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## ADVANCEMENTS AND THE RIGHT OF RETAINER IN MISSOURI

HAROLD I. ELBERT\*

### I. INTRODUCTION

Among the problems which confront attorneys, executors and administrators in administering on the estates of deceased persons are the doctrine of advancements and the right of retainer. Missouri has two statutes relating to advancements. They are Sections 468.110 and 468.120, *Missouri Revised Statutes* (1949). Section 468.110 reads as follows:

“When any of the children of the intestate shall have received, in his lifetime, any real or personal estate, by way of advancement, shall choose to come into partition with the other parceners, such advancement shall be brought into hotchpot with the estate descended.”

Section 468.120 reads:

“Maintaining, educating or giving money to a child under the age of majority, without any view to a portion or settlement in life, shall not be deemed an advancement.”<sup>1</sup>

The Missouri definition of advancements is, in *Pilkington v. Wheat*,<sup>2</sup> stated as follows:

“An ‘advancement’ is a free and irrevocable gift by a parent in his lifetime to his child or a person standing in place of such child, on account of such child or person’s share of the donor’s estate which he will receive under the statute of descent if the parent or donor die intestate.”

The right of retainer doctrine was defined in *Thompson v. McCune*,<sup>3</sup> as follows:

“. . . The right of the executor to deduct a debt due the estate from a legacy given by the will is what is called by many courts and law-writers the right of retainer, which means that the executor has the right to retain or hold the legacy which is in his hands by treating the debt due the estate from the legatee

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1. The word advancement appears in Mo. REV. STAT. § 468.300 (1949) which reads: “If such child or children, or their descendants, shall have an equal proportion of the testator’s estate bestowed on them in the testator’s lifetime, by way of advancement, they shall take nothing in virtue of § 468.290.” That statute has reference to those cases in which a child claims to be a pretermitted heir, with which we are not concerned in this article.

2. 330 Mo. 767, 771, 51 S.W. 2d 42, 44 (1932).

3. 333 Mo. 758, 768, 63 S.W. 2d 41, 45 (1933).

as assets of the estate, also in his hands, and collected by deducting same from the legacy. . . ."

Although the definition from *Thompson v. McGune*, *supra*, indicates that the doctrine applies to testate estates, our courts hold that it also applies to intestate estates.

The purpose of this article is to discuss the cases in Missouri which involve the two doctrines and to suggest certain legislative changes which the writer believes should be adopted.

## II. HISTORY

### A. Advancements

The doctrine of advancements was unknown to the common law of England, and first became part of the law of that country, with the possible exception of certain customs of the City of London and York, upon the enactment of the statute of distributions of 1670.<sup>4</sup> Since the statute of distributions was enacted subsequent to the fourth year of the reign of King James I it has been said that it is not to be regarded as part of the Missouri common law. For that reason the advancement doctrine depends on statutory provisions for its force and effect as a legal doctrine.<sup>5</sup>

The first advancement statute which is now Section 468.110, *Missouri Revised Statutes* (1949), was enacted in its present form in 1822.<sup>6</sup> Although that statute has not been changed, an additional statute which provides that maintaining, educating or giving money to a child under the age of majority without any view to a portion or settlement in life shall not be deemed an advancement,<sup>7</sup> was enacted as a result of the decision of our supreme court in *State to the Use of Collins v. Stephenson*.<sup>8</sup>

In that case the court held that where a decedent is survived by both minor and adult children, and the adults have been reared and educated at the expense of the decedent during his lifetime, the minor children should be educated and supported out of his estate after his death and that if at the closing of the estate more had been spent on the adult children than the minor children, then on distribution the excess allowed the older

4. Elbert, *Advancements I*, 51 MICH. L. REV. 665-675 (1953).

5. *In re William's Estate*, 62 Mo. App. 339 (1895); 22 and 23 Charles II, Chapter 10; MO. REV. STAT. § 1.010 (1949).

6. For a history of the Missouri probate code see Maus, *History and Introduction to Missouri Probate Law*, 25 VERNON'S ANNOTATED MISSOURI STATUTES 327 (1952).

7. MO. REV. STAT. p. 661, § 7 (1855), now MO. REV. STAT. § 468.120 (1949).

8. 12 Mo. 178 (1848).

children should be charged against them as an advancement. The legislature was dissatisfied with this decision and enacted the statute, heretofore mentioned, to nullify it.

### B. *Right of Retainer*

The right of retainer is an equitable doctrine and does not depend on any legislation for force and effect. It is a creature of the common law and is based on the proposition that it is without conscience for a legatee or distributee who is indebted to the decedent to receive anything from the estate without first paying his indebtedness to the decedent.<sup>9</sup>

### III. ADVANCEMENTS AND RIGHT OF RETAINER DISTINGUISHED

Courts are often confused when called upon to distinguish between advancements and the right of retainer, and on occasion our courts have not been free of this fault. For example, in *In re Lietman's Estate*<sup>10</sup> the question was whether an executor could on final settlement set off a debt due the testator from a nephew against the nephew's legacy, and the court in referring to the matter said:

"It matters not by what name the proceeding is called whether 'retainer', 'advancement', 'set-off' or 'assets in the hands of the legatee' the practical result is the same and it rests upon wholesome principles of right and justice, which can be administered in probate courts, without the aid of a court of conscience. . . ."

Although in some cases it may not matter whether you call an advancement a case calling for the application of the right of retainer principle or you call a right of retainer case an advancement, many cases do make a difference and for that reason the two doctrines must be distinguished. An advancement is a gift which must be accounted for on the distribution of an intestate's estate, if the advancee is a child or grandchild of the deceased.<sup>11</sup> If the gift was more than the distributive share of the child or grandchild he need not account for the excess.<sup>12</sup>

The right of retainer is based on the legal doctrine that an heir or leg-

9. *In re Lietman's Estate*, 149 Mo. 112, 50 S.W. 307 (1899); *Webb v. Fuller*, 85 Me. 443, 27 Atl. 346, 22 A.L.R. 177 (1893).

10. 149 Mo. 112, 50 S.W. 307, 309 (1899).

11. *Pilkington v. Wheat*, 330 Mo. 767, 51 S.W. 2d 42 (1932). In the following cases the court held that the doctrine of advancement was not applicable: *Johnson v. Antrikin*, 205 Mo. 244, 103 S.W. 936 (1907) (nieces and nephews); *Schaper's Ex'r. v. Schaper*, 158 Mo. 605, 138 S.W. 896 (1911) (widow).

12. *Marston v. Lord*, 65 N.H. 4, 17 Atl. 980 (1888).

atee must pay his obligations due the decedent,<sup>13</sup> whether he died testate or intestate,<sup>14</sup> and whether the heir or legatee be a child, grandchild, wife, husband, niece, nephew, parent or other relative of the deceased.<sup>15</sup> If the debt exceeds the legacy or distributive share of the heir or legatee he can be sued for the excess,<sup>16</sup> unless the obligation be barred by limitation or bankruptcy, in which event he is liable only to the extent of his legacy or distributive share.<sup>17</sup>

In instances where the debtor contends that the right of retainer doctrine is not applicable because the debt is discharged by bankruptcy or limitations, the courts hold that the moral obligation to repay is sufficient to justify the application of the retainer doctrine.<sup>18</sup>

Under the right of retainer doctrine grandchildren who inherit in lieu of their parents are not chargeable with a debt of their parents to the decedent,<sup>19</sup> whereas children who inherit as representatives of their parent must account for advancements made to the latter.<sup>20</sup>

#### IV. PERSONS TO WHOM THE DOCTRINES ARE APPLICABLE

##### A. Advancements

In Missouri the advancement statute provides in part: "When any of the children of the intestate shall have received an advancement. . . ."<sup>21</sup> By its very terms the legislation includes those instances in which the advancee is a child of the advantor. The question is then presented whether the word "children" as used in the statute includes adopted children, grandchildren, a surviving spouse and collateral relatives.

In this state adopted children are treated as if they were the natural children of the adoptive parents. Although our courts have never been

13. *Thompson v. McCune*, 333 Mo. 758, 63 S.W. 2d 41 (1933).

14. *In re Lietman's Estate*, *supra* n. 9; *Hopkins v. Thompson*, 73 Mo. App. 401 (1898).

15. *In re Jamison's Estate*, 202 S.W. 2d 879 (Mo. 1947) (sister); *Johnson v. Johnson*, 352 Mo. 757, 179 S.W. 2d 605 (1944) (child); *Wright v. Green*, 239 Mo. 449, 144 S.W. 437 (1912) (parent); *Leach v. Armstrong*, 156 S.W. 2d 959 (Mo. App. 1941) (child); *In re Lietman's Estate*, *supra* n. 9 (nephew); *Hopkins v. Thompson*, 73 Mo. App. 401 (1898) (parent).

16. *Cf.* statements in *Gorg v. Rutherford*, 31 S.W. 2d 585 (Mo. App. 1930).

17. *Thompson v. McCune*, 333 Mo. 758, 63 S.W. 2d 41 (1933) (limitations); *Leach v. Armstrong*, 156 S.W. 2d 959 (Mo. App. 1941) (bankruptcy).

18. See note 17, *supra*.

19. *Barnum v. Barnum*, 119 Mo. 63, 24 S.W. 780 (1893).

20. *In re William's Estate*, 62 Mo. App. 339 (1895); *dicta*, *Douglass v. Hammel*, 313 Mo. 514, 285 S.W. 433 (1926).

21. Mo. Rev. Stat. § 468.110 (1949).

called upon to determine whether they can compel natural children to account for advancements or whether natural children can compel them to account for advancements, the writer is of the opinion that the courts of this state would hold that adopted children are included in the word children" as used in the advancement statute. To hold otherwise would defeat the very purpose of our adoption statutes which are designed to treat adopted children as if they were natural children.<sup>22</sup>

Although there has never been an appellate court case in Missouri in which grandchildren of the advancor tried to compel children of the advancor to account for advancements, or in which children of the advancor tried to compel grandchildren of the advancor to account for advancements made to them, the writer is of the opinion that the court would hold that the word children in the advancement statute includes grandchildren.

Cases involving this factual situation are not numerous because the grandchildren can only inherit if their parent, who is the child of the advancor, predeceases them. Cases from other jurisdictions having statutes which use the word children hold that the words child or children include grandchildren.<sup>23</sup> The theory of these decisions is that the statute was designed to preserve equality in the division of an intestate's property among his children and that to hold that grandchildren who inherit by representation need not account for advancements would tend to defeat the equality that the statute sought to preserve. In Pennsylvania where the statute used the word children the court held that the doctrine is applicable in those instances where a grandchild who received an advancement from a grandparent inherits as next of kin.<sup>24</sup>

In one case the court of appeals held that grandchildren, who inherit by right of representation, must account for advancements made to their

22. Brock v. Dorman, 339 Mo. 611, 98 S.W. 2d 672 (1936); Oler, *Construction of Private Instruments Where Adopted Children Are Concerned*, 43 MICH. L. REV. 705, 901 (1945). Cf. *In re Furnish's Will*, 254 S.W. 2d 645 (Mo. 1953) (*en banc*) (In that case it was held that an adopted child cannot inherit as a pretermitted heir from his natural grandparent. In that connection the court said (*l.c.* 650):

"... Generally the change by adoption is one of gain. The new status is a better one than the former. To grant dual inheritance, the child adopted would be given the inheritance of a natural child and allowed an additional one. The law intended to give the child adopted the same rights and advantages of a natural child as far as possible. It was never intended to give the child of adoption more."

23. Wolfe v. Galloway, 211 N.C. 361, 190 S.E. 213 (1937); Storey's Appeal, 83 Pa. 89 (1876); Eshelman's Appeal, 1 Leg. Chron. 245 (Pa. 1873). Cf. Alleman v. Manning, 44 Mo. App. 4 (1891), where a parent intended that money given his grandchildren should be an advancement to his daughter. Although she knew her father's intention the daughter did not object. Held, the amount is chargeable to the daughter as an advancement.

24. Storey's Appeal, *supra* n. 23.

parent. In that case the court construed the word children to include grandchildren.<sup>25</sup> If the word children includes grandchildren in that instance, our courts should hold that grandchildren must account for advancements made to them.

This rule is subject to the limitation that the grandchild's parent must be dead at the time of the advancement. If the transfer of property is made by the grandfather to the grandchild prior to the death of the grandchild's parent the doctrine is not applicable.<sup>26</sup>

A surviving spouse cannot compel children to account for advancements. In *Schafer's Ex'r. v. Schafer*,<sup>27</sup> the court of appeals held that a widow could not compel her children to account for advancements made to them by her husband. She contended that since she was entitled to a child's share of the estate, she should be entitled to compel them to account for advancements. The court held that the statute allowing her a child's share was designed to show the quantity of estate to which she was entitled and that it did not indicate that she should take as a child.

The court pointed out that if a widow could compel children to account for advancements, they could compel her to account and that such a ruling might prove disastrous to her. The court said (*l.c.* 898):

"It may be said in passing that if this was to be extended to the widow when taking a child's part, it might prove very disastrous to her, for if it includes the widow, she might herself be required to bring into hotchpot advancements that she had received from her husband, which advancements might far exceed the interest she takes as a child."

In *Johnson v. Antrikin*,<sup>28</sup> the supreme court held that the doctrine was not applicable to collateral relatives of the decedent. The court reached this result by refusing to extend the word children in the advancement statute to include collaterals.

### B. *The Right of Retainer*

The cases in this state involving the right of retainer doctrine do not discuss the parties to whom it is applicable. Cases decided by our courts

25. *In re William's Estate*, 62 Mo. App. 339 (1895).

26. *Corlett v. May*, 126 Fla. 506, 171 So. 517 (1936).

27. 158 Mo. App. 605, 138 S.W. 896 (1911).

28. 205 Mo. 244, 103 S.W. 936 (1907).

have applied the doctrine to children,<sup>29</sup> parents,<sup>30</sup> nephews<sup>31</sup> and a sister.<sup>32</sup> In all likelihood the doctrine would also be held to apply to a surviving spouse.<sup>33</sup>

The right to set off a debt due against the share of a distributee or legatee should not depend on the relationship of the debtor to the decedent; it should apply to any instance where a heir or legatee was indebted to the decedent at the time of his death.

#### V. REQUISITES OF ADVANCEMENTS

So long as the parent lives a voluntary inter vivos transfer from a parent to a child is not an advancement. It cannot become such until the parent's death at which time the personal representatives and heirs are first confronted with the problem. Proof of the transferor's death does not make all voluntary inter vivos transfers advancements. Before advancements can be changed certain additional things must be proved.

##### A. Intent of the Advancor

The Missouri cases when called upon to determine the nature of an alleged voluntary inter vivos transfer state that the intent of the advancor determines the nature of the transaction and the intent of the advancee is regarded as immaterial.<sup>34</sup> Although the advancement statute does not say that the intent of the parent controls, such a conclusion has been reached because of the belief that a person may dispose of his property as he pleases. In *Alleman v. Manning*,<sup>35</sup> the reasons for this conclusion are stated as follows:

“ . . . Our statutes recognize no right of inheritance on the part of the child, as against the will of the parent, but the parent's estate is subject to the absolute disposition of the parent; hence it logically results that the question is not, whether the child was willing to reserve any specific amount which the parent gave to it, or paid for it, on its behalf as an advancement, but whether the parent so intended it to be . . . when the parent gives property to the child, he may at the time fix on it what value he pleases as an advancement, or he may do so by his will. . . .”

29. *Leach v. Armstrong*, 156 S.W. 2d 959 (Mo. App. 1941).

30. *Wright v. Green*, 239 Mo. 449, 144 S.W. 437 (1912); *Hopkins v. Thompson*, 73 Mo. App. 401 (1898).

31. *In re Lietman's Estate*, 149 Mo. 112, 50 S.W. 307 (1899).

32. *In re Jamison's Estate*, 202 S.W. 2d 879 (Mo. 1947).

33. *In re Lietman's Estate*, *supra* n. 31. In this case the court cites several English cases where the doctrine was applied to a surviving spouse.

34. 44 Mo. App. 4 (1891).

35. 44 Mo. App. 4, 8 (1891).



This conclusion can also be justified by a consideration of the advancement statutes. Section 468.110 of the *Missouri Revised Statutes* (1949) does not define advancements but states that children to be entitled to a share of their parent's estate must account for them, and Section 468.120 states that maintaining, educating or giving money to a child under the age of majority without any view to a portion or settlement in life is not an advancement. Therefore, since under one section of the statute the advancor's intent determines that certain transactions are not advancements, the legislature must have intended for the question of advancements to depend on the advancor's intent.<sup>36</sup>

### B. Acceptance

From our previous discussion we have seen that the intent of the alleged advancee is regarded as immaterial. Since the intent of the advancee is regarded as immaterial, he need not accept the property as an advancement. In other words, if the parent intended the property to be charged as an advancement, and the child accepts it, there is a sufficient acceptance. Such a rule, although consistent with the rule that an advancement depends on the advancor's intent, may lead to unjust results. For example, a child may accept property as a gift which he would not accept as an advancement. In many instances the parent does not express his intention to the child and therefore the child may be misled. The justification for the rule is that the child is charged with knowledge that if he accepts property without ascertaining his parent's intention he may be accepting it as a part portion and, therefore, he takes the risk if he fails to ascertain his parent's intention.

In *Alleman v. Manning*,<sup>37</sup> a parent sold certain land and the purchaser at the parent's request executed five notes for \$200 each, one note payable to one of his daughters and the other notes payable to her four children. On the parent's death intestate the other children contended that the daughter should be charged with the four notes given her children as an advancement, because the evidence showed that the parent intended it to be an advancement to the daughter and she knew his intention. Held, the notes given to the daughter's children were advancements to the daughter.

Since the daughter did not request the parent to give the notes to her four children, the case at first blush seems to be erroneous. However, since the daughter permitted her parent to give the notes to her children knowing

36. Cf. *Woolery v. Woolery*, 29 Ind. 249 (1868).

37. 44 Mo. App. 4 (1891).

that he intended her to be charged with the value of the notes as an advancement, she must, because of her failure to object, be deemed to have assented to the transaction as an advancement.

### C. *Intestacy of the Advancor*

Before the advancement doctrine is applicable the person making the transfer must die intestate. If he leaves a will which disposes of any part of his property, then the advancement doctrine is not applicable.<sup>38</sup> The justification for this conclusion may be found in the language of Section 468.110 which reads in part as follows: “. . . any of the children of the intestate should have received. . .” Since the statute uses the word intestate, the legislature must be deemed to have intended to make the legislation applicable only in those instances where the purported advancor dies totally intestate.<sup>39</sup> Another justification is that by making a will the parent decided that he did not desire his children to share equally in his estate.<sup>40</sup>

In *Turpin v. Turpin*,<sup>41</sup> the court expressed the reasons for the rule in the following language:

“The doctrine of bringing advancements into hotchpot applies only to cases of intestacy. . . . And this is often said to be the rule where there is a surplus undisposed of by the will. . . . In this state the matter is covered by statute and the statute only applies to children of persons dying intestate. . . . Other provisions are made as to children not named or provided for in the will. . . . Here the children are all provided for in the will one is by the will charged with an advancement, the others are not, though two were advanced before the date of the codicil. . . .”

“The will must control. . . .”

In our previous discussion we have assumed that the purported advancor left a will which took effect on his death. Suppose a purported advancor makes a will and revokes it before his death and dies intestate. Although there are no Missouri cases involving this problem, the writer is of the opinion that under such circumstances the doctrine of advancements is applicable. Such a conclusion is based on the use of the word intestate in

38. *Diebold v. Diebold*, 235 Mo. App. 83, 141 S.W. 2d 119 (1940); *Graham v. Karr*, 331 Mo. 1157, 55 S.W. 2d 995 (1932); *Turpin v. Turpin*, 88 Mo. 337 (1885); *In re Reichelt's Estate*, 179 S.W. 2d 119 (Mo. App. 1944); *Wickliffe v. Wickliffe*, 206 Mo. App. 42, 226 S.W. 1035 (1920); *In re Lear's Estate*, 146 Mo. App. 642, 124 S.W. 592 (1910).

39. *Turpin v. Turpin*, *supra* n. 38; *Cowper v. Scott*, 3 P. Wms. 119, 24 Eng. Rep. 993 (1731); *Walton v. Walton*, 14 Wes. Jr. 318, 33 Eng. Rep. 543 (1807).

40. Cases, note 38, *supra*.

41. 88 Mo. 337, 340-341 (1885).

the advancement statute. In *Hartwell v. Rice*,<sup>42</sup> the Massachusetts court justified a like result on the assertion that if the making of a will indicates an intent to extinguish the advancement, then revocation indicates a change of purpose.

D. *Applicability of the Doctrine of Advancements to a  
Pretermitted Child*

Section 468.290, *Missouri Revised Statutes* (1949), provides that a child not named or provided for in his parent's will shall receive a child's share as if his parent had died intestate, unless the child was provided for in his parent's lifetime or unless it appears that the omission was intentional.

In *Gibson v. Johnson*,<sup>43</sup> certain pretermitted grandchildren contended that the other children of the testator, who were the legatees and distributees named in his will, should be compelled to account for advancements received by them from the testator. Held, the children were not required to account for advancements. The decision of the court was based on the language of the statute which requires the children to elect to "come into partition with the other parceners." The court pointed out that title to an estate by coparcency is always by descent and the persons who had received advancements had taken title by devise and that the advancement statute did not apply to devisees.

If the reasoning of *Gibson v. Johnson*, *supra*, is carried to its logical conclusion the children, who take under the will, cannot compel the pretermitted child to account for advancements. However, Section 468.300 provides that if a pretermitted child shall have an equal proportion of the testator's property by way of advancement, he shall take nothing by virtue of the pretermitted heir statute. In the writer's opinion this statute should make the principle of *Gibson v. Johnson*, *supra*, inapplicable because the legislative intent is designed to limit the rights of a pretermitted heir. Therefore, if he received an advancement in the testator's lifetime, which is not an "equal proportion of the testator's property," it should be taken into consideration in determining his rights as a pretermitted heir.

## VI. REQUISITE OF THE RIGHT OF RETAINER

The right of retainer doctrine is designed to collect any indebtedness that an heir or devisee owes the intestate or testator. Whereas an advance-

42. 67 Mass. (1 Gray) 587 (1854). If the will is invalid or inoperative, the doctrine of advancement is applicable. *In re Ford*, 2 Ch. 605 (1902); *Cf. Prichard v. Prichard*, 91 W. Va. 398, 113 S.E. 256 (1922).

43. 331 Mo. 1198, 56 S.W. 2d 783, 88 A.L.R. 369 (1932).

ment is a gift and principles of gifts are applicable thereto, the right of retainer is based on a legal obligation owed by the heir or devisee to the intestate or testator. Although in some instances the legal obligation may be discharged by bankruptcy or limitations, the moral obligation to repay, which remains, is deemed sufficient to make the doctrine applicable. However, before the doctrine is applicable the executor, administrator, heirs or devisees must establish a legal obligation owed by the heir or devisee to their decedent. The following cases are clearly illustrative of this principle.

In *Barnett v. Kemp*,<sup>44</sup> the administrator of an intestate's estate sued her son for an accounting alleging that the son had collected money for the intestate, which was many times the amount he expended for her support and maintenance. The court held that the son need not account in the following language:

" . . . If she chose to give her income or more to her son in exchange for a home and the companionship of those endeared to her by . . . ties of blood, a court of conscience, whose decrees should be tempered by sentiment as well as a wholesome sense of right, should not interfere with her choice. . . ."<sup>45</sup>

In *In re Jamison's Estate*,<sup>46</sup> the executors of an estate on partial distribution sought to charge a claimed indebtedness against the distributive share of a sister of testator. The evidence showed that testator opened a brokerage account at Paul Brown and Company in his sister's name and he guaranteed it. The evidence showed that he told his sister that he would take the loss and she would have the profit. His executors were compelled to pay out certain sums by virtue of said guaranty agreement. Held, that in view of the circumstances the estate could not charge the indebtedness against the distributive share of the sister.

In *Johnson v. Johnson*,<sup>47</sup> it was claimed that certain notes barred by limitations could by right of retainer be set off against a son's share of his father's estate. The father and son had, after the statute of limitations had run, compromised the indebtedness for \$5,500. Held, the compromise was valid and the indebtedness could not be set off against the son's share of the estate. In ruling on the matter the court stated its reasons in the following language (*l.c.* 609):

44. 258 Mo. 139, 167 S.W. 546, 52 A.L.R. (N.S.) 1185 (1914).

45. 167 S.W. at 552. *Haid v. Prendiville*, 292 Mo. 552, 238 S.W. 452 (1922).

46. 202 S.W. 2d 879 (Mo. 1947).

47. 352 Mo. 787, 179 S.W. 2d 605 (1944).

"The notes were therefore barred by limitation . . . and respondent could make a valid compromise thereon. . . . But since the deceased father has made a valid compromise settlement of the outlawed notes before his death, they would no longer be obligations due the estate. For the statute of limitations was binding on him when he made it. . . ."

Although the legal obligation has been destroyed by such things as limitations and bankruptcy, the courts hold that the moral obligation to repay remains and that the only thing that was destroyed was the remedy. Therefore, the executor or administrator can take credit on final settlement of the decedent's estate for the indebtedness, even though it is barred by limitations or bankruptcy.<sup>48</sup>

In a number of cases the decedent was surety on an obligation of one of his heirs or devisees, and his administrator or executor was compelled to pay a claim based on the suretyship obligation. Because the decedent was not compelled to pay out the money in his lifetime, creditors of the heirs or devisees have claimed that the right of retainer is applicable only to an indebtedness incurred in the decedent's lifetime. Since the obligation to repay the surety, if he was compelled to pay the debt, was incurred in the decedent's lifetime, the courts of this state hold that the rights of the administrator or executor are superior to those of creditors.<sup>49</sup>

## VII. PROOF OF ADVANCEMENTS

Although the intent of the advantor is said to determine whether or not a voluntary inter vivos transfer of property is an advancement, the determination of that intent is often difficult. When the parent's intention is expressed, the court have no difficulty in giving it effect.<sup>50</sup> However, in a great number of instances the courts of this state have no expressed intent of the parent to solve the problem. Under those circumstances the courts have created a presumption that all substantial voluntary inter vivos

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48. *Thompson v. McCune*, 333 Mo. 758, 63 S.W. 2d 41 (1933) (limitations); *Leach v. Armstrong*, 156 S.W. 2d 959 (1941) (bankruptcy); *dicta*, *In re Lietman's Estate*, 149 Mo. 112, 50 S.W. 307 (1899).

49. *Hopkins v. Thompson*, 73 Mo. App. 401 (1898). *Cf.* *Old v. Heibel*, 352 Mo. 511, 178 S.W. 2d 351 (1944) (In that case one Heibel was named executor of testator's estate and was a devisee of certain real estate. Before the death of testator an investment company had obtained a judgment against Heibel and it claimed that its rights were superior to the right of the estate to subject land devised to Heibel to a claim for misappropriation of funds while serving as executor. Held, the lien of the investment company was superior to the claim of the estate).

50. This rule contemplates that intent be expressed at the time the advancement is made and not thereafter. *Nelson v. Nelson*, 90 Mo. 460, 2 S.W. 413 (1886); *McDonald v. McDonald*, 86 Mo. App. 122 (1900).

transfers are prima facie advancements<sup>51</sup> and the burden of proof is on the child to prove that an absolute gift was intended.<sup>52</sup>

The courts base this presumption on the assumption that a parent desires all of his children to share equally in all things they receive from him, whether received in his lifetime or from his estate at his death.<sup>53</sup>

Before a transfer of property is presumed to be an advancement, the person seeking to show advancement must prove that the transfer was a gift. Once that is proved the presumption of advancement arises and the purported advancee must prove that an absolute gift rather than an advancement was intended.<sup>54</sup>

*Stephens v. Smith*,<sup>55</sup> is illustrative of the rule. In that case certain children sought to charge intestate's daughter with an advancement. The evidence showed that intestate lived with her daughter for 15 months prior to her death and that during that time she gave the daughter a check for \$300. The court held that the \$300 could not be charged as an advancement, because the presumption of advancement is based on proof of a gift and where the proof is that she received it and the evidence does not show the capacity in which the property was received, the presumption is not applicable. The court thought that to hold otherwise would require a presumption to be based on a presumption which is not proper under Missouri law.

In *Lynch v. Culver*,<sup>56</sup> intestate transferred land to three of his six children by deeds that recited a consideration which the grantees admitted was never paid. In ruling on the case the court pointed out that ordinarily a deed reciting a consideration is prima facie a sale and that the burden is on the person seeking to prove an advancement to rebut the presumption of sale,<sup>57</sup> but where the grantees admit that the transfer was without consider-

51. *Lynch v. Culver*, 260 Mo. 295, 168 S.W. 1138; *Gunn v. Thruston*, 130 Mo. 339, 32 S.W. 654 (1895); *Pitts v. Metzger*, 195 Mo. App. 677, 187 S.W. 610 (1916).

52. *Gobel v. Kitchen*, 217 Mo. App. 354, 266 S.W. 992 (1924).

53. *Miller v. Richardson*, 85 S.W. 2d 41 (Mo. 1935).

54. *Ray v. Loper*, 65 Mo. 470 (1877); *Gobel v. Kitchen*, 217 Mo. App. 354, 266 S.W. 992 (1924); *Pitts v. Metzger*, 195 Mo. App. 677, 187 S.W. 610 (1916).

55. 127 Mo. App. 18, 106 S.W. 533 (1907).

56. 260 Mo. 495, 168 S.W. 1138 (1914) (One of the advancees contended that his father deeded the property to him because he was a good boy, and that, therefore, he should not be charged with an advancement. Held, the fact that it was deeded to him because he was a good boy is as consistent with an advancement as a gift and therefore the evidence was insufficient to rebut the presumption); *Lisles v. Huffman*, 88 Mo. App. 143 (1901).

57. *Pilkington v. Wheat*, 330 Mo. 767, 51 S.W. 2d 42 (1932) (The deed recited a consideration and the other children claimed it had not been paid and, therefore, the value of the real estate should be treated as an advancement. Held, the evidence was insufficient to rebut the presumption of sale). *Dobbins v.*

ation, the presumption is one of advancement and the burden is on them to prove an absolute gift.

The mere showing of a voluntary inter vivos transfer does not of necessity make a prima facie case of advancements. In many instances the size of the transfer may be sufficient to rebut the presumption. Often the fact that the property transferred is small rebuts the presumption because an advancement is said to be made with a view towards establishing a child in life. In *McDonald v. McDonald*,<sup>58</sup> the court pointed out that the surrounding circumstances and the wealth of the parent must be taken into consideration in determining whether the transfer is so small that the presumption of advancement is rebutted. For example, an automobile given to a child by a wealthy parent may be so small as not to give rise to the presumption of advancement,<sup>59</sup> whereas a gift of a team of horses by a poor farmer to one of his sons may give rise to the presumption.<sup>60</sup>

If the parent at the time of the transfer refers to it as a gift, the child on the former's death may contend that the reference to the transfer as a gift means that the parent intended an absolute gift and not an advancement. Although such contention has been made on a number of occasions, the courts of this state have always held that the use of the word gift is as consistent with the intent to make an advancement as a gift because an advancement is a gift and that showing that the parent used the word gift does not rebut the presumption of advancement.<sup>61</sup>

Humphreys, 171 Mo. 198, 70 S.W. 815 (1902) (The evidence showed that the consideration recited in the deed had never been paid. Held, the presumption of sale was rebutted and the transaction was an advancement). Cf. *Yates v. Burt*, 161 Mo. App. 267, 143 S.W. 73 (1912), where a testator charged advancements to his children by will. He charged one daughter with \$1500 as an advancement in the will and thereafter deeded her property at a stated consideration of \$1600, which was not paid. The daughter claimed it was a gift and the other children claimed it was a sale. Held, parol evidence is not admissible to prove it was a gift because the conveyance was for a good consideration—blood and affection—and that it should be treated as a sale and the daughter's share of the estate should be charged with that amount. The parol evidence point made by the court in this case is not followed in other Missouri cases.

58. 86 Mo. App. 122 (1900).

59. Cf. *Dent v. Foy*, 206 Ala. 454, 90 So. 317 (1921), 210 Ala. 475, 98 So. 390 (1923).

60. Cf. *Ison v. Ison*, 5 Rich. Eq. 15 (S.C. 1852).

61. *Miller v. Richardson*, 85 S.W. 2d 41 (Mo. 1935). In determining whether a voluntary inter vivos transfer of property was a gift or advancement many evidence points have arisen of which the following are illustrative: In *Gunn v. Thurston*, 130 Mo. 339, 32 S.W. 654 (1895) the court held that a child could not testify to her dealings with the intestate to show that a transaction was a gift or advancement, because of the Dead Man's Statute, but that she could testify as to transaction between the parent and other children; that declarations of the intestate made after the transfer of property are admissible to prove that an absolute gift

If a parent transfers property to a child for an inadequate consideration, the difference between the price actually paid and the fair market value at the time of the transfer is presumed to be an advancement.<sup>62</sup>

Often a child performs services for a parent or remains on the farm of his father after becoming of age and renders valuable services. In instances where the parent has given such a child property, he on settlement of the latter's estate will contend that it is not an advancement because given him in satisfaction of a moral obligation. The courts hold that the proof of such services prior to the conveyance is sufficient to rebut the presumption of advancement, because the parent was morally obligated to the child and was repaying that obligation.<sup>63</sup>

In *State to the Use of Collins v. Stephenson*,<sup>64</sup> the court held that educating a child was an advancement. To annul the effect of that decision Section 468.120 of the *Revised Statutes* was enacted. That statute provides that: "Maintaining, educating or giving money to a child under the age of majority, without any view to a portion or settlement in life, shall not be deemed an advancement."<sup>65</sup>

Since its enactment the courts have not been called upon to construe Section 468.120. Several problems may arise from support, maintenance and education of children over the age of majority and in those instances where a child is the recipient of a college education.

Although the statute is restricted to those instances where money is advanced for the support and maintenance of a minor child, the court should, in view of the statute, hold that money spent for the support and maintenance of a child over the age of majority is prima facie an advancement.

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and not an advancement was intended and that a child can show absolute gifts that the intestate made to other children as evidence that the transaction was an absolute gift and not an advancement. In *McDonald v. McDonald*, 86 Mo. App. 122 (1900) the court held that a writing charging an advancement which was not made contemporaneously with the voluntary inter vivos transfer was not admissible to prove advancements. By way of dicta the court said that a statement by the intestate that it was an advancement is admissible, if made contemporaneously with the voluntary inter vivos transfer, as part of the *res gestae*, but that such statement is not admissible if made after the transaction and not in the presence of the purported advancee because it is self serving, and a statement by the intestate that it was not an advancement which is made after the transaction is admissible as a declaration against interest. In *Ray v. Loper*, 65 Mo. 470 (1877) a statement made by the intestate, after the voluntary inter vivos transfer, to a third person, in the presence of the purported advancee, that the transfer was intended as an advancement was held admissible.

62. *Mumford v. Mumford* 194 S.W. 898 (Mo. App. 1917).

63. *Ibid.*; *Lisles v. Hoffman*, 88 Mo. App. 143 (1901); *Waddell v. Waddell*, 87 Mo. App. 216 (1901).

64. 12 Mo. 178 (1848).

65. Mo. REV. STAT. § 7, p. 661 (1855).



However, the Colorado courts under an almost identical statute hold that money expended for the support and maintenance of an adult child is *prima facie* not an advancement.<sup>66</sup>

In states which have been called upon to pass on the problem a college education has been held not to be an advancement.<sup>67</sup> However, the English courts hold that such an education is given with a view toward a start in life and is an advancement.<sup>68</sup> Our courts have not passed on this problem, but should, in view of the statute, hold that money expended for a college education before the child becomes of age is *prima facie* not an advancement and money expended after he becomes of age is *prima facie* an advancement.

#### VIII. PROVISIONS IN WILLS CHARGING ADVANCEMENTS OR DEBTS AGAINST LEGATEES' DISTRIBUTIVE SHARES

A parent who dies testate by his will converts all advancements to absolute gifts, unless his will specifically charges advancements. If advancements are charged by will, it controls and the doctrine of advancements is not applicable in its technical sense.

In *Hanssen v. Karbe*,<sup>69</sup> testator in his will stated that all loans and interest thereon should be treated as advancements because he wanted his children to share equally in his estate. In discussing this provision of the will the court pointed out that (*l.c.* 118):

"Our Missouri statutes requiring advancements to be brought into hotchpot . . . apply only to estates of intestates and have no application where there is a will containing a direction to the executor or trustee to treat a debt as an advancement in such plain, simple and unambiguous terms as apply in this case. . . ."

The existence of a will does not defeat the right of retainer doctrine unless the will forgives the indebtedness.<sup>70</sup> By use of a will a person can do many things that he could not do pursuant to the advancement statute, and the same is true in instances where the right of retainer is involved.<sup>71</sup>

66. *Page v. Elwell*, 81 Colo. 73, 253 Pac. 1059 (1927).

67. *Hill's Guardian v. Hill*, 122 Ky. 681, 92 S.W. 924 (1906); *Bradsher v. Cannady*, 76 N.C. 445 (1877); *Miller's Appeal*, 40 Pa. (4 Wright) 57 (1861).

68. *Taylor v. Taylor*, L. R. 20 Eq. 155 (1875).

69. 115 S.W. 2d 109 (Mo. App. 1938).

70. *Ibid.*

71. *Ibid.* In that case the will provided that all loans and interest thereon should be treated as advancements. Plaintiff in spite of the provision sought to foreclose on a deed of trust which was security for a note given to the testator by a son. The reason for this action was that if the transaction was an advancement the son had received more than his portion of the estate, if a debt the executor could collect the entire amount and distribute to the son on final settlement a smaller amount as his share of the estate. Held, the will converted the debt to an advancement and the executor would not be entitled to commissions thereon. *In re Reichelt's Estate*, 179 S.W. 2d 119 (1944).

A study of the cases shows the results that have been accomplished in this state by the use of a will, which could not have been accomplished if the person died intestate.

In *Nelson v. Wyan*,<sup>72</sup> a testator in charging advancements to his children did not state that they were to bear interest. The court held that the amounts charged against the share of the children should not bear interest. However, in *In Re Lear's Estate*,<sup>73</sup> the will which charged advancements provided that interest should be charged thereon and the court in construing the will charged interest.

In *In Re Lear's Estate*,<sup>74</sup> one son claimed that the amount charged as an advancement was an error made by the scrivener of his father's will. The court held that the amount of the advancement charged in the will controlled. Under that decision a testator can charge a child with an absolute gift as an advancement and he can determine the amount thereof.

In *Garth v. Garth*,<sup>75</sup> a testator charged part of a debt of a deceased son against a legacy of the son's child. If he had not charged part of the debt by will, the court would have held that the right of retainer doctrine was not applicable.<sup>76</sup>

In *Vitt v. Vitt*,<sup>77</sup> a testator converted debts to gifts, and in *Strode Adm'r. v. Beall*<sup>78</sup> and *Hanssen v. Karbe*,<sup>79</sup> a testator converted debts to advancements.

By use of a will advancements can be charged to parties not covered by the doctrine, such as a surviving spouse or collateral relatives,<sup>80</sup> and absolute gifts can be converted to advancements.<sup>81</sup>

In *Hanssen v. Karbe*,<sup>82</sup> the court of appeals said:

"In fact, we think an advancement set out in the will is a much preferable way to create advancements than those methods usually applicable to intestates. In the latter class, the circumstances under which a parent bestows a gift on a child is to be analyzed and testimony given in respect thereto in order to determine whether it is or is not an advancement."

72. 21 Mo. 347 (1855).

73. 146 Mo. App. 642, 124 S.W. 592 (1910).

74. *Ibid.*

75. 139 Mo. 456, 41 S.W. 238 (1897).

76. *Barnum v. Barnum*, 119 Mo. 63, 24 S.W. 780 (1893).

77. 66 Mo. App. 214 (1896).

78. 105 Mo. App. 495, 79 S.W. 1018 (1904).

79. 115 S.W. 2d 109 (Mo. App. 1938).

80. *Talbott's Ex'r. v. Goetz*, 286 Ky. 504, 151 S.W. 2d 369 (1941); *In re Bressler's Estate*, 155 Mich. 567, 119 N. W. 1104 (1909).

81. *Albrecht v. Fisher*, 14 Ohio App. 195 (1921).

82. 115 S.W. 2d 109, 118 (Mo. App. 1938).

The quotation from *Hanssen v. Karbe* is a logical one and advancements should be charged by will if possible. However, the solution is not as easy as that case indicates because the courts, in instances where the will does not specifically cover the problem, decide cases by analogy to the doctrine in its technical sense.<sup>83</sup>

Language in a will which charged children with advancements made to them in general terms does not solve any problems, and the court must still decide whether a voluntary inter vivos transfer is a gift or advancement.<sup>84</sup> For that reason the testator should specify what transfers are advancements, and he should place a value thereon. Likewise, in charging a debt against the share of a legatee, a testator should use specific language. Otherwise, if the debt exceeds the legacy, his intention may be defeated because the executor could collect the excess, or there may be a dispute as to whether the transaction was a debt or advancement, because if the will charges debts and not advancements, a child need not account if the transaction was an advancement.<sup>85</sup>

A will speaks from the date of the testator's death and if advancements are made subsequent to the will, the testator should execute a codicil. If he fails to do so, those advancements will not be charged to the child, unless the will requires the child to account for all advancements rather than specific ones.<sup>86</sup>

## IX. ACCOUNTING FOR ADVANCEMENTS

### A. *The Hotchpot Doctrine*

Section 468.110, *Missouri Revised Statutes* (1949), reads in part as follows: "When any of the children of the intestate shall . . . choose to come into partition with the other parceners, such advancement shall be brought into hotchpot. . . ." The word "hotchpot" comes from the common law rule of requiring the donees of gifts in frankmarriage to return the property received by them before participating in the distribution of decedent's estate. Under the common law hotchpot doctrine, the donee in frank-

83. *Nelson v. Wyan*, 21 Mo. 347 (1855).

84. *Yates v. Burt*, 161 Mo. App. 267, 143 S.W. 73 (1912).

85. *Hanssen v. Karbe*, 115 S.W. 2d 109 (Mo. App. 1938).

86. *Graham v. Karr*, 331 Mo. 1157, 55 S.W. 2d 995 (1935); *Wickliffe v. Wickliffe*, 206 Mo. App. 42, 226 S.W. 1035 (1920); *Turpin v. Turpin*, 88 Mo. 337 (1885).

marriage had to elect to return the identical property received by her.<sup>87</sup> In *Ray v. Loper*,<sup>88</sup> hotchpot is defined as follows:

"Bringing into hotchpot, under our statute, does not mean that the property or money advanced shall, in kind or specie, be thrown in with the property which has descended, but that it be estimated and charged against the party according to its value at the time the advancement was made. . . ."

Since the identical property is not returned and since the property is valued at the date of the transfer rather than on the date of intestate's death,<sup>89</sup> the word hotchpot as used in the statute has a different meaning from the one it had at common law. Therefore, in the writer's opinion the word should not be used in the advancement statute.

In *In Re St. Vrian's Estate*,<sup>90</sup> the court of appeals said that the advancee must elect to come into hotchpot and that if he refused he was barred from participation in the estate. In *Ladd v. Stephens*,<sup>91</sup> the supreme court said that a child had a right to a judicial determination of whether a voluntary inter vivos transfer was a gift or advancement, before being required to make an election.

Although both *In Re St. Vrian's Estate* and *Ladd v. Stephens* state what should be the technical rule in Missouri, they do not represent the prevailing view in this state. As will hereinafter appear, the child is charged with advancements on final settlement of the decedent's estate, or in a partition decree, whether he elects to participate in the division of the estate or not. The election rule is not proper in this state because the child does not return any property to the estate nor does he account for any excess if he received more by way of advancement than his distributive share. For that reason he should always elect to participate in the estate.

87. *Law v. Smith*, 2 R. I. 244 (1852). In 1 COKE'S FIRST INSTITUTES 721, Coke defines hotchpot as follows: "And it seemeth that this word (hotchpot) is in English a pudding; for in this pudding is not commonly put one thing alone, but one thing with other things together. And therefore it behooveth in this case to put the lands given in frankmarriage with the other lands in hotchpot, if the husband and wife will have any part of the other lands," In 2 BL. COMM. \*190, Blackstone in discussing hotchpot said: ". . . By this housewifely metaphor our ancestors meant to inform us, that the lands, both those given in frankmarriage and those descending in fee simple should be mixed and blended together, and then divided in equal portions among the daughters. But this was left to the choice of the donee in frankmarriage and if she did not choose to put her lands into hotchpot, she was presumed to be sufficiently provided for, and the rest of the inheritance was divided among her other sisters. . . ."

88. 65 Mo. 470, 472 (1877).

89. *Elliott v. Wilson*, 98 Mo. 379, 11 S.W. 739 (1889).

90. 1 Mo. App. 294 (1876).

91. 147 Mo. 319, 48 S.W. 915 (1898).

### B. *Property to be Accounted for*

The Missouri statute provides that if any child who has received an advancement in real or personal property shall choose to come into "partition with the other parceners such advancement shall be brought into hotchpot with the estate descended." In an early case the court of appeals held that because the statute used the word parceners only advancements in real estate need be accounted for, and that an advancement in real property could not be charged on final settlement against the advancee's share in the personal estate.<sup>92</sup> Subsequently, that case was reversed by the supreme court, and the Missouri rule is that all property given as an advancement, whether it be real or personal, must be accounted for. That case also holds that on distribution of the personal estate, advancements in real estate can be set off against the distributee's share of the personal estate.<sup>93</sup> Likewise, a child can be charged with an advancement of personal property in an action involving partition of the intestate's real estate.<sup>94</sup>

### C. *Determining Distributive Shares Where Advancements Are Involved*

An administrator or executor when called upon to charge an advancement or debt in final settlement must determine how he is going to take the debt or advancement into account in determining the share of each child.

In *Pitts v. Metzger*,<sup>95</sup> the intestate estate to be distributed was \$15,000 and intestate had made a \$1,500 advancement to daughter *A* and a \$1,300 advancement to daughter *B*. The court pointed out that the two advancements were to be added to the \$15,000, making a total estate of \$17,800 to be divided among the intestate's five children. The \$17,800 is then divided by 5, which means that each child was entitled to \$3,560, but since daughter *A* received \$1,500 as an advancement, her share is diminished by that amount and daughter *B*'s share is diminished by the \$1,300 she received as an advancement. Therefore three of the children received \$3,560, daughter *A* received \$2,060 and daughter *B* received \$2,260. The same method is followed in right of retainer cases.

### D. *An Advancee Need Not Account For the Excess When He Has Received More Than His Distributive Share of The Estate*

A child may receive more by way of advancement than he is entitled to on the distribution of the parent's estate. Under such circumstances, the

92. *Elliott's Estate v. Wilson*, 27 Mo. App. 218 (1887).

93. *Elliott v. Wilson*, 98 Mo. 379, 11 S.W. 739 (1889).

94. *Harsh v. Bilkington*, 310 Mo. 767, 51 S.W. 2d 42 (1932).

95. 195 Mo. App. 677, 187 S.W. 610 (1916).

administrator or other heirs cannot compel the child to refund the excess received by him. Although the Missouri courts have not been compelled to pass on the problem, the courts would reach that result because an advancement is a form of gift, rather than a debt.<sup>96</sup>

In those instances where the heir or devisee is indebted to the estate in an amount exceeding his distributive share, the executor or administrator can sue the heir or devisee and recover the balance. If the debt is barred by bankruptcy or limitations, an executor or administrator is not entitled to recover more than the distributive share of the heir or devisees. The reason for the rule is that recovery of the excess can only be had in a suit at law in which the defense of bankruptcy or limitations would be a bar. Recovery can only be had in a partition suit or on final settlement and in those instances the limit of the recovery is the distributive share of the heir or devisee.

*E. Liability of Grandchildren for Advancements Or  
Debts Of Their Parents*

The advancement statute of Missouri requires children to account for advancements. In many instances a child predeceases his parent, and on the latter's death the other children contend that grandchildren should account for an advancement. If the court followed a strict interpretation of the statute, grandchildren would not have to account for an advancement made to their parents. But in *In Re William's Estate*,<sup>97</sup> the court construed the word

96. Cf. *Hanssen v. Karbe* 115 S.W. 2d 109 (1938); *Nelson v. Wyan*, 21 Mo. 347 (1855).

97. 62 Mo. App. 339 (1895); *dicta*, *Douglass v. Hammel*, 313 Mo. 514, 285 S.W. 433 (1926). Cf. *Diebold v. Diebold*, 235 Mo. App. 83, 141 S.W. 2d 119 (1940), where a testator by his will charged as advancements any notes he had paid for his son's or son's-in-law with 6% simple interest. The will provided that the children of a deceased daughter should inherit her share. Testator held a note of the deceased daughter. Held, the note of the son-in-law was chargeable against the share of the children of the deceased daughter.

The authors of the Model Probate Code (Model Probate Code, § 29) take the position that grandchildren who inherit from their grandparents per capita should be charged with advancements made to their parents. This position is contrary to the decided cases. *Brown v. Taylor*, 62 Ind. 295 (1878); *Skinner v. Wynne*, 55 N.C. (2 Jones Eq.) 41 (1854). The rule as disclosed by the decisions of the courts is, in the writer's opinion, preferable to the provision of the Model Probate Code. The purpose of advancement statutes is to preserve equality among the children of the advantor. If he is survived by two children and the children of a deceased child who received an advancement, equality can only be preserved by charging the children of the deceased child with the value of the advancement. Advancement statutes are not designed to produce equality among grandchildren and consequently advancements made to their parents should not be charged to them when they inherit per capita.

child as including grandchild so that a grandchild who inherited by right of representation must account for advancements made to his parent.

In instances where a child who is indebted to a parent predeceases the latter and is survived by children who inherit from their grandparent, the other children cannot have the debt charged as part of the grandchild's distributive share.<sup>98</sup>

#### X. PROCEDURE

Once the other children or administrator determine that a transaction is to be charged as an advancement or that a debt due the estate by an heir or distributee must be collected, the question is presented as to what procedure must be followed to charge the advancement or recover the debt.

Advancements are chargeable in two ways, (1) by taking credit for the advancement on final settlement of the intestate's estate,<sup>99</sup> and (2) by charging advancements in a partition suit.<sup>100</sup> These procedures are not alternatives. If advancements are to be charged, they must be charged at the earliest opportunity. If advancements are not charged on the final settlement of the personal estate, they cannot thereafter be taken into consideration in a partition suit.<sup>101</sup>

The purported advancee can challenge the charge of advancements by filing exceptions to the final settlement or by denying the advancement in the partition suit.<sup>102</sup>

In cases involving the right of retainer the executor or administrator can recover the debt by instituting suit in the appropriate court or by setting off the debt on final settlement. In *Gorg v. Rutherford*,<sup>103</sup> the rule is stated as follows:

"A demand of this character, due an estate from a distributee, may either be collected by the administrator bringing an independent action thereon in a court having jurisdiction thereof, or the administrator may deduct the amount of the demand from the heir's distributive share, whereupon the probate court may either approve or disapprove of the act of the administrator, and make a final order of distribution, from which the party aggrieved may prosecute his appeal. . . ."

98. *Barnum v. Barum*, 119 Mo. 63, 24 S.W. 780 (1893).

99. *Nelson v. Nelson*, 90 Mo. 460, 2 S.W. 413 (1886).

100. *Pilkington v. Wheat*, 330 Mo. 767, 51 S.W. 2d 42 (1932).

101. *Gorg v. Rutherford*, 31 S.W. 2d 585 (Mo. App. 1930).

102. *Nelson v. Nelson*, *supra* n. 99.

103. 31 S.W. 2d 585, 588 (1930). If the administrator or executor sues and recovers the debt he would be entitled to commissions, whereas if he sets it off on final settlement he would not be entitled to commissions. *Hanssen v. Karbe*, 115 S.W. 2d 109 (Mo. App. 1938).

In those instances where the defense to the obligation is limitations or bankruptcy, the executor or administrator must set off the debt on final settlement. If he files suit on the debt the defense would be good, because the indebtedness may exceed the debtor's distributive share and there is no way to apportion the amount which can be recovered from the amount which cannot be recovered.

## XI. PRIORITIES

### A. *Advancements*

The Missouri courts have never been called upon to determine what rights creditors of the advancor have to set aside advancements, nor have the courts of this state been called upon to determine whether a third person who purchased the advancee's interest in the advancor's estate takes subject to the advancement or whether he takes free and clear of the advancement.

However, decisions from other states are very helpful in determining these questions. The advancee in those states acquires the same title as the advancor.<sup>104</sup> Because an advancement is a form of gift, it is said to have been made without consideration insofar as existing creditors are concerned. Therefore, if a transfer of property by a parent to a child renders the parent insolvent or if he was insolvent before the transfer, it is void as to existing creditors.<sup>105</sup>

A child cannot defeat the doctrine of advancements by selling his interest in the estate to a third person, whether the third person is aware of the advancement or not.<sup>106</sup> Likewise, a purchaser from an heir stands in the latter's position and can compel children other than the one from whom he purchased an interest in the estate to account for advancements.<sup>107</sup>

### B. *Right of Retainer*

An heir, distributee or legatee who is indebted to the decedent is often indebted to other persons who claim that their debts take priority over the

104. Cf. *Cox v. A. P. Green Fire Brick Co.*, 230 Mo. App. 774, 75 S.W. 2d 621 (1934).

105. *Creed v. Lancaster Bank*, 1 Ohio St. 1 (1852); *Hamilton v. Bradley*, 6 Tenn. (5 Hayw.) 127 (1818) Cf. *Higham v. Vanosdal*, 125 Ind. 74, 25 N.E. 140 (1890), where a parent purchased property for his son, without an agreement that the son should pay for it. Thereafter a suit was instituted against the son, who while the suit was pending, ostensibly to secure the purchase price of the land, executed a mortgage to the father. Held, the mortgage was void as to the son's creditors.

106. *Russell v. Smith*, 115 Iowa 261, 88 N.W. 361 (1901); *Corbett v. Wright*, 120 Va. 471, 91 S.E. 612 (1917).

107. *Nicholson v. Caress*, 59 Ind. 39 (1877).



claim of the estate, especially where the estate seeks to set off the indebtedness against real estate. In all instances the courts hold that the decedent's estate takes priority over the claims of other creditors.<sup>108</sup>

In *Trader's Bank v. Dennis Estate*,<sup>109</sup> plaintiff claimed that a note held by it which was secured by deed of trust took priority over the claim of the estate of a decedent, from whom plaintiff's debtor had inherited the property. The note and deed of trust were executed prior to the death of decedent, and decedent before his death was surety on an obligation for the debtor which his administrator was compelled to pay. Since the deed of trust took effect at intestate's death and the suretyship obligation was not paid until later, plaintiff claimed that its deed of trust was prior to the claim of the administrator. The administrator claimed that the real estate descended to the debtor subject to his right of set off. Held, that the claim of the administrator was prior to that of the holder of the deed of trust.

In *Studer v. Harlan*,<sup>110</sup> a partition suit, the purchasers of the interest of one of testatrix's children claimed that debts due from their vendor to the testatrix should be first taken from the child's interest in the personal estate, and if the debts exceeded the interest in the personal estate then they should be deducted from the real estate. Held, that debts should be deducted first from the personal estate and if they exceed the personal estate then they should be deducted from the real estate. The court also pointed out that the partition suit should under the circumstances be held in abeyance until it was determined whether the child's interest in the personal estate was sufficient to pay the debts he owed testatrix.

A conveyance by one child of a decedent to the other children of his interest in the decedent's estate is not fraudulent as to his creditors if he is indebted to the estate in a sum exceeding his interest in the estate. The reason for the rule is that creditors are not prejudiced by the conveyance because the child did not have anything coming from the estate.<sup>111</sup> In

108. *Hopkins v. Thompson*, 73 Mo. App. 401 (1898). Cf. *Wright v. Green*, 239 Mo. 449, 144 S.W. 437 (1912). In that case the father of intestate was one of her heirs at law and was indebted to the estate in the sum of \$136. The father was adjudicated a bankrupt and his interest in intestate's real estate was sold at bankruptcy auction sale. The purchaser of the property at bankruptcy sale offered to buy the indebtedness to the estate, but his tender was refused. Held, the indebtedness did not divest the father of title and payment of the debt would leave the interest free and clear, and therefore payment of the debt by the purchaser at the bankruptcy sale divested the estate of any claim against the father's interest.

109. 221 S.W. 796 (Mo. App. 1920).

110. 109 S.W. 2d 687 (Mo. App. 1937).

111. *Trabue v. Henderson*, 180 Mo. 616, 79 S.W. 451 (1904).

*Duffey v. Duffey*,<sup>112</sup> a child who was indebted to the intestate claimed that he was entitled to an exemption as the head of a family which must be allowed to him before the right of retainer was applicable. Held, where the estate is setting off a debt by virtue of the right of retainer doctrine, the child is not entitled to the statutory deductions as the head of a family.

In *Ford v. O'Donnell*,<sup>113</sup> one Miles O'Donnell assigned his interest in his father's estate to defendant for value. Thereafter, the administrator of his father's estate sued Miles and obtained a judgment. Before obtaining judgment, he notified defendant of the existence of the proceeding. Thereafter, in this proceeding the judgments were held not admissible and defendant was permitted to relitigate the issue of Miles' indebtedness. That case suggests that the best procedure for setting off a debt against the purchaser of a child's interest in the estate is to deduct the indebtedness on final settlement, rather than obtaining a judgment against the child.<sup>114</sup>

## XII. VALUATION AND INTEREST

A parent may give a child property in his lifetime which is worth \$5,000 and at the parent's death the property may be worth much more or much less than that amount. Likewise, a child may receive an advancement many years before his parent's death and the other children may insist that he account for interest or if the child is indebted to the parent, the question of interest may arise when the right of retainer is brought into play.

The Missouri statutes do not provide for the valuing of advancements. However, the cases hold that advancements are to be valued when made, because the advancement is made at the risk of the child receiving it and, therefore, he should be entitled to any gain.<sup>115</sup>

The Missouri cases state that the advancer can at the time of the transfer place a value on the property and that value will control.<sup>116</sup> That statement which is made in two decisions of our courts can lead to disastrous results if carried to its logical conclusion. In *Ray v. Loper*,<sup>117</sup> the first case

112. 155 Mo. 144, 55 S.W. 1002 (1900).

113. 40 Mo. App. 51 (1890).

114. A reading of *Ford v. O'Donnell*, 40 Mo. App. 51 (1890) may mislead the reader because that case referred to a previous case between the parties in which the St. Louis Court of Appeals held that the probate court did not have jurisdiction to determine the validity of the debt. However, this line of cases was overruled by *Elliott v. Nelson*, 98 Mo. 379, 11 S.W. 739 (1889). Cf. *Gorg v. Rutherford*, 31 S.W. 585 (Mo. App. 1930).

115. *Ladd v. Stephens*, 147 Mo. 319, 48 S.W. 916 (1898); *Ray v. Loper*, 65 Mo. 470 (1877). Cf. *Nelson v. Wyan*, 21 Mo. 347 (1855).

116. *Ladd v. Stephens*, *supra* n. 115; *Ray v. Loper*, *supra* n. 115.

117. 65 Mo. 470 (1877).

making that statement, and in which it was dictum, the question was whether a transaction was a gift or advancement. In the other case, *Ladd v. Stephens*,<sup>118</sup> the parent had, when he gave the property to the child, placed a value on it which was known to the child.

*Ray v. Loper* and *Ladd v. Stephens* must be limited in effect to those instances where the amount of the advancement is made known to the child. If the value is not made known to the child, he is deemed to have accepted it at its actual value, and the advancor's valuation cannot control. If the parent in placing a value on the advancement was seeking to reduce the value to an amount which is less than the value at the time of the advancement, he can do so without the advancee's assent, because his actions are beneficial to the advancee and acceptance is presumed.<sup>119</sup>

Interest is not chargeable on advancements in Missouri, because an advancement is a gift.

In *Nelson v. Wyan*,<sup>120</sup> the supreme court in discussing whether interest is chargeable on advancements said:

"The rule is that advancements do not bear interest. . . . It would work gross injustice to make them do so. A parent advances to a child a thousand dollars; twenty years after, he advances to another child, who was then unborn; now, this rule of making advancements bear interest would require the parent, in order to equalize his bounty, to give to the child last advanced, as our rate of interest is now, ten per cent, three thousand dollars. He must have his thousand dollars by way of advancement, and his twenty years' interest thereon, making two thousand dollars more, in order to make him equal with the child first advanced. An advancement is at the risk of the child advanced, from the time it is made. If it is lost, or is destroyed, or perishes it is at the risk of the child advanced. It is his loss, and he is chargeable with the value of it, at the time the advancement is made, and with no more. So, if the property or money advanced is increased—if it becomes more valuable; or the child would not have been credited by it had it perished, so he shall not be chargeable with any profits it may make. . . . These advancements are gifts; they are not debts which are discharged. . . ."

Likewise, if a stock pays dividends after the advancement the advancee need not account for them.<sup>121</sup>

118. 147 Mo. 319, 48 S.W. 915 (1898).

119. Cf. *Wallace v. Owen*, 71 Ga. 544 (1876); *Wheeler v. Wheeler's Estate*, 47 Vt. 637 (1874).

120. 21 Mo. 347, 352-353 (1855).

121. *Ladd v. Stephens*, 147 Mo. 319, 48 S.W. 915 (1898).

Our courts have never been called upon to determine whether an advancement bears interest after the death of the advantor and before the estate is finally settled. Most jurisdictions which have passed on this question hold that interest is chargeable after the death of the advantor,<sup>122</sup> but disagree as to the date that interest commences to run. According to one view, interest is recoverable from the date of the advantor's death to the date an order of distribution should be entered.<sup>123</sup> Another view is that interest does not commence until after the expiration of a reasonable time for the settlement of the estate,<sup>124</sup> and a third view is that interest is chargeable from the date of the advantor's death to the day the order for final distribution is entered.<sup>125</sup>

Where a debt is owed the decedent, and the executor or administrator seeks to set it off against a distributive share of the estate, it bears interest to the date of death, if the note provided therefore or if the obligation was past due.<sup>126</sup>

In *Studer v. Harlan*,<sup>127</sup> the St. Louis Court of Appeals stated the interest rule to be applied after death to be as follows:

"The case being one involving the doctrine of equitable retainer, we think that the date of the death of the deceased should determine this feature of the controversy. The will of the deceased spoke as of that date, and it was then that Maud Young became vested with her interest or share in the estate, which consisted, as we have already pointed out, of her distributive or inherited share less what she owed the estate. It follows, therefore, that if such share was equal to or in excess of the amount of her indebtedness, then no interest should accrue on her note subsequent to the death of the deceased as of which date the executors are retaining so much of Maud Young's share as will offset her indebtedness to the estate. In other words, her indebtedness is discharged, not by actual payment of the note, but upon the principle of equitable retainer, and it could only be in the event that her indebtedness to the estate exceeded the amount of her inherited or distributive share that interest should continue to accrue, and then only upon so much of the principal of the note as was in excess of the share vesting in her."

122. *Dixon v. Marston*, 64 N.H. 433, 14 Atl. 728 (1887); *McKelvey v. Burrow*, 89 Tenn. 101, 17 S.W. 1035 (1890).

123. *Jackson v. Jackson*, 25 Tenn. App. 198, 154 S.W. 2d 797 (1939).

124. *Tart v. Tart*, 154 N.C. 502, 70 S.E. 929 (1911).

125. *Wysong v. Rambo*, 56 S.W. 1053 (Tenn. Ch. App. 1899).

126. *Watts v. Mayes*, 232 S.W. 122 (Mo. 1921); *Studer v. Harlan*, 109 S.W. 2d 687 (Mo. App. 1937).

127. 109 S.W. 2d 687, 691 (Mo. App. 1937).

Although the rule stated in *Studer v. Harlan* seems to be a logical one, it does not represent the law in this state. In *Watts v. Mayes*,<sup>128</sup> the supreme court held that the distributee could avoid interest by paying the debt and that since the executor had a legal right to sue him rather than charge the debt on final settlement, he must pay interest until final settlement of the estate.

## CONCLUSIONS

### A. *Advancements*

The doctrine of advancements is of statutory origin and first became part of the Missouri law in 1822, and the statute enacted in that year has never been changed. The drafters of the statute seemed to think that the advancement concept was derived from the gift in frankmarriage.<sup>129</sup> For that reason they worded the statute in part as follows: "When any of the children of the intestate . . . shall choose to come into partition with the other parceners, such advancement shall be brought into hotchpot."<sup>130</sup>

The language of the statute tends to mislead persons, who have problems involving it, because of the use of such words as "choose," "partition," "parceners" and "hotchpot." Those words were incorporated in the statute because the authors believed that the doctrine was derived from the gift in frankmarriage, which doctrine only applied to real estate and which required the donee in frankmarriage to return the identical property received to the estate.<sup>131</sup> In this state the doctrine of advancement applies to both real and personal property.<sup>132</sup> Although some cases indicate the advancees must elect to participate in the estate, an election is unnecessary because the property received by the advancee is not returned to the estate, but it is charged to the advancee at its value at the time of the advancement.<sup>133</sup> Also, the advancee is not required to return the excess if he received more by way of advancement than his distributive share of the estate.<sup>134</sup> For those reasons the statute should be changed to eliminate such words as "choose," "partition," "parceners" and "hotchpot."

The statute uses the word "children" in describing the class of persons who must account for advancements. By judicial legislation the court has

128. 232 S.W. 122 (Mo. 1921).

129. *Law v. Smith*, 2 R.I. 244 (1852); 1 COKE'S FIRST INSTITUTES 721; 2 BL. COMM. \*190.

130. MO. REV. STAT. § 468.110 (1949).

131. Note 129, *supra*.

132. *Elliott v. Wilson*, 98 Mo. 379, 11 S.W. 739 (1889).

133. *Ray v. Loper*, 65 Mo. 470 (1877).

134. Note 96, *supra*.

construed the word "children" to include "grandchildren" in those instances where advancements were made to a child, who predeceased the intestate, and was survived by grandchildren.<sup>135</sup> Our courts have never decided whether grandchildren must account for advancements made to them by the intestate after their parent's death. However, since advancements are designed to produce equality among children, the courts of this state would undoubtedly require grandchildren to account for advancements made to them if they inherit by right of representation. Because a grandparent may feel that he occupies the relation of parent to a grandchild after his parent's death the statute should include grandchildren. However, the doctrine should not be extended to include a surviving spouse or collateral relatives.

Advancement statutes are designed to make such a will for an intestate as he would in all likelihood have made for himself. Because of our belief that a man should be permitted to dispose of his property as he pleases, the courts of this state hold that the intent of the advantor determines whether a voluntary inter vivos transfer is an advancement or absolute gift.<sup>136</sup> In determining that intention the courts presume that all substantial voluntary inter vivos transfers are advancements.<sup>137</sup> Such a presumption is based upon the theory that the intestate desires all of his children to share equally in his estate, including what comes from him in his lifetime, as well as at his death.<sup>138</sup>

The presumption is not a logical one because if the intestate intended for his children to share equally in his estate he would (1) attach conditions to the voluntary transfer at the time it was made which would show an advancement was intended, or (2) execute a will charging the voluntary transfer as an advancement. If he does neither of these things the logical assumption is that he did not intend to charge the transfer as an advancement. For that reason the authors of the *Model Probate Code* have prepared a provision of their model advancement statute which reads as follows: "Every gratuitous inter vivos transfer is deemed to be an absolute gift and not an advancement unless shown to be an advancement."<sup>139</sup> In the writer's opinion such a provision should be incorporated in the Missouri advancement statute, and the

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135. *In re William's Estate*, 62 Mo. App. 339 (1895).

136. *Alleman v. Manning*, 44 Mo. App. 4 (1891).

137. *Lynch v. Culver*, 260 Mo. 295, 168 S.W. 1138 (1914); *Gunn v. Thruston*, 130 Mo. 339, 32 S.W. 654 (1895); *Pitts v. Metzger*, 195 Mo. App. 677, 187 S.W. 610 (1916).

138. *Miller v. Richardson*, 85 S.W. 2d 41 (Mo. 1941).

139. *Simes and Basye, Problems in Probate Law*, MODEL PROBATE CODE § 29, pp. 65-66 (1949).

provisions of Section 468.120 providing that maintaining, educating or giving money to a child under the age of majority, without a view to a portion or settlement in life, shall not be deemed an advancement, should be eliminated.

In the writer's opinion an appropriate advancement statute in Missouri should read as follows:

(a) If a person dies intestate, real or personal property which he gave as an advancement in his lifetime to any of his children or grandchildren, who if the intestate had died at the time of making the advancement would be entitled to inherit a part of his estate, shall be counted toward the advancee's intestate share, but the advancee shall not be compelled to refund any part of such advancement, if it exceeds his distributive share of the estate. Every gratuitous inter vivos transfer is deemed to be an absolute gift and not an advancement unless shown to be an advancement.

(b) Advancements shall be valued as of their value at the time of the voluntary inter vivos transfer, unless the advancee comes into possession or enjoyment at a later date, and in that event they shall be valued as of the time the advancee came into possession or enjoyment or at the death of the intestate, whichever first occurs.

If advancements are restricted to voluntary inter vivos transfers from an intestate to a child or grandchild and if the presumption is one of absolute gift rather than advancement, the writer is of the opinion that much litigation between children and grandchildren of intestates will be avoided.

### B. *The Right of Retainer*

The right of retainer doctrine is designed to simplify the collection of debts due a testator or intestate from his heirs or devisees. By permitting the executor or administrator to set off a debt on final settlement of the estate, the courts relieve him of the necessity of procuring a judgment against the heir or devisee.<sup>140</sup>

By use of the doctrine the executor or administrator can also obtain priority over other creditors of the heir or devisee to the extent of the interest of such heir or devisee in the estate, whether his interest be in real or personal property.<sup>141</sup> To the extent that the doctrine accomplishes these results it should be retained in Missouri. However, our courts have extended the doctrine to permit the administrator or executor to set off debts barred by bankruptcy or limitations against the share of the heir or leg-

140. *Gorg v. Rutherford*, 31 S.W. 2d 585 (Mo. App. 1930).

141. *Trader's Bank v. Dennis Estate*, 221 S.W. 796 (Mo. App. 1920).

atee.<sup>142</sup> In the writer's opinion the doctrine should not be used to allow an executor or administrator to set off an obligation against the share of an heir or distributee unless he could collect the claimed obligation by an action in a court of appropriate jurisdiction.

A testator or intestate who permits a debt to be barred by bankruptcy or limitations could recoup any loss he feels that he has suffered by changing his will or by dying testate instead of intestate. Since he failed to change the outlawed obligation by will, the presumption should be that he did not intend the outlawed obligation to be deducted from the distributive share of the heir or legatee.

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142. *Thompson v. McCune*, 333 Mo. 758, 63 S.W. 2d 41 (1933) (limitations); *Leach v. Armstrong*, 156 S.W. 959 (1941) (bankruptcy).