following are proper matters of charity for the jurisdiction of equity: (1) The relief of aged, impotent, diseased or poor people. (2) Every educational purpose. (3) Provisions for religious instruction or worship. (4) For the construction or repair of public works or highways, or other public conveniences. (5) The promotion of any craft, or persons engaging therein. (6) For the redemption or relief of prisoners or captives. (7) For the improvement or repair of burying grounds or tombstones. (8) Other similar subjects, having for their object the relief of human suffering, or the promotion of human civilization."

"Section 3155: Equity has jurisdiction to carry into effect the charitable bequests of a testator or founder or donor, when the same are definite and specific in their objects, and capable of being executed."

Code, § 3156: "Cy Pres: If the specific mode of execution be for any cause impossible, and the charitable intent be still manifest and definite, the court may, by approximation, give effect in a manner next most consonant with the specific mode prescribed."

Code, § 2468: "Bequest to Charity: A devise or bequest to a charitable use, will be sustained and carried out in this state, and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it fails, from any cause, a court of chancery may, by approximation, effect the purpose in a manner most similar to that indicated by the testator."

Code, § 3195: "Want of Trustee: A trust shall never fail for want of a trustee."

Code, § 3160: "Extraneous Evidence: If the terms of a bequest or deed are obscured, doubtful or equivocal, other evidence may be looked up to ascertain the sense in which particular expressions are used, but not to make definite that which in itself is too indefinite for execution."

The foregoing sections of the Code have been construed together by the supreme court of Georgia. Newson v. Starke, 46 Ga. 88. In the above case the law of Georgia, upon charitable bequests, is fully discussed, and being the unanimous decision of the supreme court, the law there fixed was the guide to the testatrix. From that decision the following rules may be established: The words "definite and specific," in the Code, mean such as by the usual practice in chancery

courts, are held to be "definite and specific." Id. 95. "If the bequest be to charity generally, or to religion and education generally, the jurisdiction was not in the courts, as such, to carry it into effect; but if the objects of the gifts were stated, though only generally, or if there were a trustee appointed, the court would supply the want of definiteness in the object, or would compel the trustee to carry out the general intent of the testator." Id. The following are cited as instances which have been held not to be too indefinite: A gift "to the poor;" to a "particular parish or place;" to the "widows or orphans of a parish;" to a "church, to be laid out in bread for the poor." Id. "If the general objects were pointed out, or if the testator had fixed any means for doing so, as by the appointment of trustees for such purpose, courts of chancery treated the bequest as one sufficiently 'definite and specific' for judicial cognizance, and carried it into effect, notwithstanding there might remain some in definiteness and uncertainty." Id. "If there should be no trustee, or if the trustee should fail, the court has power to appoint a master to devise a scheme for carrying the bequest into effect." Id. 95, 96. This case overruled Beall v. Drane, 25 Ga. 430, and affirmed Beall v. Fox, 4 Ga. 404. And, in the last named case, the statute of 43 Eliz. c. 4, was declared of force in Georgia, and the statute of 9 Geo. II., not of force. The only restriction upon the right of a testator to devise his property to charity, is contained in Code, § 2419; Rev. Code, § 2384.

Code, § 2419: "Charitable Devises: No person leaving a wife or child, or descendants of child, shall, by will, devise more than one-third of his estate to any charitable, religious, educational or civil institution, to the exclusion of such wife or child; and in all cases the will containing such devise shall be executed at least ninety days before the death of the testator, or such devise shall be void." This section construed by the supreme court of Georgia. Reynolds v. Bristow, 37 Ga. 283.

Miss Telfair left no lineal heirs, and had never been married. It was, therefore, competent for her to have given her entire property to charity; and, in giving expression to her wishes, it was necessary that she should comply with the laws of Georgia alone, and those laws may be reduced to the following general principles: (1) The objects of the charity should be "definite and specific," according to the meaning of those words in the usual practice of chancery courts. For instance, "to the poor," to "a particular parish or place," "to the widows and orphans of a parish," "to a church to be laid out in bread for the poor." (2) If the objects should not be "definite and specific," the devise must be to a trustee, upon whose judgment the testator will be supposed to have relied to supply any want of definiteness. (3) If no trustee be appointed where the objects are definite and specific as aforesaid, or if a trustee be appointed, and the want of definiteness in that way be supplied, and the trustee should fail, or need judicial aid, the court will appoint a trustee, or a master, to devise a proper scheme for carrying the bequest into effect. And

more particularly is this true, where a bequest is to a trustee and his successors. If these principles are applied to the devises in this will, they will be found valid.

Item Tenth. This devise is to the trustees of the Independent Presbyterian Church of the city of Savannah. The gift is to the corporation in its corporate name. The object is definite and specific.

Item Eleventh. The devise is to the Union Society of Savannah. The object is definite and specific.

Item Twelfth. This devise is also to the corporation. The object is definite and specific. The uses in each of these items are all charitable, and the objects of the corporations are also charitable. Perry, Trusts, §§ 706, 699, 712, p. 657. But even if these devises were not charitable they are good as bequests to the several corporations, which, under their charters and the general laws of Georgia, are empowered to receive donations by gift, grant, devise, etc. Code, §§ 1679, 2346, 2347; see "Charters."

Conditions. The condition against alienation in each of the tenth, eleventh and twelfth items does not render the devises void. Perin v. Carey, 24 How. [65 U. S.] 465; Stanley v. Colt, 5 Wall. [72 U. S.] 119; McDonogh's Ex'rs v. Murdoch, 15 How. [56 U. S.] 367; Ould v. Washington Hospital, 95 U. S. 303; Wilcoxon v. Harrison, 32 Ga. 480; Proprietors of Church in Brattle Square v. Grant, 3 Gray, 142. The conditions are not illegal, immoral or impossible, and, therefore, do not invalidate the devises; but if they are of that character the conditions are void, and the devises stand.

Code, § 2661: "Void Conditions: Impossible, illegal or immoral conditions are void, and do not invalidate a perfect gift."

Code, § 2296: "Repugnant Conditions: A condition repugnant to the estate granted is void; so are conditions to do impossible or illegal acts, or which in themselves are contrary to the policy of the law." This very point, in principle, was made in the case of McDonogh's Ex'rs v. Murdoch, 15 How. [56 U. S.] 358, supra, by the heirs at law, and was decided against them. The statute law of Louisiana being almost in the above language of the Code of Georgia. Conditions which are repugnant to the legal rights which the law attaches to ownership, the common law pronounces void, and the civil law treats as recommendation and counsel not designed to control the will of the donee. McDonogh's Ex'rs v. Murdoch, supra. Subsequent conditions are not favored because they serve to defeat estates. These conditions are good whenever they are not impossible

to be performed at the time, or made so afterwards by the act of God or the grantor, when they are not contrary to law or repugnant to the deed itself. In all such cases the conditions themselves are void, and the party takes an absolute estate at once. Taylor v. Sutton, 15 Ga. 109. But even if these conditions contained in said tenth, eleventh and twelfth items should be held to defeat the devise, still there would be no resulting trust in favor of the heirs at law, for the reason that the thirteenth item provides that for breach of conditions, the executors are directed to enter and dispossess the original legatee, and the estate is given to the Savannah Female Orphan Asylum. Where property was given to one charity to go over to another in a certain event, it was allowed to go over to the second charity after the lapse of two hundred years, on the ground that it was no more a perpetuity in one charity than in the other. Perry, Trusts, § 736, p. 687; Christ's Hospital v. Grainger, 1 Macn. & G. 460.

Item Fourteenth. This is a devise to the Georgia Historical Society, and its successors, of the lot on St. James's Square, with the pictures, books, etc., in special trust, to keep and preserve the same as a public edifice for a library and academy of arts and sciences etc., "to be open for the use of the public," etc. The object here is clearly a charity. Perry, Trusts, § 700; Jarm. Wills, 236. The testatrix intended the gift for "educational purposes," and for "the promotion of human civilization." Code Ga. § 3157. The devise is to a corporation, the Georgia Historical Society, and its successors. A corporation may be a trustee to carry out a charitable bequest (Vidal v. Girard's Ex' rs, 2 How. [43 U. S.] 127; Perin v. Carey, 24 How. [65 U. S.] supra), unless prohibited by charter (American Colonization Soc. v. Gartrell, 23 Ga, 448). If the trust be not germane to the powers and purposes of the corporation, the corporation cannot be compelled to act, but the devise does not fail. McDongh's Ex'rs v. Murdoch, 15 How. [56 U. S.] supra; Vidal v. Girard's Ex' rs, 2 How. [43 U. S.] supra; Code Ga. §§ 3195, 3197. If the corporation be willing, but not competent under the charter, this is a question for the state and not for the heirs. Wade v. American Colonization Soc, 15 Miss. [7 Smedes & M] 663: Vidal v. Girard's Ex'rs, 2 How. [43 U. S.] supra. In this case the devise is to the Georgia Historical Society, and its successors. It is, therefore, to be presumed that the testatrix anticipated that there might be a substitute for her first choice. Perry, Trusts, § 721. As to the conditions attached to this devise, they are mere details which are to be treated as recommendations, but which do not invalidate the gift. See cases already cited on conditions. The conditions are so much in detail, and the charitable intention of the testatrix is so plain, that a court of chancery could, with the aid of a master, carry the bequest into effect. Newson v. Starke, 46 Ga. 88.

Item Seventeenth. This contains a gift of $30,000 to the Presbyterian Church in Augusta, or to the trustees thereof, and its or their successors. The statement of the devise is the best argument which could be made to sustain it

Item Twenty-First. This contains the devise of the residuum to the executors, and their successors, in trust, etc., to build a hospital for sick and indigent females, etc., and to obtain a charter, etc. In addition to the authorities already cited, in this connection particular attention is asked to the consideration of the cases of Ould v. Washington Hospital, 95 U. S. 303; Inglis v. Trustees of Sailors' Snug Harbor, 3 Pet. [28 U. S.] 99.

Item Twenty-Third. This contains two gifts: $1,000 to the Hodgson Institute in Telfairville, Burke county, Ga. This is clearly valid. And $1,000 to the first Christian church erected or to be erected in said village of Telfairville. The executors are made trustees, and if the church is not now erected, the court would hold up the fund a reasonable time. If the contingency fails to happen, the court will apply the fund cy pres. Attorney-General v. Bishop of Chester, 1 Brown, Ch. 444; Attorney-General v. Oglander, 3 Brown, Ch. 166; Ould v. Washington Hospital, supra. But if this device were void, being a gift of money, there would be no resulting trust for the heirs at law; the fund would fall into the residuum. Word v. Mitchell, 32 Ga. 623; Williams v. Whittle, 50 Ga. 523. Railroad stock is personalty in this state. Code, § 2237; Southwestern R. Co. v. Thomason, supra.

Item Twenty-Second. This item contains the expression upon which is based the claim that the entire will is void, under the law against perpetuities. "It is my wish, and I hereby so direct, that none of the legacies, bequests and devises in any of the clauses of this, my will, shall be executed or take effect until the building and other improvements on the lot on the corner of Whitaker and Gaston streets, and known as the 'Hodgson Memorial Hall,' which I have conveyed in trust to the Georgia Historical Society, shall be completed and entirely paid for out of my estate." The bill states "that the building and other improvements referred to were in the course of construction at the time of the death of testatrix, but were not completed until many months thereafter, and whether yet entirely paid for, your orators are not certainly informed. If not paid for, it is the only debt known to your orators now existing against said estate."

Code, § 2451: "Assets to Pay Debts: All property, both real and personal, in this state being assets to pay debts, no devise or legacy passes the title until the assent of the executor is given to such devise or legacy."

Code, § 2547: "Duty as to Contracts: The administrator must, as far as possible, fulfill the executory and comply with the executed contracts."

The said twenty-second item is but a statement of the general law, and if stricken out, Code, §§ 2451, 2547, would take its place. And should the construction contended for by complainants be placed upon this section of the Code no one could make a will in Georgia, valid under the law of perpetuities, who should die leaving unfinished, and not entirely paid for, any house, building or other improvement. Each legatee, upon the death of the testatrix, acquired such an interest in the respective legacies that, if the executors capriciously delayed the payment of debts and withheld their assent, he could in equity have compelled the assent Code, § 2452. All the devises, bequests and legacies in the will are immediate and not mediate. These words were originally used and a technical meaning given to them by Lord Hale. Collingwood v. Pace, 1 Vent. 413. If the gift, devise or bequest is direct to the legatee or devisee, without passing through another, it is immediate. In this case all the gifts are directly to the legatees or devisees mentioned in the respective items of the will or they are to William N. Habersham and William Hunter, who are nominated "as executors of this my last will and testament, and trustees under the provisions of the same." "When a will directs acts to be done which necessarily require the intervention of a trustee to hold the property, the executor is a trustee by necessary implication." Nash v. Cutler, 19 Pick. 67; Bennet v. Batchelor, 1 Ves. Jr. 63; Gordon v. Green, 10 Ga. 534. In this case the testatrix not only directs acts to be done which require the intervention of a trustee (if the payment of her debts and the completion of the building and other improvements on the lot on the corner of Gaston and Whitaker streets known as "Hodgson Memorial Hall," be such acts), but expressly declares that Habersham and Hunter are nominated executors and trustees under the provisions of the will. The various legatees are the beneficiaries. Construe, then, the entire will, and the scheme of the testatrix is, that her whole estate should pass to Habersham and Hunter, as executors and trustees, to carry out her intentions. They are instructed to complete and pay for, out of her entire estate, the building and other improvements on the lot on the corner of Gaston and Whitaker streets, and known as "Hodgson Memorial Hall," which has been conveyed in trust to the Georgia Historical Society; and when this charity, begun in her life time, shall have been completed and entirely paid for out of her estate, then these trustees are directed to assent to and turn over the legacies according to the other provisions of the will. The trust, if any, is to perfect a charity commenced in the life time of the testatrix, and to execute the provisions of the will. In such case, as already cited, when property was given directly to one charity to go over to another in a certain event, it was allowed to go over to the second charity after a lapse of two hundred years, on the ground that it was no more a perpetuity in one charity than in the other. Perry, Trusts, § 737, p. 687, and cases cited in the text. "The disposition which he makes of any

surplus, after the complete organization of the colleges, is a good charitable use for poor white male and female orphans." Perin v. Carey, 24 How. [65 U. S.] 465. Charitable uses are never void for perpetuity, and but rarely for uncertainty in America. Wag. Wills, pp. 401–406; Tud. Char. Trusts, p. 207. There being a gift to charity, remoteness is out of the case—that doctrine has no application to a charity. Chamberlayne v. Brockett, 8 Ch. App. 206; Christ's Hospital v. Grainger, 1 Maen. & G. 460. There may be a use or trust upon a use or trust. Code, § 2315.

Code, § 2311: "An express trust may depend for its operation upon a future event, and is then a contingent trust. It may operate in favor of additional or other beneficiaries upon specified contingencies, and is then a shifting trust." But the complainants rely upon the following extract from the opinion of Judge Swayne, in the case of Ould v. Washington Hospital, supra; "There may be such an interval of time possible between the gift and the consummation of the use as will be fatal to the former. The rule of perpetuity applies to trust as well as to legal estates. The objection is as effectual in one case as in the other. If the fatal period may elapse before what is to be done can be done, the consequence is the same as if such must inevitably be the result. Possibility and certainty have the same effect; such is the law." The bill alleges, on this point, as follows: "And your orators show that the building, and other improvements referred to, were in course of construction at the time of the death of testatrix, but were not completed till many months thereafter, and whether yet entirely paid for your orators are not certainly informed. If not yet paid for, it is the only debt known to your orators existing against said estate." The appraised value of the estate is placed at $650,000. If "can be done" is to be ascertained by what has been done, then there has never been the least possibility of the lapse of the fatal period in this case. The building and improvements, says the bill, were in course of construction; there was but one debt, and it has, in fact, says the bill, required but a few months to complete this work. The law regards that as certain which can be made certain. If the executors had been dilatory,' a court of equity could have compelled the completion of and payment for the work.

The nineteenth chapter of "Lewis on Perpetuities" concludes the subject on indefinite contingencies as follows: "In fine, let the event contemplated be what it may, and the probability of its early occurrence as great as it may, it will, in every case be of too remote expectancy, and a limitation depending upon it will, therefore, always be void, unless either from the nature or internal quality of the contingency, or from express provisions and restrictions it be certain, that the event which is to give effect to the limitation will happen, if at all, within the period of lives in being, and twenty-one years." Lewis, Perp. 481. The contingency relied on in this case is the completion of a building, and other improvements which were in the process of construction at the death of testatrix, and finished several months after her decease. Is there anything in the nature or internal quality of such a pretended contingency to make a perpetuity? The estate was wealthy; the fulfillment of that executory contract of the testatrix was a legal certainty, and not a contingency. In Henshaw v. Atkinson, Sir John Leach uses the following language: "It is argued that it was the testator's intention that the charities were not to take effect until lands or buildings were supplied by others, and that the money may be locked up for an indefinite period of time, and, therefore, that the bequest cannot be sustained. The cases of In re Downing College {Attorney-General v. Lady Downing}, Amb. 550, and Attorney-General v. Bishop of Chester, 1 Brown, Ch. 444, seem to be authority against that objection." 3 Madd. 306. But if, as already contended, the gift is immediate, either to the legatees or to Habersham and Hunter, as trustees under the provisions of the will the devise is good, although the enjoyment or consummation of the use may depend upon uncertain events. In such cases, the court will hold up the gift a reasonable time to await the happening of the contingency. Attorney-General v. Bishop of Chester, 1 Brown, Ch. 444; Attorney-General v. Oglander, 3 Brown, Ch. 166; Chamberlayne v. Brockett, 8 Ch. App. 206. In this case, the contingency, if any ever existed, has already happened, and the intention of the testatrix expressed in clear and unambiguous terms, can be carried into full effect Mr. Justice Swayne, in Ould v. Washington Hospital, supra, said: "It is a cardinal rule in the law, that courts will do this whenever it can be done. Here we find no impediment in the way. The gift was immediate and absolute, and it is clear, beyond doubt, that the testator meant that no part of the property so given should ever go to his heirs at law, or be applied to any object other than that to which he had devoted it." "Charitable uses are favorites with courts of equity. The construction of all instruments, where they are concerned, is liberal in their behalf. Even the stern rule against perpetuities is relaxed for their benefit" Ould v. Washington Hospital, 95 U. S. 313. See, also, Beall v. Fox, 4 Ga. 404.

Before BRADLEY, Circuit Justice, and ERSKINE, District Judge.

BRADLEY, Circuit Justice. This is a bill filed by the heirs at law of Mary Telfair, seeking to have the devises and bequests of her last will adjudged inoperative and void,

and a resulting trust in all of her estate declared in favor of said heirs, and that they may have a decree for their distributive shares thereof. The defendants demurred, and the question now arises on the demurrer. The will was made on the second day of June, 1875, when the testatrix was far advanced in years, and the probate thereof was strenuously contested, on various grounds, but was finally established on appeal by the supreme court of Georgia. The testatrix was never married, and had no relations except collaterals in the third and fourth degree. A great portion of her estate, which is alleged to have been of the value of $650,000, was given to charities.

A fundamental objection raised by the complainants to all the devises and bequests, arises on the twenty-second item of the will, which is as follows: "Twenty-Second. It is my wish, and I hereby so direct, that none of the legacies, bequests and devises in any of the clauses of this, my will, shall be executed or take effect until the building and other improvements on the lot on the corner of Gaston and Whitaker streets, and known as the 'Hodgson Memorial Hall,' which I have conveyed in trust to the Georgia Historical Society, shall be completed and entirely paid for out of my estate." It is contended that this postponement of the execution and effect of the devises and bequests "violates the rule against perpetuities, and renders them inoperative and void. The bill alleges that the building and other improvements referred to were in course of construction at the time of the death of testatrix, but were not completed till many months thereafter, and whether yet entirely paid for, the complainants were not certainly informed. If not paid for, it was the only debt known to the complainants existing against said estate. The complainants concede the English rule to be, that where there is an immediate gift to trustees for a general charity, but the particular application of the fund will not of necessity take effect within any assignable limit of time, and can never take effect at all, except on the occurrence of events in their nature contingent and uncertain, the gift is valid, and the court will hold up the fund a reasonable time, and await the happening of the contingency. Reference for this is made to the cases of Attorney-General v. Bishop of Chester, 1 Brown, Ch. 444; and to Attorney-General v. Oglander, 3 Brown, Ch. 166. But the complainants question whether this rule can be applied in

Georgia; and they contend that, whether it can or cannot, there is no immediate gift of the property in the mean time, before the contingency happens. The last clause of the will, it is true, after appointing executors of the will, makes them also "trustees under the provisions of the same;" but it is contended that this does not operate as a devise to them of the real estate.

In considering this objection to the validity of the dispositions of the will, it is to be observed, in the first place, that all the gifts therein contained are immediate in form. Thus, the first item declares: "I hereby give, devise and bequeath to George Noble Jones, son of the late Noble Wymberly Jones, all that full lot of land in the city of Savannah," etc. (going on to describe it), "to him and his heirs forever." The tenth item declares thus: "I hereby give, devise and bequeath to the trustees of the Independent Presbyterian Church, of the city of Savannah, all that full lot of land," etc., going on to describe the same, and to declare the purposes for which the gift was made. It seems to us, therefore, that the gift itself is not suspended upon the completion of the Hodgson Memorial Hall, and the payment thereof; but only the execution and carrying into effect thereof. Some of the gifts are pecuniary legacies. If this view is correct, the gift of these legacies is not suspended, but only the payment thereof. This seems to us to be the intent of the testatrix. No one can read the whole will and believe that the testatrix, for one moment, had in her mind the revocation or non-operation of the gifts themselves. The memorial hall was begun at the time the will was executed, and was so far constructed as to be completed within a few months afterwards. Its plan and extent must have been designed, and its cost must, within probable limits, have been anticipated. It was her desire that the executors and trustees should finish that building, and pay for it, before the other legacies should be paid or the other donations carried into effect. If any unreasonable delay should occur in this behalf, of course it would be competent for any of the beneficiaries under the will to compel the trustees to proceed. But it being an obligation of her estate, incurred under her own directions, she wished it discharged before the other donations of her will should be carried out, and she is, therefore, emphatic on the subject. There is reason in what the counsel for the defendants say, that this provision is in effect what the law of Georgia requires or allows in all cases. Section 2451 of the Code declares that "all property, real and personal, in this state, being assets to pay debts, no devise or legacy passes the title until the assent of the executor is given to such devise or legacy." In other words, the payment of debts and the fulfillment of obligations are the first things to be executed before the devises and bequests can be carried out without the assent of the executors. The completion of this memorial hall was an obligation already incurred, and the will merely requires what the law virtually requires, or allows the executors to require, in all cases.

Before proceeding further, it may be proper to cite the provisions of the Code of Georgia on the subject of charities. The most important for the purposes of this case are the following:

Section 2468: A devise or bequest to a charitable use will be sustained and carried out in this state; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done fails from any cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator.

Section 3155: Equity has jurisdiction to carry into effect the charitable bequest of a testator, or founder, or donor, when the same are definite and specific in their objects, and capable of being executed.

Section 3156: If the specific mode of execution be for any cause impossible, and the charitable intent be still manifest and definite, the court may, by approximation, give effect in a manner next most consonant with the specific mode prescribed.

Section 3157: This section specifies the subjects which are proper matters of charity for the jurisdiction of equity, corresponding nearly to the 43 Eliz.

By these provisions, it will be seen that the law of charities is fully adopted in Georgia, as far as is compatible with a free government where no royal prerogative is exercised.

We will now proceed to consider the objections which have been urged against the several charitable dispositions of the will. The first of these is contained in the tenth item, and is a gift to the trustees of the Independent Presbyterian Church of the city of Savannah, of a certain lot of land in Savannah, with the buildings and improvements thereon, upon the following terms and conditions, to wit:

"First. That the trustees of the said Independent Church shall appropriate annually out of the rents and profits of said lot and improvements the sum of one thousand dollars to one or more Presbyterian or Congregational churches in the state of Georgia in such destitute and needy localities as the proper officers of said Independent Presbyterian Church may select, so as to promote the cause of religion among the poor and feeble churches of the state. Second. This gift and devise is made on the further condition that neither the trustees nor any other officers of said Independent Presbyterian Church will have or authorize any material alteration or change made in the pulpit or galleries of the present church edifice on the comer of Bull and South Broad streets but will permit the same to remain substantially as they are, subject only to proper repairs

and improvements; nor shall they sell or alien the lot on which the Sabbath schoolroom of said church now stands, but shall hold the same to be improved in such manner as the trustees or pew-holders may direct. Third. Upon the further condition that the trustees of said Independent Presbyterian Church will keep in good order and have thoroughly cleaned up every spring and autumn my lot in the cemetery of Bonaventure, and that no interment or burial of any person shall ever take place either in the vault or within the inclosure of said lot; and for the purpose of having the same protected and cared for, I hereby give, devise and bequeath my said lot in the Bonaventure cemetery to the trustees of the Independent Presbyterian Church, and their successors."

Various objections are raised to this gift, which will be considered in due order.

First. It is objected that it is void for uncertainty. This objection cannot prevail.

The appropriation of a certain sum of money annually to one or more Presbyterian or Congregational churches in the state of Georgia in such destitute and needy localities as the trustees may select, so as to promote the cause of religion among the poor and feeble churches of the state, is a definite charitable object, much more so than hundreds of cases to be found in the books which have been sustained. The circumstances under which this opinion is prepared will not allow us to cite authorities for all the conclusions to which we have arrived, and, therefore, we shall content ourselves, in most instances, by simply stating them. We can only say that on the point under consideration we have no doubt whatever. It requires but a slight knowledge of the law of charities to determine a question of this kind. Almost all charities describe their objects in general terms, indicative of the particular kind of good to be effected thereby. When this is done the charity is definite, although the particular objects are indefinite. Another object declared in this item is to keep in good order the testatrix's burying lot in the cemetery of Bonaventure. This is sufficiently definite, and is clearly authorized by the Code of Georgia (section 3157); although it was once held not to be a proper object of a charitable disposition. Perry, Trusts, § 706. It is somewhat singular that it should ever have been doubted, since the sanctity of tombs and other places of rest for the dead has always been an object of cherished regard since the establishment of Christianity, and received the peculiar care of the Roman law.

Second. Another objection made to this devise is that it is accompanied with a condition which renders it void, namely, not to allow any alteration to be made in the pulpit or galleries of the church edifice of the trustees, nor to alien the lot on which the Sabbath school-room of said church stands, but to hold the same to be improved in such manner as the trustees or pew-holders may direct. So far as this condition is expressive of a direction to keep the pulpit or school house in repair, it is a proper charity. So far as it may be construed as a condition, as for example, a condition against changing the form of the pulpit, or alienating the land, if un-lawful (which we do not affirm), it is nevertheless

a condition subsequent, and cannot affect the charitable gift. It is a condition subsequent, because it relates to the future after the gift is designed to take effect.

Third. The next objection is, that the trustee named being a corporation of definite powers, not including that of holding property in trust for any other object than that connected with the church as a religious society, is incapable of receiving or administering the trust. Supposing, for the sake of argument, this to be true, still the charity will not be permitted to fail, but the court of chancery has full power to supply the want of a legal trustee. A definite charity is not allowed to fail for want of a trustee. The Code expressly says: "A trust shall never fail for the want of a trustee." Section 3195, But we are inclined to think that the corporation may administer this trust. Every religious society or church has, from the very nature of the Christian religion and Christian institutions, a missionary vocation as old as the apostolic times; and it is not foreign to its purposes to extend aid to sister churches, or to promote the cause of Christianity, and especially of the particular form of Christianity which it professes, in places of destitution or ignorance.

Another objection founded on the terms of the thirteenth item of the will, will be considered hereafter.

The next gift is contained in the eleventh item of the will, and is in these words: "Eleventh. I give and devise to the Union Society of Savannah all that lot or parcel of land in the city of Savannah on the north side of Bay street, and at or near its intersection with Jefferson street, extended or prolonged, known in the plan of said city as lot letter 'B,' with the buildings and improvements thereon, but on the express condition that said society shall not sell or alienate said lot, but shall use and appropriate the rents and profits of the same for the support of the school and charities of said institution, without said lot being at any time liable for the debts or contracts of said society." This gift is objected to on account of the condition against alienation, and because the Union Society has already a surplus of funds. The condition is nothing but a condition subsequent, and if void, does not vitiate the gift. But we are not aware that a condition against alienation annexed to property devoted to a charity has ever been held to be void. Charity property, as a general thing, cannot be alienated without the aid of the court of chancery. Its normal character is to be inalienable, and the condition only expresses that character. The court, notwithstanding the

condition, would probably, if a proper case arose, make a decree allowing it to be alienated for the good of the charity. See Perin V. Carey, 24 How. [65 U. S.] 465. The objection that the Union Society has more funds already than are needed or can be used for the purposes of its institution is not supported by the allegations of the bill. The fact that a charitable society is well managed, and does not spend its entire income, but increases, as it may occasionally, its capital, is no evidence that its sphere of usefulness may not be greatly enlarged by an accession of new capital.

The twelfth item of the will is as follows: "Twelfth. I give, devise and bequeath to the Widows' Society of Savannah, all that lot or parcel of land in Savannah on the corner of President and West Broad streets, on which the improvements now consist of four brick tenement buildings, the rents and profits of the same to be appropriated to the benevolent purposes of said society; but this devise is made on condition the said Savannah Widows' Society shall not sell or alienate said lot or improvements, nor hold the same subject to the debts, contracts or liabilities of said society." It is objected to this item that the gift is too general, being for benevolent purposes indefinitely, which are not necessarily charitable. But it is for the benevolent purposes of the donee, the Widows' Society of Savannah. By turning to the charter of this society we find that it is incorporated and made a body politic, by the name and style of the Savannah Widows' Society, for the relief of indigent widows and orphans. This is sufficiently expressive of its charitable objects. But it is insisted that this declaration of the purpose and object of the society is only a part of its name. This is doubtful; but if it were so, it would still be sufficient to show for what purpose the society was organized, and would lay the foundation of a bill, or information, in equity, to prevent a diversion of its funds to any other purpose. We think the objection is untenable.

The thirteenth item of the will contains a provision which is applicable to the tenth, eleventh and twelfth, which have been considered. It is as follows: "Thirteenth. Should either one or more of the corporate bodies or institutions named in the preceding items of my will attempt to sell, alienate or otherwise dispose of the property and estate therein devised, contrary to the terms and conditions therein set forth, or should there be any levy on the same to satisfy the debts of said corporation, then I hereby direct my executors, or legal representatives, to re-possess and enter upon said property or estate as to which the conditions may be so broken or violated, and in that event I do hereby give and devise the said property so entered upon and re-possessed unto the Savannah Female Orphan Asylum." Here is a gift over of the property devised in the three previous items upon certain conditions subsequent. It is either valid or invalid. If valid, there is an end to the matter. If invalid, the conditions are inoperative, and the property remains as first given. This seems to us so clear that no further observation is required on the subject.

The next item is as follows: "Fourteenth. I hereby give, devise and bequeath to the Georgia Historical Society, and its successors, all that lot or parcel of land, with the buildings and improvements thereon, fronting on St. James's Square, in the city of Savannah, and running back to Jefferson street, known in the plan of said city as lot letter 'N,' Heathcote ward, the same having been for many years past the residence of my family, together with all my books, papers, documents, pictures, statuary and works of art, or having relation to art or science, and all the furniture of every description in the dwelling-house and on the premises (except bedding and table service, such as china, crockery, glass, cutlery, silver, plate and linen), and all fixtures and attachments to the same; to have and to hold the said lot and improvements, books, pictures, statuary, furniture, and fixtures, to the said Georgia Historical Society, and its successors, in special trust, to keep and preserve the same as a public edifice for a library and academy of arts and sciences, in which the books, pictures and works of art herein bequeathed and such others as may be purchased out of the income, rents and profits of the bequest hereinafter made for that purpose, shall be permanently kept and cared for, to be open for the use of the public on such terms and under such reasonable regulations as the said Georgia Historical Society may from time to time prescribe; but this devise and bequest is made upon condition that the Georgia Historical Society shall cause to be placed and kept over and against the front porch or entrance of the main building on said lot a marble slab or tablet, on which shall be cut or engraved the following words, to wit: 'Telfair Academy of Arts and Sciences,' the word 'Telfair' being in larger letters and occupying a separate line above the other words; and, on the further condition, that no part of the building shall ever be occupied as a private residence, or rented out for money, and none but a janitor, and such other persons as may be employed to manage and take care of the premises, shall occupy or reside in or upon the same, and that no part of the same shall be used for public meetings or exhibitions, or for eating, drinking or smoking; and that no part of the lot or improvements shall ever be sold, alienated or incumbered, but the same shall be preserved for the purposes herein set forth. And it is my wish, that whenever the walls of the building shall require renovating by paint or otherwise, the present color and design shall be adhered to, as far as practicable. For the purpose of providing more

effectually for the accomplishment of the objects contemplated in this item or clause of my will, I hereby give, devise and bequeath to the Georgia Historical Society, and its successors, one thousand shares of the capital stock of the Augusta & Savannah Railroad, of the state of Georgia, in special trust, to apply the dividends, income, rents and profits arising from the same, to the repairs and maintenance of said buildings and premises, and the payment of all expenses attendant upon the management and care of the institution herein provided for, and then to apply the remaining income, rents and profits in adding to the library, and such works of art and science as the proper officers of the Georgia Historical Society may select, and in the preservation and proper use of the same, so as to carry into effect in good faith the object of this devise and bequest." The charity indicated in this gift is a very meritorious one, and is authorized by the Code (section 3157), under the general class of "every educational purpose," which undoubtedly embraces public libraries. The principal objection to the gift is, that the donee, the Georgia Historical Society, is incapable of taking it. But if this were true, as before stated, where the charity is definite, the court of chancery will provide a trustee, if none is named, or if the one named is incompetent to act. It seems to us, however, that the gift to the Georgia Historical Society is not void. One ground of objection is, that whilst a general power is given to the society to take and hold goods and lands, it is coupled with a proviso that the clear annual income of such real and personal estate shall not exceed the sum of five thousand dollars; whereas the bill states that the income of the society was already between three and four thousand dollars at the time of the gift, which will increase it seven thousand dollars more. This, if the society accepted the trust, may have been cause of forfeiting its charter; but the gift would none the less be vested in it To hold otherwise would be to render the society exempt from any inquiry on the subject at the suit of the state, for the answer would be: "We cannot hold more property than our charter allows, and, therefore, we do not". Certain things are ultra vires of a corporation; but when it has the power to hold property, and is forbidden to hold beyond a certain amount, the matter being one of degree merely, or of more and less, this is not a question of ultra vires, but of violation of its charter. A contrary rule would involve many absurdities. Suppose a corporation has no more property than its charter allows, but by an enhancement of values it grows into an excess of that allowance, to what particular portion of its property does its title become void? Is the whole affected by the vice? The answer plainly is, the title to none of it becomes void; but the corporation may be amenable to the penalty of violating its charter. Individuals cannot call it in question; its tenants must continue to pay its rents, and its debtors their debts; the state alone has the right to proceed against it. The state may or may not see fit to do so. It would depend on the circumstances of the case, the greatness of the excess, the causes which led to it etc. The state may condone the offense. The legislature may relieve by enlarging its power. In the present case the defendants

contend that the Georgia Historical Society has been relieved by an amendment to its charter, passed in 1870, by which the proviso in question was repealed. The complainants insist that this amendment was unconstitutional, because the constitution of 1868 declares that the general assembly shall have no power to grant corporate powers and privileges to private companies, except to banking and other business companies named; but shall prescribe by law the manner in which such powers shall be exercised by the courts. But "corporate powers and privileges" are powers and privileges which appertain to a corporation as such; its corporate franchise is not every power that a corporation has which is a corporate power. The intent of this prohibition undoubtedly was to relieve the legislature from applications to create private corporations of a certain class, such as benevolent, religious, literary, etc. It did not take away the power to make amendments to existing charters, nor intend to give that power to the courts. Suppose there had been a general law of mortmain, forbidding all religious corporations to hold land, would the constitution prevent the legislature from repealing it? Yet, by repealing it existing corporations would have a new accession of power—not of corporate power, but of power to hold property. We think the amendment of 1870 was valid. That a corporation may be a trustee, if not prohibited, has been frequently held. Vidal v. Girard's Ex'rs, 2 How. [43 U. S.] 127; Perin v. Carey, 24 How. [65 U. S.] 465; McDonogh's Ex'rs v. Murdoch, 15 How. [56 U. S.] 367; American Colonization Soc. v. Gartrell, 23 Ga. 448. It may be a qualification that the object of the trust should be germane to, or in harmony with, the objects of the corporation. If this is true, what more appropriate existing corporation in Georgia could have been selected as trustee for the proposed library than the Georgia Historical Society? The presence of the library would greatly promote the objects of its incorporation. The charter declares that it shall be construed benignly and favorably for every beneficial purpose therein intended. In our judgment, the gift in this case took effect in the society as trustee.

The other objections to this item, relating to the inscription to be placed on the building, etc., are not tenable. It is a laudable ambition to wish to transmit one's name to posterity by deeds of beneficence. The millionaire who leaves the world without doing anything

for the benefit of society, or for the advance of science, morality or civilization, turns to dust, and is forgotten; but he who employs a princely fortune in founding institutions for the alleviation of suffering, or the elevation of his race, erects a monument more noble, and generally more effectual to preserve his name, than the pyramids. Thousands of the wealthy and the noble, in the early days of English civilization are deservedly forgotten; but the founders of colleges in Oxford and Cambridge will be borne on the grateful memories of Englishmen as long as their empire lasts. Harvard and Yale, in our own country, are pertinent examples of this truth.

The seventeenth item of the will gives thirty thousand dollars to the Presbyterian Church of the city of Augusta, to be appropriated in building a commodious Sunday school house and library on a portion of its lot. We do not remember that any peculiar objections were raised to this bequest.

The twenty-first item is as follows: "Twenty-first. All the rest and residue of my estate, of whatever the same may consist, real, personal and mixed, and wherever situated, I hereby give, devise and bequeath to my executors hereinafter named, and to the survivor of them, and to the successors in this trust of said survivor, in trust, to use and appropriate the proceeds arising from the same to the building and erection and endowment of a hospital for females within the city of Savannah, on a permanent basis, into which sick and indigent females are to be admitted and cared for, in such manner and on such terms as may be defined and prescribed by the trustees or directresses provided for in this item or clause in my will. The income, rents and profits of such portion of the residuum of my estate, as may not be expended in the building, erection and furnishing said hospital, shall be annually appropriated to the support and maintenance of the same. My desire and request is that a thoroughly convenient hospital, of moderate dimensions, suited to the wants of the city of Savannah, and capable of enlargement, if necessity should require, may be built and erected, with no unnecessary display connected with it. And I do hereby nominate as first trustees, managers or directresses of said hospital, Mrs. Louisa F. Gilmer, Sarah Owens, Mary Elliott (formerly Habersham), Susan Mann, Florence Bourquin, Eva West, and Eliza Chisholm, all of Savannah, Georgia, and do request and instruct my executors to advise and consult with the ladies named as to the construction, arrangement and furnishing of said hospital. It is further my wish and desire, and I do hereby request, that a suitable and proper act of incorporation for said hospital shall be obtained from such tribunal in the state of Georgia as may have jurisdiction in the premises, to be called and known as the 'Telfair Hospital for Females,' with the ladies above named, or such of them as may consent to serve, and such others as they may apply for to be associated with them as the first trustees, managers or directresses, under said act of incorporation, with power to fill any vacancies, that occur in their number. And for the purpose of accomplishing the objects contemplated in this item or clause of my will, I do hereby authorize

and empower my executors, or the survivor of them, to sell and convey all, or any portion, of the real estate, or any interest in the same, which I may have, or be entitled to, and not given or devised in any of the previous items or clauses of this my will, using their discretion as to private or public sales, and to whether, and at what time, such sales shall be made." This is an important item in consequence of the amount supposed to be given for the object indicated therein. It is devoted to the building and endowment of a hospital for sick and indigent females within the city of Savannah. It is objected to for uncertainty as to the objects; for uncertainty as to the time when the hospital is to be built, and when the act of incorporation is to be obtained; for the impossibility of creating such an act under the constitution and laws of Georgia, and as being in violation of the rule against perpetuities, in that it gives the property ultimately to a corporation not yet in existence. We do not think that any of these objections can prevail. First. As to want of certainty in its objects. Surely, when the testatrix says that the hospital is intended for females within the city of Savannah, into which sick and indigent females are to be admitted and cared for, she has said all that is necessary to make it a well-defined charity. It is to be a hospital; it is to be for females in Savannah; it is to be for sick and indigent females. What more could well be said to define it? Very few charities are more definite. As to the uncertainty of the time when the hospital is to be built, and when the act of incorporation is to be obtained, no one who has read the case of Inglis v. Trustees of Sailors' Snug Harbor, 3 Pet. {28 U. S.} 99, or the more recent case of Ould v. Washington Hospital, 95 U. S. 303, can have any doubt that the gift is good. Even if it cannot be carried out in the particular manner contemplated by the testatrix, the court can and will provide proper trustees to carry it out. This is fairly within the powers given by the Code. But we cannot agree with the counsel for the complainants that the state of Georgia has, inadvertently or otherwise, deprived itself of the power of creating a charitable corporation. If the law authorizing the courts to grant charters is imperfect in this respect, it will, no doubt, be promptly amended when the defect is discovered. This is no greater or more remote contingency than that which intervenes in any case where a gift of charity contemplates a future act of incorporation by the legislature. The fact

that the property is directed to be ultimately conveyed to a corporation to be created, creates no perpetuity. The estate is given immediately to the executors and trustees, and the prosecution of the charity is to be carried on by them until the building shall be ready for delivery, and then handed over with the fund to support it to the corporation to be created; or, if none shall be created, to such trustees as the court may appoint. This creates no perpetuity as has been decided in the cases referred to, and many others that might be cited.

The twenty-third item which gives a thousand dollars to the first Christian church erected, or to be erected, in the village of Telfairville, in Burke county, or to such persons as may become trustees of the same, and a like sum to the Hodgson Institute, in the same village, are of the same character precisely, so far as objected to, with the bequest in the case of Attorney-General v. Bishop of Chester, 1 Brown, Ch. 444, which was approved by Lord Eldon in Attorney-General v. Parsons, 8 Ves. 186.

In our judgment, the gifts of this will must be sustained. We should not have thought it necessary to go so much into detail in examining the objections that have been raised, but for the ability and earnestness with which the several points were presented. The bill must be dismissed with costs.

{NOTE. This case was reviewed upon appeal in the supreme court, Mr. Justice Gray delivering the opinion of the court. The contention is made that by the twenty-second clause of the will all the devises and bequests in the will are made to violate the rule against perpetuities. This contention is founded upon the use of the words "take effect," in the twenty-second clause. Says the learned justice: "Reading the twenty-second clause in connection with the other parts of the will, and in the light of the attending facts, it is quite clear that the words 'take effect' are used by the testatrix as synonymous with or equivalent to the word 'executed,' with which they are coupled, and not as signifying that the devises and bequests shall not vest immediately, but only that they shall not be paid or carried out until the debt contracted by the testatrix for the construction of the Hodgson Memorial Hall shall have been paid out of her estate. Bach devise and bequest is present and immediate in form, introduced by the words, 'I give, devise, and bequeath.' The bill shows that the building and improvements referred to were, at the time of the death of the testatrix, in the course of construction, and so far advanced that they were actually completed within some months afterwards, so that the probable cost must have been capable of estimation at the time of making the will. The twenty-second clause is but a declaration of what the law would require,—that the debt of the testatrix for the construction of the memorial hall must be first paid out of her estate before her devisees and legatees receive any benefit therefrom." The objection that section 2914 of the Code of Georgia, providing that wills containing devises to charitable, educational, etc., uses, shall be executed at least 90 days before the death of the testator, applies to this case, is met

by the learned justice by a number of citations showing that the true construction given to the clause by the supreme court of Georgia limits its application to cases of testators who have wife, child, or descendants. The opinion considers at length the subject of charitable bequests. The particular bequests are to be considered under the operation of the Georgia state statutes. Says the learned justice in speaking of sections 2468, 3155–3158, Code Ga.: "These provisions were evidently enacted to clear up the doubts created by previous conflicting decisions and opinions of the supreme court of Georgia. They show, as was well observed by Mr. Justice Bradley in the circuit court, quoting the opinion above, 'That the law of charities is fully adopted in Georgia as far as is compatible with a free government where no royal prerogative is exercised.'. The learned justice then takes up the devises in their order. First, that of tenth clause, to the trustees of the Presbyterian Church (a corporation). He overrules the objection that the corporation cannot, under its charter, hold and administer the charity. "It is a novel proposition, as inconsistent with the rules of law as it is with the dictates of religion, that a Christian church or religious society cannot receive and distribute money to poor churches of its own denomination, so as to promote the cause of religion in the state in which it is established." The eleventh clause of the will, to the Union Society, which was incorporated "for the relief of distressed widows, and the schooling and maintaining of poor children." The twelfth clause, to the widows' Society, having similar purposes; and the fourteenth clause, to the Georgia Historical Society, are all considered and sustained. In the last it was contended that, because the Historical Society, by its charter, was limited as to the amount of property it might hold, and this bequest, if valid, together with the other property of the society, exceeded the amount, rendered the bequest void. There is, says the learned justice, a conclusive answer to this argument. "Restrictions imposed by the charter of a corporation upon the amount of property that it may hold cannot be taken advantage of collaterally by private persons, but only in a direct proceeding by the state which created it." Of the residuary clause of the will, giving to trustees the residue of the estate for the purpose of establishing a hospital, continuing, says the learned justice: "That this devise and bequest to establish a hospital for sick and indigent females in the city of Savannah is sufficiently definite, and that its validity is not impaired by the proviso of the will requiring an act of incorporation to be obtained, is clearly settled." Summing up: "The result is that all the devises and bequests contained in Miss Telfair's will are valid as against her heirs at law and next of kin." Decree affirmed. 107 U. S. 174, 2 Sup. Ct. 338.]

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

[2] [Affirmed in 107 U. S. 174, 2 Sup. Ct. 338.]