the progress of the work. The flat cars upon which the piles were loaded were provided with iron sockets, known as "pockets," placed at stated intervals around the lower edge of the car. Stakes or standards were placed in the sockets of the car on the further side from the stack of piles. Some of these were split saplings, and were placed in the sockets with the round side towards the outside of the car. Others were round saplings. Two switch ties, 16 feet long and 10 inches wide, were placed, one end resting on the car and the other upon the ground on that side of the car nearest the piles, and were used as skids or slides up which the piles were hauled upon the car by means of two tackles consisting of two double blocks with lines reeved through them. These tackles were attached to the two outer stakes on the outer side of the car by slings of rope passed around the stakes into the ends of which the blocks were hooked. The ropes used in the slings were 1¼-inch Manilla ropes. In one tackle a 1-inch fall line was used, and in the other a line of 1¼-inch. The pile was rolled to the foot of the skids, and the tackle attached to both ends of the pile; the smaller rope to the smaller end. The men engaged pulled first on the one tackle, hauling that end of the pile upon the skid some two feet, and the fall rope being then fastened to prevent the pile slipping down, the opposite end of the pile was raised in like manner, and so the pile was hauled up upon the car. Occasionally the piles would stick upon the skids or become jammed. To overcome this obstruction, a pinch bar was used to raise the pile upon the skid when the men hauled upon the tackle. At the time of the accident two layers of piles had been loaded upon the car, occupying a space of three feet in height above the floor of the car. The accident occurred during the hauling of the last pile, which was somewhat heavier than the others, and when the pile had been hauled upon both skids nearly to the top. Some of the bridge gang and section men were hauling on the fall rope at the west end of the pile, assisted by some bystanders. Davis, standing at the west side of the skid, was prying up the pile with a pinch bar to overcome some obstruction. The men engaged in hauling on the fall rope tugged several times with the rope, but could not move the pile, and while thus hauling upon the rope the sling holding the tackle to the post on the west end broke, allowing the pile to slide down the skids, striking Davis upon the chest, and throwing him against the bank of a ditch at the side of the track, and instantly killing him. After the accident the rope was examined, and showed a clean, new break, presenting no sign of wear or defect. This rope was a Manilla rope 1¼ inches in diameter, and was of the best grade on the American market. In size it was somewhat heavier than was ordinarily used for work of this character. Its breaking strength was about 4,000 pounds. It had been supplied, through the master of bridges, to the foreman, about a year before the accident, and had been used occasionally when heavy work was done, about four or five times a month. There was no evidence given by the plaintiff below, other than the fact of the accident itself, to show that the rope was defective or insufficient. The evidence upon the part of the defendant below was to the effect that the rope was of the best quality, of sufficient strength for the work in which it was employed, was in good condition and was not defective. At the conclusion of the evidence the court was moved to direct the jury to return a verdict for the defendant. This motion was overruled by the court, to which ruling a proper exception was reserved, and such ruling is assigned for error.

Clarence Brown and Charles A. Schmettau, for plaintiff in error.

F. W. Dundas, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). The declaration charges a failure by the master to furnish adequate machinery and appliances, and negligence upon his part in furnishing appliances which were improper, inadequate, and of insufficient strength for the required service, and that the death of the defendant in error resulted from such negligent discharge by him of

his duty. It was, therefore, incumbent upon the defendant in error to prove the negligence asserted in one or other of the particulars charged, and that such failure in duty was the proximate cause of the death. The duty of the master is to use ordinary care to furnish appliances reasonably safe and suitable for the use of the servant, such as, with reasonable care upon the part of the servant, can be used without danger except such as is incident to the business in which such instrumentalities are employed. Reed v. Stockmeyer, 34 U. S. App. 727, 20 C. C. A. 381, and 74 Fed. 186. But the master is not responsible for the negligent or unskillful use by the servant or by the foreman of his gang of laborers of the necessary and safe tools and appliances furnished. Railway Co. v. Brown, 34 U. S. App. 759, 20 C. C. A. 147, and 73 Fed. 970. The undisputed evidence at the trial was to the effect that the rope furnished was sufficient for the performance of the work; that it was a Manilla rope,—the best quality of rope in the market; that after the accident the rope exhibited a clean, new break, the strands throughout being bright, and without sign of wear or defect. There was no evidence, other than the fact that the rope broke, to suggest insufficiency or defect. The general rule is not disputed that, as between master and servant, the proof of the occurrence of an accident raises no presumption of negligence. If the circumstances surrounding the transaction speak the negligence of the master, and that can be deduced therefrom as a natural and reasonable inference, the duty of explanation is cast upon the master. Bahr v. Lombard, 53 N. J. Law, 233, 21 Atl. 190, and 23 Atl. 167; McKinnon v. Norcross, 148 Mass. 533, 20 N. E. 183; Redmond v. Lumber Co., 96 Mich. 545, 55 N. W. 1004. The proof to warrant such inference must be brought forward by him who charges the negligence, and upon whom is the burden of proof. The inference of negligence cannot be established by conjecture or speculation, or drawn from a presumption, but must be founded upon some established fact. The law of the case was correctly apprehended and stated by the court in its charge to the jury, but the court erred in not directing a verdict for the defendant below. There was absolutely no evidence, other than the fact of the breaking of the rope, from which negligence of the master could justly be inferred. The accident may have occurred from (1) the insufficiency of the rope, (2) a latent defect in the rope, (3) its improper use and overstraining, (4) the manner of its adjustment to the standard, (5) the character of the standard used. It is urged that it was proper to submit the case to the jury upon the ground that they had the right to infer that the rope was insufficient, for the reason that the other possible causes of the accident were excluded by the evidence. This reasoning is fallacious in its premises. The evidence did not exclude all other probable causes of the breaking of the rope. To the contrary, it suggests as strongly probable that the accident was due to a great and inconsiderate strain upon the rope during the obstruction of the pile, and while Davis was endeavoring with the pinch bar to overcome the obstruction, and before it could be surmounted, and through the great lateral strain upon the rope caused by the pulling on it by 15 or 20 men while the pile was thus obstructed. Whether that be the

correct solution of the cause of the accident or not, it is certain that not only were all other probable causes of the insufficiency of the rope not excluded by the evidence, but the testimony clearly established its sufficiency. The plaintiff below, therefore, had failed to establish any neglect of duty upon the part of the defendant below causing this injury, and it was error not to direct a verdict as requested. The judgment will be reversed, and the cause remanded, with directions to the court below to grant a new trial.

SICKLES et al. v. CITY OF NEW ORLEANS.

(Circuit Court of Appeals, Fifth Circuit. April 12, 1897.)

No. 526.

1. CONSTRUCTION OF WILL—CHARITABLE BEQUESTS—RIGHTS OF HEIRS.
When a will makes several bequests to charities, including a bequest of the residue of the testator's estate, and also provides that, in the event of the failure of any such bequest, the executors shall pay over the amount bequeathed to such uses as they think most in consonance with the testator's wishes, the heirs of the testator can take nothing on the failure of any charitable bequest.

2. CONFLICT OF LAWS—CONSTRUCTION OF WILL.
The law of a testator's domicile controls as to the formal requisites of the validity of a will as a means of transmitting property, the capacity of the testator, and the construction of the instrument; but, if a will contains a particular bequest of funds to be transmitted to and administered for particular purposes in another state, the validity of such bequest must be tested by the law of the latter state.

3. CHARITABLE BEQUESTS—PERFORMANCE OF CONDITIONS.
Under the law of New York and of common-law states generally, a valid bequest for charitable uses is not revocable, on account of failure of the trustees to comply with conditions attached thereto, unless such revocation is expressly reserved in the will.

4. GIFTS—DONATIO CAUSA MORTIS—CHARITABLE USES.
Under the law of Louisiana, there is a distinction between a mode or charge and a condition, as affecting a donation; and the expression of a purpose in the making of a donation is not equivalent to the imposition of a condition, within the meaning of articles 1559 and 1710 of the Civil Code relating to the revocation of donations. Accordingly, *held*, that a donation mortis causa for charitable or pious uses is not revocable in favor of the heirs, because of the failure of the donee to administer the charity.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

In 1856, Simon Van Antwerp Sickles, formerly a resident of the city of New Orleans, state of Louisiana, but then a resident of the state of New York, departed this life, leaving an olographic will, executed on the 30th day of July, 1855, as follows: "I, Simon V. Sickles, late of the city of New Orleans, now residing in the village of Nyack, county of Rockland and state of New York, considering the uncertainty of this mortal life, but being of sound and disposing mind and memory, do make, publish, and declare the following to be my last will and testament: I hereby enjoin it upon my executors, hereinafter named, to dispose of all my real and personal estate, excepting that specifically devised by me, and to apply the proceeds thereof to the purposes of this will, first paying all my just debts. I give and bequeath unto my

brother James ten thousand dollars, for his own sole use forever; and I also give and bequeath to my said brother James the sum of six thousand dollars, to be held by him in trust, and invested in bond and mortgage in his name, as trustee, and the income thereof applied to the use of my brother William during his natural life, half-yearly, and upon his death, whether before or after me, said sum of six thousand dollars shall be paid over to such of his children as shall survive him, in equal shares (excepting Margaret, who is otherwise provided for), when they respectively become of age, with the accumulated interest. I give and devise unto my niece Mary Ann Sickles the farm on which she now resides, situated in the county of Adams, or Hancock, or both, and state of Illinois, purchased by me of Mr. Tucker, containing 110 acres, and also the eighty acres of land adjoining said farm, and subsequently bought by me of Mr. Ellison. I give and bequeath unto my nieces Jane and Elizabeth, and to my nephew James, children of my brother Nicholas, the sum of three thousand dollars each. I give and devise unto my brother William the forty acres of land lying on the northeast corner of the farm he now occupies and owns, situate in Adams county, and state of Illinois. I give and bequeath unto my cousin Mary V. A. Ostrom and James E. Van Antwerp the sum of one thousand dollars each; unto my aunts Sarah King and Mary Salsbury the sum of five hundred dollars each; unto my cousins Mary Van Wagener, Catharine Blanrelt, Francis Heath, Mary Green, Sarah Herring, John L. Salsbury, and my friends William Demarest, of New York, and Margaret, wife of William S. Dunham, of Brooklyn, the sum of five hundred dollars each. I give and bequeath unto Abraham Springstein, late in the employ of my brother William, five hundred dollars. I give and bequeath unto William C. Trimmins, now one of the firm of Sickles & Co., one thousand dollars. I give and bequeath unto my executors in trust, to pay over to the societies or institutions hereinafter named, or to the treasurers thereof for the time being, for the use of such institutions respectively, the following sums, namely: To the Protestant Boys' Orphan Asylum of the city of New Orleans five thousand dollars, and to the Protestant Girls' Orphan Asylum of the same city five thousand dollars. My executors will select those asylums most in need of this bequest, and bestow it accordingly. To the Catholic Female Orphan Asylum on Camp street, in the city of New Orleans, where my friend Margaret is worthily engaged, five thousand dollars. To the New York Magdalen Female Benevolent Society of the city of New York ten thousand dollars. To the Association for the Relief of Respectable Aged Indigent Females in the city of New York the sum of five thousand dollars. To the New York Institution for the Instruction of the Deaf and Dumb five thousand dollars. To the New York Institution for the Blind in the city of New York five thousand dollars. I also give and bequeath unto my executors in trust the sum of ten thousand dollars, to be paid to the treasurer for the time being of the Protestant Orphan Asylum situated on the banks of the Hudson river, in the city of New York, on the east side of the river, the same to be applied to the use of said asylum. I give and bequeath unto my esteemed friend, the Revd. Lewis M. Pease, superintendent of the Five Points House of Industry in the city of New York, in consideration of his self-devotion to the cause of humanity, the sum of five thousand dollars. In his truly noble efforts to rescue from crime, and elevate the character of, the sons and daughters of misfortune, he merits the gratitude of mankind. In the event that my brother-in-law Richard D. Cantillon survives my sister Mary, I give and bequeath unto him, to have and to hold during his natural life, the use of the farm, buildings, and appurtenances, situated near the village of Nyack, on which he now resides, and containing about seventeen acres; and, upon his death, I give and devise said farm, buildings, and appurtenances unto the New York Magdalen Female Benevolent Society in fee simple; and if, for any legal difficulty, such society cannot take title thereto, then I direct my executors to sell and dispose of the same, and to apply the proceeds thereof to the use of said society. I give and bequeath unto the trustees of the Rockland County Female Institute the amount of my present subscription of eight thousand dollars, and, in addition, I give and bequeath ten thousand dollars more. It is my will that the income of these sums should be applied in the education and support in this institution of orphan girls, to be selected from among the most promising in point of character and intellect from the orphan

asylums in the city of New York, provided, however, that there shall be reserved from the income of said fund for the board and education in said institution of my niece Margaret Sickles, or, in the event of her death before majority, any other of my nieces, not exceeding two, whom my sister may choose to send, a sum sufficient for this purpose. It is my expectation that said institution will be lawfully incorporated, and, when this shall happen, said sum of ten thousand dollars shall be paid over to the trustees or managers thereof upon trust to invest the same, and to apply the income thereof as hereinbefore set forth. I give and bequeath unto my executors in trust, to pay over to the trustees of the Five Points House of Industry, or its treasurer for the time being, twenty thousand dollars, to be applied to the uses thereof. Said institution is in the city of New York. All the rest and residue of my estate, both real and personal and wheresoever situate, I give, devise, and bequeath to the municipal authorities of the city of New Orleans, to be appropriated to the establishment of a city dispensary for the gratuitous dispensing of medicine, and medical advice to the poor of said city. It is my will that none of the foregoing charitable bequests shall fail by reason of my not having described correctly the beneficiaries intended by me. If, in consequence of any lack of authority on the part of any of such beneficiaries to receive the sums given them, or in case any of said bequests cannot take effect in consequence of any legal objection, it is my will, and I direct, that my executors shall in such event pay over the amount of the bequest or bequests so failing to such charitable and educational uses as they shall think most in consonance with my wishes and intention expressed in this will. Finally, I nominate and appoint my friends James S. Aspinwall, of the city of New York, and John G. Gaines, of the city of New Orleans, and my brother James B. Sickles, of the city of St. Louis, or such of them as shall qualify, the executors of this, my last olographic will and testament. I give to them full power to sell either at public or private sale, and convey by proper deed of conveyance, all my real estate not specifically devised, to compromise and submit to arbitration all claims in favor of or against my estate, also without the interference of judicial or extrajudicial authority, to make inventory and dispose of all my estate, and to settle and liquidate the same in as ample a manner as I might myself do were I living and acting in my own behalf. I have signed and sealed this, my olographic will, entirely written in my own hand, this thirtieth day of July, in the year of our Lord one thousand eight hundred and fifty-five (1855).

"[Signed] Simon V. Sickles."

The succession of said Sickles was opened in the state of New York, and thereafter ancillary proceedings were had in the Second district court of the parish of Orleans, state of Louisiana, wherein the last will and testament of the deceased was duly proved, and John G. Gaines duly qualified as testamentary executor. Such proceedings were then had that the real estate situated in Louisiana and other property belonging to the estate of the said Sickles were duly inventoried, sold, and accounted for. After the payment of special legacies and other obligations and expenses, on May 6, 1864, $14,000 were paid over to the city of New Orleans as the residuary legatee; and afterwards, on August 26, 1871, the further sum of $2,884.93, being the balance in the hands of the executor as the assets of said succession, was likewise paid over. February 16, 1893, Mary A. Sickles and numerous other persons, alleging themselves to be the heirs at law of Simon Van Antwerp Sickles, brought this action against the city of New Orleans to recover the aforesaid sums, amounting to $16,884.93, with legal interest on $14,000, and on $2,884.93, from the respective dates on which said sums were received by the city, on the ground that the city of New Orleans has wholly failed to fulfill the conditions of the bequest made by Simon Van Antwerp Sickles, and it has never made any attempt or shown any disposition to fulfill said conditions, said city having not only never established the city dispensary required, but, on the contrary, has actually applied and appropriated said money to other purposes, in gross violation of the trust and the conditions imposed. On February 27, 1893, the city of New Orleans filed exceptions to the demand of the plaintiffs, on the following grounds, to wit: First, that the said plaintiffs are not the proper parties to institute the proceeding on the last will and testament of Simon Van Antwerp

Sickles, having no interest in the same; second, no cause of action. These exceptions, on being heard by the court, were ordered referred to the merits, and thereafter, on April 29, 1893, the city of New Orleans filed an answer, as follows: "This defendant now, and at all times hereafter, saving and reserving to itself all and all manner and benefit and advantage of exception or otherwise herein filed, or which may be hereinafter filed, denies each and every allegation contained in plaintiffs' petition, saving and excepting what may be hereinafter admitted. Your respondent admits that, by his last will and testament, the said Simon Van Antwerp Sickles bequeathed to the city of New Orleans, for the establishment of a free dispensary, wherein drugs and medical advice would be furnished free to the indigent, the residue of his estate, after payment of debts and legacies, and that the executor of the said will, J. B. Gaines, did turn over to the city of New Orleans, for the purpose designed by the testator, on the 12th day of May, 1864, the sum of fourteen thousand dollars; and subsequently, on the 19th day of April, 1865, the additional sum of 2,884 $^{93}/_{100}$ dollars, making a total of 16,884 $^{93}/_{100}$ dollars. Your respondent denies that the defendant city has at any time or in any way squandered or misapplied the funds so bequeathed, but, on the contrary, has fostered the same with the care and the full intention and purpose of carrying out to the very letter the beneficent object of the testator. That the defendant, on the 31st of August, 1871, by Ordinance No. 1,011, A. S., authorized the selection of a drug store to furnish medicines to the poor; and, by and in virtue of the said ordinance, Dr. Shelly was appointed druggist, and dispensed drugs, etc., to the poor, up to the month of December, 1872. He was succeeded by Dr. Kelly. On the 24th of January, 1872, by Ordinance No. 1,325, A. S., it was ordered that the Sickles fund be placed in charge of the administrator of finance; that said fund be specially kept apart and separate from any funds belonging to the city of New Orleans; that said funds be invested in city securities, and the interest collected therefrom be applied to supplying the indigent sick with medicines; that by Ordinance No. 2,139, A. S., May 21, 1873, the administrator of public accounts was authorized and directed to issue to the custodian of the Sickles fund a warrant for consolidated bonds at par, for the sum of 20,124 $^{55}/_{100}$ dollars, being the amount due by the city to the said fund on the 1st day of May, 1873. From this time, up to October 1, 1877, drugs, medicines, and advice were furnished to the poor to the extent of the means derived from said fund in the hands of the administrator of finance, at which date, however, by Ordinance No. 4,189, A. S., all further expenditure on said fund was stopped, and the mayor was authorized to select a committee of three physicians to devise some means of carrying out the object of the bequest; and the mayor appointed Drs. J. D. Bruns, Charles C. Turpin, and F. L. Taney to act on said committee. This action on the part of the council was no doubt provoked by the report of the administrator of finance, the Hon. J. C. Denis, of date of the 29th of October, 1877, which informs the committee that 'now the utmost amount of the revenue that can be expected will be about $1,200 per annum, which would have nearly sufficed to carry on the previous rate of monthly expenditure, but that for the past four months, by what seems to be a preconcerted arrangement, a raid has been made on this fund by prescriptions, at the rate of over $325 per month, which the fund is entirely inadequate to furnish. * * *' In January, 1878, the committee of physicians appointed by the mayor made their report, containing various suggestions as to how the dispensing of drugs gratis would be more advantageously made, which, though received with due courtesy, were not put into execution; and from that time to this day the effort of the city of New Orleans has been to increase the fund by judicious and successful investments, until such time when the revenues derived from it will be such that the grand purpose of the benevolent testator will be a permanent memorial of his love for the poor. As will be seen by the annexed report of A. P. Harrison, to whom, for a number of years, this sacred fund has been intrusted, and to whom is due chiefly the credit for the grand condition in which the fund now is, it will be seen that the fund, which originally, as above set forth, amounted to the sum of 16,884 $^{93}/_{100}$ dollars, is of date of February 20, 1893, of face value 37,267 $^{86}/_{100}$ dollars, actual market value 58,795 $^{86}/_{100}$ dollars, showing an increase of over threefold of the original amount bequeathed. Respondent denies

the right of plaintiffs to demand a money judgment against the city of New Orleans. Respondent further denies the right of said plaintiffs to stand in judgment; that the plaintiffs, being special legatees, have received from the testator all that he desired that they should receive; and that, under the construction of the will, should any eleemosynary institution fail to receive the amount which he designed it to receive, that it should go to some other institution of charity. Respondent further denies the right of the poor of the city of New Orleans to be deprived by any act of the city administration of the charitable provisions made for their benefit. Respondent specially denies the right of the said plaintiffs to demand a rescission of the bequest, for the reasons that, in the provisions of said will for the institution of a free dispensary, no time was designated by testator wherein the establishment of a free dispensary should be made. Respondent, by way of answer, specially pleads prescription of ten years to plaintiffs' action. Annexed hereto, and making part hereof, are certified copies of ordinances, resolutions, and reports herein referred to. Respondent prays that judgment be rendered in favor of the defendant, the city of New Orleans, and for all and general relief."

Other proceedings were had, not necessary to recite, and finally a jury was impaneled, and the action tried. The evidence submitted substantially established the facts averred in the answer, and thereupon, on motion of the defendant, the court directed the jury to find a verdict for the defendant. Due exceptions were made to this action of the court, as well as to the refusal of the court to give the following charges requested by the plaintiffs, to wit: "(1) To establish a dispensary for the gratuitous dispensing of medicine to the poor of this city does not necessarily mean to establish and maintain for all time a dispensary containing a stock sufficient to dispense medicine daily to all the poor. (2) No time having been specified by the testator within which the dispensary was to be established, the law implies that he intended that it should be established within a reasonable time; that is to say, as soon as it was practicable to establish such a dispensary as was contemplated by the testator. (3) The jury must look at the intention of the testator, and, if they find that such a dispensary as he had in mind could have been established with the said Sickles fund at any time prior to the suit, then the city has failed to perform the conditions imposed upon it as donee, and a verdict should be rendered for the plaintiffs. (4) If the jury find that the city at any time used said money received from the Sickles estate for any purpose other than that for which it was bequeathed, then a verdict should be rendered for the plaintiffs. (5) If the jury find that said money was at any time indistinguishably mixed with the general or any other fund of the city, and that thereafter the city paid back the amount, with interest, and then for the first time separated said money from the other funds of the city, that is presumptive evidence that the city used the money for its own account, and for other purposes than that for which it was bequeathed; and, if the city has failed to show the contrary, then this presumptive evidence becomes conclusive evidence of that fact. (6) That 'all the rest and residue of my estate, both real and personal, and wheresoever situate,' is, in law, 'a universal legacy,' the action to recover which is prescribed by the prescription of thirty years; and, twenty-nine years having run when this action was instituted, the donee has had more than a reasonable time to comply with the bequest. (7) That the city of New Orleans is the donee of the bequest in this case, and is subject to the same obligations and governed by the same rules as other donees, under articles 1559 and 1710 of the Revised Civil Code." The plaintiffs below, having failed to obtain a new trial, prosecute this writ of error, assigning 13 specific errors, the first 8 of which relate to the general charge given to the jury, and the charges requested by the plaintiffs, but refused, and the last five assignments relate to rulings of the court not appearing in the record, or else not reviewable on error.

J. Ward Gurley and D. C. Mellen, for plaintiffs in error.
Saml. L. Gilmore and W. B. Sommerville, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge, after making the above statement of the case, delivered the opinion of the court.

Under the will of Simon Van Antwerp Sickles, there is no estate to vest in his heirs at law on the failure of any charitable bequest therein named. The intention of the testator in this respect is clear. Aside from bequeathing to the municipal authorities of the city of New Orleans all the rest and residue of his estate, both real and personal, wherever situated, to be appropriated to the establishment of a city dispensary for the gratuitous dispensing of medicines and medical advice to the poor of said city, the will provides that, in the event that any of the specific charitable bequests therein made should fail, the executors should pay over the amount of the bequest or bequests so failing to such charitable and educational uses as they should think most in consonance with the testator's wishes and intention expressed in the will; thus apparently following the doctrine of cy-pres. Under such testamentary disposition, the heirs at law can take nothing on the failure of any charitable bequest. Vidal v. Girard's Ex'rs, 2 How. 126, 191; McDonogh's Ex'rs v. Murdoch, 15 How. 367; Prevost v. Martel, 10 Rob. (La.) 512; McDonogh's Will Case, 8 La. Ann. 171, 220, 253. All the charitable bequests, except the one to the municipal authorities of the city of New Orleans, are of specific amounts of money; and it would seem that the bequest to the municipal authorities of New Orleans is a bequest of money, because the will provides that the executors shall dispose of the real estate not specifically devised, collect all claims, dispose of all the estate, and settle and liquidate the same; and it is apparent from the face of the will that the testator's intention was that the said municipal authorities should receive nothing but money. In equity (where, perhaps, this case should have been brought), there is no question on this point. See Macn. p. 29; Pom. Eq. Jur. § 1159. The court of appeals of New York, in Chamberlain v. Chamberlain, 43 N. Y. 431, in dealing with a will containing provisions similar to those in the Sickles will, says:

"If the residuary bequests are valid, there was an equitable conversion of the whole estate into personalty for all the purposes of the will. The gifts were of money, the avails of the real and personal estate, and the conversion of the realty into personalty, under the authority conferred upon the executors, is regarded as having been accomplished at the death of the testator. Leigh & D. Conv. 5, 109; Phelps v. Pond, 23 N. Y. 69; Thornton v. Hawley, 10 Ves. 129; Stagg v. Jackson, 1 N. Y. 206. If, therefore, the disposition of the residue of the estate in favor of the two corporations named as legatees is valid as a bequest of personal property, and to the extent that the two corporations can take under the will, regarding the gift as of personalty, and not of realty, the will must stand. The Centenary Fund Society is a foreign corporation, having its existence under the laws of Pennsylvania, and located within that state. The existence, however, of corporations organized under the laws of a sister state, is recognized by the courts of this state; and they may take property here under wills executed by citizens of the state if, by the law of their creation, they have authority to acquire property by devise or bequest."

The law of the testator's domicile controls as to the formal requisites essential to the validity of the will as a means of transmitting property, the capacity of the testator, and the construction of the instrument. Story, Confl. Laws (8th Ed.) § 479ab; Crusoe v. Butler, 36

Miss. 150; Chamberlain v. Chamberlain, supra. Movable property has no locality, and therefore the law of the domicile of the owner governs its transmission, either by last will and testament or by succession in case of intestacy. Story, Confl. Laws (8th Ed.) § 481; Jones v. Habersham, 107 U. S. 179, 2 Sup. Ct. 336; Holmes v. Remsen, 4 Johns. Ch. 460. Although, within the law of the domicile, a will has all the forms and requisites to pass the title to movable property, nevertheless, if the will contains a particular bequest of funds to be transmitted to and administered for particular purposes in another state, the validity of such particular bequest must be tested by the law of the state to which the fund is, by the terms of the will, to be transmitted and administered. Chamberlain v. Chamberlain, supra. Under the laws of the state of New York, as in common-law states generally, a valid bequest for charitable uses is not revocable on account of failure by the trustees to comply with any conditions attached thereto, unless such revocation is expressly reserved in the will. Perry, Trusts, § 744; Reformed Church v. Mott, 7 Paige, 77. A donation to the municipal authorities of the city of New Orleans for charitable purposes is substantially a donation to the city for the purposes named, and may be accepted and administered. Rev. Civ. Code, arts. 433, 1549; Succession of Mary, 2 Rob. (La.) 438; Fink v. Fink, 12 La. Ann. 301. Donations to charitable uses are not only permitted in Louisiana, but are highly favored. Succession of Mary, supra; McDonogh's Will Case, supra; Succession of Vance, 39 La. Ann. 371, 2 South. 54.

Interpreting the will of Simon Van Antwerp Sickles according to the laws of the state of New York, in which state said Sickles resided, and where his said will was made, we find that the bequest to the municipal authorities of the city of New Orleans, for the purposes named, was not revocable for any failure of said authorities to comply with any of the conditions attached thereto; and, testing the validity of said bequest by the law of Louisiana as to the right and power of the municipal authorities of the city of New Orleans to accept and administer said trust, the same is valid in all respects. It would seem that what has been said should dispose of this case, because, if the heirs at law have no interest, or if the bequest to the municipal authorities of the city of New Orleans is not revocable, the plaintiffs in error cannot complain of the instruction given to the jury to find a verdict for the defendant. The majority of the court, however, are not willing to rest their decision upon either of these points, because the case was tried in the court below, and has been presented by both sides here, as a case arising wholly under the law of Louisiana; and therefore I proceed to consider whether, under the law of Louisiana, a donation mortis causa to municipal authorities for charitable or pious uses, having once vested, is revocable in favor of the heirs at law, whenever the said authorities shall fail to administer the charity, although no revocatory right is reserved by the donor.

Articles 1559 and 1710, Rev. Civ. Code, provide as follows:

"Art. 1559. Donations inter vivos are liable to be revoked or dissolved on account of the following causes: (1) The ingratitude of the donee; (2) the non-

fulfillment of the eventual conditions, which suspend their consummation; (3) the nonperformance of the conditions imposed on the donee; (4) the legal or conventional return."

"Art. 1710. The same causes which, according to the foregoing provisions of the present title, authorize an action for the revocation of a donation inter vivos, are sufficient to ground an action of revocation of testamentary dispositions: provided, however, that no charges or conditions can be imposed by the testator on the legitimate portion of forced heirs, nor can they lose their inheritance for any act of ingratitude to the testator, prior to his decease. That he has not disinherited them shall be sufficient evidence of his having forgiven the offense."

The learned counsel for the plaintiffs in error, in their very lucid brief, contend that the bequest or donation in this case was made on a condition within the meaning of articles 1559 and 1710,—i. e. that a free dispensary should be established by the city; that the city is the donee, and, as such, is subject to the same obligations and governed by the same rules as other donees under said articles, there being no exception made in the case of donations for pious uses; and that the word "conditions," in article 1559, is used in the sense of "charges,"—i. e. "a donation may be revoked for failure on the part of the donee to execute the charges on him imposed." It is conceded that, under the civil law prevailing in Louisiana before the adoption of the Civil Code, a donation mortis causa to charitable uses was not revocable for the failure of the authorities to administer the charity, unless the revocation was expressly reserved by the testator in his will.

Under the same law, there was a well-recognized distinction between the mode (or charge) and the condition as affecting donations, and this distinction is clearly stated in De Pontalba v. New Orleans, 3 La. Ann. 660, which was a suit to annul a donation inter vivos made in 1785 to the city of New Orleans for a leper hospital. The donation was qualified as follows: "Which he gives wholly and gratuitously to you, in order that the lepers, of whom there is a large number at present, may be harbored, and in order that the public may perpetually enjoy this endowment,"—and was accepted and applied for some time to the use contemplated by the donor, but was afterwards abandoned as a hospital, the building having been burned. The court says:

"We take this donation to be a donation sub modo. The laws cited by the plaintiff's counsel from the Fuero Real and the Partidas were undoubtedly the general rules on the revocation of donations; but those rules were liable to many exceptions, and, in applying them, regard must be had to the distinction made by the civil and the Spanish laws between the mode or charge and the condition. The inobservance of the condition often avoided the donation, when the inexecution of the charge did not. Thus says Pothier: 'If the charge on which the bequest is made is not in itself impossible, but fails before the legatee has been put in mora, his obligation to execute it ceases, and the legacy is due. For instance, a testator has given me a legacy, and charges me to be tutor of his children. If the judge, on the advice of the family, has appointed another tutor, as I can no longer be appointed, I am liberated from the charge, and entitled to the legacy. In such a case, the legacy made sub modo differs from that made under the condition, if he is tutor of my children.' Pothier des Testaments, Donations, etc., No. 114. Merlin, deriving the doctrine on the subject from the Roman law, says that a material difference must be made between the motives which the donor mentions as being the cause of the liberality, and the conditions he imposes, because, although the failure of a condi-

tion annuls the donation, it remains valid, although the motives therein expressed be untrue. Merlin, Répert. verbo 'Donations,' § 6, No. 5. See, also, (39. 4.) D., 5 De Donationibus. The same distinction, also drawn from the civil law, is recognized by the English courts. The rule there is that, where a legacy is bequeathed for a particular purpose, it is not conditional, so as to fail with the purpose for which it is given. Thus, a legacy made to a woman for the maintenance of her children has been held valid, notwithstanding she has no children, or they all die. So, also, where lands were given to a mother for the education and maintenance of her daughter till eighteen years old, and the daughter died under eighteen, it was adjudged a good term to the mother till the daughter would have obtained eighteen years had she lived. Ward, Legacies, No. 142, and cases there cited. 8 Law Lib. Delvincourt and Duranton, upon whose authority the opinion of the court below rests, were misunderstood by the learned judge. We perceive no material difference between the opinion of Delvincourt and those of Merlin and Pothier. Duranton, if his authority was so decided as the judge supposes it to be, ought not to prevail against those three commentators. But he does not greatly differ from them. He merely says that, when a donation is made ob rem futuram, it is a mode affixed to the liberality, and, when the motive fails, the validity of the donation depends upon the intention of the donor to be deduced from the act. 8 Duranton, No. 548."

The Civil Code, when adopted, contained this article:

"Art. 3521. From and after the promulgation of this Code, the Spanish, Roman and French laws, which were in force in this state, when Louisiana was ceded to the United States, and the acts of the legislative council, of the legislature of the territory of Orleans, and of the legislature of the state of Louisiana, be and are hereby repealed in every case, for which it has been especially provided in this Code, and that they shall not be invoked as laws, even under the pretense that their provisions are not contrary or repugnant to those of this Code." Fuqua's Civ. Code La. art. 3521.

This article, retained in the Code up to 1870, was omitted in the revision of that date. Construing this article, the supreme court of Louisiana, in Reynolds v. Swain, 13 La. 193, said:

"The repeal spoken of in the Code and the act of 1828 cannot extend beyond the laws which the legislature itself had enacted, for it is this alone which it may repeal. 'Eodem modo quiquit constitutur, eodem modo dissolvitur.' The civil or municipal law, that is, the rule by which particular districts, communities, or nations are governed, being thus defined by Justinian,—'Jus civile est quod quisqui sibi populus constituit.' 1 Bl. Comm. 44. This is necessarily confined to positive or written law. It cannot be extended to those unwritten laws which do not derive their authority from the positive institution of any people, as the revealed law, the natural law, the law of nations, the laws of peace and war, and those laws which are founded in those relations of justice that existed in the nature of things, antecedent to any positive precept. We therefore conclude that the Spanish, Roman, and French civil laws, which the legislature repealed, are the positive, written, or statute laws of those nations and of this state, and only such as were introductory of a new rule, and not those which were merely declaratory; that the legislature did not intend to abrogate those principles of law which had been established or settled by the decisions of courts of justice. * * * We know not any Roman or French statute which was in force in this country at the period of the cession, and to which the repeal in the Code and the act of 1828 could extend. Nevertheless, it is the daily practice in our courts to resort to the laws of Rome and France, and the commentaries on those laws, for the elucidation of principles applicable to analogous cases."

According to this, the Code did not repeal principles of construction and interpretation, nor the legal meaning of words and terms, but, following the well-recognized rule, used words and terms according to the meaning and interpretation of the same as previously de-