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RULES AGAINST PERPETUITIES AND GIFTS TO CHARITY

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I

A perpetuity is an "inalienable, indestructible interest."¹ In speaking of the "rule against perpetuities," the courts often refer to some rule, judicial or statutory in origin, against the unhampered existence of such an interest. Or the reference may be to the rule that invalidates contingent interests which may vest in interest at a remote period—the rule against remoteness.² And what may be meant may be a rule against undue postponement of enjoyment of the property—that is, some rule against accumulation.³ These rules have their common source in the "policy of the law . . . that property should not be taken out of commerce," explained Gray.⁴ Gifts by way of trust to charity do render property inalienable;⁵ and gifts to charities, by way of trust or not, may vest

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¹ GRAY, RULE AGAINST PERPETUITIES (3rd ed. 1915), sec. 590.

² *Ibid.*, sec. 2 suggests this as the appropriate nomenclature.

³ For the various rules the phrase may cover, see 2 BOGERT, TRUSTS AND TRUSTEES (1935), Sec. 341.

⁴ GRAY, RULE AGAINST PERPETUITIES (3d ed. 1915), sec. 603a. Moreover, future interests are stricken by the rule against remoteness because they tend to impair more energetic use of the property by the present tenant. GRAY, sec. 603f.

⁵ *Ibid.*, sec. 590. Phillips v. Chambers, 174 Okla. 407, 51 P. (2) 303 (1935) at p. 410. Professor Simes suggests that an indestructible trust (such as a trust for charity is) makes for malienability by way of indirect restraint on alienation because of the "practical malienability" involved. 2 SIMES, FUTURE INTERESTS (1936), sec. 440. In absence of power expressly given the charitable trustee must get permission to sell from the legislature—Crawford v. Nies, 224

at remote periods.⁶

But there is also a strong policy in favor of gifts for charitable purposes. "A devise or bequest to charity is a favorite of the law and is liberally construed to make it effective."⁷ My purpose is to try to discover, primarily from a study of the case law since the last edition of Gray's Rule against Perpetuities, what adjustments the law makes in favor of gifts for charity as against the operation of these rules against perpetuities.

II

The courts persist in saying that "the rule against perpetuities does not apply to gifts for charity." The context may show that the reference is to what would seem to be the common law rule⁸ that inalienability (resulting from the indirect restraint upon alienation imposed by an indestructible trust) shall not continue beyond lives in being and twenty-one years.⁹ Or the reference may be to those statutes existing in some jurisdictions which prohibit suspension of alienation beyond specified periods.¹⁰ The New York statutes against undue suspension of alienation (which were the models for similar statutes in other states) were at one time held to apply to gifts for charity.¹¹ Adopted statutes were given

Mass. 474, 113 N.E. 408 (1916)—or from a court of equity—Delaware Sand & Development Company v. Presbyterian Church, 16 Del. Ch. 410, 147 Atl. 165 (1929), South Kingston v. Wakefield Trust Company, 48 R.I. 27, 134 Atl. 815 (1926)—upon a showing that the sale is essential to the purposes of the trust. And the presence of a power of sale would not materially add to marketability—*cf.* 2 SIMES, FUTURE INTERESTS (1936), sec. 553.

⁶ *Cf.* below, note 51.

⁷ *Re Schleier's Estate*, 91 Colo. 172, 13 P. (2) 273 (1932) at p. 176. Such language is to be found in nearly all the cases.

⁸ 1 SIMES, FUTURE INTERESTS (1936), sec. 53. Warren, *The Progress of the Law—Estates and Future Interests*, (1921) 34 Harv. L. Rev. 508 at p. 646.

⁹ *Bauer v. Myers*, 244 Fed. 902 (C.C.A. 8th, 1927); *Delaware Land & Development Co. v. First & Central Presbyterian Church*, *supra*, note 5, *Skinner v. Northern Trust Co.*, 288 Ill. 229, 123 N.E. 289 (1919), *Newton v. Newton Burial Park*, 326 Mo. 901, 34 S.W. (2) 118 (1931); *Powers v. First National Bank*, 137 S.W. (2) 839 (Tex. Civ. App. 1940); *Smith v. Pond*, 90 N.J. Eq. 445, 107 Atl. 800 (1919) reversed on another point 92 N.J. Eq. 154, 92 N.J. Eq. 211 (1920)

¹⁰ *Dykeman v. Jenkins*, 179 Ind. 549, 101 N.E. 1013 (1913); *Wilson v. First National Bank*, 164 Iowa 402, 145 N.W. 948 (1914); *Phillips v. Chambers*, *supra*, note 5.

¹¹ ZOLLMAN, AMERICAN LAW OF CHARITIES (1924), pp. 28-38.

similar construction.¹² But now either remedial statutes have been passed,¹³ or courts have of their own volition held that the statute against suspension of alienation does not apply to charities.¹⁴ So that it may be stated as uniformly accepted law that property given to charity may be rendered perpetually inalienable, at least, by way of indirect restraint upon alienation—provided, however, that the gift vests in interest within the period permitted by any rule against remoteness.¹⁵ A gift is vested, of course, if made unconditionally to an existing donee. At this point it will have to be merely asserted that a gift for charitable purposes is also deemed vested whenever power exists in a court of equity to compel application of the donated property to charity.¹⁶ If the gift is vested from the first or must vest within the legal period, the property thus effectually given to charity may abide there inalienable forever, however impossible it may be to create an indestructible private trust to last forever. Moreover, although the grantor or donor of property to an individual may not affix a direct restraint upon alienation,¹⁷ it would seem that the donor of property to a charity may.¹⁸

For this particular "rule against perpetuities," whether judicial or statutory, that prohibits inalienability arising because of direct or indirect restraint upon alienation, has for its object the prevention of "accumulation of vast private estates by making property in the hands of individuals inalienable."¹⁹ Gifts to charities are entirely without the scope of the rule; society gains rather than loses by property being taken out of commerce when it is given to charity.

¹² See *Lowell v. Lowell*, 29 Ariz. 138, 240 Pac. 280 (1925).

¹³ Ariz. Rev. Code (Struckmeyer, 1928), sec. 2761; Mich. Stats. Ann. (1937), sec. 26 (1191) Wis. Stats. (1939); sec. 230.15. The statutes (New York Personal Property Law, sec. 12; N.Y. Real Property Law, sec. 113) that the New York have liberally construed as exempting charitable trusts from the statute against suspension of alienation do not even refer to any rule against perpetuities. *Matter of McDowell*, 217 N.Y. 454, 112 N.E. 177 (1916).

¹⁴ See above note 10.

¹⁵ *Frazier v. Merchant's National Bank*, 296 Mass. 298, 5 N.E. (2) 550 (1936); *Barr v. Geary*, 82 Ind. App. 5, 142 N.E. 622 (1924).

¹⁶ See below, Part V.

¹⁷ 2 SIMES, FUTURE INTERESTS (1936), sec. 445 and following sections.

¹⁸ *Dickenson v. City of Anna*, 310 Ill. 222, 141 N.E. 754 (1923); *Trustees of First Presbyterian Church of Town of Salem v. Wheeler*, 106 N.J. Eq. 8, 142 Atl. 589 (1930). Contra, *Haas v. Haas*, 195 N.C. 734, 143 S.E. 541 (1928).

III

If a valid charitable trust is set up, the further question presents itself if the settlor of the trust may validly direct accumulation of all or part of the property, and if so, for how long. An accumulation occurs whenever there is an addition to the capital fund.²⁰ The very reason for exempting charitable gifts from the application of the rule against perpetuities just discussed is that the property is to be devoted to charitable rather than private purposes. May then the settlor defer the application of the property to those purposes?

Under the doctrine of *Saunders v. Vautier*,²¹ an individual beneficiary who is *suu juris* and has a vested and indefeasible interest may defeat the provision for postponement of enjoyment; and in England the doctrine has been extended to charitable settlements.²² However, if the gift be upon trust with discretion in the trustees to select the charity donees after a period of accumulation, the trustees should at least "*prima facie* bear in mind" the direction to accumulate.²³ But in no event may an accumulation continue for longer than twenty-one years because the Thelluson Act applies to charitable gifts.²⁴

In *Berry v. Geen*,²⁵ testator gave the residue of his estate on trust to pay annuities to natural persons and to charitable organizations; the balance of income was to be accumulated; any deficiency of income in one year could be made up from income of any other year. "After the death of the last personal annuitant," the property was given to the X Charity. A large surplus of income accruing, X Charity asked that the annual surplus income be paid over to it, or the *corpus* itself subject to provisions for safe-guarding the annuitants. The House of Lords held that X Charity had no vested interest in the *corpus* because of the deficiency clause, so that *Saunders v. Vautier* was inapplicable. Even so, the court intimated that X Charity could have had immediate en-

¹⁹ Phillips v. Chambers, *supra*, note 5, at p. 412.

²⁰ 2 BOGERT, TRUSTS AND TRUSTEES (1935), sec. 217.

²¹ Cr. & Ph. 240 (1841)

²² Wharton v. Masterman (1895) A. G. 186.

²³ In re Knapp (1929) 1 Ch. 341 at p. 344.

²⁴ Law of Property Act (1925), sec. 164; see *Berry v. Geen*, below, note 23.

²⁵ (1938) A.C. 575, *aff'g* (1937) 1 Ch. 325.

joyment of the property had it not been for the phrase "after the death of etc."²⁶ By taking this phrase at its face value, the court held that the income to be released by the running of the Thelluson Act twenty-one years after the settlor's death and accruing up to the death of the last annuitant went by intestacy. Therefore, in order to protect the rights of those taking by intestacy, the base for the accrual of income after the running of the statute would have to be not only the *corpus* of the trust fund but also the accumulations got during the running of the Act.

This result was surely not intended by the settlor. If he had understood that accumulations would have to end twenty-one years after his death, he would have wanted the X Charity to have possession at that time of the principal. One wonders if the American courts, applying their often professed rule of liberal construction applicable to charitable gifts, would not have concluded that the testator's scheme was essentially that X Charity have possession whenever and however the period of accumulations terminated. A gift to charity being involved, his inadequate exposition of that scheme in terms of the death of the last annuitant would be disregarded.

Berry v. Geen shows that what is most characteristic in the English treatment of accumulations for charity is not the desire to put the charity in possession at once. Rather what would seem to be most characteristic is that the rules applicable to private settlements—the rule of *Saunders v. Vautier*, the statute against accumulations and rules of formalistic construction—are applied with equal vigor to charitable settlements.

However much the rules pertaining to accumulations for charity differ among themselves in this country, the trend is to extend more latitude to accumulations for charity than to those for private purposes. It has been held, under what may be called the Massachusetts doctrine, that what would seem to be the common law rule against accumulations²⁷ does not apply to accumulations for charity.²⁸ These are, in-

²⁶ P. 582.

²⁷ Cf., 2 BOGERT, TRUSTS AND TRUSTEES (1936), sec. 215, that enjoyment of vested accumulations cannot be postponed past lives in being and twenty-one years.

²⁸ The cases on the point come from Massachusetts and Connecticut. For recent cases following earlier decisions in their respective jurisdictions, see *Lyme High School Association v. Alling*, 113 Conn. 200, 154 Atl. 439 (1931); *Frazier v. Merchant National Bank*, *supra*, note 15.

stead, subject to the order of the court of equity which may, in the exercise of its *cy pres* power, either at the outset²⁹ or after some accumulation has taken place,³⁰ interfere should the accumulation be "unreasonable, unnecessary, and to the public injury";³¹ checking the accumulation completely or ordering a shorter period.³² Upon him who would stop accumulation is the burden of persuasion.³³ And in some states statutes expressly exempt accumulations for charity from prohibitions against accumulations.³⁴ But, on the other hand, other legislatures have deemed it more politic that rigid limits be set.³⁵

*Reasoner v. Herman*³⁶ in the teeth of the Indiana statute against accumulations emphatically approved the Massachusetts attitude.

" . . . Appellees talk of this accumulation as going through the ages until it becomes a public menace. There is no occasion for alarm; for this may be limited by a court of equity, so that . . . it will subserve the main purpose, charity."

Professor Schnebly³⁷ believes that the thrust of *Webb v. Webb*³⁸ implies like approval. In this case, testator ordered the trustees of the residue of his estate to pay income to his wife for life then to hold it for charitable purposes. Twenty per cent of the income each year was to be set aside into a "sinking fund," the income from which fund was to be also expended for charity, the *corpus* of which fund was to be used "to restore, replace or make major improvements or additions to the buildings and improvements on said real estate."³⁹ A Thelluson Act was in force. The court upheld the sinking fund arrangement on the ground that it called for the

²⁹ See cases cited *supra*, note 28.

³⁰ *St. Paul's Church v. Attorney General*, 164 Mass. 188, 41 N.E. 231 (1895).

³¹ *St. Paul's Church v. Attorney General*, *supra*, note 30 at p. 204.

³² *Ripley v. Brown*, 218 Mass. 33, 105 N.E. 637 (1914) at p. 38.

³³ *St. Paul's Church v. Attorney General*, *supra*, note 30 at p. 205.

³⁴ Mich. Stats. Ann. (1937), sec. 26, 1191, Minn. Stats. (Mason, 1927), sec. 8090-2; 20 P.S., sec. 3251—*In re Archambault's Estate*, 308 Pa. 549, 162 Atl. 801 (1932) *Quaere* if the effect of these statutes is to preclude equitable supervision over accumulations for charity.

³⁵ Ariz. Rev. Code (Struckmeyer, 1928), sec. 2773 (twenty-one years); Wis. Stats. (1939), sec. 230.37 (twenty-one years), N.Y. Personal Property Law, sec. 16 (gifts to colleges left to discretion of regents; one fourth of principal of gifts to other types of charities can be accumulated unless that equals more than \$50,000.00 and in no case can more than \$100,000.00 be accumulated).

creation of a mere replacement fund; no "accumulation" was called for because accumulation was to be only temporary; prudent safeguarding of the principal would require the periodic expenditure of any surplus income. Professor Schnebly would seem to be right in criticizing the court for lack of candor; what was involved was "in substance an addition of income to capital";⁴⁰ and it would have been more ingenuous to have held that such accumulation as would be caused by the sinking fund clause was simply not within the contemplation of the statute. The accuracy of Professor Schnebly's belief that the Illinois court indicated that it would follow the Massachusetts practice is, however, doubtful. The court said that if after the lapse of the statutory period it were found that a surplus of income accrued over what was needed for replacement—if the sinking fund "created any accumulations contrary to the act, equity would provide a lawful method of managing the estate."⁴¹ Under the *Reasoner* approach, there cannot be accumulations contrary to the statute where gifts to charity are involved because the statute does not apply. The Illinois court says that the statute does apply and that constant paring of surplus income down to a replacement fund by the equity court may be necessary.

There would not seem to exist, then, the uniform exempting of charitable gifts from this particular rule against perpetuities—that against making income inalienable—that exists as to the rule against inalienability of *corpus*. It is submitted that the Massachusetts attitude toward accumulations for charity of laissez-faire curbed by the existence of supervisory power in equity should prevail in those states, at least, where *Saunders v. Vautier*⁴² is not received and where property vested in charity may stay inalienable forever. If the courts of a jurisdiction have held that it is not against public policy for a large amount of property to become an inalienable *res* to be devoted to charity forever—a

³⁶ 191 Ind. 642, 134 N.E. 276 (1922) at p. 654.

³⁷ Schnebly, *Some Problems under the Illinois Statute against Accumulations* (1932), 26 Ill. L. Rev. 491.

³⁸ 340 Ill. 407, 172 N.E. 730 (1930).

³⁹ *Webb v. Webb*, 340 Ill. 407, 172 N.E. 730 (1930) at p. 412.

⁴⁰ 26 Ill. L. Rev. at p. 495.

⁴¹ P 421.

⁴² It is not received by most American authority. 2 SIMES, *FUTURE INTERESTS* (1936), sec. 591.

res that may increase in size because of financial trends—it would seem to follow that public policy is not offended because that res may be increased through accumulation, providing equity has power to prevent undue deferment of distribution.⁴³ And moreover, since even under the “new rules” charitable gifts should be encouraged, it is well to remember that the potential charitable settlor will be spurred to proceed with his charitable settlement if he feels that his scheme will be presumed valid and that if his scheme cannot be carried out exactly it will be altered by the discreet hand of the chancellor, not drastically compressed through the operation of some rigid rule.⁴⁴

It is true that the courts following the Massachusetts practice have not yet traced the line with any definiteness where the social utility of continued accumulation disappears and equity must intervene. That all schemes have been approved as drafted⁴⁵ only shows a desirable depth to the policy of exemption from rules against accumulations. The cases show that whether or not there will be a substantial increase in corpus is immaterial. Where the plan of the settlor is to provide for an obviously useful charity, a prescribed lengthy period of deferment of application to the charitable use only causes the court to consider if possibilities for investment will continue and if the purpose may be carried out at the designated period.⁴⁶ The necessities of the present are relegated in favor of those of the future. One may conceive instances where equity might interfere.

“No doubt there could be a period of accumulation so long with the time of enjoyment so remote that for this reason alone a court should refuse to sanction the plan.”⁴⁷

⁴³ St. Paul's Church v. Attorney General, *supra*, note 30 at p. 204; Schnebly, *op. cit.* at p. 504.

⁴⁴ Even in the absence of an express direction, equity may order accumulation if that would best carry out settlor's purpose. Note, 35 Mich. L. Rev. 694 (1937) Allen v. Trustees of Nassau, 107 Me. 120, 77 Atl. 638 (1910). The writer of the note in 41 Harv. L. Rev. 514 (1928) errs in saying that such cases as Ely v. Attorney General, 202 Mass. 545, 89 N.E. 166 (1909) and Grimke v. Attorney General, 206 Mass. 49, 91 N.E. 899 (1910) are authority to the contrary.

⁴⁵ 2 SIMES, FUTURE INTERESTS (1936), sec. 591.

⁴⁶ Frazier v. Bank; Lyme High School Association v. Alling, *supra*, note 28.

⁴⁷ Frazier v. Bank, *supra*, at p. 301.

⁴⁸ GRAY, RULE AGAINST PERPETUITIES (3d. Ed. 1915), sec. 679a.

The necessities of the present might be very pressing. The accumulation of a vast sum might be envisaged for a manifestly trivial cause.

Gray disapproved of the Massachusetts practice because, a question of public policy being involved,

"It would seem better that the matter should be fixed by a positive rule of law than left to the discretion of the judges. The discretion which chancellors exercise is a discretion in arranging the claims of one individual against another, not in settling limits to the operation of rules of public policy. It is a novel head of equity."⁴⁸

But, in arranging individual disputes, does not equity act in final analysis upon considerations of policy? In exercising their power of *cy pres*, the equity courts "are in reality making a disposition of the trust *res* which they think is desirable from the point of view of public policy."⁴⁹ Whether or not the utility of postponing the application of property given to charity outweighs the advantages involved depends in any one case upon manifold circumstances peculiar to that case and its settling in time and space. The problem should be left to the sound discretion of the chancellor.⁵⁰

IV

The rule against remoteness⁵¹ applies to gifts for charity⁵²—in the absence of statute, at least.⁵³ The law permits

⁴⁸ 2 BOGERT, TRUSTS AND TRUSTEES (1935), sec. 436.

⁴⁹ Accord: 16 Va. L. Rev. 370 (1930).

⁵¹ The common law rule, as stated by Gray, sec. 201, is that "no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." It may be modified by statute. *Matter of Wilcox*, 194 N.Y. 288, 87 N.E. 497 (1909).

⁵² *First Camden National Bank & Trust Co. v. Collins*, 114 N.J. Eq. 59, 168 Atl. 275 (1933) reversing 110 N.J. Eq. 623, 160 Atl. 848 (1932); *Girard Trust Company v. Russell*, 179 Fed. 446 (C.C.A. 3rd, 1910); *Malmquist v. Detar*, 123 Kan. 384; 255 Pac. 42 (1927); *In re Dyer* (1935) *Vict. L. Rep.* 273; *Muir v. Archdall*, 19 N.S. Wales St. Rep. 10 (1918); *In re Schjaastad's Estate*, 50 Dom. L. Rep. 445 (1919); *Kingham v. Kingham* (1897) *Ir. Eq.* 170; *In re Lord Stratheden and Campbell* (1894) 3 Ch. 265; *Easton v. Hall*, 323 Ill. 397, 154 N.E. 216 (1926), noted in 40 *Harv. L. Rev.* 918 (1927).

⁵³ The proviso is added because of statutes providing that charitable gifts shall not be invalidated because "of any statute or rule against perpetuities." *Mich. Stats. Ann.* (1937), sec. 26.1191, *Min. Stats.* (Mason, 1927), Sec. 8090-2. These have not as yet been construed as covering a rule against remoteness. *In re Brown's Estate*, 198 Mich. 554, 165 N.W. 929 (1917) merely decided that a statute against suspension of alienation was referred to.

malienability when the property vests in charity within the legal period; but the policy in favor of charitable gifts has not proved so strong as to cause courts to hold that property may be rendered less alienable by the existence of a future gift to charity when power may not exist within the legal period to compel distribution of the property for charity.

However, in one situation gifts to charity are excepted from the rule. Under the doctrine of *Christ's Hospital v. Granger*⁵⁴ a gift to a charity that would otherwise be invalid for remoteness is valid if it follows a valid gift to charity. The doctrine is usually justified on the ground that since property once given validly to charity is put *extra commerciam*, the gift over does not cause the property to be any the more inalienable.⁵⁵ The doctrine of the *Granger* case does not save remote gifts to charity after a gift to an individual, nor remote gifts to individuals after a gift to charity.⁵⁶ Whether the doctrine could be justified or not, Gray said he would leave to the "judgment of the learned reader."⁵⁷ Since 1915, although some legal writers have been moved to express dislike of the rule,⁵⁸ the courts have taken it in stride,⁵⁹ together with the limitations to the exceptions.⁶⁰

⁵⁴ 16 Sim. 83 (1847), affirmed 1 Macn. & G. 460 (1848).

⁵⁵ WALSH, FUTURE ESTATES IN NEW YORK (1931), sec. 22.

⁵⁶ *Ibid.*

⁵⁷ GRAY, RULE AGAINST PERPETUITIES (3d Ed. 1915), sec. 603h. Gray proffered two possible objections to the *Granger* doctrine. First, this exemption given gifts to charities, circumscribed as it is to gifts over to charities preceded by charitable gifts, is illogical. Inalienability would not exist to a greater degree where either the first or the subsequent gift over were to an individual, and there is no reason why a gift over to a second charity may not clog the use of the property in the hands of the first charity as completely as a gift over to an individual would. Second, if the remote gift should be allowed to come into possession on the contingency of failure by the first charity to maintain the grave of the settlor or to make periodic payment to settlor's heirs etc., the settlor can do indirectly what he could not do by the direct method of a private trust.

⁵⁸ Scott, *Control of Property by the Dead* (1917), 65 U. of P. L. Rev. 527 at p. 641; Warren, *supra*, note 8 at p. 646.

⁵⁹ *Dickenson v. City of Anna*, *supra*, note 18, In re Delong's Estate, 140 Misc. 92, 250 N.Y.S. 504 (1931); In re Levan's Estate, 314 Pa. 274, 171 Atl. 617 (1934). Professor Warren hailed *Herron v. Stanton*, 79 Ind. App. 683, 128 N.E. 363 (1920) for not following the *Granger* case, in 34 Harv. L. Rev. at p. 646, but the court recanted in a republished opinion in 179 Ind. App. 683, 147 N.E. 305 (1925).

⁶⁰ Gifts over to charity preceded by gift to individual. Application of Gordon, 281 N.Y. 541, 24 N.E. (2) 322 (1939); *Clairborne v. Wilson*, 168 Va. 469, 192 S. E. 585 (1937); *Talbot v. Riggs*, 287 Mass.

The courts merely mention and apply the rule; it must be taken as settled law.

Professor Scott⁶¹ urges that, at least, a remote gift to charity upon a contingency unrelated to charitable purposes should be stricken as offending the policy embodied in the prohibition against the maintenance by private trust of the state of affairs the failure to maintain which by the first charity is to deprive it of the property. Although this would seem to be sensible, it must be noted that in cognate situations where a determinable fee⁶² or a fee upon condition subsequent⁶³ has been given to charity subject to the settlor (or rather his heirs) regaining the estate upon the happening of an unrelated contingency, the contingency has been held binding. In these cognate situations, a remote gift may be limited after charitable gifts over to individuals (taking because of relationship to the settlor) because of the vested quality ascribed to possibilities of reverters and to rights of entry.⁶⁴ Hence, the court may be faced with a problem of construction whether the gift over is an executory interest in favor of third persons or one of the above types of vested interests.⁶⁵

Community of Priests of St. Basil v. Byrne,⁶⁶ held that an option to rebuy real estate from a charity grantee by a charity grantor was valid as falling within the *Grainger* doctrine. This would seem clearly correct. The court also

144, 191 N.E. 360 (1934); *In re Penrose Estate*, 257 Pa. 231, 101 Atl. 319 (1917). Gift over to individual after gift to charity: *In re Da Costa* (1912) 1 Ch. 337; *Yarborough v. Yarborough*, 151 Tenn. 221, 269 S.W. 36 (1925).

⁶¹ 3 SCOTT, TRUSTS (1939), sec. 401.5.

⁶² *In re Chardon* (1928) Ch. 464.

⁶³ *Dunne v. Minsor*, 312 Ill. 333, 143 N.E. 842 (1924).

⁶⁴ *Simes*, sec. 506-7. In England rights of entry are deemed executory. *Ibid.* Under the English cases, moreover, the power to make valid though remote gifts over to individuals (claiming through the settlor) is further restricted by the requirement that the original gift to charity be expressed in determinable terms. If the charitable gift be expressed as perpetual, any later provision for an automatic return of the property upon the happening of an event will be deemed to have created an executory and invalid interest—an interest “operating by way of positive curtailment and destruction of the original gift.” *In re Peel’s Release* (1921) 2 Ch. 218 at p. 224.

⁶⁵ *Yarborough v. Yarborough*, *supra*, note 59.

⁶⁶ 236 S.W. 1016 (Tex. Civ. App. 1922).

suggested that the option did not create any property right in the grantor;⁶⁷ but it must be recalled that the leading case which subjected options to the operation of the rule against remoteness did so on the ground that the option did create an equitable property right.⁶⁸

Are there situations other than that of the *Granger* case where, although no power exists to compel distribution of the property to the charity within the legal period, the rule against remoteness does not apply? In *Odell v. Odell*,⁶⁹ Mr. Justice Gray uttered a puzzling dictum. A charitable gift is valid "provided that there is no gift of the property meanwhile to or for the benefit of any individual or private corporation." Charitable gifts would indeed be favored by the law if the rule against remoteness applied to them only if they were preceded by private gifts. But the conclusion that must be drawn from the cases is that, although limitations to charity will be liberally construed, the rule will be applied to invalidate remote interests which even liberal construction cannot designate as immediate. It is true that litigants have made use of Mr. Justice Gray's language with some success. Not that they have succeeded in defeating the charitable gifts, but they have driven some courts to think they had to make a distinction between preceding private interests of the type Mr. Justice Gray had in mind (whatever they were) and preceding gifts of a certain percentage of the income to an individual.⁷⁰ Making distinctions where there are no differences would seem to indicate that the *Odell* dictum will not be followed. Nor has it been. An unconditional gift by way of remainder to an existent charity is valid and vested though preceded by a life estate to an individual;⁷¹ and a gift on a charitable use may be invalid though not preceded by a gift to a private individual.⁷²

⁶⁷ At p. 1018. The upper court in 255 S.W. 601 (Tex. Civ. App. 1923) at p. 603 said it was unnecessary to decide, on the facts before it, whether the covenant to reconvey was a personal one or "was attached to the land."

⁶⁸ *London & South Western R.R. Co. v. Gomm*, 20 Ch. D. 562 [1882].

⁶⁹ 10 Allen 1 (1865), at p. 7. Similar language is to be found in Mr. Justice Gray's decision in *Russell v. Allen*, 107 U.S. 163, 27 L. Ed. 397 (1882) at p. 171.

⁷⁰ *Washington Loan and Trust Co. v. Hammond*, 278 Fed. 569, 51 App. D.C. 260 (1933); *Mass. Institute of Technology v. Atty. General*, 235 Mass. 288, 126 N.E. 521 (1920).

⁷¹ *Ashmore v. Newman*, 350 Ill. 64, 183 N.E. 1 (1932).

⁷² See cases cited under note 52.

V

Most litigation upon the issue of remoteness has arisen where the possibility seems to exist because of the terms of the dispositive instrument that application of the property to charity may be deferred beyond the legal period and there is no prior valid gift to another charity. On the basis of the results reached, the cases may be divided into two groups. First, there are those where the termination of the period of postponement of enjoyment depends to a substantial degree upon action by the trustees or other personal representatives of the settlor. The personal representatives are directed to establish and maintain a charitable establishment.⁷³ More frequently settlors desire that their charitable purposes be carried out by corporations. They direct their representatives to form a corporation and pay over the property to it;⁷⁴ the gift may be in terms made direct to the future corporation.⁷⁵ Often, the formation of the corporation, or at least the payment over, is to occur only after a period of accumulation that may last beyond the legal period.⁷⁶ Or the direction for accumulation may be the sole cause of deferring the application of property to charity;⁷⁷ again, it may be coupled with a direction to pay the accumulated fund over to another body for expenditure.⁷⁸ In these cases, whether or not the property will ever be distributed in charity is dependent to some degree, of course, upon extrinsic factors. It

⁷³ *Barr v. Geary*, *supra*, note 15.

⁷⁴ *In re Potts' Will*, 205 App. Div. 147, 199 N.Y.S. 880 (1923), affirmed *per curiam* in 236 N.Y. 658, 142 N.E. 323 (1923); 37 Harv. L. Rev. 275 (1923); *In re Juillard's Will*, 238 N.Y. 499, 144 N.E. 442 (1924).

⁷⁵ *In re Tower's Estate*, 147 Misc. 773, 226 N.Y.S. 43 (1933); affirmed in 240 App. Div. 804, 266 N.Y.S. 995 (1933), noted in 43 Yale L. J. 334 (1933).

⁷⁶ *Camden National Bank & Trust Co. v. Collins*, *supra*, note 51, 43 Yale L. J. 334 (1933); *Codman v. Brigham*, 187 Mass. 309, 72 N.E. (1909); *Conway v. Third National Bank & Trust Co.*, 118 N.J. Eq. 61, 177 Atl. 113 (1935), modified 119 N.J. Eq. 575, 182 Atl. 916 (1936). Or payment over may be directed after the termination of life estates. *Jansen v. Godair*, 292 Ill. 364, 127 N.E. 97 (1920).

⁷⁷ *Reasoner v. Herman*, *supra*, note 36.

⁷⁸ *In re Galland's Estate*, 103 Wash. 106, 173 Pac. 740 (1918). An interesting, sensible plan appeared in *Perkins v. Citizens & Southern National Bank*, 190 G. 29, 8 S.E. (2) 28 (1940). After the principal had accumulated to a certain amount, the income (or rather part of it) was to be paid over to an "advisory board" that was to expend the money for charity, but the trustees were to continue managing the property.

is conceivable that incorporation may not be procurable; and the rapidity of accumulation does depend on prevailing opportunities for investment. But it may be said that the application of the property to charity depends substantially upon the ability and integrity of managers chosen by the settlor himself.

In the second group of cases, however, extrinsic factors play a greater rôle. Property may be given directly to an existing organization for charitable distribution subject to a condition that certain action be taken by persons other than the personal representatives of the settlor, or it may be given in trust subject to the fulfillment of the same type of condition. Property is given to a city or a civic organization provided that it do certain things.⁷⁹ It is given in trust to be applied for a bishopric when a bishop is appointed or for an almshouse when land is given by somebody else or for the payment of the state debt whenever the accumulated fund should be the same as the state debt.⁸⁰ The representatives of the settlor, in this group of cases, play a more passive part; the ultimate fate of the property is materially dependent upon the activity of other persons.

In cases belonging to either group, the question is if the gift to charity can be deemed to be immediate and not remote. If the donee of the property were deemed to be the corporation or other kind of charitable organization whose creation might not occur within the legal period, or if the donee were deemed to be the existing organization to whom the gift is in terms conditional and where the condition might stay unfulfilled beyond the legal period, then, obviously, no gift to charity could be sustained where application was to be postponed, and there was no preceding gift to charity. In some way we must be able to find that the gift is vested, not conditional.

⁷⁹ *Bell v. Nesmith*, 217 Mass. 254, 104 N.E. 72 (1914); *Bullard v. Village of Albion*, 217 N.Y.S. 84, 128 Misc. 292 (1926); *Y.M.C.A. Ass'n of Matawan v. Appleby*, 97 N.J. Eq. 95 (1924), 124 Atl. 25, affirmed in 98 N.J. Eq. 704, 130 Atl. 921 (1925); and see cases cited above note 51.

⁸⁰ *Atty. General v. Bishop of Chester*, 1 Bro. C.C. 444 (1785); *Harges v. Zander*, 314 Ill. 140, 145 N.E. 363 (1924); *Chamberlayne v. Brockett* (1872) 8 Ch. App. 206, *Sinnett v. Herbert* (1872) 7 Ch. 232; *Tincher v. Arnold*, 147 Fed. 665 (C.C.A. 7th, 1906); *Simmons v. Fidelity Nat'l Bank & Trust Co.*, 64 F. (2) (C.C.A. 8th, 1933); *Massachusetts Institute of Technology v. Attorney General*, 235 Mass. 288, 126 N.E. 521 (1920), and see cases cited above note 52.

Where application of the property to charity is linked up with action by the representatives of the settlor, the gift is regarded as immediate.⁸¹ Only by gifts of the second group of cases has the rule against remoteness sometimes been held to have been violated. Can it be said that any process of validating or invalidating has been consistently adhered to? Unfortunately, too often, the courts sustain the gift to charity without bothering to do more than answer in the affirmative the inquiry if the gift be immediate.⁸² But there is language in the cases which throws light upon the process of validating.

What the courts seem to say either expressly, or by their holding, is this: "Where a charity is involved, the *cy pres* doctrine of liberal construction will cause us to be keen to discover whether the main purpose is charitable."⁸³ Where the settlor has relied on his personal representatives to see to it that property is applied to charity, it can usually be assumed that his main purpose was charitable. That being so, equity can, in the exercise of its *cy pres* power, interfere at any time so as to assure an application of the property within a reasonable period. Power to compel distribution sanctions deeming the gift vested.⁸⁴ The reason for applying the rule against remoteness—i.e., the inalienability of property without any prospect of application to charity—is obviable. Hence, equity will indulge in the fictitious concept (but one not entirely nondescriptive of what the settlor contemplated) that beneficial ownership to the property vests at once in

⁸¹ But see *Camden National Bank & Trust Co. v. Collins*, *supra*, note 76, discussed below.

⁸² *Tincher v. Arnold*, *supra*, note 80; *In re Scheier's Estate*, *supra*, note 7.

⁸³ *Reasoner v. Herman*, *supra*, note 36 at p. 652.

⁸⁴ No statement to this precise effect has been found in the cases and it is only suggested in GRAY, *RULE AGAINST PERPETUITIES* (3d Ed. 1915), sec. 607 and 3 SCOTT, *TRUSTS* (1939), 401.8, but it must be the law. For instance, note the facts in *Tincher v. Arnold*, *supra*, note 80, belonging to the second group of cases. Money is given trustees to be accumulated then to be paid to City provided it has done certain acts but if not to Seminary—in either case to be applied for educational purposes. As beneficiaries, they possess alternative executory (and invalid) interests. Beneficial ownership must be said to have vested at once, for the settlement is upheld as against the charge of remoteness, and not in either organization.

that portion of the public to be benefited by the gift.⁸⁵ The "donee . . . is not a corporation to be created in the future. The gift is for the benefit of that class of unfortunate persons whom"⁸⁶ the settlor thought to assist.

The formation of a corporation or some other kind of organization merely constitutes the settlor's machinery of administration which equity treats "not as conditions precedent to vesting, but as suggestions regarding the management."⁸⁷ In directing that a corporation or some other body shall after a certain period distribute the property, the settlor has in substance provided for a successor trustee to his own representative.⁸⁸ Whether the corporation will ever be formed, or whether any other body will accept the trust to apply the property, is immaterial.⁸⁹ The main purpose being charitable, equity has jurisdiction, "if his directions as to management are impractical, unreasonable or unlawful," to change settlor's scheme to one that is practical, reasonable and lawful.⁹⁰

No different result will be reached if the gift is not by way of trust but is in terms directly to the organization to be formed in the future. If the main purpose be charitable so that it can be said that beneficial ownership to the property vests at once in that portion of the public to be benefited, equity will not permit the gift to fail because the legal interest is in form executory; it will provide substitute trustees.⁹¹

It is where additional contingency is injected into the picture because settlor has conditioned the application of the property to charity on action by third persons that one finds

⁸⁵ 2 BOGERT, TRUSTS AND TRUSTEES (1935), sec. 344. It is too fictitious to say that equitable ownership vested at once in the corporation to be founded but *cf* *In re Potts*, *supra*, note 74.

⁸⁶ *Jansen v. Godair*, *supra*, note 76 at p. 373.

⁸⁷ *Reasoner v. Herman*, *supra*, note 36 at p. 652.

⁸⁸ *In re Hunter' Estate*, 279 Pa. 349, 123 Atl. 865 (1924) at p. 356. *Dykeman v. Jenkines*, *supra*, note 10 at p. 588.

⁸⁹ See *Jansen v. Godair*, *supra*, note 76 at p. 374; and *Dykeman v. Jenkines*, *supra*, note 10 at p. 588.

⁹⁰ *Reasoner v. Herman*, *supra*, note 36 at pp. 652-3. But the power of equity to allow an accumulation plan to continue for a more reasonable period than that contemplated by settlor may be curtailed by a statute or a rule like that of *Saunders v. Vautier*. Under the Massachusetts practice, equity has full power to control the accumulation, the gift having vested in charity at the outset.

⁹¹ *In re Tower's Estate*, *supra*, note 75.

the courts more hesitant about upholding the charitable gift. Search is made, explicit and scrupulous, for the existence of a general charitable intention.⁹² Where action by third persons is called for, it may very well be that, if those persons will not do their share for charity, the settlor does not want to do more than his share. For example, in *In re Dyer*⁹³ testator gave a fund to help in founding an orchestra; trustees were to hold this fund and moneys donated by others for the purpose. The court found it could not be inferred that

“the donor had any general charitable intention. On the contrary... his intention was to help to inaugurate a fund. . . . His gift was contingent upon a fund sufficient for the named purpose being subscribed.”⁹⁴

But the courts have sometimes been able to find a general charitable intention even in cases where action by third persons is required.⁹⁵

Where such action has not been required, so strong is the policy in favor of gifts to charities that rationalization has not been thought necessary. A “main charitable intent” is not so often deliberately sought by the courts as it is in cases where gifts have been held invalid for remoteness. The method of validating just sketched cannot be said to be explicit in many of the cases. But it is submitted that one should approach every case involving charity and remoteness armed with the concepts of that method. It is desirable because it makes for conceptual symmetry between private and charitable trusts by its distinction between legal and beneficial ownership and its putting that beneficial ownership in the public. It is simple to apply and can be applied in every instance where a gift does not follow a preceding valid gift to other charitable uses or where a future gift is not unconditionally made to an existent organization. If the settlor manifests intention that the property “should be applied to charitable purposes only in the method specified by him...or if the doctrine of *cy pres* be rejected, then the

⁹² *In re Schjaasted's Estate*, *supra*, note 52; *Muir v Archdall*, *supra*, note 52.

⁹³ *Supra*, note 52.

⁹⁴ P. 288.

⁹⁵ See cases cited *infra* note 80.

bequest fails."⁹⁶ But if the main purpose be charitable and the *cy pres* power exists, the gift is sustained.

This conceptual but simple method of validating gifts to charity is certainly preferable to one occasionally found in the books—that is, a painstaking dissection of the structure of the settlement to discover intention to make an immediate gift. This latter approach with its emphasis on form seems *malapropos* when applied to charitable gifts. Besides, it seems disingenuous. One feels that the court has perfectly well made up its mind to sustain the gift before it begins looking at the precise language of the dispositive instrument.

Both approaches may be employed in the same case⁹⁷ as well as in the same jurisdiction. In *Codman v. Brigham*⁹⁸ testator directed the formation of a charitable corporation after twenty-five years of accumulation. The Massachusetts court said,

"Not only the legal but the equitable estate vests immediately; the legal interest in the trustees, and the equitable in that part of the public which is to be benefited."

But in *Bell v. Nesmith*⁹⁹ where testator left money in trust to be paid over (after life estates) to the state of New Hampshire for it to apply to charity, on condition that by "proper legislation" New Hampshire accept the property on certain conditions, the formalistic approach was resorted to. The court did not try to discover a general charitable intent so that if such were found the court could regard the state as a potentially recalcitrant trustee whose position it could fill. It upheld the gift by reasoning that testator meant that the condition should be fulfilled, if at all, within the legal period because of the phrase "proper legislation." The court chose to escape the operation of the rule against remoteness by very

⁹⁶ 3 SCOTT, TRUSTS (1939) sec. 401.8. But in *Graff v. Wallace*, 32 F. (2) 960, 59 App. D.C. 64 (1929), a gift on trust to found a hospital out of accumulating income was upheld although the doctrine of *cy pres* was not accepted in the jurisdiction. Apparently, the court exempted charitable gifts altogether from the operation of the rule against remoteness, sustaining the gift on the ground that under the circumstances it would probably be applied to charity within a reasonable period.

⁹⁷ A good example is *Ingraham v. Ingraham*, 169 Ill. 432, 48 N.E. 561 (1897).

⁹⁸ *Supra*, note 76.

⁹⁹ *Supra*, note 79.

liberal construction made possible only because of language peculiar to the case before it.¹⁰⁰

Finally, reference must be made to *First Camden National Bank and Trust Company v. Collins*.¹⁰¹ Testator left over six hundred thousand in trust to be accumulated over a period measured by specific lives and after "the expiration of twenty-one years from the death of the survivor of said persons said trustee shall proceed to form the corporation. . . and shall then pay over. . . fund to said corporation" to be by it applied to charity. The Court of Errors and Appeals held the gift invalid. Pointing out that after the probable duration of the prescribed period of accumulation the fund might amount to the sum of thirty-eight million dollars, the court held that "where title must vest. . . in a corporation intended to be formed upon or after the expiration of the lawful period of accumulation, the gift is void." The court below¹⁰² had upheld the disposition: the corporation was not the donee but merely a "new trustee" and "it would seem probable" that the "vesting of the equitable estate. . . in the beneficiary, the public" vested at once. Later, in *Conway v. Third National Bank and Trust Company of Camden*¹⁰³ the upper court held that the "estate for accumulation vested immediately" where accumulation was directed for twenty years only. The New Jersey position would seem to be, then, that the duration of the prescribed period of accumulation is in itself the criterion of immediacy. If that period is shorter than lives in being etc., the "estate for accumulation" will be deemed to have vested at once; if not, the organization to be formed *in futuro* will be termed the donee. The obvious general charitable intention of the settlor in the *Collins* case was thus thwarted—and thwarted because of judicial fears that could easily have been allayed had the

¹⁰⁰ Again, in *Frazier v. Merchant's National Bank*, *supra*, note 15 where testator directed accumulation and said, "From and after the time that the principal and accumulated interest shall have reached a million I direct the trustee to hold . . . for the benefit of the Salem Hospital," the court said the equitable interest vested in the hospital at once rather than in the sick. To uphold the gift, then, it had to stretch the quoted language to refer to the beginning of enjoyment, not of vesting.

¹⁰¹ *Supra*, note 52.

¹⁰² Vice-Chancellor Buchanan in 110 N.J. Eq. 623, 160 Atl. 848 (1932).

¹⁰³ *Supra*, note 76.

power of equity to check unreasonable accumulation been recalled.¹⁰⁴

VI

Gifts for charity must run the gauntlet of the rule against remoteness. Simply because property is intended for future charitable use does not allow its being put out of commerce without certainty existing that it will ever be so used. But if equity has power to compel its application to charity at any time, the requisite certainty exists. The gift will be deemed vested. By the better view, because of this power residing in equity, accumulation may take place for an indefinite period so long as it is useful. The key to the adjustment made by the law between the policy in favor of charitable dispositions and rules against perpetuities is in the power to compel application. Implicit in the cases is the sensible attitude that if the courts can at any time have the property distributed for charity it is not material that at any given moment the property is inalienable.

¹⁰⁴ Ordinarily, the power of *cy pres* is exercised by the New Jersey equity courts. *Patton v. Pierce*, 114 N.J. Eq. 548, 169 Atl. 284 (1933).