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Remoteness of Vesting and the Charitable Trust

the Code writers to include a similar proviso in the section establishing carriers liability.[329] This section, while giving due precedence to federal or state provisions establishing a more stringent liability,[330] also allows for contractual limitations by assent of the parties where the carrier's rates are dependent on a value which the shipper has had an opportunity to declare.[331] If the Law Revision Commission has correctly devined the rationale of the provision in section 7-204(2),[332] it would seem that the added protection given the bailor to increase valuation should not have been denied the shipper in section 7-206. If this is an inconsistency, it is one which has saved the latter section from an ambiguity appearing in the section defining warehouseman's liability, which has given rise to a unanimous approval by one warehouseman's group,[333] and unanimous condemnation by another.[334]

REMOTENESS OF VESTING AND THE CHARITABLE TRUST

I. INTRODUCTION

From earliest times equity has favored charitable trusts. In one form or another, the chief, but by no means exclusive, method has been through the doctrine of *cy pres*.[1] While there are divergent views on the scope of this doctrine,[2] it can be broadly defined as a device, applied exclusively to charitable

329. N.Y.U.C.C. § 7-309.

330. N.Y.U.C.C. § 7-309(1). E.g., N.Y. Pub. Serv. Law § 38; Federal Bills of Lading Act, 39 Stat. 538 (1916), 49 U.S.C. §§ 81-124 (1958); Carriage of Goods by Sea Act, 49 Stat. 1207 (1936), as amended, 46 U.S.C. §§ 1300-15 (1958). The provisions of ocean bills of lading are here prescribed. Liability prior to loading or after discharge may, however, be abrogated. 49 Stat. 1212 (1936), 46 U.S.C. § 1307 (1958), but not otherwise. 49 Stat. 1208 (1936), 46 U.S.C. § 1303(8) (1958). The amount of liability may be fixed by contract above a fixed minimum. 49 Stat. 1210 (1936), 46 U.S.C. § 1304(5) (1958).

331. N.Y.U.C.C. § 7-309(2).

332. This provision effects no change in New York law since the carrier, like the warehouseman, may limit his liability by contract. National Blouse Corp. v. Felson, 299 N.Y. 612, 86 N.E.2d 177 (1949). Limitations are effective, however, only when a choice of rates between limited and unlimited liability was afforded. Kilthau v. International Mercantile Marine Co., 245 N.Y. 361, 157 N.E. 267 (1927). See N.Y.U.C.C. § 1-102(3) which allows reasonable agreement as to the standard of care.

333. Resolution of the New York State Ass'n of Refrigerated Warehouses, N.Y. Leg. Doc. No. 65(F), pp. 39-40 (1954).

334. Brochure of American Warehouseman's Ass'n, Merchandise Div., id. at 20-21.

1. The use of the cy pres doctrine has been attributed to the fact that the English chancery court, originally being ecclesiastical, treated charities favorably and viewed them as a fictitious person, having the same rights as any cestui que trust, with the added advantage of being exempt, to a certain degree, from the Rule Against Perpetuities. See Tudor, Charities, 2-3 (5th ed. 1929). For an analysis of the history and development of the cy pres doctrine see Fisch, The Cy Pres Doctrine in the United States (1950).

2. Scott describes the cy pres doctrine as embracing "the principle . . . [that equity will]

trusts,[3] whereby a court of equity can prevent a trust's failure by applying the trust proceeds *as near as possible* to the donor's express intention, when this intention cannot be fulfilled.[4]

> If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose . . . if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.[5]

It should also be noted that this doctrine, originally intended as a means to salvage only those charitable trusts which had already vested,[6] has through the years been used to circumvent the " 'vice of perpetuity.' "[7]

It is frequently stated that the Rule Against Perpetuities has no application to charitable trusts.[8] While this proposition contains an element of truth, it is, unless qualified, both erroneous and misleading.[9] The court in *Matter of Roe*,[10] for example, categorically stated that charitable gifts are within the scope of the rule against remoteness.

> "Charitable donations of a public nature, form no exception to the law against

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attempt to save a charitable trust from failure by carrying out the more general purpose of the testator and carrying out approximately though not exactly his more specific intent. . . ." 4 Scott, Trusts § 399, at 2824 (2d ed. 1956). Bogert states the doctrine thus: "[It] is the principle that equity will, when a charity is originally or later becomes impossible or impractical of fulfillment, substitute another charitable object which is believed to approach the original purpose as closely as possible. It is the theory that equity has the power to mould the charitable trust to meet emergencies." 2A Bogert, Trusts and Trustees § 431, at 315-16 (1935) [hereinafter cited as Bogert, Trusts].

3. Fisch, The Cy Pres Doctrine in the United States 9 (1950).

4. See, e.g., Md. Ann. Code art. 16, § 196 (1957).

5. Restatement (Second), Trusts § 399 (1959).

6. See generally Fisch, op. cit. supra note 3.

7. Matter of Roe, 281 N.Y. 541, 549, 24 N.E.2d 322, 325 (1939).

8. Jones v. Habersham, 107 U.S. 174, 185 (1882); Russell v. Allen, 107 U.S. 163, 166 (1882); Bauer v. Meyers, 244 Fed. 902, 911 (8th Cir. 1917) (per curiam); Ingraham v. Ingraham, 169 Ill. 432, 450, 48 N.E. 561, 566 (1897); Burlington County Trust Co. v. New Jersey Soc'y for the Prevention of Cruelty to Animals, 12 N.J. Super. 369, 374, 79 A.2d 710, 713 (Ch. 1951); American Trust Co. v. Williamson, 228 N.C. 458, 463, 46 S.E.2d 104, 108 (1948); Penick v. Bank of Wadesboro, 218 N.C. 686, 691, 12 S.E.2d 253, 257 (1940).

9. J. Gray, The Rule Against Perpetuities § 589 (4th ed. 1942) [hereinafter cited as Gray, Perpetuities].

10. 281 N.Y. 541, 549, 24 N.E.2d 322, 325 (1939). This case, however, is distinguishable. Although it involved a charitable gift, the gift was to vest only if the testator's nephew, then a missing person, was found within two years. Because of this absolute condition precedent, the court found that the testator had no general charitable intent. Id. at 548-49, 24 N.E.2d at 325.

perpetuities; at least while they remain contingent and executory. Estates although given to charitable uses, must vest within the time prescribed by law."[11]

The term, Rule Against Perpetuities, may connote either the common-law rule against remoteness[12] or one of its many statutory modifications.[13] It is well established that charities are exempt from the statutory rules against the suspension of the power of alienation.[14] Whether they are exempt from the common-law rule against remoteness of vesting,[15] however, depends, in most jurisdictions, upon some application of the *cy pres* doctrine.[16]

The problem of remoteness of vesting arises where a gift, either outright or in trust, is made to a nonexistent charitable corporation.[17] Whether a particular result is desirable or justified remains a question of public policy. However, in the area of charitable trusts, the theories used to subordinate the Rule Against Perpetuities to the public policy which encourages private benefaction have been divergent and often conflicting.

II. The Rule Against Remoteness

What is most commonly referred to as the Rule Against Perpetuities is the judicially developed doctrine[18] that every contingent future interest must vest, if at all, not later than the end of a period measured by one or more lives in being at the creation of the interest, plus twenty-one years thereafter.[19] While this common-law rule has been modified by statute,[20] the motivating

11. 281 N.Y. at 549, 24 N.E.2d at 325.

12. Potter v. Couch, 141 U.S. 296, 314 (1891). See 1A Bogert, Trusts § 213.

13. 1A Bogert, Trusts § 219.

14. Ariz. Rev. Stat. Ann. § 33-261 (1956), Lowell v. Lowell, 29 Ariz. 138, 240 Pac. 280 (1925); Mich. Comp. Laws § 554.351 (1948); Minn. Stat. Ann. § 501.12(2) (1947); N.C. Gen. Stat. § 36-21 (1950); N.D. Cent. Code § 47-02-27 (1960), Hagen v. Sacrison, 19 N.D. 160, 123 N.W. 518 (1909); S.D. Code § 59.0602 (Supp. 1960). Neither statutory nor common-law restraints on alienation apply to charities. See Reasoner v. Herman, 191 Ind. 642, 134 N.E. 276 (1922); Odell v. Odell, 92 Mass. (10 Allen) 1, 6 (1865). The New York Statutes (N.Y. Pers. Prop. Law § 12 and N.Y. Real Prop. Law § 113) which do not refer to any Rule Against Perpetuities have been construed as exempting charitable trusts from the rules prohibiting the suspension of the power of alienation. See, e.g., Allen v. Stevens, 161 N.Y. 122, 55 N.E. 568 (1899).

15. 2 Bogert, Trusts § 343. See also Restatement, Property §§ 396-98 (1944) as to the application of the rule against remoteness to charities.

16. 6 American Law of Property § 24:38 (Casner ed. 1952); Gray, Perpetuities § 608; 4 Scott, Trusts § 401.8.

17. Gray, Perpetuities § 604.

18. E.g., Inglis v. Trustees of Sailor's Snug Harbour, 28 U.S. (3 Pet.) 99, 144 (1830). See also 2 Bogert, Trusts § 342.

19. Potter v. Couch, 141 U.S. 296, 314 (1891). See also 1A Bogert, Trusts § 213. With certain exceptions, this form of the Rule Against Perpetuities applies to charitable gifts. See, e.g., MacKenzie v. Trustees of Presbytery, 67 N.J. Eq. 652, 669, 61 Atl. 1027, 1034 (Ch. 1905).

20. For a discussion of the New York statutory provisions which have recently been

principle has remained unchanged, namely that it is the policy of the law to keep land in commerce and not to suspend the absolute ownership of property, both real and personal, beyond unreasonable limits.

At the outset, a basic principle should be emphasized: the rule against remoteness proscribes only the future vesting of contingent property rights, and not the present vesting of a right the enjoyment of which is postponed.[21] The fact that an existing charity is not to *enjoy* its presently bestowed interest until the distant future poses no problem with respect to the rule against remoteness so long as the interest conferred is not dependent upon a condition which may not occur within the limits prescribed by the rule.[22] Using this distinction between present vesting and postponement of enjoyment, courts have, in the case of nonexisting charities, been keen to discover an immediate vesting in "charity"[23] or in a "charitable purpose."[24] Through this reasoning,[25] the problem presented by the Rule Against Perpetuities has been obviated.

Other problems arise, however, where the named charity is not in being at the time the trust is created.[26] If the organization or incorporation of the specified charity be viewed as a condition to vesting, any gift must, on its face, be *contingent*. Furthermore, if the organization be considered a prerequisite to the certainty or ascertainability of the beneficiary, the gift might run afoul of the rule against remoteness for the reason that the beneficiary need not be ascertained within the limits of the rule.[27] Confusion has resulted from the varying attempts of English and American courts to circumvent, in the interest of public policy, these often-occurring impediments to charitable gifts.[28]

A. *Indefinite Beneficiary*

The validity of a private trust, within the rule against remoteness, depends on whether the beneficiaries of such a trust are ascertainable within the period

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amended, see Pasley, The 1960 Amendments to the New York Statutes on Perpetuities and Powers of Appointment, 45 Cornell L.Q. 679 (1960); Powell, Changes in the New York Statutes on Perpetuities and Accumulations: A Report and a Proposal, 58 Colum. L. Rev. 1196 (1958).

21. Gray, Perpetuities § 591. See also Thomas v. Bryant, 185 Va. 845, 856, 40 S.E.2d 487, 492 (1946); In re Dyer, Vict. L.R. 273, 41 Argus L.R. 384 (Austl. 1935).

22. 4 Scott, Trusts § 401.8, at 2882. But see Murphy v. Johnston, 190 Ga. 23, 8 S.E.2d 23 (1940); Matter of Roe, 281 N.Y. 541, 24 N.E.2d 322 (1939); In re Lord Stratheden, [1894] 3 Ch. 265; Kingham v. Kingham, [1897] 1 Ir. R. 170 (1896).

23. Franklin v. Hastings, 253 Ill. 46, 50, 97 N.E. 265, 267 (1911); Mayor of Lyons v. Advocate-General, 1 App. Cas. 91, 113 (P.C. 1876); Mills v. Farmer, 19 Ves. Jr. 483, 486, 34 Eng. Rep. 595, 596 (Ch. 1815).

24. In re Davis, [1902] 1 Ch. 876. See also 6 American Law of Property § 24:38.

25. See H. Gray, The History and Development in England of the Cy-Pres Principle in Charities, 33 B.U.L. Rev. 30, 41 (1953).

26. Gray, Perpetuities § 604.

27. See notes 30-33 infra and accompanying text.

28. See Comment, A Revaluation of Cy Pres, 49 Yale L.J. 303 (1939).

of the rule.[29] On the other hand, it is the essence of a charitable trust—flowing from the settlor's general purposes which cannot possibly embrace the *actual* individuals to be benefited—that the *ultimate* beneficiaries remain indefinite and unascertainable.[30] Nevertheless, a valid "charitable trust can be created although there is no definite or definitely ascertainable beneficiary designated."[31] In fact, it is this very element of indefiniteness which is the distinguishing element of a charity.[32] Recognizing this necessary uncertainty inherent in almost every charitable trust, several states have passed statutes providing that charitable gifts shall not be invalid merely because of the indefiniteness or uncertainty of the charitable object or beneficiaries.[33] Where, however, the organization or incorporation of a named charity be considered a condition precedent to vesting, the problem of remote vesting admits of no such obvious solution inherent in the nature of a charitable use.

B. *The Existence of the Charity as a Condition Precedent to Vesting*

In the absence of a method to obviate the problem of remoteness of vesting, a charitable gift to a future corporation will fail if the existence of the named charity is a condition precedent to vesting.[34] One method used to vitiate the effect of the Rule Against Perpetuities is to treat the named charitable organization simply as a *trustee* to effect the general charitable intention of the donor.[35] Under this approach, most commonly employed where the settlor directs that the fund be administered by a corporation not in existence at the time the trust is created,[36] there can be no valid objection based on remoteness of vesting because equity will not allow a charitable trust to fail for mere lack

29. A private trust will be declared void if the beneficiaries are not certain and cannot be ascertained within the period allowed by the rule. Jackson v. Phillips, 96 Mass. (14 Allen) 539, 550 (1867) (dictum). See also 4 Scott, Trusts § 364. Where a charitable trust is involved, however, the ultimate beneficiaries need not be ascertained within the rule. See, e.g., Burrill v. Boardman, 43 N.Y. 254, 260-61 (1871).

30. Russell v. Allen, 107 U.S. 163, 167 (1882). See also Perin v. Carey, 65 U.S. (24 How.) 465 (1860); Vidal v. Mayor of Philadelphia, 43 U.S. (2 How.) 126 (1844); Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938) (per curiam).

31. Restatement (Second), Trusts § 364. Usually, the beneficiaries are "a class of persons described in some general language . . . and partaking of a quasi public character." 4 Pomeroy, Equity Jurisprudence § 1018, at 2 (5th ed. 1941). (Emphasis omitted.)

32. Russell v. Allen, 107 U.S. at 167.

33. Md. Ann. Code art. 93, § 195 (1957); Minn. Stat. Ann. § 501.12(2) (1947); N.Y. Pers. Prop. Law § 12(1); N.C. Gen. Stat. § 36-21 (1950); S.D. Code § 59.0602 (Supp. 1960).

34. First Portland Nat'l Bank v. Kaler-Vaill Memorial Home, 155 Me. 50, 151 A.2d 708 (1959); In re Schjaastad Estate, 13 Sask. 114, 119, [1920] 50 D.L.R. 445, 450 (1919). However, had the court in Schjaastad found a general charitable intent, the gift would have been upheld. Id. at 119, 50 D.L.R. at 450 (dictum). See also Brown v. Condit, 70 N.J. Eq. 440, 61 Atl. 1055 (Ch. 1905); In re Mander [1950] Ch. 547.

35. Field v. Drew Theological Seminary, 41 Fed. 371, 374 (C.C.D. Del. 1890).

36. Ibid.

of a trustee.[37] A court will give effect to the trust either by appointing a trustee[38] or by acting, itself, in that capacity and establishing a plan to accomplish the purposes of the settlor.[39] There is a distinction drawn, though without practical consequence, between the case of a testator who directs that an organization be incorporated in the future as administrator of the funds,[40] and the one where an outright gift to a future charitable corporation is made.[41] In the latter situation, because of the donor's *immediate general charitable purpose,* the gift is considered to vest immediately and is thereby upheld.[42]

> An executory gift to a charity, without a precedent gift to private persons, upon the organization of a corporation . . . is held valid upon the theory that the general charitable purpose of the donor being immediate, a court of equity, having the power from the beginning to execute the charity . . . notwithstanding the fact that the donor's method may cause delay, will regard the gift as immediate, involving neither postponement nor suspension.[43]

In both instances, however, the formation of the corporation has been regarded merely as a method of administering the trust rather than the essence of the gift.[44] Hence, it was deemed that an immediate gift to charity had been made.[45]

Where, however, as is most often the case, the settlor has simply *failed* to direct that the charity be incorporated within a given number of years,[46] or is unaware that the charity is nonexistent,[47] the existence of the donee is, at first glance, a condition precedent to vesting and such a trust on its face violates the rule. In this situation many courts have attempted to save the trust by a novel application of the *cy pres* doctrine.[48]

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37. 4 Pomeroy, Equity Jurisprudence § 1026, at 37. This equitable doctrine is used when a gift has been made to a charitable organization which is not in existence. Id. at 40.

38. E.g., Bruere v. Cook, 63 N.J. Eq. 624, 633, 52 Atl. 1001, 1004 (Ch. 1902).

39. 4 Pomeroy, Equity Jurisprudence § 1026, at 37-38.

40. Ould v. Washington Hosp. for Foundlings, 95 U.S. 303 (1877); Inglis v. Trustees of Sailor's Snug Harbour, 28 U.S. (3 Pet.) 99 (1830); Coit v. Comstock, 51 Conn. 352 (1884).

41. Creech v. Scottish Rite Hosp. for Crippled Children, 211 Ga. 195, 84 S.E.2d 563 (1954); Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938) (per curiam).

42. Matter of Potts, 205 App. Div. 147, 199 N.Y. Supp. 880 (3d Dep't), aff'd mem., 236 N.Y. 658, 142 N.E. 323 (1923).

43. Id. at 152, 199 N.Y. Supp. at 885.

44. Compare Coit v. Comstock, 51 Conn. 352 (1884), with Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938) (per curiam).

45. Franklin v. Hastings, 253 Ill. 46, 50-51, 97 N.E. 265, 267 (1911).

46. See Russell v. Allen, 107 U.S. 163 (1882); Matter of Potts, 205, App. Div. 147, 199 N.Y. Supp. 880 (3d Dep't), aff'd mem., 236 N.Y. 658, 142 N.E. 323 (1923).

47. Petition of Rochester Trust Co., 94 N.H. 207, 49 A.2d 922 (1946); Cinnaminson Library Ass'n v. Fidelity-Philadelphia Trust Co., 141 N.J. Eq. 127, 56 A.2d 417 (Ch. 1948); Jewish Home for the Aged v. Toronto Gen. Trusts Corp., [1961] Can. Sup. Ct. 465, 28 D.L.R.2d 48 (B.C. 1961).

48. See generally Gray, Perpetuities § 608, at 584.

III. The *Cy Pres* Doctrine

In the view of one of the most eminent authorities on the Rule Against Perpetuities, charitable trusts which would be void for remoteness can only be salvaged by a *cy pres* application.[49]

> If the Court . . . can see an intention to make an unconditional gift to charity . . . then the gift will be regarded as immediate, not subject to any condition precedent, and therefore not within the scope of the Rule against Perpetuities. The mode pointed out by the testator is only one way . . . of carrying out the charitable purpose; and if it cannot, with regard to the *general charitable intention,* be carried out in that way, it will be carried out *cy pres.*[50]

This view is perhaps too broad.[51]

The exact origin of the *cy pres* doctrine has been obscured by history.[52] The phrase, itself, is of Norman French origin[53] and signifies literally, "as near as possible."[54] Once the requisites of *cy pres* are present,[55] a court of equity can save a gift, which would otherwise fail, by applying it "as near as possible" to the named charity.[56] The precise advantage of the doctrine is to provide the courts with a flexible tool to construe charitable trusts in such a way as to enable them to remain perpetual in the face of circumstances or conflicting principles of law not contemplated by the testator.[57] In those jurisdictions which do not recognize this doctrine, therefore, it would appear that such gifts should necessarily fail for remoteness.[58] Nevertheless, even in these jurisdictions, gifts to nonexistent charities have been upheld, apparently on the ground that they form an exception to the rule.[59] It is difficult, if not impossible, even to attempt a reconciliation of the reasoning of these cases.

On its face, a gift to a charity not in *esse* is necessarily contingent, in spite

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49. Gray, Perpetuities § 608, at 584-85.

50. Gray, Perpetuities § 607, at 581. (Emphasis added.)

51. See notes 37-45 supra and accompanying text.

52. Fisch, The Cy Pres Doctrine in the United States 3 (1950); see also Gray, op. cit. supra note 25, at 31.

53. Fisch, op. cit. supra note 52, at 1.

54. Ironmongers' Co. v. Attorney-General, 10 Cl. & F. 908, 922, 8 Eng. Rep. 983, 988 (H.L. 1844).

55. The prerequisites to the application of the cy pres doctrine are three-fold: (1) a valid charitable trust, (2) impossibility or impracticability of carrying out the donor's specified purpose, and (3) a general charitable intent. Fisch, op. cit. supra note 52 at 128. Several states have apparently eliminated the first requirement from their cy pres statutes. E.g., Ga. Code Ann. § 108-202 (1947); N.Y. Pers. Prop. Law § 12(2). See also Fisch, Changing Concepts and Cy Pres, 44 Cornell L.Q. 382, 383 (1959).

56. See note 54 supra.

57. Fisch, op. cit. supra note 52, at 2.

58. Gray, Perpetuities § 608, at 584-85; see also 6 American Law of Property § 24:38.

59. See Graff v. Wallace, 32 F.2d 960, 962 (D.C. Cir.), cert. denied, 280 U.S. 579 (1929). But see Noel v. Olds, 138 F.2d 581 (D.C. Cir. 1943), aff'd, 149 F.2d 13 (D.C. Cir.), cert. denied, 321 U.S. 773 (1944).

of any general charitable intent of the donor. It is logically without foundation to find that a general intention dictates an immediate vesting in charity,[59] or in that portion of the public intended to be benefited.[61] Conceptually, however, where a donor's benevolent intention is absolute and unconditional, many courts, applying the *cy pres* doctrine, have found that the gift—to "charity in the abstract"[62]—is unconditional and, therefore, not subject to the rule against remoteness.[63] Under this view the specific charity named is treated merely as the mode of disposition indicated by the donor.[64]

Thus, *cy pres* is used to accomplish two things: first, to apply the trust fund to an *existing* charity which carries on work similar to that of the *named*, but *nonexisting* charity specified by the settlor,[65] and second to find an immediate vesting in "charity."[66] Historically, *cy pres* was used only to effect the former result which is within the realm of the classic *cy pres* power.[67] The latter, however, appears to be a corruption of the real purpose of *cy pres*, effecting as it does, an artificial construction of trust instruments.[68]

Where a gift has immediately vested in an *existing* charitable organization, and due to some unforeseen circumstances that organization ceases to exist, or the purpose of the charity is no longer feasible or possible, the doctrine of *cy pres* has been utilized to apply the funds to a kindred charity.[69] Similarly,

60. See Ingraham v. Ingraham, 169 Ill. 432, 458, 48 N.E. 561, 571 (1897); Matter of Potts, 205 App. Div. 147, 199 N.Y. Supp. 880 (3d Dep't), aff'd mem., 236 N.Y. 658, 142 N.E. 323 (1923); Mills v. Farmer, 19 Ves. Jr. 483, 34 Eng. Rep. 595 (Ch. 1815).

61. Henderson v. Troy Bank & Trust Co., 250 Ala. 456, 34 So. 2d 835 (1948), aff'd sub nom. Tumlin v. Troy Bank & Trust Co., 258 Ala. 238, 61 So. 2d 817 (1950); Creech v. Scottish Rite Hosp. for Crippled Children, 211 Ga. 195, 84 S.E.2d 563 (1954); Crerar v. Williams, 145 Ill. 625, 34 N.E. 467 (1893).

62. Mayor of Lyons v. Advocate-General, 1 App. Cas. 91, 113 (P.C. 1876). See also Franklin v. Hastings, 253 Ill. 46, 50, 97 N.E. 265, 267 (1911).

63. Ingraham v. Ingraham, 169 Ill. 432, 451, 48 N.E. 561, 568 (1897); Crerar v. Williams, 145 Ill. 625, 648, 34 N.E. 467, 471 (1893); Codman v. Brigham, 187 Mass. 309, 312, 72 N.E. 1008, 1009 (1905). In many instances, a court has merely answered the question whether or not there is a general charitable intent, without considering the question of remoteness. Fisher v. Minshall, 102 Colo. 154, 78 P.2d 363 (1938) (no general intent); Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938) (per curiam); First Portland Nat'l Bank v. Kaler-Vaill Memorial Home, 155 Me. 50, 151 A.2d 703 (1959) (void gift); Petition of Rochester Trust Co., 94 N.H. 207, 49 A.2d 922 (1946); Cinnaminson Library Ass'n v. Fidelity-Philadelphia Trust Co., 141 N.J. Eq. 127, 56 A.2d 417 (Ch. 1948) (valid gift because general charitable intent present); In re Davis, [1902] 1 Ch. 876.

64. Brigham v. Peter Bent Brigham Hosp., 126 Fed. 796 (C.C.D. Mass. 1903); Jewish Home for the Aged v. Toronto Gen. Trusts Corp., [1961] Can. Sup. Ct. 465, 28 D.L.R.2d 48 (B.C. 1961).

65. E.g., Petition of Rochester Trust Co., 94 N.H. 207, 49 A.2d 922 (1946).

66. See notes 60 & 62 supra.

67. See H. Gray, The History and Development in England of the Cy-Pres Principle in Charities, 33 B.U.L. Rev. 30-31 (1953). See also Fisch, op. cit. supra note 52, at 164-66.

68. See, e.g., Brown v. Condit, 70 N.J. Eq. 440, 61 Atl. 1055 (Ch. 1905).

69. State ex rel. Attorney General v. Van Buren School Dist., 191 Ark. 1036, 89 S.W.2d

where the settlor, in the trust instrument, includes a provision or condition for a charitable disposition which is itself illegal or against public policy, the doctrine will operate to excise the offending provision.[70] In all such cases, however, *cy pres* operates to apply funds *which have already vested,* or which would vest but for an illegal provision in the trust, to a kindred charity. In no instance has *cy pres* properly operated to change *settled principles of law*; but rather the doctrine is applied to change the *named beneficiary*, where such beneficiary for reasons of fact or law, is incompetent to take.[71] In every proper case of *cy pres* the court will only change an impossible beneficiary, or excise an illegal provision of the trust instrument if it finds that the general intention of the settlor was charitable. To argue in the first instance that a general charitable intent necessarily gives rise to an immediate gift to "charity" in general is unrealistic. Indeed, the concept of a general charitable intent is itself a legal fiction.

> The question is not so much what was the intention [of the testator] . . . as what, in the contemplation of the law must be presumed to have been the intention.[72]

IV. The Doctrine in England

Historically, the *cy pres* power in England has two sources: the so-called prerogative power which vested in the Crown as *parens patriae* and judicial *cy pres*, exercised by the chancellors.[73] Though the division still exists today,[74] it is "purely vestigial and the results under either doctrine are the same."[75] The reasoning used to reach these results, however, was quite different, for prerogative *cy pres* was applied without regard to the donor's general charitable purpose, which was often perverted.[76] This twofold origin has had repercussions in this country where the idea of an uncontrolled sovereign power was alien to American democracy.[77]

A. *General Charitable Intention*

The concept of a general charitable intention which has become identified with the *cy pres* doctrine did not appear in concrete form until the decision in

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605 (1936) (ceased to exist); Society of Cal. Pioneers v. McElroy, 63 Cal. App. 2d 332, 146 P.2d 962 (Dist. Ct. App. 1944); Jackson v. Phillips, 96 Mass. (14 Allen) 539 (1867) (gift to promote the abolition of slavery applied cy pres for the education of Negroes after the passage of thirteenth amendment).

70. E.g., Jewish Home for the Aged v. Toronto Gen. Trusts Corp., [1961] Can. Sup. Ct. 465, 28 D.L.R.2d 48 (B.C. 1961) (illegal accumulation of income).

71. E.g., In re Peterson's Estate, 202 Minn. 31, 277 N.W. 529 (1938).

72. Mills v. Farmer, 1 Mer. 55, 79-80, 35 Eng. Rep. 597, 605 (Ch. 1815).

73. See note 28 supra at 303-04.

74. See, e.g., In re Bennett, [1960] 1 Ch. 18 (1959) (gift to nonexistent charity upheld under the prerogative cy pres).

75. See note 28 supra at 306.

76. See note 28 supra at 305.

77. Fisch, op. cit. supra note 52, at 116.

Attorney General v. Boultbee,[78] where for the first time a court drew the distinction between the general object of the testator's gift (charity) and the mode of effecting it.[79] The full ramifications of this distinction were not crystallized until the monumental decision in *Moggridge v. Thackwell*,[80] where the court, reviewing the cases of indefinite gifts to charity, said that such bequests could be sustained only on the theory that the testator had had a general intent to benefit charity, and had merely neglected to provide the specific mode.[81] Absent a specified *modus operandi*, the court could apply the gift *cy pres*. While Lord Eldon did not purport to reconcile all the decisions prior to *Moggridge*, he did lay down a working pattern for future problems.[82]

With this concept of general charitable intention thus established with respect to unnamed or indefinite beneficiaries, the principle came to be applied later, under a misdirected application of the *cy pres* doctrine, to charitable uses which would otherwise run afoul of the rule against remoteness of vesting.[83]

B. *Application to Gifts to Nonexistent Charities*

When a court, by the novel employment of the *cy pres* doctrine determines that a donor's primary intention is to benefit charity in general, it is imposing a legal presumption rather than imputing an actual state of mind to the settlor.[84] A benefactor of charity does not in fact visualize "charity in the abstract" or the *persona* of Charity, as the beneficiary.[85] Consequently, when a court finds a general charitable intention even where the donor has denoted a specific charity as the beneficiary, this construction is tantamount to holding that the donor's intention was general from the mere fact that it was charitable. Certainly, it is distorted reasoning which finds any intention to benefit "charity in the abstract" merely because the named beneficiary is charitable. In many instances, due to the peculiar predilections of the donor, he might wish to benefit only a specific charity. This indiscriminate philanthropy attributed to him by the law is most often without foundation in fact.[86]

Surely, it would be more in accord with reason and consistency simply to hold the rule against remoteness inapplicable to charitable trusts. Public policy should be able to justify an exception to a settled rule of law to fulfill the needs of society without distorting existing law or offending reason. However

78. 2 Ves. Jr. 380, 30 Eng. Rep. 683 (Ch. 1794), aff'd, 3 Ves. Jr. 220, 30 Eng. Rep. 979 (Ch. 1796).

79. Attorney General v. Boultbee, 2 Ves. Jr. at 387, 30 Eng. Rep. at 687.

80. 7 Ves. 36, 32 Eng. Rep. 15 (Ch. 1803), aff'd, 13 Ves. 416, 33 Eng. Rep. 350 (Ch. 1807).

81. Moggridge v. Thackwell, 7 Ves. at 83, 32 Eng. Rep. at 31.

82. Ibid.

83. Mills v. Farmer, 19 Ves. Jr. 483, 34 Eng. Rep. 595 (Ch. 1815).

84. Brown v. Condit, 70 N.J. Eq. 440, 453, 61 Atl. 1055, 1060 (Ch. 1905).

85. H. Gray, The History and Development in England of the Cy-Pres Principle in Charities, 33 B.U.L. Rev. 30, 41 (1953).

86. See Comment, A Revaluation of Cy Pres, 49 Yale L.J. 303, 321 (1939).

desirable it is to find a cogent legal basis for saving charities from the rule against remoteness, the English courts have persisted in this type of reasoning. Thus, it has become settled law that in the case of the initial failure of the donor's named object, the gift will not fail entirely if a manifest intention to benefit *charity* is present.[87] In such a situation, the court will formulate a scheme, making a *cy pres* application of the funds.[88] In *Mayor of Lyons v. Advocate-General*,[89] the court stated the theory thus:

> The principle on which the . . . [cy pres] doctrine rests appears to be, that the Court treats *charity in the abstract* as the substance of the gift, and the particular disposition as the mode, so that in the eye of the Court, the gift, notwithstanding the particular disposition may not be capable of execution, *subsists* as a legacy which *never fails* and *cannot lapse*.[90]

No English case has categorically stated that the Rule Against Perpetuities does not apply to charities.[91] The leading decision on the subject, *Chamberlayne v. Brockett*,[92] on the contrary, seems to recognize the theoretical possibility of a charitable trust which might fail because it violates the rule against remoteness.

> If there was an immediate gift . . . for charitable uses . . . [it was clear upon the authorities] that such gift was valid . . . although the particular application of the fund . . . would not of necessity take effect within any assignable limit of time, and could never take effect at all except on the occurrence of events in their nature contingent and uncertain.[93]

Such a recognition, however, was without practical effect, since the court then stated that once property is given absolutely to charity (and this depends on a general charitable intent) it was taken out of the reach of the rule against remoteness.[94]

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87. Chamberlayne v. Brockett, 8 Ch. App. 206, 212 (1872).

88. In re Songest, [1956] 1 Weekly L.R. 897 (C.A.); In re Harwood, [1936] 1 Ch. 285 (1935).

89. 1 App. Cas. 91 (P.C. 1876).

90. Id. at 113 (dictum). (Emphasis added.) In Attorney General v. Bishop of Chester, 1 Bro. C.C. 44, 28 Eng. Rep. 1229 (Ch. 1875) where the gift was upheld, the question of remoteness apparently was not raised, nor was it suggested that the fund left to a non-existent charity could be applied cy pres. In Sinnett v. Herbert, 7 Ch. App. 232 (1872), virtually silent on the subject, the Lord Chancellor felt that the decision in Bishop of Chester was the complete answer to any question of remoteness. However, both these cases have been explained in the light of a general charitable intention being present. See In re Schaajstad Estate, 13 Sask. 114, [1920] 50 D.L.R. 445 (1919).

91. Wallis v. Solicitor-General, [1903] A.C. 173, 186 (P.C.).

92. 8 Ch. App. 206 (1872).

93. Id. at 210-11.

94. Id. at 211.

C. *Summation*

The more recent decisions are in accord with the policy now firmly entrenched in English jurisprudence.[95] The courts continue to recognize the rule that charities are not per se exempt from the Rule Against Perpetuities,[96] but in almost every case find a general charitable intent (from the mere fact that the gift is charitable) sufficient to satisfy the requirement of vesting.[97] Today, as a practical matter, the English theory will not permit a charitable trust to fail merely because the named donee is nonexistent. Where, however, the trust is for a definite and special purpose—and therefore there is no general intent to be inferred—it will succumb to the rule against remoteness if there is no charity in being capable of taking.[98]

Thus, it can be said that while the English chancery has been content to recognize the problem of the rule against remoteness by finding an almost universal exception to it through a peculiar application of *cy pres*, American courts have struggled with varying and divergent theories.[99]

V. Charitable Trusts in the United States

In addition to an aversion to its historical background,[100] another factor which retarded the acceptance in America of charitable trusts, and therefore necessarily the *cy pres* doctrine, was the historical error in *Trustees of the Philadelphia Baptist Ass'n v. Hart's Ex'rs*.[101] There, the Supreme Court erroneously concluded that equity's jurisdiction over charitable dispositions was

95. See, e.g., In re Bennett, [1960] Ch. 18 (1959); In re Songest, [1956] 1 Weekly L.R. 897 (C.A.).

96. Jewish Home for the Aged v. Toronto Gen. Trusts Corp., [1961] Can. Sup. Ct. at 468-69, 28 D.L.R.2d at 51.

97. Ibid.

98. In re Schjaastad Estate, 13 Sask. 114, [1920] 50 D.L.R. 445 (1919).

99. One mode employed to sustain gifts to charitable corporations to be organized in the future is based on the theory of an executory devise. See Russell v. Allen, 107 U.S. 163 (1882); Ould v. Washington, 95 U.S. 303 (1877); Inglis v. Trustees of Sailor's Snug Harbour, 28 U.S. (3 Pet.) 99 (1830); Coit v. Comstock, 51 Conn. 352 (1884). Although the concept of general charitable intent is frequently alluded to, the theory is in no way, except to the extent that cy pres has become identified with the law of charitable trusts, dependent upon that doctrine; rather it has for its basis, the inherent power of equity to administer charitable trusts. See Matter of Potts, 205 App. Div. 147, 199 N.Y. Supp. 880 (3d Dep't 1923). However, an executory devise like any other future interest is subject to the Rule Against Perpetuities if it imposes no limitation whatever upon the time within which the future estate shall vest. McMahon v. Consistory of St. Paul's Reformed Church, 196 Md. 125, 75 A.2d 122 (1950). Therefore, executory charitable gifts should, unless they form an exception, be subject to the rule against remoteness.

100. See note 77 supra and accompanying text.

101. 17 U.S. (4 Wheat.) 1 (1819). Accord, Gallego's Ex'rs v. Attorney General, 30 Va. (3 Leigh) 450 (1832).

conferred by the English Statute of Charitable Uses.[102] The Court reasoned that apart from this statute, which was not in effect in Virginia, the initial forum, equity had no inherent jurisdiction to enforce charitable trusts.[103] Not until twenty-five years later did the Supreme Court overrule this decision and hold that equity has this inherent power.[104] In spite of this recognition, the impression left by the *Baptist* case has never been totally erased.[105] Gradually, however, the *cy pres* doctrine gained acceptance and, as in England, whether a trust would be applied or salvaged under that power depended upon a finding of a general charitable intent.[106] It has been held, however, that the trust instrument, itself, must evidence such purpose.[107] Consequently, evidence of subsequent incorporation of the specified charity was inadmissible on the question of the settlor's actual intent.[108]

Today, many American jurisdictions have adopted the equitable doctrine of *cy pres* by express statutory authorization.[109] In some that have not, charitable trusts are still upheld, apparently on the basis of equity's inherent power to enforce charitable dispositions.[110]

Remedial legislation has not been an important factor in eliminating the problem of remoteness. The misconception that the rule against remoteness does not apply to charities is often attributable to references made to statutes in several jurisdictions which prohibit the suspension of the power of alienation beyond specified periods.[111] Although some of these statutes exempt charitable

102. 17 U.S. at 29.

103. Id. at 27.

104. Vidal v. Mayor of Philadelphia, 43 U.S. (2 How.) 126 (1844).

105. Fisch, op. cit. supra note 52, at 12-13.

106. See, e.g., Miller v. Mercantile-Safe Deposit & Trust Co., 224 Md. 380, 168 A.2d 184 (1961).

107. First Portland Nat'l Bank v. Kaler-Vaill Memorial Home, 155 Me. 50, 151 A.2d 708 (1959).

108. Id. at 65-66, 151 A.2d at 716-17.

109. Ala. Code tit. 47, § 145 (1958); Ga. Code § 108-202 (1933); Md. Ann. Code art. 16, § 196 (1957); Minn. Stat. Ann. § 501.12(3) (1947); N.Y. Pers. Prop. Law § 12(2); N.Y. Real Prop. Law § 113(2); R.I. Gen. Laws Ann. § 18-4-1 (1956); Wis. Stat. Ann. § 231.11(7) (1957).

110. See note 59 supra and accompanying text. In Tumlin v. Troy Bank & Trust Co., 258 Ala. 238, 61 So. 2d 817 (1950) a charitable trust was upheld under the doctrine of approximation which is purportedly Alabama's equivalent of cy pres. Id. at 242, 61 So. 2d at 820. However, one dissenting opinion pointed out that the two doctrines are diverse; the trust being violative of the Rule Against Perpetuities, it could not be validated by substituting equitable approximation for the cy pres doctrine. Id. at 256, 61 So. 2d at 834 (Simpson, J., dissenting).

111. E.g., N.D. Cent. Code § 47-02-27 (1960). In Hagen v. Sacrison, 19 N.D. 160, 123 N.W. 518 (1909), it was held that charities are not subject to the rule against the suspension of the power of alienation.

gifts from the Rule Against Perpetuities,[112] the exemption has not been construed to extend to the common-law rule against remoteness.[113] Thus, a Michigan statute[114] has been held merely to exempt charities from the rule prohibiting the unlawful suspension of the power of alienation.[115] Similar legislation is in force in a number of jurisdictions.[116] Thus theoretically, the rule against remoteness could still apply to charities.

Maryland by statute has alleviated the problem to some extent:

> No devise or bequest of real or personal property for any charitable uses shall be deemed or held to be void by reason of any uncertainty with respect to the donees thereof. . . .[117]

Severe restrictions, however, are imposed on this provision in that the testator must direct the formation of the corporation in his will.[118] A further limitation is placed on the time within which the corporation may be organized.[119]

New York has broadened its *cy pres* power by additions to an already liberal statute.[120] Previously, a *gift in trust* to a charitable corporation to be organized in the future was held valid,[121] while *absolute* gifts without the interposition of a trust were often held to lapse.[122] The new provisions, on the other hand, expressly validate outright gifts made to nonexistent charities;[123] and although the statute is silent on the rule against remoteness, it implicitly exempts charities.[124] Of course, the statute's application depends upon a general charitable intent of the donor.[125]

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112. See note 14 supra.

113. Lowell v. Lowell, 29 Ariz. 138, 240 Pac. 280 (1925); American Trust Co. v. Williamson, 228 N.C. 458, 46 S.E.2d 104 (1948); Penick v. Bank of Wadesboro, 218 N.C. 686, 12 S.E.2d 253 (1940). In New York, the Rule Against Perpetuities is directed against both remoteness of vesting and the suspension of the absolute ownership of property. Matter of Wilcox, 194 N.Y. 288, 87 N.E. 497 (1909); In re Jarvie's Trust, 73 N.Y.S.2d 246 (Sup. Ct. 1947); Bankers Trust Co. v. Firth, 177 Misc. 797, 31 N.Y.S.2d 889 (Sup. Ct. 1941).

114. Mich. Comp. Laws § 554.351 (1948).

115. In re Brown's Estate, 198 Mich. 544, 165 N.W. 929 (1917).

116. See note 14 supra.

117. Md. Ann. Code art. 93, § 357 (1957).

118. Yingling v. Miller, 77 Md. 104, 26 Atl. 491 (1893).

119. See note 117 supra.

120. In 1953, New York amended Section 113 of the Real Property Law and Section 12 of the Personal Property Law, giving its courts power to prevent the failure of gifts made to nonexistent donees.

121. Matter of Potts, 205 App. Div. 147, 199 N.Y. Supp. 880 (3d Dep't), aff'd mem., 236 N.Y. 658, 142 N.E. 323 (1923).

122. Matter of Joseph's Estate, 62 N.Y.S.2d 197 (Surr. Ct. 1946); Matter of Walker, 185 Misc. 1046, 53 N.Y.S.2d 106 (Surr. Ct. 1944). But see Matter of Wolf, 7 Misc. 2d 799, 162 N.Y.S.2d 645 (Surr. Ct. 1957); Matter of Dobbins, 205 Misc. 64, 132 N.Y.S.2d 236 (Surr. Ct. 1953).

123. See N.Y. Leg. Doc. No. 65(S) (1953).

124. Matter of Sanders, 7 Misc. 2d 800, 161 N.Y.S.2d 982 (Surr. Ct. 1957); In re Westheimer's Estate, 124 N.Y.S.2d 784 (Surr. Ct. 1953) (dictum).

125. Matter of Sanders, 7 Misc. 2d 800, 803, 161 N.Y.S.2d 982, 984-85 (Surr. Ct. 1957).

In Massachusetts and Illinois, the rule that charities are subject to the rule again remoteness is apparently limited to the situation where there is a prior gift for a noncharitable intention.[126]

> A gift in trust for a charity not existing at the date of the gift, and the beginning of whose existence is uncertain, or which is to take effect upon a contingency that may possibly not happen within . . . [the time allowed by the Rule Against Perpetuities] is valid provided there is no gift of the property meanwhile to or for the benefit of any private person or corporation.[127]

In *Crerar v. Williams*,[128] a testator left the residue of his estate for the purpose of erecting a public library and directed that a corporation be formed to carry out this plan. Despite the fact that the corporation might not have been chartered within the period prescribed by the rule against remoteness, the court did not invalidate the gift.[129] Since it was for a general charitable purpose, the gift was upheld.[130] A general charitable intent will not, however, be inferred merely from the fact that the named donee, which ceased to exist before the gift vested, was engaged in a particular type of charitable work.[131] Also, *Codman v. Brigham*[132] indicates that the rule in these states is not dependent solely on the *cy pres* doctrine. *Cy pres* would be used to save the gift only in the event that the corporation could not be formed.[133] A kindred federal decision[134] pointed out that under the law of Massachusetts a gift to a nonexistent charity was valid because the strict Rule Against Perpetuities had been modified to favor charitable gifts.[135] Where there is an intention to benefit charity generally, the gift is construed as "immediate" (that is, without any intervening gift) and merely the mode of enjoyment is postponed.[136]

VI. Conclusion

While both English and American courts have exempted charitable dispositions from the rule against remoteness on a unique application of the *cy pres*

126. Franklin v. Hastings, 253 Ill. 46, 97 N.E. 265 (1911); Ingraham v. Ingraham, 169 Ill. 432, 48 N.E. 561 (1897); Crerar v. Williams, 145 Ill. 625, 34 N.E. 467 (1893); Codman v. Brigham, 187 Mass. 309, 72 N.E. 1008 (1905); Odell v. Odell, 92 Mass. (10 Allen) 1, 7 (1865) (dictum).

127. Brigham v. Peter Bent Brigham Hosp., 126 Fed. 796, 797 (C.C.D. Mass. 1903).

128. 145 Ill. 625, 34 N.E. 467 (1893).

129. Id. at 648-49, 34 N.E. at 471.

130. Ibid.

131. Quimby v. Quimby, 175 Ill. App. 367, 372-73 (1912).

132. 187 Mass. 309, 72 N.E. 1008 (1905).

133. Id. at 313, 72 N.E. at 1009.

134. See note 127 supra.

135. 126 Fed. at 800.

136. Id. at 798; Franklin v. Hastings, 253 Ill. 46, 50-51, 97 N.E. 265, 267 (1912); Ingraham v. Ingraham, 169 Ill. 432, 458, 48 N.E. 561, 566 (1897).