

do they enjoin the third party from further competing with the covenantee, which is the effect of the restraint in question. On the contrary, in the Fleckenstein case,<sup>12</sup> the court specifically stated that a covenant, on the sale of a business and good will, not to engage in the same trade was not binding on the covenantor's wife and did not prevent her from establishing a similar business using her own name, although such use would injure the good will of the purchaser of the husband's business. In like manner Schoone-Jongen was not bound by the covenants of his business compatriots, and is free to engage in competition with the complainant. As long as the petitioner obtains all the benefits which a fair observance of the covenants still in force affords, he cannot complain merely because the protection is inadequate for his purposes.<sup>13</sup>

Since we can find no equitable basis on which to issue an injunction against Schoone-Jongen, and since, as we have pointed out, the complainant will be fully protected by a restraining order against the other two defendants alone, it is submitted that the injunction against Schoone-Jongen should not have been granted. If it is felt that after the issuance of such restraining order Schoone-Jongen is still in a position to profit from, and has profited from, customers previously acquired by the other two defendants, leave should be allowed the complainant to take an action in tort against him for damages resulting from his wrongful conduct in entering into business with Vander Sluys and Vanderweert. For such damage the remedy at law is adequate, and equity should not have intervened.

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**Rule Against Perpetuities — Application to Charitable Gifts — Limitation from Individual to Charity**—Testatrix bequeathed all her property to her son and his heirs, with a provision that if he died leaving no descendants, then a valuable portrait was to go to defendant. Upon the death of testatrix, one of her executors delivered the portrait to defendant. The children and widow of the son now deceased, bring a bill for equitable replevin. *Held*, decree for complainant. The heirs have a present posses-

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12. *Supra* note 9.

13. *Fleckenstein v. Fleckenstein*, *supra* note 9.

sory interest in the portrait under a fee simple, subject to being divested by a gift over in fee to the society upon the running out of the line of the son's descendants. The gift over to the defendant is a charitable bequest and valid under the well recognized exception to the rule against perpetuities. *Redmond v. N. J. Historical Society*, 129 N.J.Eq. 57, 18 A. (2d) 275 (Ch. 1941).

The assertion is frequently made that the rule against perpetuities does not apply to gifts to a charity. This statement standing alone is a half truth.<sup>1</sup> It should be more accurately worded to read, "The rule against perpetuities does not apply to *some* gifts to a charity."<sup>2</sup>

If the gift is an immediate one to a charity with no intervening gift to or for the benefit of a private person or corporation, the rule against perpetuities is not applied.<sup>3</sup> If the gift is to one charity with a conditional limitation over to another, the rule again does not apply.<sup>4</sup> However, if a gift be made to a charity with a limitation over to a private person, the gift violates the rule.<sup>5</sup> And the doctrine applies in all its vigor to a gift to a charity limited over after a gift to an individual if the limitation is not to take place within lives in being and twenty-one years thereafter.<sup>6</sup> It also applies to a gift to vest at a future time in a trustee for charitable purposes.<sup>7</sup>

The declaration is easy to grasp that if an interest will not certainly

1. If the rule as stated is true, then every case involving a charity can be instantly answered.

2. What is meant is that the rule against suspension of the power of alienation does not limit the period of time within which the first taker, if a charity, may hold the property. 21 R.C.L. 284 (1929).

3. *In re Potts' Will*, 199 N.Y.S. 880, 205 A.D. 147 (1923).

4. *Dickenson v. City of Anna*, 310 Ill. 222, 141 N.E. 754, 30 A.L.R. 587 (1923); 2 REST. TRUSTS 1227 (1935). The bequest must be a gift. If it is for a consideration, the restrictions on alienation or encumbrance may be ignored, since otherwise creditors of the charity would be harmed. *Magie v. Evangelical Dutch Church*, 13 N.J.Eq. 77 (Ch. 1860); *Holmes v. Trustees of Wesley M. E. Church*, 58 N.J.Eq. 327, 41 A. 102 (Ch. 1898); *Trustees of First Presbyterian Church v. Wheeler*, 106 N.J.Eq. 8, 149 A. 589 (Ch. 1930).

5. *Hopkins v. Grimshaw*, 165 U.S. 342, 17 S.C. 401, 41 L. Ed. 739 (1897); *First Universalist Society v. Boland*, 155 Mass. 171, 29 N.E. 524 (1892); 2 REST. TRUSTS 1228 (1935).

6. *Mills v. Davidson*, 54 N.J.Eq. 659, 35 A. 1022, 35 L.R.A. 113, 55 A. S. Rep. 594 (E. & A. 1896); *Talbot v. Riggs*, 287 Mass. 273, 191 N.E. 360, 93 A.L.R.

vest within the period prescribed by the rule against perpetuities, the attempted gift is bad. The exceptions are not so simple to comprehend, however, because the judges early confused the rule against perpetuities with the rule against restraints on alienation.<sup>8</sup> The two canons had the common purpose of facilitating the economic circulation of property, but aimed at this result by different means.<sup>9</sup>

The earliest case to enunciate the rule that a gift to a charity is valid even though a condition is attached that may cause the property to shift to another charity beyond the period of the rule against perpetuities, had as its rationale the rule against inalienability.<sup>10</sup> This reasoning,

964 (1934); *Ledwith v. Hurst*, 284 Pa. 94, 130 A. 315 (1925); *Village of Brattleboro v. Mead*, 44 Vt. 556; *Merrill v. American Baptist Union*, 62 A. 647 (N.H. 1905); *Institute for Savings v. Roxbury Home for Aged Women*, 244 Mass. 383, 139 N.E. 301 (1923); *Easton v. Hall*, 323 Ill. 397, 154 N.E. 216 (1926); 2 *REST. TRUSTS* 1229 (1935); *Jocelyn v. Nott*, 44 Conn. 55 (1876); *Company of Pewterers v. Governors of Christ Hospital* [1623] 23 Eng. Rep. 388. However, where the latter gift is vested in interest upon the bequest to the individual, the rule is not violated, although possession is postponed. *In re Gageby's Estate*, 293 Pa. 109, 141 A. 842 (1928).

7. *Girard Trust Co. v. Russell*, 179 F. 446 (C.C.A. 3d 1910). But if there is a gift of an immediate interest to a charity, the rule doesn't apply. *Brigham v. Peter Bent Brigham Hospital*, 134 F. 513 (C.C.A. 1st 1904); *MacKensie v. Trustee*, 67 N.J.Eq. 652, 61 A. 1027 (E. & A. 1905); *Webster v. Wiggins*, 19 R.I. 73, 31 A. 824 (1895).

8. Thus in the leading case of *Christ's Hospital v. Granger* [1849] 47 Eng. Rep. 1521, the court, upholding a bequest to a charity which bequest contained the condition that if it failed to apply the trust property for one year, the property was to pass to another named charity, said: "If the Corporation of Reading might hold the property for certain charities in Reading, why may not the Corporation of London hold it for the charity of Christ's Hospital in London? The property is neither more nor less alienable on that account." See criticism of this rationale in 31 *MICH. L. REV.* 1167 (1933).

9. Courts' statements that the rule against perpetuities doesn't apply to charitable trusts are also misleading for the reason that the confusion exists as to what the rule means. Thus it may mean the rule against remoteness of vesting of contingent interests (see 1 *BOGERT, TRUST AND TRUSTEES* 630, 1933); the common law rule against restraints on alienation (1 *id.* 702); statutory rules against suspension of the power of alienation (1 *id.* 680); the rule against unduly postponing direct enjoyment (1 *id.* 670).

10. *Supra*, note 8.

beneficent though it be, fails when applied to gifts which shift from charities to individuals. However, the authorities are dogmatic in their stand that the latter gift is bad. The only excuse for the exception in the instant case is that the courts are loath to apply the harsh doctrine to charities, and seize on all possible pretexts to validate the bequest.<sup>11</sup> This case might be better explained on this ground than on the confusing one assigned by the English courts.

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11. *E.g.*, the cases where a gift is to a charitable corporation to be organized. *First National Bank v. Collins*, 114 N.J.Eq. 59, 168 A. 275 (E. & A. 1933), 3 *MERCER BEASLEY L. REV.* 117 (1934). And see on this point, *Inglis v. Trustees of Sailors' Snug Harbor*, 28 U.S. 99, 7 L. Ed. 617 (1830); *Jones v. Habersham*, 107 U.S. 174, 23 S. Ct. 336, 27 L. Ed. 401 (1882); *Y.M.C.A. v. Appleby*, 98 N.J.Eq. 704, 130 A. 921 (E. & A. 1925); *First Camden Bank v. Collins*, 110 N.J.Eq. 623, 160 A. 848 (Ch. 1932); *In re Daly's Estate*, 208 Pa. 58, 57 A. 180 (1904); *Heskoth v. Murphy*, 36 N.J.Eq. 304 (----).

See the language in *Storrs Agricultural School v. Whitney*, 54 Conn. 342, 8 A. 141 (1887): "As one charitable use may be perpetual, the gift to two in succession can be of no longer duration nor of greater evil. The property is taken out of commerce but it instantly goes into perpetual servitude to charity. The effect is practically the same as if the gift had been to a specified charitable use during the pleasure of the trustee, then to another charitable use, both by the administration of the same trustees or their successors."