



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 27 | Number 4

Article 17

6-1-1949

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Recommended Citation

Katherine S. Wright, *Trusts -- Charitable Bequests -- Application of Cy Pres Doctrine*, 27 N.C. L. REV. 591 (1949).

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state, and the total miles of their entire run is 500 miles, then a figure of 100 over 500, or 1 over 5 is the figure for step (2). Applying one-fifth to \$500,000, the state has a valuation of \$100,000 which it can tax. If the tax rate is one dollar on \$100 valuation, then the tax to be assessed against the company results as \$1,000 in step (3).

Since 1905, North Carolina has had a statute¹⁵ providing for taxing of canal and steamboat companies in the same manner as provided for railroads, and so would seem to be in line with this latest decision of the United States Supreme Court on the point. No cases seem to have arisen under the North Carolina statute.

Only one North Carolina case dealing with the tax situs of boats has been found. In *Texas Co. v. Elizabeth City*¹⁶ boats were employed by the Texas Co., a Delaware corporation, to haul oil products on North Carolina rivers and sounds and into Virginia. Elizabeth City was allowed by our court to levy an *ad valorem* tax on the boats on a finding by the jury in the lower court that for tax purposes the situs of the boats was in Elizabeth City. That this decision failed to square with prior federal decisions is pointed out in a prior note in this REVIEW.¹⁷

BASIL SHERRILL.

Trusts—Charitable Bequests—Application of *Cy Pres* Doctrine

The testator, Ackland, willed the bulk of his fortune to his executors as trustees for the purpose of building and maintaining a memorial art museum on the campus of Duke University. Duke declined the "benefits, burdens and responsibilities" of the trust and the heirs sued the trustees, claiming the fortune resulted to them, but the trust was upheld by the invocation of the *cy pres* doctrine.¹ The court ordered the trustees to investigate to see whether the University of North Carolina or Rollins College or either of them should be selected as the new site.² The trustees, after two years of investigation, recommended North Carolina because of its similarity to Duke in size, financial status, location, cultural influence, faculty and curricula. The trial court, however, selected Rollins as the site because of evidence of its more prominent art department and Rollins' contention that the University of North

¹⁵ N. C. GEN. STAT. §105-371 (1943).

¹⁶ 210 N. C. 454, 187 S. E. 551 (1936).

¹⁷ 15 N. C. L. REV. 217 (1937).

¹ *Noel v. Olds*, 138 F. 2d 581 (App. D. C. 1943), *cert. denied*, 321 U. S. 773 (1944). The court found that the testator's primary purpose was to benefit art education in the South. The fact that a previous will had named Duke, University of North Carolina and Rollins, in that order, tended to show that he had no special interest in Duke nor any intent to benefit it exclusively.

² See note 1 *supra*.

Carolina had been eliminated from consideration by the testator.³ The Court of Appeals for the District of Columbia reversed⁴ and awarded the art gallery to North Carolina, holding that even if Rollins had a better art department, this was irrelevant,⁵ that the contention that the testator had excluded North Carolina from consideration was not well founded,⁶ that the trustees' findings should have been binding on the court;⁷ and that North Carolina more nearly met the test that "some great university as nearly similar to Duke in all respects as could be found" should be chosen.

The *cy pres* doctrine is "the principle that equity will make specific a general 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."⁸ It is an intent-enforcing doctrine; that is, to apply it the court must find that the testator would not have intended the trust to fail because the mode of carrying it out failed. If the testator intended to benefit *only* a particular institution or purpose, then the doctrine is not applicable. Having determined that the settlor had a more general charitable intent, the court must frame a new scheme for giving effect to it. What should be the basis for this selection? Scott states that the court in applying the doctrine should look to what the settlor would have intended at the time he created the trust, if he had known the particular purpose would fail.⁹ Rollins

³ Rollins contended that it was the original choice but that testator was induced by President Few of Duke to change his mind and name Duke instead. Rollins further contended that testator's choice had been narrowed to these two schools, and that North Carolina had been eliminated from consideration. See note 6 *infra*.

⁴ *Olds v. Rollins College*, 173 F. 2d 639 (App. D. C. 1949); *University of North Carolina v. Rollins College*, 173 F. 2d 639 (App. D. C. 1949).

⁵ "The testator did not compare the art facilities of Duke and Rollins, and decide that Duke had the better of it. He based his choice on Duke's greater financial strength, and the fact that its geographical area is better established as one of extensive educational and cultural advantages. The consideration just mentioned make it, in our view, inapposite to compare the art departments of Rollins and North Carolina. . . ." *Id.* at 643.

⁶ The previous will of 1936 remained in effect until the one naming Duke was executed in 1938; hence North Carolina legally remained testator's second choice until he picked Duke, at which time he excluded North Carolina and Rollins *at the same time*. *Id.* at 644.

⁷ Ordinarily a master is appointed to frame a scheme for the court's consideration, but the trustees were appointed instead. A master's finding of fact is conclusive on the court; hence the District Court had to accept the findings of fact and did so expressly. In holding that these facts did not control the basis of the selection, the trial court in effect misapplied the *cy pres* doctrine.

⁸ 2 BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* §431 at 1287 (1935).

⁹ 3 SCOTT, *THE LAW OF TRUSTS* §399.2 (1939). This language which Rollins cited does not appear in the author's section on framing a scheme, but on determining if a general charitable intent existed. Bogert in the section on framing a scheme suggests looking to what the settlor would have intended but cites no cases. 2 BOGERT, *op. cit. supra* note 8, §441. The Restatement also uses intention language. RESTATEMENT, TRUSTS §399, comment *c* (1935).

strongly relied on this language, claiming that it was second choice and testator would have picked it had he known that Duke would reject. On the other hand, the University of North Carolina argued that in applying *cy pres* the court should look to the specification of the settlor as expressed in the trust instrument and should approximate that choice as nearly as possible. In practice, the court decisions have followed the latter view¹⁰ and state statutes embodying *cy pres* have adopted it as the basis for selection.¹¹ No *cy pres* case has been found involving such evidence of previous alternative choices as existed here.¹² The courts, having only the general intent of the settlor and his chosen mode of effectuating that intent to guide them, have therefore approximated what the settlor said, rather than presumed what he might have said. It would seem that the principal case stands for the proposition that this basis should be adhered to, in the absence of clear evidence that the object most closely resembling the one stated would have been excluded.

It is well settled that if *cy pres* is applied, the court frames the scheme, and although the trustees, attorney general or others may make recommendations, the court is not bound to accept them.¹³ The doctrine is not applicable at all if the trust instrument has special provisions giving the trustees the power to select substitute schemes. The instant case states that the court on previous appeal, *Noel v. Olds*,¹⁴ had construed the will as having such provisions giving the trustees the right to select a new site,¹⁵ and that therefore the lower court had no right to reject their selection. This is clearly an error in the interpretation of the language of the *Noel* case.¹⁶ Had the court so construed the

¹⁰ *Sheldon v. Powell*, 99 Fla. 782, 128 So. 258 (1930); *Ford v. Thomas*, 111 Ga. 493, 36 S. E. 841 (1900); *Jackson v. Phillips*, 14 Allen 539, 580 (Mass. 1867) ("as near the testator's particular directions as possible . . ."); *In re Williams' Estate*, 353 Pa. 638, 643, 46 A. 2d 237, 239 (1946); *Philadelphia v. Girard's Heirs*, 45 Pa. 9, 28 (1863) ("as close approximation to that scheme [settlor's] as reasonably practicable . . ."); *First Wisconsin Trust Co. v. Racine College*, 225 Wis. 34, 272 N. W. 464 (1937).

¹¹ GA. CIV. CODE §4604 (1926); *Ford v. Thomas*, *supra* note 10; WIS. STAT. §231.11 (1945).

¹² Cf. *Johnson v. Wagner*, 219 N. C. 235, 13 S. E. 2d 419 (1941), notes 31-33 *infra*.

¹³ *E.g.*, *Ford v. Thomas*, 111 Ga. 493, 36 S. E. 841 (1900) (court rejected plan proposed by trustee); 2 BOGERT, *op. cit. supra* note 8, §435, §440 at 1335.

¹⁴ 138 F. 2d 581 (App. D. C. 1943).

¹⁵ "We adhere to our decision in *Noel v. Olds*, where we construed the will as envisaging the possibility of Duke's refusal, and as giving the trustees the right, in that event, to select another site." *Olds v. Rollins College*, 173 F. 2d 639 (App. D. C. 1949).

¹⁶ That case relied on the provisions of the will giving the trustees discretion in administration and also those directing them to carry out the trust according to the spirit of his intentions, as a basis for finding that the testator had a general intent, and would not have wanted his trust to fail. That case did state that "here was provision of the possibility which actually eventuated and provision for the course to be followed by his trustees if it did." This language did not recognize the right of the trustees to select the site, but only the duty to take such steps as necessary to see that the trust was carried out, including the duty to apply to the court for *cy pres* application. *Noel v. Olds*, 138 F. 2d 581, 588 (App. D. C. 1943).

will, it could not have held that the case called for the *cy pres* power, as that power would have been unnecessary. The instant case should have decided only that the trial court judge misapplied the *cy pres* doctrine as a matter of law, or that he abused his discretion in not approximating testator's scheme as nearly as possible.¹⁷

Although the North Carolina court has stated that the doctrine is contrary to the public policy of the state, in this case a former governor of North Carolina¹⁸ and the attorney general, acting for a board of trustees headed by the present governor of the state, argued for its application so that the state university might benefit. It therefore seems advisable to review the North Carolina cases and statutes and see if the doctrine is *now* unacceptable.

The cases in which *cy pres* has been discussed by American courts fall into three broad classes. The first is that where a trust is set up for indefinite objects, such as "to the poor." In England, *cy pres* was applied if the trustee refused to act,¹⁹ but if he was willing to make the selection he could do so and *cy pres* relief was unnecessary. So in America, where such trusts have been held valid, the trustees have had either the express or implied power of selection.²⁰ In those states holding such trusts as invalid because too vague for enforcement, it has been said that *cy pres* would not be applied to make the general intent specific and thus save the trust.²¹ North Carolina now has a statute validating such trusts and giving the trustees the power to select the objects.²²

¹⁷ A *cy pres* case may be appealed on the grounds of the lower court's abuse of discretion in applying the doctrine. *Sherman v. Richmond Hose Co.*, 230 N. Y. 462, 473, 130 N. E. 613, 616 (1921).

¹⁸ The late O. Max Gardner was the instigator of the University's application to intervene, and his law firm handled the case to its conclusion without charge to the University.

¹⁹ 2 BOGERT, *op. cit. supra* note 8, §432.

²⁰ 3 SCOTT, *op. cit. supra* note 9, §396. If the trust instrument doesn't expressly state the trustees should select the objects, apparently they have the right to do so as a part of the administration of the trust. *Cy pres* is not mentioned in such cases. See *State v. Gerard*, 37 N. C. 210 (1842) (for the poor of B county); *State v. McGowen*, 37 N. C. 9 (1841) (for the establishment of schools for the poor of X county); *Whitsett v. Clapp*, 200 N. C. 647, 158 S. E. 183 (1931) (for "keeping up preaching in weak churches").

²¹ 2 BOGERT, *op. cit. supra* note 8, at 1304. Where a trust is held void for indefiniteness, the court will not apply *cy pres* to save it. *Holland v. Peck*, 37 N. C. 255 (1842); *Bridges v. Pleasants*, 39 N. C. 26 (1845); *Taylor v. American Bible Society*, 42 N. C. 201 (1851); *Thomas v. Clay*, 187 N. C. 778, 122 S. E. 852 (1924). The North Carolina courts have seemed to think this situation involved prerogative power, rather than the judicial. *Holland v. Peck*, *supra* at 260; see *Griffin v. Graham*, 8 N. C. 96, 134 (1820). But the prerogative power in England was exercised only where the object was illegal, or there was a direct gift for charity generally without a trust created. 3 SCOTT, *loc. cit. supra* note 9. In *Holland v. Peck*, *supra*, a trust was set up. For an explanation of the judicial confusion in America, see Comment, *A Revaluation of Cy Pres*, 49 YALE L. J. 303 (1939); 32 GEO. L. J. 427 (1944).

²² "No gift, grant, bequest or devise whether in trust or otherwise, to religious,

In the second class of cases the objects of the trust are definite, as in the instant case the trust is for an art museum at a particular site. The doctrine is invoked when it becomes impossible to carry out the trust exactly as stated—the site becomes unavailable, the purpose becomes impossible or the beneficiaries no longer exist. The great majority of states will apply *cy pres* in such cases and execute the trust “as near as may be.”²³ Under this general class, four types of cases have arisen in North Carolina. (1) Thus where there was a surplus of funds after the trust was carried out, the court refused to apply the surplus *cy pres* to similar objects.²⁴ (2) Where the purpose of the trust became impossible the court refused to save it by applying *cy pres*.²⁵ In the next two types North Carolina actually applied *cy pres*, at the same time repeating the rejection of the doctrine. (3) Where there was a deficit of funds making impossible the exact execution of the trust, the court nevertheless upheld the trust as near as possible, saying it was merely applying the fund to the very purpose named as far as it would go.²⁶ Regardless of the court’s statement that this type case did not call for *cy pres*, it is generally accepted that this situation is one application of the doctrine.²⁷ (4) The last case in this class involved a sale of the trust property. Ordinarily, a court of equity can order such a sale as incident to jurisdiction over the administration of the charitable trust. It is said that this does not involve *cy pres* power as long as the specific purpose of the trust remains unchanged,²⁸ but the line between the two theories is not well defined. A typical case is one in which a residence is devised

educational, charitable, or benevolent uses . . . shall be invalid by reason of any indefiniteness or uncertainty of the objects or beneficiaries of such trust, or because said instrument confers upon the trustee or trustees discretionary powers in the selection and designation of the objects. . . .” N. C. GEN. STAT. §36-21 (1943). N. C. GEN. STAT. §36-23.1 (1947 Cum. Supp.) broadens the scope of the 1925 statute. See 25 N. C. L. REV. 476 (1947) to the effect that the later statute was passed to overrule *Woodcock v. Wachovia Bank*, 214 N. C. 224, 199 S. E. 20 (1938). That case held that the 1925 act did not validate a trust in which trustees were to pay to any corporation which would best promote the cause of preventing cruelty to animals, because it left control not only in the trustees, but in the trustees’ donee.

²³ 2 BOGERT, *op. cit. supra* note 8, §433.

²⁴ *Trustees of Davidson College v. Chambers*, 56 N. C. 253 (1857).

²⁵ *McAuley v. Wilson*, 16 N. C. 276 (1828); see 1 N. C. L. REV. 41 (1922).

²⁶ *Wachovia Bank & Trust Co. v. Ogburn*, 181 N. C. 324, 107 S. E. 238 (1921); *Paine v. Forney*, 128 N. C. 237, 38 S. E. 885 (1901); *University of North Carolina v. Gatling*, 81 N. C. 508 (1879).

²⁷ 2 BOGERT, *op. cit. supra* note 8, §438; *Jones’ Unknown Heirs v. Dorchester*, 224 S. W. 596 (Tex. Civ. App. 1920).

²⁸ 2 BOGERT, *op. cit. supra* note 8, §392; 3 SCOTT, *op. cit. supra* note 9, §381; 6 ALA. LAW. 17 (1945). This principle should apply when a mortgage is allowed, or a sale of property incidental to the purposes of the trust. Where the purpose of the trust is closely connected with the use of some specific piece of property, the sale *does* defeat the specific intent of the settlor but the proceeds are applied *cy pres*. See ZOLLMANN, *THE AMERICAN LAW OF CHARITIES* §161 (1924), and note 29 *infra*.

to be used as a parsonage. The property is in disrepair; the court orders a sale, the proceeds to be used to build another parsonage. Many courts say this is applying *cy pres* because the specific intent (using the original residence as the parsonage) is not feasible, but the general intent is carried out.²⁹ North Carolina will order a sale, saying that this does not call for *cy pres* power because the purpose of the trust is not changed.³⁰ If these North Carolina cases are on the borderline, then *Johnson v. Wagner*³¹ is undoubtedly a *cy pres* case, as the sale in that case necessarily involved a change in the purpose of the trust. The testator devised property to individual trustees to be used by the Baptist Church for an assembly ground, but the church refused the benefits. The court allowed a sale and authorized the trustees to use the proceeds for other religious purposes.³² Here the funds were not applied to the original purpose of an assembly ground, but were applied in accordance with the testator's general charitable intention. The court, while not specifically mentioning *cy pres*, said, "The general intent of the testator must prevail over the particular mode prescribed," citing Zollmann on *Charities* from the chapter on *cy pres*.³³

The third class is that in which no trust is created; for example, a

²⁹ *In re Emlen's Estate*, 57 Pa. D. & C. 404 (1946) (T willed residence as convalescent home for girls; court allowed sale, applied *cy pres*, proceeds to be used for convalescing girls). In two Rhode Island cases on practically identical facts, one court applied *cy pres*, the other expressly said it was not applying it. *Town of South Kingstown v. Wakefield Trust*, 48 R. I. 27, 134 A. 815 (1926); *City of Newport v. Sisson*, 51 R. I. 481, 155 A. 576 (1931). The former is cited in the text of Scott as authority that this is not *cy pres*; it would seem that the latter case at least impliedly overrules it. See 3 SCOTT, *op. cit. supra* note 9, at 2046. *Weeden Home v. Weeden's Heirs*, 73 R. I. 22, 53 A. 2d 476 (1947) (*cy pres* applicable). And the sale of realty held in trust is called the doctrine of approximation in Alabama, and incorporated into statute. ALA. CODE ANN., tit. 58, §57 (1940); *Heustess v. Huntington College*, 242 Ala. 272, 5 So. 2d 777 (1942); see *Thurlow v. Berry*, 247 Ala. 631, 636, 25 So. 2d 726, 730 (1946) ("The distinction between that [approximation] and *cy pres* is sometimes shadowy."). ZOLLMANN, *loc. cit. supra* note 28 ("The sale of property donated to charitable purposes affords one of the best illustrations of the doctrine. . . . The incidental purpose of the donor that the particular real estate given by him be used as the seat of the charity will be disregarded in order to carry out his primary purpose. The proceeds realized must, of course, be reinvested in similar property for the same uses and trusts, or at least must be used for the same purposes."); 2 BOGERT, *op. cit. supra* note 8, §437 at 1316.

³⁰ *Holton v. Elliott*, 193 N. C. 708, 138 S. E. 3 (1927); *Ex parte Wilds*, 182 N. C. 705, 110 S. E. 57 (1921); *Church v. Ange*, 161 N. C. 314, 77 S. E. 239 (1913); *accord*, *Page v. Covington*, 187 N. C. 621, 122 S. E. 481 (1924).

³¹ 219 N. C. 235, 13 S. E. 2d 419 (1941).

³² A portion of the residuary fund was to be used by the trustees for the assembly ground or "For such other religious purposes as said Board of Trustees may determine as worthy." Court found the general intent was to donate to charity under the control of the religious organizations named. This case seems to have gone farther than the cases it cites for authority. *E.g.*, *Church v. Ange*, 161 N. C. 314, 77 S. E. 239 (1913); *Holton v. Elliott*, 193 N. C. 708, 138 S. E. 3 (1927).

³³ 219 N. C. 235, 239, 13 S. E. 2d 419, 422 (1941) citing ZOLLMANN, *op. cit. supra* note 28, §137.

testator bequeaths the residue of his estate directly "for charity" without naming a trustee. In England the king exercised prerogative *cy pres* power and picked a charity without regard to the testator's intent.³⁴ The abuses of this power resulted in the unpopularity of the judicial *cy pres* doctrine in the early American decisions.³⁵ The American courts now will not let the trust fail, but will appoint a trustee and allow him to select the objects,³⁶ and the North Carolina statute on charitable trusts seems broad enough to allow this.³⁷ If the testator makes a direct bequest to a charitable organization which for some reason cannot take, the courts will imply a trust for the corporate purposes³⁸ and appoint a new trustee. Some say they are applying *cy pres*;³⁹ others say they are proceeding on the theory that equity will not allow a trust to fail for want of a trustee.⁴⁰ North Carolina has upheld such a gift by appointing a new trustee on the latter theory.⁴¹

On analysis it may be seen that North Carolina, while refusing to apply *cy pres*, has used various other methods to accomplish the same result as is accomplished by that doctrine in other states. The decisions have taken care to repeat such refusal, even in cases not concerned with the doctrine.⁴² In an early *cy pres* case, *Holland v. Peck*, the North Carolina court assigned two reasons for this state's refusal to apply the

³⁴ In England two types of *cy pres* existed, and later both were exercised by the chancellor: one, the prerogative, was exercised for the king; the other, judicial, was an equitable doctrine. The American courts have felt they could exercise only the judicial power; if a case would have called for the prerogative in England, the American courts would not apply the doctrine. These distinctions are disappearing. See notes 21 *supra* and 49 *infra*.

³⁵ See *Klumpert v. Vrieland*, 142 Iowa 434, 437-8, 121 N. W. 34, 35 (1909); 3 *Scorr*, *op. cit. supra* note 9, §399.1.

³⁶ *Klumpert v. Vrieland*, *supra* note 35; *Jordan's Estate*, 329 Pa. 427, 197 Atl. 150 (1938); see RESTATEMENT, TRUSTS §397, comment *f* (1935).

³⁷ N. C. GEN. STAT. §36-21 (1943); N. C. GEN. STAT. §36-23.1 (1947 Cum. Supp.).

³⁸ *Sherman v. Richmond Hose Co.*, 230 N. Y. 462, 130 N. E. 613 (1921).

³⁹ *Osgood v. Rogers*, 186 Mass. 238, 71 N. E. 306 (1904) (court implied trust and then applied *cy pres* to pick new trustee); *Powers v. Home for Aged Women*, 58 R. I. 323, 192 Atl. 770 (1937).

⁴⁰ *Sherman v. Richmond Hose Co.*, 230 N. Y. 462, 130 N. E. 613 (1921); *In re Clendenin's Estate*, 9 N. Y. S. 2d 875 (Surr. Ct. 1939); *In re Shand's Estate*, 275 Pa. 77, 118 Atl. 623 (1922); *In re Gilchrist's Estate*, 50 Wy. 153, 58 P. 2d 431 (1936).

⁴¹ *Keith v. Scales*, 124 N. C. 497, 32 S. E. 809 (1899); see *Holland v. Peck*, 37 N. C. 255, 258 (1842) (bequest to a church is charitable trust, and where trustee cannot take, court will supply one; trust not upheld because purposes indefinite); *Lassiter v. Jones*, 215 N. C. 298, 1 S. E. 2d 845 (1939) (to a lodge for use of an Academy; lodge no longer existed, court appointed new trustee; ignored fact that beneficiary had also ceased to exist).

⁴² *Lemmond v. Peoples*, 41 N. C. 137 (1848) (private trust for certain slaves); *Faribault v. Taylor*, 58 N. C. 219 (1859) (if G wants to remain with mother, house should be enlarged—too indefinite to be a trust, and won't apply *cy pres* to make it definite); *Board of Education v. Wilson*, 215 N. C. 216, 1 S. E. 2d 544 (1939) (town attempts to collect taxes to be refunded for school purposes; town has no school and won't be allowed to use for something else, as this would be *cy pres*).

doctrine: (1) it is not the law in any of the other states; (2) to exercise it would be to make a new will for the testator.⁴³ *Cy pres* is now recognized in all but five states,⁴⁴ and in some of these, as in North Carolina, the words and actions have not been consistent.⁴⁵ Moreover, the application of the doctrine no more makes a will for the testator than where he wills his property outright to one charitable organization and the court awards it to a similar organization.⁴⁶ The only justifiable reason left for failure to adopt the doctrine is the precedent of the earlier decisions, and the policy behind these has changed.⁴⁷

It would now be desirable for North Carolina to adopt *cy pres* by incorporating the doctrine into a statute⁴⁸ to cover any case in which it might be applied, without regard to historical distinction or the resulting judicial confusion.⁴⁹

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⁴³ *Holland v. Peck*, 37 N. C. 255, 261-62 (1842).

⁴⁴ Bogert listed seven states in 1935. 2 BOGERT, *op. cit. supra* note 8, §433. Since then four of these have adopted the doctrine: Alabama, ALA. CODE ANN., tit. 47, §145 (1940); District of Columbia, *Noel v. Olds*, 138 F. 2d 581 (App. D. C. 1943); Kentucky, *Citizens Fidelity Bank v. Bernheim Foundation*, 305 Ky. 802, 205 S. W. 2d 1003 (1947); Delaware, *Delaware Trust Co. v. Graham*, — Dela. —, 61 A. 2d 113 (1948). Also, Virginia incorporated the doctrine into statute. VA. CODE ANN. §587-a (Cum. Supp. 1946). This left North Carolina, South Carolina and Tennessee. Arizona by dictum in *In re Hayward's Estate*, 65 Ariz. 228, 235, 178 P. 2d 547, 551 (1947) repudiated the doctrine. Mississippi has the doctrine of approximation. *National Bank of Greece v. Savarika*, 167 Miss. 571, 148 So. 649 (1933).

⁴⁵ The Tennessee situation is much like the North Carolina law. *Johnson v. Johnson*, 92 Tenn. 559, 23 S. W. 114 (1893) (if void for indefiniteness, *cy pres* won't save); *Milligan v. Greeneville College*, 156 Tenn. 495, 2 S. W. 2d 90 (1928) (if gift to charitable organization, treats as a trust); *King College v. Anderson*, 148 Tenn. 328, 255 S. W. 374 (1923) (changed site for college by sale—in effect applied *cy pres* by “varying details of administration”); *Garner v. Home Bank & Trust Co.*, 171 Tenn. 652, 107 S. W. 2d 223 (1937) (bequest to college lapsed; court found no general intent; *cy pres* not mentioned); see 16 TENN. L. REV. 38 (1939). South Carolina has the “doctrine of liberal construction.” This amounted to *cy pres* in *Mars v. Gilbert*, 93 S. C. 455, 77 S. E. 131 (1913). See 2 BOGERT, *op. cit. supra* note 8, §433. South Carolina still talks as if *cy pres* is prerogative; see *Porcher v. Cappelmann*, 187 S. C. 491, 198 S. E. 8 (1938); *City of Columbia v. Monteith*, 139 S. C. 262, 137 S. E. 727 (1927).

⁴⁶ See note 41 *supra*.

⁴⁷ “It is hereby declared to be the policy of the state of North Carolina that gifts, transfers, grants, bequests and devises for religious, educational, charitable or benevolent uses or purposes . . . are and shall be valid, notwithstanding the fact that any such gift . . . shall be in general terms, and this section shall be construed liberally to effect the policy herein declared. . . .” N. C. GEN. STAT. §36-23.1 (1947 Cum. Supp.). Thus the state has reversed its policy toward charities since *McAuley v. Wilson* was decided in 1828.

⁴⁸ E.g., GA. CIV. CODE §4604 (1926); MINN. (L. 1927, c. 180); WIS. STAT. §231.11 (1945). For other statutes see 2 BOGERT, *op. cit. supra* note 8, §433 n. 40 and 2 BOGERT, *op. cit. supra*, §433 n. 40 (1948 Cum. Supp.).

⁴⁹ See 32 GEO. L. J. 425 at 432 criticizing the *Noel* case for distinguishing judicial and prerogative *cy pres*, as these distinctions are disappearing in practice and should in courts' language; Comment, *A Reevaluation of Cy Pres*, 49 YALE L. J. 303 at 308 (1939).