so we may take leave of the case with the remark, that there is not wanting in judicial records a precedent for Portia's final act—the passing upon Shylock of a penal sentence for attempting the life of a citizen.[1]

On the whole, therefore, we perceive no error in the record, and it follows that Professor Love's assignment of error should be dismissed. The decree of the Venetian Court should be affirmed, and thus tardy justice will be done to the learned Portia. She has been called a "pettifogger;" but even if there are some who will dissent from my view of her opinion, yet all, I think, will admit that she deserves no such appellation. How lacking in gallantry have her stern legal critics been, even assuming their criticisms to be well founded! And it is surely a surprising thing that Professor Love should be found among their number. For was it not Portia who, with matchless eloquence, exhorted the Jew to be merciful? And who should be so ready to show mercy as Love?

AN EXAMINATION OF THE DECISION IN TILDEN *v.* GREEN.

By R. C. McMurtrie, Esq.

Criticism of a decision of a foreign court is of all things the most dangerous. No one that has watched such attempts upon subjects he is familiar with, can have failed to see that local notions and statutes cannot be readily comprehended by strangers. Two illustrations will suffice. Mr. Bell, Professor of Law in the University of Edinburgh, deduces this result from a study of Kent's Commentaries: "The law of the United States (respecting sales of personal property) . . . is grounded on the law of England, and has indeed been settled nearly on the footing of the

[1] See an instance of a sentence of this kind in connection with a civil suit in a court administering Spanish law, in an article by John T. Doyle, in The Overland Monthly for July, 1889. Venetian law was presumably the same.

Statute of Frauds as applicable to all contracts for the the sale of goods and chattels for the price of $50 or more. . . . . The Statute of Frauds, as *thus adopted in America*, has years ago been *reconstructed by the Legislature of New York*. . . . . The law of *America*, standing on the same footing as that of *England* under the Statute of Frauds, the precise words of which had been adopted *in the American Statute, etc.*"[1] The other illustration is the disclaimer by Lord Campbell of the power assumed by the courts of the United States to declare a statute void as illegal.

Such examples may well deter one from attempting a criticism of such a decision as that of Tilden *v.* Green.[2] But there are some grounds upon which this decision seems to rest, that may without arrogance—even with profit—be discussed by a foreigner, for they profess to be principles of the common law.

The case decides that a charity which requires a discretion of trustees to organize it, a charity where the form and mode of operation are not sufficiently defined to enable a court to compel its execution in that mode, is void. So far as this results from local statutes, or a common law of the State differing from the law of England, it would probably be unwise, at least for a foreigner, to criticise the conclusion. But if these or either of them are the grounds, it is unfortunate that other reasons were resorted to. Distrust and uncertainty are the invariable result of a double postulate, one branch of which is either untrue or misunderstood. Moreover it is, to some extent at least, to be inferred that the alleged local statutes are deemed to be legislation in the line of what is assumed to have been the common law, until marred by the arrogant assumption of ecclesiastic chancellors. This is quite evident from the dissertation by WRIGHT, J., in 33 New York, 97, 106, one of the foundations for the judgment in the Tilden case. Moreover, that judgment does, it is submitted, utterly misstate as well as misunderstand the object and effect of the Statute of 9

[1] Bell's Contract of Sale, pp. 59 and 62.

[2] 31 American Law Register and Review, 75.

Geo. II, and it is supported, as on a sure and sound foundation, by the assertion that the jurisdiction by which these estates were protected and preserved rests on the 43d Eliz.—which is a matter of *fact*, not of opinion, and is demonstrably untrue.

These are apparently the postulates on which this decision is based by Mr. Justice BROWN and the majority of the Court: First, the statement of Judge WRIGHT, in Levy *v.* Levy:[1] "*If there is a single postulate of the common law established by an unbroken line of decisions it is that a trust without a certain beneficiary who can claim its enforcement is void.*" Second: "*The equitable rule that prevailed in the English Court of Chancery, known as the Cy-pres doctrine, and which is applied to uphold gifts for charitable purposes, when no beneficiary is named, has no place in the jurisprudence of this State.*"

There is a third postulate, for which Read *v.* Williams[2] is cited as the authority. An indefinite purpose to be executed by a power given to a devisee, as a trustee, is contrary to the Statute of Wills, because it substitutes the will of the donee for that of the testator. Precisely what is meant by the abstraction quoted from Read *v.* Williams is uncertain. It may be that a devise to A. for life, and remainder to his appointees, is illegal under the New York statutes. It is if the statement of the reason for the decision is true. If it means what was admitted in Morice *v.* Bishop of Durham, it is a singularly caricatured statement of that rule. In either case the reason assigned for the rule cannot be the true one as applied to statutes of wills as such.

It would naturally be inferred from the above-quoted passage that there was some occult and mysterious quality in the Statute of Wills that produces this effect; whereas the cause is the same which operates to make it impossible to get rid of water in a bucket, unless it is placed somewhere else. Did it ever occur to ask what is the rule in the case of a grant? In this respect how do deeds and wills differ? If they do not, certainly it is not the policy of the Statute

[1] 33 N. Y., 107. [2] 125 N. Y., 560.

of Wills that produces the rule that property must have an owner.

Compare this portentous declaration with the simplicity of Sir WILLIAM GRANT.[1] A trust without a beneficiary is void, because *an uncontrollable power of disposition is ownership.* Ownership in the trustee being excluded by the fact that he is a trustee, there can be none unless the Court can ascertain who is the owner. But charities are an exception, because the Court or the Crown will direct the peculiar application. A trust is a means, not an end. Ownership is the end or object. If there is none mentioned there would be a deed without a grantee, or a will without a devisee; that is, an incompleted attempt to grant. The principle is the one common to all conceivable modes of transferring property, whether by contract, deed, will or law.

One cannot help being curious to learn if these were the points which counsel were expected to meet to sustain the trust. For it is quite certain that it was these very objections to a trust for charitable uses, that forty-eight years ago were supposed to exist and were relied on in the case of Girard's Will. They were then met and (it was supposed) demolished by the great argument of Mr. BINNEY in that case as they had been before by Mr. Justice BALDWIN, in Magill *v.* Brown. It may therefore be permitted, without incurring the charge of arrogance, to point out where the fallacies lie in each one of these postulates, for the purpose of relegating the Tilden will case to the category of an unfortunate provincial peculiarity of no importance to anyone but the people that are living under such a system of law.

There is a bit of the argument that deserves notice, first, because it seems to present such a specimen of reasoning as to cast doubt on the validity of the residue. Inglis *v.* The Trustees of the Sailors' Snug Harbor[2] is got over by this statement, which appears to be meant for reasoning. There was there a direction to apply for legislation creating a corporation, if such application was necessary to render

[1] 9 Ves., 405. [2] 3 Peters, 99.

the devise valid. Here the creation of the corporation was in the discretion of the executors. Surely, if the discretionary element in the gift of the power to create a body capable of taking, holding and administering was fatal because legality or illegality must depend on things as they are at the death of the testator, there was the same mere discretion in the case of Inglis *v.* The Trustees as in Mr. Tilden's will—granting the trustees could be compelled to apply, could the legislature be compelled to grant? Moreover, it is a singular notion of discretion, surely, that holds that a trustee's discretion cannot be controlled. What this word means it would be quite impossible to discuss at length here; but certainly it has never been heard of that a trustee could destroy a person's rights by declining to exercise this discretion. Blunders enough there are as to the meaning of the word, but no one before appears to have so misunderstood its meaning. It means, if we may be guided by authority, that *he must do what is most beneficial to the owner.*[1] No one has stated the rule better than the great American Chancellor, DESSAUSURE, so that we need not fear being snubbed for resorting to English precedents, invented by ecclesiastics and not applicable to a free people.

The supposed distinction between that which is private property and a gift to a class, or an object, or a purpose by any description that constitutes a charity, will be noticed further on. All that need be said here is, that by the common law, if we include equity within that definition, there has never been a time when a class such as *the blind*, or *the poor*, or *the sick* was not as absolutely capable of taking by a gift or grant as individual persons are. Such a mode of dealing—with not a case but a great principle of law such as was elaborated in the Sailors' Snug Harbor case—can scarcely commend itself to the judgment of men. If it is conceived that there is a distinction between a discretion which is necessary to make a right in a private person capable of enjoyment, and a discretion to select

[1] Harper's Equity, 114; Haynes *v.* Cox, per Dessausure, Ch.; Mislington *v.* Mulgrave, 3 Madd., 491; *In re* Coleman, 39 Ch. Div., 446.

objects of a charitable gift, it is submitted that this is a mistake for which there is no foundation, but a dictum of Lord LOUGHBORO followed, it is true, in some of the American courts, but which is demonstrably incorrect. That the Court will compel and oversee the exercise of a discretionary power in respect of charities was decided in Attorney-General *v.* Glegg, Ambler, 584; and that an optional right to select could be postponed, and, therefore, the right be destroyed at the pleasure of the trustees, was evidently treated as absurd in Moggridge *v.* Thackwell.[1] As to the first point, there is no fault to be found with the abstract statement that the law requires certainty in a devise; but it would be well to ascertain the meaning of this rule. The law of the land vests property, when the owner ceases to live, in some one, and his title is held precisely as was that of the deceased owner—*i.e.*, by the law of the land. Without discussing the political question how far a dead man may control things after he ceases to exist, all will agree that it is by the law of the land that he can or cannot do this. And it necessarily follows that he must name someone to be owner or describe him, so that he can be ascertained, or the person named by the law must take. There then arise two possible classes of cases, and this seems to have created the confusion. A gift naming an owner or one to take for himself or for someone else creates *property*—that is a right in the person named to apply to his own purposes. Now, there must be somebody who can claim this right, who stands to the State as the owner and can fulfil the duties of ownership; and the second class must be subject to the same rule—and, therefore, a gift to a class, if indefinite, is void. Of course, all contingent interests are included in this.

But the first thing to be noticed is how entirely untrue is the statement of Judge WRIGHT as an abstraction. Assuming the New York Statute of Wills is not different in this respect from all other statutes in the civilized world, no one will say that a devise to A. for life with a power to appoint by deed or will is void, and yet it is quite certain that

[1] 7 Ves., p. 82.

there is and can be no beneficiary except A. until he exercises the power, assuming the New York Statute of Wills is not different from all other statutes of wills in the civilized world. It is in this way only that the futility of such extremely universal statements can be tested.

It may be granted that a mere power of appointment without an immediate estate of any kind is void. There are plain reasons for this; but they are independent of any statute of wills. But it is also quite certain that if the devisees can be ascertained it is valid. What, therefore, apparently was in the mind of Judge WRIGHT when he made this somewhat exaggerated generalization was the rule that governs trusts. He evidently is speaking of the English law; his citation of Gallego *v.* The Attorney-General,[1] a Virginia case, shows he was not dealing with the question as one of provincial jurisprudence.

Now, the distinction that governs trusts is probably most clearly brought out in a case that had the benefit of a discussion by two great makers of the law—Lord ELDON and Sir WILLIAM GRANT.[2] The trust was for "*such objects of benevolence and liberality as the trustee in his own discretion shall most approve.*" It was conceded by all that if the objects were not charitable the devise was void, for the trust excluded a beneficial interest not declared, and a trust without an object is void.[3] The express trust precluded a possible beneficial interest in the trustee, and no court could ascertain what purpose was intended. The next of kin represented by Sir Samuel Romilly and Mr. Bell (probably the great pleader) admitted that if it was a charity, the *indefiniteness was immaterial.* It was decided not to be a charity and hence void. It will be said (Judge BROWN impliedly does say) that by that time the rule in

[1] 3 Leigh., 457.

[2] Morice *v.* the Bishop of Durham (10 Vez., 532; 9 *Id.*, 399).

[3] Why it did not appear necessary to counsel or Court to give a reason. If it were not it would result that property might be held for the life of a trustee, belonging to no one and incapable of being used for any purpose whatever. But the rule as the reason applies to all possible forms of conveyancing. A resulting trust arises for the grantor or the heir.

the English Chancery was settled and hence the concession. What is to be noticed is that if the devise is to a charity, indefiniteness of the object is quite immaterial, and what is the reason for this rule? Is it because of anything peculiar to English law that did not form part of the law that came with our ancestors, and was part of our law before the Revolution? Has it anything to do with the Statute 43 Eliz., or with prerogative, or with Cy-pres doctrine, as we generally understand those words? It is true this was supposed, once upon a time, to be the case in Virginia, Maryland and by the Supreme Court of the United States. Traces of this notion can be found everywhere. Even in Pennsylvania, where the statute is not in force, there was supposed to be a doctrine of some kind that was called "*The Equity of the Statute*," that could maintain a trust for persons incompetent to take, without any devises capable of taking.[1] But it has been generally supposed for forty-eight years past that all this was shown to be utterly without any foothold other than a mistaken dictum of one Chancellor, and the thing had been given up and abandoned.

In 1833, and before the publication of the "Record Commission," the subject had been examined with a care probably never before or since bestowed on such a question. The judgment of Mr. Justice BALDWIN, in Magill *v.* Brown, reprinted from a pamphlet in Brightly's Reports, covers 164 closely printed pages in small type. Its purpose was, and it resulted in showing, that the jurisdiction over trusts for charities, where there was no trustee or one not competent to take, was the ordinary jurisdiction over trusts of any and every kind. It did not depend on any statute or prerogative, or arise out of either. If the object could be ascertained, it was absolutely unimportant whether there was any one competent to take at law or not. There the devise was to a treasurer of an unincorporated religious society *for the benefit of the Indians*, and a bequest to the *citizens* of a town in a foreign country, *to purchase a fire engine* and

[1] It would be a curiosity indeed to see how from the statute an equity can be deduced. One might as well look for equity in a commission of Oyer and Terminer. The thing is impossible if only the statute is read.

keep it in repair, and these were held valid, though the persons named as devisees could not take at law, and there was no person named to select the engine. The demonstration that the 43 Eliz. had nothing to do with this jurisdiction is found on p. 394; that the right was administered by the ordinary rules and principles of the Court (p. 598). The prerogative is discarded on p. 403. It is by virtue of one of the inherent powers of Chancery, *proceeding as a Court of Equity*, according to equity and good conscience (p. 404). Tradition tells us six months were given up to the preparation for this wonderful judgment. There is said to have been a prediction of what the Records in the Tower would disclose if examined, which was verified as to what the jurisdiction had been and how it had been exercised from time immemorial by the "Record Commission Publication."

When, therefore, we are told that this jurisdiction, which recognizes an object or purpose, if it be charitable, as a person for the purpose of sustaining a devise, was an invention of "ecclesiastics," we must ask: Is that phrase used to stigmatize the jurisdiction, and if it is, why not the invention of the same persons of the mode of compelling the execution of any trust and of fastening it on the property, in place of leaving the party to an action? Surely one may weigh in the balance the relative merits of a mind that can see that the real beneficiaries are the persons whose miseries will be alleviated by means of the use of property, and that corporations or trustees to manage the fund and select the patients to be treated are precisely what guardians or trustees for infants are—mere machinery to execute the purpose of the giver or administer property, with those who can find in the want of such machinery a good reason for destroying the right of the beneficiaries in the one case, but not in the other. And it may be that the despised and contemned "ecclesiastics" will turn the balance for largeness of mind and comprehension of what that is or should be, by which mankind are governed and their property disposed of, which we call law. Which law is more worthy of a seat in the bosom of God? It may be that such a

decision as the one cited has escaped observation, but it seems impossible that such a case as that of Mr. Girard's will could have been overlooked. It could not have been studied in any proper sense of that word. Above all, it is quite impossible that the great argument could have been even looked at.

The point of the case mentioned must be carefully borne in mind, and it is not to be looked for merely in the judgment. It could scarcely be expected that Judge STORY should have brought out in very vivid colors the fact that not only was his Court absolutely wrong in the great case of Baptist Church *v.* Hart, but that he had volunteered a most learned note on the subject which was all wrong too. During the argument he had the good taste to hand to Mr. BINNEY a decision of SUGDEN'S, then Chancellor of Ireland, confirming all that he was contending for; although in so doing he, STORY, was convicting himself of error. As it is quite evident that Vidal *v.* Girard has not been appreciated, possibly not looked at, it may as well be stated. The devise was to a municipal corporation as a trustee, to build a school, and select the scholars, first, from the city, second, from the county, third from New Orleans, and fourth from the world at large, and then educate them. It was also quite clear—it was not disputed—that the trustee was utterly incompetent to take the property and act as trustee. And why? It is impossible to conceive anything more incongruous than that a political corporation, the membership of which is compulsory, and which is maintained by compulsory taxation only, can assume the duty and the peril of a trustee—apart from what is the complete objection—that it must act by agents, which a trustee cannot do. If a more grotesque incongruity in relations can be suggested than this—of a political corporation acting the part of a trustee—it is at least hard to find. The sanction by the legislature was *after* the death. No one pretended in *that* argument to rest the case on that. It was met—as that lawyer met all his cases—by discarding all that was not certain.

If the devise required for its validity the intervention

of a trustee to be named in the will, it was void. That it required a trustee to make the work possible was, of course, admitted. This rule of law relied on was the common law, independent of statute, prerogative, or any other consideration, than that there was a *charitable use*, and equity, as part of the law—and *that the universal English law*, which came here with the colonists—not a prerogative power unfitted for freemen. The outline of the argument is given to show that every reason alleged in the Tilden case, as the foundation of the jurisdiction which alone support such trusts, was not only abandoned but disclaimed at the outset. Mr. Binney well knew his argument would only be weakened by any claim on the ground of ecclesiastical polity or religious sentiment or prerogative power. He claimed under a system that had never had a Court of Chancery, nor knew any other equity than such as was believed to be capable of being administered by a court having its jurisdiction thus defined, *that of the King's Bench at Westminster*. That is that simple rule which recognizes law and equity as parts of the one system called law, for determining rights of property. His points were:

First.—That the error of the Courts of Virginia and Maryland required a statement of only the most elementary principles to expose it.

Second.—That at *law* as distinguished from equity there could never exist a title except in a person capable of ascertainment, in whom all duties and in whom all rights must vest at the death of the owner.

Third.—No claim is set up, because the will in every sense defines the objects to be benefited. If a trust for poor orphans generally, or poor children, or poor seamen, or for the members of any class of the helpless or necessitous, however general the description, cannot be supported, neither can this trust; nor will a suggestion be offered to distinguish Girard's trust from these in favor of the former.

Fourth.—Uncertainty of persons to enjoy, until appointment or selection, is a *never-failing attendant of a charitable trust.*

It is impossible to put a proposition more evidently true

as to all charities, or more distinctly contradictory to that on which the decision in the Tilden case rests, so far as any law other than local law not derived from England, is concerned, and none that more distinctly shows the absence of even an apprehension of the true meaning of *uncertainty*, when applied as a test of the validity under the law of England, of a grant, whether by deed or will. Can a charity be described which by its terms makes it possible to define a person by name as entitled to the benefit, without the intervention of a power to select? If this person is ascertained by the terms of the will then the gift creates private property. All are familiar with cases where this very thing created the doubt as to the intention.

Fifth.—A gift to a class, such as the blind or orphans, if charitable, is as effectual as a gift to the children of A. for their own benefit.

After citing some authorities, he says: "Here are ten cases, all before the 43d Eliz., all of a solemn character, and all of them incontestably clear to the point, that perpetual charitable uses—for the poor, for the poorest of the six nearest parishes; for poor men, decayed and unfortunate or visited by the hand of God; to find a preacher in such a place: for the maintenance of a master and usher of a free grammar school; for a free school; for almsmen and almswomen—are good, lawful and valid uses *by the common law of England.*" Then in answer to the supposed necessity of a vesting of a legal estate to maintain this equity: "There is no court in England that has ever held such uses to be void. I do not say that there is none to show that a *legal estate to uses may sometimes be void*, but as to the uses themselves, until the Mortmain Act of George II, there is not an instance, there cannot be one. The general law of England in matters of charity thoroughly carries out the language of the Apostle, 'Charity never faileth,' and equity not only declares the same thing but makes it effectual."

Sixth.—Two other propositions are then stated the exact reverse of the postulates of Mr. Justice BROWN: (*a*) the beneficiaries are the real owners, the trusts for them being lawful, the incapacity of the trustee or the want of one is

of no moment; (*b*) the defendants are entitled, upon general principles, and by the constitution of a Court of Equity, to have their valid trust protected in this Court, whatever may be the defects of the legal estate, whenever the Court recognizes the rule that a trust shall not fail for want of a trustee. Has any one ever heard that phrase qualified by the exclusion of charities?

The cases support this as an universal proposition—that all trusts rest on the same foundation, and the proof is that the thing or property is bound. The authorities are beyond the suspicion of being formulated by "mediæval ecclesiasticism."[1] The application of the rule to charities are all cases, since the revolution in 1688, except one by Finch,[2] and that was a devise of "tithes impropriate to the curate and to all that should serve after him." The devise being void, the heir was declared a trustee.[3]

Seventh.—It is part of the *original jurisdiction.* It is here (p. 114) Mr. BINNEY mentions the *one solitary dictum in 1798 of* Lord LOUGHBOROUGH, that questions the original jurisdiction of equity in cases of charitable trusts before the statute.

It would be unreasonable here to repeat all these authorities. They demonstrated the fact thus—by deciding there is no jurisdiction under the statute, and directing the litigation to be instituted in Chancery. Judge BALDWIN'S opinion is a demonstration that the statement attributing the jurisdiction to the statute is a mistake of FACT. If it were only remembered that the statute was, as stated by Sir ORLANDO BRIDGEMAN,[4] designed to create a more effectual system for administering charities and hunting up fraudulent trustees, the wonderful mistakes as to its effect would have been avoided. The title to the act really indi-

[1] Co. Litt., 290 b; Mr. Butler's note, 113 a; Mr. Hargraves' note, and a string of decisions.

[2] 2 Ventris, 349.

[3] That the Statute of 43 Eliz. has nothing to do with this rule, see 2 My. & K., 581; Shelford, 630. There is also a case (1 Eden, 10) where it is thus stated: "A void conveyance was aided before, during and since the statute."

[4] 1 Ch. C., 157.

cates its intent: "It is an act *to redress the mis-employment of lands*, etc., *heretofore given* to charitable uses." It then creates a commission and gives them power to inquire into and redress wrong. As Mr. BINNEY remarks: "It has been abandoned as useless and inconvenient, and the ordinary jurisdiction resorted to." Can it be supposed that such a statute was intended to give validity to past transactions that, being illegal, were void?

It would seem that there was, on the part of Judge WRIGHT and Judge BROWN, forgetfulness of an important fact in the judicial history of England, that the contest and doubt as to the power of the Chancery to disregard the forms of law, when they made plain legal purposes impossible of execution, were not confined to charities. Long after this jurisdiction had been applied to that class of devises, the question arose, in 1675, as to mere private interests, the effectuating of which required the intervention of some one, and there was no such person named. A will devised lands to be sold and the proceeds distributed between the heir and three nephews.[1] Observe the facts, and compare them with the position deemed fatal by Judge BROWN. He says: "The Tilden trust (the beneficiary) takes nothing by the will," and evidently thinks this vital. In Pell *v.* Pelham there was no estate or property in the land given to the devisees that was owned by the testator or passed by the will. There was a power by inference and no one named to exercise it. There was a direction, but it was given to no one. This was all.

At the present day it is quite probable many really good lawyers would not even be able to see that there was any question either as to the rights or the mode of getting at them. Yet the best lawyer of that day could see neither right nor remedy. Neither could there be except through equity. The Lord Keeper dismissed the bill to enforce the direction, *because no one was named to execute the power.* The Lords declared the *heir* must sell and distribute the money. This is now so commonplace that we would call the rule self-evident.

[1] Pell *v.* Pelham, 1 Levinz., 309.

Now is it not plain—it is not certain—that there is nothing in the fact that the beneficiaries take nothing, or that their right depends on the power of the Court to compel somebody to deal with *what is his estate by law*, as if he had been made a trustee for that purpose and had accepted the trust, though he does not take under the will?

As to this portentous monster called Cy-pres—and the prerogative—let us consider what it means before first insisting on its necessity and then on its illegality. Under this head or title *when the Court exercises the so-called Cy-pres power as a Court of Chancery, and as distinguished from the power under the prerogative*, we find that the Court cannot vary a charity if it is defined, merely because it is useless.[1] But when there is a devise to "such lying-in hospital as his executor might select," and there was no executor, the Court selected.[2] "All and every the hospitals" include all in the town.[3] A devise for augmentation of collections "for the benefit of poor Dissenting ministers;" "a devise to a particular charity which was dissolved before the death of the testator;" blanks left for the names of the charities; "to the poor," all come under the ordinary jurisdiction of trusts.

The distinction between the cases in which the Court or the Crown act is so fine that it seems to have escaped attention. It is this: *In those cases where the testator has evinced no intention to commit the disposal of his property to any one*, there the object or purpose creates a valid gift, but it is executed by virtue of the power of the Crown under the sign manual; but if there are or were intended to be trustees, the power is in the Court.[4] The subject is thoroughly discussed in Moggridge *v.* Thackwell;[5] but the *distinction* is not because of *prerogative;* it is because in the former case the trustee is the king, and he is not amenable to the jurisdiction. It is because the king takes as *constitutional trustee*[6]—as a trustee for property where there is a beneficiary but no legal owner. See 4 My. & K., 584, for an admission as to this being the point decided.

[1] Boyle, 162; Atty.-Gen. *v.* Manfield, 2 Russ., 501.
[2] Boyle, 170. [3] *Id.* [4] Boyle, 213.
[5] 7 Ves., 83. [6] *Id.*, 83.

Certainly, one may be permitted to express astonishment that such conclusions could possibly be drawn in New York from such premises. Some may recall the settlement, in Burgess *v.* Wheat, of the long-disputed question as to the effect on the equitable estate by the escheat of the legal estate because of the death of the trustees without heirs. Could an American Court be induced to sit patiently through such an argument? Yet it is this very thing, only in another form, that raises up this unknown and, therefore, fearful creature, prerogative, as if the duty to give property to the real owner, because the legal title vested in the Crown ought not to extend to republics. Or as if a Court is not entitled to say that when there is a devise to A., in trust for B., the Court will recognize B.'s title if A. happens to die without heirs or has forfeited his estates for felony. Is it to be wondered that even chancellors occasionally overlooked foundations for their decisions and thought only of the question who was the owner, and not how the Court got the right to give him his property?

The only question then is, it being essential that there must be a beneficiary ascertained or ascertainable, are the purposes declared in the Tilden will sufficient for this purpose? It is quite unnecessary to discuss the question as to the power of the Court when no purpose other than a charitable one generally is stated. For, so far as the Tilden Trust is concerned, that purpose is a library and reading-room in a city, and it is admitted it is a charity, and the supposed difficulty is identical with that in the case of the Sailors' Snug Harbor, and there the question arose at common law and not in equity—the devisees were incapable of taking, and the distinction is that there there was a direction to apply, while in Mr. Tilden's will there is only an authority or power to apply to the legislature for powers. If that could be compelled (about which it seems difficult to conceive that there can be a doubt) the distinction relied on does not exist. The objection was the same in both cases; it was optional in both cases. In the one case the option was with the legislature to grant; in the other in

the trustees to apply—*i.e.*, there is a distinction—there is not a difference.

The alternative trust is *any wide and substantial benefit to the interests of mankind.* The considerations drawn from this may be dismissed, (1) because no stress is laid on it, but it is coupled with the former and agreed to be a charity in the sense of the English rule. No attempt is made to bring it within the rule in Maurice *v.* Bishop of Durham. (2) The fact that the alternative power was illegal could not make void the one that was legal.[1] A reference to Chamberlain *v.* Brockett[2] has induced a suspicion that the devise in the Tilden case may have been supposed to be on a condition precedent, and, as was there stated by Lord SELBORNE, if that was a thing which might not certainly happen within the period limited by law, the devise would be void for indefiniteness. The condition there was, if somebody should happen to furnish land for the building. But the fact that the property was devoted to charity made this quite unimportant. So that it is evident the Court of New York rejected the general intention to create a charity, though there were persons named to devise a scheme, and that the Court treats the discretion in selecting as a condition precedent to the vesting. If this be so, it is obvious that a direction to distribute among named charities then established is made void by conferring on the trustee either the power to select or the power to determine the amount each shall have. And further, the same result must follow if, in place of charities, the beneficiaries are children of a particular person. The reference to the Cy-pres doctrine might still further be noticed. There have been very wrong things done in the name of that doctrine, certainly; but one may venture to doubt if any one who sneers at the rule is aware of its meaning, and has not mistaken a few abuses for the rule. That it has no possible bearing on this case is beyond question. It only really applies where the *purpose of the founder is changed.* It has no possible application to a case where the purpose of the founder can be executed.[3]

[1] 2 M. & Keen, 576. [2] L. R., 8 Ch., 206. [3] Boyle, 150.

But there has been more than enough said to show that it is a mere bugbear—horrible only because unknown.

So far as the Tilden case is concerned, if the doctrine of Courts of Equity in reference to charitable uses is supposed to be unfit for freemen, in the ordinary case of its application, one might appeal to the common sense and the universal practice of mankind. What ought to be done with a fund given to charity, where the purpose has ceased—such as the redemption of prisoners from the Barbary States, or the disseminating of information as to slavery in the Southern States? There is no more conspicuous application of the doctrine of Cy-pres than is found in the case of Dartmouth College *v.* Woodward.[1] The foundation was for the education of the Indians and for the civilizing and Christianizing of the children of pagans. The funds were contributed for the spreading of knowledge of the only true God and Saviour *among the American savages.*[2] The institution was converted into an ordinary college for the education of the youth of the State because the objects had ceased to exist. It is true that the Court was not asked to do this, but the trustees nevertheless did it. The point decided was that the State could not vary the charter authorizing this in respect of the mode used in selecting the administrators of the charity, though it was used to educate their own youth. No one had ever questioned the right to divert the funds from their original destination to another and analogous purpose, because the original purposes were no longer possible.[3] Surely, this was better than embezzling them, which was the alternative.

The only possible excuse for not appointing a trustee for a purpose or object is the absence of a person named having a *locus standi* to ask the intervention of the Court. What can be said in defence of a destruction of a public benefaction on such a ground, but that the State is regardless of its duty, if such be its law?

In the Tilden case there were such trustees, and the machinery was perfected, and if there had been no such persons it was absolutely immaterial. All is lost—all this

[1] 4 Wh., 524. [2] P. 535.

[3] See Mr. Webster's recital of the facts, p. 552.

most beneficent, most magnificent dedication of property—this splendid monument to the owner, and upon reasons such as have been pointed out! It cannot be denied that they are technical. They could not be otherwise, whether right or wrong, but they are so technical that the common mind must fail to grasp them; if well founded they are technical in the worst sense. An authority to ask for the machinery, and a duty to ask it. This divides the good from the bad. Can we, governed by such niceties, afford to sneer at the schoolmen, or at the mediæval ecclesiastics who laid the foundations for that jurisprudence which has so certainly commended itself to men that when the rules of property and the rules of evidence recognized in equity differ from those of the law, the former must always prevail? This is the English notion of that which is the creation of their lawyers without the aid of one iota of legislation. Did any system of law ever before receive such a crown, such a proof of admitted superiority from those who understood the subject?

If, then, there are any provincial reasons that have even unconsciously compelled a departure from the law that our English forefathers brought with them, it may be accepted as certain there is not the faintest proof of anything in the law for the past three centuries that can be twisted into a support of that departure, and the decision in the State of New York must be reorganized as quite as local and provincial as one on the custom of Cornwall; indeed far more so, for that, while provincial in England, is in accord with the mining law of all countries and all times.

This paper may most aptly be concluded by a quotation from the close of the argument so frequently referred to already. In winding up his argument (which Judge BALDWIN said could not be reported, for even he, familiar with the subject as he was, found himself left behind if he ventured to make a note), Mr. BINNEY said: "Thus stands the law of Pennsylvania on the subject of charitable uses, and so, I trust, it ever will stand. While we do not ask to impose it upon other States against their will, we are happy that the adjudications of this Court, over and over again

pronounced, bind them not to disturb its operation upon ourselves.

"In two of the States of this Union, the decision in the Baptist Association *v.* Hart's Executors, seems to have been adopted, and indeed to have been carried beyond the precise limits of that judgment, which only refused to establish a charitable use for education, bequeathed to an unincorporated association, incapable of taking at law; and did not, except by the reasoning of the Court, touch the case of a bequest of the same nature to competent trustees. Such cases, however, have since fallen before the judgments of Courts of Chancery, both in Maryland and Virginia. The Maryland doctrine is to be found in Trippe *v.* Frazier,[1] and Dashiel *v.* the Attorney-General.[2] The case of Gallego's Executors *v.* Attorney-General,[3] in the Court of Appeals of Virginia, adopted the same doctrine, and rejects charitable uses, whether there be competent trustees or not, if the objects of the charity are uncertain, in that sense which calls for selection at the discretion of anybody. But I think I cannot be mistaken in saying as to all these cases, that the learned judges adopted as the basis of their judgments the error in point of fact, which led to the judgment in the Baptist Association *v.* Hart's Executors—namely, that the law of charities originated in the 43d Eliz., and that, independent of that statute, a Court of Chancery cannot by its ordinary jurisdiction sustain a charitable use, which, if not a charity, would on general principles be void.[4] What influence the fact of the original jurisdiction of Chancery, as it now appears, would have had upon the respective courts, if it had been shown to them, it is of little use to conjecture.

"In the other States the result has been uniformly otherwise. I regard it as impossible to select from any judicial reports a body of more thoroughly able and learned arguments by both counsel and judges, than are to be found on this question in the various reports of cases to which

[1] 4 Harris & J., 446.
[2] 5 Harris & J., 392; Same *v.* Same, C. Harris & J., 1.
[3] 3 Leigh, 450.
[4] Vid. 5 Harris & J., 398; 6 Harris & J., 7; 3 Leigh, 468.