Missouri Law Review

Volume 23
Issue 4 *November 1958*

Article 10

1958

Trusts and Succession in Missouri-1957

William F. Fratcher

TRUSTS AND SUCCESSION IN MISSOURI–1957*

WILLIAM F. FRATCHER**

Probably the most interesting decision of the year was that in *Cook v. Daniels*,[1] which involved the question of whether an instrument in the form of a deed manifested a testamentary intent. In 1918 Allen Weaver executed a deed conveying land to his wife Myrtle and the heirs of her body.[2] The habendum was followed by a clause reading, "The Grantor herein conveys to the said Myrtle Weaver, his wife, and to the heirs of her body, all his right, title and interest in the above land, to be effective at his death, reserving herein a life estate in said land, intending at the death of his wife, Myrtle Weaver, for the land to descend to the heirs of her body."[3] In 1926 Allen and Myrtle Weaver executed a warranty deed purporting to convey the entire title to defendants' ancestor. After the deaths of Allen and Myrtle Weaver the children of Myrtle brought suit for a determination that they owned the land in fee simple. A judgment for the plaintiffs was affirmed, the court holding that the 1918 deed was not testamentary, that the children of Myrtle took by purchase and not by descent, and that, because they took by purchase rather than as heirs, they were not estopped by the warranties in the 1926 deed.

The common law did not permit the transmission of a freehold estate in land by will[4] or the creation by an inter vivos conveyance of any freehold estate in land to commence in possession in the future except the remainder.[5] A remainder could be created only incident to the conveyance to a definite living person, other than the grantor, of a present possessory

---

*This Article contains a discussion of selected 1957 Missouri court decisions.

**Professor of Law, University of Missouri; A.B., Wayne University, 1933, A.M., 1938; J.D., University of Michigan, 1936, LL.M., 1951, S.J.D., 1952.

1. 306 S.W.2d 573 (Mo. 1957).

2. § 451.290, RSMo 1949 has been construed as abolishing the common law disability of a husband to convey directly to his wife. Hall v. Hall, 346 Mo. 1217, 145 S.W.2d 752 (1940).

3. 306 S.W.2d at 574-75.

4. 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 312-28 (1895). There were exceptions to this rule in certain localities. *Id.* at 330.

5. DIGBY, HISTORY OF THE LAW OF REAL PROPERTY 219 (3d ed. 1884); GRAY, RULE AGAINST PERPETUITIES § 918 (3d ed. 1915).

estate for life or in tail and so as to become possessory immediately upon the expiration of the preceding particular estate. Consequently, at common law it was not possible to convey an estate for life, in fee simple or fee tail to commence in possession at the death of the grantor.[6] The Statute of Uses[7] made it possible, by way of executed springing use, to make an inter vivos conveyance of a legal freehold estate to commence in possession at the death of the grantor.[8] The Statute of Wills made it possible to devise a legal freehold estate to commence in possession at the death of the devisor.[9] Since the enactment of these statutes, an owner of land has had two optional methods of creating freehold estates to commence in possession at his death—by inter vivos conveyance or by will.

When an owner has attempted to create a freehold estate to commence in possession at his death it is necessary, for two reasons, to determine which of the two methods he has chosen: First, the formal requirements for inter vivos conveyances differ from those for wills; Second, a will conveys nothing until death. If, after making a will devising land, the owner conveys the land to another, the devise is defeated by ademption. An inter vivos conveyance of a freehold estate to commence in possession at the death of the grantor, on the other hand, passes the estate to the grantee immediately, subject only to the grantor's right of possession during his lifetime, so that the estate conveyed cannot be defeated by any subsequent act of the grantor.

Whether an instrument following the form of a deed and purporting to create an estate to commence in possession at the death of the grantor is an inter vivos conveyance or a will depends upon the judicially determined intent of the grantor: if he intended to pass title presently to a future interest, the instrument is an inter vivos conveyance; if he intended nothing to pass until death, it is a will. Because of widely

---

6. Hogg v. Cross, Cro. Eliz. 254, 78 Eng. Rep. 510 (1591); Barwick's Case, 5 Co. Rep. 93b, 77 Eng. Rep. 199 (1598).

7. 1535, 27 HEN. VIII, c. 10.

8. BROOKE, GRAUNDE ABRIDGEMENT, *Feffements al Uses*, pl. 30, 50 (1573); DIGBY, HISTORY OF THE LAW OF REAL PROPERTY 313 (3d ed. 1884); 4 HOLDSWORTH, HISTORY OF ENGLISH LAW 440, 474 (1924); RESTATEMENT, PROPERTY, Introductory Note to div. III (1936). Many states have statutes expressly permitting conveyance of a freehold estate to commence in possession in the future; *e.g.*, § 442.510, RSMo 1949 (". . . and hereafter an estate of freehold or of inheritance may be made to commence in future by deed, in like manner as by will." See O'Day v. Meadows, 194 Mo. 588, 92 S.W. 637 (1906); Eckardt, *Property*, 4 Mo. L. REV. 419, 420 (1939).

9. 1540, 32 HEN. VIII, c. 1.

varying language in and circumstances surrounding the execution of such instruments, the cases construing them are numerous and the results varied.[10] The specific language in the instrument involved in the instant case, which raises question as to its inter vivos character, is the clause, "Grantor herein conveys . . . all his right, title and interest in the above land, *to be effective at his death.*"[11] Such language has commonly been construed to mean that the estate conveyed is to take effect *in possession* at death but that the instrument is immediately effective as an inter vivos conveyance of a future interest.[12] There are, however, several Missouri decisions treating such language as manifesting a testamentary intent.[13] On this point, the decision in *Cook v. Daniels* accepts the construction commonly made in other states. The decision may represent a shift in the constructional preference in this state, but in view of the language of the instrument relative to reservation of a life estate in the grantor it is not clear that it does so.

The language in the granting and habendum clauses of the instrument involved in *Cook v. Daniels,* to the grantee "and the heirs of her body"[14] was that normally used to create an estate tail. The clause which followed the habendum read, to the grantee " 'and to the heirs of her body . . . intending at the death [of the grantee] . . . for the land to *descend* to the heirs of her body.' "[15] (Emphasis added.) This language is consistent with that of the granting and habendum clauses in indicating an intention to create an estate tail which would pass, at the death of the grantee, to the heirs of her body by descent and not by purchase. Nevertheless, the opinion stated, "Certainly, it is clear that the land involved was intended to be conveyed by this deed to the heirs of the body of the grantee as remaindermen."[16] At common law, under the Rule in *Shelley's Case,*[17] a

10. Annots., 11 A.L.R. 23 (1921), 31 A.L.R.2d 532 (1953).
11. 306 S.W.2d at 574-75.
12. The cases are collected in Annots., 11 A.L.R. 23, 69-74, 92-96 (1921), 31 A.L.R.2d 532, 556-68, 585-90 (1953).
13. Thorp v. Daniel, 339 Mo. 763, 99 S.W.2d 42 (1936); Kanan v. Hogan, 307 Mo. 269, 270 S.W. 646 (1925); Hohenstreet v. Segelhorst, 285 Mo. 507, 227 S.W. 80 (1920); Goodale v. Evans, 263 Mo. 219, 172 S.W. 370 (1914); Terry v. Glover, 235 Mo. 544, 139 S.W. 337 (1911); Givens v. Ott, 222 Mo. 395, 121 S.W. 23 (1909); Murphy v. Gabbert, 166 Mo. 596, 66 S.W. 536 (1902). *Cf.* Barker v. Barker, 219 S.W.2d 391 (Mo. 1949), 15 Mo. L. REV. 376, 383 (1950); Dawson v. Taylor, 214 S.W. 852 (Mo. 1919); Wimpey v. Ledford, 177 S.W. 302 (Mo. 1915); Comment, 5 Mo. L. REV. 350, 351-52 (1940).
14. 306 S.W.2d at 574.
15. *Id.* at 575.
16. *Id.* at 576.
17. 1 Co. Rep. 93b, 76 Eng. Rep. 206 (1581).

conveyance to a grantee for life with remainder to the heirs of his body passed an estate in fee tail to the grantee and the heirs of his body took by descent notwithstanding the clearly manifested intent that they should take by purchase. As the opinion observed, the Rule in *Shelley's Case* has been abolished by statute in Missouri[18] so that, if the court's strained construction of the instrument be accepted, its conclusion that the heirs of the body of the grantee took by purchase rather than by descent necessarily follows. This strained construction of the instrument was, however, unnecessary. If the language of the deed had been given its natural and usual meaning as manifesting an intention to create an estate in fee tail in the grantee, another Missouri statute would ensure that the heirs of the body of the grantee took by purchase rather than by descent.[19]

Two other deceisions were of particular importance because they involved questions of first impression in this state. *Minor v. Lillard*[20] was concerned with the amendment of a claim against the estate of a decedent after the period for filing claims allowed by the non-claim statute had expired. Section 464.020, Missouri Revised Statutes (1949) (since superseded by section 473.360, Missouri Revised Statutes (1957 Supp.) which reduces the period to nine months) provided that claims against estates must be filed within one year or be forever barred. Within the year claimant filed a claim for $7,157.60 for nursing services rendered to the decendent over a period of six and a half years prior to her death. This claim was allowed in full by the probate court in 1954 and by the circuit court on appeal. The supreme court reversed this judgment in 1956 on the ground that, as the evidence showed that the services were not continuous, the five-year statute of limitations barred part of the claim.[21] The circuit court then permitted claimant to amend her claim so as to

18. § 442.490, RSMo 1949 ("where a remainder shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heir or heirs of the body of such tenant for life shall be entitled to take as purchasers in fee simple, by virtue of the remainder so limited in them").

19. § 442.470, RSMo 1949 ("in case where, by the common or statute law of England, any person might become seized in fee tail of any lands, by virtue of any devise, gift, grant or other conveyance, or by any other means whatever, such person, instead of being seized thereof in fee tail, shall be deemed and adjudged to be, and shall become, seized thereof for his natural life only; and the remainder shall pass in fee simple absolute to the person to whom the estate tail would, on the death of the first grantee, devisee or donee in tail, first pass according to the course of the common law, by virtue of such devise, gift, grant or conveyance").

20. 306 S.W. 2d 541 (Mo. 1957).

21. Minor v. Lillard, 289 S.W.2d 1 (Mo. 1956), 22 Mo. L. REV. 402 (1957).

increase it to $11,189.60. After evidence that the services were continuous over the whole period, the jury returned a verdict for $10,000. The circuit court entered judgment for this amount plus interest on the original claim from the date of its allowance by the probate court in 1954. The supreme court required a remittitur of so much of the judgment as exceeded $7,157.60, the amount of the original claim. The opinion is a careful study of decisions in other states relative to similar non-claim statutes and of the purpose of the non-claim statute as revealed by other Missouri statutes. It concludes that, unlike general statutes of limitation, non-claim statutes have a special purpose of expediting administration of estates. Although claims against estates may be amended after the non-claim period,[22] such an amendment may not increase the amount of the claim. The opinion makes it clear that the same rule will apply under the new Missouri probate code. It was further held that interest on the original judgment was not authorized because of its reversal.

The other case involving an important question of first impression was *In re Gerling's Estate.*[23] Decedent owned land and corporate stock jointly with her brother, who survived her. They had contributed equally to the purchase price of the land; decedent had provided the whole purchase price of the stock. It was held that none of this property was taxable under the Missouri inheritance tax laws[24] because no interest passed at or in contemplation of death. The court recognized that the passage of joint property to the survivor is commonly taxable under the inheritance tax legislation of other states[25] but held that the Missouri statutes, under a narrow construction, did not include it.

Another inheritance tax case, *In re Atkins' Estate,*[26] would have been of great importance but for legislation, enacted after the occurrence of the facts involved, making clear provision as to the point involved. Decedent died in January 1956, leaving a will by which he bequeathed $5.00 to each of his three sons and the residue to his widow. The widow elected to take under the will, which did not provide that the residuary bequest was in lieu of marital rights. Missouri Laws of 1953, at 739,[27]

22. Siegel v. Ellis, 288 S.W.2d 932 (Mo. 1956), 22 Mo. L. REV. 402 (1957).
23. 303 S.W.2d 915 (Mo. 1957), 23 Mo. L. REV. 240 (1958).
24. §§ 145.010-.240, RSMo 1949 as amended.
25. Annot., 1 A.L.R.2d 1101 (1948).
26. 307 S.W.2d 420 (Mo. 1957).
27. § 145.090(3), RSMo 1955 Supp.

(since superseded by section 145.090(3), Missouri Revised Statutes (1957 Supp.)) provided that the value of marital rights which would accrue to a surviving spouse upon renunciation of the will was exempt from state inheritance tax. Section 252 of the Missouri probate code[28] (since superseded by section 474.160, Missouri Revised Statutes (1957 Supp.)) providing that a surviving spouse who elected to take against the will was entitled to one third of the estate. The probate and circuit courts deducted one third of the estate before computing the inheritance tax. The state appealed on the ground that, under the probate code, when a surviving spouse elects to take under the will, she has no marital rights except those to the household goods,[29] a year's maintenance[30] and the homestead allowance.[31] The supreme court affirmed, holding that the value of the forced share is deductible whether or not the surviving spouse elects to take against the will and pointing out that section 145.090(3) was amended in 1957[32] to make it clear that this is the case.

Intestate Descent and Distribution

The statutory right of a child not provided for in his parent's will to take a share in the parent's estate as on intestacy was involved in *Hegger v. Kausler*.[33] After her father had died and her mother had contracted a fatal illness, plaintiff, then aged four, was taken into the house of her maternal uncle and his wife and remained there until she married at the age of 32. The uncle and his wife discussed adopting her but did not do so and she went by her father's name until her marriage. The uncle's wife sometimes referred to her in conversation as her child but, in formal documents, always did so as her niece or her husband's niece. When plaintiff was about 40, the uncle's widow executed a will giving her estate to her brother, and died soon after. Plaintiff sought a decree that she was an equitably adopted child of her uncle's widow and entitled to her estate under the pretermitted child statute then in force.[34] Dismissal of the petition was affirmed on the ground that, although when one

28. Mo. Laws 1955, at 465, codified as § 474.160, RSMo 1955 Supp.
29. § 474.250, RSMo 1957 Supp.
30. § 474.260, RSMo 1957 Supp.
31. § 474.290, RSMo 1957 Supp.
32. Mo. Laws 1957, at 782.
33. 303 S.W.2d 81 (Mo. 1957).
34. § 468.290, RSMo 1949 which gave an intestate share to every child, whenever born, not named or provided for in the parent's will. It has since been superseded by § 474.240, RSMo 1957 Supp. which gives such a share only to children born or adopted after the making of the will and those whom the testator mistakenly believes to be dead.

voluntarily assumes the status of parent he may be estopped to deny adoption if justice, equity and good faith require it, the grounds for such estopped were not clearly shown in this case.

CONTRACTS TO MAKE WILLS

An appropriate attitude of suspicion toward assertions that a person now dead contracted to make a will was manifested in *Higgins v. Rachford.*[35] Plaintiff, a divorcee who operated a beauty parlor, sued the administrator and heirs for specific performance of an alleged oral contract by which decedent, an ailing elderly man without wife or close relatives, agreed, in consideration of plaintiff's refraining from social engagements with other men and acting as his confidential secretary, companion and nurse during all her free time, so long as he lived, to devise or convey his entire estate to her, subject to his debts. There was evidence that decedent had told several persons that he had an agreement with plaintiff to care for him and that she would have everything after he was gone. Undelivered deeds conveying all his property to plaintiff were found in decedent's lock box, together with a witnessed and acknowledged letter directing her to record the deeds, keep 15%, and give the rest to designated charities. A judgment denying relief on the ground that there was not clear and convincing evidence of the specific terms of the contract was modified with directions to allow plaintiff to recover the reasonable value of her services. The supreme court held that the plaintiff could not enforce the contract both because of the lack of proof of its exact terms and because her alleged performance, necessary to take the contract out of the Statute of Frauds, was not clearly referable to the contract.

WILL CONTESTS

In *Hammonds v. Hammonds*[36] decedent's children by his first wife brought an action against his fourth and surviving wife to contest his

---

35. 307 S.W.2d 411 (Mo. 1957). In view of the relationship between the parties, a less suspicious attitude toward such an assertion was probably warranted in Bealmear v. Beeson, 303 S.W.2d 690 (K.C. Ct. App. 1957). Decedent deserted his wife and baby son and remained absent for thirty years. The son grew up using the name of his mother's second husband and believing him to be his father. Decedent then returned, disclosed his identity and relationship and agreed orally to "give you all I have at my death" if the son would adopt his name and treat him as father. The son did so for twenty years. Decedent's will disinherited the son. The son sued to enforce the oral agreement as a contract to devise the entire estate. A decree denying relief was reversed with directions to grant specific performance. The opinion makes no direct mention of the Statute of Frauds.

36. 297 S.W.2d 391 (Mo. 1957).

will, executed in 1949, and to set aside deeds executed in 1944 and 1946, on the ground that the three instruments were procured by undue influence of the defendant. The parties stipulated that in the event the verdict of the jury was adverse to the plaintiffs as to the will, the issue as to the deeds "would also be so decided by the court."[37] There was no direct evidence of undue influence at the time of the making of the instruments. There was evidence that the decedent married the defendant in 1925 after her complaint against him for attempted rape had been nolle prossed; that the decedent declared that his wife had been blackmailing him by threats of prosecution under the Mann Act; that he sent his daughter a paper requesting a court to set aside the deeds; and that he had declared and evidenced by his conduct that his wife controlled his money, forbade his seeing his relatives, and kept him virtually confined to his house. The trial court directed a verdict for the defendant as to the will and entered judgment for her as to both the will and the deeds. The supreme court affirmed, saying that the testator's declarations were not competent in the absence of independent substantive evidence of undue influence.

On the question of undue influence the decision is, as the court recognized, difficult to reconcile with that in *Gott v. Dennis*.[38] In the *Dennis* case it was held that a testator's declarations that he had left his wife in 1871 because of pressure from his relatives were sufficient evidence of undue influence on the making of a will in 1912 to go to the jury. The decision is even harder to reconcile with *State v. Strother*,[39] where it was held that counts attacking a will and an inter vivos trust for undue influence could not be joined in the same action because, in a will contest, the court has no jurisdiction to consider any issue except the validity of the will. The instant decision appears to permit the parties to confer such jurisdiction by consent.

A different result was reached in *Hardy v. Barbour*.[40] In that case a will giving testatrix's only child, a daughter, one dollar and the residue of her substantial estate to strangers was contested by the daughter on the grounds of testamentary incapacity and an insane delusion that contestant had conspired to put testatrix into an insane asylum. Letters

37. *Id.* at 393.
38. 296 Mo. 66, 246 S.W. 218 (1922).
39. 289 S.W.2d 73 (Mo. 1956) (en banc), 22 Mo. L. Rev. 403 (1957).
40. 304 S.W.2d 21 (Mo. 1957).

from testatrix to contestant, manifesting hatred and a belief that contestant had so conspired were received in evidence, together with evidence that there were no reasonable grounds for the hatred and belief and testimony of an expert that the letters indicated schizophrenia. The circuit judge instructed the jury, *inter alia,* that strong hatred for contestant, without cause or reason, would, if it overcame the will and judgment of testatrix, negative testamentary capacity. After a verdict against the will the circuit court entered judgment probating the will, notwithstanding the verdict, and, in the alternative, granting a new trial on the ground that the instruction was erroneous in the absence of an allegation that the hatred was an insane delusion. The judgment and the order granting a new trial were reversed by the supreme court, which held that there was sufficient evidence of testamentary incapacity and insane delusion to go to the jury and that the instruction was warranted by the allegation of testamentary incapacity.

The important question of the right of a testamentary trustee to contest an alleged later will was passed upon, without adequate consideration, in *Freeman v. De Hart.*[41] A will dated May 19, 1954 which contained a lagacy of $1,000 to two individuals and bequeated the residue to such charities as the executor might select was provided. A will dated September 17, 1954, omitting these provisions, was admitted to probate. The legatees and executor under the prior will contested the later will on the ground of lack of mental capacity. The court of appeals ruled that the executor under the prior will had no standing to contest the later will and that the trial court did not abuse its discretion in allowing the jury to see a letter, written by a physician on August 27, 1954 and received in evidence, indicating that the testatrix was competent on that date.

There is a split of authority on the question of whether an executor named in a prior will has sufficient interest to contest a later will.[42] It is uniformly held, however, that a testamentary trustee named in a prior will may contest a later one.[43] In the present case the executor

41. 303 S.W.2d 217 (St. L. Ct. App. 1957).

42. ATKINSON, WILLS § 99 (2d ed. 1953). It has been held in Missouri that an executor lacks sufficient interest to appeal from a judgment sustaining a contest of the will naming him. O'Connell v. Dockery, 102 S.W.2d 748 (St. L. Ct. App. 1937); Shock v. Berry, 221 Mo. App. 718, 285 S.W. 122 (K.C. Ct. App. 1926); see Love v. White, 348 Mo. 640, 154 S.W.2d 759 (1941).

43. ATKINSON, WILLS § 99 (2d ed. 1953). Notes, 36 MICH. L. REV. 685 (1938), 25 MINN. L. REV. 120 (1940).

under the prior will was also the donee of a power to appoint to charities. It would seem that he was a trustee of the power of appointment and as such, should have been allowed to contest the later will which defeated the charitable disposition. If the trustee of such a charitable trust may not defend its validity, then no one but the attorney general may do so, it having no ascertainable beneficiaries capable of suing.

Construction of Wills

The scope of a testamentary power of sale was involved in *Edwards v. Payne*.[44] Testator devised his farm to his wife "during her natural life, and to sell any part of same if it be necessary for her maintenance and the remaining part to be divided equally between my children at her death."[45] Six years later the widow, who was 82, was ill, and had no means of support except the farm, worth $2,750, and an old age pension, conveyed the farm to defendant, a daughter, in consideration of defendant's promise to live with and care for her until death. The defendant fully performed this promise until the widow's death, ten years after the date of the deed. The other children sued to set aside the deed on the ground that it was not necessary for the maintenance of the widow and that the power of sale was limited to a sale for cash. A decree for the defendant was affirmed, thus rejecting both of the plaintiffs' contentions.

A power of sale given to a trustee is not ordinarily construed to authorize sale on credit, at least without adequate security for the purchase price.[46] A trustee, however, holds a power of sale for the benefit of the trust beneficiaries and the proceeds of the sale are equitably theirs. A power of sale of the fee for maintenance given to a life tenant is received for her own benefit and the proceeds of the sale are, at least to the extent required for her maintenance, hers. Consquently, such a power tends to be construed, as to mode of exercise, more liberally. Hence a construction permitting sale in consideration of the purchaser's unsecured promise to render personal services to the donee of the power may be appropriate.[47]

---

44. 307 S.W.2d 657 (Mo. 1957).
45. *Id.* at 658.
46. 2 Scott, Trusts § 190.7 (2d ed. 1956).
47. A similar construction of such a power was made in Gent v. Thomas, 363 Mo. 528, 252 S.W.2d 345 (1952). Proceeds of a sale under such a power remaining at the life tenant's death ordinarily pass to the remaindermen. Guthrie v. Crews, 286 Mo. 438, 229 S.W. 182 (1920); Redman v. Barger, 118 Mo. 568, 24 S.W. 177 (1893); Annot., 158 A.L.R. 480 (1945).
In Hereford v. Unknown Heirs of Tholozan, 306 S.W.2d 648 (St. L. Ct. App. 1957).

ADMINISTRATION OF ESTATES

In *Rodewald v. Rodewald*[48] the supreme court passed upon several interesting questions connected with enforcement of a surviving spouse's statutory right to an allowance for a year's support. Testator, who resided on a forty-acre farm and owned other land, devised his estate to his wife for life, with remainder in fee to their three children, all of whom were of age. The widow qualified as executrix, the home farm was appraised at $1,000, and the widow was granted an allowance of $1,200 for a year's support under section 462.450, Missouri Revised Statutes (1949) (since superseded by section 474.260, Missouri Revised Statutes (1957 Supp.)). The widow resigned as executrix without complying with section 461.510, Missouri Revised Statutes (1949) (since repealed), which required publication of notice of intention to resign. The irregular resignation was accepted and a daughter appointed administratrix de bonis non with the will annexed. After proper petition and notice the administratrix was authorized to and did sell the home farm to the widow at private sale for $1,000, in order to pay the support allowance. The widow later conveyed the home farm to the daughter. The other two children did not appeal from the probate order of sale but, after their mother's death, sued the daughter in equity to set aside the administratrix's deed to the mother on the grounds that (1) her appointment as administratrix de bonis non was void because of the lack of publication of notice of the executrix's intention to resign, and (2) the widow, by virtue of the will and the homestead statute then in force[49] (since superseded by section 474.290, Missouri Revised Statutes (1957 Supp.)) was a life tenant and her purchase of the fee enured to the benefit of the remainderman. A judgment for the defendant was affirmed. The court ruled that the appointment of the administratrix de bonis non without publication of notice of the executrix's intention to resign, although irregular, could not be attacked collaterally. A similar ruling, as to

---

plaintiffs sued to establish title to property under an ambiguous will. The will having been construed to give nothing to plaintiffs (Hereford v. Unknown Heirs of Tholozan, 292 S.W.2d 289 (Mo. 1956) (en banc), 22 Mo. L. REV. 400 (1957)), they sought fees for their attorneys from the estate of the testatrix. An order denying such fees was affirmed on the ground that, when no trust is involved, Missouri does not grant attorney's fees from the estate to an unsuccessful party suing to construe the will, even though the will is so ambiguous as to require construction.

48. 297 S.W.2d 536 (Mo. 1957).

49. § 513.495, RSMo 1949.

proceedings under the new probate code, is now required by express statute.[50]

The court also held that the widow, although a life tenant, could properly buy the fee for her own benefit at a sale to obtain funds for payment of her support allowance. "It is well established, at least when they are co-heirs or co-devisees, that when one of several tenants in common purchases an encumbrance on the whole title or a title which is adverse to all the co-tenants, he must share the benefit of his purchase with the others, they contributing their shares of the cost."[51] A similar rule is applied to a life tenant who buys the fee at a sale foreclosing an encumbrance on the whole title: he must, in effect, permit the remaindermen to redeem their interests.[52] In the instant case, however, it was the life tenant herself who owned the encumbrance on the whole title and the court's refusal to apply the rule to her would seem to be correct, particularly in view of the failure of the remaindermen to offer payment of their shares of the encumbrance.[53]

Allmon v. Allmon,[54] involved the special statutory procedure for discovery of assets of decedents' estates. A distributee commenced a proceeding for discovery of assets against the administrator under sections 462.400-.440, Missouri Revised Statutes (1949) (since superseded by sections 473.340-.353, Missouri Revised Statutes (1957 Supp.)) alleging that the administrator had received the proceeds of a check payable to the decedent. The administrator, in answer to interrogatories, admitted receiving the proceeds of the check but claimed that he had later paid an equivalent sum to the decedent. In the absence of evidence relating to this transaction the probate and circuit courts held for the administrator. The court of appeals reversed on the ground that, having admitted

---

50. § 473.013, RSMo 1957 Supp.

51. Fratcher, *Trusts and Succession*, 22 Mo. L. REV. 390, 395 (1957), citing Hinters v. Hinters, 114 Mo. 26, 21 S.W. 456 (1893); Annot., 54 A.L.R. 874 (1928). This rule was recognized, but held inapplicable to the facts involved, in Gilliam v. Gohn, 303 S.W.2d 101 (Mo. 1957).

52. Witcher v. Hanley, 299 Mo. 696, 253 S.W. 1002 (1923); Peak v. Peak, 228 Mo. 536, 128 S.W. 981 (1910); Meads v. Hutchinson, 111 Mo. 620, 19 S.W. 1111 (1892); Allen v. De Groodt, 98 Mo. 159, 11 S.W. 240 (1889), 105 Mo. 442, 16 S.W. 1049 (1891); 4 SIMES AND SMITH, LAW OF FUTURE INTERESTS § 1700 (2d ed. 1956); Annot., 54 A.L.R. 874, 910 (1928). There are contrary decisions in other jurisdictions; *e.g.*, Stortz v. Voss, 181 Ky. 546, 205 S.W. 610 (1918).

53. Morrison v. Roehl, 215 Mo. 545, 114 S.W. 981 (1908); Cockrill v. Hutchinson, 135 Mo. 67, 36 S.W. 375 (1896).

54. 306 S.W.2d 651 (Spr. Ct. App. 1957).

receipt of the money, the administrator had the burden of proving its repayment.

Mason's Estate v. Sagehorn[55] concerned the power of an administratrix to subject the decedent's real property to a mechanic's lien. The attorney for the administratrix authorized one Weber to repair a house owned by the deceased. The repairs were worth $1,700 and mechanics' liens were filed for labor and materials. In 1954 the administratrix secured an order for sale of the house and its site to pay debts. The heirs offered to pay $5,000 but the probate court confirmed a sale to Weber for $4,000, he assuming the repair cost. The circuit court and court of appeals affirmed confirmation of the sale on the ground that, his assumption of the repair cost considered, Weber's bid exceeded that of the heirs by $700.

The mechanics' lien statutes give a lien on the land and building to one who performs labor or furnishes material for repair of the building under a contract with the owner "or his agent, trustee, contractor or subcontractor."[56] Under Missouri law real property of an intestate passes on death directly to his heirs, not to the administrator.[57] The administrator is not entitled to possession of real estate without a court order.[58] Prior to the enactment of the probate code he had no authority to make repairs or improvements to real property without a court order.[59] From this it would appear that the administratrix was not the owner within the meaning of the mechanics' lien statutes and she would seem to have no authority to subject the land and building to a mechanic's lien[60] unless the heirs were estopped to deny that she was their agent for this purpose.[61] The opinion does not suggest the existence of facts which would raise such an estoppel. The repairs, unless readily removable, became real estate by accession or annexation and so property of the heirs. If the heirs were not bound by the administratrix's contract, they would not be personally liable for the repair cost and their title would not be

---

55. 303 S.W.2d 194 (St. L. Ct. App. 1957).
56. § 249.010, RSMo 1949.
57. Sturgeon v. Schaumburg, 40 Mo. 482 (1867); § 473.260, RSMo 1957 Supp.
58. §§ 462.280-.290, RSMo 1949, since superseded by § 473.263, RSMo 1958 Supp. to the same effect.
59. Clark v. Bettelheim, 144 Mo. 258, 46 S.W. 135 (1898); Ritchey v. Withers, 72 Mo. 556 (1880). § 473.263, RSMo 1957 Supp. authorizes him to repair if he is in possession under a court order.
60. Sol Abrahams & Son Const. Co. v. Osterholm, 136 S.W.2d 86 (St. L. Ct. App. 1940); Ford v. Dixon, 171 Mo. App. 275, 157 S.W. 99 (K.C. Ct. App. 1913).
61. Badger Lumber & Coal Co. v. Pugsley, 227 Mo. App. 1203, 61 S.W.2d 425 (K.C. Ct. App. 1933); Hughes v. Anslyn, 7 Mo. App. 400 (1879).

subject to a lien for such cost. This being so, the court's view that Weber's bid exceeded the heirs' offer would seem to be unsound.

The work of the Missouri supreme court in 1957 included decision of several cases of claims against decedents' estates. The plaintiff in *Jones v. Davis*,[62] who rendered nursing service to decedent during his last illness, sued the grantees in a deed given by decedent shortly before his death to set it aside on grounds of mental incompetence and undue influence. After trial and judgment for plaintiff, she secured allowance of a claim against decedent's estate for the value of the services. The supreme court reversed the judgment setting aside the deed without prejudice to the institution of a similar suit, holding that the instant suit was premature as a creditor of a decedent is not entitled to sue to set aside a conveyance made by the decedent without first securing allowance of his claim against the estate. Plaintiff was not aided by section 509.070, Missouri Revised Statutes (1949) which permits joinder in the same action of a claim for money and a claim to have a fraudulent conveyance set aside, because she failed to join decedent's administrator as a party.

At common law persons who were financially interested in the outcome of litigation were disqualified to testify as witnesses. Section 491.010, Missouri Revised Statutes (1949) abolishes this disqualification as to most situations but contains a provision commonly known as the dead man's statute, providing that where one of the parties to a contract is dead, the other party to the contract shall not be admitted to testify in his own favor, except that where the matter at issue is a matter of book account, the living party may testify as to the handwriting and when made. In *Moore v. Adams' Estate*[63] claimant filed a claim for repair work on buildings of the deceased, performed under oral contract with the deceased. On trial in the probate court claimant was permitted to testify,

62. 306 S.W.2d 479 (Mo. 1957).

63. 303 S.W.2d 936 (Mo. 1957). In Wright v. Fick, 303 S.W.2d 157 (St. L. Ct. App. 1957), the plaintiff sued an administrator in the circuit court, alleging that he had worked on the decedent's farm for twelve years under an oral agreement with the decedent to share the profits equally, that the oral agreement was unprovable because of the dead man statute, that the profits for the period were $3,648.54, and praying the reasonable value of his services *or* half the profits. There was testimony of others that the services were rendered and were not intended to be gratuitous. A judgment on a verdict for $4,000 was reduced to $1,824.27 plus interest on the theory that the plaintiff, by the terms of his prayer, had limited his possible recovery to half the profits. The court held that the mere mention of the unprovable express contract did not preclude recovery quantum meruit. If so, it is difficult to understand why the recovery should be restricted to the alleged contract amount.

over objection based on the statute, to identify his account books, which detailed the repair work done. Counsel for the executor and the beneficiaries under the will cross-examined him as to the oral contract and the extent of repairs. On appeal to the circuit court, objection was made, based on the statute, to claimant's testifying to the contract and the repairs. The circuit court overruled the objection on the ground the cross-examination in the probate court had waived the statute and its judgment for claimant was affirmed.[64]

McDaniel v. McDaniel,[65] involved a claim against the estate of a decedent for services as nurse and housekeeper to decedent and his wife for six years prior to his death. Claimant, a granddaughter who had lived with decedent since infancy, wished to leave and get a job when she graduated from high school. She stayed on for six years after being told by decedent that, because of the illness of the grandparents, one of the granddaughters must stay and that if she would stay "they would give her a good deal."[66] Held: This evidence was sufficient to warrant a jury finding that the presumption domestic services rendered by a relative are intended to be gratuitous was rebutted.

Ordinarily when a defendant dies pending trial or appeal the proceeding may be revived by or against his executor or administrator. *State ex rel. White v. Terte*[67] makes it clear that the normal rule does not apply to proceedings in or upon appeal from Missouri magistrates' courts. In that case the relator recovered a judgment against Rieger in a magistrate court on October 17, 1955. Rieger died on October 21, 1955. Rieger's attorneys filed a notice of appeal to the circuit court on October 25, 1955. An executrix of Rieger's estate received letters testamentary on October 26, 1955. She made no attempt to appeal the judgment and relator made no attempt to file a claim or lis pendens against the estate in the probate court. A writ of prohibition directing the circuit judge to refrain from exercising jurisdiction over the appeal was issued by the court of appeals. The supreme court affirmed. The court of appeals based its decision on the sole ground that Rieger's attorneys had no authority

64. See Annot., 36 A.L.R. 959, 969 (1925).
65. 305 S.W.2d 461 (Mo. 1957). A similar result was reached in Kivett v. Stanley, 305 S.W.2d 739 (K.C. Ct. App. 1957), where an adult daughter kept house and cared for her infirm father.
66. 305 S.W.2d at 463.
67. 303 S.W.2d 123 (Mo. 1957) (en banc).

to appeal on his behalf after his death.[68] The supreme court based its decision upon the additional ground that, even if Rieger had perfected an appeal in his lifetime or his executrix had done so within ten days after her appointment, the circuit court would have no jurisdiction.[69]

Section 517.450[70] provides that when a sole defendant in a magistrate court dies *before* judgment, proceedings shall cease and a transcript shall be transmitted to the probate court. Section 517.890 provides that when a defendant in a magistrate court dies *after judgment against him has become final,* a transcript of the judgment shall be exhibited to the probate court and there proceeded on as other judgments. Section 512.260 provides that if a party in a magistrate court who is entitled to an appeal dies *within the time allowed for entering the same,* an appeal may be taken within ten days after his administrator or executor has qualified. Section 482.100 provides that no magistrate shall have jurisdiction to hear or try any action against any executor or administrator. Section 464.060[71] provided that an action pending against a person at the time of his death, when revived against the executor or administrator, should be deemed a claim filed against his estate. Section 464.090[72] permitted suit in the circuit court against an estate. Section 464.080[73] permitted establishment of claims against an estate by judgment of a court of record. Section 517.050 provides that magistrates' courts are courts of record.

By holding that sections 512.260, 464.060, 464.090 and 464.080 are inapplicable to an appeal by or on behalf of a defendant in a magistrate's court who dies after judgment, the instant decision means that a judgment of a magistrate is deprived of its effect as a judgment if the defendant dies before it is collected. This appears to be the intended meaning of the Missouri probate code[74] but, prior to this decision, it was not at all clear that it was the meaning of the statutes superseded thereby. The theory of the decision is that a circuit court hearing an appeal from a magistrate

68. State *ex rel.* White v. Terte, 293 S.W.2d 6 (K.C. Ct. App. 1956).
69. Following Newman v. Weinstein, 230 Mo. App. 794, 75 S.W.2d 871 (St. L. Ct. App. 1934), a case in which the defendant had perfected an appeal before his death.
70. All statutory references, unless otherwise indicated, are to RSMo 1949.
71. Since superseded by § 473.363, RSMo 1957 Supp. which requires filing in the probate court of notice of revival.
72. Since superseded by § 473.367, RSMo 1957 Supp. which requires filing in the probate court of the process and return of service.
73. Since superseded by § 473.370, RSMo 1957 which is limited to courts of record other than magistrates' courts.
74. *Ibid.*

is not truly acting as a circuit court but as the appellate division of a magistrate's court.

Creation and Modification of Trusts

The parol evidence rule is thought of primarily in connection with contracts. It also applies to transactions involving the creation of trusts but its application to such transactions raises special problems. One of these received less than satisfactory handling in *Krummenacher v. Easton-Taylor Trust Co.*[75] Funds of decedent, an elderly woman, were deposited in a trust company in the names of herself and the plaintiff, who was a relative by marriage. When the account was opened, decedent and plaintiff signed an instrument addressed to the trust company providing that it should pay to or upon order of either or the survivor, without reference to the original ownership of the money. After decedent's death plaintiff sued for the amount on deposit, joining decedent's administrator as a party. The administrator offered evidence designed to prove that at the time of the original deposit plaintiff agreed orally with decedent to hold her rights in the account upon trust for decedent. The trial court excluded this evidence under the parol evidence rule and the court of appeals affirmed, saying that there was no evidence of fraud and suggesting that there was no evidence of an agreement to hold on trust.

Both the trial court and the court of appeals thought that, in the absence of fraud, parol evidence of a contemporaneous agreement to hold on trust was inadmissible under the rule announced in *Commerce Trust Co. v. Watts*[76] that the parol evidence rule applies to joint deposit agreements. For several reasons it would seem that the *Watts* case should not have been deemed controlling. First, the *Watts* case involved an agreement by the depositors "'each with the other'"[77] that all sums deposited "shall be owned by them jointly with right of survivorship."[78] In the instant case there was no such language; the instrument was merely a letter addressed to the trust company and designed for its protection. Second, the alleged agreement to hold on trust in the instant

75. 306 S.W.2d 593 (St. L. Ct. App. 1957).
76. 360 Mo. 971, 231 S.W.2d 817 (1950). *Accord:* Connor v. Temm, 270 S.W.2d 541 (St. L. Ct. App. 1954). These cases cite § 363.740, RSMo 1949 which provides that upon the making of a deposit payable to either or survivor it shall become "the property of such persons as joint tenants." See Annot., 33 A.L.R.2d 569 (1954).
77. 360 Mo. at 974, 231 S.W.2d at 818.
78. *Ibid.*

case did not vary or contradict the terms of the deposit agreement, even if that agreement should be treated as a contract between the parties to create a joint tenancy. It is well settled in Missouri as elsewhere that the parol evidence rule does not exclude extrinsic evidence that the grantee in a conveyance which is absolute in form was intended by the parties to hold the legal title so conveyed on trust for the grantor or another.[79]

The tendency of testators to express wishes as to how devisees and legatees shall deal with property, without making it clear whether the wishes are mandatory directions or mere advice, is a frequent source of litigation. The controversy in *Thompson v. Smith*[80] stemmed from this source. By the second paragraph of his will testator devised the residue of his estate to his wife. The third paragraph provided, " 'It is my wish and desire that as soon after my decease as may be practical that my widow make a will, thereby willing that part of the property which she has inherited from my estate that may be left at the time of her decease to my heirs, as I feel like it should be nothing more than fair and just that at the time of her decease for her to leave that part of the property which she has left which she inherited from my estate to my heirs.' "[81] A judgment determining that the wife took the residue in fee simple, free of trust, was affirmed.

In the eighteenth century the English courts held that language accompanying a devise or bequest to the effect it was the testator's wish or desire that the devisee dispose of the property in a particular manner was sufficient to impose a trust even though the language was not mandatory in form and did not clearly manifest an intention to impose enforceable duties on the devisee.[82] In the nineteenth century the English courts shifted to a view that precatory language—words of wish or desire—was insufficient to impose a trust unless the context manifested an intention to impose enforceable duties.[83] In effect, this was a shift from a presumption that precatory language imposes a trust to a pre-

79. Smith v. Hainline, 253 S.W. 1049 (Mo. 1923) (en banc); Boggs v. Yates, 101 W. Va. 407, 132 S.E. 876 (1926); RESTATEMENT, TRUSTS § 38(3) (1935).
80. 300 S.W.2d 404 (Mo. 1957), 23 Mo. L. REV. 503 (1958).
81. *Id.* at 405.
82. Harding v. Glyn, 1 Atk. 469, 26 Eng. Rep. 299 (1739); 1 SCOTT, TRUSTS § 25.1 (2d ed. 1956).
83. Lambe v. Eames, L.R. 6 Ch. App. 597 (1871); 1 SCOTT, TRUSTS § 25.2 (2d ed. 1956).

sumption that it does not. American courts have tended to follow the modern English view. The Missouri decisions on this problems are difficult to reconcile.[84] The instant decision clearly follows the modern English view.

In *Turner v. Mitchell*[85] two brothers who together held a controlling interest in the stock of a corporation, one owning 550 shares and the other 190 shares, signed an instrument purporting to assign their shares to themselves as trustees. The instrument set the term of the trust at 21 years, provided that, on the death of either, he should be succeeded as trustee by his wife, and designated a son of each as successor trustee on the death of the wife. During the term of the trust the income was to be paid to the trustees for the time being in equal shares. Upon termination, each wife was to have a life estate in half the stock with remainder to the son of the settlor whose wife she was. The settlors acted as trustees until their deaths, after which the wife and son of the settlor who had owned 550 shares denied the validity of the trust on the grounds, *inter alia,* that there could not be a trust with the settlors both trustees and beneficiaries and that it could not become effective without endorsements of the stock certificates for transfer. A judgment declaring the trust valid was affirmed.

The supreme court adopted the view favored by the *Restatement of Trusts*[86] that, while the sole beneficiary of a trust cannot be the sole trustee, if there are several beneficiaries they may be the trustees, destruction by merger being prevented by the fact that the legal title of the trustees is held in joint tenancy whereas their equitable interest as beneficiaries is as tenants in common.[87] On this point the court noted that the wives and sons were also beneficiaries, which would prevent a merger even in jurisdictions where the trustees and beneficiaries may not be identical.

As to the lack of endorsement of the stock certificates, the court held that the instrument in question was a self-declaration of trust, which is

---

84. *Compare* English v. Ragsdale, 347 Mo. 431, 147 S.W.2d 653 (1941) and Noe v. Kern, 93 Mo. 367 (1887) *with* Lemp v. Lemp, 264 Mo. 533, 175 S.W. 618 (1915) and Hayes v. Hayes, 242 Mo. 155, 145 S.W. 1155 (1912). See Note, 23 Mo. L. REV. 503 (1958).

85. 297 S.W.2d 458 (Mo. 1956).

86. § 99 (1935).

87. See Fratcher, *Trustor as Sole Trustee and Only Ascertainable Beneficiary,* 47 MICH. L. REV. 907, 917 (1949).

effective without a transfer of legal title. The opinion seems to suggest[88] that even if a transfer of title were necessary, as it would be in the case of an assignment to a third party as trustee, the execution of a separate instrument of transfer would be sufficient without endorsement of the stock certificates.

The decision seems sound and a helpful precedent on the two issues discussed. The suggestion that title to corporate stock may be transferred to a third-party trustee by means of a separate written instrument without endorsement of the stock certificates raises a quesion of considerable interest. In most jurisdictions title to a documented chose in action may be transferred without consideration by delivery of a deed of gift, or an instrument which operates as such, without delivery of the document (*e.g.,* the bond, insurance policy, stock certificate, etc).[89] A very few decisions require delivery of the document in addition to delivery of the instrument of gift.[90] Missouri has been thought to favor this minority view.[91] The language of the instant opinion may indicate a leaning toward the majority view on this question.

A problem of construction of a trust instrument and related documents arose in *Mercantile Trust Co. v. Kilgen.*[92] Settlor created an inter vivos trust in 1931 with himself and a trust company as co-trustees. The trust instrument provided that the income should be paid to the settlor and his wife during their joint lives, then to the survivor of them for life, and that on the death of the suvivor the trust should terminate and the " 'property then constituting the trust estate, both principal and income then accrued,' "[93] should be transferred to designated remaindermen, including one eighth to defendant, a son of the settlor. The original trust property included two promissory notes of the defendant, payable to the settlor, each in the amount of $2,500, executed in 1926 and 1927 and bearing six per cent interest compounded annually. Paragraph H of the

88. 297 S.W.2d at 464.
89. Annots., 63 A.L.R. 537 (1929), 48 A.L.R.2d 1405 (1956), 23 A.L.R.2d 1171, 1190 (1952).
90. *E.g.,* Cox v. Hall, 6 Md. 274 (1854). England and Maryland have required, moreover, in the case of corporate stock, actual transfer on the books of the corporation. *In re* Fry [1946] Ch. 312; Pennington v. Gittings, 2 Gill. & J. 208 (Md. 1830).
91. Brannock v. Magoon, 141 Mo. App. 316 (K.C. Ct. App. 1909); see *In re* Estate of Soulard, 141 Mo. 642, 656-59, 43 S.W. 617, 620-21 (1897); Hamilton v. Clark, 25 Mo. App. 428, 435-36 (K.C. Ct. App. 1887).
92. 298 S.W.2d 387 (Mo. 1957).
93. *Id.* at 389.

trust instrument provided that the share of each son of the settlor on distribution should be charged, to the extent of such share, with the amount due from such son on notes forming part of the trust estate. The settlor reserved the power to alter, amend, or revoke the trust. Two days after creating the trust the settlor wrote a letter to his co-trustee requesting it to make no effort to collect the principal or interest on the notes. After the settlor's death his widow wrote the co-trustee assenting to no effort being made to collect interest or principal on the notes until, upon termination of the trust, an adjustment was made under Paragraph H, and waiving her right to receive interest on the two notes. At her death the principal and interest due under the two notes exceeded defendant's distributive share and the trust company sued for a determination as to whether the defendant was entitled to any distribution. A judgment determining that he was not was affirmed, the court rejecting the defendant's contentions that the settlor's letter revoked Paragraph H and that the wife's letter eliminated the obligation to pay interest for the period of her survivorship of her husband. This construction of the documents accords with the common-law theory of advancements and seems sound under the circumstances.

Trust Administration

The important question of the allocation, between life beneficiary and remaindermen, of capital gain dividends declared by investment trusts and corporations, was settled for this state in *Coates v. Coates*.[94] A will bequeathed money to testator's second wife and one of his three sons by his first wife upon trust to pay the income to the second wife for life, with remainder to the three sons. The will provided that the trustees should not invest in common stock without the consent of the two remaindermen who were not trustees and that the trustees should have authority to determine whether receipts should be treated as principal or income. With the consent of the two remaindermen, the trustees invested the money in open end investment trusts which bought and sold common stock. The investment trusts paid "cash dividends" derived from dividends paid on the stocks held, and " 'capital gain dividends' "[95] derived from profits on sales of stock. The capital gain dividends were payable in cash or investment trust stock, at the option of the holder. The trustees determined that such capital gain dividends should be treated as income and,

94. 304 S.W.2d 874 (Mo. 1957).
95. *Id.* at 875-76.

when the two remaindermen objected to this determination, sued for a declaratory judgment as to its propriety. A decree upholding the trustees' determination was affirmed. The supreme court stated that Missouri follows the now dominant Massachusetts rule that all cash dividends are income and all stock dividends principal but pointed out that the *Restatement of Trusts*[96] and the Uniform Principal and Income Act,[97] both of which follow the Massachusetts rule, treat dividends payable in cash or stock at the option of the holder as cash dividends, whether received as cash or as stock.[98]

The extent to which liability is imposed upon a trustee who, without dishonesty or bad faith, commits a breach of trust is, to some extent, within equitable discretion, as is illustrated by *Moser v. Keller*.[99] The owner of all the stock of a bank transferred it to trustees for the benefit of holders of certificates of beneficial interest. The trust instrument gave the settlor an option to purchase the bank stock at book value. The settlor having elected to exercise this option, the trustees had the book value computed by a reputable accounting firm and sold at the price so computed, $1,767,829.76. Two of more than two thousand holders of certificates of beneficial interest sued on behalf of themselves and the other certificate holders to compel the payment of an additional $256,-356.20, on the theory that the book value had been miscomputed. The supreme court held that the plaintiffs were entitled to maintain a class action on behalf of all the beneficiaries of the trust, that the book value as computed was some $76,000 below a proper computation, to which amount the beneficiaries were entitled, but that the trustees, having acted in good faith and in reliance on the advice of reputable accountants, should not be surcharged for the plaintiffs' court costs and attorneys' fees.

The principal point involved in *Bakewell v. Mercantile Trust Co.*[100] was the extent to which trustees are accountable for the exercise of discretionary powers. Testator bequeated his estate to a trust company and two individuals to hold upon trust for numerous lives plus twenty-

96. § 236(c) (Supp. 1948).
97. § 5(1).
98. Annots., 27 A.L.R.2d 1323 (1953), 130 A.L.R. 492 (1941), 44 A.L.R.2d 1277 (1955).
99. 303 S.W.2d 135 (Mo. 1957).
100. 308 S.W.2d 341 (St. L. Ct. App. 1957).

one years. The will directed the trustees to divide the income into five shares and to pay one share to each of two grandchildren, a daughter and a daughter-in-law or their designated successors and the fifth share to testator's daughter, May. After May's death the trustees were given a power to appoint the fifth share to May's husband or descendants or to the beneficiaries of the first four shares. As to this power the will provided, "It shall be entirely optional with the said trustees to give as much or as little of the . . . [fifth] share . . . to [May's husband or descendants] . . . as the trustees may deem proper."[101] The will further provided that successor trustees could be appointed by "all of the adults then receiving income."[102] After May's death the trustees annually paid part of the fifth share to her sole descendant, a granddaughter, Rose. One of the individual trustees having become unable to act, the income beneficiaries other than Rose, purported to appoint Bakewell a trustee. In a suit to construe the will Bakewell was appointed trustee pendente lite. The trial court decided that (1) Rose's concurrence was necessary to appointment of a successor trustee by the income beneficiaries; (2) the allocations of income by the two remaining trustees prior to effective appointment of a third were valid; (3) the allocations made by these two and the trustee pendente lite were binding; and (4) the trustees' allocations of the fifth share of income "must be in good faith and from proper motives, *must be just and equitable* and within the bounds of reasonable judgment."[103] (Emphasis added.) The court of appeals deleted the words "must be just and equitable" as confusing and otherwise affirmed, holding that the language of the will was not sufficient to disclose clearly an intent to relieve the trustees from exercising the power of allocation reasonably.[104]

In *Ford v. Boyd*[105] a subdivider subjected his land to a trust for the benefit of lot owners, with himself and two others as trustees. The trustees were to repair and maintain roads and parks, provide for street cleaning and garbage and trash collection and approve building plans

101. *Id.* at 345.
102. *Id.* at 343.
103. *Id.* at 353.
104. See Winkel v. Streicher, 295 S.W.2d 56 (Mo. 1956) (en banc), 22 Mo. L. REV. 405 (1957); Vest v. Bialson, 293 S.W2d 369 (Mo. 1956), 22 Mo. L. REV. 404 (1957).
105. 298 S.W.2d 501 (St. L. Ct. App. 1957). Hostility between a trustee and the beneficiaries was treated as a contributory ground for removal of the trustee in Vest v. Bialson, *supra* note 104.

only when they were consistent with use restrictions. They were empowered to levy assessments on lots to pay for these activities. The trustees kept no records. The subdivider and one trustee who cooperated with him exempted land owned by the subdivider from assessments, exempted purchasers from him from the requirement of approval of plans, and permitted him to sell land designated as a park as lots. There was serious friction between these two trustees and the third trustee, who was supported by the other lot owners. A decree removing the subdivider and his cooperating co-trustee for misconduct and appointing successor trustees was affirmed.

The movement for abolition of the doctrine that charitable corporations and trusts are exempt from tort liability has not yet succeeded in Missouri. In *Gambill v. White*[106] the plaintiff sued a charitable hospital for damages for mental anguish caused by its suffering her to give birth to a child unattended. Both mother and child were well and healthy after birth. Plaintiff urged that the court abolish the doctrine of immunity of charities from tort liability. A judgment denying recovery was affirmed on the ground that, in the absence of physical injury, there is no tort liability for negligent infliction of mental anguish. The court declined to consider the question of charitable immunity from tort liability because no tort had been shown.

106. 303 S.W.2d 41 (Mo. 1957).