COMMENT.

Few judicial decisions have aroused more popular disapproval than that declaring void Mr. Tilden's will. Popular criticism of judicial decisions is generally unjust. It forgets that the general principle must control the equity of the individual case. But in this case there is some ground for the popular feeling. It is certain that the intention of a testator was never more plainly or clearly expressed. It is equally certain that it was never more completely disregarded. And it may be said with some justice that rarely or never has the practical purposes aimed at by the law been more completely lost sight of in the subtlety of technical construction. Mr. Tilden after making some special bequests vested the rest of his property in certain trustees and executors for executing the purposes of the trusts. He defined these purposes by requesting his trustees to obtain the incorporation of the Tilden Trust with power to establish a free library in the City of New York, and to promote such other scientific and educational purposes as the trustees might deem proper. If they thought it expedient they were then to convey the entire residuary property to the trust in fulfillment of these purposes; if not, they were to use it independently for such charitable educational and scientific purposes as would in their judgment most widely and substantially benefit mankind. The law of New York requires an imperative trust, which defines the purpose for which the property given in trust *must* be used, to have a definite beneficiary who can enforce the trust. But a trust or power in trust whose execution is discretionary in the trustee or donee is valid where no definite beneficiary exists. Both the majority and minority opinion held the general clause void for uncertainty. The difference of opinion rose in the construction of the Tilden Trust. As the power to convey to that trust was discretionary in the trustee, and as a discretionary power is a valid power, the minority of three judges held that the invalidity of the general clause could not

affect the disposition of the property until the trustees had exercised their discretion, and that the actual incorporation of the Tilden Trust and the conveyance to it by the trustees of all the residuary estate made it of no importance whether the ultimate disposition was or was not valid. Its invalidity could have affected the heirs only in case the trustee failed to convey to the Tilden Trust. The testator's intention had therefore been lawfully carried out. But the majority held that while the creation of the Tilden Trust was discretionary, it was but one of an indefinite and unlimited number of means by which the ultimate and imperative end of the will was to be carried out. There was no discretion in the trustees as to the purposes for which the property was to be used. The trust raised by the will in them imperatively required a disposition to charity in some manner or other. The Tilden Trust was a possible means, which did not affect the general purpose. As the general purpose was imperative, the trust was an imperative trust without a beneficiary and void. The reasoning by which this conclusion is reached may be sound. In one respect, however, it is curious. The effect of striking out the general clause, says the majority opinion, would be to destroy the intentions of the testator. For he did not intend to confer upon his trustees the option of deciding whether his property should go to the Tilden Trust or to his heirs; and if they failed to endow the Tilden Trust, as they might if they chose, the property could go nowhere else. But the testator has declared that his trustees shall have option only as to means but not as to ends. Therefore, although the Tilden Trust has been created as the testator desired and all the residuary property has been conveyed to it — also as the testator desired, — nevertheless, as the trustees might have chosen not to incorporate and endow the Tilden Trust, and might have thrown the residuary property into the hands of the heirs by so failing, and might thus have exercised a power which the testator did not mean to confer upon them — *we* will declare the whole will void in order not to defeat his intention and will give all his property to his heirs because the trustees might have so indirectly given it.

Is it not a question whether the usefulness of the law and its value as a practical guide to conduct is impaired, when a refined and intricate construction, which nullifies, is adopted, instead of a broad and generous one which upholds? In this instance the anxiety of the court not to defeat the testator's intention resulted in giving his entire estate to the heirs whose legacies he had expressly declared should be stricken out of his will if they caused it to be contested.

Mr. Justice Lamar, as Circuit Justice, has just given in the northern district of Mississippi, a decision in a curious case, which will gratify strict constructionists. A U. S. deputy marshal for a district of Tennessee had received, while in Mississippi, notice of the whereabouts of a criminal for whose arrest he had a lawful warrant with him. He borrowed a pistol of a deputy sheriff in Mississippi to effect the arrest with; whereupon a zealous mayor, catching a glimpse of the protruding handle, had him promptly arrested and jailed for the offence of carrying concealed weapons, contrary to the law of Mississippi. After further reflection, however, the municipal officials began to waver. It did not seem so clear that a U. S. marshal could be arrested by State authorities for carrying concealed weapons. He was released, and proceeded to make the arrest in his own district. Returning to Mississippi he was again arrested on the old charge, and this time tried and severely fined. Upon appeal to the Circuit Court it was alleged that, as he was setting out to make a lawful arrest, he was executing the law of the United States, and had a right to carry a pistol, if that were necessary to accomplish the purpose, and that while executing the laws of the United States he was under their protection. But the Justice held that he was only a private citizen while beyond the limits of his district, and it was of no consequence that somewhere else he had an official character; and as to that section of the revised statutes which provides that, "the marshals and their deputies shall have in each State the same powers in executing the laws of the United States as the sheriffs and their deputies in such State may have by law in executing the laws thereof," said: "the argument is that as in the performance of their duty the sheriffs and their deputies in Mississippi have a right to carry a pistol, therefore the relator as a deputy United States marshal for the western district of Tennessee, should have the same right. This conclusion is a *non-sequitur*. That section of the statute will not warrant such a construction. It was never intended by that section to enlarge the territorial jurisdiction of the U. S. marshals and their deputies, which is the logical effect of the construction contended for. * * * It means simply that the U. S. marshals and their deputies within their respective districts, shall have in the States the same powers in executing the law of the U. S. as the sheriffs and their deputies have by law in executing the laws thereof." (*Walker* v. *Lea*, 47 Fed. Rep. 645).

Under a statute similar to those existing in most States, providing for the forfeiture of the charter of a corporation for the violation of any of its provisions or failure to exercise the powers conferred by it, the New York Court of Appeals has recently rendered a decision, part of which is well worth producing here. After quoting the statute it continues, in part as follows: "* * * The statute does not execute itself, but requires the action of the attorney-general to make it effective. Even the willful neglect of a railroad corporation to exercise all its franchises does not, of itself, terminate its corporate existence; but to effect that result, the State, through its attorney-general, must not only elect to enforce the forfeiture, but also procure leave of court to bring an action for that purpose. Such actions are not even then maintainable, except some public interest is involved which requires the exercise of the franchise by the corporation. It was therefore incumbent upon the State to show upon the trial of the action that a cause of forfeiture had not only been incurred by the corporation, but that it continued to exist, and that its existence involved some public interest, and also that the court had authorized the bringing of the action. An action thus commenced is even then necessarily always within the control of the State, as the sole party interested, to prosecute or abandon, at its mere will and pleasure. It is responsible to no one for the exercise of its discretion in this respect. * * * By enforcing the forfeiture of corporate existence the State receives no benefit and acquires no property, and by waiving such forfeiture it loses no privilege and interferes with no vested right. Having the absolute power at will to take the corporate life, it does not hamper its freedom of action by forbidding its servants, in specified cases, from prosecuting actions for forfeiture. It requires no exercise of judicial power to enable it to waive a forfeiture, but it may be effectuated by the mere expression of its will, and its will may be based upon cause or utterly without one. Having absolute power, as the supreme representative of the people, in respect to the question, it may do so with or without cause, or upon whatever terms or conditions it may see fit to impose." (*Opinion by Ruger, C. J., in People v. Ulster & D. R. Co., 28 N. E. Rep. 636.*)

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There being no innkeeper's liability act in Indiana, the Supreme Court of the State has recently passed upon a case (*Bowell* v. *DeWald*, 28 N. E. Rep. 430) somewhat similar to that of *Peckham* v. *Barnes*, which has for so long a time done service in

our Moot Courts. They hold that at common law the failure of a guest to inform the innkeeper or his servant that his valise contained valuables does not constitute negligence. An innkeeper is an insurer of all goods entrusted to his care, and the fact that he may not know the value of a particular valise entrusted to him or his servant does not lessen his liability.

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In the case of *People ex. rel. Fitzgerald, Mayor*, v. *Whipple et al.*, 49 N. W. Rep. 822, the Supreme Court of Michigan held that "a mandamus will not lie to compel the members of a city council to attend the meetings thereof."

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The views expressed in Mr. Thomas Thacher's article, "Incorporation in one State for business to be done in another," have received confirmation in *Demarest* v. *Grant*, New York Court of Appeals, published, since the article was received, in 28 North Eastern Rep. 645.