CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1819.

TRUSTEES OF THE PHILADELPHIA BAPTIST ASSOCIATION *et al.* *v.* HART'S EXECUTORS.[1]

Charitable uses.

In the year 1790, S. H., a citizen of Virginia, made his last will, containing the following bequest: "Item, what shall remain of my military certificates, at the time of my decease, both principal and interest, I give and bequeath to the Baptist Association that, for ordinary, meets at Philadelphia, annually, which I allow to be a perpetual fund for the education of youths of the Baptist denomination, who shall appear promising for the ministry, always giving a preference to the descendants of my father's family." In 1792, the legislature of Virginia, passed an act repealing all English statutes; in 1795, the testator died. The Baptist Association in question had existed as a regularly organized body for many years before the date of his will; and in 1797, was incorporated by the legislature of Pennsylvania, by the name of "The Trustees of the Philadelphia Baptist Association."

Held, that the Association, not being incorporated at the testator's decease, could not take this trust, as a society.

*2] *That the bequest could not be taken by the individuals who composed the Association at the death of the testator.

That there were no persons to whom this legacy, were it not a charity, could be decreed.

And that it could not be sustained, in this court, as a charity.

Charitable bequests, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was extended, cannot be established by a court of equity, either exercising its ordinary jurisdiction, or enforcing the prerogative of the king as *parens patriæ*, independent of the statute 43 Eliz.

If, in England, the prerogative of the king, as *parens patriæ*, would, independent of the statute of Elizabeth, extend to charitable bequests of this description: *Quære?* How far this principle would govern in the courts of the United States?

Held, that it was unnecesssry to enter into this inquiry, because it could only arise where the attorney-general is made a party.

IN the year 1790, Silas Hart, a citizen and resident of Virginia, made his last will in writing, which contains the following bequest: "Item, what shall remain of my military certificates, at the time of my decease, both

[1] This case was practically overruled in Vidal *v.* Girard's Executors, 2 How. 127; for though it is there stated to have been decided upon the local law of Virginia, where the English statute of 43 Eliz., ch. 4, was not in force, yet the court came to the conclusion, in the latter case, that

principal and interest, I give and bequeath to the Baptist Association that, for ordinary, meets at Philadelphia, annually, which I allow to be a perpetual fund for the education of youths of the Baptist denomination, who shall appear promising for the ministry, always giving a preference to the descendants of my father's family."

In 1792, the legislature of Virginia passed an act, repealing all English statutes, including that of the 43 Eliz., c. 4. In the year 1795, the testator died. The Baptist Association which met annually at Philadelphia, had existed as a regularly organized body, for many years before the date of this will, and was composed of the clergy of several Baptist churches, of different states, and of an annual deputation of laymen from *the same churches. *3] It was not incorporated, until the year 1797, when it received a charter from the legislature of Pennsylvania, incorporating it by the name of "The Trustees of the Philadelphia Baptist Association." The executors having refused to pay the legacy, this suit was instituted in the circuit court for the district of Virginia, by the corporation, and by those individuals who were members of the association at the death of the testator. On the trial of the cause, the judges of that court were divided in opinion, on the question, whether the plaintiffs were capable of taking under this will? Which point was, therefore, certified to this court.

The *Attorney-General*, for the plaintiffs, argued, that the peculiar law of charitable bequests did not originate in the statute of the 43 Eliz., which was repealed in Virginia, before the death of the testator. If lands had been conveyed in trust, previous to the statute, for such purposes as are expressed in this will, the devise would have been held good at law; and consequently, the court of chancery would have enforced the trust, in virtue of its general equity powers, independent of that statute. The statute does not profess to give any validity to devises or legacies of any description, not before valid; but only furnishes a new and more convenient mode for discovering and enforcing them; but the case before the court is such as requires the interposition only of the ordinary powers of a court of equity. Devises equally vague and indefinite, have been sustained in courts of common law, before the statute of Elizabeth, *and would, *à fortiori*, *4] have been supported in courts of equity. *Porter's Case*, 1 Co. 22 *b*; Plowd. 522. And the court of chancery, exercising the prerogative of the king as *parens patriæ*, has been constantly in the habit of establishing charitable bequests of this nature. "In like manner," says Lord Chancellor

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the jurisdiction of the chancery over charitable uses was not derived from the statute, it appearing from the publication of the ancient English records, to have been exercised, in many cases, long before the statute was passed; and, of course, the argument derived from the repeal of all English statutes by the legislature of Virginia, fell to the ground. See Fontain *v.* Ravenel, 17 How. 394. In Perin *v.* Carey, 24 Ibid, 501, the court admitted, that whatever doubts on that subject had been expressed in the Baptist Association *v.* Hart's Executors, they had been removed by later and more satisfactory sources of information. So also in Kain *v.* Gibboney, 101 U. S. 367, Mr. Justice STRONG, says, that "trusts for charitable uses are not dependent for their support upon that statute; before its enactment, they had been sustained by the English chancellors, in virtue of their general equity powers, in numerous cases, and generally, in this country, it has been settled, that courts of equity have an original and inherent jurisdiction over charities, though the English statute is not in force, and independent of it." This, however, is not the law of Virginia. Ibid.

MACCLESFIELD, "in the case of charity, the king, *pro bono publico*, has an original right to superintend the case thereof, so that, abstracted from the statute of Eliz., relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice, to file informations in chancery, in the attorney-general's name, for the establishment of charities." *Eyre* v. *Countess of Shaftsbury*, 2 P. Wms. 119. So also, Lord Keeper HENLEY says, "and I take the uniform rule of this court, before, at, and after the statute of Elizabeth, to have been, that where the uses are charitable, and the person has in himself full power to convey, the court will aid a defective conveyance to such uses. Thus, though devises to corporations were void under the statute Hen. VIII., yet they were always considered as good in equity, if given to charitable uses." *Case of Christ's College, Cambridge*, 1 W. Black. 91. The powers of the court of chancery over these subjects, are derived from, and exercised according to the civil law. 3 Bl. Com. 476; *White* v. *White*, 1 Bro. C. C. 15; *Moggridge* v. *Thackwell*, 7 Ves. 36. Lord THURLOW says, "the cases have proceeded upon notions adopted from the Roman and civil law, which are very favorable to charities, that legacies given to public uses, not ascertained, shall be applied to some *proper object." [*5
White v. *White*, 1 Bro. C. C. 15. By that law, bequests for charitable purposes, *ad pios usos*, are not void for uncertainty. Swinb. pt. 1, § 16; pt. 7, § 8. But even supposing all the powers of the English court of chancery over charities to have been originally derived from the statute of Elizabeth, still it does not follow, that the courts of the United States have not all the powers which the English courts of equity possessed, when this country was separated from the British empire. The chancery system originated in various sources; in the peculiar jurisprudence of the court, which may be denominated its common law; in statutes; and in the authority of the chancellor, as keeper of the king's conscience. It is difficult to find any chancery decisions wholly purified from the influence of statutory provisions. The grant of equity powers in the constitution, to the national judiciary, extends "to all cases in equity." It is not limited to those cases which arise under the ordinary jurisdiction of the court of chancery. This is not a question of local law, nor can the equity jurisdiction of the United States courts depend upon the enactment or repeal of local statutes. This court has already determined, that the remedies in the court of the United States, in equity, are to be, not according to the practice of state courts, but according to the principles of equity as known and practised in that country from which we derive a knowledge of those principles. *Robinson* v. *Campbell*, 3 Wheat. 212. In England, this bequest would, unquestionably, be sustained. The association, which was *the object of the [*6
testator's bounty, though unincorporated at the time, was certainly as definite a body as the "sixty pious ejected ministers," in one case (*Attorney-General* v. *Baxter*, 1 Vern. 248; *Attorney-General* v. *Hughes*, 2 Ibid. 105), or, "the charitable collections for poor dissenting ministers living in any county in England," in another. *Waller* v. *Childs*, Amb. 524. Nor was it necessary that they should be incorporated, in order to take. A devise by an impropriator, directly "to one who served the cure, and all who should serve it after him," &c., has been carried into effect. *Anon.*, 2 Vent. 349. So, if the devise be to a charitable use, though the object be not *in esse*, and though it depend on the will of the crown, whether it shall ever be called

into existence, equity will establish it. *Lady Downing's case*, Ambl. 592 ; *Aylet* v. *Dodd*, 2 Atk. 238 ; *Attorney-General* v. *Oglander*, 3 Bro. C. C. 166 ; *Attorney-General* v. *Bowyer*, 3 Ves. jr. 725.

Leigh, contrà, contended, that the association could not take the bequest, either in their individual or in their collective capacity. Not as individuals ; because the persons composing the association were continually fluctuating, and were not designated, nor indeed known, at the time of the bequest. No personal benefit was intended to them. The testator's intent was, to constitute the association, in its collective capacity, trustee of the fund, for this charitable purpose ; and whether the trust can be carried into
*7] effect or not, they cannot take individually *to their own use. *Morice* v. *Bishop of Durham*, 9 Ves. 399 ; s. c. 10 Ibid. 522. Nor can they so take in their collective capacity, because not incorporated at the time : and the subsequent incorporation does not help their case. 8 Vin. Abr. tit. Devise H. pl. 1 ; *Widmore* v. *Woodroffe*, Ambl. 636. Therefore, this is to be regarded as a bequest to charitable uses, without the intervention of trustees to take the legal estate and fulfil the uses. According to the law of Virginia, which must govern in this case, such a trust cannot be carried into effect by any court in any mode. Had such a case occurred in England, it is admitted, that the court of chancery would carry the trust into effect, by supplying legal and capable trustees, to take and hold the fund for the objects of the testator's charity ; or, if those objects were not designated in the testator's will with sufficient certainty, would execute it, upon the doctrine of *cy pres*, for objects *ejusdem generis*, according to a scheme digested by the master. But the court of chancery in England exercises such powers solely in virtue of the statute of the 43 Eliz.

All ancient precedents of the exercise of such powers, to effect such charitable uses, are expressly stated to be founded on that statute. *Attorney-General* v. *Rye*, 2 Vern. 453 ; *Rivett's case*, Moor 890 ; *Pigot* v. *Penrice*, 2 Eq. Cas. Abr. 191, pl. 6 ; *Attorney-General* v. *Hickman*, Ibid. 193, pl. 14. As all the early decisions are founded on the statute, so the more modern cases are founded on the authority of the ancient ; with this only extension
*8] of their principle, that although the statute merely provides that *charitable donations shall be applied to such of the charitable uses therein expressed, for which they were appointed by the donors or founders, the court of chancery has gone a step farther, and held, upon the equity of the statute, that where objects of charity are in any way pointed out, however vaguely and indefinitely, the court will apply the fund to charitable uses of the same kind with those intended by the donor, according to a scheme digested by the master. *Baylis* v. *Attorney-General*, 2 Atk. 239 ; *White* v. *White*, 1 Bro. C. C. 12 ; *Moggridge* v. *Thackwell*, 3 Ibid. 517, s. c. 1 Ves. jr. 464 ; s. c. 7 Ibid. 36. All the elementary writers and compilers concur in deducing the jurisdiction of the English court of chancery over charitable bequests from the statute of Eliz. ; tracing all the powers of the court, as a court of equity, over this subject, to that source ; its liberality and favor toward charitable donations ; its practice of supplying all the defects of conveyances to charitable uses ; of substituting trustees where those named by the donor fail, before the vesting of the legal estate ; and of taking on itself the execution of the trust, where incapable, or no trustees

are appointed by the donors. 2 Bl. Com. 376 ; 2 Fonbl. Eq. 213 ; Roberts on Wills 213, 214 ; 1 Bac. Abr., tit. Ch. Uses ; 5 Vin. Abr. same tit. ; 1 Burn's Eccles. Law, same tit. Indeed, no donation is considered in England as a donation to charitable uses, unless for such uses as are enumerated in he statute of Eliz., or such as are analogous. *Attorney-General* v. *Hewer*, 2 Vern. 387 ; *Brown* v. *Yeale*, 7 Ves. 50, note c ; *Morice* v. *Bishop of Durham*, 9 Ibid. 399 ; s. c. 10 Ibid. 540. The very signification of *the words charity and charitable use are derived from that statute. In [*9 the case last cited, Sir W. GRANT said, "In this court, the signification of charity is derived prircipally from the statute of Elizabeth. Those purposes are considered charitable which that statute enumerates, or which, by analogies, are deemed within its spirit and intendment." *Morice* v. *Bishop of Durham*, 9 Ves. 399. Lord ELDON, in rehearing the same case, confirms the doctrine. "I say, with the master of the rolls, a case has not yet been decided, in which the court has executed a charitable purpose, unless the will contains a description of that which the law acknowledges to be a charitable purpose, or devotes the property to purposes of charity in general." s. c. 10 Ves. 540. In a previous case, Lord LOUGHBOROUGH had said, "It does not appear that the court, before that period (the 43 Eliz.), had cognisance of informations for the establishment of charities. Prior to the time of Lord ELLESMERE, so far as tradition in times immediately following goes, there were no such informations, but they made out the case as well as they could at law." *Attorney-General* v. *Bowyer*, 3 Ves. 726.

The repeal of the English statute of charitable uses by the legislature of Virginia, must be considered as almost, if not entirely, repealing that whole head of equity. The effect of this repeal may be estimated, by recurring to the history of the system of equitable jurisprudence. Every part of that system has been built up since the 43d year of Elizabeth, and there is not a single chancery case, touching charitable bequests, prior to the *stat- [*10 ute of that year. The court is then driven to ascertain, either the common-law method of effecting charitable uses, or the jurisdiction of the English chancery, independent of the statute. Lord LOUGHBOROUGH says, that it had no jurisdiction whatever of the matter, before the statute, and that they made out the case as well as they could at law ; and he instances certain cases. *Porter's Case*, 1 Co. 23 ; *Sutton Hospital Case*, 10 Ibid. 1. The jurisdiction of the court of chancery, in England, abstracted from, and independent of, the statute of the 43 Eliz., may be inferred from the course of the court, in cases where the donors of charities, failing to point out any object of charity, or designating improper, impolitic or illegal objects, the statute gives the court no authority to direct the charity to any definite purpose. In all such cases, the disposition of the funds belongs to the king, as *parens patriæ*, and is made by him under his sign manual. In *Moggridge* v. *Thackwell*, 7 Ves. 36, Lord ELDON, after reviewing all the cases (acknowledging that they conflicted with each other, and that his own mind was perplexed with doubts), came to this general conclusion, which he deemed the most reconcilable to authorities ; that when the execution of the trust for a charity is to be by a trustee, with general, or some, objects pointed out, there the court will take upon itself the execution of the trust : but where there is a general indefinite purpose, not fixing itself on any object, the disposition is to be made by the king's sign manual. A due attention to

*the cases there collected by Lord ELDON, will show that the first class of cases are those over which the statute of the 43 Eliz. gives the court a jurisdiction, and which it will consequently exercise; and that the second class consists of those which belong to its jurisdiction, abstracted and independent of the statute, and in which the disposition belongs to the king. *Attorney-General* v. *Syderfen*, 1 Vern. 224; *Frier* v. *Peacock*, there cited; *Attorney-General* v. *Herrick*, Ambl. 712. So, if the donation be to a charitable use, but one which is deemed unlawful or impolitic, the disposition belongs to the king. *Attorney-General* v. *Baxter*, 1 Vern. 248; *De Costa* v. *De Pas*, Ambl. 228; *Cary* v. *Abbott*, 7 Ves. 490. And were it not for the statute, all charitable donations, whatever, would be subject to the disposition of the king, as *parens patriæ*.

It is true, there are some *dicta*, which, at first sight, seem to support a different doctrine. Such is that of Lord Keeper HENLEY, in the case of *Christ's College*, 1 W. Black. 91. But this *dictum* is directly contradicted by Lord LOUGHBOROUGH, in the *Attorney-General* v. *Bowyer*, 3 Ves. 726. Lord Keeper HENLEY cites no authority for this *dictum;* but Lord Chief Justice WILMOT having, in the case of *Downing College* (Wilm. Notes 1), said something of the same kind, cites the authority which, doubtless, Lord Keeper HENLEY had in his mind, which is what fell from Lord MACCLESFIELD, in *Eyre* v. *The Countess of Shaftsbury*. "And in like manner, in case of
*12] charity, the king, *pro bono publico*, has an original *right to superintend the care thereof; so that, abstracted from the statute of Elizabeth relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice to file an information in chancery, in the name of the attorney general, for the establishment of charities." 2 P. Wms. 118–19. Whence it appears, that the information which might be filed in the attorney-general's name, for the establishment of charities, abstracted from, and independent of, the statute, related to such as depended on the disposition of the king as *parens patriæ*. This explanation is corroborated by what is said by Lord SOMERS, in the case of *Lord Falkland* v. *Bertie*, 2 Vern. 342. Lord THURLOW's *dictum*, in *White* v. *White* (1 Bro. C. C. 15), that "the cases had proceeded on notions derived from the Roman and civil law," cannot be construed to extend to the entire adoption of the civil law on charities. By the civil law, if a man make a will containing a charitable bequest, and afterwards cancel the will, the bequest to charity is not thereby revoked. It is otherwise by the law of England. So, in case of a deficiency of assets, the civil law gave a preference to charitable legacies; but in the English court of chancery, they abate in proportion. *Attorney-General* v. *Hudson*, 1 Coxe's P. Wms. 675, and note.

The conclusion, then, is, that in every case of charity, wherein the English court of chancery has not jurisdiction to direct the application of the
*13] *charity, either by the words or the equity of the statute 43 Eliz., the disposition belongs to the king, as *parens patriæ*, and the court of chancery is only resorted to, in order to enforce his disposition. That statute being repealed in Virginia, and no similar one enacted in that state, the disposition of all charitable donations is in the *parens patriæ* of Virginia. The courts of the United States cannot direct this charity, or carry it into effect. It is the government of Virginia which is the *parens patriæ* of that state. At the revolution, all the rights of the crown devolved on the common-

wealth ; and still remain in the commonwealth, except such as are delegated to the United States by the national constitution. But none of the rights that appertain to the state government, as *parens patriæ*, are delegated to the United States. Can this, or any other court of the United States, pretend to the care or guardianship of infants, lunatics and idiots? If not, neither can they undertake the direction of a charity, which stands on the same footing as belonging to that government which is *parens patriæ*. Even, therefore, if it were admitted, that the court of chancery of Virginia could carry this bequest to charitable uses into effect, the courts of the United States cannot.

Another objection to the jurisdiction of those courts is, that the attorney-general (that is, of Virginia) representing the *parens patriæ*, must be made a party. Mitf. Plead. 7, 93 ; Cooper's Plead. 219 ; *Anon.*, 3 Atk. 277 ; 2 Ibid. 87 ; *Monell* v. *Lawson*, 1 Eq. Cas. Abr. 167 ; *Attorney-General* v. *Hewett*, 9 Ves. 432. But *to make the attorney-general of Virginia, that is, the state of Virginia, a party defendant, would be contrary to [*14 the constitution of the United States. There is a further, and an insurmountable objection to the jurisdiction of the United States courts in cases of charity, where there is no trustee appointed, or (which is the same thing) unascertainable and incapable trustees are appointed. If not the whole jurisdiction of the English court of chancery, at least so much of it as is abstracted from, and independent of, the statute 43 Eliz., belongs neither to its ordinary nor extraordinary jurisdiction, but to the Lord Chancellor personally, as delegate to the king. But by the constitution and laws of the United States, the only branch of the English chancery jurisdiction which is vested in the courts of the United States, is the ordinary or equity jurisdiction of the court of chancery in England.

Finally, it is impossible to give effect to this charity in any mode. Not only are the trustees uncertain and unascertainable, but the objects of the charity are also uncertain, and not ascertainable by this court. The very idea of the court attempting to execute the trust, *cy pres*, and referring it to the master to digest a scheme for that purpose, is absurd and impracticable.

The *Attorney-General*, in reply, insisted, that if it were necessary to show the capacity of the plaintiffs as trustees, it could be done. *Id certum est quod certum reddi potest :* and the court might direct the money to be paid to those who constituted the association at *the time of the be- [*15 quest. But this association was incorporated shortly after the death of the testator ; and it is sufficient to support the charity, that its objects may be *in esse*. The first of the two cases, cited to show that the devise must take effect at the time, or not at all, was a devise of lands to the priests of a chantry or college in the church of A.; and there were none such, neither chantry, college nor priests. 8 Vin. Abr. tit. Devise, H. But suppose there had been, as in the case now before the court, would their want of a corporate character have defeated the devise? But this case is entirely inapplicable. The objects designated did not exist, even under the description which the testator used. Nor did they exist, at the time of the decision, so as to present the question as to the efficacy of the devise in that respect ; and all that the court said upon this subject, must be regarded as extra-judicial. The whole question was on a devise of lands, on the rigid rules

of the common law. The case of *Widmore* v. *Woodroffe*, Ambl. 636, was a bequest of money to the corporation of Queen Anne's Bounty to augment poor vicarages, which was held to be void by the statute of mortmain, as the corporation were bound by their rules to lay out their donations in lands. It does not touch the question, whether a devise of a charity must take effect at the death of the testator, or not at all. But if the court should think, that the Baptist Association were incapable of taking, as trustees, at the death of the testator, and that there must be some person then *in esse*, to
*16] hold the legal estate, the *executors will be considered, by a court of equity, as trustees, whether so named or not. 1 Bridg. Index 761. So also, the court will regard the heir as a trustee for the same purpose. 2 Ibid. 607. The case of the *Attorney-General* v. *Bowyer*, was decided on this very principle. The law had thrown the legal title on the heir, but he was held responsible for the intermediate profits, in the imputed character of a trustee. 3 Ves. 726.

The position, that the English court of chancery derives the jurisdiction now in question from the statute of Eliz., is denied. The title of the act is, "Commissioners authorized to inquire of misemployment of lands or goods, given to hospitals, &c., which, by their orders, shall be reformed." The preamble recites, that whereas, lands, &c., had been theretofore given, limited, appointed and assigned, to various objects which are specified, which lands, &c., had not been employed "according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver and employ the same." It is clear, from this preamble, that no new validity was intended to be given to these donations. Their previous validity is admitted ; and the mischief was, that they had been defeated by the frauds, breaches of trust, and negligence of those who should have paid them. Frauds and breaches of trust were, at this time, known heads of the equitable jurisdiction of the court of chan-
*17] cery ; but the statute proceeds to provide a new remedy for *the mischief announced in the preamble. This is the appointment of commissioners, with powers to institute an inquisition to detect the frauds which had been practised ; authorizing the commissioners, conformable to the title of the act, to make orders to carry the intention of the donor into effect ; and allowing the party injured by such orders, to complain to the chancellor for an alteration or reversal of such orders. Even supposing the statute did profess to confer on the court of chancery a new jurisdiction, it is merely an appellate jurisdiction from the decrees of the commissioners ; and this appeal is given to one party only, he who is charged with the fraud. So that, it is neither an original jurisdiction, nor is it a jurisdiction to enforce a charitable trust. The eighth and ninth sections of the act direct the commissioners to certify their decrees into the high court of chancery of England, and the chancery of the Palatinate of Lancaster, and direct the chancellors to take such order for the due execution of the decrees (of the commissioners) as to them shall seem fit and convenient. This is not a power to make a decree, but to execute the decrees made by the commissioners. The 10th section reiterates the appellate power of the chancellor, recognised by the 1st section. The only principles the 10th section prescribes for the regulation of the chancellor on these appeals, are so far from being new to

the court, that they have existed ever since its equitable jurisdiction commenced.

If, then, the jurisdiction of the court of chancery over charitable bequests cannot be derived from the letter of the statute of Eliz., can it be supported *from ancient adjudged cases, interpretative of that statute? Even if it could, this would be but a frail support; because the court of [*18 chancery was then in the infancy of its existence, and grasping at everything to enlarge that jurisdiction, which time and usage have since consecrated; and because, if its jurisdiction to enforce a charity by original bill, is to depend upon the statute, it has been shown from the statute itself, that it cannot be sustained. But the adjudged cases do not support the position, that the jurisdiction of the court over charities is derived from the statute. It is necessary, however, to distinguish between the two questions, whether a particular charity is within the statute? and whether the original jurisdiction of the court of chancery is derived from the statute? The first question properly arises, where the commissioners have acted, and the court is reviewing their decree in its appellate character. As the commissioners derive their whole authority from the statute, and are, therefore, confined to the cases enumerated in it, the first question, upon the threshold of the appeal, is, whether the case on which they have acted, be within the statute. Of this description are the cases cited on the other side, as being the ancient cases upon the authority of which the modern cases have been decided. The cases of the *Attorney-General* v. *Rye*, 2 Vern. 453, and *Rivett's Case*, Moor 890, are expressly stated by the reporters to have come before the chancellor on exceptions to the orders of the *commissioners. *Piggot* v. *Penrice*, 2 Eq. Cas. Abr. 191, is given by the editor on the authority of [*19 another reporter. Gilb. Eq. Rep. 137. On looking into the original report, it will be seen, that the question of the statute was not involved in case as it stood before the Chancellor. The only questions before him were, 1st. Whether any estate in lands passed to an executor by the words, "I made my niece Gore, since married to Sir Henry Penrice, executrix of all my goods, lands and chattels"? and 2d. What writing would amount to a revocation of a will? At the end of the report, there is a note in these words: "Note, the testatrix, by her second will, gave part of these lands to charitable uses, and they were decreed, at the rolls, to be good, as an appointment upon the act of parliament, notwithstanding there was no revocation; but that point was not now in question." (Ibid.) How this question came before the Master of the Rolls does not appear; but all that is, decided is, that the charity is within the statute, which leaves the question of the original jurisdiction of the court over charities untouched.

The last ancient case cited is that of the *Attorney-General* v. *Hickman*, 2 Eq. Cas. Abr. 193. A testator gave his estate to B. and his heirs, &c., by a will duly executed; and by a codicil, not attested by three witnesses, declared the use in these words: "I would have the same employed for the encouraging such non-conformist ministers as preach God's word, and in places where the people are not able to allow them a sufficient maintenance; and for encouraging the *bringing up some to the work of the ministry who are designed to labor in God's vineyard among the dissenters. [*20 The particular method how to dispose of it, I prescribe not, but leave to their discretion, designing you (B.) to take advice of C. and D." This

bequest, analogous to that now before the court, though much more vague and general, was confirmed, and the money decreed to be distributed immediately, and not made a perpetual charity. But nothing is said of the statute of Elizabeth, either in the argument, or in the opinion of the court. The question was, whether B., and his testamentary advisers, C. and D., having all died before the testatator, the court could supply trustees. The counsel who contended for this power in the court, supported it, not by the statute, but by the general authority of the court; instancing a legacy bequeathed in trust, and the death of the trustee, which, in equity, would not defeat the bequest. The court sustained its authority, without assigning any particular ground; and it may, therefore, be fairly inferred, that the court adopted the ground assumed in the argument. The case is cited from a manuscript report, and another note of the case, in the margin, goes no further than to say, that it was considered as being within the description of the statute of Elizabeth, but does not profess to found the power of the court over the case upon that statute.

Nor do the cases cited to show that the power of the court to give effect to a vague devise, by the rule of *cy pres*, is founded upon the statute, support that position. In the case of *Baylis* v. **The Attorney-General* (2 Atk. 239), 200*l.* were given under the will of Mr. Church, "to the ward of Bread street, according to Mr. ——, his will." Lord HARDWICKE, after rejecting testimony to fill the blank, proceeds thus: "Though the alderman and inhabitants of a ward are not, in point of law, a corporation, yet, as they have made the attorney-general a party, in order to support and sustain the charity, I can make a decree that the money may, from time to time, be disposed of in such charities as the alderman, for the time being, and the principal inhabitants, shall think the most beneficial to the ward." Nothing is said of the statute; and the circumstance of making the attorney-general a party points rather to the exercise of the king's prerogative, as *parens patriæ*, which is independent of the statute. In *White* v. *White*, 1 Bro. C. C. 12, the testator bequeathed one moiety of the residue of his personal estate to the Foundling, and the other to the Lying-in-Hospital, and if there should be more than one of the latter, then to such of them as his executors should appoint. The testator struck out the name of his executor, and never appointed another. Lord THURLOW held, that this was no revocation of the legacy, and referred it to a master, to which of the lying-in-hospitals it should be paid; but he does not countenance the idea of the power thus exercised by him being derived from the statute of Eliz. On the contrary, he refers it to notions derived from the Roman and civil law. *Moggridge* v. *Thackwell*, 3 Bro. C. C. 517, was a gift of a residue to I. Vaston, *to such charitable uses as he should appoint, but recommending poor clergymen with large families and good characters; I. V. died in the testator's lifetime. The charity was sustained and executed by the court; but there is no allusion to the statute in the opinion of Lord ELDON. He says: "Vaston, if alive, could not claim this property for his own use. All the rules, both of the civil and common law, would repel him from taking the property in that way. This reduces it to the common case of the death of a trustee, which cannot defeat the effect of a legacy." The second report of the same case does not vary the ground taken by the court. 1 Ves. jr. 464. In the report of the case, on the rehearing, all the cases are

*21] *22]

collated, yet nothing is delivered at the bar, or from the bench, referring the power of the court to the statute of Eliz. 7 Ves. 36. Lord ELDON, speaking of former decisions, says: "In what the doctrine (of *cy pres*) originated, whether as supposed by Lord THURLOW, in *White* and *White*, in the principles of the civil law as applied to charities, or in the religious notions entertained in this country, I know not." Ibid. 69. A strange doubt, if the doctrine originated in the statute! Nor are the elementary writers and compilers understood as deducing the jurisdiction from the statute. Blackstone, who is cited for this purpose, is treating of a different subject in the passage of his commentaries referred to. 2 Bl. Com. 376. Having stated in a preceding page, that corporations were excepted from the statutes of wills of 32 Hen. VIII., c. 1., and 34 Hen. VIII., c. 5, he says, in the page cited, that the statute *of 43 Eliz., c. 4, is considered as having repealed that of Hen. VIII., so far as to admit a devise to a corporation for a charitable use; he then speaks of the liberal construction which had been given to devises under this statute, by force of the word appointment; but does not even insinuate that it was the origin of the chancery jurisdiction. All the other elementary writers and compilers cited are equally remote from proving the position assumed. Their remarks are directed to the liberal construction put upon the word appoint, under the statute of Eliz.; but the principles to be extracted from all the cases cited by them are the principles of the civil law, by which the court had been guided, antecedent to, and independent of, the statute. [*23

The *Attorney-General* v. *Hever*, 2 Vern. 387, which is cited to prove that no donation is considered in England as a charitable donation, unless for the uses enumerated in the statute, or for analagous uses, was a devise to a school; and the lord keeper decided, that not being a free school, the charity was not within the statute, and consequently the inhabitants had not a right to sue in the name of the attorney-general. This is a very different position from that which the case was cited to prove; and it is an unfounded position: for the statute authorizes no proceeding in the name of the attorney-general; and it is admitted, that the attorney-general might, and had, informed in the name of the king as *parens patriæ* previous to, and independent of, the statute. *Brown* v. *Yeale* is merely stated in a note, and settles nothing. 7 Ves. 50, note *a*. It is true, the *statute of Eliz., having enumerated charities, gave a new technical name to a portion of the uses and trusts recognised by the civil law. It is this idea which the master of the rolls pursues in *Morice* v. *The Bishop of Durham*, 9 Ves. 399. The trust before the court was for such objects of benevolence and liberality, as her executor, in his own discretion, should most approve of. Sir W. GRANT determined, that this was not within the description of charitable trusts under the statute: that purposes of liberality and benevolence do not necessarily mean the same as objects of charity. With regard to charities, he says, that it had been settled upon authorities which it was too late to controvert, that they should not fail on account of their generality, but that in some cases, their particular application should be directed by the king, and in others by the court. But he does not say that the king or the court derived this power of direction from the statute. The statute is looked at, to see if the bequest be a charity within it; but the powers of control and direction in the king and the court are derived [*24

from the original respective authority of the one, as *parens patriæ*, and of the other, as a court of equity. It is admitted, by the clearest implication, that although the bequest was not a charity within the statute, yet if any definite object had been indicated by the will for which the money could have been decreed, it would have been so decreed. On the rehearing of the same case, Lord ELDON merely confirms the same principles. 10 Ves. 522.

*25] But Lord LOUGHBOROUGH is supposed to have *attributed the jurisdiction to the statute, in express terms, in the case of the *Attorney-General* v. *Bowyer*, 3 Ves. 726. But to understand his words correctly, it is necessary to observe, that the 43d of Elizabeth's reign, was the year 1601, and that Lord ELLESMERE received the seals in 1603, the epoch of her decease, and of the accession of James I. The point under Lord LOUGHBOROUGH's consideration was the title to intermediate rents and profits, in the case of a trust to take effect *in futuro*. He first considers the question as to the legal right, and introduces *Porter's case* (1 Co. 226), and that of the *Sutton Hospital*, 10 Co. 1. The case of *Porter*, he says, was upon a devise before the statute of wills (32 Hen. VIII., c. 1), and before the statute of uses (27 Hen. VIII., c. 10), and consequently, before the statute of Eliz. "It does not appear, that the court, before that period, had cognisance of informations for the establishment of charities." At what period? Not the 43d Eliz., as has been contended; but either the period of the devise, which was in the 32d of Hen. VIII., or of the decision, which was in the 34th of Elizabeth. The chancellor proceeds, "prior to the time of Lord ELLESMERE, as far as the tradition in times immediately following goes, there was no such information as that upon which I am now sitting, but they made out the case as well as they could at law." The phrase, "prior to the time of Lord ELLESMERE," cannot be considered as equivalent to prior to the 43d of Eliz.; for there is no coincidence in point of time. The idea is

*26] singularly expressed, if he meant to deduce the practice and authority *of informations from the statute of the 43d of Elizabeth. All that he really meant was, to affirm, that the practice of proceeding on informations by the attorney-general grew up in the time of Lord ELLESMERE. But this position is contradicted by Lord Keeper HENLEY (1 W. Bl. 91), by Lord MACCLESFIELD (2 P. Wms. 119), by Lord SOMERS (2 Vern. 342), by Lord THURLOW (1 Bro. C. C. 15); and finally, by the admission on the opposite side, that the proceeding of the attorney-general, was as representing the king in his character of *parens patriæ*. The chancellor next proceeds to establish the validity of these devises at common law, and consequently, independent of the statute; and coming to the exercise of the equitable jurisdiction, he expressly founds it on the general power of the court over trusts. It results, then, that by the civil law, devises to pious and public uses were liberally expounded, and not suffered to fail by their uncertainty; that the ecclesiastical courts, and courts of equity, acting on ecclesiastical subjects, when called upon to take cognisance of a devise to pious or public uses, exercised all the powers, before the statute, which have been since exercised; that the statute of Eliz. came, and following up the principle of the civil law, made an enumeration of those gifts to pious and public uses, under the new name of charitable uses; not to give them new validity, but to discover them by inquisition, and to effectuate them upon civil-law principles. After the statute, the new name of charitable uses, became the fashion of the

court; and the word appointment *was extended, to produce the same effect which Swinburne had ascribed to the civil law before. It became unnecessary to look back beyond the statute, for the exercise of power over a charitable use: the case was brought within the statutory description, and if found within it, the constructive power of the word appointment was brought to bear upon it.

Whatever be the origin of the powers of the court of chancery, in England, whether derived from the peculiar law of the court itself, from statutes, or from the extraordinary jurisdiction of the chancellor, they are all vested in the courts of the United States, by the constitution giving to them jurisdiction of all suits in equity between citizens of different states. There is no necessity that the attorney-general of Virginia should be made a party, because that is only required where the objects of the charity contravene the policy of the law; nor is it necessary that the court should superintend the execution of the trust, since the trustees are appointed by the testator; nor that the court should refer it to a master to digest a scheme for its application, as the objects are clearly designated in the will.

Marshall, Ch. J., delivered the opinion of the court.—It was obviously the intention of the testator, that the Association should take in its character as an association; and should, in that character, perform the trust created by the will. The members composing it must be perpetually changing; but however they might change, it is "The Baptist Association that, *for ordinary, meets at Philadelphia annually," which is to take and manage the "perpetual fund," intended to be created by this [*28 will. This association is described with sufficient accuracy to be clearly understood; but not being incorporated, is incapable of taking this trust as a society. Can the bequest be taken by the individuals who composed the association at the death of the testator? The court is decidedly of opinion, that it cannot. No private advantage is intended for them. Nothing was intended to pass to them but the trust; and that they are not authorized to execute as individuals. It is the association for ever, not the individuals, who, at the time of his death, might compose the association, and their representatives, who are to manage this "perpetual fund."

At the death of the testator, then, there were no persons in existence who were capable of taking this bequest. Does the subsequent incorporation of the association give it this capacity? The rules of law compel the court to answer this question in the negative. The bequest was intended for a society which was not, at the time, and might never be, capable of taking it. Accccording to law, it is gone for ever. The legacy is void; and the property vests, if not otherwise disposed of by the will, in the next of kin. A body corporate, afterwards created, had it even fitted the description of the will, cannot divest this interest, and claim it for their corporation.

There being no persons who can claim the right to execute this trust, are there any who, upon the *general principles of equity, can entitle [*29 themselves to its benefits? Are there any to whom this legacy, were it not a charity, could be decreed? This question will not admit of discussion. Those for whose ultimate benefit the legacy was intended, are to be designated and selected by the trustees. It could not be intended for the education of all the youths of the Baptist denomination, who were designed

for the ministry; nor for those who were the descendants of his father, unless, in the opinion of the trustees, they should appear promising. These trustees being incapable of executing this trust, or even of taking it on themselves, the selection can never be made, nor the persons designated who might take beneficially.

Though this question be answered in the negative, we must still inquire, whether the character of this legacy, as a charity, will entitle it to the protection of this court? That such a legacy would be sustained in England, is admitted. But it is contended, for the executors, that it would be sustained in virtue of the statute of the 43 of Elizabeth, or of the prerogative of the crown, or of both; and not in virtue of those rules by which a court of equity, exercising its ordinary powers, is governed. Should these propositions be true, it is further contended, that the statute of Elizabeth does not extend to the case, and that the equitable jurisdiction of the courts of the Union does not extend to cases not within the ordinary powers of a court of equity.

*30] *On the part of the plaintiffs, it is contended, that the peculiar law of charities does not originate in the statute of Elizabeth. Had lands been conveyed in trust, previous to the statute, for such purposes as are expressed in this will, the devise, it is said, would have been good at law; and, of consequence, a court of chancery would have enforced the trust, in virtue of its general powers. In support of this proposition, it has been said, that the statute of Elizabeth does not even profess to give any validity to devises or legacies, of any description, not before good, but only furnishes a new and more convenient mode for discovering and enforcing them; and that the royal prerogative applies to those cases only, where the objects of the trust are entirely indefinite; as a bequest generally to charity, or to the poor.

It is certainly true, that the statute does not, in terms, profess to give validity to bequests, acknowledged not before to have been valid. It is also true, that it seems to proceed on the idea, that the trusts it is intended to enforce, ought, in conscience, independent of the statute, to be carried into execution. It is, however, not to be denied, that if, at the time, no remedy existed in any of the cases described, the statute gives one. A brief analysis of the act will support this proposition. It authorizes the chancellor to appoint commissioners to inquire of all gifts, &c., recited in the act, of the abuses, &c., of such gifts, &c.; and upon such inquiry, to make such order as that the articles given, &c., may be duly and faithfully employed, to and

*31] for the charitable uses and intents, before rehearsed *respectively, for which they were given, &c. The statute then proceeds, "which orders, judgments and decrees, not being contrary or repugnant to the orders, statutes or decrees of the donors or founders, shall, by the authority of this present parliament, stand firm and good, according to the tenor and purport thereof, and shall be executed accordingly, until the same shall be undone or altered by the Lord Chancellor of England," &c. Subsequent sections of the act direct these decrees, &c., to be certified to the chancellor, who is to take such order for their execution as to him shall seem proper; and also give to any person aggrieved the right to apply to chancery for redress.

It is not to be denied, that if any gifts are enumerated in this statute, which were not previously valid, or for which no previous remedy existed, the

statute makes them valid, and furnishes a remedy. That there were such gifts, and that the statute has given them validity, has been repeatedly determined. The books are full of cases, where conveyances to charitable uses, which were void by the statute of mortmain, or were, in other respects, so defective, that, on general principles, nothing passed, have been sustained under this statute. If this statute restores to its original capacity, a conveyance rendered void by an act of the legislature, it will, of course, operate with equal effect on any legal objection to the gift, which originates in any other manner, and which a statute can remove.

The authorities to this point are numerous. In the case of the *Attorney-General, on behalf of St. John's* *College, *in Cambridge*, v. *Platt* (Cas. temp. Finch 221), the name of the corporate body was not fully [*32 expressed. This case was referred by the chancellor to the judges, who certified, that though, according to the general principles of law, the devise was void; yet it was good under the statute of Elizabeth. This case is also reported in Cases of Chancery 267, where it is said, the judges certified the devise to be void at law, but the chancellor decreed it good under the statute. So, in Chancery Cases 134, it was decided, that a bequest to the parish of Great Creaton was good, under the statute. Though this case was not fully nor clearly reported, enough appears, to show that this bequest was sustained only under the statute of Elizabeth. The objections to it were, that it was void on general principles, the parish not being incorporated; and that it would not be decreed, under the statute, the proceedings not being before commissioners, but by original bill. The Master of the Rolls ordered precedents to be produced; and on finding one in which four judges had certified that a party might, under the statute, proceed in chancery, by original bill, he directed the legacy to be paid. Could this bequest have been sustained, on doctrines applicable to charities, independent of the statute, no question could have arisen concerning the rights to proceed by original bill. In *Collison's case*, Hob. 136, the will made John Bruet and others, "feoffees of a home, to keep it in reparation, and to bestow the rest of the profits on reparation of *certain highways." On a reference by the chancellor, [*33 the judges declared, that "this case was within the relief of the 43d of Elizabeth; for though the devise were utterly void, yet it was, within the words, limited and appointed for charitable uses."

In these cases, it is expressly decided, that the bequests are void, independent of the statute, and good under it. It furnishes no inconsiderable additional argument, that many of the gifts recited in the 43 Eliz., would not, in themselves, be considered as charitable; yet they are all governed by the same rule. No *dictum* has been found, indicating an opinion that the statute has no other effect than to enable the chancellor to inquire, by commission, into cases before cognisable in this court by original bill. It may, then, with confidence be stated, that whatever doubts may exist in other points which have been made in the cause, there is none in this: The statute of the 43 Eliz. certainly gave validity to some devises to charitable uses, which were not valid, independent of that statute. Whether this legacy be of that description, is a question of more difficulty.

The objection is, that the trust is void; and the description of the *cestui que trust* so vague, that no person can be found whose interest can be sustained. The counsel for the plaintiff insists, that cases equally vague have

been sustained in courts of common law, before the statute ; and would *à fortiori*, have been sustained in courts of equity. He relies on *Porter's case*, 1 Co. 226, and on Plowd. 522. *Porter's case* is this : Nicholas Gibson, in the
*34] 32 *Hen. VIII., devised a wharf and house to his wife, upon condition, that she should, on advice of learned counsel, in all convenient speed, after his decease, assure, give and grant the said lands and tenements, for the maintenance for ever of a free school the testator had erected, and of alms-men and alms-women attached to it. The wife entered into the property, and instead of performing the condition, conveyed it, in the 3 Edw. VI., by a lease for forty years. Afterwards, in the 34 Eliz., the heir-at-law entered for a condition broken, and conveyed to the queen. On the validity of this entry and conveyance, the cause depended. On the part of Porter, who claimed under the lease, it was contended, that the use was against the act of the 22 Hen. VIII., c. 10, and therefore, void, on which the estate of the wife became absolute. On the part of the queen, it was argued, 1st. That the statute of Hen. VIII. avoided superstitious, and not charitable uses. But if it extended to this, still, that it made the use, and not the conveyance, void. The devisee, there being no consideration, would stand seised to the use of the heir. 2. That in case the devise is to the wife, on condition that she would, by the advice of learned counsel, assure his lands for the maintenance of the said free-school, and alms-men and alms-women, this might be done lawfully, by procuring the king's letters-patent incorporating them, and afterwards, a letter of license to assure the lands to
*35] them. Upon these reasons, the court was of opinion, that *the condition was broken, and that the entry of the heir was lawful.

In this case, no question arose concerning the possibility of enforcing the execution of the trust. It was not forbidden by law ; and therefore, the trustee might execute it. On failing so to do, the condition on which the estate was given was broken, and the heir might enter ; but it is not suggested that the *cestui que trust* had any remedy. An estate may be granted on any condition which is not against law, as that the grantee shall go to Rome ; and for breach of that condition, the heir may enter, but there are no means of compelling the journey to Rome. In the argument of *Porter's case*, the only mode suggested for assuring to the school the benefit intended, is by an act of incorporation, and a letter of license. In considering this case, it seems impossible to resist the conviction, that chancery could, then, afford no remedy to the *cestui que trust*. It is not probable, that those claiming the beneficial interest would have waited, without an effort, from the 32 Hen. VIII., when the testator died, or, at any rate from the 3 Edw. VI., when the condition was conclusively broken, by the execution of the lease, until the 34 Eliz., and then have resorted to the circuitous mode of making an arrangement with the heir-at-law, and procuring a conveyance from him to the queen, on whose will the charity would still depend, if a plain and certain remedy had existed, by a direct application to the chancellor.

If, as there is much reason to believe from this, and from many other
*36] cases of the same character *which were decided at law, anterior to the statute of Eliz., the remedy in chancery was not then afforded, it would go far in deciding the present question ; it would give much countenance to the opinion, that the original interference of chancery in charities, where the *cestui que trust* had not a vested equitable interest which might

be asserted in a court of equity, was founded on that statute, and still depends on it. These cases, and the idea they suggest, that at the time chancery afforded no remedy for the aggrieved, account for the passage of the statute of the 43 Elizabeth, and for its language, more satisfactorily than any other cause which can be assigned.

If, as has been contended, charitable trusts, however vague, could then, as now, have been enforced in chancery, why pass an act to enable the chancellor to appoint commissioners to inquire concerning them, and to make orders for their due execution, which orders were to be revised, established, altered, or set aside, by him? If the chancellor could accomplish this, and was in the practice of accomplishing it, in virtue of the acknowledged powers and duties of his office, to what purpose pass the act? Those who might suppose themselves interested in these donations, would be the persons to bring the case before the commissioners; and the same persons would have brought it before the chancellor, had the law afforded them the means of doing so. The idea, that the commissions were substituted for the court, as the means of obtaining intelligence not otherwise attainable, or of removing inconveniences in prosecuting claims by original bill, which had been found so *great as to obstruct the course of justice, is not war- [*37
ranted by the language of the act, and is disproved by the efforts which were soon made, and which soon prevailed, to proceed by way of original.

The statute recites, that whereas, lands, money, &c., had been heretofore given, &c., some for the relief of aged, impotent and poor people, &c., which lands, &c., "nevertheless, have not been employed according to the charitable intent of the givers and founders thereof, by reason of"—what? of the difficulty of discovering that such trusts had been created? or of the expensiveness and inconvenience of the existing remedy? No. "By reason of frauds, breaches of trust, and negligence in those that should pay, deliver and employ the same:" that is, by reason of fraud, breach of trust and negligence of the trustees. The statute then proceeds to give a remedy for these frauds, breaches of trust and negligences. Their existence was known, when the act passed, and was the motive for passing it. No negligence or fraud is charged on the court, its officers, or the objects of the charity; only on the trustees. Had there been an existing remedy for their frauds and negligences, they could not, when known, have escaped that remedy.

There seem to have been two motives, and they were adequate motives, for enacting this statute: The first and greatest was, to give a direct remedy to the party aggrieved, who, where the trust was vague, had no certain and safe remedy for the injury sustained; who might have been completely defeated by any compromise between the heir of the feoffer *and the [*38
trustee, and who had no means of compelling the heir to perform the trust, should he enter for the condition broken. The second, to remove the doubts which existed, whether these charitable donations were included within the previous prohibitory statutes. We have no trace, in any book, of an attempt in the court of chancery, at any time, anterior to the statute, to enforce one of these vague bequests to charitable uses. If we have no reports of decisions in chancery at that early period, we have reports of decisions at common law, which notice points referred by the chancellor to the judges. Immediately after the passage of the statute, we find, that ques-

tions on the validity of wills containing charitable bequests, were propounded to, and decided by, the law judges. *Collison's case* was decided in the 15 James I., only seventeen years after the passage of the act, and the devise was declared to be void at law, but good under the statute. Two years prior to this, *Griffith Flood's case*, reported in Hobart, was propounded by the court of wards to the judges ; and, in that case too, it was decided, that the will was void at law, but good under the statute. Had the court of chancery taken cognisance, before the statute, of devises and bequests to charitable uses, which were void at law, similar questions must have arisen, and would have been referred to the courts of law, whose decisions on them would be found in the old reporters. Had it been settled, before the statute that such devises were good, because the use was charitable, these
*39] questions could not have arisen *afterwards ; or had they arisen, would have been differently treated.

Although the earliest decisions we have, trace the peculiar law of charities to the statute of Elizabeth, and although nothing is to be found in our books to justify the opinion, that courts of chancery, in the exercise of their ordinary jurisdiction, sustained, anterior to that statute, bequests for charitable uses, which would have been void on principles applicable to other trusts, there are some modern *dicta*, in cases respecting prerogative, and where the proceedings are on the part of the king, acting as *parens patriæ*, which have been much relied on at the bar, and ought not to be overlooked by the court.

In 2 P. Wms. 119, the Chancellor says, "In like manner, in the case of charity, the king, *pro bono publico*, has an original right to superintend the care thereof ; so that, abstracted from the statute of Elizabeth, relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice to file informations in chancery, in the attorney-general's name, for the establishment of charities." "This original right," of the crown, "to superintend the care" of charities, is no more than that right of visitation, which is an acknowledged branch of the prerogative, and is certainly not given by statute." The practice of filing an information in the name of the attorney-general, if, indeed, such a practice existed in those early times, might very well grow out of this prerogative, and would by no means prove, that, prior to the statute, the law respecting charities was what it has been
*40] since. These *words were uttered for the purpose of illustrating the original power of the crown over the persons and estates of infants, not with a view to any legal distinction between a legacy to charitable and other objects.

Lord Keeper Henley, in 1 W. Black. 91, says, "I take the uniform rule of this court before, at, and after the statute of Elizabeth, to have been, that where the uses are charitable, and the person has in himself full power to convey, the court will aid a defective conveyance to such uses. Thus, the devises to corporations were void under the statute of Hen. VIII.; yet they were always considered as good in equity, if given to charitable uses." We think, we cannot be mistaken, when we say, that no case was decided between the statute of mortmain, passed in the reign of Hen. VIII., and the statute of Elizabeth, in which a devise to a corporation was held good. Such a decision would have overturned principles uniformly acknowledged in that court. The cases of devises in mortmain, which have been held

good, were decided since the statute of Elizabeth, on the principle, that the latter statute repeals the former so far as relates to charities. The statute of Geo. II. has been uniformly construed to repeal, in part, the statute of Elizabeth, and charitable devises comprehended in that act have, ever since its passage, been declared void. On the same reason, similar devises must, subsequent to the statute of Henry VIII., and anterior to that of Elizabeth, have been also declared void. It is remarkable *that, in this very case, the Lord Keeper declares one of the charities to be void, because it is [*41 contrary to the statute of mortmain, passed in the reign of Geo. II. All the respect we entertain for the reporter of this case, cannot prevent the opinion, that the words of the Lord Keeper have been inaccurately reported. If not, they were inconsiderately uttered.

The principles decided in this case are worthy of attention: "Two questions," says the report, "arose, 1st. Whether this was a conveyance to charitable uses, under the statute of Elizabeth, and therefore, to be aided by this court? 2d. Whether it fell within the purview of the statute of mortmain, 9 Geo. II., and was, therefore, a void disposition?" It is not even suggested, that the defect of the conveyance could be remedied, otherwise than by the statute of Elizabeth. The Lord Keeper says, "the conveyance of the 22d of June 1721, is admitted to be defective, the use being limited to certain officers of the corporation, and not to the corporate body; and therefore, there is a want of persons to take in perpetual succession." (The very defect in the conveyance under the consideration of this court.) "The only doubt," continues the Lord Keeper, "is, whether the court should supply this defect, for the benefit of the charity, under the statute of Elizabeth." It is impossible, we think, to understand this declaration, otherwise than as an express admission, that a conveyance to officers, who compose the corporate body, instead of the corporate body itself, or in other words, a conveyance to any persons not incorporated *to take in succession, [*42 although for charitable purposes, would be void, if not supported by the statute of Elizabeth. After declaring the conveyance to be good, the Lord Keeper proceeds: "The conveyance, therefore, being established under the statute of Elizabeth, we are next to consider how it is affected under the statute of the 9 Geo. II."

The whole opinion of the judge in this case, turns upon the statute of Elizabeth. He expressly declares the conveyance to be sustained by that statute, and in terms, admits it to be defective, without its aid. The *dictum*, therefore, that before that statute, courts were in the habit of aiding defective conveyances to charitable uses, either contradicts his whole opinion on the point before him, or is misreported. The probability is, that the judge applied this *dictum* to cases which occurred, not to cases which were decided before the statute. This application of it would be supported by the authorities, and would accord with his whole opinion in the case. In the case of the *Attorney-General* v. *Bowyer*, 3 Ves. 725, the chancellor, speaking of a case which occurred before the passage of the statute of wills, says, "It does not appear that this court, at that period, had cognisance upon information for the establishment of charities. Prior to the time of Lord Ellesmere, as far as tradition in times immediately following goes, there were no such informations as this on which I am now sitting, but they made out the case as well as they could by law."

*Without attempting to reconcile these seemingly contradictory *dicta*, the court will proceed to inquire, whether charities, where no legal interest is vested, and which are too vague to be claimed by those to whom the beneficial interest was intended, could be established by a court of equity, either exercising its ordinary jurisdiction, or enforcing the prerogative of the King as *parens patriæ*, before the 43 Elizabeth?

The general principle, that a vague legacy, the object of which is indefinite, cannot be established in a court of equity, is admitted. It follows, that he who contends that charities formed originally an exception to the rule, must prove the proposition. There being no reported cases on the point, anterior to the statute, recourse is had to elementary writers, or to the opinions given by judges of modern times. No elementary writers sustain this exception as a part of the law of England. It may be considered as a part of the civil code, on which our proceedings in chancery are said to be founded; but that code is not otherwise a part of the law of England than as it has been adopted and incorporated by a long course of decisions. The whole doctrine of the civil law, respecting charities, has certainly not been adopted. For example, by the civil law, a legacy to a charity, if there be a deficiency of assets, does not abate; by the English law, it does abate. It is not, therefore, enough to show that, by the civil law, this legacy would be valid. It is necessary to go further, and to show that this principle of
*44] the civil law has been engrafted *into the jurisprudence of England, and been transplanted into the United States.

In *White* v. *White*, 1 Bro. C. C. 15, the testator had given a legacy to the Lying-in-Hospital which his executor should appoint, and afterwards struck out the name of the executor. The legacy was established, and it was referred to a master to say to which Lying-in-Hospital it should be paid. In giving this opinion, Lord THURLOW said, "the cases have proceeded upon notions adopted from the Roman and civil law, which are very favorable to charities, that legacies given to public uses not ascertained, shall be applied to some proper object." These expressions, apply perhaps exclusively, to that class of cases in which legacies given to one charity have, since the statute of Elizabeth, been applied to another; or, in which legacies given so vaguely as that the object cannot be precisely defined, have been applied by the crown, or by the court, acting in behalf of the crown, to some charitable object of the same kind. *White* v. *White* was itself of that description; and the words "legacies given to public uses not ascertained," "applied to some proper object," seem to justify this construction. If this be correct, the sentiment advanced by Lord THURLOW, would amount to nothing more than that the cases in which this extended construction was given to the statute of Elizabeth, proceed upon notions adopted from the Roman and civil law.

*45] But if Lord THURLOW used this language, under the *impression that the whole doctrine of the English chancery, relative to charities, was derived from the civil law, it will not be denied, that his opinions, even when not on the very point decided, are entitled to great respect. Something like the same idea escaped Lord ELDON, in the case of *Moggridge* v. *Thackwell*, 7 Ves. 36. Yet, upon other occasions, different opinions have been advanced, with an explicitness, which supports the idea, that the court of chancery in England does not understand these *dicta* as they have been

understood by the counsel for the plaintiff. In the case of *Morice* v. *The Bishop of Durham*, 9 Ves. 399, where the devise was to the bishop, in trust, to dispose of the residue "to such objects of benevolence and liberality as he, in his own discretion, should most approve," the bequest was determined to be void, and the legacy decreed to the next of kin. The master of the rolls said, "In this court, the signification of charity is derived principally from the statute of Elizabeth. Those purposes are considered charitable, which that statute enumerates, or which, by analogies, are deemed within its spirit and intendment." This case afterwards came before the chancellor, who affirmed the decree, and said, "I say, with the master of the rolls, a case has not yet been decided, in which the court has executed a charitable purpose, unless the will contains a description of that which the law acknowledges to be a charitable purpose, or devotes the property to purposes of charity in general." 10 Ves. 540.

The reference made by the chancellor to the words of the master of the rolls, whose language he adopts, *proves that he used the term "law" as synonymous with "the statute of Elizabeth." Afterwards, in the [*46 same case, speaking of a devise to charity, generally, the chancellor says, "it is the duty of the trustees, or of the crown, to apply the money to charity, in the sense which the determinations have affixed to the word in this court: viz., either such charitable purposes as are expressed in the statute, or to purposes analogous to those." He adds, "charitable purposes, as used in this court, have been ascribed to many acts described in that statute, and analogous to those, not because they can with propriety be called charitable, but as that denomination is, by the statute, given to all the purposes described." It has been also said, that a devise to a charity generally is good, because the statute of Elizabeth uses that term.

These quotations show that Lord Eldon, whatever may have been the inclination of his mind, when he determined the case of *Moggridge* v. *Thackwell*, was, on more mature consideration, decidedly of opinion, that the doctrines of the court of chancery, peculiar to charities, originated not in the civil law, but in the statute of Elizabeth. This opinion is entitled to the more respect, because it was given, after an idea, which might be supposed to conflict with it, had been insinuated by Lord Thurlow, and in some degree followed by himself; it was given in a case which required an investigation of the question; it was given, too, without any allusion to the *dicta* uttered by Lord Thurlow and himself; a circumstance which would *scarcely have occurred, had he understood those *dicta* as advancing [*47 opinions he was then denying. It is the more to be respected, because it is sustained by all the decisions which took place, and all the opinions expressed by the judges soon after the passing of the statute of Elizabeth. In 1 Ch. Cas. 134, a devise to the Parish of Great Creaton, the parish not being a corporation, was held to be void, independent of the statute, but good under it. So, in the same book, p. 267, on a devise to a corporation, which was misnamed, the Lord Keeper decreed the charity, under the statute, though, before the statute, no such devise could have been sustained. The same point is decreed in the same book, p. 195, and in many other of the early cases. These decisions are totally incompatible with the idea, that the principles on which they turned were derived from the civil law.

There can be no doubt, that the power of the crown to superintend and enforce charities existed in very early times; and there is much difficulty in marking the extent of this branch of the royal prerogative, before the statute. That it is a branch of the prerogative, and not a part of the ordinary power of the chancellor, is sufficiently certain. Blackstone, in vol. 3, p. 47, closes a long enumeration of the extraordinary powers of the chancellor, with saying, "he is the general guardian of all infants, idiots, lunatics; and has the general superintendence of all charitable uses in the kingdom; and all this, over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the court of chancery." In the
*48] same volume, p. 487, he says, "the king, as *parens *patriæ*, has the general superintendence of all charities, which he exercises by the keeper of his conscience, the chancellor; and therefore, whenever it is necessary, the attorney-general, at the relation of some informant, files, *ex officio*, an information in the court of chancery, to have the charity properly established."

The author of "A Treatise of Equity" says, "so, anciently, in this realm, there were several things that belonged to the king as *parens patriæ*, and fell under the care and direction of this court: as, charities, infants, idiots, lunatics, &c." Cooper, in his chapter on the jurisdiction of the court, says, "the jurisdiction, however, in the three cases of infants, idiots or lunatics, and charities, does not belong to the court of chancery as a court of equity, but as administering the prerogative and duties of the crown." Cooper's Eq. Pl. 27. It would be waste of time, to multiply authorities to this point, because the principle is familiar to the profession. It is impossible to look into the subject, without perceiving and admitting it. Its extent may be less obvious.

We now find this prerogative employed in enforcing donations to charitable uses, which would not be valid, if made to other uses; in applying them to different objects than those designated by the donor; and in supplying all defects in the instrument by which the donation is conveyed, or in that by which it is administered. It is not to be admitted, that legacies, not
*49] valid in themselves, can be made so by force of prerogative, *in violation of private rights. This superintending power of the crown, therefore, over charities, must be confined to those which are valid in law. If, before the statute of Elizabeth, legacies like that under consideration would have been established, on information filed in the name of the attorney-general, it would furnish a strong argument for the opinion, that some principle was recognised, prior to that statute, which gave validity to such legacies. But although we find *dicta* of judges, asserting, that it was usual, before the statute of Elizabeth, to establish charities, by means of an information filed by the attorney-general; we find no *dictum*, that charities could be established on such information, where the conveyance was defective, or the donation was so vaguely expressed, that the donee, if not a charity, would be incapable of taking; and the thing given would vest in the heir or next of kin. All the cases which have been cited, where charities have been established, under the statute, that were deemed invalid independent of it, contradict this position.

In construing that statute, in a preceding part of this opinion, it was shown, that its enactments are sufficient to establish charities not previously

valid. It affords, then, a broad foundation for the superstructure which has been erected on it. And although many of the cases go, perhaps, too far; yet, on a review of the authorties, we think, they are to be considered as constructions of the statute, not entirely to be justified, rather than as proving the existence of some other principle, concealed in a dark and remote *antiquity, and giving a rule in cases of charity, which forms an exception to the general principles of our law. [*50

But even if, in England, the power of the king as *parens patriæ* would, independent of the statute, extend to a case of this description, the inquiry would still remain, how far this principle would govern in the courts of the United States? Into this inquiry, however, it is unnecessary to enter, because it can arise only where the attorney-general is made a party.

The court has taken, perhaps, a more extensive view of this subject than the particular case, and the question propounded on it, might be thought to require. Those who are to take this legacy beneficially, are not before the court, unless they are represented by the surviving members of the Baptist Association, or by the present corporation. It was, perhaps, sufficient to show, that they are not represented by either. This being the case, it may be impossible, that a party plaintiff can be made, to sue the executor, otherwise than on the information of the attorney-general. No person exists who can assert any interest in himself. The *cestui que trust* can be brought into being, only by the selection of those who are named in the will to take the legacy in trust, and those who are so named, are incapable of taking it. It is, perhaps, decisive of the question propounded to this court to say, that the plaintiffs cannot take. But the rights of those who claim the beneficial interest, have been argued at great length, and with great ability; and there would have *been some difficulty in explaining satisfactorily, the reasons why the plaintiffs cannot take, without discussing also, the rights of those for whom they claim. The court has, therefore, indicated its opinion on the whole case, as argued and understood at the bar. [*51

Story, Justice.[1]—Charitable donations were of great consideration in the civil law, and bequests to pious uses were deemed privileged testaments. Swinburne, pt. 1, § 16, p. 103; Ibid. pt. 7, § 8, pt. 908; 2 Domat 160, 161, 163. There can be little doubt, that the authority of the Roman code, combining with the religious notions of former times, contributed in no small decree to engraft the principles of that law respecting charities into the common law. This was manifestly the opinion of Lord Thurlow (*White* v. *White*, 1 Bro. C. C. 12); and Lord Eldon, in assenting to it, has added, that as, at an early period, the ordinary had authority to apply a portion of every man's estate to charity, when afterwards the statute compelled a distribution, it is not impossible, that the same favor should have been extended to charity in the construction of wills, by their own force, purporting to authorise such a dis-

[1] This opinion was prepared, at the time, by Justice Story, but not delivered. It was published in the appendix to the first edition of 3 Peters' reports; but omitted in the subsequent editions, most probably, because Judge Story had then changed his opinion as to the origin of the jurisdiction of the court of chancery over charitable bequests. It is, however, worth preserving, as a part of the history of the case, and as containing much learning upon a very interesting legal question.

tribution. *Moggridge* v. *Thackwell*, 7 Ves. 36, 69; *Mills* v. *Farmer*, 1 Merivale 55, 94. Be this as it may, it cannot be denied, that many of the privileges given to charitable testaments by the civil law have been, for ages, incorporated into the common law. For instance, one privilege was, that no such testament was void for uncertainty, either as to persons or objects. Hence, if a testator gave his goods to be distributed among the poor, or made the poor his executors, the legacy was not void; although it would have been otherwise, if charity had not been the legatee. Swinburne, pt. 1, § 16, p. 104, 59; 2 Domat, lib. 4, tit. 2, § 6, p. 161, 162, 163. And the same rule has been adopted into the common law, at least, ever since the statute of charitable uses. 43 Eliz., ch. 4. Indeed, at one period, the constructions in respect to charitable bequests were pushed to a most extravagant length; and the good sense of succeeding times has lamented, and so far as it consistently could, has endeavored to abridge the ancient doctrine to something like a rational system.(*a*)

It is now too late to contend, that a disposition in favor of charity can be construed according to the rules which are applicable to individuals. In the first place, the same words in a will, when applied to individuals, may require a very different construction, if applied to the case of a charity. If a testator give his property to such person as he shall hereafter name to be his executor, and afterwards appoint no executor; or if, having appointed an executor, he dies in his lifetime, and no other is appointed in his place; in either of these cases, as to individuals, the testator must be held intestate, and his next of kin will take the estate. But to give effect to a bequest in favor of charity, chancery will, in both instances, supply the place of an executor, and carry into effect that which in the case of individuals must have failed altogether. *Mills* v. *Farmer*, 1 Merivale 55, 94; *Moggridge* v. *Thackwell*, 7 Ves. 36; *Attorney-General* v. *Jackson*, 11 Ibid. 365, 367. Again, in the case of an individual, if an estate is devised to such person as the executor shall name, and no executor is appointed, or one being appointed dies in the testator's lifetime, and no one is appointed in his place, the bequest amounts to nothing. Yet such a bequest to charity would be good, and the court of chancery would in such case assume the office of executor. *Mills* v. *Farmer*, 1 Merivale 55, 96; *Moggridge* v. *Thackwell*, 7 Ves. 36. So, if a legacy be given to trustees, to distribute in charity, and they die in the testator's lifetime, although the legacy is lapsed at law (and if they had taken to their own use it would have been gone for ever), yet, in equity, it will be enforced. *Attorney-General* v. *Hickman*, 2 Eq. Cas. Abr. 193; *Moggridge* v. *Thackwell*, 3 Bro. C. C. 517; s. c. 1 Ves. jr. 464; 7 Ibid. 36; *Mills* v. *Farmer*, 1 Merivale 55, 100; *White* v. *White*, 1 Bro. C. C. 12.

Again, although in carrying into execution a bequest to an individual, the mode in which the legacy is to take effect must be of the substance of the legacy, yet where charity is the legatee, the court will consider it as the whole substance of the bequest; and in such cases only, if the mode fail, will

(*a*) See what is said on this subject in Moggridge *v.* Thackwell, 1 Ves. jr. 464; s. c. 7 Ves. 36; Mills *v.* Farmer, 1 Merivale 55; Corbyn *v.* French, 4 Ves. 418; Attorney-General *v.* Minshull, Ibid. 11; Attorney-General *v.* Boultbee, 2 Ibid. 380; Attorney-General *v.* Whitchurch, 3 Ibid. 141; Cary *v.* Abbot, 7 Ibid. 490; Attorney-General *v.* Bains, Prec. Ch. 270.

provide a mode by which that legatee shall take, but by which no other than charitable legatees can take. *Mills* v. *Farmer*, 1 Merivale 55, 100; *Moggridge* v. *Thackwell*, 7 Ves. 36; *Attorney-General* v. *Berryman*, 1 Dick. 168; 2 Roper on Legacies 130. A still stronger case is, that if the testator has expressed an absolute intention to give a legacy to charitable purposes, but has left uncertain, or to some future act, the mode by which it is to be carried into effect, there, the court of chancery, if no mode is pointed out, will of itself supply the defect, and enforce the charity. *Mills* v. *Farmer*, 1 Merivale 55, 95; *Moggridge* v. *Thackwell*, 7 Ves. 36; *White* v. *White*, 1 Bro. C. C. 12. Therefore, it has been held, that if a man devises a sum of money to such charitable uses as he shall direct, by a codicil to be annexed to his will, or by a note in writing, and afterwards leaves no direction by note or codicil, the court of chancery hath power to dispose of it to such charitable uses as it shall think fit. *Attorney-General* v. *Syderfen*, 1 Vern. 224; s. c. 2 Freem. 261, recognised as law in *Mills* v. *Farmer*, 1 Merivale 55, and *Moggridge* v. *Thackwell*, 7 Ves. 36, 70, &c. So, if a testator bequeath a sum for such a school as he should appoint, and he appoints none, the court may apply it for what school it pleases. 2 Freem. 261; *Moggridge* v. *Thackwell*, 7 Ves. 36, 73, 74. The doctrine has gone yet further, and established, that if the bequest denote a charitable intention, but the object to which it is to be applied is against the policy of the law, the court will lay hold of the charitable intention, and execute it for the purpose of some charity, agreeable to the law, in the room of that contrary to it. *Da Costa* v. *De Pas*, Ambl. 228; *Moggridge* v. *Thackwell*, 7 Ves. 36, 73, 75; *Cary* v. *Abbot*, Ibid. 490; *Attorney-General* v. *Guise*, 2 Vern. 266. Thus, a sum of money bequeathed to found a Jew's synagogue, has been taken by the court, according to this principle, and transferred to the benefit of a foundling hospital. Ibid., and *Mills* v. *Farmer*, 1 Merivale 55, 100. And a bequest for the education of poor children in the Roman Catholic faith, has been decreed to be disposed of according to the pleasure of the king, under his sign manual. *Cary* v. *Abbot*, 7 Ves. 490.

Another principle, equally well established, is, that if the bequest be for charity, it matters not how uncertain the objects or persons may be; or whether the bequest can be carried into exact execution or not; or whether the persons who are to take be *in esse* or not; or whether the legatee be a corporation capable in law to take or not; in all these and the like cases, the court will sustain the legacy, and give it effect, according to its own principles, and where a literal execution becomes inexpedient or impracticable, will execute it by *cy pres*. *Attorney-General* v. *Oglander*, 3 Bro. C. C. 166; *Attorney-General* v. *Green*, 2 Ibid. 492; *Frier* v. *Peacock*, Rep. temp. Finch 245; *Attoney-General* v. *Boultbee*, 2 Ves. jr. 380; Duke 108–113. Thus, a devise of lands to the church-wardens of a parish (who are not a corporation capable of taking lands), for a charitable purpose, though void at law, will be sustained in equity. 1 Burn's Eccles. Law 226; Duke 33, 115; Com. Dig. Chancery, 2, N, 2; *Rivett's Case*, Moore 890; *Mills* v. *Farmer*, 1 Meriv. 55; *Attorney-General* v. *Bowyer*, 3 Ves. 714; *West* v. *Knight*, 1 Ch. Cas. 135; *Moggridge* v. *Thackwell*, 7 Ves. 36. So, if the corporation for whose use it is designed, is not *in esse*, and cannot come into existence, but by some future act of the crown, as for instance, a gift to found a new college, which requires an incorporation, the gift is valid, and the court will execute it.

White v. *White*, 1 Bro. C. C. 12 ; *Attorney-General* v. *Downing*, Ambl. 550, 571 ; *Attorney-General* v. *Bowyer*, 3 Ves. 714, 727. So, if a devise be an existing corporation, by a misnomer, which makes it void at law. *Anon.*, 1 Ch. Cas. 267 ; *Attorney-General* v. *Platt*, Rep. temp. Finch 221. So where a devise was to the poor generally, the court decreed it to be executed in favor of three public hospitals in London. *Attorney-General* v. *Peacock*, Rep. temp. Finch 45 ; *Owen* v. *Bean*, Ibid. 395 ; *Attorney-General* v. *Syderfen*, 1 Vern. 224 ; *Clifford* v. *Francis*, 1 Freem. 330. So, a legacy towards establishing a bishop in America was held good, though none was yet appointed. *Attorney-General* v. *Bishop of Chester*, 1 Bro. C. C. 444. And where a charity is so given, that there can be no objects, the court will order a different scheme of the charity; but it is otherwise, if objects may, though they do not at present, exist (*Attorney-General* v. *Oglander*, 3 Bro. C. C. 166) ; and when objects cease to exist, the court will new model the charity. *Attorney-General* v. *City of London*, 3 Bro. C. C. 171 ; s. c. 1 Ves. jr. 243. And in aid of these principles, the court will, in all cases of charities, supply all defects in the conveyances, where the donor hath a capacity and a disposable estate, and his mode of donation does not contravene the provisions of any statute. *Case of Christ's College*, 1 W. Bl. 90 ; s. c. Ambl. 351 ; *Attorney-General* v. *Rye*, 2 Vern. 453 ; *Rivett's Case*, Moore 890 ; *Attorney-General* v. *Burdet*, 2 Vern. 755 ; *Attorney-General* v. *Bowyer*, 3 Ves. jr. 714; *Mills* v. *Farmer*, 15 Merivale 55 ; *Collison's Case*, Hob. 136 ; Moore 822.

Some of these doctrines may seem strange to us, as they have also seemed to Lord ELDON ; but he considered the cases too stubborn to be shaken, without doing that in effect, which no judge will in terms take upon himself, to reverse decisions that have been acted upon for centuries. *Moggridge* v. *Thackwell*, 7 Ves. 36, 87.

If, therefore, the present case had arisen in England, since the statute of charitable uses, 43 Eliz., ch. 4, there can be no doubt, that it would have been established as a valid bequest, notwithstanding it is given to an unincorporated society.(*a*) The only question would have been, whether it ought to be administered by a scheme under the direction of the court of chancery, or by the king himself, as *parens patriæ*, under his sign-manual. As to this, the rule which has been drawn by Lord ELDON, from a most learned and critical examination of all the authorities is, that where there is a bequest to trustees for charitable purposes, the disposition must be in chancery, under a scheme to be approved by a master ; but where the object is charity, and no trust is interposed, it must be by the king, under his sign-manual ; for in such cases, the king, as *parens patriæ*, is deemed the constitutional trustee. *Moggridge* v. *Thackwell*, 7 Ves. 36, 86 ; *Paice* v. *Archbishop of Canterbury*, 14 Ibid. 372 ; *Attorney-General* v. *Herrick*, Ambl. 712; *Morice* v. *Bishop of Durham*, 9 Ves. 399 ; s. c. 10 Ibid. 522, 541 ; *Clifford* v. *Francis*, 1 Freem. 330 ; *Attorney-General* v. *Syderfen*, 2 Ibid. 261 ; s. c. 1 Vern. 224 ; 7 Ves. 69, 70 ; 2 Maddock's Ch. 63 ; Highmore on

(*a*) See also, Baylis and Church *v.* Attorney-General, 2 Atk. 239; Owen *v.* Bean, Rep. temp. Finch 395 ; s. c. 2 Ventris 349; Anon., 1 Ch. Cas. 267; West *v.* Knight, Ibid. 135; Mayor, &c., of Reading *v.* Lane, Duke 81. And see Bridgman's Duke 361, 486.

Mortm. 250 ; 1 Bac. Abr., Charitable Uses, E ; *Attorney-General* v. *Mathews*, 2 Lev. 167.

But the statute of Elizabeth not being in force in Virginia, at the time when the present will took effect (it having been repealed by the legislature between the making of the will and the death of the testator), it becomes a material inquiry, how far the jurisdiction and doctrines of the court of chancery respecting charitable uses depends upon that statute, and whether, independent of it, the present donation can be upheld.

It is not easy to arrive at any satisfactory conclusion on this head. Few traces remain of the exercise of this jurisdiction, in any shape, prior to the statute of Elizabeth. The principal, if not the only cases now to be found, were decided in the courts of common law, and turned upon the question, whether the uses were void or not, within the statutes against superstitious uses. One of the earliest cases is *Porter's Case*, 1 Co. 22 *b*, in 34 & 35 Elizabeth. See also, a like decision in *Partridge* v. *Walker*, cited 4 Co. 116 *b* ; *Martindale* v. *Martin*, Cro. Eliz. 288 ; *Thetford School*, 8 Co. 130, which was a devise of lands devisable by custom, to the testators's wife in fee, upon condition, that she should assure the lands devised for the maintenance and continuance of a free school and certain alms-men and alms-women ; and it appeared, that the heir had entered for condition broken, and conveyed the same lands to the queen. It was held, that the use being for charity, was a good and lawful use, and not void by the statutes against superstitious uses, and that the queen might well hold the land for the charitable uses. Lord Eldon, in commenting on this case, has observed, "it does not appear that this court (*i. e.*, chancery), at that period, had cognisance upon informations for the establishment of charities. Prior to the time of Lord Ellesmere,(*a*) so far as the tradition of times immediately following goes, there were no such informations as that upon which I am now sitting (*i. e.*, an information to establish a charity); but they made out their case as well as they could by law." *Attorney-General* v. *Bowyer*, 3 Ves. 714, 726. So that the result of Lord Eldon's researches on this point is, that until about the period of enacting the statute of Elizabeth, bills were not filed in chancery to establish charities ; and it is remarkable, that Sir Thomas Egerton and Lord Coke, who argued *Porter's case* for the queen, though they cited many antecedent cases, refer to none which were not decided at law. And the doctrine established by *Porter's case* is, that if a feoffment be made to a general legal use, not superstitious, though indefinite, though no person is *in esse*, who could be the *cestui que use*, yet the feoffment is good ; and if the use was bad, the heir of the feoffor would be entitled to enter, the legal estate remaining in him. 3 Ves. jr. 726. The absence, therefore, of all authority derived from equity decisions, on an occasion when they would probably have been used, if existing, certainly does very much favor the conclusion of Lord Eldon ; and if we might hazard a conjecture, it would be that *Porter's case* having established charitable uses, not superstitious, to be good at law, chancery, in analogy to other cases of trusts, immediately held the feoffees to such uses accountable in equity for the due execution of them ; and that the inconveniences felt in resorting to

(*a*) Sir Thomas Egerton was made lord chancellor in 39 Elizabeth, 1596, and was created Lord Ellesmere in 1 James I., 1603.

this new and anomolous proceeding, from the indefinite nature of some of the uses, gave rise within a very few years to the statute of 43 Elizabeth.(a) This view would have a great tendency to reconcile the language used on other occasions by other chancellors, in reference to the jurisdiction of chancery over charities, with that of Lord ELDON; as it would show, that cases of feoffments to charitable uses, bills to establish those uses might in fact have been introduced by Lord ELLESMERE, about five years before the statute of Elizabeth; which might be quite consistent with the fact, that such bills were not sustained, where the donation was to charity generally, and no trust was interposed, or legal estate devised, to support the uses, and it is very certain, that at law, a devise to charitable uses, generally, without interposing a trustee, or a devise to a non-existing corporation, or to an unincorporated society, would have been, and, in fact, was held, utterly void, for want of a person having a sufficient capacity to take as devisee. *Anon.*, 1 Chan. Cas. 267; *Attorney-General* v. *Tancred*, 1 W. Bl. 90; s. c. Ambl. 351; *Collinson's Case*, Hob. 136; s. c. Moore 888; *Widmore* v. *Woodroffe*, Ambl. 636, 640; Com. Dig. Devise, K. The statute of Elizabeth in favor of charitable uses cured this defect, Com. Dig. Charitable Uses, N, 11; Ibid. Chancery, 2, N, 10; and provided (as we shall hereafter have occasion more immediately to consider), a new mode of enforcing such uses, by a commission, under the direction of the court of chancery. Shortly after this statute, it became a matter of doubt, whether the court could grant relief by original bill, in cases within that statute, or was not confined to the remedy by commission. That doubt remained, until the reign of Charles II., when it was settled in favor of the jurisdiction by original bill. *Attorney-General* v. *Newman*, 1 Ch. Cas. 157; s. c. 1 Lev. 284; *West* v. *Knight*, 1 Ch. Cas. 134; *Anon.*, Ibid. 267; 2 Fonb. Eq. b. 3, pl. 2, ch. 1, § 1; *Parish of St. Dunstan* v. *Beauchamp*, 1 Ch. Cas. 193. But on one occasion, in which this very question was argued before him, Lord Keeper BRIDGMAN declared, "that the king, as *pater patriæ*, may inform for any public benefit for charitable uses, before the statute of 39 of Elizabeth, for charitable uses; but it was doubted, the court not, by bill, take notice of that statute, so as to grant a relief, according to that statute, upon a bill." *Attorney-General* v. *Newman*, 1 Ch. Cas. 157. On another occasion, soon afterwards, where the devise was to a college, and held void at law by the judges, for a misnomer, and on a bill to establish the devise as a charity, the same question was argued; Lord Keeper FINCH (afterwards Lord NOTTINGHAM) held the devise good, as an appointment under the statute of Elizabeth, and "decreed the charity, though before the statute, no such decree could have been made." *Anon.*, 1 Ch. Cas. 267.

It would seem, therefore, to have been the opinion of Lord NOTTINGHAM, that an original bill would not, before the statute of Elizabeth, lie, to establish a charity, where the estate did not pass at law, to which the charitable uses attached. In *Eyre* v. *Shaftesbury*, 2 P. Wms. 103, 118 (cited also, 7 Ves. jr. 63, 87), Sir JOSEPH JEKYLL said, in the course of his reasoning on another point, "in like manner, in the case of charity, the king, *pro bono publico*, has an original right to superintend the care thereof, so that, ab-

(a) There was, in fact, an act passed respecting charitable uses in 39 Elizabeth, ch. 9; but it was repealed by the act of 43 Eliz., ch. 4. Com. Dig. Charitable Uses, N, 14.

stracted from the statute of Elizabeth relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice, to file informations in chancery, in the attorney-general's name, for the establishment of charities." In the *Bailiffs, &c. of Burford* v. *Lenthall*, 2 Atk. 550 (1743), Lord HARDWICKE is reported to have said, "the courts have mixed the jurisdiction of bringing informations in the name of the attorney-general, with the jurisdiction given them under the statute of Elizabeth, and proceed either way, according to their discretion." In a subsequent case, *Attorney-General* v. *Middleton* (1751), 2 Ves. 327, which was an information filed by the attorney-general against the master and governors of a school, calling them to account in chancery, as having the general superintendency of all charitable donations, the same learned chancellor, in discussing the general jurisdiction of chancery on this head, and distinguishing the case before him from others, because the trustees or governors were invested with the visitatorial power, said, "consider the nature of the foundation; it is at the petition of two private persons, by charter of the crown, which distinguishes this case from cases of the statute of Elizabeth on charitable uses, or cases before that statute, in which this court exercised jurisdiction of charities at large. Since that statute, where there is a charity for the particular purposes therein, and no charter given by the crown to found and regulate it, unless a particular exception out of the statute, it must be regulated by commission. But there may be a bill by information in this court, founded on its general jurisdiction; and that is from necessity, because there is no charter to regulate it, and the king has a general jurisdiction of this kind. There must be somewhere a power to regulate, but where there is a charter, with proper powers, there is no ground to come into this court to establish that charity; and it must be left to be regulated in the manner the charter has put it, or by the original rules of law. Therefore, though I have often heard it said in this court, if an information is brought to establish a charity, and praying a particular relief and mode of regulation, and the party fails in that particular relief, yet that information is not to be dismissed, but there must be a decree for the establishment; that is, always with this distinction, where it is a charity at large, or in its nature before the statute of charitable uses; but not in the case of charities incorporated and established by the king's charter, under the great seal, which are established by proper authority allowed." And again, "it is true, that an information in the name of the attorney-general, as an officer of the crown, was not a head of the statute of charitable uses, because that original jurisdiction was exercised in this court before, but that was always in cases now provided for by that statute, that is, charities at large, not properly and regularly provided for in charters of the crown."

It was manifestly, therefore, the opinion of Lord HARDWICKE, that, independently of the statute of Elizabeth, the court of chancery did exercise original jurisdiction, in cases of charities at large, which he explains to mean, charities not regulated by charter; but it does not appear, that his attention was called to discriminate between such as could take effect at law, by reason of the interposition of a feoffee or devisee capable of taking, and those where the purpose was general charity, without the interposition of any trust to carry it into effect; and the same remark applies to the

dictum by Sir JOSEPH JEKYLL. In a still later case, *Attorney-General* v. *Tancred*, 1 W. Bl. 90 ; s. c. Ambl. 351 ; 1 Eden 10, which was an information to establish a charity, and aid a conveyance in remainder, to certain officers of Christ's college, to certain charitable uses, Lord Keeper HENLEY (afterwards Lord NORTHINGTON) is reported to have said, "the conveyance is admitted to be defective, the use being limited to certain officers of the corporation, and not to the corporate body ; and therefore, there is a want of proper persons to take in perpetual succession. The only doubt is, whether the court shall supply this defect, for the benefit of the charity, under the statute of Elizabeth. And I take the uniform rule of this court, before, at and after the statute of Elizabeth, to have been, that where the uses are charitable, and the person has in himself full power to convey, the court will aid a defective conveyance to such uses. Thus, though devises to corporations were void, under the statute of Henry VIII., yet they were always considered as good, in equity, if given to charitable uses." And he then proceeds to declare, that he is obliged, by the uniform course of precedents, to assist this conveyance, and therefore, establishes the conveyance, expressly under the statute of Elizabeth.

There is some reason to question, if the language here imputed to Lord NORTHINGTON be minutely accurate. His Lordship manifestly aids the conveyance, as a charity, in virtue of the statute of Elizabeth ; and there is no doubt, that it has been the constant practice of the court, since that statute, to aid defects in conveyances to charitable uses. But there is no case in which such defects were aided, before that statute. The old cases, though arising before, were deemed to be within the reach of that statute, by its retrospective language, and expressly decided on that ground. *Collinson's Case*, Hob. 136 ; s. c. Moore 888 ; Ibid. 822 ; *Sir Thomas Middleton's Case*, Ibid. 889 ; *Rivett's Case*, Ibid. 890, and the cases cited in Raithby's note to *Attorney-General* v. *Rye*, 2 Vern. 453 ; Duke 74, 77, 83, 84 ; Bridg. Charit. 366, 379, 380, 370 ; Duke 105 to 113. And the very case put, of devises to corporations, which are void under the statute of Henry VIII., and are held good, solely by the statute of Elizabeth, shows that his Lordship was looking to that statute ; for it is plain, that a devise, void by statute, cannot be made good, upon any principles of general law. What, therefore, is supposed to have been stated by him, as being the practice before the statute, is probably founded in the mistake of the reporter. The same case is reported in Ambler 351, where the language is, "the constant rule of the court has always been, where a person has a power to give, and makes a defective conveyance to charitable uses, to supply it as an appointment ; as, in Jesus' college, *Collinson's case*, in Hobart 136." Now *Collinson's case* was expressly held to be sustainable, only as an appointment under the statute of Elizabeth ; and this shows that the language is limited to cases governed by that statute.

In a very recent charity case, Sir Arthur Piggott, in argument, said, "the difference between the case of individuals and that of charities, is founded on a principle which has been established ever since the statute of charitable uses, in the reign of Elizabeth, and has been constantly acted upon from those days to the present ;" and Lord ELDON adopted the remark, and said, "I am fully satisfied as to all the principles laid down in the course of this argument, and accede to them all." His Lordship then proceeds to

discuss the most material of the principles and cases from the time of Elizabeth, and builds his reasoning, as, indeed, he had built it before, upon the supposition, that the doctrine in chancery, as now established, rested mainly on that statute. *Mills* v. *Farmer*, 1 Merivale 55, 86, 94, 100; *Moggridge* v. *Thackwell*, 7 Ves. 36; *Attorney-General* v. *Bowyer*, 3 Ibid. 714, 726. And his Lordship's opinion, in the case alluded to, *Attorney-General* v. *Bowyer*, 3 Ves. 714, 726, when commenting on *Porter's case*, is entitled to the more weight, because it seems to have been given after a very careful examination of the whole judicial history of charities.

These are all the cases which the researches of the court and of counsel have enabled them to find, where the jurisdiction of chancery over charities, antecedent to the statute of Elizabeth, has been directly or incidentally discussed. The circumstance that no cases prior to that time can be found in equity; the tradition that has passed down to our own times, that original bills to establish charities were first entertained in the time of Lord Ellesmere; and the fact that the cases immediately succeeding that statute, where devises, void at law, were held good as charities, might have been argued and sustained, upon the general jurisdiction of the court, if it existed, and yet were exclusively argued and decreed upon the footing of that statute; do certainly afford a very strong presumption, that the jurisdiction of the court to enforce charities, where no trust was interposed, and where no devisee was *in esse*, or where the charity was general and indefinite both as to persons and objects, mainly rests upon constructions (whether ill or well founded, is now of no consequence) of that statute.

It is very certain also, that since the statute of Elizabeth, no bequests are deemed within the authority of chancery to establish and regulate, except bequests for those purposes which that statute enumerates as charitable, or which, by analogies are deemed within its spirit and intendment. A bequest may be, in an enlarged sense, charitable, and yet not within the purview of the statute. Charity, as the master of the rolls has justly observed, in its widest sense, denotes all the good affection men ought to bear towards each other; in its more restricted and common sense, relief to the poor. In neither of these senses, is it employed in the court of chancery. *Morice* v. *Bishop of Durham*, 9 Ves. 399; s. c. 10 Ibid. 522; *Brown* v. *Yeall*, 7 Ibid. 59, note *a*; *Moggridge* v. *Thackwell*, Ibid. 36; *Attorney-General* v. *Bowyer*, 3 Ibid. 714, 726; *Cox* v. *Basset*, Ibid. 155. In that court, it means such only as are within the letter and the spirit of the statute of Elizabeth; and therefore, where a testatrix bequeathed the residue of her personal estate to the bishop of D., to dispose of the same "to such objects of benevolence and liberality as the bishop, in his own discretion, shall most approve of," and appointed the bishop her executor; on a bill to establish the will and declare the residuary bequest void, the court held the bequest void, upon the ground, that objects of benevolence and liberality were not necessarily charitable, within the statute of Elizabeth, and were, therefore, too indefinite to be executed. The court further declared, that no case had yet been decided, in which the court had executed a charitable purpose, unless the will contained a description of that which the law acknowledges a charitable purpose, or devoted the property to purposes of charity, in general, in the sense in which that word is used in the court. That the case was, therefore, the case of a trust of so indefinite a nature,

that it could not be under the control of the court, so that the administration of it could be reviewed by the court, or if the trustee died, the court itself could execute the trust. That it fell, therefore, within the rule of the court, that where a trust is ineffectually declared, or fails, or becomes incapable of taking effect, the party taken shall be a trustee, if not for those who were to take by the will, for those who take under the disposition of the law; and the residue was accordingly decreed to the next of kin.

So that it appears, since the statute of Elizabeth, the court of chancery will not establish any trusts for indefinite purposes of a benovelent nature not charitable within the purview of that statute, although there be an existing trustee in whom it is vested; but will declare the trust void, and distribute the property among the next of kin: and yet, if there was an original jurisdiction in chancery over all bequests, charitable in their own nature, and not superstitious, to establish and regulate them, independent of the statute, it is not easy to perceive, why an original bill might not be sustained in such court, to establish such bequest, especially, where a trustee is interposed to effectuate it; for the statute does not contain any prohibition of such bequests. An argument may, therefore, be fairly drawn from this source, against a general jurisdiction in chancery over charities of an indefinite nature, prior to the statute.

And the statute itself may be resorted to, as affording an additional argument in corroboration of the opinion already expressed. It begins, by a recital, that lands, goods, money, &c., had been given, &c., heretofore, to certain purposes, which it enumerates in detail, which lands, &c., had not been employed according to the charitable intent of the givers and founders, by reason of frauds, breaches of trusts, and negligence in those that should pay, deliver and employ the same. It then enacts, that it shall be lawful for the lord chancellor, &c., to award commissions, under the great seal, to proper persons, to inquire, by juries, of all and singular such gifts, &c., breaches of trusts, &c., in respect to such gifts, &c., heretofore given, &c., or which shall hereafter be given, &c., "to or for any the charitable and godly uses before rehearsed;" and upon such inquiry, to set down such orders, judgments and decrees, as the lands, &c., may be duly and faithfully employed to and for such charitable uses before rehearsed, for which they were given "which orders, judgments and decrees, not being contrary to the orders, statutes or decrees of the donors or founders, shall stand firm and good, according to the tenor and purpose thereof, and shall be executed accordingly, until the same shall be undone and altered by the lord chancellor, &c., upon complaint by any party grieved, to be made to them." Then follow several provisions, excepting certain cases from the operation of the statute, which are not now material to be considered. The statute then directs the orders, &c., of the commissioners to be returned under seal, into the court of chancery, &c., and declares, that the lord chancellor, &c., shall and may "take such order for the due execution of all or any of the said judgments, orders and decrees, as to them shall seem fit and convenient;" and lastly, the statute enacts, that any person aggrieved with any such orders, &c., may complain to the lord chancellor, &c., for redress therein; and upon such complaint, the lord chancellor, &c., may, by such course as to their wisdom shall seem meetest, the circumstances of the case considered, proceed to the examination, hearing and determining thereof;

"and upon hearing thereof, shall and may annul, diminish, alter or enlarge the said orders, judgments and decrees of the said commissioners, as to them shall be thought to stand with equity and good conscience, according to the true intent and meaning of the donors and founders thereof;" and may tax and award costs against the person complaining, with just and sufficient cause, of the orders, judgments and decrees before mentioned.(*a*)

From this summary statement of the contents of the statute, it is apparent, that the authority conferred on the court of chancery, in relation to charitable uses, is very extensive; and it is not at all wonderful, considering the religious notions of the times, that the statute should have received the most liberal, not to say, in some instances, the most extravagant, interpretation. And it is very easy to perceive, how it came to pass, that as power was given to the court, in the most unlimited terms, to annul, diminish, alter or enlarge the orders and decrees of the commissioners, and to sustain an original bill in favor of any party grieved by such order or decree, the court arrived at the conclusion, that it might, by original bill, do that, in the first instance, which it certainly could do circuitously upon the commission.(*b*) And as in some cases, where the trust was for a definite object, and the trustee living, the court might, upon its ordinary jurisdiction over trusts, compel an execution of it, by an original bill, independent of the statute (*Attorney-General* v. *Dixie*, 13 Ves. 519; *Kirkby Ravensworth Hospital*, 15 Ibid. 305; *Green* v. *Rutherforth*, 1 Ibid. 462; *Attorney-General* v. *Earl of Clarendon*, 17 Ibid. 491, 499; 2 Fonb. Eq. b. 63, pt. 2, ch. 1, § 1, note *a*; Cooper's Eq. Pl. 292), we are at once let into the origin of the practice of mixing up the jurisdiction by original bill, with the jurisdiction under the statute, which Lord HARDWICKE alluded to in the passage already quoted, *Bailiffs, &c., of Burford* v. *Lenthall*, 2 Atk. 550; and which, at that time, was inveterately established. And this mixture of the jurisdictions serves also to illustrate the remark of Lord NOTTINGHAM in the case already cited; *Anon.*, 1 Ch. Cas. 267, where, upon an original bill, he decreed a devise to charity, void at law, to be good in equity, as an appointment, though before the statute of Elizabeth, no such decree could have been made.

Upon the whole, it seems to me, that the jurisdiction of the court of chancery over charities, where no trust is interposed, or there is no person *in esse* capable of taking, or where the charity is of an indefinite nature, is not to be referred to the general jurisdiction of that court, but sprung up, after the statute of Elizabeth, and rests mainly on its provisions. See Cooper Eq. Pl. 102, 103. This opinion is supported by the weight of authorities speaking to the point, and particularly, by those of a very recent date, which appear to have been most thoroughly considered. The language, too, of the statute lends a confirmation to the opinion, and enables us to trace what would otherwise seem a strange anomaly, to a legitimate origin. If so, there is no pretence, that by the law of Virginia, at the period when this will took effect, the statute of Elizabeth was then in force; or that any court of equity of that state could sustain the bequest, in equity, as a charity, if it

(*a*) See the statute 43 Eliz., ch. 4, at large, 2 Inst. 707; Bridg. on Duke Char., ch. 1, pl. 1.

(*b*) See the Poor of St. Dunstan *v.* Beauchamp, 1 Ch. Cas. 193; 2 Inst. 711; Bailiffs, &c., of Burford *v.* Lenthall, 2 Atk. 551; 15 Ves. 305.

was void at law. And that it was void at law, cannot be seriously doubted; for the legatees were not then a corporate society, capable of taking it. Com. Dig., Devise, K; 1 Roll. Abr. 609; Com. Dig., Chancery, 2, N, 1, &c. And it is a maxim, that the legacy must take effect at the death of the testator, or be void at that time, and the right vest in another. *Per* Lord HARDWICKE, *Widmore* v. *Woodroffe*, Ambl. 636, 640. And if a court of chancery could not, in virtue of its general jurisdiction, take cognisance of, or sustain the bequest in this suit, neither can the circuit court of the United States.

If we could surmount the objection already considered, that this bequest is, under the present law of Virginia, deemed void, both in law and equity, and therefore, incapable of being decreed by this court, we might entertain the other questions which have been made in this court. One of these questions is, whether this court, as a court of equity, has a right to administer any charities, the administration of which would properly belong to the government of Virginia as *parens patriæ*. It is certainly stated in books of authority, that the king, as *parens patriæ*, has the general superintendence of all charities, not regulated by charter (3 Bl. Com. 427; 2 Fonb. Eq. b. 2, pt. 2, ch. 1, § 1, and note *a*), which he exercises by the keeper of his conscience, the chancellor; and therefore, the attorney-general, at the relation of some informant, when it is necessary, files, *ex officio*, an information in the court of chancery, to have the charity properly established. And it is added, that the jurisdiction thus exercised does not belong to the court of chancery, as a court of equity, but as administering the prerogative and duties of the crown. Cooper's Eq. Pl. xxvii.; 2 Fonb. Eq. b. 2, ch. 1, § 1; *Lord Falkland* v. *Bertie*, 2 Vern. 342; Mitf. Eq. Pl. 29; *Bailiffs, &c., of Burford* v. *Lenthall*, 2 Atk. 551. It may safely be admitted, that the government of a state, as *parens patriæ*, has a right to enforce all charities of a public nature, by virtue of its general superintending authority over the public interests, where no other person is intrusted with it; and it seems also to be held, that the jurisdiction vested by the statute of Elizabeth over charitable uses, is personal to the lord chancellor, and not in his ordinary or extraordinary jurisdiction in chancery, like that, in short, which he exercises as to lunatics and idiots. *Bailiffs of Burford* v. *Lenthall*, 2 Atk. 551; 2 Fonb. Eq. b. 3, pt. 2, ch. 1, § 1, and note *a*.

It may also be admitted, that where money is given to charity, generally and indefinitely, without trustees or objects selected, the king, as *parens patriæ*, is the constitutional trustee, and may apply it as he pleases, under his sign-manual, and not under a decree of chancery. *Moggridge* v. *Thackwell*, 7 Ves. 36, 83, 85, 86; *Mills* v. *Farmer*, 1 Merivale 55; *Paice* v. *Archbishop of Canterbury*, 14 Ves. 364; *Attorney-General* v. *Matthews*, 2 Lev. 167. Where, however, the execution is to be by a trustee, with general, or some, objects pointed out, or to a trustee for indefinite and general charity, the court of chancery will take the administration of the trust. *Moggridge* v. *Thackwell*, 7 Ves. 36, 86; *Mills* v. *Farmer*, 1 Merivale 55. Whether, in such a case, upon *an original bill* to establish the charity, the lord chancellor acts as the personal delegate of the crown, administering its prerogative in analogy to the authority *personally* given to him by the statute of charitable uses, under a commission; or whether, as a court of equity, in virtue of its general powers, may, perhaps, upon the authorities, admit of some ques-

tion : though my opinion is, that it belongs to the court, as a court of equity, exercising jurisdiction to enforce a *trust* recognised and enforced by the law of the land ; and I think this opinion is corroborated by the better authorities. Ibid.; *Paice* v. *Archbishop of Canterbury*, 14 Ves. 364 ; *Attorney-General* v. *Wansay*, 15 Ibid. 231 ; *Attorney-General* v. *Price*, 17 Ibid. 371 ; *Waldo* v. *Caley*, 16 Ibid. 206. Be this as it may, where there is a *trust* for a *definite* object, and the trust is, in point of law sustainable, there seems no reason why a court of equity, as such, may not take cognisance of such trust at the suit of any competent party, whether the attorney-general, or a private interested relator, as well as of any other trust whose execution is sought. 2 Fonb. Eq. b. 3, pt. 2, ch. 1, § 1, note *a*, § 2, § 3, note *i ; Moggridge* v. *Thackwell*, 7 Ves. 36 ; *Attorney-General* v. *Brewer's Company*, 1 Merivale 495 ; *Attorney-General* v. *Bowyer*, 3 Ves. 714 ; 2 Vern. 387 ; *Attorney-General* v. *Newcombe*, 14 Ves. 1, 7 ; *White* v. *White*, 7 Ibid. 423. If, therefore, by the law of Virginia, the bequest in this case had been valid in law or equity, the trustees being marked out, and the objects being definite, there does not seem any reason why, at their instance, it might not have been executed in this as well as in any other court of equity. The court, in such a case, would carry into effect the intention of the testator ; nothing would be left to its discretion; and it would, therefore, do precisely what a state court of chancery must do, acting as such, or administering the prerogative of the government as *parens patriæ*.

In respect to another question, whether the attorney-general be not a a necessary party to a bill in equity to establish a charity, or carry it into effect, that must depend upon circumstances. If the charity be indefinite, or there be no trustees, or no persons competent to take, or the objects be of a general and public nature, it would clearly be proper, that the government to whom the superintendency of such charities belongs, should be made a party to the bill by their attorney-general. This seems to have been the general course established by the authorities. Cooper's Eq. Plead. 21, 22, 102, 163 ; *Monell* v. *Lawson*, 2 Eq. Cas. Abr. 167, pl. 13 ; 4 Vin. 500, pl. 11; *Attorney-General* v. *Pearce*, 2 Atk. 87. But where the charity is definite in its nature, and trustees are appointed to take or execute it, it is not perceived, why a suit at the instance of such trustees may not properly be maintained, without the government being a party. *Monell* v. *Lawson*, 2 Eq. Cas. Abr. 167, pl. 13 ; 4 Vin. 500, pl. 11 ; Bridg. Duke, Charit. 385, 386 ; *Chitty* v. *Parker*, 4 Bro. C. C. 38 ; *Anon.*, 3 Atk. 276 ; *Attorney-General* v. *Newcombe*, 14 Ves. 1, 7 ; *Waldo* v. *Caley*, 16 Ibid. 206.

Another question which has been discussed in the argument is, whether a court of court of equity, sitting within one jurisdiction, can execute any charitable bequests for foreign objects, in another jurisdiction ; and it is said, in a technical sense, to be against the public policy of Virginia, to sustain or execute such bequests. There is no statute of Virginia making such bequests void; and therefore, if against her policy, it can be only because it would be against the general policy of all states governed by the common law. The case of the *Attorney-General* v. *The City of London*, 3 Bro. C. C. 171 ; s. c. 1 Ves. jr. 243 (*Provost, &c., of Edinburgh* v. *Aubery*, Ambl. 236 ; *Oliphant* v. *Hendrie*, 1 Bro. C. C. 571), is relied on to establish the general proposition. It was an information to establish a new scheme for a charity of Mr. Boyle, who by his will, in 1691, gave the resi-

due of his fortune to be laid out by his executors for charitable and other pious and good uses, at their discretion, but recommended that the greater part should be laid out for the advancement of the Christian religion among infidels. The charity had been established under a decree of the court, and the property conveyed to the City of London, upon trust to lay out the rents and profits, in the advancement of the Christian religion, as the bishop of London, for the time being, and Lord Burlington should appoint. The trustees appointed the rents and profits to be paid to an agent in London, for the college of William and Mary, in Virginia, for this purpose, that the college should maintain and educate in the Christian religion so many Indian children, as far as the fund would go, and that the president, &c., thereof, should transmit accounts, and *should be subject to rules given them, until altered.* This arrangement was ratified by the court. After the revolution, the present bill was filed for the purpose of taking away the charity from the college, because emancipated from the control of the court, and to have it disposed of by a new scheme. Upon hearing the cause, a decree was made accordingly, upon the ground, that the trusts to the college to convert neighboring infidels, ceasing for want of objects (there being now, as the court said, no neighboring infidels), the charity must be applied anew. 3 Bro. C. C. 171, 177. There was also an intimation, at the argument, that the corporation was not now an existing corporation, and at all events, was not within the control of the court. But the ground of the decision was as above stated. It is observable in this case, that the charity of Mr. Boyle was not, in terms or substance, limited to foreign countries or objects ; but the application to foreign objects was originally under the decree of the court. It certainly then furnishes no argument against, but an argument in favor, of the power of a court of equity, to apply even a *general* charity to *foreign* objects.

But we need not rest here. There are other cases directly in point, in which bequests for foreign charitable objects have been sustained in equity. In the *Provost, &c., of Edinburgh* v. *Aubery*, Ambl. 236, there was a devise of 3500*l.* south-sea annuities, to the plaintiffs, to be applied to the maintenance of poor laborers, residing in Edinburgh and the towns adjacent. Lord Hardwicke was of opinion, that he could not give any directions as to the distribution of the money, that belonging to another jurisdiction, that is, to some of the courts in Scotland ; and therefore, directed that the annuities should be transferred to such person as the plaintiffs shall appoint, to be applied to the trusts in the will. So, in *Oliphant* v. *Hendrie*, 1 Bro. C. C. 571, where A., by will, gave 300*l.* to a religious society in Scotland, to be laid out in the purchase of heritable securities, in Scotland, and the interest thereof to be applied to the education of twelve poor children, the court held it a good bequest. That case approaches very near to the case now at bar. In *Campbell* v. *Radnor*, 1 Bro. C. C. 271, the court held a bequest of 7000*l.*, to be laid out in the purchase of lands in Ireland, and the rents and profits distributed among poor persons in Ireland, &c., to be good and valid in law. In *Curtis* v. *Hutton*, 14 Ves. 537, the court held a bequest of personal estate for the maintenance of a charity (a college) in Scotland, to be a valid bequest. In a still more recent case, a bequest of 10,000*l.* in trust, with the magistrates of Inverness, in Scotland, to apply the interest and income for the education of certain boys, was held a valid bequest. *Mack-*

intosh v. *Townsend*, 16 Ves. 330. There is also another case, *Attorney-General* v. *Bishop of Chester*, 1 Bro. C. C. 444, in which it was held, that a legacy given towards establishing a bishop in America was held good, notwithstanding none was yet appointed; and the court directed the money to remain in court, until it should be seen whether any appointment should take place. Nor is the uniformity of the current of the authorities broken in upon, by the doctrine in *De Garcin* v. *Lawson*, 4 Ves. jr. 433, note There, the bequests were to Roman Catholic establishments, or for the benefit of Roman Catholic priests, and were considered void, because they were illegal, and contrary to the policy of England, evinced by the express enactments of statutes on this subject. *Cary* v. *Abbot*, 7 Ves. jr. 490; Highmore on Mortmain (1809), p. 34, &c. It does not strike me, therefore, that there is any solid objection to the bequest, in the case at bar, founded on the persons or objects being foreign to the state of Virginia.

But for the reasons already stated, the bequest being void, I am of opinion, that the court ought to certify that opinion to the circuit court of Virginia.

Certificate.—This cause came on to be heard on the transcript of the record of the court of the United States, for the fifth circuit, and the district of Virginia, and on the question therein stated, on which the judges of that court were divided in opinion, and which was adjourned to this court, and was argued by counsel: On consideration whereof, this court is of opinion, that the plaintiffs are incapable of taking the legacy for which this suit was instituted; which opinion is ordered to be certified to the said circuit court.(*a*)

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*The Divina Pastora: The Spanish Consul, Claimant. [*52

Civil war.

The government of the United States having recognised the existence of a civil war between Spain and her colonies, but remaining neutral, the courts of the Union are bound to consider as lawful, those acts which war authorizes, and which the new governments in South America may direct against their enemy.

Unless the neutral right of the United States (as ascertained by the law of nations, the acts of congress and treaties) are violated by the cruisers sailing under commissions from those governments, captures by them are to be regarded by us as other captures, *jure belli*, are regarded; the legality of which cannot be determined in the courts of a neutral country.[1]

Where the pleadings in a prize, or other admiralty cause, are too informal and defective to pronounce a final decree upon the merits, the cause will be remanded to the circuit court, with directions to permit the pleadings to be amended, and for further proceedings.

Appeal from the Circuit Court of Massachusetts. The petition or libel, in this cause, by the consul of his Catholic Majesty at Boston, alleges and propounds: 1. That there lately arrived at the port of New Bedford, in this district, and is now lying in the said port of New Bedford, a Spanish vessel, called the Esperanza, otherwise called the Divina Pastora, having on board a cargo, consisting of cocoa, cotton, indigo, hides and horns, of great value, to wit, of the value of $10,000; that the said vessel is navigated by seven persons,

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(*a*) See Appendix, Note 1, on Charitable Bequests.

[1] The Neustra Senora de la Caridad, *post*, p. 497.