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of the legislature of the territory of Orleans, and of the legislature of the state of Louisiana, be and are hereby repealed in every case, for which it has been especially provided in this Code, and that they shall not be invoked as laws, even under the pretense that their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-

clared by judicial authority. We find no decision of the supreme court of Louisiana conflicting with De Pontalba v. New Orleans and Reynolds v. Swain, but we find recently, in Succession of Vance, 39 La. Ann. 371, 2 South. 54, in a suit by the city of New Orleans for a legacy construed to mean and be for the benefit of the indigent insane, and where the defense was that the particular insane asylum mentioned in the will had been closed and abandoned by the city before the city accepted or made demand for the legacy, the court held:

"The executor puts himself out of court by the very attitude which he assumes when he charges that the legacy has returned to the succession, by reason of the discontinuance of the asylum. He thereby impliedly admits that the legacy has passed from the succession to the legatee, but insists that it has returned. This cannot be under our system of law, which forbids giving and not giving. Had the testatrix thus stipulated, however, that condition, being prohibited, would have been illegal, and, as such, dealt with or reputed as not written. If the legacy has passed, as it surely has, then the succession has been devested absolutely, and the legatee has acquired. An unconditional legatee cannot, after vesting, be devested under any contingency. * * * Here the question is not one of identity. It is simply one of existence or not,—one which is practically whether a municipal corporation has a right to claim a legacy made to an institution at a time under its direct management, and which has been discontinued as a distinct organization after the death of the testator. There is no dispute that, if the insane asylum which was in being at that date existed to-day in the same conditions, the city would have a right to recover. But we have said that the place, mode, or manner in which the insane of the city are maintained is insignificant, the intention or object of the testatrix being the relief of those persons of whom the city takes charge and for whom she provides. We therefore conclude that the legacy made by the deceased for such relief, having once vested, cannot be, and has not been, devested, and that consequently the city is entitled to recover it, the same to be used exclusively in furtherance of the benevolence of the testatrix."

If this language is to be given any force, we must conclude that it means that a donation to a municipality for charitable uses is unconditional, although the special charity to be aided is named, and that such donation is irrevocable for any reason, which is the same as holding that the charge to apply a charitable donation to the uses of a particular charity is not imposing on the donation a condition, within the meaning of the word in article 1559.

Counsel for plaintiffs in error rely upon the case of Girod v. Crossman, 11 La. Ann. 497, which was a suit to revoke and annul a legacy for the neglect and refusal of the devisee to comply with the conditions on which it was claimed the legacy was made. Reliance is placed upon this passage in the opinion of the court:

"On the third ground, it may be admitted, so far as this case is concerned, that the modus or charge upon the legacy is in the nature of a condition, and subject to the rules which govern other conditional legacies. 2 Moreau & C. 739, Law 6; 3 Savigny, 230, bk. 2, c. 3, § 128. We concur also with plaintiff's counsel that, in order to ascertain how the condition conceding it to be one should be performed, we should look at the intention of the testator." Page 500.

This is the mere admission of a contention not necessary to determine (obiter dictum), and falls far short of deciding that modes or charges expressed in a donation to pious uses are conditions, within the meaning of article 1559, Rev. Civ. Code. The real beneficiaries to charitable donations are generally the unorganized poor, and the administration of the charity is necessarily confided to agents. If

such charities are not properly administered, or by neglect are allowed to lapse, the fault is not attributable to the beneficiaries, nor always to the public, but generally to the bad judgment or neglect of administrators. The state, as parens patriæ, can and should protect all such charities by legislation and through the courts, as is the universal rule in civilized states. Where a municipal corporation is the instituted donee, and its mayor and council misapprehend the limitations and charges of the trust, and thereby delay or wholly fail to carry the charity into effect, it would be contrary to equity, as well as contrary to the donor's intention, to decree a revocation (really, a forfeiture) on that account. Besides, such donations are generally intended to and really constitute perpetuities, and, unless the same expressly appears in the act of donation, it cannot be said that the donor intended that the thing or amount donated should ever return to himself or his estate, much less to his heirs at law.

Enough has been cited and said to show why we find that article 1559, Rev. Civ. Code, was not intended to, and does not, include, among donations liable to be revoked, those donations to pious uses which, otherwise absolute and unconditional, merely specify or direct the particular charity favored by the donee, and why we conclude that, under the recognized jurisprudence of Louisiana, such donations are not revocable. In our opinion, the plaintiffs in error (plaintiffs below) are not entitled to recover in any aspect of the case as presented by the record, and therefore the general charge in favor of the defendant was correct and proper. Judgment affirmed.

CUNNINGHAM IRON CO. v. WARREN MANUF'G CO.

(Circuit Court, D. Rhode Island. May 8, 1897.)

No. 2,548.

1. SALES—EXECUTORY AGREEMENT—PASSAGE OF TITLE.
An agreement for the sale of steam boilers then in place in a factory, which provides that they shall be taken out and delivered before a certain time, is an executory contract, and is not rendered operative to pass title by a statement in the memorandum of sale that the vendee "purchased the * * * boilers."

2. SAME—INJURIES TO PROPERTY IN HANDS OF VENDOR—FAILURE TO DELIVER.
Slight damages occurring to the subject-matter of an executory contract of sale prior to the time of delivery, not being such as to render performance impossible, will not excuse the vendor for refusing to deliver on the vendee's offer to accept the property with a deduction for the damages.

3. SAME—DAMAGES.
It is the duty of one injured by breach of contract to make reasonable exertions to save himself from loss. He can charge the delinquent with such damage only as with reasonable endeavors and expenses he could not prevent. A. agreed to sell to B. certain boilers, which were to be taken out of A.'s factory, and delivered before a day named. Prior to that time the boilers were slightly injured by fire. A. offered to cancel the contract, or to deliver the boilers in their injured condition at the original price. B. insisted upon his rights under the contract. A resold the boilers to D., who sold them to C., the agent and manager of the corporation (B.), C. purchasing in his individual name. The boilers were delivered at B.'s place of business. In an action by B. against A. for breach of contract, *held*,

that as B., through its agent, C., had an opportunity to purchase the boilers, as a part of B.'s business was repairing boilers, and as the injuries in question might have been repaired with trifling trouble and expense, it was B.'s duty to use the available means to place itself in the same condition as if the contract had been fulfilled; and that, in consequence, B. could recover only such damages as B. could not have prevented by the use of such available means, namely, an amount equal to the expense of making the repairs. Warren v. Stoddart, 105 U. S. 230, followed.

J. C. Pegram, for plaintiff.
B. M. Bosworth, for defendant.

BROWN, District Judge. This is an action on the case for breach of contract relating to the sale and delivery of certain second-hand boilers contained at the time of contract in the defendant's factory, and by the terms of the contract to be taken out and delivered in defendant's yard before November 1, 1895. The case was heard upon oral testimony, a jury trial being waived. From the fact that the boilers were in use and bricked in at the defendant's factory, to be taken out by the defendant at such time prior to November 1, 1895, as the defendant chose, I am of the opinion that the contract was an executory contract, which did not pass title to the plaintiff, since something was to be done to make delivery possible, and to be done by November 1st, which made time essential, and gave a right to the plaintiff to rescind for failure to perform the agreement within the stipulated time. The fact that the memorandum of sale states, "Cunningham Iron Co. purchased * * * the thirteen 72" boilers," etc., does not, in my opinion, render the transfer of title complete, in view of the foregoing facts. Hatch v. Oil Co., 100 U. S. 124; Jones v. U. S., 96 U. S. 24, 28. On October 3, 1895, defendant's factory was destroyed by fire. There remained eight boilers to be delivered. These boilers were not damaged, except by loss of doors, flue doors, water gauges, and other appliances. After the fire the plaintiff wrote, requesting the delivery of the remaining boilers. On October 26th the defendant wrote, "The remaining boilers having been through the fire, we cannot deliver the same as if they had not been through the fire, and we do not think you can expect it," and offering to cancel the agreement as to the rest of the boilers, and afterwards wrote inquiring whether the plaintiff would take the boilers in their then condition at the original price. The plaintiff replied, insisting upon performance of the original contract, saying, "We see no occasion to make any additional contract, or change the provisions of the old one;" and subsequently, without waiving its rights, offered, by way of compromise, to take the boilers at the original price, "less the amount of actual damage done, to be ascertained by inspection." On November 23d the defendant wrote, "I understood that legally the fire canceled the contract or agreement had between us," but again offering the boilers at the original price. The proposal not having been accepted, and the plaintiff still insisting on its original rights, the defendant, after notice of its intention to do so, sold the boilers on January 31, 1896, to George B. Doane for $230 per boiler. On the same day Doane billed the same to Cunningham, the plaintiff's agent and largest stockholder, and

on the following day was paid $1,900 for the same by Cunningham's individual check. Some time afterwards the boilers were removed to the yard of the Cunningham Manufacturing Company, where they remained at the time of trial; Cunningham claiming the same as his individual property, and testifying that he purchased the same on his own account, and not for the plaintiff. In view of the fact that the title remained in the Warren Manufacturing Company at the time of the fire, and of the testimony of Cunningham that the boilers "were not damaged a particle," save in loss of doors and other appliances, which could have been replaced at a comparatively insignificant cost, there was no impossibility of performance resulting from the fire, and the defendant was not relieved thereby from its obligation under the contract. Jones v. U. S., 96 U. S. 24, 29. Failing therefore either to accept the reasonable offer of plaintiff for a compromise by a deduction of the amount of actual damage, or to perform the contract substantially according to its terms, and preventing performance by a resale, the defendant must be held liable in damages for breach of contract. The question of damages being necessarily before the court, the following facts become material: The boilers were sold by the defendant to Doane for $230 each. Doane sold the same to Thomas Cunningham for a price amounting to $237.50 each. Cunningham was the owner of 398 out of 400 shares of the Cunningham Iron Company, and the agent and manager of said company. The company was engaged in repairing and selling boilers as a part of its business. The boilers were brought to the company's yard, and save for loss of doors, etc., "not damaged a particle," as Cunningham testified. Upon these facts, I find that the Cunningham Iron Company had an opportunity, at a trifling expense, and with slight exertions on its part, to place itself in the same condition as if the contract had been fulfilled. The duty of the plaintiff on the breach of contract is well defined in the case of Warren v. Stoddart, 105 U. S. 224, 229:

"The rule is that where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense, or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damage only as with reasonable endeavors and expenses he could not prevent."

See, also, Marsh v. McPherson, 105 U. S. 709.

Considering the character of the business of the plaintiff, its facilities for putting the boilers in a condition equal to that called for by the contract at an expense which, upon the evidence, I find not to be in excess of $30 each, for new doors, etc., and considering the willingness of the plaintiff to receive the boilers in their actual condition, I am of the opinion that by the reasonable endeavors and exertions required by the foregoing rule the corporation might have saved itself from all damages except the expense of making good the loss of doors, etc. If Cunningham, who was the agent of the corporation, did not see fit to avail himself of the opportunity to reduce the damages, and preferred to make the purchase in his own name, the corporation became responsible for a failure of its agent to take advantage of the opportunity, and cannot charge the de-

fendant for large damages based upon evidence uncertain and speculative in character. In the language of the supreme court in Warren v. Stoddart, 105 U. S. 230, "The law required him to take that course by which he could secure himself with the least damage to the defendant." Applying the rule above quoted from the case of Warren v. Stoddart, and assessing such damages only as with reasonable endeavors and expenses the plaintiff could not prevent, I find for the plaintiff in the sum of $240.

In re LI FOON.

(Circuit Court, S. D. New York. February 23, 1897.)

1. CHINESE IMMIGRANTS—CERTIFICATE OF RIGHT TO ENTER.
   An infant child of a Chinese merchant lawfully residing in the United States is not entitled to enter the country without the production of the certificate required by the act of July 5, 1884 (1 Supp. Rev. St. [2d Ed.] p. 458), which is the sole evidence of the right of a Chinese alien to enter.
2. SAME—COLLECTOR'S DECISION.
   Under the act of August 18, 1894 (28 Stat. 390), the decision of a collector of customs in favor of the right of a Chinese alien to enter the country is not final, but the question of his right to enter is subject to re-examination by the courts.

Wm. C. Beecher, for petitioner.
Max J. Kohler, for the United States.

LACOMBE, Circuit Judge. Since the facts are all set forth tersely in stipulation, it will not be necessary to restate them. The proceedings under which the petitioner is temporarily held till he can be removed from the United States were instituted under section 12 of the Laws of 1882, as amended by the Laws of 1884, which provides that "any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came." He was brought before a United States commissioner, who found that he was a person not lawfully entitled to be or to remain in the United States, and ordered his removal. Section 6 of the same amended act provides in detail for a certain certificate evidencing, inter alia, the permission of the Chinese government to be obtained by every Chinese person other than a laborer who seeks admission into the United States, and further provides that such certificate "shall be produced to the collector of customs of the port in the district of the United States at which the person therein shall arrive, and afterwards produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted, and the facts therein stated disproved, by the United States authorities." Petitioner concededly did not produce such certificate to the collector or to the commissioner, and apparently had never obtained one.

It is contended that the petitioner, being the infant son (he is