Comment on Recent Decisions

ACCESSION AND CONFUSION—INNOCENT COMMINGLING—RIGHTS OF OWNERS.—In an action of replevin to recover the increase of certain cows owned by plaintiff, running in a large herd under the control of the defendant where all calves had been branded with the same brand and hence were indistinguishable, *held* the owner could not recover in replevin because he was unable to identify the calves. *Hagan v. Cosper* (Ariz. 1930) 292 Pac. 1020.

The legal presumption is that the confusion was caused by unavoidable accident or mistake. Fraud or negligence, to enter the case, must be pleaded and proved. *Franklin v. Gumersell* (1881) 9 Mo. App. 84; *Wright v. Ellwood Irvins Tube Co.* (C. C. E. D. Pa. 1904) 128 F. 462; *Ayre v. Hixon* (1908) 53 Ore. 19, 98 Pac. 515.

In cases of innocent confusion it is universally held that both the comminglor and the other owner have rights in the goods or their value. Ordinarily the comminglor has the property and the other owner is trying to get his proportionate share. The latter may take physical possession of his portion wherever he can find it, if he can do so without breach of the peace. *Ryder v. Hathaway* (1838) 21 Pick. (Mass.) 298; *Gates v. Rifle Boom Co.* (1888) 70 Mich. 309, 38 N. W. 248. In some jurisdictions the owner is denied the right to recover his property in kind by legal means, upon the principle that the claimant in replevin must identify his goods—an impossibility in a case of true confusion. *Gray v. Parker* (1866) 38 Mo. 160; *Ames v. Mississippi Boom Co.* (1863) 8 Minn. 467; *Hull v. Hull* (1871) 1 Idaho 361. *Gray v. Parker*, above, probably does not represent the present doctrine of the Missouri courts, which would now allow an action of replevin if the property is similar in quality and value and is separable. *Kaufmann v. Schilling* (1874) 58 Mo. 218; *Blurton v. Hansen* (1909) 135 Mo. App. 548, 116 S. W. 474. This is the prevailing view. *Keweenaw Ass'n Ltd. v. O'Niel* (1899) 120 Mich. 240, 79 N. W. 183; *Rust Land & Lumber Co. v. Isom* (1902) 79 Ark. 99, 66 S. W. 434; *Page v. Jones* (1920) 26 N. M. 195, 258 Pac. 274; *Dalton v. Bilbo* (1927) 126 Okla. 129, 258 Pac. 274. To enable the owner to maintain trover against the comminglor, many courts require some act of conversion other than the confusion. *Martin v. Mason* (1886) 78 Me. 452, 7 Atl. 11; *Cronberg Brothers v. Johnson* (1922) 29 Wyo. 11, 208 Pac. 446. The modern trend is to treat the mere confusion as sufficient. *Rabe v. Jourdan* (1907) 46 Tex. Civ. App. 456, 102 S. W. 1167; *Samuel v. Holbrook, Cabot, & Rollins Corp.* (1913) 156 App. Div. 485, 141 N. Y. S. 275. An action of general assumpsit will not lie [*Pratt v. Bryant* (1848) 20 Vt. 333]; but equity will grant an accounting. *Hobbs v. Monarch Refrigerating Co.* (1912) 277 Ill. 326, 115 N. E. 534.

If the other owner should take more than his share by peaceable recaption, the comminglor has an action of trespass against him. *Ryder v. Hathaway*, above. If the whole lot of goods is seized under an execution against either party, the other has a right of action against the sheriff if the latter refuses to surrender a proportionate share on demand. *Bowen v.*

Sanborn (1861) 1 Allen (Mass.) 389; *Servel v. Corbett* (Idaho 1930) 290 Pac. 200. But in Missouri the injured owner cannot maintain a statutory interplea in an attachment unless he can identify the goods. *Kelly-Goodfellow Shoe Co. v. Sally* (1905) 114 Mo. App. 222, 89 S. W. 889.

In relatively few cases courts have treated the former owners as tenants in common of the whole mass. *Davis v. Krum* (1882) 12 Mo. App. 279; *First National Bank of Rogers v. Tribble* (1922) 155 Ark. 264, 244 S. W. 33. This seems to be the prevailing rule in England. *Sandemen & Sons v. Tyzack & Branfoot Steamship Co. Ltd.* (1913) A. C. 680; *Spence v. Union Marine Insurance* (1868) L. R. 3 C. P. 427. It is submitted that the analogy is not perfect as tenancies in common normally arise through the consent of the tenants. Where a statute exists, as in Missouri, for the partition of tenancies in common of personalty at the request of either party, calling the relationship a tenancy in common would make little difference if the other owner was vigilant to protect his rights. R. S. Mo. (1929) secs. 1606-1608.

The decision in the case under review is unduly technical, for range cattle in a single herd are necessarily closely similar in quality and value and the action of replevin under the Codes was designed to give the claimant a way to recover property in specie when he wished and could do so without injuring the defendant. G. W. S., '33.

CRIMINAL LAW—PUNISHMENT—BANISHMENT.—Defendant, convicted of a violation of the liquor law, was fined and sentenced to leave the State of Michigan within thirty days and not return for a period of five years. *Held,* the sentence was unauthorized and contrary to public policy. *People v. Baum,* (Mich. 1930) 231 N. W. 95.

Very few cases of banishment by state courts have arisen. This type of punishment, so frequently resorted to at common law, seems to have been considered only by the Supreme Court of South Carolina in *State v. Baker* (1900) 58 S. C. 111, 36 S. E. 501, holding that a sentence of perpetual banishment from the state may not be imposed.

Banishment, which was first known in England as "adjuration," where a party accused fled to sanctuary, confessed his crime, and took an oath to leave the kingdom and not return without permission, was not considered at that time as a punishment, but as a conditional pardon. 4 BLA. COM. 333. It was well recognized at common law; and banishment as a condition of pardon has been sustained in the United States. *People v. Potter* (1895) 1 Park. Cr. (N. Y.) 47.

Banishment is not a cruel or unusual punishment, and does not constitute a violation of the guaranty against cruel and unusual punishments. *Legarda v. Valdez,* 1 Philippine 146. The Michigan court in the instant case did not place its decision on constitutional grounds but pointed out that this method of punishment was not authorized by statute and was contrary to public policy. To sustain its view of public policy the court says, " . . . to permit one state to dump its convict criminals into