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William F. Fratcher

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## TRUSTS AND SUCCESSION IN MISSOURI\*

WILLIAM F. FRATCHER\*\*

Probably the most interesting decision of the period under review was that in *Cox v. Fisher*,<sup>1</sup> involving the effect of a provision imposing forfeiture for contest. Settlor transferred property to a trustee to be held for the benefit of the settlor during his lifetime and thereafter for others. An amendment to the trust instrument provided, "if any beneficiary under this trust shall contest the validity thereof . . . such person shall thereby be deprived of all beneficial interest." After the execution of this amendment the settlor was placed under guardianship because of mental incompetence. The guardian and some of the beneficiaries, who were also prospective heirs of the settlor, joined as plaintiffs in an unsuccessful suit to set aside the trust and the amendment on the ground that the settlor was mentally incompetent at the times of their execution. After the settlor's death the trustee sued for a declaratory judgment as to whether these beneficiaries had forfeited their interests under the trust. The supreme court determined that they had not, holding that the forfeiture provision should be construed narrowly. As so construed, the forfeiture provision did not apply to the suit to set aside the trust because the beneficiaries, as mere prospective heirs, had no standing as plaintiffs in that suit, the settlor himself being the only true plaintiff.

In a majority of states a provision in a will or trust instrument that a beneficiary who contests the validity of the instrument shall forfeit his interest thereunder is deemed invalid as to a contest instituted in good faith with probable cause.<sup>2</sup> The majority rule is based upon the propositions that persons guilty of forgery, fraud or undue influence ought not to be able to protect their ill-gotten gains by threats of punishment against those who seek to reveal their wrongdoing and that the interests

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\*This Article contains a discussion of selected 1958 and 1959 Missouri court decisions.

\*\*Professor of Law, University of Missouri; Member of the Michigan and Missouri Bars.

1. 322 S.W.2d 910 (Mo. 1959).

2. Annots., 157 A.L.R. 596 (1945); 146 A.L.R. 1211 (1943); 125 A.L.R. 1135 (1940); 67 A.L.R. 52 (1930). BROWDER, *Illegal Conditions and Limitations*, 6 AMERICAN LAW OF PROPERTY §§ 27.4, .6 (Casner ed. 1952).

of public justice demand that no one should be penalized for a good-faith attempt to secure justice in the courts of the land. Missouri follows a minority view, under which such forfeiture provisions are enforced even if the contest is instituted in good faith and upon probable cause.<sup>3</sup> It has been observed that the minority rule penalizes an innocent beneficiary for refusing to become, morally, a party to and recipient of the benefits of what he honestly believes to be forgery, fraud, undue influence or the work of a diseased mind.<sup>4</sup> In the instant case the court continued its adherence to the minority rule that good faith and probable cause in the institution of the contest are irrelevant but the decision offers some hope that the court will eventually abandon this vicious rule.

*Sando v. Phillips*<sup>5</sup> may be the last proceeding in this state for assignment of dower. The Missouri Probate Code abolished dower but did not affect any estate which vested prior to January 1, 1956.<sup>6</sup> In this case the parties and the court assumed that the widow of a man who died in 1955 was entitled to dower. Whether the statute effectively abolishes dower in cases where the husband was seized during the marriage prior to January 1, 1956 but died thereafter was not discussed or decided. It probably does.<sup>7</sup> Thus passes, with scant notice, one of the basic rights guaranteed by *Magna Carta*.<sup>8</sup>

The mediaeval theory of dower was based upon two simple and seemingly self-evident propositions: (1) a faithful wife should be guaranteed a share in her husband's estate sufficient to ensure her comfortable support, and (2) the property should return to the family after her death. Land was the principal type of wealth and common law dower, the widow's right to a life estate in a third of her husband's land, con-

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3. *Commerce Trust Co. v. Weed*, 318 S.W.2d 289 (1958); *Rossi v. Davis*, 345 Mo. 362, 133 S.W.2d 363 (1939).

4. *Rouse v. Branch*, 91 S.C. 111, 74 S.E. 133 (1911), quoted in *In re Estate of Cocklin*, 236 Iowa 98, 17 N.W.2d 129 (1945). In the latter case the Iowa supreme court shifted from the minority to the majority rule.

5. 319 S.W.2d 648 (Mo. 1959). Cf. *Chapman v. Corbin*, 316 S.W.2d 880 (K.C. Ct. App. 1958) in which a post-nuptial property settlement, executed prior to the enactment of the Missouri Probate Code, in which the wife waived any interest in her husband's property, barred dower. Compare *Ellis v. Williams*, 312 S.W.2d 97 (Mo. 1958). Section 474.220, RSMo 1957 Supp. provides for similar waiver of marital rights under the Probate Code.

6. § 474.110, RSMo 1957 Supp.

7. SCURLOCK, *RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND* 285-95 (1953).

8. C. 7 (1215); restated and elaborated, 9 Hen. III, c. 7 (1225).

formed to both of these propositions.<sup>9</sup> In modern society, with a major part of wealth classified as personal property, common law dower, limited to real property, is inadequate protection for widows. Hence there has been a tendency to enact legislation giving widows interests in their husbands' personal property which cannot be defeated by will. New York has done this without departure from either of the mediaeval propositions. There a widow cannot elect to take against her husband's will if it gives her the income from a third of the estate for her life.<sup>10</sup> Missouri, in creating a modern substitute for dower, has, unfortunately, neglected the second proposition, that the property should return to the family after the widow's death. If a man's widow is the mother of all of his children, has no children by any other man, and does not remarry, the new Missouri statutes are unlikely to result in permanent diversion of property from the family. If his widow is not the mother of his children, the possible results of the Missouri Probate Code provisions can best be described by a novelette, which we shall entitle,

*In re Estate of Joseph Sedley, Deceased*

Joseph Sedley and Amelia, his devoted wife, celebrated their golden wedding anniversary with a grand reception put on by their two beloved sons, Peter and John, their daughters-in-law and their eight grandchildren. Just a month later Amelia died, leaving Joseph heartbroken and lonely. Peter and John and their wives offered to take him into their homes but Joseph wanted to stay on the old home place. Peter and John inquired in town as to a housekeeper for their father. Several friends mentioned Becky Sharp. One of them remarked that she was young and had been known to associate with that scamp from the reform school, George Osborne, before he joined the Army, but said that she was known as a hard worker. Becky asked for surprisingly low wages so Peter and John employed her without further inquiry.

Peter and John had been doing most of their father's farm work, in

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9. Prior to the fourteenth century a widow was also guaranteed a third of her husband's personal property and this right could not be defeated by his will. ATKINSON, WILLS 15-16 (2d ed. 1953). She took the full title to personal property, not merely a life estate, but it should be remembered that the personal property of that period was tangible—food, clothing, furniture, farm implements and livestock—and unlikely to outlast a human life. Stocks, bonds and the other modern types of intangible personal property which are not consumed and do not wear out were, in the main, unknown.

10. N.Y. DECED. EST. LAW § 18(b). This is its effect in the average case.

addition to running their own farms, for several years and they continued to do so. Before Becky's arrival, they and their families had spent much of their time at the old home place. After Becky took over, the old house was kept in excellent condition but their welcome there gradually grew colder. After awhile they only went to the house for short Sunday calls. These ceased to be enjoyable as it became increasingly evident that Joseph Sedley had become putty in the hands of his efficient young housekeeper. Peter and John decided to ask their father to discharge Becky and went to the old home place one Sunday afternoon with this in mind. They were met by their father's shamefaced announcement that he had married Becky Sharp the night before.

Six weeks after his second marriage Joseph Sedley died, leaving a will which gave his widow a life estate in enough of his property to ensure her comfortable support for life and the residue to his sons. Becky promptly elected to take against the will<sup>11</sup> and soon married George Osborne, who had secured his dishonorable discharge from the Army after a term at Leavenworth.

Now let us see what, under the Missouri Probate Code, becomes of the property which Joseph and Amelia Sedley acquired by fifty years of hard work. First, Becky receives an allowance for a year's support according to her previous standard of living as Mrs. Joseph Sedley.<sup>12</sup> We may assume that this will be five thousand dollars cash and that Becky and George Osborne will use it to finance their foreign honeymoon. Next, Becky receives "the family bible and other books, all wearing apparel of the family, all household electrical appliances, all household musical instruments and all household and kitchen furniture, appliances, utensils and implements."<sup>13</sup> So the rare old Bible which Hezekiah Sedley brought to Virginia in 1673 will have its pages used to light George Osborne's cigars. The fine library which Joseph's bachelor brother Tom, the minister, left to Joseph in order to keep it in the Sedley family is now the property of Becky Sharp Sedley Osborne. The quaint parlor organ, the walnut cradle and the antique grandfather's clock which Jacob Sedley carried over the mountains from Virginia in a covered wagon are also Becky's. Even the china and silver which were Amelia

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11. § 474.160, RSMo 1957 Supp.

12. § 474.260, RSMo 1957 Supp.

13. §§ 474.160 250, RSMo 1957 Supp.

Sedley's wedding gifts and which she intended to go to her granddaughters,<sup>14</sup> the quilts which she made during the long winter evenings and her hand-embroidered pillow cases will grace the home of Becky and George Osborne. Lastly, Becky takes a third of everything left of the property of Joseph Sedley, including the old home place, in fee simple absolute.<sup>15</sup> Becky's wages were not so low after all.

George Osborne's tavern companions have a new name for the Missouri Probate Code. They call it "The Golddigger's Dream Come True."

#### CONTRACTS TO MAKE WILLS

*Fisher v. Cox*<sup>16</sup> involved an oral promise by an uncle to devise a farm to his nephew in consideration of the nephew's promise to occupy the farm, pay taxes, and pay the uncle \$150 a year. The nephew performed his promise and made substantial improvements. The uncle executed a will devising the farm to the nephew but later conveyed it to the defendant trustee. At suit of the nephew, commenced after the uncle's death, the trustee was compelled to convey the farm to the nephew, apparently on the ground that the oral contract to devise was taken out of the Statute of Frauds by part performance.

In *Glueck v. McMehen*<sup>17</sup> a husband and wife executed a joint will giving all of the property of the first to die to the survivor and the property of the survivor to named devisees. After the death of the husband the wife conveyed land which had been owned by the entirety to the defendants in consideration of a promissory note secured by a purchase money deed of trust. The wife later released the note and deed of trust without consideration. At suit of the wife's executor the release was set aside upon the basis of evidence of ambiguous oral statements by the wife indicating that she may have agreed with her husband not to change the will. In some states it is held that the mere making of a joint

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14. Because of § 474.250, RSMo 1957 Supp. Amelia could not bequeath even souvenirs from her china, books, linens and household goods to her grandchildren or anyone else. They all went to her surviving husband without regard to her wishes.

15. 474.160, RSMo 1957 Supp.

16. 312 S.W.2d 775 (Mo. 1958). This case is related to *Cox v. Fisher*, *supra* note 1. Cf. *Jackson v. Tibbling*, 310 S.W.2d 909 (Mo. 1958), discussed below, holding that an oral contract to devise land was unenforceable because of the Statute of Frauds. See also cases discussed in *Fratcher, Trusts and Succession in Missouri—1957*, 23 Mo. L. Rev. 467, 473 (1958).

17. 318 S.W.2d 371 (Spr. Ct. App. 1958).

and reciprocal will implies a contract by the survivor not to revoke.<sup>18</sup> The Missouri supreme court has wisely rejected this view and held that adequate evidence of the making and content of a real contract is essential to its enforcement.<sup>19</sup> Particularly in view of the fact that the property involved in this case did not pass to the wife by the joint will, the finding by the court that there was a contract inhibiting inter vivos transfer is difficult to reconcile with the supreme court decisions.

#### VALIDITY OF WILLS

*Strahl v. Turner*<sup>20</sup> involved a contention that a person is incompetent to be a subscribing witness to a will unless he observes and judges the mental capacity of the testator. The court properly and clearly rejected this contention, holding that, while failure to observe and judge the mental capacity of the testator impairs the *credibility* of the testimony of a witness on the issue of testamentary capacity, it has no bearing on *competency* to be a subscribing witness to a will or a testifying witness in a will contest. The opinion, unfortunately, contains language suggesting that publication by the testator is required for execution of a will.<sup>21</sup> Publication, that is, an announcement by the testator to the witnesses that the instrument is his will, is a required part of the execution of a will in New York and some other states. It has never been required in Missouri.

*McCaleb v. Shantz*<sup>22</sup> involved the validity of a devise of land to a business corporation. The Missouri constitution provides, "No corporation . . . shall . . . hold any real estate except such as is necessary and proper for carrying on its legitimate business . . ." <sup>23</sup> The residuary devisees contended that this provision made the corporation incapable of taking title, so that the devise to it was void and fell into the residue,

18. *E.g.*, *Tutunjian v. Vetzgian*, 299 N.Y. 315 (1949); *Frazier v. Patterson*, 243 Ill. 80, 90 N.E. 216 (1909).

19. *Hart v. Hines*, 263 S.W.2d 13 (Mo. 1953) (contract not to revoke joint will, if any, did not prevent inter vivos conveyance by survivor of property held by the entirety); *Wanger v. Marr*, 257 Mo. 482, 165 S.W. 1027 (1914).

20. 310 S.W.2d 833 (Mo. 1958). In *Black v. City Nat'l Bank & Trust Co.*, 321 S.W.2d 477 (Mo. 1959), a prisoner in a Texas penal institution mailed a petition contesting a will to the Missouri probate court which had admitted it to probate within the time allowed for contest. He filed another petition in the circuit court after the time for contest had expired. It was held that neither petition could be considered because the probate court had no jurisdiction of will contests and the limitation on time for contest in the circuit court applied to prisoners.

21. 310 S.W.2d at 839-40.

22. 318 S.W.2d 199 (Mo. 1958).

23. Mo. Const. art. XI, § 5.

citing a case in which a clause of the 1875 constitution was so construed.<sup>24</sup> It was held that the constitutional provision does not incapacitate a corporation from taking title to land by devise or otherwise and that it is enforceable only at the suit of the state. As the opinion observes, such constitutional provisions have been variously interpreted. There is considerable authority for the interpretation made in this case.<sup>25</sup>

#### CONSTRUCTION OF WILLS

In *Uphaus v. Uphaus*<sup>26</sup> a testator with four children devised a farm to his son Jesse for life and provided, "at the death of my said son, . . . there shall be paid to his wife, . . . if she shall survive him, the sum of . . . [\$3,000] out of the real estate so devised to my said son, Jesse, and the remainder in said real estate, after the expiration of the life estate of my said son, Jesse, and after the payment of the said sum of . . . [\$3,000] shall go to and descend equally to the rest of my children or their descendants, share and share alike, per stirpes."<sup>27</sup> The court, emphasizing the constructional preference for early vesting,<sup>28</sup> determined that the remainder vested in the three children of the testator, other than Jesse, at the death of the testator. Only possession, not vesting, was postponed until the death of Jesse. Consequently, when Jesse's brother died, Jesse took a share in the remainder as heir of his brother.

*Thomas v. Higginbotham*<sup>29</sup> involved the will of a testator who died in 1905. It devised an undivided half of the testator's land to his son Robert, remainder to Robert's children, but if Robert should die without surviving issue in the lifetime of testator's son Charles, to Charles for life "and at his death vest absolutely in his heirs at law."<sup>30</sup> The other undivided half was devised to Charles, with reciprocal remainder provisions in favor of Robert and his heirs. Robert died in 1935 without

24. *Proctor v. Board of Trustees of Methodist Episcopal Church, South*, 225 Mo. 51, 123 S.W. 862 (1907). The provision there involved prohibited the establishment of a religious corporation except for the purpose only of holding title to land for church edifices, parsonages and cemeteries.

25. *Jones v. Habersham*, 107 U.S. 174 (1882). *Hubbard v. Worcester Art Museum*, 194 Mass. 280 (1907);

26. 315 S.W.2d 801 (Mo. 1958).

27. *Id.* at 803.

28. See Fratcher, *Trusts and Succession*, 22 Mo. L. REV. 390, 400 (1957).

29. 318 S.W.2d 234 (Mo. 1958). *Hunter v. Hunter*, 320 S.W.2d 529 (Mo. 1959), an interesting and important will construction case, is discussed by Professor Eckhardt in his Article on property. A complicated construction problem created by overlapping land descriptions in two paragraphs of a will involved in *Boxley v. Easter*, 319 S.W.2d 628 (Mo. 1959).

30. 318 S.W.2d at 236.

surviving issue. Charles died January 21, 1956 survived by his widow and two children. Prior to 1956 a widow was not an heir of her husband. The Missouri Probate Code, effective January 1, 1956, makes a widow an heir of her husband.<sup>31</sup> The question presented was whether the phrase "heirs at law" in the devise of the ultimate remainder in Robert's half to the heirs of Charles was to be applied according to its meaning at the time of the testator's death in 1905 or according to its meaning at the death of Charles in 1956. The court held that it meant heirs as defined at the death of Charles, so Charles' widow took a share as her husband's heir.

In *Commerce Trust Co. v. Weed*<sup>32</sup> the will of a testator who died in 1927 bequeathed \$100 to his son James, whose whereabouts were unknown to him, and devised the residue to a trustee to pay the income to two daughters and a daughter-in-law and their children. When the daughters and daughter-in-law died and all their children reached 21, the trust was to terminate and the trust estate to "be divided, distributed, and paid over to my lineal descendants, per stirpes."<sup>33</sup> The will provided that if any beneficiary attempted to oppose the admission of the will to probate or to have it set aside or declared invalid all bequests to that beneficiary or his descendants should be null and void. The son, James contested the will in 1928 on grounds of undue influence and lack of testamentary capacity. This contest was settled by the payment of a relatively small sum to James and he died in 1942. One of testator's daughters adopted a child in 1909 and testator treated this child as a grandchild. A judgment determining that (1) the remainder to the lineal descendants did not vest until the termination of the trust and they should be ascertained at that time; (2) the descendants of James were barred from taking by the no-contest clause even if his contest was instituted in good faith;<sup>34</sup> and (3) the adopted child of the testator's daughter took as a lineal descendant of the testator, was affirmed. As to the last point, the court conceded that an adopted child was not a lineal descendant under the adoption statutes in force in 1909 and that the 1917 legislation, enlarging the rights of adopted children, applied only to those adopted thereafter. It held, however, that 1943 legislation ex-

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31. §§ 472.010(14), 474.010, RSMo 1957 Supp.

32. 318 S.W.2d 289 (Mo. 1958).

33. *Id.* at 292.

34. See note 3 *supra* and accompanying text.

tending the 1917 legislation to persons adopted before its enactment was applicable because the testator meant that the words "lineal descendants" should be applied according to their meaning at the time of vesting and distribution rather than at the time of his death.<sup>35</sup>

#### ADMINISTRATION OF ESTATES

*In re Dugan*<sup>36</sup> involved the appointment by a Missouri probate court of an administrator of the estate of a decedent who was killed in a railroad accident in Kansas. The administrator commenced a wrongful death action in Illinois against the railroad, which was a Missouri corporation. The railroad filed a motion in the probate court to cancel the letters of administration on the ground that the decedent was a resident of Kansas and the court lacked jurisdiction. The motion was overruled and the circuit court dismissed an appeal on the ground the railroad had no interest in the estate which entitled it to make the motion or take the appeal from its denial. The court of appeals reviewed the provisions of the Missouri Probate Code and concluded that, under them, a debtor to an estate does have sufficient interest to attack the appointment of the administrator on the ground that it is void.

*State ex rel. Sullivan v. Cross*<sup>37</sup> was a prohibition proceeding. An automobile collision in Missouri caused the death of a Missouri resident in one car and those of the driver and owner of the other car, both of whom were Nebraska residents. The widow of the Missouri decedent commenced an action for wrongful death against the Nebraska administrators of the Nebraska decedents in a Missouri circuit court. Summonses were served on the Missouri Secretary of State. A Missouri statute, as amended in 1955<sup>38</sup> provides that a nonresident who operates a motor vehicle on a Missouri highway thereby agrees that he, his executor or administrator, may be sued in Missouri for damages arising from such operation, and appoints the Missouri Secretary of State agent for him, his executor or administrator, to receive services of process. Nebraska law prohibits wrongful death actions against administrators and requires claims against decedents' estates to be filed in the court with probate jurisdiction within a specified time. The widow's claim

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35. Cf. *Vreeland v. Vreeland*, 296 S.W.2d 55 (Mo. 1956); *Fratcher, supra* note 28, at 397.

36. 309 S.W.2d 137 (Spr. Ct. App. 1957).

37. 314 S.W.2d 889 (Mo. 1958) (en banc).

38. § 506.210, RSMo 1957 Supp.

was not so filed. The supreme court held the statute valid and refused to issue a writ of prohibition against prosecution of the action in the circuit court. The opinion indicates that the effect of a judgment in such an action in Nebraska is for determination by the courts of that state.

The Missouri statutes provide that causes of action for personal injury shall not abate upon the death of the tort-feasor but except actions for slander, libel, assault and battery and false imprisonment.<sup>39</sup> *Gray v. Wallace*<sup>40</sup> was an action for malicious prosecution and false imprisonment. The defendant died before trial and her administrator was substituted. It was held that the count for malicious prosecution did not abate. *Joyce v. Central Sur. & Ins. Corp.*<sup>41</sup> confirms the view expressed last year that a magistrate's court judgment ceases to have the effect of a judgment if the defendant dies pending expiration of the time for appeal.<sup>42</sup> In the *Joyce* case it was held that the plaintiff who secured such a judgment lost all rights against the defendant's estate and his liability insurer by failing to file a claim in the probate court within the non-claim period.

During the period under review there were a number of decisions relative to claims against estates which turned on questions of competency and sufficiency of evidence<sup>43</sup> and several decisions in proceedings by personal representatives for discovery of estate assets.<sup>44</sup>

#### CREATION, MODIFICATION AND TERMINATION OF TRUSTS

In *Trotter v. Trotter*<sup>45</sup> a dairy clerk who unexpectedly inherited \$80,000 worth of corporate stock from an uncle, transferred it to a trust company upon trust for his wife, his mother-in-law and himself

39. §§ 537.020, .030, RSMo 1949.

40. 319 S.W.2d 582 (Mo. 1958). *Overstreet v. Overstreet*, 319 S.W.2d 49 (Mo. 1958) involved the effect of the death of a plaintiff who had taken a default judgment canceling a deed of land.

41. 321 S.W.2d 272 (K.C. Ct. App. 1959).

42. See Fratcher, *supra* note 16, at 481-83 discussing *State ex rel. White v. Terte*, 303 S.W.2d 123 (Mo. 1957) (en banc).

43. *Taylor v. Commerce Trust Co.*, 319 S.W.2d 895 (K.C. Ct. App. 1959); *Lenhardt's Estate v. Lenhardt*, 322 S.W.2d 170 (St. L. Ct. App. 1959); *Birdsong v. Estate of Ladwig*, 314 S.W.2d 471 (Spr. Ct. App. 1958); *Allmon v. Allmon*, 314 S.W.2d 457 (Spr. Ct. App. 1958); *Beckers-Behrens-Gist Lumber Co. v. Adams*, 311 S.W.2d 70 (St. L. Ct. App. 1958); *Sevier v. Staples' Estate*, 309 S.W.2d 706 (K.C. Ct. App. 1957).

44. *In re Kies' Estate*, 320 S.W.2d 478 (Mo. 1959); *In re North's Estate*, 320 S.W.2d 597 (K.C. Ct. App. 1959); *Covey v. Van Bibber*, 311 S.W.2d 112 (K.C. Ct. App. 1958); *Bringer v. Barr*, 318 S.W.2d 524 (St. L. Ct. App. 1958).

45. 316 S.W.2d 482 (Mo. 1958).

for their lives and thereafter for charity. By the express terms of the trust instruments they were irrevocable. After his wife divorced him; the settlor sued to rescind the transfers on the ground that, at the time of their execution, he thought they were revocable. A decree for the plaintiff was reversed on the facts. The opinion is interesting in its assumption that a settlor who creates a trust by transfer may rescind for unilateral mistake of law.

*Carlock v. Ladies Cemetery Ass'n*<sup>46</sup> involved the effect of a devise of Missouri land to "the Atlanta, Illinois, Cemetery." The cemetery was established by the City of Atlanta for public use and transferred by it to a non-profit Illinois corporation for operation. The trial court determined that the devise created a valid trust for a public charity and appointed a resident of Missouri<sup>47</sup> trustee to sell the land and pay over the proceeds to the Illinois corporation. The supreme court agreed that the devise created a valid charitable trust but directed modification to require the trustee to continue to administer the trust.

In *Prudential Ins. Co. v. Gatewood*<sup>48</sup> the decedent carried two policies of life insurance under which his wife was the beneficiary. After their divorce, decedent executed a will bequeathing the residue of his estate to the Citizens Bank as trustee for his children and designated the "Citizens Bank, Trustee of Estate of John J. Gatewood" as beneficiary under the policies. He died five months after a second marriage. The second wife claimed marital rights in the proceeds of the policy on the theory that the designation of beneficiary failed to create an express trust because of indefiniteness of beneficiaries and purpose and, therefore, the bank held on resulting trust for the estate of the decedent. The supreme court affirmed a judgment that the proceeds of the policies passed to the Citizens Bank as trustee for the children, free of marital rights, and not as part of the decedent's estate. The opinion indicates that the designation of beneficiary created an inter vivos trust which was definite as to beneficiaries and terms because it incorporated by reference the provisions of the residuary clause of the will.

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46. 317 S.W.2d 432 (Mo. 1958).

47. This was necessary because, at the time the trial court acted, § 456.120, RSMo 1949 prohibited Illinois corporations from acting as trustees of Missouri land. This section was modified in 1955 by §§ 363.205, 456.120, RSMo 1957 Supp.

48. 317 S.W.2d 382 (Mo. 1958). This case followed *Tootle-Lacy Nat'l Bank v. Rollier*, 341 Mo. 1029, 111 S.W.2d 12 (1937), which is a leading case.

*Butler State Bank v. Duncan*<sup>49</sup> not only recognized the Totten<sup>50</sup> or tentative savings bank trust but construed language which seemed to manifest a testamentary intent as creating a revocable inter vivos trust. A mother deposited \$8,000 in a saving account which she opened in the name of herself "pable on deth" to her daughter. She later withdrew some \$3,000. It was held that the daughter was entitled to the balance remaining in this account at the time of the mother's death. This result may be sound but should it not have been reached on a theory of contract for the benefit of a third party rather than on a trust theory? The transaction was very similar to the acquisition of a life insurance policy designating a third party beneficiary but reserving to the insured power to demand the cash value.

#### ADMINISTRATION OF TRUSTS

A charitable trust for the promotion of musical education was involved in *Murphey v. Dalton*.<sup>51</sup> The will creating the trust was contested on the ground that the testatrix was of unsound mind. The trustee employed a lawyer to oppose the will contest on a thirty per cent contingent fee basis. The will contest having failed, the circuit court refused to allow the lawyer any fee whatever from the trust estate on the ground that the attorney general alone may represent charitable trusts. The supreme court reversed, holding that, while the attorney general properly represents the beneficiaries of charitable trusts, this does not preclude employment of other counsel, when appropriate, by the trustees. The court held, however, that the contingent fee contract was subject to judicial approval as to fairness and allowed the lawyer only \$2,500 instead of the \$12,000 for which the contract provided.

*Smith v. Haley*<sup>52</sup> was an application of the normal fiduciary rule

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49. 319 S.W.2d 913 (K.C. Ct. App. 1959). Substantially *contra* Bank of Perryville v. Kutz, 276 S.W.2d 593 (St. L. Ct. App. 1955); cf. Clabbey v. First Nat'l Bank, 320 S.W.2d 738 (K.C. Ct. App. 1959) in which a deposit by a mother in the names of her son and herself was held to give no beneficial interest to the son. Compare cases discussed in Fratcher, *supra* note 16, at 433-34.

50. So called from Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904), a leading case holding that a deposit in a savings bank in the name of the depositor as trustee for another creates a revocable inter vivos trust which is neither testamentary nor too indefinite as to terms for enforcement.

51. 314 S.W.2d 726 (Mo. 1958).

52. 314 S.W.2d 909 (Mo. 1958). See also *Jesser v. Mayfair Hotel, Inc.*, 316 S.W.2d 465 (Mo. 1958), in which trustees of a voting trust were enjoined from selling part of the corporate stock held by them in trust to a corporation formed by some of the trustees. Cf. *Jackson v. Klein*, 320 S.W.2d 553 (Mo. 1959).

that a trustee may not acquire a personal interest in the trust property without full disclosure to and consent by the trust beneficiaries. Parents conveyed land to their daughter and son-in-law and took back a purchase money deed of trust for \$1,650 running to a trustee. A default having occurred, the father agreed orally to repurchase the land, took possession and accidentally burned down the house on it. Thereafter the deed of trust was foreclosed without actual notice to the daughter and her husband. The father purchased the land at the foreclosure sale for \$400 and, half an hour later, conveyed to the trustee and his wife in consideration of \$600. The foreclosure and the conveyance to the trustee and his wife were set aside at suit of the daughter and her husband.

The controversy in *Coates v. Coates*<sup>53</sup> arose out of a case discussed last year<sup>54</sup> in which trustees of a testamentary trust sought and secured a declaratory judgment that they acted properly in determining that "capital gain dividends" from investment company stock should be treated as income. In the later case it was decided that, the ambiguity of the provisions of the will having necessitated the original litigation, all the parties thereto were entitled to reimbursement from the trust fund for their expenses of litigation and that, these expenses being extraordinary, should be paid from principal rather than from income. This decision follows a modern trend toward charging non-routine costs of trust administration to principal.

*Montgomery v. Snyder*<sup>55</sup> involved the special type of charitable trust administered by trustees who hold property for an unincorporated church. The church was of a denomination which follows the independent congregational form of church government in which congregations belong to regional and national associations but are not subject to hierarchical control by these organizations. It was held that a majority of the congregation could control the church property in shifting from one such association to another so long as there was no departure from the basic faith and doctrine to which the church was devoted when it was established.

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53. 316 S.W.2d 875 (K.C. Ct. App. 1958).

54. *Coates v. Coates*, 304 S.W.2d 874 (Mo. 1957), Fratcher, *supra* note 16, at 487-88.

55. 320 S.W.2d 283 (Spr. Ct. App. 1958). The Freewill Baptist denomination, to which the church in question belonged, had, according to the opinion, various regional and national associations with minor differences in procedure and organization.

In *Schofield v. Commerce Trust Co.*<sup>56</sup> a testator devised the remainder in half his estate to a trustee for the upkeep and maintenance of a son "and at his death, the residue, if any to be by the Trustee delivered to my legal heirs. The Trustee may use the principal of corpus if necessary for the upkeep of my son."<sup>57</sup> The trustee refused to pay the son more than \$100 a month, which was the income from the trust fund, although his living expenses were some \$380 a month. A judgment requiring the trustee to pay the son \$225 a month, using principal to the extent necessary, was affirmed. The court failed to answer the trustee's contention that it should not have been ordered to pay a specific sum from principal.<sup>58</sup>

A case which was discussed at some length last year<sup>59</sup> was transferred to the supreme court.<sup>60</sup> It involved the construction of a provision in a will giving trustees a power to appoint a fifth share in income to the descendants of a daughter of the testator or to other trust beneficiaries who were absolutely entitled to the other four shares. As to this the will stated, "It shall be entirely optional with the said trustees to give as much or as little of the [fifth] . . . share . . . to [the descendants of the daughter] . . . as the trustees may deem proper."<sup>61</sup> The court of appeals held that allocations of this share by the trustees must be within the bounds of reasonable judgment. The supreme court held that the discretionary power was not restricted to reasonable exercise and that "so long as the trustees do not act arbitrarily, fraudulently, or in bad faith their actions are not reviewable."<sup>62</sup>

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56. 319 S.W.2d 275 (K.C. Ct. App. 1958).

57. *Id.* at 276.

58. Cf. *Winkel v. Streicher*, 295 S.W.2d (Mo. 1956) (en banc); *Fratcher*, *supra* note 28, at 405-06; *In re Will of Sullivan*, 144 Neb. 36, 12 N.W.2d 148 (1943).

59. *Bakewell v. Mercantile Trust Co.*, 308 S.W.2d 341 (St. L. Ct. App. 1957).

60. *Bakewell v. Mercantile Trust Co.*, 319 S.W.2d 600 (Mo. 1958) (en banc). See RESTATEMENT, TRUSTS § 187, comment i (1935). The supreme court decided two other interesting cases involving problems of trust administration during the period under review. *Old Folks Home of St. Louis County v. St. Louis Union Trust Co.*, 313 S.W.2d 671 (Mo. 1958), was concerned with the liability, as between each other, of beneficiaries of an inter vivos trust for inheritance tax assessed against the estate of the settlor. *Buder v. Walsh*, 314 S.W.2d 739 (Mo. 1958), related to the right of a trustee who has paid a surcharge for a breach of trust committed by both trustees to obtain contribution from his co-trustee.

61. 319 S.W.2d at 603.

62. *Id.* at 606.

## RESULTING AND CONSTRUCTIVE TRUSTS

In *Anderson v. Stacker*<sup>63</sup> a man paid the full consideration for a conveyance of land to himself and a woman described in the conveyance as his wife. This woman was living with him but was not his wife. It was held that the two grantees took the legal title as equal tenants in common but that the woman held her half on resulting trust for the man.

The plaintiff in *Jackson v. Tibbling*<sup>64</sup> was an elderly widow. She conveyed land, reserving a life estate, to a man who had been her husband's and her friend for many years. The grantee agreed to execute a will devising the land to the plaintiff if she survived him. He made such a will but, while on his death bed, revoked it and conveyed the land to his daughter, who then conveyed to the defendant, her mother. The court held that the oral contract to make a will was unenforceable because of the Statute of Frauds but that, because of the confidential relationship between plaintiff and the grantee, defendant held on constructive trust for the plaintiff. In *Wilber v. Wilber*<sup>65</sup> a wife paid the entire consideration for a conveyance of land. She had the conveyance run to herself and her husband as tenants by the entireties, because her husband was ashamed to live in a house owned by his wife, in reliance upon the husband's promise that he would never claim any beneficial interest in the property. After their divorce the former husband asserted beneficial title to an undivided half. It was decided that, because of their confidential relationship, he held upon constructive trust for his former wife. Probably the same result could have been reached by means of the purchase money resulting trust theory.

*Chandler v. Howard*<sup>66</sup> involved a rooming house proprietress who employed a lawyer to help her redeem her property from foreclosure of two deeds of trust. At the lawyer's request, this client executed a prom-

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63. 317 S.W.2d 417 (Mo. 1958). Purchase money resulting trusts were discussed in Fratcher, *supra* note 28, at 407-10. The evidence was found insufficient to establish purchase money resulting trusts in *Ellis v. Williams*, 312 S.W.2d 97 (Mo. 1958), and *Bennett v. Shaul*, 318 S.W.2d 307 (Mo. 1958). Cf. *March v. Gerstenschlager*, 322 S.W.2d 743 (Mo. 1959), holding that a suit to establish a purchase money resulting trust of land affects title to realty and, therefore, must be brought in the county where the land is situated.

64. 310 S.W.2d 909 (Mo. 1958). For a discussion of other Missouri cases relative to the imposition of a constructive trust upon a grantee of land who agreed orally to reconvey or to hold on trust for the grantor, see Fratcher, *supra* note 28, at 412-13.

65. 312 S.W.2d 86 (Mo. 1958).

66. 312 S.W.2d 26 (Mo. 1958).

issory note to the lawyer's daughter in an amount equal to the balance due on the two deeds of trust. The lawyer paid this amount to the holder of the deeds of trust, obtained the notes which they secured, and had the second deed of trust released of record. The lawyer later foreclosed the first deed of trust for his own benefit. It was held that, in view of the fiduciary relationship of lawyer and client, the lawyer held whatever interest he had acquired by the transfer of these notes and deeds of trust upon constructive trust for his client. Similarly, in *Johnson v. Blase*<sup>67</sup> a tenant in common of land subject to two deeds of trust consulted a lawyer in regard to the impending foreclosure of the second deed of trust, on which there was some \$850 due. The lawyer agreed to acquire title at the foreclosure sale and reconvey to the client when reimbursed for his expenses. The lawyer did acquire title through the foreclosure sale. The client more than repaid the lawyer's expenses and also spent substantial sums on improvements. It was held that the lawyer held upon constructive trust for his client.

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67. 322 S.W.2d 759 (Mo. 1959). This case involved, of course, two bases, which all jurisdictions recognize, for the imposition of a constructive trust despite the fact that the oral contract was within the Statute of Frauds: the fiduciary and confidential relationship of lawyer and client and the fact that the lawyer took title for security only. Cf. *Poole v. Campbell*, 289 S.W.2d 25 (Mo. 1956); *Fletcher*, *supra* note 28, at 412-13.