

Missouri Law Review

Volume 16
Issue 3 *June 1951*

Article 8

1951

Masthead and Recent Cases

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Masthead and Recent Cases, 16 MO. L. REV. (1951)

Available at: <https://scholarship.law.missouri.edu/mlr/vol16/iss3/8>

This Masthead is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

MISSOURI LAW REVIEW

Published in January, April, June, and November by the
School of Law, University of Missouri, Columbia, Missouri.

Volume XVI

JUNE, 1951

Number 3

If a subscriber wishes his subscription to the Review discontinued at its expiration, notice to that effect should be sent; otherwise it is assumed that a continuation is desired.

Subscription Price \$2.50 per volume

85 cents per current number

EDITORIAL BOARD

HIRAM H. LESAR, *Faculty Chairman*

STUDENTS

WILLIAM B. ANDERSON
JACK L. BRANT
JOHN D. COLLINS
JOHN ROBERT GIBSON
ROBERT P. KELLY
WILLIAM D. LAY
ROY W. MCGHEE
ROYAL M. MILLER

THOMAS B. MOORE
LEONARD O'NEAL
JAMES E. REEVES, *Chairman*
ROBERT L. RILEY
BRUCE A. RING
WILLIAM W. SHINN
ALLAN H. STOCKER
MONTGOMERY WILSON

ESTHER MASON, *Business Manager*

Publication of signed contributions does not signify adoption of the views expressed by the REVIEW or its Editors collectively.

"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Recent Cases

CONSTITUTIONAL LAW—SEARCH AND SEIZURE WITHOUT WARRANT AS AN
INCIDENT TO A LAWFUL ARREST

*United States v. Rabinowitz*¹

On February 1, 1943, federal officers were informed that respondent was in possession of a quantity of stamps bearing forged overprints. On February 6, four such stamps were sold to a government agent. Finally, on February 16, a warrant for respondent's arrest was procured, and officers accompanied by stamp experts

1. 339 U. S. 56 (1950).

went to his small office where he was found and arrested. The office was searched for about an hour, and some 573 stamps were found. Timely motions to suppress the evidence pertaining to the stamps were made, but all were denied. Respondent was convicted of possessing and selling the stamps. The court of appeals reversed the conviction and the supreme court granted certiorari.

Held: that as an incident to a lawful arrest, a search, without warrant, could be made of the whole office, and the legality of the search is in no way affected by the fact that there had been sufficient time in which to procure a search warrant.

This is the fourth amendment:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Though it is only unreasonable searches that are prohibited,² it can be said as a general rule that a warrant is necessary to validate a search. The present case deals with a long recognized exception to this rule; search without warrant incident to lawful arrest.

The court expressly relies on the highly controversial case of *Harris v. United States*³ as providing ample authority for holding valid a search of the extent here made. In that case the petitioner was arrested in his four-room apartment and an intensive five-hour search was made of all four rooms, during which a number of selective service cards were found in a sealed envelope. He was convicted for their unlawful possession even though the arrest and search had been for another suspected crime. The Supreme Court upheld the conviction, reasoning that the search might extend to the whole apartment which was in petitioner's "exclusive possession" and "control." Further, that this was not a general exploratory search since officers were honestly searching for forged checks which they reasonably believed were there, but that since the draft cards were government property, unlawful to possess, they could be seized.

Both in this case and in the principal case the dissenting justices vigorously condemn the judicial sanction of searches of such breadth. Justice Jackson apparently would limit the scope of permissible search to "the person arrested and the objects upon him or in his immediate physical control."⁴ In his dissenting opinion in *United States v. Rabinowitz*, Justice Frankfurter would impose the same limits, and only allow that because of the necessity of protecting the officer, preventing escape, and avoiding the destruction of evidence by the arrested person.⁵

The first clear statement by the Court which would seem to sanction a search beyond these limits is found in *Agnello v. United States*.⁶ There a search, without

2. *Carroll v. United States*, 267 U. S. 132 (1925).

3. 331 U. S. 145 (1946).

4. *Harris v. United States*, *supra* note 3.

5. *United States v. Rabinowitz*, 339 U. S. 56 (1950).

6. 269 U. S. 20 (1925).

warrant, of the home of one of the accused, several blocks from where the arrest was made, was held unreasonable. In the course of the opinion, Mr. Justice Butler makes the statement that "the right without a search warrant contemporaneous to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as the fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody is not to be doubted." As authority for this proposition the cases of *Weeks v. United States*⁷ and *Carroll v. United States*⁸ are cited. The first of these—the famous *Weeks* case—held unreasonable a search without warrant of the home of the defendant arrested elsewhere, much as in the *Agnello* case. During the course of the opinion recognition is made of the right to search the person of the accused and to seize the fruits or evidence of crime, but nothing is found to support the broad contention of Justice Butler. The same can be said of *Carroll v. United States* where a search of an automobile used to transport illegal liquor was upheld, partly because of the easily movable nature of an automobile which would make the procurement of a warrant difficult. Though the Court alludes to the long recognized right to search the person, it in no way supports the contention that the place of arrest may be searched as well.⁹

It should be noted that though the statement in the *Agnello* case was not controlling in the result, it was often quoted and heavily relied upon as authority in a great number of the state and lower federal decisions growing out of prohibition.¹⁰ These cases almost uniformly supported the validity of searches which extended beyond the person of the accused or the surroundings under his immediate physical control. Prior to this time, however, the most one authority can say in regard to the scope of permissible search is "the cases do not so clearly define how far an officer may go, in searching the room, premises or effects of the person arrested."¹¹

The next case of interest is *Marron v. United States*¹² where prohibition agents raided a speakeasy with a valid search warrant entitling them to search for "intoxicating liquor and articles for their manufacture." They arrested a bartender in the process of selling drinks, and proceeded to search the place. In a closet in which they found a quantity of liquor they also found a ledger showing entries of an incriminating nature. The trial court refused to suppress the evidence pertaining to the ledger, which action was affirmed by the Supreme Court. It was held that

7. 232 U. S. 383 (1913).

8. *Supra*, note 2.

9. In his dissent in the principle case, Justice Frankfurter points out that "These decisions do not justify today's decision. They merely prove how a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision."

10. See cases collected in notes, 32 A.L.R. 680 (1924), 51 A.L.R. 424 (1927), 74 A.L.R. 1337 (1931), 84 A.L.R. 782 (1933).

11. CORNELIUS, SEARCHES AND SEIZURES § 38 (1926).

12. 275 U. S. 192 (1927).

though the ledger could not be taken under the warrant in which it was not specified, it could be taken as an incident to the lawful arrest of the bartender, who was at the time committing a crime in the presence of the arresting officers. The Court relied upon *Agnello v. United States* and stated the rule to be this: "The authority of the officers to search and seize the things by which the nuisance was being maintained extended to all parts of the premises used for the unlawful purpose."

The broad holding of this decision was explained, if not limited, a few years later in *Go-Bart Importing Co. v. United States*¹³ and *United States v. Lefkowitz*.¹⁴ Both cases condemned general exploratory searches which were attempted to be justified by lawful arrest. Justice Butler distinguished his former opinion in that there a crime was openly being committed in the presence of the officers, while this was not so in either the *Go-Bart* or *Lefkowitz* cases. Furthermore "the ledger and bills being in plain view were picked up by the officers as an incident of the arrest."¹⁵ No search for them was made." Thus explained *Marron v. United States* means no more than that arresting officers may seize fruits and instruments of crime visible to them when making the arrest. This is a right long recognized and is something entirely different from search.¹⁶ *Harris v. United States* therefore stands as the first case to sanction in its result a search of greater breadth than that held allowable by Mr. Justice Jackson.¹⁷

The case of *Trupiano v. United States*¹⁸ followed by *McDonald v. United States*¹⁹ introduces a novel proposition which raised a major obstacle in the path of the majority in the principal case. Federal officers had kept under careful surveillance for some time the operation of an illegal distillery. When a raid was made it was done without the procurement of a warrant of any kind. The distillery was operated in a barn on premises owned by a farmer who was acting in conjunction with the officers, and who admitted them to the premises. Peering into the barn they discovered one of the defendants operating the apparatus. They entered, arrested him, and seized the equipment, apparently all of which was in plain sight.

13. 282 U. S. 344 (1931).

14. 285 U. S. 452 (1931).

15. This statement seems hard to justify in view of the language employed to state the facts in the previous case. "They searched for and found large quantities of liquor, some of which were in a closet. While in the closet, they noticed a ledger showing inventories . . . and other things related to the business." Justice Butler appears to have been careless either in his description, or in his interpretation of the facts. A ledger found while in a closet hardly would be in plain view at the time of arrest, considering the rest of the facts stated.

16. CORNELIUS, SEARCHES AND SEIZURES § 38 (1926).

17. The case of *Davis v. United States*, 328 U. S. 582, decided in 1946, held valid a search, without warrant, of a filling station office. Defendant had been arrested, in front of the station, for selling gasoline without ration stamps, and the search was made in order to discover illegally possessed extra stamps. However, the determination was made on the grounds of the district court's findings as to consent by the accused. The court refused to otherwise consider the question as to the reasonableness of the search.

18. 334 U. S. 699 (1948).

19. 335 U. S. 451 (1948).

The Supreme Court held that the seizure was bad because of the failure of the officers to procure a search warrant when it was reasonably practicable to do so. Hence, even though a lawful arrest was made, a search or seizure made incident thereto would be unconstitutional if there had been time prior to the arrest to procure a search warrant. A similar result is reached in *McDonald v. United States* where police officers, having gained access to the common hallway in a tenement house, observed a lottery in operation through a transom. They entered, made an arrest, and seized the machines, slips and money being used. As the principal case points out, this is a rule of easy application. However, they refuse to apply it and expressly overrule *Trupiano v. United States* in so far as it would make the practicability of procuring a search warrant the only test.

It is certainly desirable to have magistrates or judges rather than police officers determining when searches and seizures are permissible and what limitations should be placed upon such activities.²⁰ Undoubtedly an unauthorized search or seizure without contemporaneous arrest is bad whether or not the officers had time to procure a warrant.²¹ In *Johnson v. United States*, Justice Jackson dwells long and earnestly on the desirability of requiring the procurement of a warrant when at all practicable, but the case is decided on other grounds. Similar statements can be found in other cases,²² but in no case prior to *Trupiano v. United States* has a search incident to an arrest been held bad solely because the arresting officer had time to procure a search warrant.

As is said in the principal case, it is unreasonable searches that are prohibited by the fourth amendment, and "that criterion in turn depends upon the facts and circumstances—the total atmosphere of the case."²³ Is it correct to say that every search and seizure without warrant made at the time of arrest would be unreasonable when it was practicable for the arresting officers to also procure a search warrant? It wasn't required in *Harris v. United States* where the arrest was made under warrant. If there was time to procure an arrest warrant, there was also time to procure a search warrant. That case therefore has been considered as having been overruled by the *Trupiano* decision. Perhaps the *Trupiano* ruling had a salutary effect, in that officers would almost always find it necessary to procure a search warrant. Even when an unexpected arrest was made at the scene of a crime it could be contended that a search should be postponed until a warrant was obtained except where absolutely necessary according to the guides set forth by Justice Frankfurter.²⁴ But what of the long recognized right to seize fruits and instrumentalities of crime when found at the scene of arrest? Such right would be seriously limited by the rule as applied in the *Trupiano* and *McDonald* cases.

20. *Trupiano v. United States*, *supra*, note 18; *United States v. Lefkowitz*, *supra* note 14; *Johnson v. United States*, 333 U. S. 10 (1948).

21. *Taylor v. United States*, 286 U. S. 1 (1932).

22. *Go-Bart v. United States*, *supra* note 13, *Carroll v. United States*, *supra*, note 2.

23. *United States v. Rabinowitz*, 339 U. S. 56, 66 (1950).

24. *Supra* note 5.

Certainly the practicability of procuring a search warrant is one thing to be considered in determining the reasonableness of a search or seizure. *United States v. Rabinowitz* does not preclude the consideration of this factor. It only denies that it is the sole and controlling test.

How then do matters stand? Apparently *Harris v. United States* has been shorn of any cloud which may have been cast upon it by later decisions. It would seem therefore that a search incident to a lawful arrest may extend beyond the person or his immediate surroundings and include those premises in his actual possession and control. Of this Justice Frankfurter says "If upon arrest you may search beyond the immediate person and the very restricted area that may fairly be deemed part of the person, what national line can be drawn short of searchnig as many rooms as arresting officers may deem appropriate for finding the fruits of the crime?"²⁵ If a small office or a four room apartment may be searched, why not a whole house? Under the flexible test of reasonableness as promulgated by the Court, that of course might not be so. Several of the reasons for holding the search in the instant case reasonable were that the office was small and devoted to a business use for which the public was invited, and the whole room was "under the immediate and complete control" of the respondent.²⁶ This is a strong indication that the Court will carefully scrutinize the scope of the search made, and perhaps draw a line far short of a whole residence. But since the reasonableness test provides no concrete guide, the determination of this question must depend upon future cases for an answer.

As yet however, there are no cases pending in the lower federal courts which would give much aid. There have been three cases holding valid seizures of evidence made in the immediate presence of the arrested person,²⁷ and one upholding the search of a car.²⁸ *Best v. United States*²⁹ upholds the search without warrant of an apartment in Vienna, Austria, made by military authorities some two weeks after the accused had been arrested. Applying the reasonableness test and citing *United States v. Rabinowitz* the court reasons that the chaotic conditions existing in that city at the beginning of the occupation excused the authorities from the necessity of procuring a search warrant.

The case of *McKnight v. United States*³⁰ presents an interesting question quite like that in the *Trupiano* case. Police officers allowed a suspect, for whom they had an arrest warrant, to get by them and into a house where a lottery was being carried on. They then broke in, arrested the suspect and seized all the evidence in sight. The court decided that their apparent intention was the seizure and not the

25. *United States v. Rabinowitz*, 339 U. S. 56, 79, (1950).

26. *Id.* at 64.

27. *United States v. Spadafora*, 181 F. 2d 957 (7th Cir. 1950) *cert. denied* 71 Sup. Ct. 234 (1950); *Martin v. United States*, 183 F. 2d 436 (4th Cir. 1950) *cert. denied* 71 Sup. Ct. 280 (1950); *United States v. Baxter*, 89 Fed. Supp. 732 (E. D. Tenn. 1950).

28. *United States v. Roberts*, 90 Fed. Supp. 718 (E. D. Tenn. 1950).

29. 184 F. 2d 131 (1st Cir. 1950).

30. 183 F. 2d 977 (D. D. C. 1950).

1951]

arrest; that such "police stratagem" was unreasonable and therefore unconstitutional. The opinion shows some reluctance to break away from the spirit of the *Trupiano* decision; a reluctance shared by many, and set forth at length by the dissenting justices in the principal case.

Justice Frankfurter finds little value in a test which requires a search without warrant to be reasonable and provides no further criterion as a guide. "It is no guide at all either for a jury or for district judges or the police to say that an 'unreasonable search' is forbidden—that a search must be reasonable."³¹ He would interpret the amendment in the light of the history that gave rise to its enactment, and the dangers to free society from unrestrained police action untempered with prior judicial scrutiny. He would bar every search without warrant except where there is a good excuse for not getting one, that is to say searches that are based on absolute necessity.

"The test by which searches and seizures must be judged is whether conduct is consonant with the main aim of the Fourth Amendment. The main aim of the Fourth Amendment is against the invasion of the right of privacy as to one's effects and papers without regard to the result of such invasion. The purpose of the Fourth Amendment was to assure that the existence of probable cause as the legal basis for making a search was to be determined by a judicial officer before arrest and not after, subject only to what is necessarily to be excepted from such requirement."³²

The questions presented in this case do not appear to be foreclosed from further consideration. Let us hope that such questions are resolved on a sounder basis than that feared by Justice Frankfurter, *i.e.* "unexpected changes in the courts composition and the contingencies in the choice of successions."

WILLIAM B. ANDERSON

INCOME TAX—PARTNERSHIPS WITH PROVISION FOR CONTINUATION OF PARTNERSHIP
UPON DEATH OF PARTNER—ALLOCATION OF INCOME AT DEATH

*Commissioner of Internal Revenue v. Mnookin's Estate*¹

Samuel Mnookin and his son were partners in the retail clothing and jewelry business. The partnership was created and engaged in business in Missouri. The partnership agreement provided that upon the death of a partner neither the partnership nor the interest of the deceased partner should terminate, but that the surviving partner should carry on the business of the partnership until the interest of the deceased partner was distributed to his heirs, legatees or trusts beneficiaries.

Samuel Mnookin kept his own books and filed his own income tax returns on the basis of the calendar year. The partnership kept its books and filed its income tax returns on the basis of a fiscal year ending on May 31.

31. *United States v. Rabinowitz*, 339 U. S. 56, 83 (1950).

32. *Id.* at 80.

1. 184 F. 2d 89 (8th Cir. 1950).

On December 1, 1943 Samuel Mnookin died. The surviving partner continued the business without interruption and without change of the manner of keeping the books or the time or basis for filing partnership returns. There was no distribution of Mnookin's estate until March 15, 1945.

The Commissioner of Internal Revenue claimed that death terminated the partnership, hence ended its taxable year, and that the deceased's share of the income of the business from May 31, 1943 until December 1, 1943 became income to deceased upon his death and should be included in his individual income for the period January 1, 1943 to December 1, 1943.

The executrix of the estate contended that death did not terminate the partnership, did not end its taxable year and that the deceased's share of the partnership income was not taxable as his individual income until the end of the current fiscal year of the partnership, May 31, 1944, and therefore this income was not properly includible in decedent's income tax return for the period January 1 to December 1, 1943.

The Tax Court of the United States sustained the contention of the executrix,² and that decision was affirmed by the United States Court of Appeals, Eighth Circuit.

Section 188 of the Internal Revenue Code provides:

"If the taxable year of a partner is different from that of the partnership, the inclusions with respect to the net income of the partnership, in computing the net income of the partner for his taxable year, shall be based upon the net income of the partnership *for any taxable year of the partnership* (whether beginning on, before, or after January 1, 1939) *ending within or with the taxable year of the partner.*" (Italics added)

The italicized portion of the section quoted above gave rise to the major issue of the case—when did the taxable year of the partnership end? To answer this question it was necessary to first decide if effect can be given to a provision in the partnership agreement that death will not terminate the partnership until distribution of the deceased's estate.

The court held that under the Missouri law such a provision was effective where the "agreement clearly manifests the intention that the partnership continue and not terminate upon the death of a partner." Only two cases were cited³ to support this proposition and neither of them was discussed. A careful reading of these two and other Missouri cases discloses that perhaps the court was not as thorough as it could have been in its analysis of the Missouri law as to the effectiveness of such a provision.⁴ It seems clear, however, that at least

2. 12 T. C. 744 (1949).

3. *Edwards v. Thomas*, 66 Mo. 468, 481 (1877); *Hidden v. Edwards*, 313 Mo. 642, 285 S.W. 462 (1926).

4. No attempt is made to analyze or reconcile the following cases; they are merely called to the reader's attention as *some* of the cases that have *purported* to decide the question of whether or not such a provision in a partnership agreement will be given effect.

In *Edwards v. Thomas*, *supra* note 3, the partnership agreement provided:

"that in the event of the death of either party to the agreement, the co-part-

as far as the application of the Internal Revenue Code is concerned an agreement that the partnership will not terminate upon the death of a partner is valid and will be given effect.

With this as their premise the court simply applied the express language of Section 188 of the Internal Revenue Code and held that the deceased's share of the income earned by the partnership between the date of the partnership's last accounting period, May 31, and the death of the partner, December 1, was not taxable as deceased's individual income for the period from January 1 to December 1, 1943.

The facts in *Girard Trust Co. v. United States*,⁵ were not significantly different from the facts in the *Mnookin* case. In the *Girard* case the court held that

nership should not, on that account, be dissolved, but the interest of such deceased party should be continued and represented by the legal representative of such deceased party."

Upon the death of one of the partners his widow was appointed to administer his estate. At the foot of the partnership agreement she made and signed the following memorandum: "I approve and accept the above." *It is said* the court held that the partnership was not dissolved by the death of a partner.

This proposition was reiterated, though it was dictum, in the case of *Hidden v. Edwards*, *supra*, note 3.

In *Hax v. Barnes*, 98 Mo. App. 707, 73 S.W. 928 (K. C. Ct. of App. 1903) the provision was:

"In case of the death of any one of the partners during the continuance of this contract, the business shall not on account thereof be discontinued, but the interest of said partner shall be kept in the business and the same shall be continued by the surviving partners, and the administrator or executor of such deceased until the expiration of the time agreed upon."

One of the partners died and his legal representatives were sued for contribution for a contract liability which arose after his death. The court held that the representatives had to contribute. They said:

"Ordinarily, the death of a partner puts an end to the partnership, except for certain necessary purposes in winding up its affairs. . . . But a partner may by contract provide for a continuation of the partnership business after his death, and that the interest of his estate therein shall not cease."

"The fact remains that the partnership survived the death of Barnes."

To the same effect was the case of *E. R. Hawkins & Co. v. Quinette*, 156 Mo. App. 153, 136 S.W. 246 (1911). *But see Exchange Bank v. Tracy*, 77 Mo. 594, 599 (1883).

If the partnership agreement containing such a provision was made prior to the passage of the Uniform Partnership Act in 1949 and the death occurred after its passage will the provision be given effect? Section 358.040-5, Mo. REV. STAT. (1949), provides that the act shall not be construed to impair the obligations of any contract. See *Gerding v. Baier*, 143 Md. 520, 122 Atl. 675 (1923).

With regard to agreements containing such a provision it will be observed that Section 358.310-4, Mo. REV. STAT. (1949), says that dissolution is caused by the death of any partner. Apparently there are no Missouri cases at this date construing this statute. However this same section of the Uniform Partnership Act has been construed by other courts as not applying if the partnership agreement provides that there will be no dissolution upon the death of a partner.

Pailthorpe v. Tailman, 87 N.Y.S. 2d 822 (Sup. Ct. 1949), *affirmed* 93 N.Y.S. 2d 712, 276 App. Div. 823 (4th Dept., 1949), said that dissolution by death of a member is controlled by partnership law only in absence of a particular agreement on the subject made by the partners themselves. Also see *Gerding v. Baier*, *supra*. The writer was unable to find any cases to the contrary.

"a taxable year of the partnership did not end with the death of partner Samuel Kentworthy." Continuing, Judge Hastie pointed out that for purposes of administering the Internal Revenue Code a partner is treated as earning partnership income not as it comes into the partnership from day to day, but rather as a periodic partnership accounting may reveal partnership profit or loss and individual shares thereof. The fact that a partner dies does not alter the statutory plan which set up such a procedure.

The wisdom of the decisions in the *Girard* and *Mnookin* cases is manifest. Prior to the partner's death his individual income tax return for a given year, for example, 1942, would, under Section 188, Internal Revenue Code, include income received by the partnership from the end of its fiscal year in 1941, for example, May 31, 1941, until the end of its fiscal year in 1942. Thus his individual taxable income for 1942 would include the partnership's income for the last seven months of 1941, and the first five months of 1942, but it would not include the partnership's income for the last seven months of 1942.

If, as the Commissioner of Internal Revenue has contended, because of the partner's death on December 1 1943, the partnership's income from the date of its last accounting period, May 31, 1943, until the date of the partner's death were includible as the partner's individual income for the first eleven months of 1943, the effect would be to pyramid into the partner's individual taxable income for these first eleven months of 1943 his share of the income earned by the partnership from May 31, 1942, until December 1, 1943, a total of eighteen months. This, of course, would push his income into a higher tax bracket and subject him to tax rates which were intended to apply only to those whose incomes were as great in twelve months as his was in eighteen months.

Decisions contrary to those of the *Girard* and *Mnookin* cases may be found⁵ but it is extremely significant that in none of those cases did the court's decision result in pyramiding income for more than a twelve-month period.

JOHN DAVID COLLINS

PROPERTY—REMAINDERS—CLASS GIFTS—IMPLICATION OF REMAINDERS

*St. Louis Union Trust Co. v. Hamilton*¹

The St. Louis Union Trust Co. brought an action for the construction of a trust indenture in which it was trustee. The indenture provided that the income should be accumulated until the settlor's death, at which time one-fourth was to be further accumulated, and three-fourths was to be divided among his nieces, A. B. and C. D., his nephew, E. F., and Bertha, the widow of a deceased nephew.

5. 182 F. 2d 921 (3rd Cir. 1950).

6. *Darcy v. Commissioner of Internal Revenue*, 26 B.T.A. 841 (1932) affirmed 290 U. S. 705 (1934); *Beverly W. Smith*, 26 B.T.A. 778 (1932), appeal dismissed, 67 F. 2d 167 (4th Cir. 1933); *Clarence B. Davison*, 20 B.T.A. 856 (1930), affirmed per curiam, 54 F. 2d 1077 (2d Cir. 1931).

1. 235 S.W. 2d 241 (Mo. 1951).

It was expressly provided that should any of his beneficiaries die before the termination of the trust his or her share of income was to go to his or her descendants (in case of Bertha dying or remarrying, to the descendants of the deceased nephew). It was also expressly provided that the share of income of any beneficiary dying without descendants was to go over to the surviving beneficiaries.

The indenture further provided that upon the termination of the trust "... the entire corpus of the trust estate and undistributed income shall be paid over and distributed unto [A. B., C. D., E. F., Bertha, etc., twelve named individuals] and unto the descendants of such of them as may have died prior to such time." There was a provision for a gift over to the surviving beneficiaries should Bertha die or remarry before the termination of the trust not survived by descendants of the deceased nephew. In the event of a complete failure of beneficiaries to survive to the termination of the trust there was a gift over the whole corpus and undistributed income to two named hospitals.

Four corpus beneficiaries died before the termination of the trust. Two of them were not survived by descendants. The major issue in this case involved the right to succeed to the share, if any, of these two corpus beneficiaries who died without descendants. There was also a question presented as to the distribution of the share of income of one of the income beneficiaries but the court had little difficulty in interpreting² the trust indenture which was very clear as to the disposition of income in all situations.

The Attorney-General was made a defendant because under the Trading with the Enemy Act he succeeded to the interest, if any, of the two corpus beneficiaries (German Nationals) who died without descendants. He contended that each deceased beneficiary had a vested remainder and that it was not divested by the death of the beneficiary without descendants since there was no provision for succession to the share of any beneficiary who died without descendants.³ The surviving named beneficiaries contended that all were contingent remaindermen and those who survived the termination of the trust should take the whole corpus and undistributed income as this was a class gift and they were the surviving members of the class.⁴

The Missouri Supreme Court held that there was a class gift saying, "... it is our conclusion settlor intended a gift to his 'relatives therein named' (and Bertha)

2. In *ATKINSON, WILLS* § 265 (1937), there is a clear explanation of the difference between interpretation and construction.

3. 2 *FEARNE, REMAINDERS*, § 380 (1844). "Where a conditional limitation is limited in favor of unborn persons, or persons who shall answer a given description, and no such persons come in esse or answer such description, the preceding estate becomes absolute: because, although the express condition may have been fulfilled, on which such estate is to go over, yet, as there is no one to whom it can go over, according to the terms of the conditional limitation, it must of necessity remain undivested by the fulfillment of the express condition." *Gardner v. Vanlandingham*, 334 Mo. 1054, 1066, 69 S.W. 2d 947, 953 (1934).

4. *Scott v. Bargeman*, 2 P. Wms. 69, 24 Eng. Rep. 643 (1722); *Kingston v. St. Louis Union Trust Co.*, 348 Mo. 448, 154 S.W. 2d 37 (1941).

as a class, with a proviso that if there were a complete failure of the class, then the hospitals were to take."

The gift of the corpus and undistributed income was to twelve named individuals. Prima facie, this creates a vested remainder of equal one-twelfth's. To overcome this presumption there must be a clear indication of a contrary intent. This was not a gift simply to "nieces and nephews."⁵ Neither was it a gift to "A, and B, nieces and nephews," or to, "nieces and nephews, A and B."⁶ Furthermore, these twelve named beneficiaries did not bear the same relationship to the settlor: three were nieces and nephews; one was the widow of a deceased nephew; and the remaining eight were grandnieces and grandnephews. In holding that the settlor intended these twelve named beneficiaries to take as a class the court has gone further than any previous Missouri case in determining that a gift to named persons is a class gift and not a gift to individuals.⁷

As a theory alternative to a class gift theory, the court uses language to indicate that each of the twelve named beneficiaries and their descendants had a contingent remainder with a gift over to the surviving beneficiaries of any beneficiary who died without descendants before the termination of the trust. By assuming that there were contingent remainders, the court was still faced with the problem of finding a gift over to the surviving beneficiaries. The court states that the gift over to the hospitals on complete failure of beneficiaries "is a clear manifestation of settlor's intention that undistributed income and corpus" is to be paid to the named beneficiaries and their descendants "as long as one remains." But there are other indications in the indenture, not mentioned by the court, which would indicate that the settlor had no such intention to create a gift over to the surviving beneficiaries. In providing for the distribution of income the trust indenture has an express provision for a gift over to the surviving beneficiaries of the share of any beneficiary who dies without descendants before the termination of the trust. Further, in providing for the share of corpus that the widow, Bertha, is to take there is an express gift over to the surviving beneficiaries should she die or remarry before the termination of the trust not survived by descendants of the deceased nephew. As to income there is complete express provision for a gift over. As to corpus the provision for a gift over is partial only. By providing expressly for a gift over in the part of the indenture dealing with income, and omitting such a provision from the part dealing with the distribution of corpus, has not the settlor indicated that he did not intend that there be a gift over to the surviving beneficiaries of the share of a beneficiary who died without descendants before the termination of the trust?

5. *Snow v. Ferril*, 320 Mo. 543, 8 S.W. 2d 1008 (1934) ["my nieces and nephews of the first degree," held a class gift].

6. *Holloway v. Burke*, 336 Mo. 380, 79 S.W. 2d 104 (1935) ["my full brothers and sisters, A.B. and C.D. etc.," held a class gift].

7. 2 GILL, *REAL PROPERTY LAW IN MISSOURI* 614 (1949). But see *Walker v. First Trust and Savings Bank*, 12 F. 2d 896 (8th Cir. 1926). 75 A.L.R. 757, 105 A.L.R. 1394 have annotations on the problem of distinguishing class gifts and gifts to individuals.

Has not the settlor shown that he knows how to provide for a gift over if he intends that there be one?

It would seem that the court might have reached the same result by applying the "divide and pay over" rule, thereby avoiding the necessity of calling this gift to named persons a class gift. Simes in his work on future interests states that the "divide and pay over" rule may be applied when the gift is to individuals.⁸

Had there been an express provision for the distribution of the share of corpus of a beneficiary who died without descendants before the termination of the trust, this law suit would never have come up. This situation was expressly provided for as to income. It was omitted as to corpus. By not providing for a situation which later arose it was necessary to supply an intention which might never have been present.⁹ The court was forced to strain to reach a desirable result. Although the decision is not unsound it might be observed that had the opposite result been reached there would be good authority to support it.

ALLAN H. STOCKER

PROPERTY—CONTINGENT REMAINDERS—ALIENABILITY

*Ott v. Pickard*¹

In the 1946 case of *Grimes v. Rush*,² noted previously in the *Missouri Law Review*,³ the basic limitation was "to A for life and then to the heirs of her body." A had three children. She and her three children quitclaimed by ordinary quitclaim deeds to the defendant's predecessor in title. A died and the same three children who had quitclaimed brought an action in ejectment on the theory that they had a fee simple as heirs of the body of A. The Missouri Supreme Court held that the children's contingent remainders had been effectively conveyed by the ordinary quitclaim deeds, under Section 442.020, *Missouri Revised Statutes* (1949), which provides that conveyances of lands, or of any estate or interest therein, may

8. 2 SIMES, FUTURE INTERESTS, §§ 361 and 393 (1936); *Shufeldt v. Shufeldt*, 130 Wash. 253, 227 Pac. 6 (1924); 3 RESTATEMENT, PROPERTY § 260 says the "divide and pay over" rule is in effect nullified by the exceptions thereto, and neither the rule nor the exceptions are helpful in construing a limitation. For an annotation on the "divide and pay over" rule as applied to individuals see 144 A.L.R. 1155, 1166.

Applying the "divide and pay over" rule would result in a contingency of survivorship; whether the surviving individuals would take the whole gift presents a much more difficult problem than it does in a class gift.

9. In *Boal v. Metropolitan Museum of Art of City of New York*, 292 Fed. 303, 304 (S. D. N. Y. 1923) Learned Hand says, "I have to do with a situation quite outside of anything which the testator had in contemplation, and it is therefore obvious that any solution is bound to be verbal and indeed formal. Yet while it is idle to speculate upon what he personally would have done had he been able to look ahead, courts have always permitted themselves, within limits, to impute to testators an intent which they could not foresee."

1. 237 S.W. 2d 109 (Mo. 1951).

2. 355 Mo. 573, 197 S.W. 2d 310 (1946).

3. 12 Mo. L. Rev. 218, 415 (1947).

be made by deed. The court expressly rejected the argument that the deed must be one capable of conveying an after-acquired title; the court pointed out that the contingent remainders were present interests, not after-acquired interests. The court distinguished the line of cases represented by *Williams v. Reid*⁴ where the interest was not a contingent remainder, but merely the possibility that an heir apparent might inherit from a living person (or the possibility that a person might take under the will of a living person).

Ott v. Pickard, a recent case involving basically the same problem, was decided without reference to *Grimes v. Rush*. *Grimes v. Rush* was not cited in either brief, and the court does not cite the case. The limitation in question was to *B* "to have and to hold during her life time only, and at her death to descend to and become the property of her heirs in fee-simple." *B* had four brothers and sisters and they quitclaimed to *B* by an ordinary quitclaim deed, except that following the description there was a recital:

"This deed is made to clear title to the above described lands owned jointly by the grantors and grantee."

B married the plaintiff and died without ever having had issue, leaving as her only heirs her four brothers and sisters. Plaintiff elected to take a fee in one-half as statutory dower; he brought this action to try and determine title and for partition. The four brothers and sisters defended on the theory that the quitclaim deed was ineffective to convey their contingent remainders and therefore *B* had a life estate only. This is the theory upon which the trial court reached its judgment in favor of the brothers and sisters.⁵ Appellant contended that the quitclaim deed was effective to convey the contingent remainders⁶ as after-acquired interests because of the "clear title" recital.

The Missouri Supreme Court followed the appellant's theory and held that this particular quitclaim deed with the special "clear title" recital was effective to convey to *B* contingent remainders as after-acquired interests. The court stated: "... we think the language of this deed shows that the grantors tried to convey not only the title they had at the time of execution but any title they might have in the future. . . . An ordinary quitclaim would⁷ have conveyed the contingent remainder interest these grantors had when the deed was executed. . . . this deed was more than an ordinary deed and we hold that this deed also conveyed their after-acquired title. . . ."

Because *Grimes v. Rush* was not cited in the principal case it is submitted that the principal case should not be considered as weakening the doctrine that a contingent remainder of the fourth class may be conveyed by ordinary quitclaim deed in Missouri. *Grimes v. Rush* was decided after both theories had been fully pre-

4. 37 S.W. 2d 537 (Mo. 1931).

5. Appellant's brief, p. 9.

6. Appellant also argued that the remainders were vested. The court properly rejected this construction.

7. The word "not" may have been omitted at this point in printing the opinion.

sented to the court. *Grimes v. Rush* has been cited with approval in three subsequent Missouri cases.⁸ Its authority has not been questioned. There is no reason to think that the court would have departed from *Grimes v. Rush* had counsel cited that case to the court.⁹

ALLAN H. STOCKER

TRUSTS—DEVIATION BY COURT PERMISSION—LEGAL TRUST
INVESTMENTS IN MISSOURI

*St. Louis Union Trust Co. v. Ghio*¹

Appolonio P. Ghio, who died in 1920, provided for an express private trust in his will in which he directed the testamentary trustee, St. Louis Union Trust Co., to invest the proceeds received from the sale of specified real estate "in real estate, first mortgage notes or good bonds bearing interest at not less than four per cent per annum." In 1949 an inflated market existed making substantially impracticable the above specified types of investments at 4% interest per annum without exposing the corpus of the trust to undue risks. The trustee brought this suit in equity praying that the court instruct it as whether to deviate from the terms of the trust by investing only in the specified types of securities at 2.6% to 3.5% interest, or by investing in "other good and legal property and securities, including debentures and sound preferred and common stocks" which will reasonably bring a return of 4%. The contingent remaindermen² contended that deviating from the specific types of investments named in the instrument creating the trust might tend to jeopardize the safety of the corpus. The St. Louis Court of Appeals, affirming the judgment of the circuit court, held that the trustee may deviate from the terms of the trust by court permission where unforeseen conditions which may defeat the trustor's purpose arise after execution of the instrument creating the trust, and in such cases the court will authorize the trustee to act in such a manner as the court believes the trustor would have authorized had he foreseen such a change in conditions. According to the court's construction of the will the trustor was primarily concerned with obtaining a 4% return for the income beneficiaries and only secondarily concerned with the specified types of securities to be purchased, and the court therefore authorized the trustee to procure such investments bearing 4% interest as are proper under the laws of Missouri.

8. *Brown v. Bibb*, 356 Mo. 148, 201 S.W. 2d 370 (1947); *Tapley v. Dill*, 358 Mo. 824, 217 S.W. 2d 369 (1949); *Munday v. Austin*, 358 Mo. 959, 218 S.W. 2d 624 (1949).

9. It should be noted that in *Grimes v. Rush* and similar cases the contingent remainderman is conveying to a person who has a vested interest in the land, namely as a life tenant. Query, as a matter of public policy, whether such a contingent remainder should be alienable to a stranger who had no other interest in the property. Such a conveyance, as a practical matter, would not further the free alienability of the land.

1. 222 S.W. 2d 556 (Mo. App. 1949).

2. See *Lang v. Mississippi Valley Trust Co.*, 359 Mo. 688, 223 S.W. 2d 404 (1949), as to relative rights of life beneficiaries and contingent remaindermen.

Generally it is the trustee's duty to comply implicitly with the trustor's manifested intentions where they are clear and capable of being carried out.³ But it is well established in Missouri,⁴ and generally recognized elsewhere,⁵ that a court of equity may authorize a trustee to deviate from the terms of the trust where there arises a change of circumstances not anticipated by the trustor and compliance with the specific terms of the trust under the changed circumstances would tend to defeat or substantially impair the purpose of the trust.⁶ The deviation must be by court permission;⁷ otherwise the deviation will constitute a breach of trust as unauthorized conduct and the trustee will be liable for losses occurring as a result of such deviation.⁸

Where the instrument creating the trust, as in the principal case, requires two standards to be satisfied, and unforeseen conditions arise making it impossible to satisfy both standards without defeating the purpose of the trust, the question as to which standard the court will authorize the trustee to follow depends upon a construction of the instrument creating the trust as to which standard was of primary concern to the settlor.⁹ In the New York case of *In Re Cohn's Estate*¹⁰ the trust

3. *Coleman v. Lill*, 191 S.W. 2d 1018 (Mo. App. 1945); *In Re Stack's Will*, 217 Wis. 94, 258 N.W. 324, 97 A.L.R. 316 (1935).

4. *Seigle v. First National Co.*, 338 Mo. 417, 431, 90 S.W. 2d 776, 781, 105 A.L.R. 181 (1936) (approved by the principal case).

5. *Hoffman v. First Bond & Mortgage Co. of Hartford*, 116 Conn. 320, 164 Atl. 656 (1933); *Porter v. Porter*, 138 Me. 1, 20 A. 2d 465 (1941); *New Jersey National Bank & Trust Co. v. Lincoln Mortgage & Title Guaranty Co.*, 105 N. J. Eq. 557, 148 Atl. 713 (1930); *In Re Cohn's Estate*, 158 Misc. 96, 285 N. Y. Supp. 279 (Surr. Ct. 1936); 3 BOGERT, TRUSTS AND TRUSTEES, Part 1, Secs. 561, 562 (2d ed. 1946); 2 SCOTT, TRUSTS, Sec. 167 (1939).

6. As to the power of a court of equity to authorize a deviation from the specific terms of the trust, see Brunswick, *The Court Moves The Dead Hand*, 15 CHI-KENT L. REV. 24 (1936); note, 20 MINN. L. REV. 447 (1936); note, 22 VA. L. REV. 596 (1936); note, 77 A.L.R. 971 (1932); note, 80 A.L.R. 117 (1932).

7. *T. J. Moss Tie Co. v. Wabash Railway Co.*, 11 F. Supp. 277, 285 (S.D. N. Y. 1935); *Porter v. Porter*, 138 Me. 1, 20 A. 2d 465 (1941); *Seigle v. First National Co.*, 338 Mo. 417, 431, 90 S.W. 2d 776, 781 (1936); RESTATEMENT, TRUSTS, Sec. 167 (1935). But the principal case and the *Seigle* case, *supra*, must be distinguished from cases in which a construction of the instrument creating the trust indicates that the settlor intended that the trustee should have the right to vary from the specific directions in the trust instrument. In the later type of case the trustee is authorized by the instrument creating the trust, and hence court permission is unnecessary, though advisable. *Loud v. Union Trust Co.*, 313 Mo. 552, 281 S.W. 744 (1926); *Seigle v. First National Co.*, *supra*, dictum; *Toronto General Trusts Co. v. Chicago, B. & Q. R.R.*, 64 Hun 1, 18 N. Y. Supp. 593 (Sup. Ct. 1892), *affirmed without opinion*, 138 N. Y. 657, 34 N.E. 514 (1893); 2 SCOTT, TRUSTS, § 167 (1939). Deviation is also allowed without permission of court where there is impossibility of compliance with the terms of the trusts, or where the specific terms of the trust are contrary to public policy or are illegal, or where there is a change in circumstances whereby a compliance with the specific terms of the trust would tend to defeat or substantially impair the purpose of the trust and there exists a necessity for immediate action on the part of the trustee. But even here court permission is advisable to protect the trustee from liability. 2 SCOTT, *supra*, § 167.1.

8. 2 SCOTT, TRUSTS, §§ 167.2, 201, 205 (1939).

9. 2 SCOTT, TRUSTS, § 165 (1939).

10. 158 Misc. 96, 285 N. Y. Supp. 279 (Surr. Ct. 1936).

instrument provided that investment should be made in "legally authorized investments" and that no security should be purchased which did not yield an income of at least 5%. Legally authorized trust investments in New York at that time were confined to a statutory "list,"¹¹ and in *In Re Muller's Will* it was held that the statutes constituting this list were a part of the public policy of the state and that the court had no power to authorize a deviation from this list.¹² Professor Scott suggests that the provision in the trust instrument requiring legally authorized investments implied that the safety of the principal was of primary concern to the settlor.¹³ Therefore in the *Cohn* case the court authorized the trustee to invest only in legally authorized investments even though the return was less than 5%. The principal case, however, is distinguishable from *In Re Cohn's Estate* on both the ground that Missouri has no statutory legal list of authorized trust investments¹⁴ and as to the language of the trust instrument. In the principal case the settlor's will created two trusts, a trust of personality and a trust of the proceeds of realty. The terms of the trust of personality did not require a minimum income to be derived but did caution the trustee to keep in mind the safety of the principal. In the trust of the proceeds of realty, the one in question in the principal case, the settlor made no provision regarding the safety of the principal other than specifying the particular types of investments to be made, but he did require at least a 4% return for the income beneficiaries. The court held that the omission of the precautionary provision in the trust as to the proceeds of realty and the imposition of a specific income to be derived from the trust of the proceeds of realty "indicates very persuasively" that the settlor was primarily concerned with obtaining a 4% return for the income beneficiaries. The court found that the whole tenor of the will supported such a conclusion.

The court in the present case authorized the trustee to "procure such investments bearing 4% interest as are proper under the laws of this state." This presents the problem of what constitute legal trust investments in Missouri. Some states have a statutory "list" of the *only* types of investments considered as proper trust investments in the particular jurisdiction.¹⁵ This, however, seems undesirable as being too inflexible, and tends to defeat the purpose of the trust in an emergency situation such as exists in the principal case. Missouri has a few statutes which make certain investments by trustees *permissive* (such as bonds issued by national

11. N. Y. DECED. EST. LAW § 111; N. Y. PERS. PROP. LAW § 21; N. Y. BANK LAW §§ 14(1), 97. However, these statutes have recently undergone vast changes. N. Y. Laws 1950, c. 464, §§ 1, 5.

12. 155 Misc. 748, 280 N. Y. Supp. 345 (Surr. Ct. 1935). It seems highly doubtful whether this case is still law in New York today in view of N. Y. Laws 1950, c. 464, § 21(1) (n).

13. 2 SCOTT, TRUSTS § 165 (1939).

14. See note 20, *infra*.

15. *Supra*, note 11. See also ORE. COMP. LAWS ANN. § 20-1214 (1940), as amended by Ore. Laws 1943, c. 109, repealed by Ore. Laws 1947, c. 523. It seems that the recent trend is toward repealing statutory lists in favor of the prudence rule of trust investments. For other states having a statutory list see 3 BOGERT, TRUSTS AND TRUSTEES, Part 2, §§ 616-663 (2d ed. 1946).

mortgage associations or the federal housing administrator,¹⁶ bonds or notes secured by deeds of trust or mortgages insured by the administrator,¹⁷ and other types of bonds,¹⁸ etc.)¹⁹ but they do not constitute an exclusive "list" prohibiting other types of investments.²⁰ The general rule, in the absence of statutory provisions and specific provisions in the instrument creating the trust, is that the trustee may make "such investments as a prudent man would make of his own property having primarily in view the preservation of the estate and the amount and regularity of the income to be derived."²¹ Missouri follows the general rule,²² which has been called the "prudence rule of trust investments." This rule requires the trustee to exercise a reasonable degree of care,²³ skill,²⁴ and caution²⁵ in selecting investments. But he is not allowed to engage in speculative investments.²⁶ There are two lines of authority regarding application of the prudence rule of trust investments: the New York or more strict view which holds that a trustee may not invest trust funds in common or preferred stocks, and permits investment only in government securities and first mortgages on real estate; and the Massachusetts or more liberal view which holds that corporate stocks *may* constitute a proper trust investment.²⁷ Until 1940 it was very doubtful as to which view Missouri courts followed,²⁸ but in

16. MO. REV. STAT. SEC. 362.185 (1949).

17. *Ibid.*

18. MO. REV. STAT. SECS. 108.240, 108.290 (1949).

19. For a listing of MO. REV. STAT. (1939) applicable to trust investments see 3 BOGERT, TRUSTS AND TRUSTEES, § 639 (2d ed. 1946). Note, however, that MO. REV. STAT. § 8218 (1939) was repealed in MO. LAWS 1945 p. 1578. For a discussion of MO. REV. STAT. (1929) and Missouri decisions applicable to trust investments see Eaton and Cameron, *Investment Authority of a Missouri Trustee*, 5 KAN. CITY L. REV. 225 (1937). For a discussion of MO. REV. STAT. (1919) and Missouri decisions see Grimm, *Legal Investments for Trusts Funds in Missouri*, 14 ST. LOUIS L. REV. 277 (1929).

20. Rand v. McKittrick, 346 Mo. 466, 142 S.W. 2d 29 (1940); St. Louis Union Trust Co. v. Toberman, 235 Mo. App. 559, 140 S.W. 2d 68 (1940), *transferred* 345 Mo. 613, 134 S.W. 2d 45 (1939).

21. 2 SCOTT, TRUSTS § 227, p. 1197 (1939); see also Harvard College v. Army, 9 Pick. 446, 461 (Mass. 1830); King v. Talbot, 40 N. Y. 76, 85 (1869).

22. Rand v. McKittrick, 346 Mo. 466, 142 S.W. 2d 29 (1940); St. Louis Union Trust Co. v. Toberman, 235 Mo. App. 559, 140 S.W. 2d 68 (1940), *transferred* 345 Mo. 613, 134 S.W. 2d 45 (1939); Covey v. Pierce, 229 Mo. App. 424, 82 S.W. 2d 592 (1935); Cornet v. Cornet, 269 Mo. 298, 190 S.W. 333 (1916); Drake v. Crane, 127 Mo. 85, 29 S.W. 990 (1895).

23. St. Louis Union Trust Co. v. Toberman, 235 Mo. App. 559, 140 S.W. 2d 68 at 72 (1940); 2 SCOTT, TRUSTS, § 227.1 (1939).

24. Cornet v. Cornet, 269 Mo. 298, 190 S.W. 333 at 339 (1916); 2 SCOTT, TRUSTS § 227.2 (1939).

25. St. Louis Union Trust Co. v. Toberman, 235 Mo. App. 559, 140 S.W. 2d 68 at 74 (1940); 2 SCOTT, TRUSTS § 227.3 (1939).

26. Cornet v. Cornet, 269 Mo. 298, 190 S.W. 333 (1916) (leading case); Covey v. Pierce, 229 Mo. App. 424, 82 S.W. 2d 592 (1935); Loud v. St. Louis Union Trust Co., 313 Mo. 552, 281 S.W. 744 (1925).

27. 2 SCOTT, TRUSTS, § 227.5 (1939); 65 C.J., TRUSTS §§ 676, 683.

28. See Eaton and Cameron, *Investment Authority of a Missouri Trustee*, 5 KAN. CITY L. REV. 225 (1937).

*Rand v. McKittrick*²⁹ the Missouri Supreme Court expressly adopted the more liberal Massachusetts view as followed by the *Restatement of Trusts*.³⁰ The court, after examining cases under both applications of the rule and finding that trust funds under the New York view fared no better than those under the Massachusetts view, held that it is not expedient or advisable to arbitrarily classify securities as unfit for trust investments. The court emphasized that "preservation of trust estates depends more upon the integrity, honesty and business acumen of the trustees than it does upon arbitrary legal classification of securities wherein trust funds may be invested." The principal case illustrates the advantage in the flexibility of the more liberal application of the prudence rule of trust investments (aided by permissive statutes) over the more strict application of the rule and over statutory exclusive "lists."

LEONARD A. O'NEAL

29. 346 Mo. 466, 142 S.W. 2d 29 (1940). See also *St. Louis Union Trust Co. v. Toberman*, 235 Mo. App. 5, 9, 140 S.W. 2d 68 (1940). However, a trust company cannot invest trust funds held by it in its own capital stock. MO. REV. STAT. § 368.070 (1949).

30. RESTATEMENT, TRUSTS § 227(1), p. 651, Sec. 227(e), p. 647 (1935).