STANLEY *v.* COLT.

1. Whether words in a devise constitute common law conditions annexed to an estate, a breach of which or any one of which, will work a forfeiture, defeat the devise, and let in the heirs, or whether they are regulations for the management of the estate, and explanatory of the terms under which it was intended to have it managed, is a matter to be gathered, not from a particular expression in the devise, but from the whole instrument.
2. The word *Provided*, though an appropriate word to constitute a common law condition, does not invariably and of necessity do so. On the contrary, it may give way to the intent of the party as gathered from an examination of the whole instrument, and be taken as expressing a limitation in trust.

   Ex. Gr. Where a testator devised real estate to an ecclesiastical society for its use or benefit: "*Provided*, that said real estate be not hereafter sold or disposed of," and in connection and continuation added numerous minute directions in the nature of regulations for the guidance of trustees whom he appointed to manage it, and with a view to the greatest advantage of the Society—

   Held, that the latter, being to be regarded as mere limitations in trust, the former was a limitation in trust also; not a common law condition.
3. Where, under a will, in some respects peculiar, a devise was made to a society for its use and benefit, but the possession, superintendence, and direction of the estate, and the letting, leasing, and management of the same, was given to trustees who were invested with power to perpetuate their authority indefinitely—the only active duties of the society being to receive the rents and profits for its use and benefit—

   Held, that the legal estate was in the trustees, not in the society.
4. The legislature of Connecticut has the powers of an English court of chancery to direct a sale of real estate devised to charitable purposes—even though it be provided by the devise, that the estate shall never be sold—in cases where lapse of time, or changes in the condition of the property, or circumstances attending it, make it prudent and beneficial to the charity, to alien the specific land, and invest the proceeds in other securities; taking care, however, that no diversion of the gift be permitted.
5. Where the legislature, setting out reasons at large for the exercise of such a power, directs a sale of land so devised, and provides for the secure reinvestment of the proceeds to the same uses as directed by the will as to the estate sold, this court cannot revise the facts upon which the legislature has exercised the power.

ERROR to the Circuit Court for the District of Connecticut, the case being this:

From the year 1702 or earlier, and down to the year 1818,

and afterwards, with some unimportant alterations, there existed and was in force in Connecticut a statute thus:

"That all such lands, tenements, hereditaments, and other estates, that either formerly have been, or hereafter shall be, given and granted, either by the General Assembly of this Colony or by any town, village, or particular person or persons, for the *maintenance of the ministry of the Gospel* in any part of this Colony, or schools of learning, or for the relief of poor people, or for any other public and charitable use, shall forever remain and be continued to the use or uses to which such lands, tenements, hereditaments, or other estates, have been, or shall be, given and granted, according to the true intent and meaning of the grantors, and to no other use whatsoever; and also be exempted out of the general lists of estates, and free from the payment of rates."

This act being thus in force, William Stanley, of Hartford, Connecticut, in October, 1786, made his will in the material parts as follows:

"*Imprimis.* I give and bequeath unto the Second Church of Christ, in Hartford, such sum, to be paid *out of the profits or rents of my real estate* as hereafter mentioned, as shall be necessary to purchase a silver tankard of the same weight and dimensions, as near as conveniently may be, of that one formerly given said church by Mr. John Ellery, deceased; *the same to be procured by my trustees*, hereafter named, and presented to the officers of said church, to be kept forever for the use and benefit of said church, and my said trustees are to cause my name, coat of arms, the time of my death and my age, thereon to be engraved.

"*Item.* I give and devise unto my niece, Elizabeth Whitman, one piece of land, &c., also one other piece of land lying, &c., and is part of the farm that formerly belonged unto my honored father, Colonel Nathaniel Stanley, deceased, and lies in the southeast corner of said farm, and butts on a highway, unto the said Elizabeth, and to her heirs and assigns forever, *provided* she shall not make any claim upon my estate for any services done for me.

"*Item.* I do also give and devise unto my sister Abigail the

use and improvement of all my real estate (except that part thereof given unto her daughter Elizabeth) during her natural life, with this reserve, that she shall not cut any of the trees growing in that lot called Rocky Hill lot.

"*Item.* After the decease of my said sister, Abigail Whitman, I give and devise *the whole* of my real *estate*, of every kind and description, except which is hereinbefore given unto my niece, Elizabeth Whitman, unto the Second or South Ecclesiastical Society, in the town of Hartford, to be and remain to the use and benefit of said Second or South Society and their *successors forever;* PROVIDED that said real estate be not *ever hereafter sold or disposed of, but the same be leased or left*, and the annual rents or profits thereof applied, to the use and benefit of said Society, and the *letting*, *leasing*, and *managing* of said estate to be *under the management and direction of certain trustees* hereafter named by me, and their successors to be appointed in manner as hereafter directed. And it is my will that the first rents, profits, or avails issuing from said real estate shall, *by my trustees after it comes to their possession*, be applied to the purchasing of the aforesaid tankard. And it is my will that so much of the rents, profits, or avails next issuing out of my real estate, my said *trustees shall reserve in their own hands* as shall be sufficient to purchase and pay for the one-half part of the price of a proper bell for the meeting-house in said Second Society, of the same weight and dimensions of that in the North Meeting-House, in said town of Hartford, and be applied by my said trustees for that purpose; *provided* that the other part be procured by subscription or otherwise without taxing the inhabitants of said society; and in case said Second Society shall *ever hereafter* be divided, it is my will that *my said real estate* be not divided, but remain entire and *forever* to the said Second Society, and such part of said society as shall hereafter secede or be divided therefrom are hereby excluded from all the use and benefit of my said estate so devised as aforesaid to said Second Society.

"And for the best management and direction of *my said real estate* I do hereby appoint my friends, W. Ellery, &c., *trustees* to *superintend*, *direct*, and *manage said real estate* for the use and benefit of said Second Society in manner as above directed, and unto them, my trustees, I do give authority and power to nominate their successors to said trust, which is to be done in the manner and form following, viz.: That immediately after my

decease, they shall nominate and appoint some meet person or persons, as occasion may require, into *said* trust and office; so be it that at no time more than three persons shall act in said trust or office or belong thereto at the same time. And all persons successors hereafter to said trust and office shall at all times in future have like power to *superintend, direct, and manage said estate* for said society, and in like manner to nominate and appoint their successors in said trust and office, and to *perpetuate* said *trust* for the benefit and use of said society as occasion may from time to time require. And the aforesaid real estate or any part thereof shall not be rented or let for a longer term or lease than thirty years before the expiration of the same, and said trustees and their successors shall have full power to *let and lease said estate*, and to do *all other legal acts for the well ordering and management of said estate under the limitation and restrictions as herein is before expressed.*"

The ecclesiastical society named in the devise above quoted was established by authority of the State of Connecticut for the support of the Gospel ministry and the maintenance of public worship, and with power, for that purpose, to hold real estate.

After the death of Stanley and his sister Abigail, who had the life-estate, and whose death occurred prior to the year 1800, it took possession of the premises, and down to 1852 the society and trustees managed them in the manner directed in the will, appropriating the income from time to time to the purposes of the society. During the whole time the premises were untaxed, the only ground for the exemption being the provision in the act of 1702, quoted on p. 120. In the year 1852 the legislature of Connecticut, upon the application of the society and of the trustees, passed a resolution reciting a memorial by the church and trustees, showing the will, possession of the land, &c.

"Also showing that the said land has on it a great number of buildings, owned by the tenants, built of wood, and in a decayed state; that the land on which they stand has, by the lapse of about three-fourths of a century, become valuable, some of which is in the central part of the city of Hartford, and too

valuable to be improved profitably in any other way than by the erection on them of permanent brick or stone blocks of buildings; that the lessees cannot safely erect such buildings, because of the uncertainty of their tenure, and because they would thereby place themselves in the power of the owners, and that the owners have not the means, and could not lawfully contract debts for the purpose of building; that other parts of the estate are subject to other embarrassments arising from the restrictions of the will, so that said property has become unproductive, and the income greatly reduced, and the object of the testator in devising the property to the society frustrated; that those embarrassments, both to the owners and occupants, consequent on the restrictions in the will, are not likely to be removed, but will be increased by time, unless said land can be sold and conveyed in fee simple, and the proceeds suitably invested.

"And praying the Assembly to authorize a sale and conveyance of said land, under such guards and provisions as will secure the application of the proceeds according to the true intent and meaning of said will, as per petition on file."

This legislative record thus proceeded:

"This Assembly having inquired into the facts stated in said memorial, find the same to be true; and do further find that the most valuable portion of said estate is situated in a central part of said city of Hartford, is covered with unsuitable wooden buildings, and it is *for the interest of the people of said city* that more useful and valuable buildings should be built thereon, and do grant the prayer thereof; and it is therefore

"*Resolved*, That the said trustees and their successors, together with D. F. Robinson, as agent, shall have power, and they are hereby authorized, to sell and convey the said lands in said memorial mentioned, and such parts or proportions thereof as may from time to time be advantageously sold, and to execute good and sufficient deeds thereof in fee simple, with or without covenants of seizin and warranty, on the part of said society, subject to liens or incumbrances, if any shall lie upon said property, &c. And the proceeds of such sales shall be, by the trustees and agent, invested in good and sufficient bonds and mortgages of real estate, of double the value of the amount invested; and the interest of said proceeds shall be paid over to the treasurer of

said society, and shall be appropriated to the use of said society in the same manner, and subject to the same use, as the rents or income of said property are by said will required to be appropriated, and for no other uses or purposes whatever. And all mortgages or investments made as aforesaid from time to time, and whenever such loans or investments shall be shifted or changed, the securities shall be taken in the name of such trustees and their successors, and expressed to be for the use and benefit of said society, according to the will of William Stanley, deceased: *Provided, however*, That before any person or persons shall proceed to make sale of said lands, or any part thereof, he or they shall become bound, in a good and sufficient bond, to the judge of probate for the district of Hartford, conditioned for the faithful performance of his duty in the premises; and said trustees shall also give the like bonds for the faithful performance of their trust."

The heirs at law of Stanley had no notice of any of these proceedings.

The trustees and agent accordingly, in August, 1852, by deed reciting the legislative proceeding, and purporting to be made in virtue of their said capacity of trustees and agent, and of the powers conferred by the act, sold and conveyed, with special warranty, to one Colt, "all the right, title, and interest that said Second Ecclesiastical Society, &c., have or ought to have in or to the above-described tract of land," one of the tracts devised.

Colt having entered into possession, the heirs at law of Stanley now brought ejectment against him for the premises. The court instructed the jury that on the case presented the defendant was entitled to their verdict; and judgment having gone accordingly, the case was now here on error.

Messrs. W. M. Evarts and C. E. Perkins, for the heirs at law:

The case is of general importance. A full argument will be allowed.

Three questions arise:

I. Had the society power under the will itself, to sell and convey this property to Colt without incurring a forfeiture?

II. If it had not such power under the will, was it enabled so to do by the act of the legislature of 1852?

III. If the society had no power to convey from either source, what consequence results from its violation of the condition of the devise?

That the legal estate is in the church must, we suppose, be conceded. The devise is, in plain terms, to it in fee: "I give and devise the whole of my *estate* . . . *unto the Second or South Ecclesiastical Society* . . . to be and remain to the use and benefit of said Second or South Society and their successors forever." No legal estate is given to the trustees. They are but to "superintend, direct, and manage." This is exactly what any mere agent of restricted powers would do in regard to any estate, of which confessedly the fee would be in his constituent. Mere directions to one person to superintend, direct, and even to manage, cannot carry to *him* the legal estate given in plain, appropriate, and even technical terms to another in fee; even assuming that it might do so, if the legal estate were left undisposed of;—which we do not admit. Inference cannot control direct expression. The trustees were to have no powers but what were necessary to the office of superintendence, direction, and management of an estate that was never to be "divided," but which was "to remain entire and forever to the said Second Society." The legal estate then was given to the church.

The heirs of Stanley say then:

I. The society, under the provisions of the will, could not sell without violating the condition upon which they held the property, and thus incurring a forfeiture of their title.

Both by the obvious *intent* of the testator and by the legal effect of the words used, this devise is of an estate upon condition subsequent, a breach of which destroys all right of the society in the property.

1. The will shows that the testator *meant* to deprive the society of the power to sell. He meant that this property should *always* remain in the hands of the society. He believed that the property would increase in value, and from

a sure increasing fund would supply the society's increased wants, while if the land was sold and the money invested, the society would receive no larger amount a hundred years thereafter, than at that day. He also desired that he should be remembered in connection with this society forever. He had an obvious pride of family name and estate, and an attachment plainly to this particular Second or South Church. He desires his "arms" and name to be put upon a sacramental tankard, "to be kept forever." He leaves to his niece a piece of land that belonged to his "honored father, Colonel Nathaniel Stanley, deceased." To his sister, he leaves for life another piece, "but she shall not cut any of the trees."

The bulk of the real estate he leaves in fee to the church, separating the real estate from all power to manage it, and giving neither to the devisee nor to the trustees a power to sell the estate; but, on the contrary, showing that he meant it should never be sold or disintegrated. He looks forward to the possibility of a division of the religious body, and provides against any *division* of his estate from even that cause; declaring that if the society should "*ever* hereafter" be divided, his real estate left to the existing body should "be not divided, but remain entire and *forever* to the said Second Society."

The courts in Connecticut have held, that where land was devised to an ecclesiastical society, the intent of the donor is shown *by that very act* to be that it should not be sold.*

The means adopted by the testator to accomplish this intent, are the most effectual that could be conceived for his purpose. He did not intrust the accomplishment of his object to the society, to the legislature, or even to courts of equity. He determined to make it the *interest of the society and its members* to use the gift as he directed, by causing a forfeiture to follow their misuse.

He used apt words to carry out this intention.

In construing wills, courts are governed by certain well-

* Brainard *v.* Colchester, 31 Connecticut, 411.

settled rules. One of these rules, the seventeenth in Mr. Jarman's series, is:*

"Where a testator uses technical words, he is presumed to employ them in their legal sense, unless the context clearly indicates the contrary."

The obligation of the rule is nowhere more recognized than in Connecticut, where in *Gold* v. *Judson*,† the court say: "We are *bound* to suppose the testator used language in its usual legal sense."

The word *Provided* is a technical word: its meaning has been settled by innumerable decisions, and it has always been held that a devise to A., *provided* he should or should not perform certain acts, is a devise upon a condition subsequent, and the estate vests in A., subject to being divested if he does or does not perform the acts specified.

This is the rule in Connecticut.

In *Wright* v. *Tuttle*,‡ Swift, J., says:

"There is no word more proper to import or express a condition, than the word *provided*, and it shall always be so taken unless it appear from the context to be the intent of the party that it shall constitute a covenant."

These words were cited and approved in the subsequent case of *Rich* v. *Atwater*,§ and in *Wheeler* v. *Walker*.‖

This decision is the more obligatory, as it has been affirmed by subsequent Connecticut decisions,¶ and has, ever since they were made, been considered as fixing the law in the State of Connecticut on this subject.

The case at bar being in relation to the construction of a will devising real estate, this court will govern itself by the decisions of Connecticut on this point.**

* Jarman on Wills, vol. ii, p. 526 (side page 744).
† 21 Connecticut, 625.
§ 16 Connecticut, 419.
‡ 4 Day, 326.
‖ 2 Id. 201.
¶ Judd v. Bushnell, 7 Id. 205; Lloyd v. Holly, 8 Id. 491, and others
** Jackson v. Chew, 12 Wheaton, 167.

But this construction of the word *provided* is not confined to Connecticut; it has always been so held both in England and this country from the earliest time.

Comyns, in his Digest,* says:

"Divers words *of themselves* make an estate upon condition, as '*sub conditione*,' '*proviso semper*,' and the word *proviso* makes a condition, though joined with other words, as 'provided always and it is covenanted,' 'provided and it is agreed,' and therefore if the word *proviso* be the speaking of the grantor and obliges the grantee to any act, it makes a condition in whatever part of the deed it stands, and though there be covenants before and after, it is not material."

This is in relation to deeds. In relation to wills, he says:†

"So words in a will make a condition which will not make it in a deed. So a devise to A. *provided, and my will is that he keep it in repair*, makes a condition; so there shall be a condition in a will though there be no words that the estate shall cease, as a devise to a wife, *provided that she shall have a rent only if she departs out of London*."

Similar decisions as to the effect of the word "provided" have been made in most if not all the States, and in England.

In *Hooper* v. *Cummings*, a case in Maine,‡ the expression was "*provided* they (the grantees) fence the land and keep it in repair." The question arose whether this word created a condition, and the court say:

"We may assume that the *proviso* in the deed created a condition subsequent, and in this we are sustained by most if not all the authorities ancient and modern."

In the New Hampshire case of *Chapin* v. *School*,§ the court say:

"The usual words of a condition subsequent are 'so that' 'provided,'" &c.

* Vol. 3, p. 86, Condition A 2. † Page 88, A 4.

‡ 45 Maine, 359; and see Marston v. Marston, 45 Id. 412.

§ 35 New Hampshire, 450.

In another case, *Wiggin* v. *Berry*, from the same State,* a devise was to a town "provided" they would pay the taxes on the land and devote the net profits to keeping a school for the benefit of the inhabitants. The town did not comply with these conditions, and the court held that this was a devise upon condition, that the town had forfeited their title, and the land went to the testator's devisees. This case seems to be directly in point.

In Massachusetts, *Attorney-General* v. *Merrimack County*,† the court say:

"The words 'provided,' 'so that,' and 'upon condition that,' are the usual words to make a condition."

In *Hayden* v. *Stoughton*,‡ a case in the same State, the devise was to a town for a school-house, "*provided* said school-house is built by said town within one hundred rods of the place where the meeting-house now stands."

In this case the school-house was not built, and the court held that the land upon entry by the heirs reverted to them.

It is an important case in many respects, and will be referred to hereafter.

So in *Hadley* v. *Hadley*,§ the court held that the words "provided" and "on condition," had the same effect in making a devise conditional.

And in *Rawson* v. *School District*,‖ in speaking of a conditional estate, they say:

"The usual and proper technical words by which such an estate is granted by deed are 'provided, so as, or on condition.'"

To the same effect are cases in New York and Pennsylvania.¶

In the English case of *Tattersall* v. *Howell*,** the same word

* 2 Foster, 114.
† 14 Gray, 612.
‡ 5 Pickering, 534.
§ 4 Gray, 145.
‖ 7 Allen, 128.
¶ Caw *v.* Robertson, 1 Selden, 125; Pickle *v.* McKissick, 21 Pennsylvania State, 232; McKissick *v.* Pickle, 16 Id. 140.
** 2 Merivale, 26.

"provided" was used, and the court held it created an estate upon condition.

The usual and legal effect of this word "provided," being therefore to create a conditional estate, subject to forfeiture by a breach of the condition, this court will give it such a construction here.

There is another rule of construction—the eighteenth of Mr. Jarman's series,* and strongly enforced, as a true rule of law, in an important case† by Lord Chancellor Sugden—applicable to this question.

"Where a word is used in one devise in a will with a particular meaning, and is again found in a subsequent devise used in the same manner, it is to have the same effect."

In one devise in this will, the testator devises certain lands to Elizabeth Whitman, "*provided* she shall not make any claim upon my estate for any services done for me."

There can be no doubt but that this is a devise upon condition subsequent, upon the breach of which a forfeiture would ensue.‡

Will it be argued, that this condition is void, as a restriction of the power of alienation? The law is not so.

1st. It has always been held in Connecticut by an uninterrupted chain of decisions, that under the act of 1702, such a restriction is valid.

In *New Haven* v. *Sheffield*,§ decided in 1861, the court say:

"The chief object in the enactment of that statute was not so much to exempt certain estates from taxation as to *confirm and perpetuate* the estates referred to in it."

And this expression was affirmed and approved in the very latest case on the subject, *Brainard* v. *Colchester*,‖ decided in 1863, and see *Hamden* v. *Rice*.¶

* Jarman on Wills, vol. 2, p. 527 (side page 744).

† Ridgeway *v.* Munkittrick, 1 Drury & Warren, 84.

‡ Rogers *v.* Law, 1 Black, 253; Sackett *v.* Mallory, 1 Metcalf, 355; Egerton *v.* Brownlow, 4 House of Lords Cases, 1–183.

§ 30 Connecticut, 171. ‖ 31 Id. 407. ¶ 24 Id. 356

This court will hold itself bound by the decisions of the State of Connecticut on this subject.*

2d. Apart from this statute of 1702, it is conceived that such a devise to an ecclesiastical society is good.

In many of the cases hereinbefore and hereinafter cited, similar devises were held to be valid.

In *Brattle Square Church* v. *Grant*, a Massachusetts case,† the devise was on condition that the land should *never* be sold, but the minister should always reside on it. In considering the question whether the devise was void as violating the rule against perpetuities, the court say:

"A grant of a fee on condition only creates an estate of a base or determinable nature in the grantee, leaving the right or possibility of revester vested in the grantor. Such an interest or right in the grantor, as it does not arise and take effect upon a future uncertain or remote contingency, *is not liable to the objection of violating the rule against perpetuities*, in the same degree with other conditional and contingent interests in real estate of an executory character. The possibility of reverter, being a vested interest in real property, is capable at all times of being released to the person holding the estate on condition or his grantee, and if so released vests an absolute and indefeasible title thereto. The grant or devise of a fee on condition does not therefore fetter and tie up estates so as to prevent their alienation, and thus contravene the policy of the law, which aims to secure the free and unembarrassed disposition of real property."

This view was again taken by the same court in *Austin* v. *Cambridgeport*,‡ where there was a grant of land to a parish on condition that it be forever used as a site for a church in part and in part for the support of the minister.

3d. But this point is not an open one here.

In *Perin* v. *Carey*,§ in this court, an important case, fully argued, one point taken was, that the devise to a charity providing that none of the land should ever be sold, was void as *making a perpetuity* contrary to law; but the court unan-

* Perin v. Carey, 24 Howard, 465.
† 3 Gray, 148.
‡ 21 Pickering, 215.
§ 24 Howard, 507

imously held that a devise to a charity could be made in perpetuity, and say:

"The direction in the will that the real estate should not be alienated, makes no perpetuity in the sense forbidden by the law, but only a perpetuity allowed by law and equity in the case of charitable trusts."

Similar decisions exist in New York,* North Carolina,† Kentucky,‡ and other States.§

II. This act of 1852 was void upon three grounds:

1st. No State legislature has power to alter the express conditions of a will. Such an attempt is contrary to the principles of natural right and justice which no legislature can contravene.

In *Hooker* v. *Canal Co.*,‖ a Connecticut case, the court say:

"The fundamental maxims of a free government require that the right of personal liberty and private property should be held sacred."

They cite and approve the expressions of Marshall, C. J., in *Fletcher* v. *Peck*:¶

"And it may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power," &c.

This whole subject is fully treated in the late decision of *Booth* v. *Woodbury*,** where it is expressly held that the legislature can pass no laws contrary to the "principles of natural justice."

All these cases, and the jurisprudence of Connecticut on

* Williams *v.* Williams, 4 Selden, 535, 554, 555.

† State *v.* Gerard, 2 Iredell's Equity, 210.

‡ Curling *v.* Curling, 8 Dana, 38.

§ See Wiggin *v.* Berry, 2 Foster, 114; Brown *v.* Hummell, 6 Pennsylvania State, 86; Grissom *v.* Hill, 17 Arkansas, 483; Franklin *v.* Armfield, 2 Sneed, 305.

‖ 14 Connecticut, 152; and see Gas Co. *v.* Gas Co., 25 Id. 38, and Hotchkiss *v.* Porter, 30 Id. 418.

¶ 5 Cranch, 185.

** 32 Connecticut, 118.

this subject, are in harmony with and in fact founded upon the case of *Calder* v. *Bull*,* a case which went from Connecticut to this court; and the expressions in *Goshen* v. *Stonington* are almost identical with those of Mr. Justice Chase, where he says:

"I cannot subscribe to the omnipotence of a State legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the State."

But both in this court and many of the State courts the same rule is applied.†

A case quite in point is *Brown* v. *Hummel*,‡ in the Supreme Court of Pennsylvania. There a devise of land was made to an orphan asylum, with a provision that the land be never sold, but the rents and profits only be applied to the use of the asylum. The legislature, by a special act, directed that part of the land be sold.

The court held unanimously that the act was void and unconstitutional.

If the legislature can, by a special act, dispense with the performance of one condition of a devise, they can with any.

Such an act as this is different from those enabling or healing acts often passed, such as those authorizing a sale of minors' lands, or those of lunatics, &c. In all such cases they merely remove a *personal disability*.§ Acts, too, will be cited on the other side in which power has been given to corporations to sell, where in the gifts to them no such power was expressly given. Such cases are from the pur-

* 3 Dallas, 386.

† Terrett *v.* Taylor, 9 Cranch, 43; Wilkinson *v.* Leland, 2 Peters, 627; Irvine's Appeal, 16 Pennsylvania State, 256; Shoenberger *v.* School District, 32 Id. 34; Railroad Co. *v.* Davis, 2 Devereux & Battle, 451; Hatch *v.* Vermont Railroad, 25 Vermont, 49; Benson *v.* Mayor, &c., 10 Barbour, 223; Regent's University *v.* Williams, 9 Gill & Johnson, 365; Billings *v.* Hall, 7 California, 1.

‡ 6 Pennsylvania State, 86.

§ Powers *v.* Bergen, 2 Selden, 358; Shoenberger *v.* School District, 32 Pennsylvania State, 34; Leggett *v.* Hunter, 5 E. P. Smith, 445.

pose. To say nothing about the constitutionality or safety of this sort of legislation in general, it may be noted that in many cases the legislature has only aided an intent of a donor left unexpressed or but insufficiently given, or cases in which perhaps the legislature was itself the donor. But can any case be found where, *without the assent of the heirs*, a power to destroy the identity and substance of the gift has been given in any case where it was plain that the testator meant to keep the land *in specie*, forever undivided in the corporation, beneficiary, and devisee? What is proper to be done in any case where heirs may have an interest, and what the legislature of Connecticut itself has done, may be seen in the Acts of Connecticut, May Sessions, 1850, at page 82. There Thaddeus and Eunice Burr, she owning it, had granted a lot for a parsonage. An act reciting that the land was not now and never could be wanted for a parsonage, and that a sale was desirable and expedient, authorized a sale. But how? It declares the sale is to be made "with the assent of the *heirs of the said Eunice;*" and the act authorized the heirs to release a condition in the deed, *in the presence of witnesses;* and such release, it was enacted, "shall operate to forever estop said heirs, and all claiming under them." This is the right way; and in no other way, assuredly, in a case like the present, could a sale be authorized and the right of property in the heirs be duly respected.

It will be argued that a legislature has power as *parens patriæ* to interfere and authorize a sale of land in cases like the one at bar; but the authorities say that the legislatures in this country have no such power.

In *Moore* v. *Moore*,* a Kentucky case, the court say:

"We do not admit that the commonwealth as *parens patriæ* can rightfully interfere, unless there has been an escheat to her, and then she can become absolute and beneficial owner. Rights here are regulated by law, and if any person has a claim to property ineffectually dedicated to charity, the commonwealth has

* 4 Dana, 366; and see Lepage *v.* McNamara, 5 Clarke (Iowa), 124, and White *v.* Fisk, 22 Connecticut, 31 (54).

no prerogative right to decide on that claim and dispose of the property, as the King of England has been permitted to do."

2d. This act of 1853 is void, as depriving the plaintiffs of property, contrary to the constitution of the State of Connecticut.

That instrument declares that no person shall be "deprived of property but by due course of law."

It is not pretended that in this case any compensation was made, nor were any of the plaintiffs cited to appear, or informed by notice in any way, of the proceedings.

By this act, property was taken from the heirs. They had a *conditional* or contingent interest, being a right to enter upon and hold this property for a breach of condition, which right this act would deprive them of.

The case of *Hayden* v. *Stoughton*,* in Massachusetts, affirmed in *Austin* v. *Cambridgeport*,† and in *Proprietors* v. *Grant*,‡ is in point. In that case there was a devise to a town upon condition that they erect a school-house, which they neglected to do, and the land was thereby forfeited. An action to recover it was brought by the heirs of the residuary devisee, and the court held that there was a *contingent interest* left in the devisor, which by the residuary devise he gave to the residuary devisee.

This accords with the law in Connecticut.

In *Smith* v. *Pendell*,§ in that State, the court say:

"The right of H., therefore, was more than a naked possibility like that of an heir apparent; *it was an interest in the estate*, though a contingent one. Such an interest is descendible."

These heirs, therefore, had an interest in this real estate, and under the *State* constitution this act is void.

3d. We say further that it is void as contrary to the

* 5 Pickering, 528.

† 21 Id. 215.

‡ 3 Gray, 147; see also Underhill *v.* Railroad Co., 20 Barbour, 455; and Robertson *v.* Fleming, 4 Jones's Equity, 387.

§ 19 Connecticut, 112.

Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts.

It has been held from an early day in Connecticut that by the law of 1702, the State made a contract with all devisors of lands for the purposes mentioned in that act, and that all acts of the legislature affecting such devises in any way contrary to such act are void.

This question first arose in 1826, in the case of *Atwater* v. *Woodbridge*.*

The last clause of the act of 1702, exempts the property named in the act from taxation, and the question was whether an act of the legislature taxing such property was valid. The court say:

"The government (by this act) made a *contract* with all such persons as might be disposed to give their property to these religious purposes and charitable uses, that it should be forever exempted from taxation."

The question again arose in 1829 in *Osborne* v. *Humphrey*,† and was again argued at great length by some of the ablest counsel in the State. The court held, in a very well-considered opinion, that an act affecting this exemption from taxation was contrary to this clause of the Constitution of the United States, and based their opinion upon the case of *New Jersey* v. *Wilson*,‡ in this court, and quote and affirm the words above cited from *Atwater* v. *Woodbridge*.

These cases have been affirmed by decisions in Connecticut down to the present time.§

The decisions of this court equally establish the proposition, especially the case of *Dartmouth College* v. *Woodward*,‖ where Marshall, C. J., says:

"These gifts were made not indeed to make a profit for the donors or their posterity, but for something in their opinion of

* 6 Connecticut, 230. † 7 Id. 335. ‡ 7 Cranch, 164.

§ Parker *v.* Redfield, 10 Connecticut, 490; Landon *v.* Litchfield, 11 Id. 251; Hart *v.* Cornwall, 14 Id. 228; Seymour *v.* Hartford, 21 Id. 481; New Haven *v.* Sheffield, 30 Id. 160; Brainard *v.* Colchester, 31 Id. 407.

‖ 4 Wheaton, 642.

inestimable value, for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated is the perpetual application of the fund to its object *in the mode prescribed by themselves.*"

The act of 1852, in fact *destroyed* this contract. The contract was that the land when so given, should forever remain and be continued to the use or uses to which such lands, &c., have been or shall be given and granted, *according to the true intent and meaning of the grantors.* This was the principal object in view in passing the act.

In *New Haven* v. *Sheffield*,* the court says,—its words being cited and approved in *Brainard* v. *Colchester*,† the last case on this subject in Connecticut,—

"The chief object in the enactment of that statute was not so much to exempt certain estates from taxation as *to confirm and perpetuate* the estates referred to in it with certain attending privileges."

Now the "true intent and meaning" of the testator was as expressed in his will, that the land "should not ever thereafter be sold or disposed of," and if so sold it should revert to his heirs.

In the Dartmouth College case, Marshall, C. J., referring to the substitution, made in that case, of the will of the State for the will of the donors, says:

"This change may be for the advantage of this college in particular, and may be for the advantage of literature in general, *but it is not according to the will of the donors*, and is subversive of that contract on the faith of which their property is taken."

Will it be argued that this devise does not come within the provisions of the act of 1702, because it is not for such purposes as are mentioned therein? Let us consider that point.

* 30 Connecticut,

† 31 Id. 407.

The objects specified are "*for the maintenance of the ministry of the Gospel* in any part of this colony, or schools of learning, or for the relief of poor people, *or for any other public and charitable use.*" This *is* a devise for the "maintenance of the ministry of the gospel." It is a devise to an Ecclesiastical Society, established "for the support of the gospel ministry and the maintenance of public worship." The lands are always to be kept by the society, and the rents are to be applied in the first place to purchase a tankard (obviously for sacramental purposes); to assist in purchasing a bell to summon the congregation to religious exercises; and the remainder of the annual rents and profits were to be applied during all time to the "use and benefit of said society."

Now as the sole object for which said society was established was the support of the Gospel ministry and the maintenance of public worship, and the rents were to be applied by the society for its *use* and benefit, they must necessarily be applied for the maintenance of the Gospel, as the society *could not* apply them to any other use.

But this expression of the statute has received a construction by the courts of Connecticut, and words much less apt than those in the will have been held to come within its fair meaning and intendment.

The question first arose in *Parker* v. *Redfield.** The words there used were "for the support and maintenance of the *church.*" It was objected that this expression did not bring the case within the statute, but the court decided that it did. And the view was even more strongly taken in *Landon* v. *Litchfield*,† where the expression was "one lot with the divisions and commons to be and remain forever *to and for the use and improvement of the first minister and his successors in the work of the ministry in said place.*"

There are decisions in other States in similar cases which sustain this construction.

In a case entitled *In re Trustees*,‡ in New York, the case was a devise to trustees to support scholars of a school, and

* 10 Connecticut, 490. † 11 Id. 257–8. ‡ 31 New York, 574.

it was held to be a devise to the school within the meaning of the act of 1806, which speaks of property devised for the use or benefit of a school; citing the well-known case of *Attorney-General* v. *Tancred*, from Ambler,* where it was held that a devise to a trustee for sundry students of Christ College was valid under the mortmain acts as in effect a devise to the college.

In *McDonogh's Executors* v. *Murdoch*,† this court say:

"All the property of a corporation like Baltimore is held for *public* uses, and when the capacity is conferred or acknowledged to it to hold property, *its destination to a public use is necessarily implied.*"

So in Massachusetts, *Brown* v. *Porter*,‡ and in Pennsylvania, *McGirr* v. *Aaron*.§

The decision in *Seymour* v. *Hartford*, in 21st Connecticut,‖ will be relied on as opposed to this view, and to show that a devise must follow the exact words of the statute to come under it.

In that case the conveyance of the land was made to the society in fee, and expressly stated to be "*without any manner of condition.*" It was asserted that *the mere conveyance to an ecclesiastical society* brought the land within the act, so that it could not be taxed.

The court first say that they affirm all the preceding cases and the principles upon which they are founded. They then say, that this being a question of exemption from taxation, they shall construe the conveyance strictly and so as not to extend such exemptions. And they find a distinction between this and the former cases, that in them "the donor had, by the express terms of the grant, impressed upon the property a perpetual sequestration for the maintenance of the ministry, &c." They say:

"Nothing of this is to be found in the deed of Mrs. Burnham, but, on the other hand, the deed expressly declares the gift is a

* Page 351.
† 15 Howard, 413.
‡ 10 Massachusetts, 93
§ 1 Pennsylvania, 49.
‖ Page 481.

sure and absolute fee simple, without any manner of condition. Of course the grantor does not require that the property should be sequestered, or kept, or used for the maintenance of the ministry, nor does she declare any particular intent whatever, unless the general character and corporate powers of the society imply one, which we think is not the case. . . . We are unable to distinguish this grant from any absolute purchase made by the society generally, or from any unqualified gift made to it. . . . We discover in Mrs. Burnham's deed nothing but an unqualified transfer of property, which may be used at the pleasure of the grantees; no restriction, no sequestration, for any public object. The society may do with it as they please; they may sell it, or use it, or give it away, without being liable to any one."

The case at bar differs therefore entirely from the case of *Seymour* v. *Hartford* in the very points mentioned by the court as the ones in which that case differed from those theretofore decided. *This* property *was* sequestered and restricted. If the donor had any intent, it was that this land should be perpetually sequestered for the use of the society. If Mr. Stanley had merely devised this property *to the society*, saying no more, it might be argued that *Seymour* v. *Hartford* applied, especially if he had said that he devised it "without any manner of condition," instead of annexing, as he has done, this express condition to it, and repeating it over and over.

But if this devise does not come under the expression, "for the maintenance of the ministry of the Gospel," it certainly does under that of "other public and charitable use."*

III. This devise being upon condition that the society should not sell and convey this land, and they having broken the condition, what is the effect of such violation?

Of course, that the heirs of the devisor may enter, declare the devise forfeited by the breach, and recover the property devised.

In *Hayden* v. *Stoughton*,† already cited, and affirmed in

* Hamden *v.* Rice, 24 Connecticut, 355.

† 5 Pickering, 528.

Brigham v. *Shattuck*,* and again in *Austin* v. *Cambridgeport*,† land was given for a school-house, provided it was built in a certain spot. It was not so built, and the residuary devisee entered for breach, and brought this action to recover the land. The court held the devise conditional, and found that there had been a breach, and thereby the estate was forfeited and went to the claimants.‡

It may be argued that even if the society have broken the condition of the devise, the land is not thereby forfeited, but that a court of chancery, either under the principle of *cy pres* or its authority over trusts, is the only power that can interfere with the sale. But in Connecticut the courts of chancery have not adopted and do not apply the principle of *cy pres*.§ And this court will follow the rule in Connecticut.‖

Nor would the principle of *cy pres*, or its jurisdiction over trusts, ever empower a court of chancery to authorize or relieve against a breach of the condition of a devise.¶

Messrs. B. R. Curtis and W. W. McFarlane, contra, for the purchaser:

The importance of the case, spoken of on the other side, is admitted; and the invitation to argue it fully is accepted.

The heirs cannot recover, unless they can show that the devise was upon some condition, or that there was some limitation made in the will in their favor.

It is not sufficient to show that the lands have been diverted from the use for which they were devised, or that they had not been enjoyed by the beneficiaries in the particular manner described by the testator; for where lands have been devised to a charitable use in fee simple, the heir

* 10 Pickering, 306. † 21 Id. 215.

‡ Phillips *v.* Medbury, 7 Connecticut, 568; Rogers *v.* Law, 1 Black, 253; Sackett *v.* Mallory, 1 Metcalf, 355; Wiggin *v.* Berry, 2 Foster, 114; Princeton *v.* Adams, 10 Cushing, 129.

§ White *v.* Fisk, 22 Connecticut, 31 (54).

‖ Fontain *v.* Ravenel, 17 Howard, 384.

¶ Dolan *v.* Baltimore, 4 Gill, 394; Gilman *v.* Hamilton, 16 Illinois, 225; De Themmines *v.* De Bonneval, 5 Russell, 289.

has no more interest in and no more right to the lands than he has when they are devised to an individual in fee simple, either directly or in trust. The public have an interest in the execution of public charities, and the beneficiaries have an interest, and if the directions contained in the will of the testator, either as to the manner of enjoyment or the objects who are to be benefited by his bounty, are departed from, either the public or the beneficiaries, if they are sufficiently certain, and have a sufficient vested interest, may have a remedy.

But the heir has no interest and no right, and therefore can have no remedy.

There are certain elementary rules that are to be applied in order to determine whether such a condition has been created.

1. That it depends upon the intention of the testator, to be gathered, not from particular phrases having a technical import, but from an examination of all the provisions of the will which can have any bearing on the matter in question.

2. That although the law allows testators to impose conditions subsequent, a breach of which will create a forfeiture, yet the law deems it improbable that testators will do so, and therefore leans against any construction which would result in such a condition. Courts will not give it that effect by construction.*

Words of proviso and condition will be construed into words of covenant when such is the apparent intention and meaning of the parties.†

Formerly courts of law did not recognize or admit the power of the court of chancery to enforce the performance of covenants and the execution of trusts, and therefore words which would not now be construed to import a strict

* Mary Portington's case, 10 Coke, 42 a; Worman *v.* Teagarden, 2 Ohio (N. S.) 380; Newkerk *v.* Newkerk, 2 Caines, 345; Wright *v.* Wilkin, 3 Law Times, 507; S. C., 4 Id. 221.

† Clapham *v.* Moyle, 1 Levinz, 155; S. C., 1 Keble, 842; Huff v. Nickerson, 27 Maine, 106; Shepherd's Touchstone, 122; 2 Parsons on Contracts, 23.

condition were allowed to have that effect when such a construction was necessary to give a remedy.*

Charities are favored in law, and they have always received a more liberal construction than the law will allow in gifts to individuals; and the same words in a will, when applied to individuals, may require a different construction when applied to a charity.†

But there is a preliminary question which, if answered one way, would seem to be decisive of the case in any aspect of it, and that question is, In whom was the legal title to the estate which was devised vested by the will?

We contend that the legal estate vested in the *trustees*, for the following reasons:

1. It is a rule of law that where trustees are named in a will it is not necessary that the testator should say in terms that he gives the legal estate to them. Nor that he should describe the quantity of legal estate which he intends to give them. If trustees are named the law looks to see what powers are conferred upon them and what duties are required of them, and then considers that it was the testator's intention to give them such a legal estate as would enable them to execute those powers and discharge those duties.‡

2. Such powers are conferred upon these trustees and such duties required of them as to make it necessary that they should take a legal estate, to enable them to execute those powers and perform those duties.

This will is inartificial, and, perhaps, confused, but reading the whole instrument,—taking all its provisions together,—we find that the testator appoints three of his friends *trustees*, that to these trustees he gives the possession of this real estate. The tankard is to be bought from the first rents issuing from his lands, "by my trustees after it comes to their possession." . . . He provides that they are to hold the estate and to rent the same, and receive the rents and profits, and to do all other legal acts for the well ordering

* Wright *v.* Wilkin, 9 Jurist, 715.
† Story's Equity, § 1165.
‡ Webster *v.* Cooper, 14 Howard, 499.

and management of said estate. The office, powers, and duties of the trustees, like the trust, are made perpetual.

The trustees, and they alone, are to have the possession of this estate. The trustees, and they alone, are to have the power to lease and manage it. They are to collect the rents. They are to pay them over to the society; and, of course, to enable them to discharge these duties, and execute these powers, "and to do all other legal acts for the well managing of the property," it was necessary that they should take the legal estate, and therefore the law will presume that the testator intended them to take it, and will declare accordingly.

In order to show that there has been any breach of condition by reason of the alienation of this land, the plaintiffs themselves must show that the legal title was vested in trustees.

The conveyance of this land purports to have been made by four persons, three of whom were trustees under this will, and a fourth was a gentleman nominated by the legislature, to represent the public interest. Upon these four persons, the legislature, by their act, undertook to confer the authority to make this conveyance, and when they make the conveyance they say they act by force of authority conferred upon them by the legislature.

The defendants contend that this act of the legislature was unconstitutional and void.

They are obliged to say so, for if the act was constitutional, then the sale was legal, and passed a title to the property.

If the act was unconstitutional and void, and the legal title was in the corporation, it still remains there, and there has been no sale, and consequently no breach of condition.

The corporation could be divested of the legal title only by a conveyance made in the name of the corporation, and under the seal of the corporation, by some person expressly authorized by the corporation to make it.

The agents of the corporation, as such, have no power to convey the real estate of the corporation. But this convey-

ance was not made by these persons under any authority conferred on them by the corporation. They did not affix the seal of the corporation. They say in the deed that they act by virtue of authority conferred upon them by the act of the legislature.

If then, by the terms of the will, the legal title vested in the society, and if the act of the legislature is void, the legal title still remains in the society, and there has been no breach of condition.

We have said that the plaintiffs, in order to recover, must show that the devise was upon some condition, the breach of which would be attended by a forfeiture.

We submit now, that upon the whole will, and looking at all its provisions, no such condition can be found. It is true that the word "*Provided*," in certain connections, and under certain circumstances, is competent to raise a condition, and it is equally certain that the same word, used in a different connection, and under different circumstances, will not create a condition. The court will therefore seek to discover the intention of the testator in this particular, not by considering what legal force some particular word in the will might have in the abstract, but by looking at all the provisions of the will, and the connection in which the word is used, and thus from an examination of the whole, will ascertain the sense in which the word was probably employed by the testator.

On the face of this will, it is plain that the Second or South Ecclesiastical Society were the objects of the testator's bounty, in respect to this land, and that he intended this bounty to be perpetual.

Now, if we keep in view this intention to create and perpetuate a trust for this society's benefit, a trust which he expected would endure forever, and consider that it was also his purpose to give very particular directions for the administration of it, and then observe the connection in which this word "provided" is used, it will be evident, that the testator could not have used the word in the sense set up by the plaintiffs.

The testator, in the beginning of the will, after the decease of his sister, Mrs. Whitman, devises his real estate except, &c., to the Second or South Ecclesiastical Society, "to be and remain to the use and benefit of said Second or South Ecclesiastical Society, forever." But the society is not to have the management and control of this property: no power to lease it and receive the rents and profits directly. The entire management of it the testator gives to certain trustees to be appointed by him, and these trustees are to execute their trust according to his directions; therefore the testator, after the words last quoted, and in the same sentence, proceeds to give those directions, and says:

"Provided, that said real estate be not ever hereafter sold or disposed of, but the same be leased or let, and the annual rents or profits thereof applied to the use and benefit of said society, and the letting, leasing, and managing of said estate to be under the management and direction of certain trustees hereafter named by me, and their successors, to be appointed in like manner as hereinafter directed."*

It will be observed that every word here quoted is directly and essentially connected with this word "provided," which is supposed to create the condition. If there is *any* condition here, then it is plain that there are *several* conditions, and if a breach of one would cause a forfeiture of the estate, it must be admitted that the same result would follow from a breach of any other. The plaintiffs say there is a condition against alienation, the breach of which will cause a forfeiture of the estate. If so, there is a condition that the estate shall be leased or let, and also that the annual rents and profits shall be paid to the society, and also that the leasing, letting, and managing of the estate shall be under the direction of trustees appointed by the testator, "*in manner as hereinafter directed*," the breach of either of which conditions would likewise cause a forfeiture of the estate; yet it is most improbable that the testator should have devised

* The directions are found in the next paragraph. See *supra*, p. 121.

this estate to this society, and endeavored to impress upon his bounty perpetual duration, and should have hedged it about by so many careful and minute directions as to its control and management, and should at the same time have intended that the society should forfeit the estate in case his trustees whom he had appointed to control and manage the estate, and in whom the legal title was vested, should be guilty of a breach of trust in violating any of these provisions. Such could hardly have been the intention. The true interpretation, in this particular, is this: The testator here creates a trust for the letting, leasing, and managing of this estate, and appoints trustees. It was his intention to give directions to those trustees for the management of it; they were not to sell but only to lease it, and the language which is supposed to raise the condition, occurs in the course of the directions he gives to his trustees, and was not used with any intention of creating a forfeiture in case the trustees should fail to obey those directions, or commit a breach of trust. Thus we find these words:

"And said trustees and their successors shall have full power to let and lease said estate, and to do all other legal acts for the well ordering and managing of said estate, under the *limitations and restrictions* as hereinbefore expressed."

Now these limitations and restrictions are, that they should not sell, that the estate should not be divided in case part of the society should secede, that they shall lease the estate, but shall not give a lease for more than thirty years. Undoubtedly he desired that these directions should be strictly obeyed, but that the testator intended that the society should forfeit the estate in the event that the trustees should disobey any of these directions, cannot be maintained with any plausibility.

Let us advert to precedents. In the recent Massachusetts case of *Chapin* v. *Harris*,* a writ of entry was brought to recover certain real estate and water power, the title to which

* 8 Allen, 594.

the plaintiff claimed had reverted to him by reason of the breach of a condition annexed to the land. The clause in the deed which was claimed to raise the condition, was as follows:

"Provided said draw shall be so built as to answer for a street to the railroad, and Spring Street is to be opened three rods wide across said farm, to the south line of said railroad, and the said Stearns is to make the road."

The court decided that this clause did not raise a condition, the breach of which would be attended by a forfeiture of the estate, and among other things they say:

"It is true, as the demandant contends, 'provided' is an apt word to create a condition, and it is often used by way of limitation or qualification only, especially when it does not introduce a new clause, but only seems to qualify or restrain the generality of a former clause."

Such is the connection in which the word is used, and such its office in the case at bar.

A recent English case is *Wright* v. *Wilkin.** A testator, after bequeathing legacies, devised to the defendant and to his heirs, &c., "all the real estate," and all the "residue of his personal estate," *upon this express condition:*

"That if my personal estate should be insufficient for the purpose, they do and shall within twelve months after my decease, pay and discharge the legacies before bequeathed, and I feel confident that he will comply with my wish, it being my particular desire that the above legacies shall be paid, and I hereby make chargeable all my said real and personal estate with the payment of the aforesaid legacies."

It was held in the K. B.,† and afterwards on appeal in the Exchequer Chamber, that the devise was not upon a condition, the failure to comply with which created a for-

* 2 Best & Smith, 232, and see Mayor, &c., of South Molton *v.* Attorney-General and others, 5 House of Lords Reports; 14 Bevan, 357.

† 2 Best & Smith, 232.

feiture, but merely a charge or trust in favor of the legatees, and that although the words "upon this express condition," if they had stood alone, would have created one, yet when the testatrix went on to say, that she trusted to his good faith and honor to pay them, and very much desired that they should be paid, and when afterwards she said she made them a charge upon her personal and real estate, that was inconsistent with the idea that she intended the property should be taken away by condition, because there was a trust to be fulfilled, and that inconsistency was so great that they held that these words, "upon this express condition," must yield, and the trust must be fulfilled, but the legal estate must remain unaffected by the words of condition.

Important deductions are to be drawn from these decisions. They say (as we submit the law clearly is),

1st. That the case is not to be decided by looking to particular provisions in the will, but by looking at the whole will to ascertain the intention of the testator.

2d. That words much stronger than those used in the will in question, will be controlled, if the court can see that there was an intention to create a trust, and that the trust will be defeated if the words shall be held to create a condition instead of a trust.

That there was an intention to create a trust here, does not admit of controversy. The testator appoints trustees and provides for perpetuating the trust, for the use and benefit of the society. Could it then have been his intention at the same time that he created this trust, and said it was to be perpetual, to insert a provision by which it could be defeated at the will of the trustees?

II. If this is a condition it is void as being in restraint of alienation.

If this was an ordinary devise, either to an incorporation or an individual, a condition against any alienation of the property devised would be merely void as contrary to the policy of the law.

This is not a devise under the statute of Connecticut, as

argued on the other side. If it were, that statute has not empowered devisors to make such conditions.

1. Upon the question whether this devise is within the statute of Connecticut we rely upon *Seymour* v. *Hartford*.* That was the case of a deed of land to this same society by Anne Burnham, dated July 7th, 1762. The land was conveyed in these words:

"I therefore by these presents fully, freely, and absolutely give, grant, release and confirm unto the said South Church or Society called Congregational, and to their successors forever, all the aforesaid house, homestead, and premises, with their appurtenances, to have and to hold unto them and their successors forever, as a good, sure and indefeasible estate in fee simple, without any manner of condition."

A part of the land included in this deed came by sundry conveyances to the plaintiff. The town of Hartford had laid a tax on it, and compelled him to pay the tax. The plaintiff then brought this action to recover back the money thus paid, claiming that this land was not liable to taxation, on the ground that by the deed of Anne Burnham it was granted "for the maintenance of the ministry of the gospel," or for some other public and charitable use, within the meaning of the statute of 1702, and therefore by the express terms of that statute was exempt from taxation.

This claim was not sustained by the court, and it was decided that the mere fact that the conveyance was to an ecclesiastical society did not bring it within the provisions of the statute. That the statute requires the grantor to dedicate the property to some of the particular uses therein specified, and the general character and corporate powers of an ecclesiastical society do not imply that it is dedicated to any of those uses; for whatever implication might be drawn from the general character and limited powers of the corporation at the time when the grant is made, yet that character and those powers might be thereafter essentially

* 21 Connecticut, 481.

changed by the legislature. That the statute requires the grantor to declare the use, and he cannot leave it to the law to do it for him.

It was therefore decided in that case that a grant of land to this society, or to any ecclesiastical society, without any other declaration of the use than may be implied from the character of the grantee, is not within the statute, because it is not a dedication or sequestration of land to any of the uses specified in the statute. That case is decisive of the case at bar, for the material facts are the same in both.

But if the devise were within the statute of Connecticut, a condition in restraint of alienation would not be a valid condition, the breach of which would work a forfeiture, because that statute does not authorize a grantor or devisor to impose such a condition.

In order to show that it does, the plaintiffs must maintain and must show to the court that this statute not only repealed the statutes of mortmain existing in England before the emigration of our ancestors, and which upon general principles would be brought over to this country by them, but authorized any proprietor of land to sequester it forever, to render it inalienable forever, and to take it out of commerce forever.

This, we submit, cannot be shown.

In *Bible Society* v. *Wetmore*,* it was decided that this statute of 1702 was virtually a re-enactment of the statute of Elizabeth.

Under the statutes of mortmain a devise to a corporation or to the use of a corporation, whether lay or ecclesiastical, was void.†

The Connecticut statute, commonly called the statute of 1702, was passed at the October session of the General Court, 1684, and was as follows:

"For the encouraging of learning and the promoting of publique concernments, it is ordered by this court, that for the

* 17 Connecticut, 181.

† 2 Kent's Com., 10th ed., 342; Shelford on Mortmain, 350.

future, that all such houses and lands as are, or shall, by any charitable persons, be given or purchased for, or to help on, the maintenance of the ministry or schools, or poor, in any part of this colony, they shall remayne to the use or uses for which they were given forever, and shall be exempted out of the list of estates, and be rate free, any former law or order notwithstanding."

The history of this law is instructive upon the question of its interpretation, and shows, we think, that we are correct as to the object of it.

The charter granted by Charles II constituted the only title of the colony to the lands within its limits, the Indian titles which they had acquired from time to time previous to the grant of the charter being, as Governor Andross said, no better than "the scratch of a bear's paw."

The colonial legislature or General Court had, however, before the grant of the charter, assumed to make numerous and large grants of land to townships, individuals, and for public, charitable, and pious uses. The charter conveyed to the colony in fee simple all the lands within its boundaries, but at the time the statute in question was passed, the grants made by the colonial legislature before the charter was granted had not been confirmed. The efforts which were being made to deprive them of their charter created the greatest anxiety and alarm in the colony. While they were in no danger of losing their charter, a confirmation of these grants by the colonial legislature was not deemed important; as soon as the people discovered that they were in danger of losing their only muniment of title, they deemed it important to confirm them by law, while they yet had power to do so.

Under these circumstances the statute in question was passed, at the session of the General Court held in October, 1684.

In February of the ensuing year, James II succeeded to the crown, and at the following May session of the General Court, another statute was passed, of the following tenor:

"This court, for the prevention of future trouble, and that

every township's grants of lands, as it hath been obtained by gift, purchase, or otherwise, of the natives, or grant of this court, may be settled upon them, their heirs, successors and assigns forever, according to our charter granted by his late majesty of happy memory; this court doth order that every township in this colony shall take out patents for their said grants of the Governor and Company, &c.

"The like course may be taken for all farms granted to any person or persons whatever within this colony."*

The fears of the colony were well founded, for in June of the same year, a *quo warranto* was issued to the Governor and Company of Connecticut, citing them to appear before the king within eight days of St. Martin, but this writ was not served until after the day named for their appearance had passed. On the 21st of December of the same year another writ was issued, citing them to appear before the king within eight days of the Purification of the Blessed Virgin.

These facts, some of which are matter of history and others gathered from the records of the colony, show beyond any question, that the object of this statute was to confirm existing grants to the uses specified in the statute, and to authorize future grants to the same uses by exempting them from the operation of the English statutes of mortmain, and placing them on the same footing merely as grants of land to individuals, or for any other lawful purpose, and not with any view to render lands so granted forever inalienable.

It is said that because this statute was in conflict with the English statutes of mortmain, and might on that ground be made an additional cause of complaint against the colony, it was not recorded with the other public acts at the time it was passed, but withheld from record for several years, until the agitation in respect to the charter had ceased. It first appeared among the public acts in the revision of 1702, and thus came to be called the statute of 1702. In the revision the phraseology of the act was slightly changed.†

* 3 Trumbull's Col. Rec. 179.

† See *supra*, p. 120. REP.

The words of perpetuity employed in it are those only which in substance are employed in all deeds and grants, and such as it is customary and proper to employ where titles are to be confirmed by statute, and where natural or artificial persons incapable of holding lands are authorized by law to do so.

Our views in regard to the object and true construction of this statute are further confirmed by the history of a case that arose very soon after the act was passed.

In 1689, John Liveen, of New London, died, leaving a will made just before his decease, by which he bequeathed and devised the greater part of his estate to the "ministry of New London," to be improved for them by his executors who were General Fitz John Winthrop and Major Edward Palms. The executors treated the devise as void, on the ground that it was within the English statutes of mortmain, and they contended that the Connecticut statute of 1684 was void, because in conflict with the laws of England.

A suit was brought against the executors by the town of New London on behalf of the ministry, and the town recovered judgment. The cause was taken by appeal to England, and was in litigation there for several years, but the records of the colony do not disclose the result.

We have already shown that the Connecticut statute of charitable uses has been held by the Supreme Court of that State to be substantially a copy of the statute of Elizabeth concerning charitable uses. Both should therefore receive the same construction; but it has never been held in England that lands given to charities were thereby rendered inalienable. On the contrary, it has always been the practice of the Court of Chancery to order a sale of such lands when a sale is shown to be for the interest of the beneficiaries.*

The Connecticut statute being a re-enactment of the statute of Elizabeth, should, as we have said, upon general prin-

* Parke's Charity, 12 Simons, 329; Ex parte the Governor, &c., 13 English Law and Equity, 145; Attorney-General *v.* Hungerford, 2 Clark & Finelly, 145; Attorney-General *v.* Kerr, 2 Bevan, 428; Archbishop of York's Case, 17 Id. 495; Re Colsten Hospital, 27 Id. 17.

ciples receive the same construction, and it always has received the same construction by the legislature of the Colony and of the State, in the exercise of the jurisdiction in regard to the sale of charity lands, exercised in England by the Court of Chancery.

The records of the State show that between the years 1670 and 1862, five hundred and seventy-five private acts, authorizing the sale of lands, were passed. A great number of these acts were for the sale of charity lands.

Charities are under the perpetual guardianship of the sovereign power. The general superintendence of them in England is delegated to the Court of Chancery.*

In Connecticut this superintendence is mainly exercised by the legislature. In Connecticut, as in England, it is a rule of public policy to require trustees for a charity to obtain the assent of the public authority exercising this guardianship to a sale of charity estates, in order to protect the charity against imprudent sales. This alone is the object of the law. It is a rule established for the protection of the *cestui que trust.*

Lands, as we have endeavored to show, are not rendered inalienable by being given to charitable uses, but set apart as constituting a fund to be used in a provident and judicious manner, to promote the object for which they are given, and this provident and judicious manner as much requires a sale, when by chance of circumstances the property has become unproductive, but can be made productive by a sale, as under other circumstances it requires the property to be preserved and kept.

When the statute says, therefore, that lands given to charitable uses "shall forever remain to the uses to which they have been or shall be given or granted, according to the true intent and meaning of the grantors, and to no other use whatever," it is to be understood not as meaning that the land should never be sold, not as giving the donor power to say that, but as providing and declaring that the fund shall never be diverted from the use to which it may be dedi

* Vidal *v.* Girard's Executors, 2 Howard, 195.

cated, subject, however, to such changes from time to time as the interest of the society may require.

A statute which rendered all charity lands forever inalienable, or which gave the donor power to render them so by imposing conditions against alienation, would be so clearly contrary to public policy, that the court would never so construe it if it admitted of any other rational interpretation.

We say in the next place that it cannot be presumed that this testator intended to impose a condition against a legislative sale, even if he did against a sale by his trustees or by the society.

When this will was made the charter of Charles II was the organic law of the State. Under this charter the General Assembly had the same power of legislation as the Parliament of Great Britain.*

The testator knew that whatever his wishes might be in regard to a sale, the legislature had power to authorize a sale, and that a sale by authority of law would not work a forfeiture.

It must therefore be assumed that he made his will and imposed this condition (if it be a condition) in subordination to the power of the legislature to order a sale.†

III. Assuming that this was a conditional devise, and that the condition was valid if, as we have endeavored to show, at the time when this will was made, and when the trusts of the will took effect, the legislature had power to authorize a sale, and to control, in this respect, the intention of the testator, it must be admitted that the legislature possessed the same power when it did authorize a sale, unless in the meantime it had been deprived of it by some constitutional restriction. It is for the plaintiff to show that by some provision in the Constitution of the United States or of the State of Connecticut, the legislature of Connecticut was prohibited from the exercise of this power, and that the act in question was therefore void.

* Starr *v.* Pease, 8 Connecticut, 548; Pratt *v.* Allen, 13 Id. 119.

† Clark's Executors *v.* Hayes, 9 Gray, 429.

Courts will not declare an act of the legislature void, unless it is a clear and unequivocal violation of the Constitution.*

The constitution of the State of Connecticut is not a grant of legislative power; it is merely a limitation imposed upon pre-existing power.†

Assume that it is beyond the scope of legislative power to pass a law taking away or impairing a vested right of property, and that upon general principles, such a law would be void, the question remains, whether the act in question is of that character.

A right of property, in order to be within the protection of this principle, must not only be a vested right (not a mere possibility), but it must also be a beneficial interest. If, as we assert, the legal title of the land vested in the trustees, the heirs of the testator could have no beneficial interest in a breach of condition by the trustees.‡

Suppose there had been no act of the legislature, and the heir at law had entered for condition broken, all he would gain by an entry would be the naked right to hold the legal estate for the beneficiaries till a court of chancery should exercise the power of appointing new trustees.

Therefore, if the court should come to the conclusion that the legal estate was vested in these trustees to hold upon trust, and that there was a breach of a condition attached to that legal estate, and an entry by which the heir vested himself with that legal estate, but for the act of the legislature, there cannot be the least difficulty in saying that the legislature might control that interest either before or after breach.

But if the court should come to the conclusion that the legal estate vested in the society, and not in the trustees, we insist that the heirs at law of the testator, by virtue of a condition against alienation, would not in that case, before con-

* Cooper *v.* Telfair, 4 Dallas, 114; Sharpless *v.* The Mayor, 21 Pennsylvania State, 160.

† Starr *v.* Pease, 8 Connecticut, 548; Pratt *v.* Allen, 13 Id. 119.

‡ Sanderson *v.* White, 18 Pickering, 333.

dition broken, have an interest in the property beyond the control of the legislature.

Admitting that the power of the legislature is so far limited and restricted by general principles of law that it cannot, by any act of legislation, destroy or impair a vested and beneficial right in property, it would not follow that the act in question was void.

The plaintiffs, in order to show to the court that this act was void, must go much further than this, and maintain that the power of the legislature is so limited and restricted that any act is void, the effect of which would be to destroy or impair (for whatever cause) not a vested and beneficial interest in property, but the most remote and contingent interest. The interest of which they say this act deprives them was both contingent and remote, a mere possibility of reverter, and so little regarded by the common law that it could not be conveyed or devised.*

This the plaintiffs cannot show.

It cannot be maintained that the legislature of Connecticut has any less power to unfetter estates by cutting off remote and contingent interests of this character than the Court of Chancery in England.

Yet in *Platt* v. *Sprigg*, reported by Vernon,† trustees were ordered to join in cutting off a contingent remainder to the heir at law. Again: In *Fruwin* v. *Coulton*, in 1st Equity Cases Abridged,‡ also in *Winnington* v. *Foley*, in 1st Peere Williams.§ *Tipping* v. *Piggot*, in 1st Equity Cases Abridged,‖ is a very strong case. There the trustees, without any order of the court, joined in making a new settlement, thereby cutting off a contingent remainder to the heir at law. On a bill filed by the heir at law to have this new settlement set aside the court declined to set it aside, the chancellor saying, that although it was an imprudent thing for the trustees to do without the sanction of the court, yet as he approved of the settlement he would not disturb it.

* Smith *v.* Pendell, 19 Connecticut, 111; 4 Kent's Com. 11, 127, 447.
† Vol. 2, p. 303. ‡ Page 386. § Page 536. ‖ Page 385.

In these cases the right of which the heir at law was deprived by the court was a mere naked possibility.

In this case the right of which he has been deprived by the legislature was the same.

In this country, laws affecting such contingent rights in property have never been held to be beyond the scope of legislative power. Cases sustaining such laws are very numerous. We shall refer to only a few of them.

Thus it has been held that the legislature might take away a contingent right of dower or courtesy.*

Also, the contingent right of the husband in the choses in action of the wife.†

Also, the possibility of reverter to the owner of the fee, in land taken for a street in a city, on the ground that the interest thus taken is too remote to be deemed an interest, in property of any value.‡

So an act of the legislature by which an estate in fee tail was declared to be a fee simple in the grantees of the tenant in tail, who were infants, and which authorized a sale of the land, was declared valid.§

So a law empowering a court of equity to order the sale of real estate owned in common, where partition would not, in the opinion of the court, be advantageous to the owners.‖

And so, a statute validating the levy of execution in cases where the levy was void, for the reason that the officer had included in his return fees not allowed by law.¶

It must be admitted that the act under consideration in the last case was not only retrospective, but affected essentially vested rights of property; yet inasmuch as those rights of

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* Strong *v.* Clem, 12 Indiana, 37; Thurber & Stevenson *v.* Townsend & Wilbur, 22 New York, 517.

† Barbour *v.* Barbour, 46 Maine, 9; Clarke *v.* McCreary, 12 Smedes and Marshall, 347.

‡ People *v.* Kerr, 27 New York, 188.

§ De Mill *v.* Lockwood, 3 Blatchford, 56.

‖ Richardson *v.* Monson, 23 Connecticut, 94.

¶ Beach *v.* Walker, 6 Id. 190, and see Goshen *v.* Stonington, 4 Id. 209; Mather *v.* Chapman et al., 6 Id. 54.

property were not unjustly affected, the act was declared to be valid.

So a private act of the legislature, divorcing a woman from her husband, was held to be valid, though its effect was to deprive a creditor of the husband of a vested estate in the lands of the wife acquired by the previous levy of an execution on the husband's estate therein.*

These last three cases arose in Connecticut. In Massachusetts and in Pennsylvania† it has been decided that a law which changed the tenure of estates by declaring all joint tenancies to be tenancies in common, was constitutional and valid.

Private acts authorizing tenants for life and trustees to support remainders, to sell real estate devised, and convert the same into personal estate, to be held subject to the same provisions and trusts as the land, are numerous, and have always been sustained, though in opposition to the will of the testator; and although the effect was to compel those in remainder to take personal estate instead of the real estate devised, and in which they had both a vested and valuable interest.‡

It cannot be denied that in each of the cases just referred to, and given in the note below,‡ the law took away or modified and controlled interests in property more immediate and tangible than any which the plaintiffs had under the will in question.

From the whole tenor of Mr. Stanley's will it is apparent that this society was the sole object of the testator's bounty in respect to the land in question, and that this condition (if there be a condition) was imposed for the purpose of protecting the society in the enjoyment of it, and not to enable the heir at law to deprive them of it.

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* Starr *v.* Pease, 8 Id. 541.

† Holbrook *v.* Finney, 4 Massachusetts, 568; Annable *v.* Patch, 3 Pickering, 363, and Bambaugh *v.* Bambaugh, 11 Sergeant & Rawle, 191.

‡ Norris *v.* Clymer, 2 Barr, 284; Blagg *v.* Mills, 18 C. C. R. 427; Sohier *v.* Massachusetts General Hospital, 3 Cushing, 483; Rice *v.* Parkman, 16 Massachusetts, 326; Clarke *v.* Van Sarlay, 15 Wendell, 436.

There is no limitation in favor of his heirs at law, no devise over, nor any other provision in the will tending to show that the testator ever intended or expected that his heirs at law would succeed to the estate in any event.

From the authorities already cited it appears that it is the constant practice of the legislature where the power has not been delegated by the legislature to the courts, and of the courts where the power has been delegated, to authorize a sale of the lands of infants, idiots, lunatics, and others, who are not *sui juris*. This is done in the exercise of a tutelary authority on the part of the legislature as *parens patriæ*. C. J. Parker, of Massachusetts, says that "this power must rest in the legislature in this commonwealth, that body being alone competent to act as the general guardian and protector of those who are incompetent to act for themselves."*

Now the power to authorize the sale of the lands of a charity is derived from the same source, and rests upon the same principles. A charity is never, so to speak, *sui juris;* it is under perpetual guardianship, and its guardian is the State. It is for this reason that the trustees are *primâ facie* guilty of a breach of trust in selling the estate of a charity without authority derived from the State. And we submit that it is not in the power of a donor to a charity so to fetter the State as to prevent the sovereign power from authorizing a lawful disposition of the estate given to the charity, its ward, when it is clearly made to appear that it will be for the interest of the charity. This never has been done, and we contend that it cannot be done. We do not mean to assert that the State may divert the fund from the use to which it is given. What we say is, that the State may authorize such modal changes in the property from time to time as may be found to be necessary and proper, and that

* Rice *v.* Parkman, 16 Massachusetts, 328; and see Sohier *v.* Massachusetts General Hospital, 3 Cushing, 483; Blagge *v.* Mills, 1 Story, 426; Davison *v.* Johonnot, 7 Metcalf, 388; Clarke *v.* Van Surlay, 15 Wendell, 436; Cochran *v.* Van Surlay, 20 Id. 365; Bambaugh *v.* Bambaugh, 11 Sergeant & Rawle, 191; Estep *v.* Hutchman, 14 Id. 435. See also Leggett *v.* Hunter, 19 New York, 445.

it is not in the power of a donor to provide that this shall not be done.

Even if this were a law impairing the obligation of any contract, how could it avail the plaintiffs? If there is any compact it is that the land shall forever be devoted to pious or charitable uses. Is the heir at law asking to have this compact observed and performed? Is he intending to devote the land to those uses? Clearly not; he is seeking to recover the land, not for the use of the society, in order that the supposed compact may be executed, but for his own private use.

The courts of Connecticut, in some early cases, involving the right of the State to tax such land, may speak of the exemption contained in the statute as a compact or pledge on the part of the State that lands given should be forever exempt from taxation. These decisions have, we think, recently been overruled, and in *Brainard* v. *Town of Colchester*,* the court say, that "there is nothing in the language of the statute which makes it differ from ordinary statutes specifying what should or should not be subject to taxation."

The notion that any general law of the State is in the nature of a compact between the State and the citizen, is erroneous, and there is no force in the suggestion that this statute of 1702 created anything in the nature of a compact between the State and any one.

The power which the legislature of Connecticut exercised in this case it has exercised unquestioned for two hundred years, and this in itself would be a sufficient vindication of its right to continue to exercise it.

There is an additional consideration, growing out of the long-continued practice of the legislature in passing such acts as this, of so much importance as to have been deemed worthy of special consideration by courts in similar cases. That consideration is the effect which a decision against the validity of this act would have in unsettling other titles to land. In *Davidson* v. *Johonnot*,† the court declares that

* 31 Connecticut, 409.

† 7 Metcalf, 388.

the vast amount of property now held under titles derived from similar legislative acts should lead us to proceed most cautiously in the investigation of this subject, and to deal with it in a liberal spirit when called upon judicially to declare that this course of legislation conflicts with the constitution, and that all the special acts of this character are of no validity. And in *Norris* v. *Clymer*,* a case in the Supreme Court of Pennsylvania, Chief Justice Gibson, speaking of the consequences in his own single State, says:

"It is not above the mark to say that ten thousand titles depend on legislation of this stamp, for many of those statutes contained provisions for more than twenty distinct estates, and could not the ruin that would be produced by disturbing them be arrested by anything less than a convention to effect a constitutional sanction of them, the consummation would not be dearly bought."

Mr. Justice NELSON delivered the opinion of the court.

This is an action of ejectment by the heirs of William Stanley to recover for breach of condition a tract of land, situate in the city of Hartford, devised by the ancestor to an ecclesiastical society and their successors, on the 7th October, 1786; and one of the principal questions in the case is whether or not the devise was upon a condition, which, when broken, would let in the heir, or was a limitation or trust, the breach of which would work no such consequence.

The material parts of the will are as follows:

"I give and devise the whole of my real estate, of every kind and description, . . . unto the Second or South Ecclesiastical Society, in the town of Hartford, to be and remain to the use and benefit of said Second or South Society and their successors forever." Then comes the condition or limitation upon the devise: "Provided, that said real estate be not ever hereafter sold or disposed of, but the same be leased or let, and the annual rents or profits thereof applied to the use and benefit of said society, and the letting, leasing,

* 2 Barr, 284.

and managing of said estate to be under the management and direction of certain trustees hereafter named by me, and their successors, to be appointed in manner as hereafter directed." And, after appointing three trustees, and prescribing the manner of the appointment of their successors, and prescribing also their authority and duties, the testator adds: "And the aforesaid real estate, or any part thereof, shall not be rented or let for a longer term or lease than thirty years before the expiration of the same." And another part of the will is as follows: "And, in case said Second Society shall ever hereafter be divided, it is my will that my real estate be not divided, but remain entire and forever to the said Second Society; and such part of said Second Society as shall hereafter secede or be divided therefrom are hereby excluded from all the use and benefit of my real estate, so devised as aforesaid to the said Second Society."

These are the several clauses in the will relating to the management of the estate, following the proviso, and which, taken together, constitute the conditions, limitations, or qualifications annexed to it, and to the enjoyment of the estate by the society.

All of them may not be equally important, but we are bound to assume that each and all of them were regarded by the testator as material in the regulations which he has seen fit to adopt and carry into his will.

These conditions or limitations following the proviso are briefly—

1. The estate is not to be sold or disposed of, but to be leased by trustees, and the rents paid over to the society.

2. The leases are not to exceed thirty years in any one term.

3. The estate is not to be divided in the event of a division of the society; and—

4. It is to be managed and directed exclusively by trustees who are appointed in the will, and by their successors; the surviving trustees to appoint when a vacancy happens.

The question is, whether these are strict common law conditions annexed to the estate, a breach of which, or of

any one of them, will work a forfeiture, defeat the devise, and let in the heir; or, whether they are regulations for the guide of the trustees, and explanatory of the terms under which he intended the estate should be managed, with a view to the greatest advantage in behalf of the society?

The difference between the two interpretations and the consequences flowing from them, is very material. As we have seen, a condition, if broken, forfeits the estate, and forever thereafter deprives the society of the gift; and not only this, but the heirs become seized of the first estate, and avoids, of course, all intermediate charges or incumbrances, and takes also free and clear all the expenditures and improvements that may have been laid out on the property.

On the other hand, if these limitations are to be regarded as regulations to guide the trustees, and explanatory of the terms upon which the devise has been made, they create a trust which those who take the estate are bound to perform; and, in case of a breach, a court of equity will interpose and enforce performance. The estate is thus preserved and devoted to the objects of the charity or bounty of the testator, even in case of a violation of the limitations annexed to it. A fraudulent or unfaithful trustee will be removed, and another appointed to his place. A diversion of the fund will be arrested, and an account compelled for any waste or improvident use of it.

Mr. Sugden, speaking of conditions, observes, that what by the old law was deemed a devise upon condition would now, perhaps, in almost every case, be construed a devise in fee upon trust, and, by this construction, instead of the heir taking advantage of the condition broken, the *cestui que trust* can compel an observance of the trust by a suit in equity.*

In the recent case of *Wright* v. *Wilkin*, in the Queen's Bench, the court approved of this observation of Mr. Sugden, and in that case construed a devise, *on express condition in terms*, looking through the whole will, and regarding the intent of the testator as falling within this rule. The court

* 1 Sugden on Powers, 123, 7th London ed.

relied very much upon the words following the condition as explaining away the strict common law meaning of the term, and as importing a meaning inconsistent with a strict interpretation. This judgment was affirmed in the Exchequer.

It is true that the word "proviso" is an appropriate one to constitute a common law condition in a deed or will, but this is not the fixed and invariable meaning attached to it by the law in these instruments. On the contrary, it gives way to the intent of the parties as gathered from an examination of the whole instrument, and has frequently been thus explained and applied as expressing simply a covenant or limitation in trust. Several cases were referred to, on the argument, to this effect, and many more might have been added.

In looking at the explanatory part of the will in this case, it will be seen that the testator had in his mind a settlement of the estate in trust for the beneficiaries, and with this view established a code of regulations to guide the trustees in the management of it that would continue through all time, and which is wholly inconsistent with the idea that the estate might be defeated by a breach of any one of them. After appointing the three trustees, he adds: "I do give authority and power to nominate their successors to said trust, which is to be done in the manner following: That immediately after my decease they . . . shall appoint some meet persons, . . . as the occasion may require, into said trust or office, so be it that at no time more than three persons shall act in said trust or office; . . . and all persons, successors hereafter to said trust and office, shall at all times in future have like power to superintend, direct, and appoint their successors in said trust and office, and to perpetuate said trust for the benefit and use of said society, as occasion may from time to time require." And he closes by saying that the said trustees and their successors shall have full power to lease the estate, and "do all other legal acts for the well-ordering and management of said estate, under the limitations and restrictions as hereinbefore expressed."

This interpretation of the devise was sought to be avoided

on the argument, by separating all the limitations and restrictions in respect to the enjoyment of the estate from *that* forbidding the sale or disposal of it, thereby conceding that they were limitations in trust, but insisting that the other constituted a condition for a breach of which a forfeiture was incurred. But the difficulty in the argument is that the same clause embraces not only the prohibition to sell, but enjoins the duty to lease, and the application of the rents to the use of the society, and also the management of the estate by the trustees, and which management contains the prohibition to lease for terms not exceeding thirty years. The separation is, therefore, not only arbitrary, but in disregard of the express words of the testator. The injunction to lease is as positive as that not to sell, and both are embraced in the same clause; and if the term "proviso" is to be construed as a condition in respect to the one, it must consistently be so construed in respect to the other. And the same observations are also applicable to the other limitations.

This devise to the Ecclesiastical Society is in some respects peculiar. The possession, management, and control of the estate are given exclusively to the trustees, who, according to the regulations, are invested with power to perpetuate their authority indefinitely. The only active duties of the society—the beneficiaries—is to receive the rents and profits for their own use and benefit. Of course, the trustees, subject to the limitations and restrictions annexed to the enjoyment of the estate, possess all the power and dominion over it that belongs to an owner, and are bound to take the same care of it and exercise the same attention, skill, and diligence in its management that a prudent and vigilant owner would exercise over his own. They are bound to rent the property, collect the rents, and pay them over to the society, to protect the possession, prevent waste, see that the taxes are paid, and, in the words of the testator, "do all other legal acts for the well-ordering and management of the estate." Being thus in the exclusive possession and control of the property, and having devolved upon them

the manifold duties incident thereto, it is quite clear that the trustees are clothed with the legal estate.

Mr. Jarman states the general principle: "The mere fact that they are made agents in the application of the rents is sufficient to give them the legal estate, as in the case of a simple devise to A. upon trust to pay the rents to B.; and it is immaterial, in such case, that there is no direct devise to the trustees, if the intention that they shall take the estate can be collected from the will. Hence, a devise to the intent that A. shall receive the rents and pay them over to B. would clearly vest the estate in A."* The same effect where the duty is devolved upon them to pay taxes and make repairs.† And it is laid down generally that whenever a trust is created a legal estate sufficient for the execution of the trust shall, if possible, be implied.‡ Indeed, it would be very difficult, if not impossible, for the trustees in the present case to execute their various and multiplied duties over this property without being clothed with the legal estate, under a mere naked power.

The distinction between a power and a trust is marked and obvious. Powers, as Chief Justice Wilmot observed, are never imperative; they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted.§

Our conclusion is, that the construction urged by the plaintiffs, of the will, importing a condition, a breach of which forfeits the devise, is not well founded.

There is another ground of defence to this action that we are of opinion is equally conclusive against the plaintiffs.

On an application of the society and trustees to the legislature of Connecticut to be permitted to sell the premises in question, setting out the reasons at large in support of it, the application was granted, and an act passed accordingly.

* 2 Jarman on Wills, 202, Perkins's Ed. † Id. 201, and cases cited.

‡ Lewin on Trusts and Trustees, 164.

§ 2 Sugden on Powers, 588.

This act authorized the trustees, together with a third person, to sell the lands in the manner therein prescribed, and to invest the proceeds at interest, in bonds and mortgages of real estate of double the value of the amount invested, appropriating the interest to the use of the society, in the same manner, and subject to the same use, as the rents or income of said property are by the will required to be appropriated.

The defendant is in possession under the title derived from a sale in pursuance of this act of the legislature.

In England, and in this country where a court of chancery exists, a charity of the description in question is a peculiar subject of the jurisdiction of that court, and in cases of abuse, or misuse of the charity by the trustees or agents in charge of it, this court will interpose to correct such abuses, and enforce the execution of the charitable purposes of the founder. So, by lapse of time, or changes as to the condition of the property and of the circumstances attending it, have made it prudent and beneficial to the charity to alien the lands, and vest the proceeds in other funds or in a different manner, it is competent for this court to direct such sale and investment, taking care that no diversion of the gift be permitted. Lord Langdale, the master of the rolls, observed, in *The Attorney-General* v. *The South Sea Company*,* "It is plain that in ordinary cases a most important part of this duty is to preserve the property, but it may happen that the purposes of the charity may be best sustained and promoted by alienating the specific property. The law has not forbidden the alienation, and this court, upon various occasions, with a view to promote interests of charities, has not thought it necessary to preserve the property *in specie*, but has sanctioned its alienation."†

This power, in the State of Connecticut, it appears, is exercised by its legislature, as in the present instance. Many acts of the kind have been referred to in the argument, ex-

* 4 Bevan, 458.

† See also Lewin on Trusts and Trustees, 373, and cases; and Shelford on Law of Mortmain, 687.

tending through a long series of years down to the present time.

We cannot doubt that the power exists in the legislature, and it is not for this court to revise the facts upon which it has seen fit to exercise it.

Mr. Justice DAVIS dissented.

JUDGMENT AFFIRMED.

THE DASHING WAVE.

1. A neutral, professing to be engaged in trade with a neutral port, under circumstances which warrant close observation by a blockading squadron, must keep his vessel, while discharging or receiving cargo, so clearly on the neutral side of the blockading line as to repel, so far as position can repel, all imputation of intent to break the blockade. Neglect of that duty may well justify capture and sending in for adjudication; though, in the absence of positive evidence that the neglect was wilful, it might not justify a condemnation.
2. Where a party, whose national character does not appear, gives his own money to a neutral house, to be shipped with money of that house and in their name, to a neutral port in immediate proximity to a blockaded region, and an attorney in fact, on capture of the money and libel of it as prize, states that such neutral house are the owners thereof, and that "no other persons are interested therein," the capture and sending in will be justified; though in the absence of proof of an enemy's character in the party shipping his money with the neutral's, a condemnation may not be.
3. On a capture of a vessel unobservant, through mere carelessness, of the duty first above mentioned, and containing money shipped under the circumstances just stated, a decree was made restoring the vessel and cargo, including the money; but apportioning the costs and expenses consequent on the capture ratably between the vessel and the coin, exempting from contribution the rest of the cargo.

DURING the late Rebellion, and while the coast of the Southern States, including that of Texas to the mouth of the Rio Grande, was under blockade by the United States, the Dashing Wave, a British-owned brig, was captured at anchor by a United States gunboat, off the mouth of that river, the di-