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Recent Cases

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE REGULATION OF TRUCKS SINCE THE ENACTMENT OF FEDERAL MOTOR CARRIER ACT

*H. P. Welch Co. v. State of New Hampshire*¹

The state of New Hampshire in 1933 enacted a law² declaring it unlawful for contract or common carriers, with certain specified exceptions, to operate on the state highways when their drivers have been continuously on duty for twelve hours or more. Appellant is a Massachusetts corporation doing intrastate and interstate business, approximately 99 per cent of the business being interstate, as a common and contract carrier in the state of New Hampshire. The Public Service Commission of that state in December, 1937, suspended appellant's registration certificate for five days for violating Section 8 of the New Hampshire Act³ in regard to maximum hours of employment of truck drivers. The case was appealed to the United States Supreme Court from a dismissal of an appeal from an order of the Public Service Commission by the Supreme Court of New Hampshire.

Appellant contended that the Act was unconstitutional because in direct conflict with the equal protection clause, and secondly, (to which point this note is limited) because the Federal Motor Carrier Act⁴ and the regulations promulgated thereunder by the Interstate Commerce Commission have superseded the state's authority to regulate the hours of employment of interstate motor carriers. Summarily, the Court held that the Congressional authority under the Federal Motor Carrier Act and the regulations as prescribed by the Interstate Commerce Commission,⁵ the effective date of which was postponed until January 31, 1939,

1. 306 U. S. 79 (1939).

2. N. H. Laws 1933, c. 106. Section 1 requires common and contract carriers between points within the state to register their trucks with the Public Service Commission. Section 2 states that contract carriers include those, other than common carriers, who haul for hire by motor vehicle on any road of the state. Section 3 exempts from the challenged regulation those transporting products of their own manufacture or labor, and motor vehicles not principally engaged in the transportation of property for hire or operating exclusively in a city or town or within ten miles of its limits or beyond the ten-mile limit on not more than two trips in thirty days. Section 8 declares: "It shall be unlawful for any driver to operate, or for the owner thereof to require or permit any driver to operate, any motor vehicle for the transportation of property for hire on the highways of this state when the driver has been continuously on duty for more than twelve hours, and after a driver has been continuously on duty for twelve hours it shall be unlawful for him or for the owner of the vehicle to permit him to operate any such motor vehicle on the highways of this state until he shall have had at least eight consecutive hours off duty." Section 11 provides that for violations of the Act the commission shall have authority after notice and hearing, to suspend or revoke any registration certificate.

3. *Ibid.*

4. 49 STAT. 546 (1936), 49 U. S. C. § 304 (Supp. 1938).

5. *Ex parte* No. MC-2, 3 M. C. C. 665 (I. C. C. Reports 1937).

did not supersede nor divest the state's authority to continue their regulations of the maximum hours of employment of drivers for interstate motor carriers, at least, until the effective date of operation of the Interstate Commerce Commission's regulations. It is worthy to note that the alleged violations of the state Act by the appellant occurred before the regulations of the Interstate Commerce Commission concerning the identical subject matter were promulgated. The Court, cognizant of this fact, intimated that this difference in time is in no way decisive of the result reached. Guided by precedent of analagous cases involving the same problem, the Court applied a rule of construction of federal statutes that had been the governing factor in those cases.⁶ The rule applied is that "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution . . . it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested."⁷ Seemingly, the Court's principal reliance is placed on the theory that there is an extreme necessity to protect human lives and property on the highways and that the regulation of motor carriers, particularly the hours of employment of truck drivers, will necessarily tend toward the desired result. Manifestly, the Court will imply that the Congressional intent must have been to permit the states to exercise their reserved powers over highway traffic until effective federal action. The Court emphasizes that the uniform effort of all governmental authorities, under modern conditions, is to mitigate the destruction of life, limb and property resulting from the use of motor vehicles. No one will take issue with the proposition that a tired and overworked truck driver who is permitted to operate on the highways is a menace to the traveling public. Congress, in the face of such dangers, would not intend to strip the states of their authority to act until they had substituted a working measure in its place. The Court, following this same line of reasoning in *Kelly v. Washington*,⁸ said: "When the State is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the State of the power which it would otherwise possess." The protection of human lives and property on the highways from possible destructive forces would, without doubt, come within this meaning of vital interests.

Orthodoxly, the Court has consistently held that whenever the federal government took effective action in a field of interstate commerce the state's authority to regulate that identical subject matter by virtue of its police powers had been superseded by the federal regulations.⁹ This so-called doctrine of the occupancy

6. *Mintz v. Baldwin*, 289 U. S. 346 (1933); *Reid v. Colorado*, 187 U. S. 137 (1902); *Missouri Pacific Ry. v. Larabee Flour Mills*, 211 U. S. 612 (1909); *Missouri, K. & T. Ry. v. Harris*, 234 U. S. 412 (1914); *Smith v. Illinois Bell Tel. Co.*, 282 U. S. 133 (1930); *Northwestern Bell Tel. Co. v. Nebraska State Ry. Comm.*, 297 U. S. 471 (1936).

7. *Illinois Cent. R. R. v. Public Utilities Comm.*, 245 U. S. 493, 510 (1918).

8. 302 U. S. 1, 14 (1937).

9. *McDermott v. Wisconsin*, 228 U. S. 115 (1913); *Chicago, R. I. & P. Ry. v. Hardwick Farmers Elev. Co.*, 226 U. S. 426 (1913); *Pensacola Telegraph Co. v.*

of the field of action by Congress has never been clarified by the Court as to what Congressional action must be taken before the resultant supersedure of federal authority over the state's reserved power will occur. Following this doctrine of occupancy of the field of action by Congress, the Supreme Court in *Northern Pacific Ry. v. Washington*,¹⁰ and in *Erie R. R. v. New York*,¹¹ held that a state act regulating hours of employment of railway employees engaged in interstate commerce was invalidated by the enactment of the Federal Hours of Service Act,¹² even though the effective date of the federal regulations was postponed for a year, and, therefore, the state act in no way conflicted with the operation of the federal statute. Upon a cursory examination, these cases seem to decide the very issue involved in the instant case. However, the Court disposed of their precedential force by concluding that the facts were so variant as to require no discussion. To dispose of any binding effect that these above-mentioned railroad cases might have upon the instant case, the Supreme Court of New Hampshire,¹³ from which this appeal is taken, pointed out that in the railroad cases Congress had made the regulations and had postponed their effective date, whereas in the principal case, Congress passed a general law imposing the duty of formulating the rules thereunder upon the Interstate Commerce Commission, who, after making such regulations, postponed their effective date. This purported grounds for distinguishing these cases has never been followed by the United States Supreme Court, and it made no mention of it in the principal case. However, a purported distinction of these cases may be made with some plausibility on the basis that the regulations in the principal case affected matters inherently different in their nature and characteristics than those in the railroad cases. The occupation of railroad engineers is highly technical and complex in its nature, and can only be mastered after long training and experience. The commonplace occupation of truck driving requires no special training and permits the motor carriers to select their drivers at random. If motor carriers were required to make drastic changes in their schedules and the personnel of their employment, they would find little difficulty in making rapid adjustments to the new conditions. When railroads are required to make such changes, however, they must necessarily be given adequate time to adjust themselves to the future conditions to be imposed upon them. The Supreme Court pointed out in *Erie R. R. v. New York*, that Congress had recognized this fact by postponing the effective date of the act to enable the railroads to meet the new conditions. State action regulating the hours of employment in the railroad cases would have thwarted the Congressional purpose, whereas in the instant case the same justification for precluding state regulation of motor carriers does not exist.

Western Union Telegraph Co., 96 U. S. 1 (1877); Powell, *Current Conflicts Between the Commerce Clause and State Police Power* (1928) 12 MINN. L. REV. 607; Note, *Supersedure of State Laws by Federal Regulations under the Commerce Clause* (1938) 86 U. OF PA. L. REV. 532.

10. 222 U. S. 370 (1912).

11. 233 U. S. 671 (1914).

12. 34 STAT. 1415 (1907), 45 U. S. C. § 61 (1934).

13. *H. P. Welch Co. v. State of New Hampshire*, 89 N. H. 428, 199 Atl. 886 (1938).

The Court recognized the state's proprietary interest in their highways. Whether this proprietary interest in itself is sufficient to justify state regulation of interstate motor carriers operating on state highways in the face of inoperative federal regulations is open to speculation, as the Court did not ground its decision on that principle. Obviously there would be a greater justification for permitting the states in such a situation to protect their vital interests on the highways than on the privately owned railroad beds.

In the case of *Oregon-Washington R. R. & Nav. Co. v. Washington*,¹⁴ a statute of Washington authorized the establishment of quarantines against infected plants and trees by the director of agriculture, who, by virtue of such authority, proclaimed quarantines and forbade the importation of alfalfa to prevent the introduction of the alfalfa weevil into the state. A Congressional act delegated to the federal department of agriculture the exclusive care of horticulture and agriculture of the states as affected injuriously by transportation in interstate and foreign commerce. The federal department of agriculture had taken no steps toward the prevention of the spread of alfalfa weevil by transportation in interstate commerce. The Court held that Congress had occupied the field by the passage of the act and that the state's power to regulate that same field of action had been superseded by the federal authority, even though there was no conflict in the operation of the federal and state statutes.¹⁵ However, since the holding in this case there has been some speculation by writers that the Court will be more hesitant to assume a strict construction in the application of the doctrine of the occupancy of the field of action than they had in the past. The principal case is some evidence of that speculation turning into a reality.

No sound reason can be given for the rule that where the effectiveness of Congressional legislation has been postponed in a field of action affecting the vital interests of the state, the state's reserved power to act has been precluded when state regulations in no way conflict, hinder, embarrass, or obstruct federal authority. Recent authority has shown that supersedure of state authority should occur where there is effective federal action, but not until that point has been reached.¹⁶

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14. 270 U. S. 87 (1926).

15. In a dissent by Justice McReynolds, concurred in by Justice Sutherland, he condemned this deplorable situation of rendering the state helpless by asseverating: "It is a serious thing to paralyze the efforts of a state to protect her people against impending calamity and leave them to the slow charity of a far-off and perhaps supine federal bureau."

16. *Eichholz v. Public Serv. Comm.*, 59 Sup. Ct. 532 (1939) In this case the Missouri Public Service Commission revoked an interstate motor carrier's permit to operate on the state highway for violations of the state act regulating motor carriers. On the passage of the Federal Motor Carrier Act the carrier applied to the Interstate Commerce Commission for a permit to operate, which application was still pending at the time of this suit. The carrier, in this suit, was seeking to enjoin the Public Service Commission of Missouri from revoking his permit, and he contended, among other things, that the federal authority to regulate interstate motor carriers had superseded the state's power to regulate such carriers by virtue of the passage of the Federal Motor Carrier Act. The Court

CRIMINAL LAW—AIDING AND ABETTING—SUFFICIENCY OF EVIDENCE

*State v. Mathis*¹

Defendant and a companion went into a department store wherein the companion stole certain goods. The state attempted to prove that defendant aided and abetted her by standing by, watching while she committed the offense. On a charge of petit larceny, the companion pleaded guilty, and defendant was tried and convicted by the court. On appeal, the St. Louis Court of Appeals found there was no substantial proof of guilt and reversed the conviction.

At common law, parties to a felony were classified as principals or accessories,² principals being those actually or constructively present *at the fact*.³ A principal was of the first degree—that is, he who committed the crime; or of the second degree—that is, he who took no part in the actual commission of the offense, but was present aiding and abetting him who did.⁴ This classification has been abolished by statute in Missouri,⁵ and in many other states.⁶ However, even under such statutes, when it is sought to prove that the accused did not directly perpetrate the crime, but only aided and abetted its perpetration, seemingly it would be necessary to find him guilty of that which formerly would have made him a principal in the second degree. It is not improper to accuse one of aiding and abetting a misdemeanor,⁷ although at common law no distinction was made between principals in the first and second degree in misdemeanors.⁸

To aid and abet the commission of a crime is to assist or encourage the actual perpetrator.⁹ There must be some participation.¹⁰ Mere presence at the

disposed of the carrier's contention, relying principally on the instant case, by asserting that due to the failure of the Interstate Commerce Commission to act upon the carrier's application, the state's authority to take appropriate action to enforce reasonable regulations of traffic upon the state highways had not been superseded. There are two recent state decisions which hold in accord with the principal case. *Lowe v. Stoutamire*, 123 Fla. 135, 166 So. 310 (1936); *State ex rel. R. C. Motor Lines v. Florida R. R. Comm.*, 123 Fla. 345, 166 So. 840 (1936).

1. 129 S. W. (2d) 20 (Mo. App. 1939).

2. MILLER, CRIMINAL LAW (1934) 226.

3. BLACK, LAW DICTIONARY (1933) 1416; MILLER, CRIMINAL LAW (1934) 229; Note (1923) 22 MICH. L. REV. 165.

4. *State v. Davis*, 29 Mo. 391, 396 (1860).

5. MO. REV. STAT. (1929) § 4446: "Every person who shall be a principal in the second degree in the commission of any felony, or who shall be an accessory to any murder or other felony before the fact, shall, upon conviction, be adjudged guilty of the offense in the same degree, and may be charged, tried, convicted and punished in the same manner, as the principal in the first degree."

6. Note (1931) 25 ILL. L. REV. 845 (collection of such statutes).

7. *United States v. Gooding*, 12 Wheat. 460 (U. S. 1827); *Shannon v. People*, 5 Mich. 71 (1858); *People v. Hoaglin*, 262 Mich. 162, 247 N. W. 141 (1933).

8. *Dowdy v. State*, 44 Ga. App. 569, 162 S. E. 155 (1932); *State v. Woodworth*, 121 N. J. L. 78, 1 A. (2d) 254 (1938).

9. *Johnson v. State*, 21 Ala. App. 565, 110 So. 55 (1926) (assist, encourage, support); *State v. Maloy*, 44 Iowa 104 (1876) (assent, countenance, approve, advise, encourage); *State v. Larkin*, 250 Mo. 218, 157 S. W. 600 (1913) (aid, abet, assist, encourage, advise); *State v. Baldwin*, 193 N. C. 566, 137 S. E. 590 (1927) (incite, encourage, abet, aid, advise, assist).

10. *Turner v. Commonwealth*, 268 Ky. 311, 104 S. W. (2d) 1085 (1937).

scene of a crime will not constitute one a participator therein.¹¹ Nor is it sufficient that one is present mentally approving,¹² or consenting to,¹³ or even favoring¹⁴ the commission of the crime, if such approval, consent, or favor is not made known to the actual perpetrator.

Many cases unreservedly state that there must be some affirmative word, act, or deed by the accused, before he can be convicted of participating in the crime,¹⁵ for a mere unlawful purpose or intent without an act in furtherance of that purpose or intent is not an offense.¹⁶ However, such affirmative conduct seems to be required only when the parties are not acting by a community of unlawful purpose.¹⁷ Apparently, no court has, expressly, made this distinction, but two cases illustrate it. In *People v. Woodward*,¹⁸ several boys attempted to rape a ten year old girl. It was alleged that defendant stood by and aided and encouraged them in the accomplishment of their purpose. There was no evidence of preconcert or combination between defendant and the others. The court found defendant was not guilty from the mere fact that he was present, if he did not act to aid, assist, or abet the perpetration of the crime. In *People v. Chapman*,¹⁹ defendant hired R. to seduce his (defendant's) wife so that he could obtain a divorce. The wife not yielding to R's advances, he raped her. Defendant was watching all the while through a hole in the wall, making no effort to restrain R. The court found defendant guilty of rape, saying, "The husband was not a mere passive looker-on. . . . when the wife screamed, and respondent did not interfere, he (R) knew that the husband was willing he should succeed in the accomplishment of the intercourse by force, . . . And the presence of the husband in the next room . . . imparted to him a confidence in his undertaking."

11. *State v. Larkin*, 250 Mo. 218, 157 S. W. 600 (1913); *People v. Woodward*, 45 Cal. 293 (1873); *Guetling v. State*, 198 Ind. 718, 153 N. E. 765 (1926); *State v. Farr*, 33 Iowa 553 (1871); *Connaughty v. State*, 1 Wis. 159 (1853).

12. *State v. Cox*, 65 Mo. 29 (1877) (instruction that defendant was guilty, if present, approving the offense, held reversible error); *Smith v. State*, 41 Ohio App. 64, 179 N. E. 696 (1931) (mere approval without expressed concurrence is not aiding and abetting).

13. *State v. Douglass*, 44 Kans. 618, 26 Pac. 476 (1890); *Clem v. State*, 33 Ind. 418 (1870) (reversible error to instruct that defendant is guilty if present and consenting to the crime).

14. *State v. Odbur*, 317 Mo. 372, 295 S. W. 734 (1927).

15. *Combs v. Commonwealth*, 224 Ky. 653, 6 S. W. (2d) 1082 (1928); *Hudson v. Commonwealth*, 227 Ky. 831, 14 S. W. (2d) 146 (1929); *White v. People*, 81 Ill. 333 (1876); *Crosby v. People*, 189 Ill. 298, 59 N. E. 546 (1901); *People v. Cione*, 293 Ill. 321, 127 N. E. 646 (1920); *State v. Epps*, 213 N. C. 709, 197 S. E. 580 (1938).

16. *State v. Bresse*, 326 Mo. 885, 33 S. W. (2d) 919 (1930).

17. "When by prearrangement, or on the spur of the moment, two or more persons enter upon a common enterprise or adventure, and a criminal offense is contemplated, then each is a conspirator, and if the purpose is carried out each is guilty of the offense committed, *whether he did any overt act or not.*" *Morris v. State*, 146 Ala. 66, 88, 41 So. 274, 280 (1906), quoted in *Jones v. State*, 174 Ala. 53, 57 So. 31 (1911). To the same effect, *Collins v. State*, 88 Ga. 347, 14 S. E. 474 (1892) (confederacy with the absolute perpetrator, supplemented by constructive presence, makes one a principal in the second degree).

18. 45 Cal. 293 (1873).

19. 62 Mich. 280, 284, 28 N. W. 896, 897 (1886).

In the principal case the state's theory was that defendant was a lookout, looking around and watching while her companion committed the offense. By the weight of authority, one who keeps watch while a crime is being perpetrated, so as to facilitate the escape of the party actually committing it, or to prevent his actually being interrupted, is an aider and abettor and guilty of the crime accomplished.²⁰ In some of these lookout, or watching cases, the defendant participates in the offense by an act which actually assists the actual perpetrator.²¹ In other such cases, the defendant, at the time of the offense, manifests his intention to assist if necessary by an overt act or oral expression.²² In most such cases the parties are acting in preconcert, and the mere presence of defendant encourages the actual perpetrator.²³

In the principal case, there was no evidence that defendant actually assisted in the commission of the offense, or that, at the time of the taking she communicated to her companion, by overt act or oral expression, her intention to assist if necessary. Therefore, to convict the defendant of participating in the offense, the state had to prove that the parties were acting by prearrangement, so that the very presence of the defendant encouraged her companion. There seems to be no direct evidence of such a plan, and the court evidently believed the circumstantial evidence was insufficient to submit to the jury.

J. LYNDON STURGIS

FEDERAL PROCEDURE—FINAL JUDGMENT—CAUSE OF ACTION

*Collins v. Metro-Goldwyn Pictures Corporation*¹

The complainant brought this action for infringement of a copyrighted book called "Test Pilot" by a motion picture of the same name, and for unfair competition in using the title "Test Pilot" as the title of the motion picture, thereby causing the public to believe the picture was lawfully based on the book with the consent of the author. The federal district court dismissed the claim of copy-

20. *State v. Walker*, 98 Mo. 95, 9 S. W. 646 (1888); *Lowe v. State*, 125 Ga. 55, 53 S. E. 1038 (1906); *People v. Courtney*, 307 Ill. 441, 138 N. E. 857 (1923); *Doan v. State*, 26 Ind. 495 (1866); *State v. Berger*, 121 Iowa 581, 96 N. W. 1094 (1903); *State v. Killian*, 178 N. C. 753, 101 S. E. 109 (1919); *Dixon v. State*, 46 Neb. 298, 64 N. W. 961 (1895); *People v. Repke*, 103 Mich. 459, 61 N. W. 861 (1895); *State v. Weekley*, 40 Wyo. 162, 275 Pac. 122 (1929); MILLER, CRIMINAL LAW (1934) 232; 16 C. J. 133.

21. *State v. Killian*, 178 N. C. 753, 101 S. E. 109 (1919) (defendant fired a gun to warn those unlawfully distilling liquor of the approach of officers); *State v. Weekley*, 40 Wyo. 162, 275 Pac. 122 (1929) (defendant, on guard at the entrance of a cafe, pressed a button warning those inside, selling liquor, of a raid by officers).

22. *Dixon v. State*, 46 Neb. 298, 64 N. W. 961 (1895) (defendant declared it was his purpose to keep watch while a doctor performed an abortion).

23. *State v. Walker*, 98 Mo. 95, 9 S. W. 646 (1888); *Lowe v. State*, 125 Ga. 55, 53 S. E. 1038 (1906); *Doan v. State*, 26 Ind. 495 (1866); *People v. Repke*, 103 Mich. 459, 61 N. W. 861 (1895).

1. 106 F. (2d) 83 (C. C. A. 2d, 1939).

right infringement because the facts were insufficient to state a cause of action; the second claim was not brought to trial. From the order of dismissal the complainant appealed to the Circuit Court of Appeals for the Second Circuit. That court held that an appeal would lie though the trial court had not disposed of the claim for unfair competition joined with it, and upon hearing the cause was reversed and remanded.

That provision of the Judicial Code which reads, "The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error *final* decisions—" has been construed in a great number of cases.³ In *Sheppy v. Stevens*,⁴ this same court held that an appeal would not lie from an order sustaining a demurrer to one of two separate causes of action when the demurrer to the other cause of action had been overruled, the defendant permitted to withdraw it and to answer, and the trial of the issues so raised was still pending. The court held that the appeal would not lie because a judgment was not final which did not dispose of all the issues in the case. After a review of the decisions in the other federal circuits,⁵ and in the light of the new Rules of Civil Procedure, the court here decided that the case of *Sheppy v. Stevens* should be overruled. In view of the extensive provisions made by the new rules for the joinder of several claims in a single suit, it would be very inconvenient to require an adjudication of all claims before a separate claim can be reviewed.⁶ The court must be given extensive discretionary powers to determine these questions in order to avoid delay. The rules indicate a definite policy to treat a judgment on a separate claim as final so that it may be enforced by execution.

The result the court reached in this case seems to be in line with the decisions of the Supreme Court which have held that an adjudication final in its nature as to a matter distinct from the general subject of the litigation and affecting only parties to the particular controversy, may be reviewed without waiting for the determination of the entire litigation.⁷ *Ex parte National Enameling & Stamping*

2. 43 STAT. 936 (1925), 28 U. S. C. § 225 (1934) (italics inserted).

3. See cases collected, 28 U. S. C. A. § 225, n. 32 (Supp. 1938). The limits of the appellate jurisdiction of the circuit courts of appeal are briefly discussed in Note (1931) 6 IND. L. J. 341.

4. 200 Fed. 946 (C. C. A. 2d, 1912).

5. *Klever v. Seawall*, 65 Fed. 373 (C. C. A. 6th, 1894) (the finality of a judgment cannot be affected because the cause of action upon which it was rendered was united in the same petition with other causes of action which had not yet been finally adjudicated); *Scriven v. North*, 134 Fed. 366 (C. C. A. 4th, 1904); *Historical Pub. Co. v. Jones Bros. Pub. Co.*, 231 Fed. 784 (C. C. A. 3rd, 1916) (a suit to restrain the infringement of two copyrights. Held that a decree dismissing the bill as to one is final as to that portion of the controversy, though it be interlocutory as to the other, and complainant may appeal from that portion of the decree which was final). *Contra*: *Myles Standish Mfg. Co. v. Champion Spark Plug Co.*, 282 Fed. 961 (C. C. A. 8th, 1922) (a decree for the plaintiff on the issues of infringement and unfair competition, and an order for an accounting for damages and profits for infringement and damages only for unfair competition held not to be final as to the disallowance of profits from unfair competition so as to support an appeal by the plaintiff); see *Moss v. Kansas City Life Ins. Co.*, 96 F. (2d) 108 (C. C. A. 8th, 1933).

6. See Rules 13, 14, 18, 20, 42(b), 54(b), and 82.

7. *Withenbury v. United States*, 5 Wall. 819 (U. S. 1866) (a decree dismissing the claim of one of the claimants for a portion of the property subject

Co.⁸ can be distinguished from the present case in that there a suit was brought for the infringement of a single patent and different claims arose out of the single invention, some of which were finally disposed of, and others remained in litigation when an appeal was attempted. The Supreme Court held that the decree was not final and that no appeal would lie. In the instant case the conduct claimed to constitute copyright infringement was distinct from the conduct alleged as unfair competition. The present case may also be distinguished from the cases where the decree appealed from failed to dispose of the case as to all the defendants involved in the transaction to which the relief was sought.⁹

In the case of *Hurn v. Oursler*,¹⁰ which laid down the rule that when a federal court takes jurisdiction of a case because it arises under the laws of the United States, the court may retain jurisdiction to dispose of the non-federal claim joined as part of the same cause of action, the Supreme Court held that claims for copyright infringement and unfair competition are to be regarded as part of a single cause of action.¹¹ In that case the two claims were based on exactly the same facts, so as to be considered not as separate causes of action but as different grounds asserted in support of the same cause of action. In the principal case the basis for the claim of unfair competition is different from that of copyright infringement, as it rests entirely upon identity of title, which is not covered by the copyright. The evidence to support the two claims is not the same. Upon this ground the two cases can possibly be distinguished.

The result reached by the court in this case depended upon its determination of what constituted a cause of action. Two definitions of the term "cause of action" are generally encountered. One, that it is such an aggregate of operative facts as will give rise to at least one right of action, but is not limited to a single right.¹² The controlling factor is a matter of trial convenience. This is sometimes referred to as "the pragmatic definition" of a cause of action.¹³ The other definition limits "cause of action" to an action based upon a single "primary

to condemnation as a prize of war, and execution of the cost was ordered; this was held to be final within the meaning of the Judiciary Act and an appeal allowed); *Trustees of Internal Improvement Fund v. Greenough*, 105 U. S. 527 (1881); *Williams v. Morgan*, 111 U. S. 684 (1884); *United States v. River Rouge Improvement Co.*, 269 U. S. 411 (1926) (an action for condemnation of land and gas mains; a new trial was given to the owners of the gas mains and the court held the judgment as to the riparian land owners was final and could be appealed. The court said that an adjudication final in its nature as to a matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy could be reviewed without awaiting the determination of the general litigation); *cf. Collins v. Miller*, 252 U. S. 364 (1920).

8. 201 U. S. 156 (1906).

9. *Bank of Rondout v. Smith*, 156 U. S. 330 (1895); *Hohorst v. Hamburg-American Packet Co.*, 148 U. S. 262 (1893).

10. 289 U. S. 238 (1933).

11. Note (1933) 33 *Col. L. Rev.* 699; Note (1934) 1 *U. of Chi. L. Rev.* 481.

12. *Harriss v. Tams*, 258 N. Y. 229, 179 N. E. 476 (1932); *Stafford Security Co., Inc. v. Kremer*, 258 N. Y. 1, 179 N. E. 32 (1931); *cf. Bemis Bros. Bag Co. v. United States*, 289 U. S. 28 (1933).

13. Arnold, *The Code "Cause of Action" Clarified by United States Supreme Court* (1933) 19 *A. B. A. J.* 215.

right."¹⁴ It argues that every action must have the elements of a primary right possessed by the plaintiff, a corresponding primary duty by the defendant, together with facts which constitute the defendant's delict or act of wrong. The former definition is usually identified with Clark,¹⁵ and the latter with Pomeroy.¹⁶ There have been other definitions which deviate slightly from these two.¹⁷ And in *United States v. Memphis Cotton Oil Co.*,¹⁸ Mr. Justice Cardozo said: "A 'cause of action' may mean one thing for one purpose and something different for another. . . . At times and in certain contexts, it is identified with the infringement of a right or the violation of a duty. At other times and in other contexts, it is a concept of the law of remedies. . . . Another aspect reveals it as . . . the group of operative facts out of which a grievance has developed. This court has not committed itself to the view that the phrase is susceptible of any single definition. . . ."

The court, in holding that the claims for copyright infringement and unfair competition constituted two separate causes of action, seems to adopt a view in keeping with the Pomeroy test. *Quaere*, on facts identical with those of *Hurn v. Oursler*, which seemed to accept the Clark definition, would the court avail itself of the varying concept of a cause of action, as enunciated by Mr. Justice Cardozo, to hold that the judgment of the copyright claim was final and appealable?

It is interesting to note the position taken by Judge Clark in his concurring opinion, where, in agreeing with the majority of the court, he asserts that the determination of a cause of action may vary with the particular case. He contends that this is in keeping with the position taken by him in his textbook and other writings,¹⁹ but while he there admitted that "cause of action" is a flexible concept, he in no place suggested that it means different things in different places, and his work has been generally interpreted to the opposite conclusion.²⁰ Perhaps recent experience with the exigencies of the judiciary has induced the positive views here expressed.

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14. *Hurt v. Haering*, 190 Cal. 198, 211 Pac. 228 (1922); *State v. Lorillard Co.*, 181 Wis. 347, 193 N. W. 613 (1923).

15. CLARK, CODE PLEADING (1928) 84; Clark, *The Code Cause of Action* (1924) 33 YALE L. J. 817; Clark, *The Cause of Action* (1934) 82 U. OF PA. L. REV. 354.

16. POMEROY, CODE REMEDIES (5th ed. 1929) 526-548.

17. *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, 321 (1927): "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result . . . is the violation of but one right by a single legal wrong . . . 'The facts are merely' he means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear.'" Gavit, *A "Pragmatic Definition" of the "Cause of Action?"* (1933) 82 U. OF PA. L. REV. 129, refers to a definition of a cause of action as the violation of a substantial right. And see Gavit, *The Code Cause of Action: Joinder and Counterclaims* (1930) 30 COL. L. REV. 802; McCaskill, *Actions and Causes of Action* (1925) 34 YALE L. J. 614.

18. 238 U. S. 62, 67 (1933).

19. See note 16, *supra*.

20. Consider the implications of CLARK, CODE PLEADING (1928) § 19, notes 110 and 146.

PROPERTY—ESTATES—LIMITATION SUFFICIENT TO CREATE JOINT TENANCY

*State ex rel. Ashauer v. Hostetter*¹

Ashauer, the testator, died leaving a will which stipulated, among other provisions, that he devised all his real estate to his two daughters, "as tenants by the entirety," with the further provision that if the daughter Adelia survived the daughter Mathilda then she should hold the estate for her sole and separate use and benefit. The will also provided that Mathilda should have the sole right to occupy the house so long as she lived. Adelia instituted a suit seeking construction of the will and partition of the land devised. The other sister demurred on the ground the petition showed that the property was not subject to partition and that there were no facts sufficient to constitute a cause of action. The lower court held that since this was a coterminous, and not a successive estate, it could be partitioned under a Missouri statute² so providing, and the demurrer should be overruled. The appellate court quashed a writ of *certiorari*, holding that the attempted creation of the estate by the entireties in the two daughters was unavailing as such an estate could exist only between husband and wife, and despite any intention of the testator to create a joint tenancy, there was not such an express declaration as to be allowed under the provisions of the Missouri statute³ requiring an express declaration to create such an estate. The daughters, therefore, were tenants in common of a fee simple absolute, the proviso not being clear enough to reduce to a life estate a preceding limitation in terms sufficient to create a fee simple.

Whenever the four unities of interest, title, time and possession⁴ were present in an estate of co-ownership, the early common law courts held the estate to be one of joint tenancy, that is, an estate held by two or more persons jointly, in which during the lives of all of the owners they are equally entitled to the enjoyment of the land or its equivalents in rents or profits; but on the death of one, his share does not devolve to his heirs, but the survivors have the whole estate. When but one survivor remains the entire estate belongs to him and passes to his heirs on his death.⁵ Because of the desire of the common law judges to lessen

1. 127 S. W. (2d) 697 (Mo. 1939), quashing *certiorari* brought to quash the decision and opinion in *Peer v. Ashauer*, 102 S. W. (2d) 764 (Mo. App. 1937).

2. MO. REV. STAT. (1929) § 1545: "In all cases where lands, tenements or hereditaments are held in joint tenancy, tenancy in common, or co-parcenary, including estates in fee, for life, or for years, tenancy by the curtesy and in dower, it shall be lawful for any one or more of the parties interested therein, whether adults or minors, to file a petition in the circuit court of the proper county, asking for the admeasurement and setting off of any dower interest therein, if any, and for the partition of the remainder, if the same can be done without any great prejudice to the parties in interest; and if not, then for a sale of the premises, and a division of the proceeds thereof among all of the parties, according to their respective rights and interests."

3. MO. REV. STAT. (1929) § 3114.

4. 2 BL. COMM. *180. The four unities required were that the joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same individual possession.

5. TIEDEMAN, REAL PROPERTY (1885) § 236; 1 WASHBURN, REAL PROPERTY (5th ed. 1887) 675; 1 TIFFANY, REAL PROPERTY (2d ed. 1920) § 190; WILLIAMS, REAL PROPERTY (24th ed. 1926) 193.

the feudal burdens of the tenants, since only one service was due from all the joint tenants⁶ and on the death of one joint tenant the other tenants acquired his share free from the burdens in favor of the lord which ordinarily accrued on the death of a tenant of land,⁷ the presumption grew up that a limitation to two or more persons created a joint tenancy. One authority⁸ believes that the reason for the presumption lay in the feudal idea that the services due the lord should be kept entire. Where the intention was present, the courts, of course, construed the estate as a tenancy in common, a co-ownership in which there is unity of possession but a lack of one or more of the other unities. A tenant in common has an undivided interest in the land so far as possession is concerned, but in all other respects he has the interests of a tenant in severalty.⁹ As has been noted, the most important difference in result between the two estates depends on the doctrine of survivorship. This doctrine appears to be an outgrowth of the concept of the joint tenancy as but one estate, a theory which conceives of the interest as being extinguished at death, leaving nothing to pass to the heirs or devisees.¹⁰ The equity courts, however, began to regard these estates as tenancies in common, especially where the parties had advanced money upon the estates.¹¹ With the practical abolition of tenures, the reason for the law court's policy ceased, and the courts of equity, regarding the doctrine of survivorship as productive of great hardships in depriving the heirs of a property inheritance, showed a disposition to seize upon any indication of intent in their efforts to construe an instrument as creating a tenancy in common rather than a joint tenancy.¹² The early American cases, while applying the presumption, opposed the joint tenancy bitterly in *dicta*, and favored the tenancy in common.¹³ In one or two jurisdictions the courts have, without legislative aid, limited¹⁴ or denied¹⁵ the English common law presumption of joint tenancy. In Connecticut, which accepted the presumption, survivorship

6. CO. LITT. *70b; 2 BL. COMM. *180.

7. Butler v. Archer, Owen 152 (K. B. 1650); Fisher v. Wigg, 1 Salk. 390 (K. B. 1795).

8. 1 WASHBURN, *op. cit. supra* note 5, at 675.

9. TIEDEMAN, *op. cit. supra* note 5, § 239; 1 TIFFANY, *op. cit. supra* note 5, § 190; 1 WASHBURN, *op. cit. supra* note 5, at 685; WILLIAMS, *op. cit. supra* note 5, at 202; Brown v. Wellington, 106 Mass. 318 (1871); Butler v. Roys, 25 Mich. 52 (1872).

10. 1 TIFFANY, *op. cit. supra* note 5, § 191. WILLIAMS, *op. cit. supra* note 5, at 208, an important use of joint tenancy in England today is for the purpose of vesting estates in trustees who are invariably made joint tenants. See Duncan v. Forrer, 6 Binn. 193 (Pa. 1813).

11. Rigden v. Vallier, 2 VES. SEN. 252 (Ch. 1751). For an excellent comment on the history of the attitude the courts have taken in the construction of these estates of concurrent ownership see Note (1910) 23 HARV. L. REV. 214; 1 WASHBURN, *op. cit. supra* note 5, at 676.

12. Lake v. Craddock, 3 P. WMS. 158 (Ch. 1732); Rigden v. Vallier, 2 VES. SEN. 252 (Ch. 1751); Jolliffe v. East, 3 BRO. C. C., 25 (Ch. 1789); 1 TIFFANY, *op. cit. supra* note 5, § 191. For a summary of the history of the courts attitude see the opinion by Marshall, J., in Johnston v. Johnston, 173 Mo. 91, 73 S. W. 202 (1903).

13. Noble v. Teeple, 58 Kan. 398 (1897); Martin v. Smith, 5 Binn. 16 (Pa. 1812).

14. Martin v. Smith, 5 Binn. 16 (Pa. 1812).

15. Vreeland v. Van Ryper, 17 N. J. Eq. 133 (1864).

was rejected.¹⁶ In the absence of statutory provisions, however, the courts in their holdings mainly followed the English decisions.¹⁷ The states have adopted statutes of various types tending to greatly restrict the application of the joint tenancy presumption, or abolishing the incident of survivorship where a joint tenancy is created, or abolishing the estate altogether.¹⁸ The Missouri statute¹⁹ states: "Every interest in real estate granted or devised to two or more persons, other than executors and trustees and husband and wife, shall be a tenancy in common, unless expressly declared, in such grant or devise, to be in joint tenancy." This statute is typical of those in other states abolishing the common law presumption of joint tenancy, and favoring a presumption of tenancy in common.

In the instant case it seems that the court has applied the statute with severity. It is clear that the estate limited could not be a tenancy by the entireties, for such an estate can exist only if the persons to whom the conveyance is made are husband and wife at the time the instrument takes effect.²⁰ Since survivorship is the most important incident of a tenancy by the entireties, it is obvious that the intention of the testator was to create an estate of co-ownership with an incident

16. *Phelps v. Jepson*, 1 Root 48 (Conn. 1769).

17. *Barclay v. Hendrick's Heirs*, 3 Dana 378 (Ky. 1835); *Decamp v. Hall*, 42 Vt. 483 (1869).

18. Hardly any two statutes on the subject are identical in their provisions, but they have been classified by BREWSTER, *CONVEYANCE* (1904) § 151, as:

(a) "Those reversing the common law rule that an estate granted or devised to two or more persons is presumed to create a joint tenancy rather than a tenancy in common;" (In a subsection the author lists Ark., Cal., Colo., Idaho, Ill., Ind., Iowa, Me., Md., Mass., Mich., Minn., Mo., Mont., N. H., N. Y., N. D., R. I., S. D., Utah, Vt., Wis.). *Hoffman v. Stigers*, 28 Iowa 302 (1869).

(b) "Those destroying survivorship;" (In a subsection the author lists Ala., Colo., Ill., Kan., N. C., Pa., S. C., Tenn., Va., Wash., W. Va.). *Parsons v. Boyd*, 20 Ala. 112 (1852).

(c) "Those expressly abolishing joint tenancy." (In a subsection the author lists Ga. & Ore.).

Ohio and Connecticut held joint tenancies did not exist at common law. *Phelps v. Jepson*, 1 Root 48 (Conn. 1769); *Miles v. Fisher*, 10 Ohio 1 (1840).

The question of retroactivity in connection with these statutes has been the subject of interesting legal discussion. Some jurisdictions have held that existing joint tenancies could not be changed into tenancies in common, *Dewey v. Lambier*, 7 Cal. 347 (1857); *Butte & B. C. M. Co. v. Montana O. P. Co.*, 25 Mont. 41, 63 Pac. 825 (1901); see *Greer v. Blanchard*, 40 Cal. 194 (1870). The weight of authority, however, holds that such statutes are valid as operating merely to render the estate more beneficial. The reasoning has been that the legislature may destroy the rights of survivorship in joint tenants as it is a mere contingency destructible by either of the joint tenants, *Bambaugh v. Bambaugh*, 11 S. & R. 190 (Pa. 1824), and in a like manner a statute making joint heirs tenants in common may embrace estates existing at the time of its passage, *Stevenson v. Cofferin*, 20 N. H. 150 (1849). An act changing the tenure of trustees from joint tenancy to tenancy in common, however, is void as to existing trusts, *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394 (1869).

19. *MO. REV. STAT.* (1929) § 3114. The Missouri statute is similar to other state statutes which are not applicable to trustees on the theory that it is desirable that there be no division of the legal title on the death of one of the trustees: *Parsons v. Boyd*, 20 Ala. 112 (1852); *Webster v. Vandeventer*, 6 Gray 428 (Mass. 1856); *Gray v. Lynch and McDonald*, 8 Gill 403 (Md. 1849). Likewise the statute does not apply to husband and wife and the tenancy by the entireties still exists in Missouri: *Harrison v. McReynolds*, 183 Mo. 533, 82 S. W. 120 (1904); *Peters v. Peters*, 312 Mo. 609, 280 S. W. 424 (1926).

20. 1 *TIFFANY*, *op. cit. supra* note 5, § 194; 1 *WASHBURN*, *op. cit. supra* note 5, at 706.

of survivorship. Such an intention is clear in the ineffective devise and in the later express provision for the surviving daughter to take the entire estate. The court, however, refuses to carry out his intention. The problem of what constitutes a sufficient declaration under a statute similar to that existing in Missouri is one on which the courts have offered a variety of interpretations. In one case²¹ a statement that the donees were to hold "jointly" was held to be a sufficient express declaration, but such an expression has been held insufficient in other jurisdictions.²² A gift to two or more persons and their survivors was held to create a joint tenancy,²³ as was a gift to two persons for their joint lives and to the survivor of them during his or her natural life.²⁴ In one case,²⁵ however, the words "jointly, the survivor to have full ownership" created a tenancy in common, not a joint tenancy.

The Missouri cases seem to have required strict conformity to the words of the statute in order to create a joint tenancy. The doctrine that the intention of the testator should be carried out²⁶ is disregarded. The court in the instant case states: "This rock-ribbed rule (intention of testator) of construction, so strictly and faithfully followed in this state, is subject to this very vital qualification, to wit, that it must not conflict with any inflexible rule or requirement of law." A number of declarations which would seem to show definitely a desire to create a joint tenancy have been construed to create tenancies in common.²⁷ The instant case has gone further than any of the prior Missouri cases in disregarding completely any intent of the testator with respect to the construction in question. It would seem that in Missouri no other words except "in joint tenancy" or perhaps "as joint tenants" will create an estate in joint tenancy.²⁸

In the instant case the court took great pains to lay down an ironclad rule for the creation of a joint tenancy, within the "express declaration" requirement of the statute. In view, however, of the fact that the Missouri statute providing

21. Case v. Owen, 139 Ind. 22, 38 N. E. 395 (1894).

22. Davis v. Smith, 4 Harr. 68 (Dela. 1843); Mustain v. Gardner, 203 Ill. 284, 67 N. E. 779 (1903); Doran v. Beale, 106 Miss. 305, 63 So. 647 (1913); Overheiser v. Lackey, 207 N. Y. 229, 100 N. E. 738 (1912).

23. Wood v. Logue, 167 Iowa 436, 149 N. W. 613 (1914); Stimpson v. Batterman, 5 Cush. 153 (Mass. 1849).

24. Pritchard v. Walker, 22 Ill. App. 286 (1887).

25. Wright v. Knapp, 183 Mich. 656, 150 N. W. 315 (1915).

26. Nichols v. Boswell, 103 Mo. 151, 15 S. W. 343 (1890); Garth v. Garth, 139 Mo. 456, 41 S. W. 238 (1897); Grace v. Perry, 197 Mo. 550, 95 S. W. 875 (1906); Gardner v. Vanlandingham, 334 Mo. 1054, 69 S. W. (2d) 947 (1934).

27. "To be joint property transferable by joint deed," Rodney v. Landau, 104 Mo. 251, 15 S. W. 962 (1891); "Secondly, I will to my sons . . . property," Lemmons v. Reynolds, 170 Mo. 227, 71 S. W. 135 (1902); "to said daughters Julia and Victoria jointly," Cohen v. Herbert, 205 Mo. 537, 104 S. W. 8 (1907); "give, and bequeath to my beloved wife . . . and my beloved niece . . . to have and hold during their natural life," Philbert v. Campbell, 317 Mo. 556, 296 S. W. 1001 (1927). For a construction of such statutes similar to that of the Missouri cases see Cockrill v. Armstrong, 31 Ark. 580 (1876); Estate of Hittell, 141 Cal. 432 (1903); Mustain v. Gardner, 203 Ill. 284 (1903); *In re Kimberly*, 150 N. Y. 90 (1896); Seely v. Seely, 44 Pa. St. 434 (1863).

28. A recent Missouri writer speaks of the instant case as establishing a new rule of law, "Intention is not considered in construing wills." Gill, *Work of Missouri Supreme Court for the Year 1937 (Property)* (1938) 3 Mo. L. Rev. 398.

for the partition of estates²⁹ provides for partition in the case of either joint tenancies or tenancies in common, it would seem that it was not material to the decision whether the estate was in joint tenancy or a tenancy in common. The decision, therefore, as to the type of estate created was *dictum*. On the other hand, a fair search of the Missouri cases has revealed no case allowing partition of an estate which was clearly a joint tenancy. The court, therefore, may be holding that a joint tenancy cannot be partitioned, or can be partitioned only to a limited extent, despite the express words of the statute. If this is the case, the courts view that the estate in question was a tenancy in common is holding and not *dictum*, since partition was permitted.

It may be possible in some cases to avoid the operation of the statute creating the presumption of tenancy in common by showing the intention of the testator or grantor, the lack of clarity in the expression, and a mutual mistake, in a suit for equitable reformation of the deed or will.³⁰ Such a procedure might also escape the limiting difficulties of the parol evidence rule.³¹

It is possible that the courts may construe a limitation to be a tenancy in common for life with a contingent remainder in favor of the survivor,³² or as a tenancy in common in fee simple with an executory interest in favor of the survivor.³³ It seems doubtful, however, whether in view of the present attitudes of courts and legislative bodies toward the doctrine of survivorship such steps will be taken to avoid the statute creating the presumption of joint tenancy.

JOHN H. GUNN

RECEIVERSHIP—DISTRIBUTION OF FEES AND COSTS BETWEEN APPLICANT AND RECEIVER

*Bowersock Mills & Power Co. v. Joyce*¹

Plaintiff, a broker under contract with defendant to distribute its products in six states, sued for breach of contract, and defendant cross-complained for an accounting, for an injunction to prevent plaintiff from disposing of perishable goods belonging to defendant and in plaintiff's possession, the disposal of which goods in a perished state might injure defendant's business, and for the appointment of a temporary receiver to take possession of such property. Such a re-

29. Mo. REV. STAT. (1929) § 1545.

30. *McVey v. Phillips*, 259 S. W. 1065 (1924); see *Peters v. Peters*, 312 Mo. 609, 280 S. W. 424 (1926).

31. "When a legal act is reduced into a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act." 4 WIGMORE, EVIDENCE (1905) § 2425.

32. "A tenancy in common with benefit of survivorship is a case which may exist, without being a jointenancy; because survivorship is not the only characteristic of jointenancy." *Bayley, J.*, in *Doe v. Abey*, 1 M. & S. 428 (K. B. 1813). *Mittel v. Karl*, 133 Ill. 65, 24 N. E. 553 (1890); *Schulz v. Brohl*, 116 Mich. 603, 74 N. W. 1012 (1898); *Hannon v. Christopher*, 34 N. J. Eq. 459 (1881).

33. *Rowland v. Rowland*, 93 N. C. 214 (1885).

1. 101 F. (2d) 1000 (C. C. A. 8th, 1939).

ceiver was appointed and for almost three years took the appropriate steps to acquire possession of and dispose of the property. After that time the defendant informed the court that a settlement had been reached, whereupon the receiver filed a final report showing that expenditures and disbursements left of the fund of the receivership a balance of only \$578.46. Upon motion for allowance of receiver's fees, defendant admitted that the services of the receiver and his attorney were most satisfactory, and fees were awarded for the full amount asked, \$2500, and charged against the defendant. The defendant, appellant, contended (1) that the fees were chargeable only against the receivership fund, and (2) that the court failed to consider the balance of \$578.46 remaining in the hands of the receiver. The circuit court of appeals modified the order to the extent that the balance of \$578.46 should be deducted from the amount charged the defendant, but affirmed the order in all other respects. The court held that this case presented sufficient grounds for the exercise of equitable discretion to be an exception to the general rule that when a receiver is properly and lawfully appointed his compensation is to be charged only against the receivership funds.

In the typical situation the petitioner seeks a receiver of the defendant's property. Adjudication that the cost of the receivership should be paid out of receivership funds is, at least where there is any surplus to be returned to the defendant, tantamount to imposing the cost on the defendant. Where the receivership assets do not satisfy the claims against them, the issue is whether the costs shall be borne by all the creditors (i. e., taken from the fund in priority to other claims), by the petitioning creditor alone, or by the receiver himself.

Ultimately, the determination of the question rests upon the chancellor's discretion,² but as in all other cases of equity discretion, its exercise has been formulated along well settled lines. Perhaps the most uniformly recognized rule is that a receiver regularly and lawfully appointed by a court of competent jurisdiction who has faithfully performed the duties of his trust is entitled to reasonable compensation for his services, and should be paid primarily from the fund in his possession.³ This rule is grounded in the basic principle that such

2. *McIntosh v. Ward*, 159 Fed. 66 (C. C. A. 7th, 1907); *Fulp v. McCray*, 21 F. (2d) 951 (C. C. A. 8th, 1927); *Speakman v. Bryan*, 61 F. (2d) 430 (C. C. A. 5th, 1932); *W. F. Potts Son & Co. v. Cochrane*, 59 F. (2d) 375 (C. C. A. 5th, 1932); *Sullivan Timber Co. v. Black*, 159 Ala. 570, 48 So. 870 (1909); *Carter v. Mitchell*, 225 Ala. 287, 142 So. 514 (1932); *Turner v. Shupin*, 166 Ga. 806, 144 S. E. 274 (1928); *Brock v. Rudug*, 119 N. E. 491 (Ind. App. 1918); *French v. Gifford*, 31 Iowa 428 (1871); *Farmers Nat. Bank v. Backus*, 74 Minn. 264, 77 N. W. 142, 143 (1898); *Pullis v. Pullis Bros. Iron Co.*, 90 Mo. App. 244 (1901); *Berry v. Rood*, 209 Mo. 662, 108 S. W. 22 (1908); *Sklar v. Bernstein*, 7 Tenn. App. 593 (1928); *Espuela Land & Cattle Co. v. Bindle*, 11 Tex. Civ. App. 262, 32 S. W. 582 (1895).

3. *Atlantic Trust Co. v. Chapman*, 208 U. S. 360, 371-373 (1908); *Ferguson v. Dent*, 46 Fed. 88 (C. C. Tenn. 1891); *Elk Fork Oil & Gas Co. v. Jennings*, 90 Fed. 767 (C. C. D. W. Va. 1898); *French v. Gifford*, 31 Iowa 428 (1871); *Crump & Field v. First Nat'l Bank*, 229 Ky. 526, 17 S. W. (2d) 436 (1929); *State ex inf. Hadley v. People's United States Bank*, 197 Mo. 605, 95 S. W. 867 (1906); *Berry v. Rood*, 209 Mo. 662, 108 S. W. 22 (1908); *State v. State Bank & Trust Co.*, 36 Nev. 526, 137 Pac. 400 (1913); *In re Atlas Iron Const. Co.*, 19 App. Div. 415, 46 N. Y. Supp. 467 (1897); *Cutter v. Pollock*, 4 N. D. 205, 59 N. W. 1062 (1894).

a receiver is not an agent of the applicant but an officer of the court, and should look to the court and the fund in court for his compensation.¹ The principle has been applied even where the funds are insufficient to pay the costs, leaving the receiver to carry the deficit,⁵ though the facts of the particular case may vary the rule. Thus, in cases in which the suit was dismissed by the applicant,⁶ or in which the receivership was peculiarly beneficial to the applicant,⁷ the costs are apt to be assessed against him, whereas in cases in which the receiver proceeded without judicial sanction, he may well find that he has worked for naught.⁸

In cases in which the court has no jurisdiction to appoint a receiver, but does so, the rule is well settled that the costs may not be taken out of the receivership funds,⁹ but the receiver must look to the party at whose instance he was appointed for compensation.¹⁰ Such decisions are grounded upon the proposition either that as the court has no jurisdiction to appoint a receiver then it has no jurisdiction to assess the costs, or that the court has no jurisdiction over the fund so cannot pay out of it.¹¹ But even to this firm rule there are exceptions. Examples of these are cases in which all the parties have acquiesced in the appointment,¹² or where the person appointed as a receiver is disqualified to act as

4. *Atlantic Trust Co. v. Chapman*, 208 U. S. 360 (1908); *Alexander v. Hillman*, 296 U. S. 222 (1935); *Berry v. Rood*, 209 Mo. 662, 108 S. W. 22 (1908).

5. *Atlantic Trust Co. v. Chapman*, 208 U. S. 360 (1908); *Crump & Field v. First Nat'l Bank*, 229 Ky. 526, 17 S. W. (2d) 436 (1929); *Farmers' Loan & Trust Co. v. Oregon Pac. R. R.*, 31 Ore. 237, 48 Pac. 706 (1897); 2 *TARDY'S SMITH ON RECEIVERS* (2d ed. 1920) § 616.

6. *Burrows v. Merrifield*, 243 Ill. 362, 90 N. E. 750 (1909) (statute provided that upon the complainant dismissing his bill in equity the defendant should recover against the complainant full costs); *McHarg v. Commonwealth Finance Corp.*, 195 App. Div. 862, 187 N. Y. Supp. 540 (1921).

7. *Bowersock Mills & Power Co. v. Joyce*, 101 F. (2d) 1000 (C. C. A. 8th, 1939); *Welch v. Renshaw*, 14 Colo. App. 526, 59 Pac. 967 (1900).

8. *Heisen v. Binz*, 147 Ind. 284, 45 N. E. 104 (1896).

9. *McIntosh v. Ward*, 159 Fed. 66 (C. C. A. 7th, 1907); *Hawes v. First Nat'l Bank*, 229 Fed. 51 (C. C. A. 8th, 1915); *State of Missouri v. Angle*, 236 Fed. 644 (C. C. A. 8th, 1916); *Ephraim v. Pacific Bank*, 129 Cal. 589, 62 Pac. 177 (1900); *Sullivan v. Gage*, 145 Cal. 759, 79 Pac. 537 (1905); *Tabor v. Bank of Leadville*, 35 Colo. 1, 83 Pac. 1060 (1905); *Moyers v. Coiner*, 22 Fla. 422 (1886); *McAnrow v. Martin*, 183 Ill. 467, 56 N. E. 168 (1899); *French v. Gifford*, 31 Iowa 428 (1871); *People ex rel. Port Huron & G. Ry. v. Jones*, 33 Mich. 303 (1876); *St. Louis, K. & S. R. R. v. Wear*, 135 Mo. 230, 36 S. W. 357 (1896); *State ex inf. Hadley v. People's United States Bank*, 197 Mo. 605, 95 S. W. 867 (1906) (so held, even though the State of Missouri was the plaintiff and no judgment for costs can be rendered against the state); *State ex rel. Fischer v. Thomas*, 249 Mo. 103, 155 S. W. 401 (1913); *City of St. Louis v. St. Louis Gas-Light Co.*, 11 Mo. App. 237 (1881); *Bushman v. Barlow*, 328 Mo. 90, 40 S. W. (2d) 637 (1931); *Ford v. Gilbert*, 42 Ore. 528, 71 Pac. 971 (1903); *Roberts Tel. & Elec. Co. v. Farmers' & Merchants' Nat'l Bank*, 155 S. W. 629 (Tex. Civ. App. 1913); 2 *TARDY'S SMITH ON RECEIVERS* (2d ed. 1920) § 627.

10. *Sullivan v. Gage*, 145 Cal. 759, 79 Pac. 537 (1905); *State ex inf. Hadley v. People's United States Bank*, 197 Mo. 605, 95 S. W. 867 (1906).

11. See note 9, *supra*.

12. *Ferguson v. Dent*, 46 Fed. 88 (C. C. Tenn. 1891); *State Journal Co. v. Commonwealth Co.*, 43 Kans. 93, 22 Pac. 982 (1890); *Cutter v. Pollock*, 7 N. D. 631, 76 N. W. 235 (1898). See *Burnrite Coal Briquette Co. v. Riggs*, 291 Fed. 754 (C. C. A. 3rd, 1923), affirmed on other grounds, 274 U. S. 208 (1927), which holds that acquiescence need not be express, but may be constructive or implied. Although the court held that there was a lack of jurisdiction in that case, they

such, but performs in good faith, and no objection is made on that ground,¹³ or where the receiver's services were of great benefit to the estate administered.¹⁴ In such cases the costs may be taken out of the funds.

The most troublesome question is presented in cases in which the appointment of the receiver is not invalid for lack of jurisdiction, but was nevertheless improvident or inequitable.¹⁵ It is generally held under such facts that the costs and expenses are not to be taken from the fund.¹⁶ The receiver, however, is entitled to compensation, and the court has power to order it paid, which it usually does—assessing the compensation as costs against the applicant.¹⁷ But it must be borne in mind that, as such a decision is the result of the exercise of discretion by the court, the mere fact that a party is successful on the merits of the action giving rise to the appointment of a receiver is not conclusive in determining who shall bear the expense.¹⁸ The decisions which assess the costs against the applicant are generally based either upon the reason that the losing party is liable for the costs, or upon the equitable ground that it would be unjust that one

stated that a party will be held to have acquiesced, in a case where jurisdiction is lacking, despite a challenge to jurisdiction, if his challenge were based wholly upon an untenable ground; for, by objecting only on the untenable ground, he may have misled the court as much as if he had not objected at all. It was said that the defendant's failure to object, or to appeal from the decree of appointment, amounted to acquiescence on his part. Query: How is it possible for a defendant by acquiescence, express or implied, or even by stipulation, to confer jurisdiction, or waive the lack of it, upon a federal district court?

13. *James v. Roberts Tel. & Elec. Co.*, 206 S. W. 933 (Tex. 1918).

14. *Tabor v. Bank of Leadville*, 35 Colo. 1, 83 Pac. 1060 (1905); *Pullis v. Pullis Bros. Iron Co.*, 90 Mo. App. 244 (1901).

15. *Fulp v. McCray*, 21 F. (2d) 951 (C. C. A. 8th, 1927), sets out the following facts as essential to render the appointment of a receiver provident and equitable: (1) the fact that there was an imminent danger that the property would deteriorate in value or the proceeds be wasted during the pendency of the suit, (2) the fact that plaintiff would suffer irreparable loss from such deterioration and waste, and (3) that there was a strong probability that the plaintiff would prevail on the merits of the case.

16. *Chicago Title & Trust Co. v. Newman*, 187 Fed. 573 (C. C. A. 7th, 1911); *Hawes v. First Nat'l Bank*, 229 Fed. 51 (C. C. A. 8th, 1915); *Fulp v. McCray*, 21 F. (2d) 951 (C. C. A. 8th, 1927); *Moyers v. Coiner*, 22 Fla. 422 (1886); *Etna Steel & Iron Co. v. Hamilton*, 133 Ga. 85, 65 S. E. 145 (1909); *McAnrow v. Martin*, 183 Ill. 467, 56 N. E. 168 (1899); *Frick v. Fritz*, 124 Iowa 529, 100 N. W. 513 (1904); *Berry v. Rood*, 209 Mo. 662, 108 S. W. 22 (1908); *State ex rel. Fischer v. Thomas*, 249 Mo. 103, 155 S. W. 401 (1913); *City of St. Louis v. St. Louis Gas-Light Co.*, 11 Mo. App. 237 (1881); *Pullis v. Pullis Bros. Iron Co.*, 90 Mo. App. 244 (1901); *Sheldon v. Parker*, 66 Neb. 610, 92 N. W. 923 (1902); *Phillips v. Hudson Film Co.*, 82 N. Y. Misc. 385, 143 N. Y. Supp. 759 (1913); *Bellamy v. Washita Valley Tel. Co.*, 25 Okla. 18, 105 Pac. 340 (1909); *DeCambre v. Murphy*, 5 S. W. (2d) 789 (Tex. Civ. App. 1929); 1 CLARK ON RECEIVERS (2d ed. 1929) § 641; 2 TARDY'S SMITH ON RECEIVERS (2d ed. 1920) § 627.

17. *McIntosh v. Ward*, 159 Fed. 66 (C. C. A. 7th, 1907); *In re Wentworth Lunch Co.*, 191 Fed. 821 (C. C. A. 2d, 1911); *Wills Valley Mining & Mfg. Co. v. Galloway*, 155 Ala. 628, 47 So. 141 (1908); *Myers v. Hines*, 122 Ark. 320, 182 S. W. 542 (1916); *Berry v. Rood*, 209 Mo. 662, 108 S. W. 22 (1908); *Pullis v. Pullis Bros. Iron Co.*, 90 Mo. App. 244 (1901); *People v. Oriental Bank*, 129 App. Div. 865, 114 N. Y. Supp. 440 (1909); *Nutter v. Brown*, 58 W. Va. 237, 52 S. E. 88 (1905) (holds that the fee should be allowed out of the fund, and the respondent be given judgment for that amount); 2 TARDY'S SMITH ON RECEIVERS (2d ed. 1920) § 627.

18. *Brock v. Rudug*, 119 N. E. 491 (Ind. App. 1918).

subjected to an unfounded suit should be compelled to pay the expenses of having his property taken away and handled by a stranger.

Numerous exceptions attend the rule last stated, and a broader exercise of discretion is perceived in these cases than the others discussed above.¹⁹ Equally sound results might be reached by discarding this rule altogether and relying simply on equitable factors of the particular cases. It may well be noted that when the discretion of the trial judge is exercised the presumption on appeal is in favor of his action.²⁰

As may be seen from the cases cited in the preceding footnotes, the decisions of the courts of Missouri are substantially in accord with the rules set out above.

In the instant case a peculiar situation was presented. The property which the receiver gathered in and liquidated belonged to the claimant himself, and was insufficient to meet the receiver's personal claims. It not being a general receivership, there were no other creditors, and the issue was solely between the petitioner and the receiver. The court had jurisdiction to make the appointment, which apparently was neither irregular nor inequitable, but the contest to which the receivership was incident never reached the point of decision on its merits. Although the receiver pursued the activities which produced this situation—a bill for service in excess of the fund realized—without submitting to an earlier scrutiny of the court which might have prevented it, this unwise and in many cases fatally prejudicial behavior was balanced by the acquiescence of the applicant, who at no time suggested a termination of the receivership, although it must have known that the expense of recovering this widely scattered and deteriorated merchandise would be out of proportion to its value. Having sought this service through the receivership proceedings, it is not unjust that it should pay for it.

Presumably this petitioner was financially responsible. The ever present possibility that the costs of the receivership sought will ultimately be assessed against the applicant suggests that he be required, upon filing his petition, to execute a bond designed to meet such an eventuality. Where such bonds are now required, the practice has been to minimize their importance, with the result that those who are forced to look to the bond may not be fully protected in the end. Where bonds, as suggested, are required, their effect is to assure the receiver his compensation, minimizing the importance of the vexing problem of whether the receiver must look directly to the plaintiff for compensation²¹ or may compensate himself from the funds in his hands before returning them to the defendant, forcing the latter to proceed against the plaintiff for reimburse-

19. Brock v. Rudug, 119 N. E. 491 (Ind. App. 1918); Capital City Tob. Co. v. Anderson, 138 Ga. 667, 75 S. E. 1040 (1912); Hembree v. Dawson, 18 Ore. 474, 23 Pac. 264 (1890).

20. See note 19, *supra*. See also Pullis v. Pullis Bros. Iron Co., 90 Mo. App. 244 (1901).

21. *In re* Lacov, 142 Fed. 960 (C. C. A. 2d, 1905); *In re* Charles W. Aschenbach Co., 183 Fed. 305 (C. C. A. 2d, 1910); *In re* Wentworth Lunch Co.,

ment.²² Such a bond as is suggested here has always been required in injunction proceedings, and there seems to be no distinction between the problem arising there and the one confronted upon the application for a receivership.

THOMAS E. DEACY, JR.

WILLS—DEPENDENT RELATIVE REVOCATION—PARTIAL INVALIDITY OF CODICIL

*Blackford v. Anderson*¹

In 1923, the testator executed his will, appointing two executors, and bequeathing a specified sum to Henry County and the residue of his estate to Lee County, both to be used to build hard surface roads under the supervision of the boards of supervisors of the respective counties. In 1926, he executed a codicil providing for the appointment of three executors who were to act as trustees of the estate, which was to be used in building specified hard surfaced roads in the two counties. In 1930, the testator executed a second codicil which provided that should there be any conflict between that instrument and the prior instruments, the latter instrument should prevail. This was followed by a formal clause of revocation. In this codicil it was provided that the estate should be used for the paving of roads in Lee County alone. Blackford, who was named sole executor, was given full power and authority to prepare all the plans and specifications for the highways, without the cooperation of the board of supervisors.

The executor brought this suit in equity to construe the will, as it was contended that the provision giving the executor this power would make an acceptance of the bequest by Lee County unlawful, as it would be a surrender of governmental functions in the control over the public highway. The court held: First, that the provisions of the second codicil did not constitute an express revocation of the entire will and first codicil; and second, assuming the provisions of the second codicil as to the control of the project by the executor to be unlawful, the doctrine of dependant relative revocation applied so that the lawful means designated by the will and first codicil should be effective. The opinion then approved the decree of the court below, which provided that the executor should proceed in the administration of the estate under the second codicil, and that he should from time to time confer with the board of supervisors. The court then lays down the rule that specific instructions must give way to the general intent of the testator.²

191 Fed. 821 (C. C. A. 2d, 1911); *In re Hurlburt Motors, Inc.*, 275 Fed. 62 (D. C. S. D. N. Y. 1920); note (1921) 21 COL. L. REV. 466.

22. See *In re Independent Machine & Tool Corp., Inc.*, 251 Fed. 484 (C. C. A. 2d, 1918); see also *In re T. E. Hill Co.*, 159 Fed. 73 (C. C. A. 7th, 1907); note (1921) 21 COL. L. REV. 466.

1. 286 N. W. 735 (Iowa 1939).

2. *Id.* at 755: "The court further finds that any directions given in said last will and codicils with reference to the manner or method of administration must give way to the general intent and purpose of the testator, and the court

The first consideration in the case is the effect of the express clause of revocation. The testator designated the instrument as a second codicil to the will and first codicil, and he provided that the second codicil should prevail in the case of any conflict. The intention of the testator should be the test in determining how far the revocation of a will is affected by a codicil.³ It is well settled that a later testamentary statement that it was the last will and testament of the testator has, of itself, no revocatory force or effect.⁴ Thus, a reading of the codicil as a whole seems to justify the result the court reaches.⁵

The next consideration is the court's application of the doctrine of dependent relative revocation. The courts have often held that where a testator purports to revoke his will while laboring under a mistake of law or fact⁶ the will is not revoked. The courts do not require an actual conditional state of mind on the part of the testator, but include under the classification of dependent relative revocation both cases of revocation under mistake and conditional revocation.⁷ Some courts do not take this view in regard to a mistake. This doctrine was applied at a very early date by the English courts,⁸ and it has been recognized by most American courts today.⁹ The courts have applied the doctrine freely in cases of revocation by physical act and alterations of the terms of the will.¹⁰ But in the cases where there were express clauses of revocation and the bequests failed for some reason *dehors* the instrument, most courts have refused to give

finds that it was the intent and purpose of the testator that his executor should administer said estate and convert the same into cash, and that after deducting the expenses of administration, the remainder and residue of said estate should be used by Lee County, Iowa, in the construction of the specific highway designated."

3. *Gelbke v. Gelbke*, 88 Ala. 427, 6 So. 834 (1889); 68 C. J. 812. *Contra*: *Limbach v. Limbach*, 290 Ill. 94, 124 N. E. 859 (1919); *Bloodgood v. Lewis*, 209 N. Y. 95, 102 N. E. 610 (1913); *Malone v. Moberly*, 55 S. W. (2d) 1008 (Mo. 1932).

4. *Neibling v. Methodist Orphans' Home Ass'n*, 315 Mo. 578, 286 S. W. 58 (1926) (expressed the view that a subsequent will described as the testatrix's last will and testament is entitled to very little weight in determining whether it should supersede the original or earlier will); *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705 (1903); *In re Venable's Will*, 127 N. C. 344, 37 S. E. 465 (1900); 68 C. J. 803.

5. *Gelbke v. Gelbke*, 88 Ala. 427, 6 So. 834 (1889) (held that a will is not revoked by a codicil made and published later, containing the following language: "As codicil to the foregoing last will and testament, and to be taken as a part thereof, I . . . hereby declare that I revoke and annul all wills by me heretofore made, . . .")

6. *Strong's Appeal*, 79 Conn. 123, 63 Atl. 1089 (1906); *Onions v. Tyrer*, 1 P. Wms. 343, 2 Vern. 741 (Ch. 1716).

7. ATKINSON, WILLS (1937) 386; Warren, *Dependent Relative Revocation* (1920) 33 HARV. L. REV. 377; cf. Evans, Book Review (1937) 15 N. C. L. REV. 441 (takes the view that dependent relative revocation is applicable to the cases where the revocation is accomplished by act to the document, but that it does not apply where the mistaken revocation is by subsequent instrument).

8. *Onions v. Tyrer*, 1 P. Wms. 343, 2 Vern. 741 (Ch. 1716); *Attorney General v. Ward*, 3 Ves. Jun. 327 (Ch. 1797); *Campbell v. French*, 3 Ves. Jun. 321 (Ch. 1797).

9. *Security Co. v. Snow*, 70 Conn. 288, 39 Atl. 153 (1898); *Sanderson v. Norcross*, 242 Mass. 43, 136 N. E. 170 (1921); *Hairston v. Hairston*, 30 Miss. 276 (1855); *In re Dougan's Estate*, 152 Or. 235, 53 P. (2d) 511 (1936).

10. *Thomas v. Thomas*, 76 Minn. 237, 79 N. W. 104 (1899); *Gardner v. Gardiner*, 65 N. H. 230, 19 Atl. 651 (1889); *Dobie, Dependent Relative Revocation of Wills* (1915) 2 VA. L. REV. 327.

relief, either upon the ground of mistake or by calling the revocation conditional.¹¹ However, the better opinion is that the doctrine may apply in such cases, since it can be inferred that the earlier will was revoked only to give effect to the later and if for any cause the later will is inoperative the earlier will takes effect.¹² The court held that since the testator intended to make a valid disposition of his estate, and failed to do so because of a mistake of law or fact, the second codicil would not revoke the will and first codicil.¹³

Query: Has the court, in fact, applied the doctrine of dependent relative revocation? The court held that because of the mistake of law the will and first codicil were not revoked; but the court does not look to the will and first codicil to find and carry out their provisions. The court simply changed the provisions of the second codicil, ". . . that the said P. A. Blackford shall have full power and authority, without the cooperation of the said Board of Supervisors, . . ." to read that, ". . . he shall from time to time confer with the Board of Supervisors of Lee County, Iowa . . ." This latter provision was not taken from any prior will or codicil.

It was also urged upon the court that this was a proper case for the application of the equitable principle of *cy pres*. Under this doctrine, if property is given in trust for a particular charitable purpose and it becomes impossible or illegal to carry out the trust in the manner the settlor provided, the court will direct it to be carried out in a manner which falls within the general charitable intention.¹⁴ This doctrine is limited to charitable trusts, and the trust need not be express if the general charitable intent is shown.¹⁵ The *cy pres* power has been generally accepted as a part of the authority of a court of general equitable jurisdiction;¹⁶ and it appears that the Iowa court had such a power which could be exercised in a case of this nature.¹⁷

11. *Mort v. Trustees of Baker University*, 229 Mo. App. 632, 78 S. W. (2d) 498 (1935) (held that where there was a properly executed second will and the bequest failed because of uncertainty as to the beneficiary, the first will was revoked by the second); *Ely v. Megie*, 219 N. Y. 112, 113 N. E. 800 (1916); *Melville's Estate*, 245 Pa. 318, 91 Atl. 679 (1914); *Tupper v. Tupper*, 1 K. & J. 665 (Ch. 1855).

12. *Security Co. v. Snow*, 70 Conn. 288, 39 Atl. 153 (1898); *In re Bernard's Settlement*, 1 Ch. 552 (1916); *ATKINSON, WILLS* (1937) 394; *Cornish, Dependent Relative Revocation* (1932) 5 So. CALIF. L. REV. 273.

13. *U. S. Fidelity & Guaranty Co. v. Douglas' Trustee*, 134 Ky. 374, 120 S. W. 328 (1909); *In re Tremain's Will*, 169 Misc. 549, 7 N. Y. S. (2d) 781 (1938).

14. *RESTATEMENT, TRUSTS* (1935) §§ 397-99; 2 *BOGERT, TRUSTS AND TRUSTEES* (1935) 1287: "Roughly speaking, it (*cy pres*) is the principle that equity will make specific a general charitable intent of a settlor, and will, when an original specific intent becomes impossible or impracticable of fulfillment, substitute another plan of administration which is believed to approach the original scheme as closely as possible. It is the theory that equity has the power to mould the charitable trust to meet emergencies."

15. *Pell v. Mercer*, 14 R. I. 412 (1882); *Richardson v. Mullery*, 200 Mass. 247, 86 N. E. 319 (1908).

16. 2 *BOGERT, op. cit. supra* note 14, at 1297: "In Alabama, Delaware, District of Columbia, Kentucky, North Carolina, South Carolina, and Tennessee there are decisions or *dicta* which repudiate the *cy pres* doctrine, both judicial and prerogative."

17. *Hodge v. Wellman*, 191 Iowa 877, 179 N. W. 534 (1920); *Lupton v. Leander Clark College*, 194 Iowa 1008, 187 N. W. 496 (1922); *Mary Franklin Home for Aged Women v. Edson*, 193 Iowa 567, 187 N. W. 546 (1922).

In the case under discussion the intent of the testator is clear. He wanted his estate to be used in paving roads, rather than to be given to his relatives. The court, in handing down its decree, speaks the language of *cy pres*, and in fact, carries out the provisions of the will "*cy pres comme possible*,"—"as near as possible."¹⁸ The court ordered that the executor should confer with the board of supervisors, while the second codicil directed that he should have full authority without the board's cooperation. The result of this case could have been better justified by the court resting its decision on the ground of an exercise of its *cy pres* power,¹⁹ rather than placing it on the ground of an exercise of dependent relative revocation which was not applied within any orthodox meaning of the term.

Missouri courts now generally recognize the doctrine of *cy pres*.²⁰ In the case of *Burrier v. Jones*,²¹ the court held valid a charitable trust, although the words of the trust did not name a legatee capable of taking under the Missouri law.

GENE M. UNTERBERGER

18. See note 2, *supra*.

19. *Richardson v. Mullery*, 200 Mass. 247, 86 N. E. 319 (1908); *Gagnon v. Wellman*, 78 N. H. 327, 99 Atl. 786 (1917); Note (1919) 19 COL. L. REV. 104.

20. *Lackland v. Walker*, 151 Mo. 210, 52 S. W. 414 (1899); *Mott v. Morris*, 249 Mo. 137, 155 S. W. 434 (1913); *Catron v. Scarritt Collegiate Institute*, 264 Mo. 713, 175 S. W. 571 (1915); *Thatcher v. St. Louis*, 335 Mo. 1130, 76 S. W. (2d) 677 (1934), (1935) 35 COL. L. REV. 467.

21. 338 Mo. 679, 92 S. W. (2d) 885 (1936), (1936) 1 MO. L. REV. 368, was an action to construe a will which provided for the payment of the testator's debts and then devised the residue of his estate to "the Macon County Mo, school funds." It was contended that this devise was void and could not be construed as creating a charitable trust because of the failure to designate a legatee capable of taking under Missouri law, and, therefore, the testator died intestate as to all the property remaining after the payment of his debts. The court held that the trust was valid, as a court of equity could ascertain and apply the testator's intent to the objects intended. This case expressly overrules the case of *Robinson v. Crutcher*, 277 Mo. 1, 209 S. W. 104 (1919), (1921) 21 U. of Mo. BUL. L. SER. 31.