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## **APPOINTMENT OF SUCCESSOR TRUSTEES, TRUST ADMINISTRATION AND SETTLEMENTS IN MISSOURI**

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In the event that a trustee who is named in a trust which has been created either by deed or by will disclaims, resigns, dies, becomes unable, or refuses, to act, the appointment of a successor trustee and the vesting of title to the trust property in the successor trustee are matters which are fundamental in the administration of any trust. Likewise, court supervision of administration of the trust and the making of settlements by the trustee are basic matters. Like many other fundamental or elementary matters, the ones just mentioned are only too often slurred over by draftsmen and practitioners alike, so that easily avoided difficulties are often presented to courts for solution.

Much of what is to follow will be only a resumé of matters which are well known to careful draftsmen and practitioners in the field of trusts in Missouri. It is felt, however, that a re-examination of the Missouri case and statutory materials may clarify some of the aspects of these matters or, at least, indicate some pertinent problems and so be of value to the profession.

### APPOINTMENT OF SUCCESSOR TRUSTEES

First of all, it should be noted that if a competent trustee is named, either by deed or by will, that original trustee takes office by virtue of being named as trustee in the instrument creating the trust and his appointment by a court of equity is not only unnecessary but is void.<sup>1</sup> It is

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\*Professor of Law, University of Missouri. (In a moment of weakness, when the date for delivery of this article to the editor was far in the future, the writer committed himself to deliver on a named date. That date has arrived, but other duties have pushed the proper preparation of the article into the background, so that it has been all too hastily prepared to be properly fortified with all-inclusive citations. If any readers should detect inaccuracies or omissions which their knowledge exposes, the writer will be glad to have the benefit of their temperate comments thereon.)

1. *Riggs v. Moise*, 344 Mo. 177, 128 S.W. 2d 632 (1939); *State ex rel. Riggs v. Seehorn*, 344 Mo. 186, 125 S.W. 2d 851 (1939); *Williams v. Hund*, 302 Mo. 451, at 472, 258 S.W. 703 (1924).

interesting to note that persons who have been named as trustees have sought, and received, appointment as trustees in this state.<sup>2</sup> Since the decision of the supreme court in *Riggs v. Moise*,<sup>3</sup> it is obvious that such a manner of proceeding is futile.

If the creator of a trust, whether established by deed or will, provides in the trust instrument for the appointment of a successor trustee in the event of a vacancy in the office of trustee, such a provision will be effective and will, when exercised, operate by way of a power of appointment, providing only that the individual or group designated to appoint the successor trustee is competent so to act.<sup>4</sup> It should be noted that it has been held in this state that although the individual members of a county court may be properly designated to select a successor trustee, a county court, as such, is incapable of appointing a successor trustee and its selection of a successor trustee is invalid, even though the settlor attempted to vest that power in that court.<sup>5</sup>

It would seem that every draftsman of a trust instrument should be careful to provide in that instrument for the appointment of successor trustees. By so doing, he will, so far as is possible, insure that successors will be appointed in the manner prescribed by him. It may even be that the settlor will wish to designate named individuals as successors instead of providing generally for the appointment of successor trustees in the mode mentioned above.<sup>6</sup> If the draftsman makes such provision, there is no authority in any court to appoint a successor trustee, so long as the manner of appointment specified in the trust instrument is complied with and competent trustees are appointed.<sup>7</sup>

If the trust instrument contains no provision dealing with the matter of appointment of successor trustees, or if the persons designated as suc-

2. *State ex rel. Kenney v. Johnson*, 229 Mo. App. 16, 68 S.W. 2d 858 (1934); *In re Beauchamp's Estate*, 184 S.W. 2d 729 (Mo. App. 1945); *Riggs v. Moise*, *supra* note 1.

3. *Supra* note 1.

4. *Harwood v. Tracy*, 118 Mo. 631, 24 S.W. 214 (1893); *Adams v. Highland Cemetery Co.*, 192 S.W. 944 (Mo. 1917); 1 SCOTT, THE LAW OF TRUSTS, § 108.3 (1939) (hereinafter, this text will be cited as "SCOTT, TRUSTS"); 3, Part 1, BOGERT, THE LAW OF TRUSTS AND TRUSTEES, § 532 (1946) (hereinafter, this text will be cited as "BOGERT, TRUSTS").

5. *Harwood v. Tracy*, *supra* note 4.

6. *Supra* note 4.

7. *Id.* It should be noted that there must be a showing of the fact that the successor trustee has been properly appointed, pursuant to the power, or else the ability of the successor trustee may be successfully questioned, as was done in *Bumgarner v. Cogswell*, 49 Mo. 259 (1872).

cessors refuse to act, or if the persons designated to select successors do not so select successors, the matter of appointment of a successor trustee devolves upon the appropriate circuit court in this state, in the exercise of its powers as a court of equity. It is elementary learning that a trust will not fail for want of a trustee, so that in the development of their control over the field of trusts, courts of equity from a very early time would appoint successor trustees to fill vacancies in the office of trustee.<sup>8</sup> It is still possible to proceed in this manner in the state of Missouri today. Such a proceeding for the appointment of a successor trustee, whether he is to act under a deed or will, would be in the nature of the traditional equity *in personam* suit and the old trustee, or his legal representatives, and the persons beneficially interested in the trust should all be joined as parties.<sup>9</sup> As a matter of fact, if the trust instrument in question be testamentary in character, the appointment of a successor trustee in the manner just mentioned is the only way in which the persons interested in the trust may properly secure the appointment of a successor trustee because of the fact that no statute has been passed in this state providing for the *ex parte* appointment of a trustee to succeed a trustee named by will.<sup>10</sup> If the trustee originally named in the trust instrument disclaims, there is, apparently, no need to join the disclaiming trustee in the equity proceeding for the appointment of a new trustee.<sup>11</sup> The theory upon which these last mentioned cases proceed is that, although the trust is valid despite the disclaimer of the trustee, the disclaiming trustee gets no title to the trust property and so is not an indispensable party to the proceedings.

If the instrument creating the trust was a deed or *inter vivos* transaction and if no provision was made therein for the appointment of a

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8. *Brandon v. Carter*, 119 Mo. 572, 24 S. W. 1035 (1894); 1 SCOTT, TRUSTS § 108.2; 3 (1939), Part 1, BOGERT, TRUSTS § 532 (1946). If suit is brought for the purpose of removing a trustee from office, he must, of course be a party to that proceeding and have notice thereof. *Hitch v. Stonebreaker's Estate*, 125 Mo. 128, at 140, 28 S. W. 443 (1894).

9. *Hitch v. Stonebreaker's Estate*, 125 Mo. 128, at 139-140, 28 S.W. 443 (1894); *Barnett v. Smart*, 158 Mo. 167, 59 S. W. 235 (1900); *Bredell v. Westminster College*, 242 Mo. 317, at 335, 147 S. W. 105 (1912); *Rawlings v. Rawlings*, 332 Mo. 503, at 508, 58 S.W. 2d 735 (1933); *Morrow v. Morrow*, 113 Mo. App. 444, 87 S. W. 590 (1905); *Dillon v. Stevens*, 62 Mo. App. 479 (1895); *Compton v. McMahan*, 19 Mo. App. 494, at 510 (1885).

10. See the text discussion of the statutes providing for *ex parte* proceedings to appoint successors to trustees named by deed, at notes 12 to 14 *infra*. 3, Part 1, BOGERT, TRUSTS § 533 (1946), contains a very condensed treatment of proceedings for the appointment of successor trustees.

11. *Brandon v. Carter*, 119 Mo. 572, 24 S.W. 1035 (1894); *Oxley Stave Company v. Butler County*, 121 Mo. 614, at 639 and 640, 26 S.W. 367 (1894).

successor trustee or if such a provision has not been compiled with, § 3525, Mo. REV. STAT. (1939) provides for the *ex parte* application by the beneficiary to the circuit court of the county in which the trust property, or any part thereof, is situated and § 3527, Mo. REV. STAT. (1939)<sup>12</sup> provides for the appointment of a successor trustee by that court. Proceedings under these statutes require no notice and are thus much easier to prosecute than the personal, adversary, proceedings which are otherwise necessary. It should be carefully noted that these two sections of the statutes apply only to the case of a trust created *by deed* and have no application to a trust which has been created by will.<sup>13</sup> There are no equivalent statutes which apply to the cases of trusts created by will so that, in theory, the only manner in which proceedings for the appointment of successor trustees of a trust created by will may be had will be by the traditional *in personam* proceedings in which all interested parties must be joined.<sup>14</sup>

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12. Both of §§ 3525 and 3527, Mo. REV. STAT. (1939), combine proceedings for the appointment of successor trustees in the cases of deeds of trust to secure the payment of debts and in the cases of deeds of trust for the benefit or use of any person. They are interesting examples of legislation by accession. In Mo. Laws 1849, p. 127, a one section statute appeared which applied only to deeds of trust to secure debts and which combined the application, the appointment of successor trustee, and the vesting of title in the successor trustee in that one section. The statute next appeared in Mo. REV. STAT. (1855), in a two section form, §§ 1 and 2 of chapter 162, but it still applied only to deeds of trust for the payment of debts, altho it was here broken into two sections, the first of which dealt with the application for appointment of a successor and the second with his appointment and the vesting of title in him. In Mo. Laws 1864, at p. 131, the statute again appeared in a two section form but, for the first time, included deeds of trust for the benefit or use of any person. The new material was added by way of tacking appropriate language on to the old statute. The forms of these statutes have changed very little as they have appeared, with amendments, from time to time as: §§ 1 and 2, chap. 154, GEN. STAT. 1866; §§ 1 and 2, chap. 139, Wagner's Mo. STAT. (1872); §§ 3929 and 3930, Mo. REV. STAT. (1879); §§ 8683 and 8684, Mo. REV. STAT. (1889); §§ 4580 and 4581, Mo. REV. STAT. (1899); §§ 11919 and 11920, Mo. REV. STAT. (1909); §§ 13418 and 13419, Mo. REV. STAT. (1919); §§ 3135 and 3137, Mo. REV. STAT. (1929). (Present § 3526, Mo. REV. STAT. (1939), which has nothing whatever to do with either the preceding or following sections, was wedged in between the two closely related sections by Mo. Laws 1921, p. 689, and continues to divide the sections which had occupied adjoining positions, and numbers, from 1864 to 1921).

13. *Hitch v. Stonebraker's Estate*, 125 Mo. 128, at 138-140, 28 S.W. 443 (1894); *Barnett v. Smart*, 158 Mo. 167, at 175 and 181, 59 S.W. 235 (1900); *Brandon v. Carter*, 119 Mo. 572, at 581, 24 S.W. 1035 (1894).

14. See cases cited, *supra* note 9. There are cases such as *Rothenberger v. Garrett*, 224 Mo. 191, 123 S.W. 574 (1909) and *In re Parker's Trust Estate*, 228 Mo. App. 400, 67 S.W. 2d 114 (1934), which impair the *in personam* theory advanced in the text when they either directly say that an *ex parte* proceeding to appoint a successor to a testamentary trustee is authorized under Missouri law (*Parker*) or say that a circuit court, as such, has the power to appoint new trustees so that an *ex parte* proceeding in which a successor to a testamentary trustee was

## VESTING OF TITLE IN SUCCESSOR TRUSTEES

The naming, or providing for the appointment, of a successor trustee is only a part of the problem involved in the drafting of a trust instrument or that involved in the court appointment of a successor trustee. It is necessary that title to the trust property be vested in the successor trustee, no matter how he may be selected or appointed. If the draftsman of the trust instrument, whether it be a deed or a will, provides for the vesting of title in the successor trustee by virtue of his appointment, such a provision is valid and effective as a power of appointment.<sup>15</sup> Provision should be made for the appointment, if made by designated individuals, to be made by an instrument in writing, to be acknowledged in such a manner as to entitle it to be recorded in the office of the appropriate recorder of deeds in the same manner as other instruments affecting real property.<sup>16</sup> This last requirement is applicable primarily to trust instruments which deal with real property and, it would seem, would have no application to trust instruments which dispose entirely of personalty, unless the trust instrument authorizes the trustee to invest the trust estate in real property.

If the trust instrument does not provide for the vesting of the title to the trust property in the successor trustee, it will be necessary, if the successor trustee is appointed by the circuit court in an *in personam* proceeding, for the court either to order the original trustee, or his legal representatives, to convey the trust property to the newly appointed trustee<sup>17</sup>

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appointed is not open to collateral attack (Rothenberger). The Parker case seems to me to be wrongly decided on the point in issue. I think that the Rothenberger case can be justified.

Throughout this article, and in dealing with the cases in this field, the reader should bear in mind the varying meanings and uses of the terms "jurisdiction" and "power," as well as the proposition that any merely "erroneous" action taken by a court which has "jurisdiction" of the subject-matter and parties is valid and binding until the judgment is directly attacked, but that any action which is taken by a court which does not have "jurisdiction" is beyond its "power," is void and subject to collateral attack. In those instances where action has been taken by a court which has "jurisdiction," *res judicata* comes into play and must be considered. I am not herein concerned so much with the question of whether or not our courts have the "power" to act as I am with whether or not they should properly attempt to exercise the "power," even though it may be conceded to exist in any given instance.

15. *Harwood v. Tracy*, 118 Mo. 631, 24 S.W. 214 (1893); *Adams v. Highland Cemetery Co.*, 192 S.W. 944 (Mo. 1917); 1 SCOTT, TRUSTS § 110 (1939).

16. Sections 3426-3428, MO. REV. STAT. (1939), set forth the requirements for, and effect of, recording. *Bumgarner v. Cogswell*, 49 Mo. 259 (1872), indicates the error of failing to show the entire picture of proper selection and vesting of title.

17. If the original trustee, or his legal representative, has title, the traditional equity mode of proceeding directed him to convey to the successor trustee. Otto

or to provide, by its decree, that the title to the trust property shall vest in the successor trustee.<sup>18</sup> Equity practitioners will recall that one of the handicaps of traditional equity procedure was the announced inability of the court of equity to act directly upon the title to property so that, absent a statute, all that the court could do would be to order the defendant to convey. Under the traditional equity practice, until and unless the defendant conveyed the property, title remained in him and was not transferred to the newly appointed trustee. This situation led to the early passage of legislation which gave to decrees of courts of equity ordering a conveyance the effect of a conveyance in the event of non-compliance with the decree, whether caused by defendant's obstinacy or his inability to convey.<sup>19</sup>

Sections 1255 and 1257, Mo. REV. STAT. (1939)<sup>20</sup> are the Missouri equivalents of the statutes referred to above and give an *in rem* operation to the judgment of the court which directs or orders the holder of legal

v. Young, 227 Mo. 193, at 217, 127 S.W. 9 (1910). The remarks in *Henderson v. Dickey*, 50 Mo. 161, at 165 (1872) to the effect that the old chancery practice authorized the direct passage of title by force of the decree of the court are obviously incorrect. See text, *infra*, at notes 18. and 19.

18. Under statutory provisions which give to the judgment of a court the direct effect of a conveyance, the judgment may, by its terms, act as a conveyance of the property. *Macklin v. Allenberg*, 100 Mo. 337, at 341, 13 S.W. 350 (1889); *Otto v. Young*, *supra* n. 17. See *infra* note 19 and the following paragraph in the text.

19. The early equity background and the origin and development of the statutory enlargement of the power of equity courts so as to permit their decrees directly to affect property involved in litigation are succinctly and accurately set forth in *Evans, Problems in the Enforcement of Federal Judgments*, 4 Mo. LAW REV. 19, at 19 to 29 (1939). There is no need to pad this article with these matters when this excellent treatment is available. His resume and classification of the types of statutory treatments of this subject are well worth reading.

20. Legislation of this type first appears in Mo. Terr. Laws 1816, p. 62, § 2, which is reprinted as § 2 of Chap. 161, in 1 Mo. Terr. Laws, 1824. It is recast as §§ 39 and 40 of an act regulating practice in chancery, in Mo. REV. STAT. (1925), at p. 643. It has always seemed that §§ 1255 and 1257 provided alternative modes of having the court's decree serve to vest title to the property. Section 1255 says that the court may by its judgment pass title to the property. Section 1257 says that if a party is ordered by a judgment to convey and does not comply with the judgment, the judgment shall have the same effect as a conveyance. The only difference between the two sections lies in the fact that, under § 1255, the judgment will recite that it vests title, while, under § 1257, the judgment which in terms orders a party to convey, if not complied with, then acts, with a sort of delayed action, to convey the property. In *Bryant v. Kynere*, 204 S.W. 2d 284, at 288-290 (Mo. 1947) involving specific performance of contract, our supreme court stated that § 1257 was for the benefit of vendees and that § 1255 was for the benefit of vendors. What this pronouncement means is a mystery to me, excepting as to the issue of whether or not a party may be jailed for contempt if he doesn't convey, as ordered by the judgment. Both statutes seem to me to be for the benefit of successful litigants who want, and should have, title or possession vested in them if the defendant can't, or doesn't, convey or deliver.

title to personalty or realty to convey that property so that what reads like a judgment *to convey* will pass the title to the property whether or not the defendant complies with the judgment.<sup>21</sup> The sections of the statutes just referred to are general in their operation and are found in the article of the statutes which deals with Judgments. There is no special section in our statutes which deals specifically with the vesting of title to trust property in successor trustees in the cases of testamentary trusts so that the vesting of title in such successor trustees depends entirely upon a combination of the common-law equity powers of the court and the statutes just mentioned which give a direct effect to the order of the court directing title to be vested in the successor trustee. It should be noted that, if the trust property be located within the state and if the trustee be absent from the state, it is possible for proceedings to be instituted in which service may be had upon the absent trustee either by publication, service at his residence, or by registered mail for the purpose of vesting title to such trust property in the successor trustee. This is possible only because, by virtue of the passage of legislation such as was referred to above,<sup>22</sup> the nature of such a proceeding is no longer viewed as being of an *in personam* character, but is now to be regarded as being the equivalent of an *in rem* proceeding which, because it directly affects property within the state, may be based upon such service.<sup>23</sup>

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21. Section 1298, Mo. REV. STAT. (1939) provides that such a judgment, in order to be valid as to parties other than the parties to the original suit or those who have actual notice must be recorded in the county where the affected lands lie within eight months after the entry thereof.

22. Evans, *loc cit. supra* note 19; *supra*, note 20.

23. Although I have not found any Missouri cases which directly pass upon the power of our courts, acting under statutes of this type, to affect the title to trust property which is situated within the state, in cases of the type mentioned in the text, the general proposition that a Missouri court may so act, in cases of parallel types is well illustrated by the case of State *ex rel.* St. Louis Union Trust Co. v. Sartorius, 350 Mo. 46, 164 S.W. 2d 356 (1942), in which the court, speaking of a proceeding based upon service by publication said, at p. 55: "... the distinction sought to be drawn is tenuous, regardless of the nature of the trustees' action, in which the non-resident and unknown parties may be brought in under constructive notice by publication, as here. As to those served only by publication and who do not appear, it is essentially in the nature of, and should be classed with, actions in rem." Again, on p. 57, the court said: "The subject matter, the trust property, was within the jurisdiction of the court, and the notice by publication to non-resident and unknown defendants was adequate to warrant the court in decreeing who were entitled to distributive shares; and such a decree protects the trustees." Other cases are: State *ex rel.* Bensberg v. Hartmann, 323 Mo. 171, 19 S.W. 2d 637 (1929) (Suit to trace and recover trust property); Shemwell v. Bettis, 264 Mo. 268, 174 S.W. 390 (1915) (Suit to quiet title); Mitchener v. Holmes, 117 Mo. 185, 22 S.W. 1070 (1893) (Suit to remove cloud on title); Adams v. Cowles, 95 Mo. 501, 8 S.W. 711, 6 Am. St. Rep. 74 (1888) (Suit to set aside conveyance as being in fraud of creditors). If the court of a state, having a trustee who has title to lands or property



If the instrument creating the trust was a deed or an *inter vivos* transaction and if no provision was made in the instrument for the appointment of a successor trustee and the vesting of title in him or if such a power has not been exercised, the beneficiary may, as has been noted,<sup>24</sup> in an *ex parte* proceeding, based upon statute, apply to the appropriate circuit court for the appointment of a successor trustee. Section 3527, Mo. REV. STAT. (1939) provides that the person so appointed by the circuit court shall, by virtue of such appointment, be vested with the same powers, title and interest in the trust property as were vested in the original trustee. It should be carefully noted that the operation of this statute is confined to trusts which have been created *by deed* and that the statute has no application whatever to trusts which have been created by will.<sup>25</sup> It will thus be seen that § 3527, in providing that title shall vest in the court-appointed successor trustee, is a special kind of so-called *in rem* statute which has application only to the cases of successor trustees who are appointed to fill vacancies in the offices of trustees provided for in deeds or *inter vivos* transactions. The existence of §§ 3525 and 3527 does not mean that they are to be used exclusively in the cases of trusts created by deed. A suit may be brought to remove a trustee named by deed or will, appoint his successor and vest title to the trust property in that successor and the relief sought will be granted in what is, in effect, an adversary *in personam* proceeding, with the general *in rem* statutes serving to vest title in the newly appointed successor.<sup>26</sup> It

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in a foreign state before it, attempts by its decree directly to transfer or affect the title to those foreign lands or property, such a decree will be ineffective. *De Lashmutt v. Teetor*, 261 Mo. 412, at 433-436, 169 S.W. 34 (1914). Such a decree can be valid only as an order directed personally to the trustee.

24. *Supra*, at notes 12 and 13.

25. *Hitch v. Stonebraker's Estate*, 125 Mo. 128, at 138-139, 28 S.W. 443 (1894); *Barnett v. Smart*, 158 Mo. 167, at 175 and 181, 59 S.W. 235 (1900); *Brandon v. Carter*, 119 Mo. 572, at 581, 24 S.W. 1035 (1894). The cases of *Röthenberger v. Garrett* and *In re Parker's Trust Estate*, mentioned *supra*, note 14, seem to sanction the *ex parte* appointment of trustees named to succeed *testamentary trustees* and the consequent vesting of title to the trust property in them. In this respect these cases present instances of judicial innovations. No statutory warrant exists for either type of action in this kind of instance.

26. Such a case was that of *Watson v. Hardwick*, 231 S.W. 964 (Mo. 1921) (deed). For a clear statement in a will case, see *Covey v. Pierce*, 229 Mo. App. 424, at 436; 82 S.W. 2d 592 (1935). See the cases cited, *supra*, note 9. The early proceedings in the case of *State ex rel. McManus v. Muench*, 217 Mo. 124, at 130-131, 117 S.W. 25, 129 Am. St. Rep. 536 (1909), present a perfect picture of how to proceed in an *in personam* proceeding to appoint a trustee to succeed a testamentary trustee who had died and to vest title in that successor. All beneficiaries and the heirs at law of the deceased trustee were joined and the judgment, after appointing a successor, recited that the title of the deceased trustee be divested out of his heirs at law and vested in the newly appointed trustee. The lawyers in this case knew precisely what they were doing and how to get it done.

has been noted above that there is no such special statutory provision made for the vesting of title in successor trustees who are appointed to fill vacancies in the offices of trustees provided for in wills or testamentary instruments.<sup>27</sup>

#### COURT SUPERVISION OF TRUST ADMINISTRATION

As late as 1934, the Saint Louis Court of Appeals announced that:

"Under the common law, courts of equity had the inherent right and power to exercise jurisdiction over trust estates, which, of course, carried with it the right to appoint trustees, take and approve bonds, *supervise the administration of the trust estate by the trustee* and to make all orders necessary for the preservation and conservation of the trust property for the use and benefit of the beneficiaries. (Italics supplied)

"This jurisdiction has been recognized and aptly referred to by many of our courts as an ancient head of equity jurisdiction."  
(Citing *Brandon v. Carter* and *State ex rel. v. Muench.*)<sup>28</sup>

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27. *Supra*, at note 16 and note 25. The cases of *Rothenberger v. Garrett* and *In re Parker's Trust Estate*, mentioned *supra*, notes 14 and 25, seem to confuse the power of our courts, proceeding in an *ex parte* manner under specific enabling legislation, such as §§ 3525 and 3527, Mo. REV. STAT. (1939), which permits appointment and vesting of title in trustees named to succeed trustees who were named in a deed, to vest title to the trust property in the successor trustee, with the power of a court exercising the powers of a court of equity and proceeding in a suit to which the ex-trustee is a party and in which he has been served with process or notice, to vest title to the trust property in such a successor trustee under the provision of our so-called general "*in rem*" statutes, mentioned *supra* notes 20-23. The first of the just mentioned instances of appointment and vesting is based upon valid statutory provisions relating only to trusts created by deed and the second is based upon a valid proceeding in which notice has been given and to which the *in rem* statutes give the effect of a conveyance. Neither of these situations should be confused with a case in which a court attempts to proceed in an *ex parte* manner to appoint and vest title in a trustee who is to fill a vacancy in a testamentary trust, because there is no warrant to proceed in such a manner without a statute and we have no statute authorizing *ex parte* proceedings to make appointments of, and vest title in, successor trustees under testamentary trusts. In *Hitch v. Stonebraker's Estate*, 125 Mo. 128, 28 S.W. 443 (1894) the court said, at page 139: "It is within the power of no court to take property rights from one citizen, and transfer them to another, unless it has acquired jurisdiction, either of the person or the property." The quoted language seems to me completely to refute the cases mentioned earlier in this note. I have no objection to *ex parte* proceedings in cases of the appointment of successor trustees in testamentary trusts, but I do believe that express legislation is needed to confer that power on our courts.

28. *State ex rel. Kenney v. Johnson*, 229 Mo. App. 16, at 21, 68 S.W. 2d 858 (1934). What is to be said, herein, about court supervision of trust administration has no application to the instance of a trustee whose trust estate is insolvent or one who, as the equivalent of a receiver, is either required or is appointed to manage or liquidate an insolvent business, as in the case of *Seigle v. First National Bank*, 338 Mo. 417, 90 S.W. 2d 776 (1936). In these instances the jurisdiction of equity exists on the basis of its power to administer the estates of insolvents. GLENN, THE LAW GOVERNING LIQUIDATION, §§ 2-4, 72, 148, 151, 153 (1935). In the case of the trustee whose trust estate is insolvent, that trust estate may properly be brought into court for the purpose of administration.

Statements such as the one quoted above to the effect that courts exercising equity powers have power to supervise the administration of trusts as one of the ancient heads of chancery jurisdiction are frequently made, but such statements do not, apparently, accurately describe the law in Missouri.

In *State ex rel. McManus v. Muench*,<sup>29</sup> the Supreme Court of Missouri held squarely that the circuit court of the city of St. Louis which had appointed a successor trustee to fill the vacancy in a testamentary trust of lands in St. Louis and had provided in its decree that the case be retained in respect to the successor trustee's administration of the trust had no power so to retain the case for the purpose of administering the trust under the supervision of the court. Judge Lamm, in delivering the opinion of the court *en banc* clearly stated that,

"Conceding that trusts and their administration are an ancient head of equity jurisdiction, yet in Missouri jurisdiction of the subject-matter of a concrete case in equity or law is only acquired by a court through pleadings filed, process issued or appearance entered, and decrees entered within the lines of the issues framed by pleadings."<sup>30</sup>

The opinion of the court further stated that the power of the trial court had been exhausted by the appointment of a new trustee, making provision for the bond and investing him with title, saying,

"This certainly is so unless we adopt the heresy that a court, *sua sponte* may hold a trust estate in its grasp for all purposes of administration under some droll notion that once in chancery for any purpose whatsoever a trust estate is always in chancery for all purposes whatsoever."<sup>31</sup>

Judge Lamm pointed squarely at another reason underlying the proposition that a court will not undertake to supervise the administration of a trust when he said,

"But, in this connection, it must also be remembered that the grandmother's will, *ex vi termini*, contemplated that a *person*, not a *court*, should manage the trust. The finger can be put on nothing in that will even squinting at a wish on the grandmother's part that the execution of the trust raised should be subjected to the traditional delays and expenses of an administration in a court of chancery."<sup>32</sup>

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29. 217 Mo. 124, 117 S.W. 25, 129 Am. St. Rep. 536 (1909).

30. *Id.* at 137.

31. *Id.* at 140.

32. *Ibid.*

Despite these clear statements, cases occasionally appeared in the books in which trustees named in trust instruments were appointed, as trustees, by trial courts or in which the courts attempted to retain cases involving trusts for the purpose of supervising the trustee's administration of the trust.<sup>33</sup> In *Riggs v. Moise*<sup>34</sup> the court quoted with approval from the *Muench* case and again stated that courts of equity in this state have no power generally to supervise the administration of a trust, save as they are brought into action by the proper institution of an action by either the trustee or the beneficiary for the purpose of settling a dispute as to a specific matter.

It is necessary to qualify the statement made above so as to take note of the statute which was passed in 1911,<sup>35</sup> and which now appears as § 3537, Mo. REV. STAT. (1939), providing that if the circuit court of the county in which a will disposing of an estate has been proved or recorded shall appoint a successor trustee for that estate, that court shall have jurisdiction of the trustee, trust estate and beneficiaries as to all matters relating to the administration of the trust, may act upon its own motion or upon notice and motion by any person interested in the trust and may require the appointed successor testamentary trustee to file accounts. Inasmuch as *State ex rel. McManus v. Muench*<sup>36</sup> was decided in 1909, it would seem that the statute just referred to was passed to avoid the result of that case. Whether or not that was the purpose of the act of 1911, it is apparent that it had that effect when one reads the case of *McManus v. Park*<sup>37</sup> which held that the act of 1911 properly applied to permit the court which had appointed the successor trustee of the same testamentary trust estate which had been involved in the *Muench* case to require the filing of accounts by the trustee, under the provisions of § 2 of the Act of 1911.<sup>38</sup> As a result of

33. *State ex rel. Kenney v. Johnson*, 229 Mo. App. 16, 68 S.W. 2d 858 (1934); *State ex rel. Heddens v. Rusk*, 236 Mo. 201, 139 S.W. 199 (1911); *In re Beauchamp's Estate*, 184 S.W. 2d 729 (Mo. App. 1945).

34. 344 Mo. 177, 128 S.W. 2d 632 (1939). The attempted judicial appointment of the trustee named in the will by the circuit court, of course, made all subsequent proceedings void.

35. Mo. Laws 1911, p. 430, quoted, *infra*, in text at note 62.

36. 217 Mo. 124, 117 S.W. 25, 129 Am. St. Rep. 536 (1909), *supra*, notes 29-32.

37. 287 Mo. 109, 229 S.W. 211 (1921), in which, on the point of the purpose of the act and with reference to the *Muench* case, the court said, on p. 119: "It is evident that the act of 1911 was intended to remedy that defect; that is, to give the circuit court jurisdiction over trustees which the ruling of this court in that case held it did not possess."

38. Mo. Laws 1911, § 2, p. 431, now § 3538, Mo. REV. STAT. (1939).

these cases and the statute in question, it will be seen that, after the act of 1911, the court of the county in which a will creating a trust estate has been filed or recorded which has appointed a trustee to fill a vacancy in a testamentary trust has been granted the specific power by that act to supervise the administration of the trust. No such specific power has ever been granted in the case of trusts which have been created by *deed*, whether the original trustee or a successor is acting as trustee, so that there seems to be no such power in a court of this state in the case of such a trust. Although the direct holding in the *Park* case dealt only with the power of the court to require accountings, it would seem that the holding also should apply to the requirement set forth in the act of 1911 as to supervision of administration of the trust.

It should also be carefully noted that § 3537 applies only to *successor trustees* who have been *appointed* by a designated circuit court to fill a vacancy in a *testamentary trust*. The statute would seem to have no application to the case of an original trustee who has been named as trustee in a will. The conclusion that this statute was passed to take care of the exact situation presented by the *Muench* case seems to be inescapable when one realizes that the facts of the *Muench* case are the exact facts set forth in the statute.<sup>39</sup>

To repeat, it seems that prior to the act of 1911<sup>40</sup> there was no power in any court in the state of Missouri generally to retain a trust case so as to supervise the administration of the trust or to compel the filing of periodic reports. The act of 1911 confers such a power only upon the court which has appointed a successor trustee to fill a vacancy in a testamentary trust created by a will which has been proved or recorded in the county in which the court sits. As to all other trusts and trustees, the situation existing before the passage of the act of 1911, as announced in the *Muench* case, is still in effect today. If legislation was required to remedy the situation presented by the *Muench* case and if that legislation applied only to cases with the same essential facts as those in the *Muench* case, then all trusts other than those of the exact type as in that case are in the same state as they were prior to 1911.

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39. See the excerpt from the *Park* case quoted *supra* note 37 and, also, note how the jurisdictional requirements set forth in § 1 of the act of 1911 are the exact facts which were present in the *Muench* case. The facts of that case are condensed in the text, *supra*, at note 29.

40. *Supra*, at notes 29-34.

Suppose that a testator or settlor provides in the trust instrument that: "In the administration of this trust, my trustee shall be subject to supervision by the Circuit Court of X County, Missouri," and that in a suit based upon personal service upon the trustee, the beneficiaries request that the Circuit Court of X County, Missouri, undertake to supervise the administration of the trust. If one takes the language of Judge Lamm in the *Muench* case<sup>41</sup> literally it would seem that the circuit court has no jurisdiction to supervise administration of the trust and that jurisdiction cannot be conferred upon a court by either a settlor or litigants. If, however, Judge Lamm's language<sup>42</sup> be read as saying that "because the will in the *Muench* case didn't contemplate court supervision of the administration of the trust and because court supervision of the trust was not specifically requested in the pleadings, the court, for these reasons, had no jurisdiction to retain that case, in that form, to supervise administration,"<sup>43</sup> then one might say that in the case supposed above, the court would have jurisdiction to grant the requested relief. At the time of this writing, my guess is that the court could not grant such relief.

The guess just made above is opposed by formidable authority. The case of *Ross v. Pitcairn*<sup>44</sup> involved the question of whether the action had been instituted by the proper party plaintiff, and this depended upon whether or not a probate court had properly acted in summarily withdrawing, or revoking, previously granted letters of administration. If the probate court had acted improperly, the plaintiff's later appointment as administrator *de bonis non* was invalid so that he could not be the proper party plaintiff in this action which was brought under the Federal Employers' Liability Act for the death of his decedent. In addition to deciding that the plaintiff did not have the capacity to maintain the action because of the invalidity of the action of the probate court in summarily revoking the letters, the opinion of Division One of the Missouri Supreme Court, by way of *obiter dictum*, advanced the following explanation of *Riggs v. Moise*,<sup>45</sup> *State ex rel. McManus v. Muench*,<sup>46</sup> and *McManus v. Parks*:<sup>47</sup>

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41. *Supra*, at notes 30 and 31.

42. *Supra*, at notes 30 and 32.

43. See the text *infra*, next paragraph.

44. 179 S.W. 2d 35 (Mo. 1944).

45. *Supra*, note 34.

46. *Supra*, note 29.

47. *Supra*, note 37.

"It may be considered that there is a distinction between the power of a circuit court when acting as a court of equity in adjudicating issues involved in the administration of a trust wherein it is not contemplated that the court shall direct or supervise the administration of the trust (the jurisdiction of the corpus of the trust not being in the court for administration), and the powers of a court of equity in directing the administration of the trust where the corpus of the trust estate has been brought into the court for the purpose of administration. In those trusts wherein it is not contemplated by the instrument of trust or by statute that the court shall direct the administration of the trust, the court cannot act, except upon issues which are presented by the parties in their pleadings. A trust of the latter class was involved in *State ex rel. McManus v. Muench*, supra (a case decided prior to the enactment of Section 3537, R.S. 1939, Mo R.S.A. §3537, and see *McManus v. Park*, 287 Mo. 109, 229 S.W. 211), for the court said, 217 Mo. at page 140, 117 S.W. at page 30, 129 Am. St. Rep. 536, 'But in this connection, it must also be remembered that the grandmother's will, ex vi termini, contemplated that a person, not a court, should manage the trust'; . . . Ought a court hold that a court of equity, if vested with the jurisdiction of the supervision of the administration of a particular trust, has not the inherent power to remove, and cannot ex mero motu, upon due notice and opportunity to be heard, remove a trustee for good cause? We will not discuss this question further here."<sup>48</sup>

The statement quoted above advances the following theories: (1) that a settlor, by direction in the trust instrument, may confer jurisdiction upon a circuit court to direct or supervise the administration of a trust; (2) that the corpus of any trust estate may be brought into a circuit court for administration; (3) that if the trust instrument, or a statute, does not contemplate court supervision of the trust's administration, the court can only act upon issues presented by the pleadings, with the strong inference that, with appropriate pleadings, the court can supervise the trust's administration (citing the *Muench* and *Park* cases on this point). If the second theory, above, be true, why in the world is there any need for the third theory? If, as the second theory states, the corpus of any trust estate may be brought into a circuit court for administration, why then add, as theory (3), that the parties may, by their pleadings, present a case where the court will direct the administration of the trust? The court's statement about the statute which confers jurisdiction upon a circuit court to supervise administration

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48. 179 S.W. 2d 35, at 37 (Mo. 1944).

is quite correct, but the only statute in this state which does that is § 3537, which has only a limited application.<sup>49</sup> All of the three theories seem to me to be opposed to the holding in the *Muench* case, unless one places a reverse twist upon the statements of Judge Lamm in that case, as mentioned above<sup>50</sup> and as was done in this dictum in *Ross v. Pitcairn*.<sup>51</sup> It may also be argued that, inasmuch as the legislature passed § 3537 in order to provide for court supervision of administration only in the cases of the type of trustees mentioned in that statute, it was the legislative intention not to permit court supervision of administration in the cases of any other type of trustee not covered by that statute. That possibility is not even mentioned, or apparently considered, in the quoted dictum from *Ross v. Pitcairn*. At the present time, the case and statute law in Missouri seem to me to establish that there is no power in a circuit court of this state to supervise a direct administration of a trust estate, save and only in the specific instance presented by § 3537. If it is felt that this condition needs correction, let that come either by way of legislation, which may take the form of either requiring, or permitting, such supervision, or of a forthright repudiation by our supreme court of the *Muench* case and its implications.<sup>52</sup>

The basic idea of the trustee's being the one who is to manage and control the trust property, exercising his discretion in so doing, is apparently attempted to be counteracted, in this instance, because of the desire of the trustee to be protected in his management of the trust estate through orders and directions of a court, given in advance of action by the trustee. The settlor, apparently, wanted the trustee to manage the trust estate. Although a court will not take upon itself the administration of the trust,<sup>53</sup> a trustee

49. See text, *supra*, at notes 35-40.

50. See text, *supra*, at notes 41-48. See, also, *State ex rel. Ponath v. Muench*, 230 Mo. 236, 130 S.W. 282 (1910).

51. See quotation in text, *supra*, at note 48.

52. See, *infra*, note 53.

53. For those who are interested in the actual situation in this country as to the attitudes of courts, and states, toward judicial supervision of the administration of trust estates, I highly recommend, as required reading, the comment: *Trusts—Judicial Supervision of the Administration of Trusts*, 35 MICH. L. REV. 479 (1937). It is there pointed out that only Maryland recognizes the common law power of equity courts to supervise trust administration. If the courts of this state want to assert such a common law power, this comment and the Maryland cases will indicate the path to be followed. In states other than Maryland, only infrequently, and in special cases, is the common law power asserted. Elsewhere, including Missouri, the matter is regulated by statutes, which vary greatly in their contents. The reader is again reminded that those trust, or other, estates which have been brought into equity for administration upon the ground that their insolvency requires administration, are properly in equity for administration and that these remarks have no application to those situations, as was mentioned, *supra*, in note 28.



who is in honest doubt as to a real question may file a bill for instructions,<sup>54</sup> or may proceed under the Declaratory Judgment Act.<sup>55</sup> In other instances it may well be true that the trustee should exercise his best judgment in the administration of the trust, rather than to incur expense and spend time in getting prior court approval of details of administration when the only object of such prior court approval is to protect, or insulate, the trustee from any liability which might otherwise result from his proposed action. Maybe we should think of the beneficiary and the trust estate as well as of the trustee and his protection. Whatever we may think of the present situation, it seems that the enactment of carefully considered and appropriate legislation is the proper way to work a change.

#### FILING OF REPORTS AND SETTLEMENTS

Trustees, whether appointed by will or deed and whether original or successor trustees, may, and should, present settlements of their accounts to the beneficiaries. Such voluntary settlements, if fair and accurate, should be binding upon both the trustee and beneficiary. If a trustee does not so present settlements of his accounts to the beneficiary, the beneficiaries may demand and compel an accounting by adversary proceedings brought for that purpose.<sup>56</sup> If a dispute arises between the trustee and beneficiary as to whether the trustee's settlement of accounts is proper, the trustee may institute proceedings in which his accounts will be examined by the court.<sup>57</sup>

Professor Bogert, in discussing the then proposed Uniform Trustees' Accounting Act,<sup>58</sup> pointed out that in this country requirements as to accounting by trustees vary, as follows:<sup>59</sup> (1) some states neither require periodic accountings nor confer jurisdiction on any court to demand or

54. *State ex rel. St. Louis Union Trust Co. v. Sartorius*, 350 Mo. 46, 164 S.W. 2d 356 (1942); *Hayden's Executors v. Marmaduke*, 19 Mo. 403 (1854). See, also, the excellent and exhaustive treatment and citation of cases in *Comment: Executors' and Trustees' Bills for Instructions*, 44 YALE L. J. 1433 (1935); 3 Part 1, *BOGERT, TRUSTS*, § 559 (1946); 2 *SCOTT, TRUSTS*, § 259 (1939).

55. Sections 1126-1140, MO. REV. STAT. (1939). Section 1129 is particularly in point.

56. *Price v. Boyle*, 287 Mo. 257, at 270, 229 S.W. 206 (1921); *Bobb v. Bobb*, 89 Mo. 411, at 423, 4 S.W. 511 (1887); *Boden v. Johnson*, 226 Mo. App. 787, 47 S.W. 2d 155 (1932). The judgment approving an account made in an adversary proceeding is *res adjudicata*. *Peake v. Jamison*, 82 Mo. 552 (1884).

57. *Johnson v. Grice*, 272 Mo. 423, 199 S.W. 409 (1917); 4 *BOGERT, TRUSTS*, § 969 (1946); 2 *SCOTT, TRUSTS*, § 260 (1939).

58. 9 U.L.A. 700 (1942).

59. Bogert, *The Proposed Uniform Trustees' Accounting Act*, 21 CORN. L. Q. 529 (1936). A digest of this article appears as the Commissioners' Prefatory Note to the Act in 9 U.L.A. 697 (1942).

receive accounts (this is, in effect, the traditional English chancery practice); (2) some states *permit* a voluntary or compulsory accounting to be had in a named court, but do not require it, or prescribe its form; (3) some states *require* periodic accountings but do not prescribe the form of the account; and (4) other states (the older, more populous and wealthy ones) *require* periodic accountings and prescribe the form and contents of the accounts and procedure to be followed by the court in their examination and approval. There is, apparently, no provision made in the statutory or case law of Missouri for the filing of periodic settlements by the trustee in a court except in the one instance of the successor to a testamentary trustee who has been appointed by the appropriate circuit court in this state to fill a vacancy in the office of trustee. If what was said by the court in the *Muench* case<sup>60</sup> as to the necessity for adversary proceedings to be instituted in order that a circuit court in Missouri may have jurisdiction over any given aspect of trust administration be taken as the law, the only effective judicial accountings and settlements that can be had by trustees in this state are those which may be had in proceedings which are adversary in nature, excepting the cases of those successor trustees who have been appointed to fill vacancies in the cases of testamentary trusts.

When one reads § 3538, Mo. REV. STAT. (1939), which appears in Chapter 25 of the Revised Statutes, entitled "Trusts and Trustees," he sees, "Every such trustee, appointed as in this *chapter* described, shall present to the court, wherein the appointment was made, a report of the condition of said trust estate at least once each year and at such other times when ordered by the court so to do." (Italics supplied)

Inasmuch as this section appears in the same *chapter* of the statutes as § 3527,<sup>61</sup> which deals with the appointment of successor trustees who are to fill vacancies existing in a trust created by *deed*, and § 3532, which deals with the appointment of successor trustees to fill vacancies caused by failure to give bond as required by statute, a reading of § 3538 would lead one to believe that it applied to trustees appointed to fill vacancies in trusts created by deed and to trustees appointed to fill vacancies caused by failure to give bond. When the legislative history of § 3538 is examined, however, the conclusion just mentioned appears to be wrong.

60. State *ex rel.* McManus v. Muench, 217 Mo. 124, 117 S.W. 25, 129 Am. St. Rep. 536 (1909), cited and quoted in text, *supra*, at note 30.

61. Mo. REV. STAT. (1939), cited in text, *supra*, at note 12.

The section which is now § 3538 was enacted in 1911 as § 2 of an act which contained what is presently § 3537 as § 1. As enacted, the entire act read as follows:

"Section 1. Court to have jurisdiction, when.—If the circuit court of the county, in which a will disposing of an estate has been proved or recorded, shall for such estate appoint a trustee to succeed another therein, who has become disqualified to act, resigned or died, then that court in the proceedings wherein the appointment was made, shall have jurisdiction over such trustee, trust estate and the beneficiaries thereof as to all matters relating to the administration of said trust until terminated; and said court on its own motion, or upon notice and motion by the trustee or any beneficiary thereof, may in its discretion make orders therein necessary to conserve the estate or to cause the same to be properly administered.

"Section 2. Trustee to make annual reports.—Every such trustee, *appointed as in this act* described, shall present to the court, wherein appointment was made, a report of the condition of said estate at least once each year and at such other times when ordered by the court so to do. [Italics supplied]

"Section 3. Purpose of act.—For purposes of this act, the city of St. Louis shall be considered a county."<sup>62</sup>

Section 2 of the act quoted above refers to trustees appointed as in "this act" described. Section 1 refers only to successor trustees who have been appointed by a circuit court of a county in which a will creating a trust estate has been proved or recorded, to fill a vacancy in a testamentary trust, so that the requirement of Section 2 as to the filing of annual reports by "every such trustee" had no application, at the time of the enactment of that section, to any trustee other than the kind of trustee mentioned in § 1 of the act. Without ever having been the subject of a revision bill, or other change by legislative enactment, the word "act" as it appeared in § 2 of the statute quoted above was apparently changed to the word "chapter" by the revision commission when the revision of 1919 was prepared. In that revision, this section appears as § 13430<sup>63</sup> and contains the word "chapter" instead of the word "act." The section appeared in the same form in the 1929 revision.<sup>64</sup> It is a fundamental principle in this state that

62. Mo. Laws, 1911, page 430. The act is quoted in the form set forth above in the case of *McManus v. Park*, 287 Mo. 109, at 121, 229 S.W. 211 (1921), cited, *supra*, at note 37.

63. Section 13430, MO. REV. STAT. (1919).

64. Section 3148, MO. REV. STAT. (1929).

a legislative act is always to be construed in its setting as it was enacted by the legislature.<sup>65</sup> The act of the 1919 revision commission, in changing the word "act" as it appeared in § 2 of the act of 1911 to the word "chapter" as it appeared in the revision of 1919, and the acts of the subsequent revision commission in 1929 and 1939 in continuing the change, without any legislative sanction therefor, was an attempt to "change, modify or alter the law,"<sup>66</sup> and was not a compliance with the legislative mandate to have the Revised Statutes contain "... laws of a general nature which were in force at the commencement of this session . . . and continue in force by their own provisions. . . ."<sup>67</sup> That change of words completely changed and broadened the meaning of that section so as to include within its scope trustees who might be appointed in ways other than that specified in section 1 of the 1911 act. The revision commission had no power to make such a change and the section must, therefore, be read, today, as it was originally enacted and has continued, without legislative change. This being true, since present § 3537, when enacted in 1911, as § 1 of an act which dealt only with trustees who had been appointed to fill a vacancy in a *testamentary* trust, had application only to trustees of that type, it would seem that present § 3538, when enacted as § 2 of the act of 1911, dealt only with trustees who were *appointed by a court* to administer trusts created by *will* and has no application whatever to trustees who have been named in a will or deed or who have been appointed by a court either to fill vacancies in trusts which have been created by deed under the terms of § 3527 or to fill vacancies caused by the failure of a prior trustee to give bond, as set forth in § 3532.

If the above conclusion be correct, it would seem that corrective legislation must be passed if trustees other than those appointed by a court to fill vacancies in testamentary trusts are to be required or permitted to file annual or other settlements. Here, too, it may be said that, inasmuch as the legislature passed § 3538 in order to provide for the periodic and other filing of reports only by the trustees mentioned in § 3537, it was the legis-

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65. *Pierce City v. Hentschel*, 210 S.W. 31, at 32 (Mo. 1919); *Timson v. Manufacturers' Coal and Coke Co.*, 220 Mo. 580, at 590-592, 119 S.W. 565 (1909); § 7082, Mo. REV. STAT. (1919) (currently found as § 678, Mo. REV. STAT. (1939)); § 7087, Mo. REV. STAT. (1919) (currently found as § 683, Mo. REV. STAT. (1939)); § 7089, Mo. REV. STAT. (1919) (currently found as § 685, Mo. REV. STAT. (1939)), which, after authorizing the revision commission to change certain words and typographical errors, ends with the following words: "... so that they do not in any case change, modify or alter the law."

66. Section 7089, Mo. REV. STAT. (1919), quoted in part, *supra*, note 65.

67. Section 7082, Mo. REV. STAT. (1919).

lative intention not to permit or require the filing of such periodic and other reports in our courts by any other type of trustee.

Some of the confusion in this field may be due to the fact that executors and administrators must qualify and have letters testamentary issued to them by the probate court before they can act officially, at least with respect to personalty in the decedent's estate. Such personal representatives are also required to file periodic settlements.<sup>68</sup> Extensive direction and supervision by the probate court is necessary. Executors and administrators, like trustees, are regarded as fiduciaries and a failure to comprehend that the powers, functions and duties of the two types of fiduciaries are separate and distinct may cause the unwary to believe that the same considerations as to administration and accounting, should govern the conduct of both types of fiduciaries.<sup>69</sup>

In many counties in the state of Missouri, it is the practice of trustees who have been named as such in wills and deeds and who have not been appointed by a court, to file annual and final settlements of their accounts in the circuit courts of their counties. These matters are carried on the docket under the heading of "Trust Estates." In some of these counties, notice of the filing of such accounts and a copy of the account are given to the beneficiaries, while in other counties no such notice is given. It would seem that the situation of those trustees who give notice of the filing of the account and a copy of the account to the beneficiaries is better than that of the trustees who do not give notice of the filing and a copy of the account to the beneficiaries. If the circuit courts of this state have no power to receive and pass upon settlements of accounts in the absence of adversary proceedings, it would seem that a procedure such as has just been mentioned would be little better than a private settlement of accounts as between the trustee and beneficiary.<sup>70</sup> If, on the other hand a circuit

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68. Sections 212-234, being art. 8, Chap. I, Mo. REV. STAT. (1939).

69. In *In re Parker's Trust Estate*, 228 Mo. App. 400, 67 S.W. 2d 114 (1934), the Kansas City Court of Appeals mentioned that summary accounting procedures were authorized solely by statute to be followed by probate courts in the cases of executors and administrators but then said, at page 409: "Such statutes authorize such proceedings in the *probate court alone* and furnish no authority whatever for their exercise by the circuit court in the matter of trustees or trust estates and their settlements." *Ross v. Pitcairn*, 179 S.W. 2d 35 (Mo. 1944), cited, *supra*, at notes 44 and 48, is another example of this confusion. Where one person is designated as both executor and trustee, there may be nice questions as to when he ceases to be executor and becomes trustee, as in *State ex rel. Bremer v. Schulte*, 90 S.W. 2d 1078 (Mo. App. 1936).

70. See text, *supra*, at notes 60-67.

court in this state has jurisdiction in such matters, or if jurisdiction may be conferred by the parties without there being adversary proceedings, such settlements, when approved by the court, may be held to be binding.<sup>71</sup> There are circuit courts in this state which refuse to permit the filing of settlements as mentioned in this paragraph, on the ground that they have no power to entertain such proceedings. I heartily agree with this last type of court.

If a settlor provides in the instrument which creates the trust that, "My trustee shall file annual reports with the circuit court of X County, Missouri," we have a variation of the problem discussed in connection with a similar provision stating that a circuit court should have power to supervise the administration of a trust and the same considerations would seem to apply to the situation just supposed.<sup>72</sup>

It may be that a settlor will provide in the trust instrument that, "My trustee shall prepare settlements annually and at the termination of his trust, and shall serve copies of such settlement upon each of the beneficiaries of this trust, from time to time, and such settlements so served upon the beneficiaries shall be conclusive if no objections are taken thereto within sixty days from the service thereof upon said beneficiaries." Such a provision as the one just quoted is but another attempt to give finality to private settlements as between the trustee and beneficiary. It would seem that, if the settlements prepared by the trustee are fair and accurate, the failure of the beneficiary to object thereto within the time limited should be binding upon him. If, on the other hand, an unfair or inaccurate settlement is served upon the beneficiary who cannot tell from the face of the settlement that it is incorrect, it would seem that the beneficiary should not be concluded from attacking such a settlement after the expiration of the stipulated time, providing only that he acts within the time named in the appropriate statute of limitation.

It is, indeed, unfortunate that so much uncertainty exists in this state with respect to the rights and duties of the trustee and beneficiary

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71. I suppose that an argument for upholding such a result would be based upon ideas similar to those expressed in *Ross v. Pitcairn*, 179 S.W. 2d 35, at 37 (1944), which were discussed in the text, *supra*, at notes 42-52, in connection with court supervision of trust administration.

72. See text, *supra*, at notes 42-52. 4 BOGERT, TRUSTS, § 972 (1946) discusses the ability of the settlor to control the duty to account and to require the trustee to file an account with a court. As to the last possibility, Bogert says that the court could receive and file the account, if it were willing.

as to the necessity for filing periodic and annual settlements, judicial approval thereof, the type of proceeding and the effect of such approval.

Some states, such as Michigan, require testamentary and other trustees who are appointed by or under the jurisdiction of the probate court to give bond and otherwise qualify before entering upon the execution of the trust.<sup>73</sup> The Michigan Probate Code is specific in its requirement that trustees of the type just mentioned shall file periodic accounts of their treatment of the trust estate<sup>74</sup> and provides for judicial settlement of such accounts.<sup>75</sup>

It would seem that legislation should be enacted in this state for the purpose of making it clear that all trustees should either be required or permitted to file periodic settlements of their accounts in a court which is empowered and directed to examine, approve or disapprove those accounts. It would seem that such legislation should also prescribe the form of such accounts and the details thereof in such a manner that both the trustee and beneficiary may have the protection afforded by judicial settlement of properly prepared accounts. Whether this legislation should take the form of the Uniform Trustees' Accounting Act,<sup>76</sup> or of the Michigan or Kansas Probate Codes,<sup>77</sup> or of some variation between the two, is a matter which should be considered by our General Assembly.

There is no reason why a state with the wealth and population of Missouri should wait any longer to adopt needed legislation which will clarify the problems which are presented in this discussion. Whether or not this effort sheds enough light on the problems mentioned to make their solutions crystal-clear is, to me, relatively unimportant if only it generates enough heat to provide the energy necessary to produce the definitive legislation in this field which is so sorely needed in this state for the guidance of our courts, our trustees and our trust beneficiaries.<sup>78</sup>

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73. Mich. Probate Code, Pub. Acts, 1939, No. 288, Ch. IV, §§ 1-3. Kansas operates in the same fashion. Kansas Probate Code, Art. 17, Kansas Laws (1939), Ch. 180, p. 327. There are other states which have modernized their systems. These are given only as examples.

74. Mich. Probate Code, Pub. Acts, 1939, No. 288, Ch. IV, §§ 38-39.

75. Mich. Probate Code, Pub. Acts, 1939, No. 288, Ch. IV, §§ 44-47.

76. *Supra*, note 58.

77. *Supra*, notes 73-75.

78. It will be noted that in the last sentence, as is sometime the case after the trust has been established, the beneficiaries come last.