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The application of the cy-pres doctrine to mitigate the destructiveness of the Rule Against Perpetuities on non-charitable trusts was developed in New Hampshire over seventy years ago and lay dormant, except in the state of New Hampshire, for more than half a century. Professor Leach here discusses the statutory and judicial development of the New Hampshire doctrine during the period since 1954 and concludes that the doctrine is now finding wider acceptance in both the legislatures and the courts.

Professor Austin W. Scott has enunciated the cy-pres doctrine as applied to charitable trusts with his habitual clarity and precision:

> Where property is given in trust for a particular charitable purpose, the trust will not ordinarily fail even though it is impossible to carry out the particular purpose. In such a case the court will ordinarily direct that the property be applied to a similar charitable purpose. The theory is that the testator would have desired that the property be so applied if he had realized that it would be impossible to carry out the particular purpose. The courts usually put it this way, that although the testator intended that the property should be applied to the particular charitable purpose named by him, yet he had a more general intention to devote the property to charitable purposes. The settlor would presumably have desired that the property should be applied to purposes as nearly as may be like the purposes stated by him rather than that the trust should fail altogether.
>
> The principle under which the courts thus attempt to save a charitable trust from failure by carrying out the more general purpose of the testator and carrying out approximately though not exactly his more specific intent is called the doctrine of cy pres. The phrase is in the Anglo-French and is equivalent to the modern French *si près*, meaning so near or as near. The intention of the testator is carried out as nearly as may be. . . . Ordinarily the court will refer the matter to a master with directions to report a scheme of application of the property to the court. The court may accept the scheme so proposed or may reject or modify it. . . .[1]

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1. 4 SCOTT, TRUSTS § 399 (2d ed. 1956).

As Scott points out, the Commissioners on Uniform State Laws in 1944 recommended a Model Act on the subject which in its first clause, provides that the doctrine should apply, among other situations, if the expressed purpose of the trust "is or becomes illegal."

How admirably sensible! But why should this benignity of the courts be limited to trusts for charity? In the indented quotation from Scott the word "charitable" appears five times; just strike out these quintuply repetitive words, read the passage again, and see whether it doesn't make good jurisprudential sense. If you were explaining Anglo-American law to a foreigner previously untutored in the common law and read to him the Scott passage—with the five "charitables" omitted—would you not expect him to nod his head in approbation? Or, put it another way: Would you expect him to gasp and exclaim, "Do you mean that you apply that principle to *family* trusts as well as *charitable* trusts?" No such thing.

Actually a cy-pres doctrine has been applied at least twice in the old and accepted law of property:

First, suppose *A* conveyed Blackacre "to *B* and his heirs, but if *B* die without issue to *C* and his heirs." We know that "if *B* die without issue" is given the indefinite construction—*i.e.*, "if *B*'s line of issue runs out at any time either at his death or in any future generation." So the conveyance purported to create a fee simple in *B*, subject to a shifting executory interest in *C* to take effect upon a contingency which might occur in the indefinite future. Before the Statute of Uses (1536) legal shifting executory interests in freehold land were entirely forbidden: "a condition could not be reserved in a stranger" is the way the rule was expressed. After the Statute of Uses shifting interests could be created, but the expressed contingency of *B*'s line of issue running out would be an outrageous violation of the Rule Against Perpetuities. The courts solved this very sensibly, through an application of the cy-pres principle, by giving *B* a fee tail, with remainder in fee simple to *C*.[2]

Secondly, the now-defunct rule in *Whitby v. Mitchell* prescribed that after a limitation of land for life to an unborn person, any further limitation to his issue was void, even though all limitations would vest within lives in being and twenty-one years.[3] Thus, where *A* created an irrevocable inter vivos trust of land for *B* for life with a special testamentary power of appointment among *B*'s issue, and

2. Machell v. Weeding, 8 Sim. 4, 7, 59 Eng. Rep. 2, 3 (1836); 1 RESTATEMENT, PROPERTY § 61 (1936).

3. Whitby v. Mitchell, 42 Ch. D. 494 (1889), 44 Ch. D. 85 (C.A. 1890). For an exposition, see MORRIS & LEACH, THE RULE AGAINST PERPETUITIES 256-61 (2d ed. 1962).

B by will appointed to his son *S* (unborn at the creation of the trust) for life with remainders in tail male to *S*'s first and other sons living at the time of *B*'s death, the remainders violated the rule in *Whitby v. Mitchell* even though all interests were vested at the death of *B*. But once more the English courts came to the rescue, and this time they used the phrase cy pres or (sometimes) approximation: they gave *S* an estate in tail male which, if there were no disentailment, would descend to *S*'s sons in the manner *B* had in mind.[4]

Thus, if we must have precedents for developing sensible judicial expedients in the face of threatened invalidity of a gift, we find at least two having the attribute of respectable antiquity.

Now to the Rule Against Perpetuities.

The standard doctrine has been that where an interest may vest too remotely the entire interest is stricken down; and this destructiveness is multiplied by the all-or-nothing rule of *Leake v. Robinson*[5] which declares that the invalidity of a gift to any member of a class invalidates the gifts of all other members.[6]

It is the thesis of this paper that the penalty for violation of the Rule—a penalty inflicted, not on the violator, but on his or her intended beneficiaries, usually minors or unborns—should be, not the invalidation of the future interest, but rather a tailoring of the interest on the principle of cy pres or approximation so that the general intention of the settlor or testator is carried out so far as possible within the limits of the Rule. Furthermore, I believe it is demonstrable that this thesis is gaining acceptance in the courts and the legislatures to the point where the time may be approaching when the enormous destructiveness of the Rule Against Perpetuities will be a thing of the past.

A chronology of the advance of cy-pres thinking is rather impressive, especially since it comes to a climax, as of 1962, with the decisions in *Carter v. Berry* from the Supreme Court of Mississippi and *In re Foster's Estate* from the Supreme Court of Kansas.

In 1832 the English Commissioners on the Law of Real Property in their Third Report recommended that where a gift violated the Rule Against Perpetuities by reason of an age contingency in excess of twenty-one (*e.g.*, "to *A* for life remainder to *A*'s children who shall reach 25" where *A* is living when the gift takes effect) the contingency should be reduced to twenty-one to save the gift. Gray

4. For further development of this cy-pres application, see MORRIS & LEACH, *op. cit. supra* note 3, at 261-65.

5. 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817).

6. For an exposition of the all-or-nothing rule and its exceptions, see 6 AMERICAN LAW OF PROPERTY §§ 24.26 to -.29 (Casner ed. 1952).

thought this a very bad thing, offered five reasons why the proposal was unsound,[7] and in his second edition applauded the fact that Parliament had declined to accept the recommendation. However, Parliament did accept the recommendation in Section 163 of the Law of Property Act, 1925,[8] a fact which Gray's fourth edition briefly acknowledges after repeating the negative arguments of the second edition.[9]

In 1891 *Edgerly v. Barker* was decided by the Supreme Court of New Hampshire, opinion by Chief Justice Doe.[10] There was an initial problem of construction, not material to the present discussion, which the court resolved by deciding that the testator intended a gift, after interests in his children, to the issue of the testator who should be living when his youngest grandchild should reach the age of forty. Since two children survived the testator, it was clear that the gift violated the Rule. The New Hampshire Court held that the age contingency should be cut down to twenty-one, thus rendering the gift valid. Said Chief Justice Doe:

> Within the legal limit, the testator's power of suspending the title is not affected by the disability under which he labors beyond that limit. The devise is effective *cy pres*, in pursuance of his implied intent to divide according to common reason, throw out what is against law, and let the rest stand. . . .[11]
>
> His intent that the grandchildren shall not have the remainder till the youngest arrives at the age of forty years is modified by his intent that they shall have it, and that the will shall take effect as far as possible. The forty years are reduced to twenty-one by his general approximating purpose, which is a part of the will.[12]

Gray in his second and third editions (1906 and 1915 respectively), thundered against this case in an appendix of fourteen pages,[13] and few could doubt that the great authority of his name had a

7. GRAY, RULE AGAINST PERPETUITIES § 884n (2d ed. 1906).

8. 1925, 15 Geo. 688, c. 20, § 163. This section of the 1925 property legislation is now incorporated in the compendious reforms of the Perpetuities and Accumulations Act, 1964, Eliz. 2, c. 55, § 4. This statute is the outgrowth of the LAW REFORM COMMITTEE'S FOURTH REPORT (Cmnd. 18, 1956), which in turn bears certain similarities to the recommendations of MORRIS & LEACH, THE RULE AGAINST PERPETUITIES (1956). Dr. Morris was "seconded," as our British cousins say, to the Committee for the studies concerning this report. The 1964 act swept through Parliament without opposition. Most of the debate comprised criticism of the government for having delayed from 1956 to 1964. 256 HANSARD, LORDS col. 246 (1964).

9. GRAY, *op. cit. supra* note 7, § 884n (4th ed. 1942).

10. 66 N.H. 434, 31 Atl. 900 (1891). This decision is vigorously supported in Quarles, *The Cy Pres Doctrine: Its Application to Cases Involving the Rule Against Perpetuities and Trusts for Accumulation*, 21 N.Y.U.L.Q. REV. 384 (1946).

11. 66 N.H. at 473, 31 Atl. at 915.

12. *Id.* at 475, 31 Atl. at 916.

13. GRAY, *op. cit. supra* note 7, §§ 857 to -93.

potent effect in constricting this doctrine to the confines of New Hampshire for more than half a century.

In 1925, as has been stated, Parliament finally enacted the statute reducing invalid age contingencies to twenty-one.

In 1954-1955 the legislatures of Massachusetts, Maine and Connecticut enacted identical perpetuities reform statutes of which one section copied the substance, though not the complex form, of section 163 of the English Law of Property Act of 1925.[14] I was one of a team who drafted this statute and nursed it through the Massachusetts legislature (which we call the General Court).[15] In testifying before the Senate Committee on Legal Affairs I had to offer substantial argument to defend other portions of this bill, but not one member of the legislature or of the lawyers' groups with whom we kept in close contact questioned the soundness of the cy-pres section as to age contingencies. The Maine and Connecticut legislatures adopted the Massachusetts statute as a routine matter on the "consent" calendars; I learned about the enactments through the mails some time after the event. But it must be confessed that these age-contingency statutes represent only a limited victory for the cy-pres principle. They take care of a lot of the foolish cases—foolish either in the inception due to ignorance of the testator or his attorney, or foolish in decision due to inadequacies of a particular court—but they leave a lot of cases outside the fold. If the cy-pres principle is sound as to age contingencies, should it not be spread to other situations which have arisen or which may arise in which (a) the general purpose of the grantor, testator or settlor is reasonable and obvious and (b) the manner in which he seeks to accomplish it oversteps the limits of the Rule? I answer this question in the affirmative.

In 1957 the Vermont legislature enacted a statute which, in my view, does the whole trick. It reads as follows:

> Section 1. *Rule against perpetuities: interest reformed to conform with intent.* Any interest in real or personal property which would violate the rule against perpetuities shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of the interest. In determining whether an interest would violate said rule and in reforming an interest the period of perpetuities shall be measured by actual rather than possible events.[16]

An Idaho statute of 1957 appears to aim at the same result as the

14. CONN. GEN. STAT. ANN. § 45-96 (1960); ME. REV. STAT. ANN. ch. 160, § 28 (Supp. 1961); MASS. ANN. LAWS ch. 184A, § 2 (1958).

15. See Leach, *Perpetuities Legislation, Massachusetts Style,* 67 HARV. L. REV. 1349 (1954), reprinted as appendix II in LEACH & TUDOR, THE RULE AGAINST PERPETUITIES 197 (1957).

16. VT. STAT. ANN. tit. 27, § 501 (1959). See LEACH & TUDOR, *op. cit. supra* note 15, app. IV.

Vermont statute; but the aim is, shall we say, a little imprecise. The statute will need clarification.[17]

In 1959 Washington enacted a statute, unique in form, providing that a trust which would violate the Rule Against Perpetuities shall be valid for the period of the Rule and that "the assets shall be then distributed as the superior court having jurisdiction shall direct, giving effect to the general intent of the creator of the trust."[18]

There appeared some published opposition to the Vermont form of statute, to which I have referred elsewhere,[19] especially on the matter of identifying the lives-in-being. I therefore applaud the enactment of the same statute in Kentucky in 1960 with an additional provision that the lives-in-being must have "a causal relationship to the vesting or failure of the interest."[20]

It was also in 1960 that the Maryland and New York legislatures adopted the Massachusetts form of statute, *i.e.*, cy pres as to age contingencies only.[21]

Let us then summarize these cy-pres statutory developments over the brief period from 1954 to 1960; and amazing it is that the progress has been so great in so short a time, bearing in mind the lack of political sex appeal in this recondite subject. Five states (Massachusetts, Maine, Connecticut, Maryland and New York) have adopted the cy-pres statute reducing void age contingencies to twenty-one pursuant to the example set in the English Law of Property Act of 1925, section 163. Four more (Vermont, Idaho, Washington and Kentucky) have adopted full-scale cy pres in all perpetuities situations—with some doubts as to what the effect of the Idaho statute will be. Additionally, it should be noted, eight of these states, plus Pennsylvania,[22] have adopted the wait-and-see principle to a greater or less extent,[23] thus permitting the court in perpetuities cases to adjudicate validity on the basis of what actually has hap-

17. IDAHO CODE ANN. § 55-111 (1957).

18. WASH. REV. CODE ANN. § 11.98 (1963).

19. Leach, *Perpetuities Legislation: Hail, Pennsylvania!*, 108 U. PA. L. REV. 1124 (1960).

20. KY. REV. STAT. § 381.216 (1962). A detailed analysis of Kentucky perpetuities law and the impact of the Kentucky statute appears in DUKEMINIER, PERPETUITIES LAW IN ACTION; KENTUCKY CASE LAW AND THE 1960 REFORM ACT (1962), originally published in abbreviated form in 49 KY. L.J. 1 (1960).

21. MD. ANN. CODE art. 16, § 197A (1957); N.Y. REAL PROP. LAW § 42b; N.Y. PERSONAL PROP. LAW § 11a.

22. PA. STAT. ANN. tit. 20, §§ 301.4, 301.5 (Purdon 1950). The non-conforming state is New York, which has no wait-and-see provision.

23. The Vermont-type statutes go all out for full wait-and-see by requiring that the interest by adjudged "by actual rather than possible events"—a phrase taken from the Pennsylvania Estates Act of 1947, the pioneer in this field. The Massachusetts-type statutes permit wait-and-see for the duration of relevant lives-in-being, MASS. GEN. LAWS ANN. ch. 184A, § 1 (1958), but this will take care of a very large percentage of possible perpetuities violations.

pened instead of what might have happened.[24] Furthermore, at long last New York has abandoned its unworkable two-life limit on suspension of the power of alienation and has adopted the common-law period of lives in being plus twenty-one years.[25]

On the judicial front there have been, over the years, some rather striking relaxations of the "remorseless" (Gray's word) traditional applications of the Rule. In 1950 it was finally established in *In re Walker's Will*[26] that there is no restriction on the duration of private trusts in Wisconsin or on the vesting of interests therein so long as the trustee has the power of sale—and one will be implied if it is not expressed.[27] In 1952 *Sears v. Coolidge*[28] held that where the settlor of an irrevocable inter vivos trust has any power to amend, the gifts in default of amendment must be adjudicated on the basis of facts existing when the power of amendment is lost either by release or by death of the settlor—a holding which applies the wait-and-see principle automatically to all gifts in default of appointment. In 1953 *Merchants National Bank v. Curtis*[29] put New Hampshire in the full-scale wait-and-see column without benefit of legislation, declaring that "the court should not be compelled to consider only what might have been and completely ignore what was."

It remained for the 1962 Mississippi court, however, to strike the most devastating blows at two of those applications of the Rule Against Perpetuities which have been the target of the Rule's critics.

In *Carter v. Berry*[30] the will of one Johnston presented a series of problems quite similar to those which the New Hampshire court faced in 1891 in *Edgerly v. Barker*. The testator directed that his trust should continue until his youngest grandchild "whether now living or hereafter born" should reach twenty-five, and should then be distributed among his grandchildren. The will was contested by the testator's two daughters, whom he had expressly excluded from the gift on the ground of adequate provision during his lifetime. The

24. The wait-and-see principle was also endorsed by the Lord Chancellor's Law Reform Committee. See recommendation No. 5 in LAW REFORM COMMITTEE, FOURTH REPORT 30 (Cmnd. 18, 1956). It became the law of the realm in section 3 of the Perpetuities and Accumulations Act, 1964, Eliz. 2, c. 55. Meanwhile, in December, 1962 the State of Western Australia enacted a bill of considerable complexity based on the Committee's recommendations and vigorous steps are being taken in Wellington to have a similar act passed by the New Zealand legislature. W. Austl. Act No. 83 of 1962.

25. N.Y. REAL PROPERTY LAW § 42; N.Y. PERSONAL PROPERTY LAW § 11.

26. 258 Wis. 65, 45 N.W.2d 94 (1950).

27. The same may be true in Idaho under IDAHO CODE ANN. § 55-11 (1957). For a discussion of the Wisconsin and Idaho situations, see CASNER, ESTATE PLANNING (3d ed. 1961).

28. 329 Mass. 340, 108 N.E.2d 563 (1952).

29. 98 N.H. 225, 97 A.2d 207 (1953).

30. 243 Miss. 321, 140 So. 2d 843 (1962).

case could have been disposed of by a holding that the gifts to grandchildren vested at birth subject to postponed enjoyment; and at several points in the opinion of Mr. Justice Ethridge the court seemed on the point of so holding. But the gifts to grandchildren were finally ruled to be contingent. Surely, then, by the all-or-nothing rule traditionally applied to gifts to classes the whole limitation to grandchildren must fail. Yet the court refused so to hold. It considered two possibilities:

(a) holding the gift valid as to living grandchildren though invalid as to after-born grandchildren,
(b) reducing the age contingency to twenty-one and thus making the gift valid as to all grandchildren.

The court adopted alternative (b), thus reducing to dicta its remarks on alternative (a); but the vehemence of its pronouncement on the all-or-nothing rule is such that this opinion must be considered a major breakthrough in perpetuities doctrine. Said the court:

> In support of the trial court's decree, appellees rely upon the all-or-nothing rule in class gifts. The source of the doctrine is the leading English case of Leake v. Robinson (2 Mer. 363). . . .
>
> In brief, the English rule is that, if the interest of one class member can possibly vest too remotely, the entire class gift must fail. . . . The subsequent history of that rule in England "can be described in two words: stare decisis.". . .
>
> Whether we should follow the rule of Leake v. Robinson is a *de novo*, open question in this jurisdiction. . . .
>
> If we should apply the all-or-nothing rule to the trust created by Johnston's will, the result would be invalidation of the entire gift to testator's grandchildren, and inheritance of the estate by his daughters for whom he had already provided, and whose participation in his estate he expressly excluded because of earlier provisions for them. The dominant idea of the entire will is that testator's grandchildren shall have the bulk of his estate. His determination that his daughters shall not have it is manifest. . . .
>
> The question is whether, as a *de novo* proposition in this jurisdiction, we should follow Leake v. Robinson and its successors from other jurisdictions, or adopt a different rule. In the immense literature of primary and secondary authorities discussing and frequently applying that case, we have found no satisfactory rationalization for it . . . .
>
> The all-or-nothing rule ignores the proposition that the problem is one of separability, not of perpetuities; a question of construction, not of application of a rule of law. There is no reason to totally amputate an arm in order to save an infected finger. The general dispositive intent should control. The court should save such parts of the gift as the rigid requirements of the rule do not strike down, provided such action carries out the testator's principal purpose. This approach will preserve the policy of the rule, and at the same time preserve so far as may be the intention of testator. . . .
>
> The common law should be but is not always a product of rational processes and growth. This question is new in this jurisdiction. We decline

to adopt the patent anomaly and ill-considered doctrine of Leake v. Robinson and its successors. It is not good logic or sound law.[31]

Then proceeding to its ultimate holding, the court relied heavily upon *Edgerly v. Barker,* adopted its cy-pres solution of reducing the age contingency to twenty-one and declared:

> The second alternative to prevent failure *in toto* of a class gift which is partially invalid is supported by reasoned precedents which we think are pertinent to this will. It is the saving principle of cy pres or equitable approximation as applied to testamentary gifts . . . 140 So.2d at 852.
>
> The doctrine of equitable approximation is a basic part of equity jurisdiction. . . . It should be applied here. Moreover, it is logical and equitable. Appellees want us to strike down the dominant idea of the entire will, that testator's grandchildren should have the bulk of his estate, and thereby to vest it in his daughters, despite his manifest intent that they should not have it. The time when the grandchildren should have the estate was secondary and subordinate to the intent that they should receive it.
>
> Appellees seek to overthrow this dominant idea and have the trust declared entirely void for remoteness, because testator was unable to postpone the vesting of the property for as long as he wished, when the youngest grandchild, born and unborn, shall become twenty-five years of age. If he had said, "when my youngest grandchild (whether now living or hereafter born) shall become twenty-one years of age", the validity of the devise to them could not be questioned. The issue is one of separability and of interpretation, not of arbitrary application of a rule of law. If an examination of the testator's will in the light of the circumstances in which it was written leads to the conclusion that his general dispositive intent would be better carried out by invalidating the gift *in toto,* rather than reducing the age contingency to twenty-one within the period of perpetuities, then the entire gift should fail. But that circumstance does not exist in this case.
>
> Here as in Edgerly v. Barker testator's dominant intent should be effectuated, to give his grandchildren the bulk of his estate. The intent that they should have it when the youngest reached twenty-five was only secondary. The latter is subordinate to the former. That which is dominant should be carried out by an adjudication, under the doctrine of equitable approximation, that the estate shall be distributed to testator's grandchildren when the youngest reaches twenty-one years of age. This adjudication rejects no more of the will than the law makes it necessary to reject. The time is changed by an intended approximation, because this is an ascertainment of his intent. The will is not invalidated beyond the bounds of necessity. The twenty-five years are reduced to twenty-one by testator's general approximating purpose and dominant intent.[32]

Later in 1962 *In re Foster's Estate* came before the Supreme Court of Kansas.[33] Testatrix bequeathed a share of income to her daughter and sole heir, Miriam, and then provided that the prin-

31. *Id.* at 359-68, 140 So. 2d at 846-52. The opinion contains such a number of references to the works of the present writer that a more modest man might be deterred from referring to the case at all.

32. *Id.* at 370-77, 140 So. 2d at 852-55.

33. 190 Kan. 498, 376 P.2d 784 (1962).

cipal should be distributed at the death of Miriam or at the time the youngest child of Miriam should reach twenty-three, whichever happened later. All parties agreed that the gifts to testatrix's grandchildren were contingent upon surviving to the date of distribution. By standard doctrine the court would wait and see which contingency happened later—the death of Miriam or her youngest child attaining twenty-three—then, if all children were twenty-three at the death of Miriam the gift would be valid, but if all were not twenty-three the gift would fail.[34] By the doctrine of *Edgerly v. Barker* and *Carter v. Berry* (neither of which was cited in any of the three opinions), the age contingency would have been reduced to twenty-one. But the majority of the Kansas court took a still third course: it excised the clause as to the youngest child reaching twenty-three, thus causing the gift to pass to all children of Miriam living at her death. The majority opinion talks the language of cy pres without using the phrase. The two dissenting judges inveigh against "making a new will for the testatrix" and one of them makes the unguarded statements that the court is adopting an "unusual rule . . . followed by no other court in the country" and that the court's conclusion "has no precedent in this jurisdiction or elsewhere to sustain it." Possibly these negative statements (always risky) can be sustained, but one may doubt that they would have been used if *Edgerly v. Barker* and *Carter v. Berry* had been before the mind of the dissenting justice.[35]

It is odd that the cy-pres principle of *Edgerly v. Barker* should have lain dormant for nearly seventy years except in cases governed by the laws of New Hampshire.[36] One might have expected that the sheer common sense of the matter would have impressed courts as much as it clearly has impressed legislators on both sides of the Atlantic. Is it too much to hope that, now that the Mississippi and Kansas courts have re-broken the judicial ice and numerous state legislatures have now declared themselves in favor of some form of the cy-pres principle as applied to private trusts, other courts may find themselves inclined to follow the New Hampshire-Mississippi-Kansas lead?[37]

34. The doctrine of separable limitations (or split contingencies) is expounded in 6 AMERICAN LAW OF PROPERTY § 24.54 (Casner ed. 1952), and GRAY, *op. cit. supra* note 7, §§ 331 to -68.

35. The case has an unusual feature in that the majority opinion was written by Justice Jackson (apparently on assignment by the Chief Justice), and then it was Jackson who dissented most vehemently from his own opinion.

36. These include one Kentucky case involving the will of a New Hampshire resident. Hussey v. Sargent, 116 Ky. 53, 75 S.W. 211 (1903).

37. A short dissertation on the extent to which courts can, and do, use statutes as precedents for judicial action appears in LEACH & TUDOR, *op. cit. supra* note 15, app. V, at 231.