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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 *Longacre v. Knowles*.¹ The Missouri Probate Code of 1955 authorizes a person who claims title to personal property wrongfully withheld from him by an executor or administrator as an asset of a decedent's estate to petition the probate court for a determination of title.² This procedure was used by Joe Longacre to determine title to bonds and notes held by the administratrix of Gus Longacre, deceased. The decedent lent money to various persons, taking from them bonds or promissory notes which were made out at his direction. Some ran to Gus Longacre or Joe Longacre, one to Gus Longacre and Joe Longacre, some to Gus Longacre and/or Joe Longacre, one to Gus Longacre and/or Joe Longacre, or survivor, and one to Gus Longacre and/or Joe Longacre, "as joint tenants with right of survivorship and owners of this security." There was evidence that the decedent retained the instruments and collected all payments made upon them during his lifetime and that he intended that they should belong to Joe at his death. The trial court determined that the administratrix was entitled to retain all the notes and bonds. The Supreme Court held that the language of the instrument last described created a joint tenancy which entitled Joe to a right of survivorship but affirmed the judgment as to all the other instruments on the ground that their references to Joe were insufficient to create joint tenancies and, in the light of the extrinsic evidence, were testamentary and did not conform to the statutory requirements of wills.³ Because of the peculiar wording of the statute authorizing the proceeding the court did not decide whether Joe had some interest in the bonds and notes less than full ownership.

*A discussion of selected Missouri court decisions reported in Volumes 323-333 Southwestern Reporter, Second Series.

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1. 333 S.W.2d 67 (Mo. 1960).

2. § 473.357, RSMo 1957 Supp., amended by Mo. Laws 1959, S.B. No. 141 § 1. The amendments effect changes in the procedure.

3. The language of the opinion relating to the testamentary character of the intent is in the section devoted to the note payable to Gus and/or Joe, or survivor, but it does not appear to be restricted to this note.

In reaching the conclusion that the language of the notes and bonds purporting to create an interest in Joe was testamentary and ineffective for want of compliance with the requirements for execution of wills the court relied heavily on the earlier case of *Napier v. Eigel*.⁴ In the *Napier* case the decedent placed currency and bearer bonds in envelopes, wrote on the envelopes that they were the property of herself and her sister, and placed the envelopes in her safety deposit box. It was held that these acts were insufficient to create an interest in the sister. If the decedent's intention was donative, the transaction failed for want of delivery; if her intention was testamentary, the writing on the envelopes failed as a will for want of attestation. The *Napier* decision was sound on its facts, but those facts did not involve an element present in *Longacre v. Knowles* which, unfortunately, the court did not discuss. That element is the fact that the notes and bonds were contracts to pay money to a third party.

Although the cases are not in harmony, there is considerable authority for the proposition that a bond payable to the purchaser if alive at maturity, otherwise to a named third party, is not testamentary and the third party is entitled to the proceeds as against the purchaser's estate.⁵ In *Kansas City Life Ins. Co. v. Rainey*⁶ the decedent paid \$50,000 to the insurance company in exchange for a contract by which it agreed to pay him a stipulated quarterly annuity as long as he lived and, upon his death, to pay \$50,000 to a named beneficiary. The decedent reserved power to change the beneficiary and did so. The Supreme Court of Missouri rejected the contention

4. 350 Mo. 111, 164 S.W.2d 908 (1942). The court also relied upon an annotation, "Instruments for payment of money naming in alternative two or more payees," 171 A.L.R. 522 (1947). This annotation discusses a number of cases which do support the result reached in *Longacre v. Knowles*. That result is also supported by cases holding that a depositor's agreement with a bank that his deposits shall be paid to another if he dies before withdrawing them is testamentary. *Mercantile Bank v. Haley*, 179 S.W.2d 916 (St. L. Ct. App. 1944); see Annots., 131 A.L.R. 967 (1941), 155 A.L.R. 174, 1084 (1945), 161 A.L.R. 304 (1946). As these annotations indicate, there is conflicting authority on the latter point.

5. Annot., 168 A.L.R. 245, at 247 (1947), and cases cited in annotations referred to in the preceding note; ATKINSON, WILLS §§ 39, 40, 44 (2d ed. 1953).

6. 353 Mo. 477, 182 S.W.2d 624 (1944); see Annot., 155 A.L.R. 168 (1944), cited with approval, *Commerce Trust Co. v. Watts*, 231 S.W.2d 817, at 820 (Mo. 1950); *Carpenter v. Carpenter*, 267 S.W.2d 632, at 638 (Mo. 1954). The opinion in the *Rainey* case relied upon *Mutual Ben. Life Ins. Co. v. Ellis*, 125 F.2d 127 (2d Cir. 1942); see Annot., 138 A.L.R. 1478 (1942). In this case the beneficiary of a life insurance policy agreed with the insurance company that it should pay her interest on the proceeds and any principal which she might demand and, upon her death, the remaining principal should be paid to her sister.

of the decedent's executor that the designation of beneficiary was testamentary and held that the substituted beneficiary was entitled to the proceeds of the contract as against the decedent's estate, saying:

The policy we are considering is a contract between Hall and the insurance company for the benefit of Miss Rainey. This is true regardless of the element of risk. It still would be a contract for the benefit of a third person if made with a bank, a corporation of any other sort, or an individual. In the policy Miss Rainey is a third-party donee-beneficiary. Restatement of Contracts, sec. 133. She is entitled to enforce the contract even though she is a stranger to both the contract and to the consideration. 12 Am. Jur. Contracts, sec. 277.

The policy is not testamentary because it became effective before Hall's death. It was a contract made and in force during Hall's lifetime. Hence there would be no reason to surround it with formalities which safeguard a will. . . .⁷

In *Longacre v. Knowles* the court appears to have determined, on the basis of extrinsic evidence, that Gus Longacre arranged to have the notes and bonds issued in the manner mentioned with the intent that he should be entitled to payments falling due during his lifetime but that they should be payable to Joe Longacre after his death. The expressed intention in *Kansas City Life Ins. Co. v. Rainey* was virtually identical. It therefore seems impossible to reconcile these two cases. It is to be hoped that the Supreme Court will clarify the law in this field at the first opportunity.

MARITAL RIGHTS

Perhaps the most extensive and important changes in the law made by the Missouri Probate Code of 1955 were those relating to the rights of the surviving spouse. Some of these have been discussed before.⁸ During the current year several of the marital rights provisions of the Probate Code have been interpreted judicially.

Under the English law in force when this country was settled a surviving wife was a distributee of personal property as to which her husband died intestate.⁹ The husband was free to defeat his widow's distributive

7. 353 Mo. 477, at 483.

8. 23 Mo. L. REV. 477-478 (1958); 24 Mo. L. REV. 498-501 (1959).

9. Statute of Distribution, 1670, 22 & 23 Car. 2, c. 10, §§ 5, 6. If the husband left descendants, she took a third; if he did not, she took half.

share in his personal property by transferring it to others either inter vivos or by will. A wife was not an heir of her husband; her only right in his real property was dower, a right to a life estate in a third of all lands of which he was seized of an estate of inheritance at any time during the marriage. Her inchoate dower in the land arose, as a sort of future interest, at the moment her husband became seized; hence dower could not be defeated by the husband by inter vivos conveyance or by will. This was not because a conveyance by him was in fraud of marital rights but because he could not transfer what he did not own. It would seem that, under English law, there was no right to dower unless the husband was actually seized on or after the date of the marriage. There is, however, American authority for the proposition that a conveyance made on the eve of marriage for the purpose of defeating dower may be set aside, at the suit of the disappointed wife, as in fraud of dower.¹⁰

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 husband's personal property, and sometimes more than a life estate in real property, which cannot be defeated by will. In most jurisdictions such statutes have not been construed to restrict the husband's freedom to make inter vivos transfers; he may give all his property away if he wishes even though his purpose is to defeat his wife's "forced share."¹¹ Missouri and a very few other states, however, developed a minority rule to the effect that a husband's transfer of property, made during the marriage for the purpose of defeating his wife's forced share in his estate, would be set aside at her suit as in fraud of marital rights.¹²

The Probate Code codified and expanded the "fraud on marital rights" by inter vivos transfer doctrine. It provides:

474.150 1. Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from him without adequate considera-

10. *Swaine v. Perini*, 5 Johns. Ch. R. 482 (N.Y. 1821); *Littleton v. Littleton*, 18 N.C. (1 Dev. & Bat.) 327 (1835); ATKINSON, WILLS § 32 (2d ed. 1953); MACDONALD, FRAUD ON THE WIDOW'S SHARE (1960).

11. ATKINSON, WILLS § 32 (2d ed. 1953).

12. *Newton v. Newton*, 162 Mo. 173, 61 S.W. 881 (1901); *Wanstrath v. Kappel*, 356 Mo. 210, 201 S.W.2d 327 (1947); ATKINSON, WILLS § 32 (2d ed. 1953).

tion and applied to the payment of the spouse's share, as in case of his election to take against the will.

2. Any conveyance of real estate made by a married person at any time without the joinder or other written express assent of his spouse, made at any time, duly acknowledged, is deemed to be in fraud of the marital rights of his spouse, if the spouse becomes a surviving spouse, unless the contrary is shown.¹³

*Loe v. Downing*¹⁴ was a suit to set aside a deed as a fraud on marital rights. Decedent purchased a farm in 1917. In 1933 he and his first wife executed and delivered the deed in question, conveying the farm to decedent's nephew and the nephew's wife. There was no consideration for this conveyance and it was probably given to hinder creditors of the decedent. Decedent retained possession of the farm until 1955. Decedent's first wife died later in 1933 and he married the plaintiff a year later. The deed was recorded in 1939 and the plaintiff learned of it then or in 1955. Decedent died in 1957. A judgment setting aside the deed was reversed. The Supreme Court held that a conveyance made prior to marriage is not in fraud of the marital rights of the surviving spouse unless made just prior to marriage with the intention of defeating such rights. An intent to defraud creditors is not an intent to defeat marital rights and, as his then wife joined in the deed, decedent could not possibly have intended to defeat the marital rights of some future unanticipated spouse. Although the plaintiff may have been deceived or defrauded and have married the decedent in reliance upon his ownership of the farm which he occupied, this did not make her a bona fide purchaser within the meaning of the recording acts.

*Reinheimer v. Rhedans*¹⁵ was also a suit to set aside a deed. In 1942 a married man conveyed a vacant lot, which he had acquired from his father, to his sister, in exchange for a conveyance of another lot which the sister had acquired from the father's estate. In 1948 the grantor's wife recorded an affidavit claiming inchoate dower in the vacant lot. At her suit, commenced in 1956, the trial court set aside her husband's deed as in fraud of her marital rights. The Supreme Court reversed, holding (1) that the Probate Code effectively abolished dower which was inchoate on De-

13. Subsection 1, which is limited to gifts, was taken from Section 33 of the Model Probate Code (Simes, 1946). Subsection 2, which is not limited to gifts, is peculiar to Missouri. The words, "joinder or other written express assent of his spouse, made at any time" were substituted for "express assent of his spouse" by Mo. Laws 1957, at 829, § 1.

14. 325 S.W.2d 479 (Mo. 1959).

15. 327 S.W.2d 823 (Mo. 1959).

ember 31, 1955;¹⁶ (2) that Subsection 2 of § 474.150, quoted above, applies to conveyances of land made prior to January 1, 1956; (3) that a spouse may sue during her husband's lifetime to protect her marital rights but that, if she does so, the penultimate clause of the subsection probably deprives her of any presumption that a conveyance was in fraud of marital rights; and (4) that this conveyance, by way of fair exchange, was not in fraud of marital rights. The court declined to decide that the existence of consideration will always prevent a conveyance of land from being in fraud of marital rights, noting that Subsection 2 is not restricted to donative conveyances, but considered the presence of consideration "a highly material element."

The Probate Code¹⁷ provides for the making to a surviving spouse, or unmarried minor children if there is no spouse, upon application, of a homestead allowance not exceeding half the estate or \$7,500. Another provision of the Code,¹⁸ as originally enacted, provided that a surviving spouse who elected to take against the will should take by descent, as a modified share, if there were lineal descendants of the testator, one-third of the estate. The latter section was amended in 1957¹⁹ by the addition of a subsection which provides:

2. The rights of the surviving spouse under this section are not given in lieu of the homestead allowance under section 474.290, but any homestead allowance made to the surviving spouse shall be offset against the share taken under this section.

It was held in *Owen v. Riffe*²⁰ that a surviving spouse who elected to take against the will was entitled to a homestead allowance under the statutory provisions as they existed prior to the 1957 amendment. This being so, the amendment effected no change in the law.

In *Schubel v. Bonacker*²¹ the testator had no children and his widow died two months after he did without having applied for a homestead allowance. The widow's administrator then applied for a homestead allowance. The Probate Code provides that if the surviving spouse dies without re-

16. § 474.110, RSMo 1957 Supp. This was predicted in 24 Mo. L. Rev. 498 (1959). Cf. Note 32 *infra*.

17. § 474.290, RSMo 1957 Supp.

18. § 474.160, RSMo 1957 Supp.

19. Mo. Laws 1957, at 853, § 1.

20. 323 S.W.2d 765 (Mo. 1959). *Accord: In re Bell's Estate*, 328 S.W.2d 697 (Mo. 1959).

21. 331 S.W.2d 552 (Mo. 1960).

ceiving the homestead allowance (whether or not it has been allowed), it may be paid to the unmarried minor children.²² The Code also provides that if a child dies, marries or comes of age before his homestead allowance has been made he shall not receive it but that if he dies, marries or comes of age after it has been allowed but before payment, he is still entitled to it.²³ The Code makes no provision for the death of a surviving spouse when there are no unmarried minor children. The Supreme Court affirmed a decision denying the application, holding that, if there are no unmarried minor children and the surviving spouse dies before payment of the homestead allowance, whether or not it has been allowed, the right to a homestead allowance is destroyed.

*In re Walton's Estate*²⁴ involved the method of making the homestead allowance. In addition to the exempt property²⁵ the estate consisted of a bank balance of \$1757.11 and real property worth \$10,000. The probate court granted the widow a \$2000 family allowance,²⁶ determined that she was entitled to a homestead allowance of \$4878.55, and authorized her, as administratrix, to convey the real property to herself in fee simple "subject to a lien for such an amount as [decendent's child and heir] may have in said property after the payment of all debts, allowances, and homestead rights . . . determined by the Probate Court . . . at the time of the final settlement of this estate." The Probate Code provides: "The selection of property shall be made by the surviving spouse If real estate is included in the homestead allowance, the executor or administrator shall convey the same or an appropriate interest therein by deed to the person entitled thereto."²⁷ The Supreme Court held that this conveyance of the whole title, subject only to a lien for an uncertain amount, was not a conveyance of an "appropriate interest" within the meaning of the statute. The opinion does not specify the form which the conveyance should take but indicates that the widow should receive a definite divided or undivided part of the real property or the whole subject to payment of a definite amount.

In *Wyatt v. Bauer*²⁸ the parties did not contest the propriety of a probate court order directing the administratrix to convey to herself, as widow

22. § 474.300, RSMo 1957 Supp.

23. *Id.*

24. 330 S.W.2d 834 (Mo. 1960).

25. § 474.250, RSMo 1957 Supp.

26. § 474.260, RSMo 1957 Supp.

27. § 474.290, RSMo 1957 Supp.

28. 332 S.W.2d 301 (K.C. Ct. App. 1960).

of the deceased, an undivided half of his real estate in satisfaction of her homestead allowance. After this conveyance had been made the children of the decedent sued the widow for partition. It appeared that physical division of the property was not possible. The circuit court ruled, on the basis of decisions under the former homestead laws,²⁹ that a homestead may not be partitioned by sale. The court of appeals reversed, holding that a homestead allowance in real property under the Probate Code is an ordinary estate in fee simple subject to partition under the general laws and not affected by the restrictions on partition which applied to homesteads under the pre-existing statutes.

Until 1857 divorce *a vinculo matrimonii* was possible in England only by special act of Parliament and such acts ordinarily adjusted property rights. Consequently, the law governing the effect of divorce on the rights of the survivor in the property of a deceased ex-spouse is modern. In the absence of statutory provision it is held, in most jurisdictions, that divorce unaccompanied by a property settlement does not revoke provisions in a will for the benefit of the testator's spouse but that divorce plus a property settlement does so.³⁰ In Missouri it was held that even divorce accompanied by a property settlement did not revoke provisions in a will for the benefit of the testator's spouse.³¹ Prior to the Probate Code divorce did not terminate the statutory dower of an innocent and injured wife.³² Under the Probate Code provisions in a will in favor of the testator's spouse are revoked by divorce³³ and the statutory marital rights (exempt property, family allowance, homestead, intestate share and forced share) do not extend to an ex-spouse. In *Heil v. Rogers*³⁴ a wife sued for divorce and her husband filed a cross petition for divorce. The hearing was completed and the judge had the case under advisement when the husband died. His death was suggested of record. Later his executor and legatees under his will filed motions in the divorce proceeding seeking to intervene and for entry of a divorce decree *nunc pro tunc*. The judge first dismissed the motions. Later

29. §§ 513.495, 513.500, RSMo 1949. These sections entitled a widow to occupy her husband's dwelling until her death or remarriage and minor children to occupy their deceased parent's dwelling during minority.

30. ATKINSON, WILLS 431 (2d ed. 1953).

31. *Robertson v. Jones*, 345 Mo. 828, 136 S.W.2d 278 (1940).

32. § 469.200, RSMo 1949. There is a serious constitutional question as to whether the dower of such an ex-spouse, inchoate on December 31, 1955, was effectively abolished by § 474.110, RSMo 1957 Supp., note 16 *supra*.

33. § 474.420, RSMo 1957 Supp.

34. 329 S.W.2d 388 (K.C. Ct. App. 1959).

he entered a decree on the cross-bill, granting a divorce *nunc pro tunc* as of the last day of the hearing. The court of appeals held that this decree was void because the death of a party to a divorce proceeding deprives the court of jurisdiction to decree divorce.³⁵

CONTRACTS TO MAKE WILLS

*Day v. Blackbird*³⁶ was a suit in equity for "specific performance" of an alleged oral contract to make a will. The plaintiff alleged that, when she and her brother became the only unmarried members of a family of nine, they agreed to live together in the brother's house, share living expenses, hold their securities as joint tenants, designate each other as life insurance beneficiaries and execute wills designating each other as sole devisees. There was evidence that the plaintiff did hold securities jointly with her brother and designate him as life insurance beneficiary. Some of the other brothers and sisters testified to the existence of the alleged agreement and some testified to the contrary. The brother did make a holographic will giving his estate to the plaintiff but this, being unwitnessed, was not admissible to probate under Missouri law. The Supreme Court refused to disturb a finding of the trial court that, although proof of intention to make a will was clear, the existence of a contract to do so was not proved *beyond a reasonable doubt*.

*Reighley v. Fabricius's Estate*³⁷ was decided eight days after the final action of the Supreme Court in the case just discussed. It was a claim against a decedent's estate for breach of an alleged oral contract to compensate the claimant, by provision in the decedent's will, for nursing and domestic services rendered to the decedent and her mother-in-law in 1924, 1925 and 1931-1933. It was held that an action at law is maintainable for breach of a contract to bequeath a definite sum (as distinguished from all or a fraction of the estate), or the reasonable value of services, and that in such an action at law the proof of the contract need only be by a *preponderance of the evidence*. By treating the claim as an action at law the court was able to distinguish it from cases, like that just discussed, indicating that, in equity, proof of a contract to make a will must be beyond a reasonable doubt.

35. Relying upon *Young v. Young*, 165 Mo. 624, 65 S.W. 1016 (1901). This is the usual view. See Annot., 104 A.L.R. 654 (1936).

36. 331 S.W.2d 658 (Mo. 1960).

37. 332 S.W.2d 76 (St. L. Ct. App. 1960).

MAKING AND VALIDITY OF WILLS

The opinion in *McGrail v. Rhoades*³⁸ contains an interesting discussion of the extent to which an insane delusion negatives testamentary capacity. This was an action to contest a will giving \$500 to testator's only child and the residue, some \$30,000, to his sisters, on the ground that he suffered from an insane delusion that contestant was not his child. Contestant was born in 1916, less than nine months after testator's marriage. Her mother divorced the testator when contestant was nine years old and contestant saw testator thereafter only in connection with efforts to compel or persuade him to support her. Testator and his sisters inherited oil interests from another sister in 1946. The will was executed in 1953 and testator died in 1955. Contestant's mother testified that once, during the marriage, testator said that contestant was not his child, that she did not look like him; and that in 1952 or 1953, while drunk and being pressed to support contestant, he said that he did not have or did not remember a daughter. Two relatives of contestant and contestant herself testified that, on occasions when they urged him to support contestant, testator denied that contestant was his daughter. Testator's drinking companion testified that testator said he had a daughter who looked like him but that his sister had told him that she was not his daughter. The will described contestant as testator's daughter. A judgment for contestant based on a 6-3 verdict was reversed on the ground that the evidence of insane delusion was insufficient for submission to a jury. The court stressed the language of the will and the absence of expert testimony.

When a deed of conveyance of land is delivered to a third party, with irrevocable instructions to redeliver to the grantee upon the death of the grantor, it is arguable that the transaction is testamentary and effective only if the instrument conforms to the requirements for wills. The courts have not tended, however, to treat such a transaction as testamentary. In some jurisdictions such a transaction is treated as a delivery in escrow, which does not pass title until the second delivery, but the second delivery relates back, for the purpose of determining the validity and effect of the conveyance, to the date of the first delivery. In other jurisdictions such a transaction is deemed to pass title to the grantee at the time of the first delivery, subject to a life estate in the grantor.³⁹ Previous Missouri decisions adopt-

38. 323 S.W.2d 815 (Mo. 1959), noted, 35 N. Y. U. L. REV. 478 (1960).

39. ATKINSON, WILLS § 43 (2d ed. 1953).

ing the latter view⁴⁰ were followed in *Bailey v. Williams*,⁴¹ holding that the grantee in such a deed could maintain ejectment, after the death of the grantor, without alleging that the second delivery had been made.

*Peters v. Dodd*⁴² was a proceeding to probate a lost will in which the court applied the usual presumption that, when a will last seen in the possession of the testator cannot be found after his death, it was destroyed by him with intent to revoke. Evidence that the testator made gifts to his daughters, who were disinherited by the will, shortly before his death and that one of them, to the testator's knowledge, had sustained serious injuries, was held to be admissible in support of the presumption.

*Wilburn v. Meyer*⁴³ was a tort action for damages for alleged fraudulent suppression of a will. There is no authority in Missouri for the existence of such a cause of action but the defendant conceded that such suppression is a tort. The decedent died in 1942 and an instrument dated January 5, 1937, which specifically devised to the plaintiff land which the decedent had sold before his death, was admitted to probate as his will. The plaintiff testified that the defendant, in 1949, handed her a typewritten paper purporting to be a copy of a will of the decedent, also dated January 5, 1937, which specifically devised to the plaintiff land which the decedent owned at the time of his death. The defendant admitted the truth of this testimony but denied knowledge of the source of the typewritten paper, having received it from the decedent's widow, since deceased. The trial court, sitting without a jury, entered judgment for the defendant and the court of appeals affirmed, holding that plaintiff had the burden of proving the execution of a valid will and its suppression by the defendant. There being no substantial proof of execution, the burden was not met.

CONSTRUCTION OF WILLS

In *Ussher v. Mercantile Trust Co.*⁴⁴ the testator's wife, who was his sole heir and distributee on intestacy, lived apart from him. By his will bequeathed to her his clothing, jewelry, furniture and other chattels of a

40. *Crites v. Crites*, 225 S.W. 990 (Mo. 1920); *Tillman v. City of Carthage*, 297 Mo. 74, 247 S.W. 992 (1923); cases cited in the opinion cited in the following note.

41. 326 S.W.2d 115 (Mo. 1959).

42. 328 S.W.2d 603 (Mo. 1959).

43. 329 S.W.2d 228 (K.C. Ct. App. 1959).

44. 328 S.W.2d 699 (Mo. 1959).

personal nature. The will then bequeathed to trustees an amount equal to the maximum marital deduction under the Internal Revenue Code, to pay the income to his wife for life and to distribute the principal as she should by will appoint. After stating that the provisions therein made for his wife were in lieu of all statutory and other legal rights in his estate, the will bequeathed the residue, if his wife survived him, to trustees to pay the income to his wife for life. A final clause provided that, if testator's wife predeceased him, the funds which would otherwise form the two trusts should pass to two cousins or their heirs, "and the same disposition shall be made of any of my property remaining which has not been disposed of under my will." A judgment determining that the remainder in the property included in the second trust was undisposed of by the will and passed to testator's wife as intestate distributee was reversed, the Supreme Court holding that, in the light of the circumstances, the final clause was intended to pass the remainder in the residue to the cousins even though the testator was survived by his wife. The usual presumption against partial intestacy conduced, of course, to this result.

*Mavrakos v. Papadimitriou*⁴⁵ involved the construction of a will clause reading, "Remaining half of my estate to be equally divided among my nieces and nephews as follows: Children of my deceased sister, Kanela Panagiotokopoulou. Haralampon S. Papademetriou, Athens, Greece." It appeared that the testator's deceased sister, Kanela, had five children and that he had nephews named Haralampon T. Papadimitriou, of Athens, Greece, son of his deceased brother, Theodore, and Haralampon S. Papadimitriou of Valtesinico, Greece, son of his living brother, Soterion. A prior clause of the will gave a quarter of the estate to Soterion and there was evidence that the testator corresponded regularly with Haralampon T. Papadimitriou of Athens. The trial court decided that Haralampon T. Papadimitriou of Athens was the nephew intended to be named and that he took a quarter of the estate, the other quarter passing to the descendants of Kanela. The court of appeals reversed, holding that the words equally divided *among* called for equal division *among* persons rather than *between* classes and that, the intention being ascertainable from the will, resort to extrinsic evidence of the testator's attitude toward his relatives was not necessary to decide the per capita-per stirpes question. In consequence, Haralampon T. Papadimitriou took only a twelfth of the estate.

45. 331 S.W.2d 161 (St. L. Ct. App. 1960).

The will involved in *Schubel v. Bonacker*⁴⁶ contained a bequest of "\$10,000.00 in bank stock of the Industrial Bank of St. Louis, Mo., and its accumulations." On the date of the will the testator owned 500 shares of stock in the Industrial Bancshares Corporation worth \$9500.00. The Industrial Bancshares Corporation then owned virtually all the stock of the Industrial Bank of St. Louis and this stock constituted some forty per cent of its assets. After the execution of the will the Industrial Bancshares Corporation changed its name to General Contract Corporation and, incident to a stock split, issued 500 shares of stock under the latter name to the testator. At about the same time the Industrial Bank of St. Louis dropped the word "Industrial" from its name. A determination that the bequest carried the stock in the General Contract Corporation owned by the testator at the time of his death was affirmed in an opinion following the usual rule that parol evidence is admissible to explain a latent ambiguity. The will contained another bequest of "\$1512.00 in the First National Bank of St. Louis, Mo." to testator's wife. At the time of his death the testator had no account in the First National Bank of St. Louis but did own thirty-six shares of its capital stock. A determination that the bequest did not carry the stock but did entitle the wife to \$1512 was affirmed without discussion of the question whether the bequest was specific or demonstrative. If the bequest was specific, the wife should have received the stock or nothing, depending upon whether the language was deemed to relate to stock or a deposit. The result reached amounts to a decision that the bequest was demonstrative. That seems questionable.⁴⁷

*Gehring v. Henry*⁴⁸ involved an ineptly drafted instrument signed by a husband and wife and purporting to be their joint will. The first clause devised all property of the husband "unconditionally" to the wife. The second clause devised all property of the wife to the husband. The third clause provided, "in case we the undersiners [*sic*] died on or near the same

46. 331 S.W.2d 552 (Mo. 1960).

47. A specific bequest is of definite property; it is defeated by ademption if the testator does not own that property at the time of his death. A demonstrative legacy is one which is to be paid out of a designated fund, but payable at all events even if this fund fails. It, like a specific bequest, has priority, to the extent of the designated fund, over general legacies but, unlike a specific bequest, it is not defeated by ademption if the testator disposes of the designated fund before his death. The late Professor Atkinson pointed out that the courts are inclined to construe legacies as demonstrative although the language of the will suggests either a specific or a general legacy. ATKINSON, WILLS 735 (2d ed. 1953).

48. 332 S.W.2d 873 (Mo. 1960).

date all of the real and personal [*sic*] property owned [*sic*] and by each and/or by both of us is to be divided equally [*sic*] between" named nephews of the husband. Only the husband had property at the date of execution of the instrument and neither spouse had descendants. In 1952 or 1953 the husband wrote on the instrument, "The Sisters [of the wife] will have no claim on estate at any time" and he made oral statements that he did not want his wife's sisters "to have a thing." The husband died in 1953 and the instrument was admitted to probate as his will. The wife was declared insane in 1953. She died in 1958 and the instrument was admitted to probate as her will. A judgment determining that, on the death of the wife, the property passed to her sisters as intestate distributees was affirmed. It was held that the written and oral declarations of the husband could not be used to achieve a distribution not provided for in the will.

ADMINISTRATION OF ESTATES

*Alexander's Estate v. McElhiney*⁴⁹ was decided on a purely procedural ground. Heirs who objected to an administrator's final settlement filed motions to modify the settlement, remove the administrator and compel him to account. The matter was removed to the circuit court, which granted a default judgment against the administrator sustaining the objections to his settlement, revoking his letters, and requiring him to appear in court the next day to render an account. The administrator appealed from this judgment. The appeal was dismissed on the ground that the judgment was interlocutory and not appealable.

*In re Toler's Estate*⁵⁰ involved a widow's petition for letters of administration on the estate of her husband, who died in 1956, leaving personal property in Missouri. The decedent was born and educated in Missouri and practiced law here until 1937. He paid his Missouri Bar dues as long as he lived. After 1937 he spent weekends, and kept some of his effects, in a hotel in Louisiana, using it as a headquarters from which he traveled in connection with his business of securing oil and gas leases. He registered as a voter, licensed his automobile and paid resident income tax in Louisiana. He resisted attempts to collect Missouri income tax on the ground that he was located permanently in Louisiana and did not intend to reside again in Missouri. Decedent's mother and sisters obtained a judgment from

49. 327 S.W.2d 218 (Mo. 1959).

50. 325 S.W.2d 755 (Mo. 1959).

a Louisiana district court determining that he was domiciled there and that they were entitled to his entire estate, a widow not being an heir or distributee under Louisiana law. Under Missouri law the widow of an intestate survived by a mother and sisters is entitled to exempt property,⁵¹ a family allowance⁵² and half the net estate.⁵³ A judgment dismissing the petition was affirmed on the ground that, as a matter of fact, the decedent was domiciled in Louisiana. Having decided the case on this ground, the court found it unnecessary to inquire into the effects of the Louisiana judgment. It did not decide whether, if ancillary administration proceedings were commenced in Missouri, the widow would be entitled to a family allowance.⁵⁴

*North v. Hawkinson*⁵⁵ was a suit commenced against an executrix in the circuit court twelve months after the first publication of notice of letters testamentary. The pleadings alleged that the plaintiff and the decedent had been partners in a business of real estate investment, that the partnership had been dissolved and that, by mutual agreement, the decedent was engaged in winding up its affairs at the time of his death. The plaintiff sought an accounting and a money judgment for his share of the profits. The Probate Code provides that all claims against decedents' estates, liquidated or unliquidated, founded on contract or otherwise, which are not filed in the probate court within nine months after the first published notice of letters testamentary or of administration, are forever barred.⁵⁶ It also provided that actions against a decedent's estate, commenced after death, shall be barred unless notice of the institution thereof is filed in the probate court within nine months after the first published notice of letters.⁵⁷ Prior to the Probate Code it was held that the nonclaim statute then in force did not apply to claims which could not be adjudicated in the probate court and that the probate court could not adjudicate upon purely

51. § 474.250, RSMo 1957 Supp.

52. § 474.260, RSMo 1957 Supp.

53. § 474.010, RSMo 1957 Supp.

54. § 473.675(3), RSMo 1957 Supp., enacted by Mo. Laws 1957, at 862, § 3, provides that, in the administration of a non-resident's estate the family allowance of the surviving spouse shall be governed by the law of the decedent's domicile or that of Missouri, whichever is more liberal to the spouse. This was enacted after the death of the decedent Toler.

55. 324 S.W.2d 733 (Mo. 1959).

56. § 473.360(1), RSMo 1957 Supp. There are some exceptions.

57. §§ 473.360(2), 473.367, RSMo 1957 Supp. The 1959 amendment to § 473.360(2) is discussed in note 60 *infra*.

equitable claims.⁵⁸ A judgment of the circuit court dismissing the suit on the ground that it was barred by the nonclaim provisions of the Probate Code was affirmed. The Supreme Court held that, under the Code, claims are barred whether or not the probate court has power to adjudicate on them and that, therefore, it was unnecessary to decide whether the claim could have been allowed by the probate court.

*Clarke v. Organ*⁵⁹ was a suit by a guardian of minors for the wrongful death of their parents against the administratrix of the alleged tort-feasor's estate. The parents and the alleged tort-feasor were killed in a collision on September 1, 1956. Notice of the issuance of letters of administration to the defendant was published October 11, 1956. The wrongful death action was commenced on November 10, 1956. The defendant was served on November 23, 1956, and filed an answer alleging a defense of contributory negligence. On October 16, 1957, the defendant filed a motion to dismiss on the ground that the action was barred by failure to file notice of its institution in the probate court within nine months after the first publication of notice of letters. Notice was filed in the probate court later. It appeared that the assets of the estate amounted to only \$125 and that the plaintiff wished a judgment so as to be able to proceed against the liability insurer of the decedent tort-feasor. A judgment granting the motion to dismiss was affirmed. The court held that the administratrix could not waive or be estopped to assert the bar arising from failure to file on time in the probate court. The 1959 amendments to the Probate Code probably require a different result on facts like those involved in this case.⁶⁰

As is usual, there were a number of cases involving claims against decedents' estates. Some of these turned on questions of proof.⁶¹ One in-

58. *Orr v. St. Louis Union Trust Co.*, 291 Mo. 383, 236 S.W. 642 (1922).

59. 329 S.W.2d 670 (Mo. 1959) (en banc).

60. As originally enacted, § 473.360, RSMo 1957 Supp. provided, "2. All actions against the estate of a deceased person, pending or filed under sections 473.363 or 473.367, shall abate or shall be barred unless notice of the revival or institution thereof is filed in the probate court within nine months after the first published notice of letters." This subsection now provides, "Unless written notice of actions instituted or revived under sections 473.363 or 473.367 is filed in the probate court within nine months after the first published notice of letters, no recovery may be had in any such action on any judgment therein against the executor or administrator out of any assets being administered upon in the probate court or from any distributee or other person receiving such assets." Mo. Laws 1959, S.B. No. 305 § 1.

61. *Wardin v. Quinn*, 324 S.W.2d 151 (K.C. Ct. App. 1959); *Schrock v. Lawrence's Estate*, 327 S.W.2d 836 (Mo. 1959).

volved a question of considerable interest in the law of insurance.⁶² The decedent was engaged in the business of purchasing livestock and selling it through a stockyard operated by the claimant. The claimant earned substantial commissions for handling and selling decedent's livestock and lent the decedent some \$11,000 to finance his business. Claimant, with the consent of the decedent, insured the decedent's life for \$21,000, paid the premiums himself, and collected the insurance proceeds. When claimant filed a claim for the \$11,000 which he lent to the decedent, the administrator contended that, as claimant's only insurable interest was as a creditor, his designation as beneficiary of the insurance policy was for security only. This being so, it was contended that the claim had been fully paid by the insurance proceeds and that claimant was bound to pay to the estate the amount by which the proceeds exceeded the claim. The Supreme Court refused to disturb a determination by the trial court that claimant had an insurable interest in the decedent's life arising from their business association and that the policy was to protect his anticipated profits from this association rather than his rights as a creditor. This being so, claimant was entitled to both the insurance proceeds and repayment of the amount lent to the decedent.

*Barnes v. Hilton*⁶³ was concerned with a question of priority between a federal tax lien and a judgment against the decedent. Barnes recovered a judgment against Hilton in the District Court of Johnson County, Kansas. Hilton subsequently died. Without reviving the judgment against Hilton's executrix, Barnes, on June 14, 1957, filed a petition on foreign judgment in the Circuit Court of Jackson County, Missouri, and had a writ of garnishment served on a bank there in which Hilton had an account. On September 6 and 9, 1957, the United States filed tax liens against Hilton's estate in Johnson County, Kansas, and Jackson County, Missouri. On October 11, 1957, Barnes secured a revivor of the judgment against Hilton's executrix in Johnson County, Kansas, and filed a copy in the Circuit Court of Jackson County, Missouri. The United States petitioned to intervene in the Missouri proceeding, claiming that its lien had priority over the garnishment. The circuit court dismissed the petition for intervention and the court of appeals reversed, holding that a duly filed federal tax lien has priority over a writ of garnishment issued prior to judgment, that the original

62. *Poland v. Fisher's Estate*, 329 S.W.2d 768 (Mo. 1959).

63. 323 S.W.2d 831 (K.C. Ct. App. 1959).

judgment in this case, under both Kansas and Missouri law, became dormant upon the death of the judgment debtor and that, consequently, Barnes's priority dated from the time of the revivor, which was subsequent to the filing of the federal tax lien.

*Robinson v. Gaines*⁶⁴ was an action by a widow against the administrator of her husband's estate for damages for personal injuries incurred by the plaintiff in an automobile collision in New Mexico in which the husband, who was driving, was killed. Both spouses were domiciled in Missouri, where such actions are permitted.⁶⁵ A judgment sustaining a motion to dismiss was affirmed. The court held that the question of whether an injury inflicted by one spouse on another is a tort is a question of substantive law governed by the law of the place where the act was done. In the absence of a New Mexico decision on the point it must be assumed that New Mexico follows the common law, under which such an injury is not a tort.

*Steva v. Steva*⁶⁶ was a claim for the value of washing, ironing, mending and meals furnished to the decedent between 1918 and 1957. It was held that the fact that the claimant was a sister-in-law of the decedent did not give rise to a presumption that the services were performed gratuitously but that, there having been a break in the continuity of the service from 1930 to 1934, the statute of limitations barred recovery for services rendered prior thereto.⁶⁷

CREATION AND TERMINATION OF TRUSTS

The opinion in *In re Sidebottom's Estate*⁶⁸ is a clear, well-reasoned and helpful discussion of the question of when the donee of a power of appointment holds the power on trust. The testator devised his residuary estate to an individual trustee, to hold for not less than six or more than ten years. After six years the trustee was directed to transfer the trust property

to that Presbyterian School located in the west half of the Synod of Missouri, which the Board of Christian Education of the Presbyterian Church in the United States of America . . . shall designate. . . . Should said Board at the end of said period not designate any

64. 331 S.W.2d 653 (Mo. 1960).

65. *Ennis v. Truhitte*, 306 S.W.2d 549 (Mo. 1957) (en banc).

66. 332 S.W.2d 924 (Mo. 1960).

67. On the latter point the decision follows that in *Minor v. Lillard*, 289 S.W.2d 1 (Mo. 1956), noted, 22 Mo. L. Rev. 402 (1957).

68. 327 S.W.2d 270 (Mo. 1959).

such school to receive said property, then the said trust shall continue for a period of not to exceed four years, under the provisions in this will; and if the said Board shall not within said additional period of four years designate any such a school to receive said property, the said Trustee shall pay and turn over to Park College, Parkville, Missouri, all of said property, money and funds in his hands.

At the end of ten years the Board of Christian Education adopted a resolution expressly declining to designate a school. Missouri Valley College, alleging that it was the only Presbyterian school located in the west half of the Synod of Missouri, sued the trustee and Park College for a determination that, by virtue of the terms of the will and a prior oral agreement with the testator, the Board of Christian Education held the power of appointment on trust and was under an imperative duty to exercise it. The trial court sustained the defendants' motions for judgment on the pleadings and dismissal. The Supreme Court affirmed, holding that, in view of the express gift over in default of appointment, the will manifested an intention that the donee should have discretion as to whether to exercise the power. This being so, extrinsic evidence of an oral agreement that the power was on trust and imperative would be inadmissible because it would contradict the clear language of the will.

Hughes v. Neely and the companion case, *Hughes v. Smith*,⁶⁹ which relate to judicial power to direct premature termination of trusts, have implications which are disturbing as to security of land titles. A settlor created two trusts of land, one by will and one by inter vivos conveyance. The same individual was trustee of both trusts and, by the terms of both, he was to pay the income to the settlor's daughter, Margaret, during her lifetime. The will limited a remainder, on the death of Margaret, to her heirs, and empowered the trustee and Margaret to mortgage or sell her interest. The deed limited a remainder, on the death of Margaret, to the heirs of her body or, in default of such heirs, to the heirs of the settlor, and empowered the trustee, with the consent of Margaret, to mortgage "such part of the real estate herein conveyed and to such an amount as he may deem necessary for the proper care and support of the said Margaret." The settlor died in 1921. In 1930 Margaret and a successor trustee brought two suits against Margaret's only child, William, and the other children of the

69. 332 S.W.2d 1 (Mo. 1960).

settlor, alleging that the income from the land was insufficient to pay taxes and mortgages encumbering it, that this made the carrying out of the purpose of the trust, providing income for Margaret, impossible. The decree in one case declared the trusts cancelled and that title to the lands was in Margaret as heir of the settlor. The decree in the other case quieted title in Margaret as heir of the settlor. Margaret and the successor trustee, who was her husband, later conveyed the lands to the defendants.

The present litigation comprised suits brought by Margaret's children, William and Mary, the latter of whom was born in 1931, against Margaret and her grantees for a declaration that the 1930 decrees were ineffective as against their contingent remainders in the land. Judgments granting the relief prayed were affirmed. The Supreme Court held that contingent remainders are indestructible in Missouri⁷⁰ and that the 1930 decrees were void on their faces because a court of equity has no power, on the facts stated in the 1930 petitions, to destroy contingent remainders by a decree terminating trusts. That the 1930 decrees were erroneous in failing to protect the contingent remaindermen seems evident⁷¹ but that they were subject to collateral attack by a party to the cases in which they were entered, thirty years after entry, is not so evident.⁷²

TRUST ADMINISTRATION

*First National Bank v. Smirnoff*⁷³ was a suit by testamentary trustees for construction of the will and instructions as to their duties. One clause of the will directed the trustees to pay the testator's wife, out of principal or income, \$500 a month, plus hospital, medical, nursing and funeral bills. A second clause directed the trustees to pay the testator's daughter, out

70. Citing Eckhardt, *The Destructibility of Contingent Remainders in Missouri*, 6 Mo. L. REV. 268 (1941), and Lewis v. Lewis, 345 Mo. 816, 136 S.W.2d 66 (1940), which held that contingent remainders cannot be destroyed by merger. See Moore v. Moore, 329 S.W.2d 742 (Mo. 1959), discussed at the end of this article. As the contingent remainders involved in Hughes v. Neely and Hughes v. Smith were protected by trusts they would not have been destructible even under seventeenth century English law. Pye v. Gorge, 1 P. Wms. 128, 24 Eng. Rep. 323 (1710), *aff'd. sub. nom.* Gorges v. Pye, 7 Brown 221, 3 Eng. Rep. 144 (1712); Fratcher, *Trustor as Sole Trustee and Only Ascertainable Beneficiary*, 47 MICH. L. REV. 907, 910-915 (1949).

71. Hughes v. Federal Trust Co., 119 N.J. Eq. 502, 183 Atl. 299 (Eq. 1936); RESTATEMENT (SECOND), TRUSTS § 168, Comment *d* (1959). *Cf.* § 167, Ill. 6; § 168, Ill. 5; § 335, Comment *a*; § 336, Comment *b*.

72. RESTATEMENT (SECOND), TRUSTS § 345, Comment *j* (1959).

73. 325 S.W.2d 359 (K.C. Ct. App. 1959).

of principal or income, \$250 a month, plus hospital, medical, nursing and funeral bills. A third clause directed the trustees, at the death of the testator's wife, to pay his daughter \$750 a month. It did not mention principal, income or hospital, medical and nursing bills. The widow elected to take against the will and an earlier construction proceeding determined that this was equivalent to her death for purposes of the third clause. The income was not quite sufficient to enable the trustees to pay \$750 a month from income. A decree determining that the daughter was entitled to \$750 a month, payable from principal to the extent necessary, but not to any additional amount for hospital, medical or nursing bills, was affirmed.

RESULTING AND CONSTRUCTIVE TRUSTS

In *Williams v. Ellis*⁷⁴ an uncle purchased land on foreclosure of a second deed of trust, paying \$3500, and had the deed made out to his nephew and the nephew's wife. The nephew and his wife assumed and agreed to pay a \$6,729.68 balance due on a first deed of trust. The income from the property was reported in the nephew's tax returns, not in the uncle's. The uncle paid the property taxes and repair bills and collected the rents during his lifetime. The nephew signed all leases as owner and the uncle signed letters as agent for the nephew. The uncle told others that he had given the property to his nephew. After the uncle's death, thirty-five of his heirs sued to establish a resulting trust in the property. A judgment for the nephew and his wife was affirmed on the ground that the evidence was sufficient to warrant a finding that the uncle did not intend a resulting trust for himself.⁷⁵

*Harrellson v. Barks*⁷⁶ was an action by the administratrix of a husband for damage to an automobile incurred in a collision while his wife was driving. Title to the automobile was in the name of the husband alone but the defendant contended that, because he purchased it with funds drawn from a bank account opened in the joint names of husband and wife, the wife was a co-owner of the vehicle. This contention was rejected on the ground that, when a spouse acquiesces in the other spouse's withdrawing funds from a joint account to purchase property in his own name, the

74. 323 S.W.2d 238 (Mo. 1959). For earlier discussions of the purchase money resulting trust doctrine in Missouri see 22 Mo. L. Rev. 407-410 (1957); 24 Mo. L. Rev. 511 (1959).

75. RESTATEMENT (SECOND), TRUSTS § 441 (1959).

76. 326 S.W.2d 351 (Spr. Ct. App. 1959).

acquiescing spouse has no interest in the property so acquired, by way of resulting trust or otherwise.

It is well established that, when a husband pays the consideration for a transfer of property to his wife, a resulting trust does not arise in the absence of a manifestation of intention on the part of the husband that the wife should not be the beneficial owner.⁷⁷ In other words, when a husband pays for a transfer to his wife there is a rebuttable presumption that a gift was intended. When, however, a wife pays the consideration for a transfer of property to her husband, there is a rebuttable presumption that a resulting trust, not a gift, was intended.⁷⁸ As to property purchased with funds withdrawn from joint bank accounts the decision in *Harrellson v. Barks* would seem to apply a presumption of gift, rather than resulting trust, whether title is taken in the name of the wife or the husband.

*Stahle v. Mercantile Trust Company*⁷⁹ was a curious case which, perhaps, should have been discussed under the heading "Marital Rights." The plaintiff resided with a woman for forty-four years, ostensibly as her husband, and permitted her to handle his financial affairs. After her death he discovered that she had transferred some \$30,000, which must have been derived from his earnings, to a trust company upon trust for herself and her relatives. The plaintiff then sued to establish title to the trust property. A judgment denying relief was affirmed on the theory that the woman had appropriated no more than her services were reasonably worth.

In *Moore v. Moore*⁸⁰ land was devised to Moore and the heirs of his body. Under the Statute of Westminster II, Chapter I, commonly known as *De Donis Conditionalibus*,⁸¹ this devise would have vested an estate tail in Moore. Under the Missouri statute abolishing entails the devise operated to give Moore a life estate with contingent remainder to the heirs of his body.⁸² Prior to his marriage the life tenant entered into an agree-

77. *Hampton v. Niehaus*, 329 S.W.2d 794 (Mo. 1959); *Fisher v. Miceli*, 291 S.W.2d 845 (Mo. 1956), noted, 22 Mo. L. REV. 409 (1957); *Glynn v. Glynn*, 291 S.W.2d 190 (Spr. Ct. App. 1956); RESTATEMENT (SECOND), TRUSTS § 442 (1959).

78. RESTATEMENT (SECOND), TRUSTS § 442, Comment *a* (1959). See *Glauert v. Huning*, 290 S.W.2d 126 (Mo. 1956).

79. 327 S.W.2d 220 (Mo. 1959).

80. 329 S.W.2d 742 (Mo. 1959). *Hughes v. Neely* and *Hughes v. Smith*, *supra* note 69, involved attempts to destroy contingent remainders by a different method.

81. 13 Edw. 1, stat. 1, c. 1 (1285).

82. § 442.470, RSMo 1949. "In cases 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 per-

ment with his uncle for the purpose of "barring the entail," *i.e.*, destroying the contingent remainder. Pursuant to this agreement the life tenant refrained from paying taxes, the land was sold at tax sale to a straw party and the uncle paid the price bid at the tax sale. The uncle also paid the life tenant's debts to others and discharged debts due to himself. The straw party conveyed, through another straw party, to the uncle, as trustee for the uncle's wife. In the latter capacity the uncle contracted to convey in fee simple to the former life tenant upon being reimbursed for the amounts paid and discharged by him. The former life tenant did not take advantage of this contract. More than thirty years after these transactions the children of the former life tenant sued him and those claiming title through or under the uncle for a determination that they were entitled to a contingent remainder in the land expectant upon the former life tenant's death. A judgment for the plaintiffs was affirmed, the court holding that, having colluded with the life tenant to defeat the contingent remainder, the uncle held upon constructive trust for the contingent remaindermen. As those who acquired the title through or under the uncle either had notice of the trust or were mere donees, they, too, held upon constructive trust.

The statute abolishing entails had long been interpreted as converting the interest of the heirs of the body of a donee in tail from a mere expectancy of inheritance into a remainder.⁸³ Under modern Missouri law a contingent remainder is not destructible by merger.⁸⁴ It is well settled that the life tenant has a fiduciary duty to protect an indestructible remainder and that he may not enlarge his estate, at the expense of the remainder, by purchasing at a tax sale.⁸⁵ From these premises the result reached in *Moore v. Moore* seems to follow logically. Yet a glance at the history of entails may raise doubts as to its soundness.

son, 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." For the history and interpretation of this legislation see Hudson, *Estates Tail in Missouri*, 7 ILL. L. REV. 355 (1913), reprinted, 1 U. MO. BULL. L. SER. 5 (1913); Steiner, *Estates Tail in Missouri*, 7 U. KAN. CITY L. REV. 93 (1939).

83. Note 82 *supra*.

84. *Lewis v. Lewis*, 345 Mo. 816, 136 S.W.2d 66 (1940); note 70 *supra*.

85. Annot., 126 A.L.R. 862, at 871 (1940). See *Witcher v. Hanley*, 299 Mo. 696, 253 S.W. 1002 (1923); *Duffley v. McCaskey*, 345 Mo. 550, 134 S.W.2d 62; Annots., 126 A.L.R. 853 (1939), 137 A.L.R. 1054 (1942); 137 Am. St. Rep. 651 (1910), 139 Am. St. Rep. 82, at 118 (1910).

*De Donis Conditionalibus*⁸⁶ served two purposes which were important to the English nobility of the thirteenth century. First, it permitted the creation of a perpetuity, by allowing land to be settled in such a manner that it would remain in the family as long as the family existed. A tenant in tail could convey only a life estate; neither a conveyance by him nor a forfeiture of his lands for treason would defeat the right of the heirs of his body to the land. Thus remote generations were protected against the improvidence and political mistakes of their forbears. Second, it permitted the establishment of a special course of descent differing from that prescribed by the common law. To understand the importance of this it must be recalled that wills of land were not permitted until 1540,⁸⁷ that contingent remainders could not be limited to unborn or unascertained persons until the fifteenth century,⁸⁸ and that no way to create an indestructible contingent remainder was found until the seventeenth century.⁸⁹ Moreover, even after the creation of indestructible contingent remainders became possible, the Rule in *Shelley's Case*⁹⁰ prevented the limitation of a remainder to the heirs or heirs of the body of a life tenant. Suppose Lord Stone's daughter was about to become the second wife of Lord Rock, who had children by his first wife, and Stone wished to convey land to Rock by way of dowry. Stone wished, of course, to have the land pass to his daughter's descendants on the death of Rock. If he conveyed the land to Rock in fee simple, the land would descend on the death of Rock to Rock's eldest son by his first wife and Rock could not change the course of descent by will. It was not possible to convey a life estate to Rock with contingent remainder to his heirs by his second wife. It was possible to convey an estate tail to Rock and the heirs of his body by his second wife. If Lord Stone's daughter had children, they would inherit the estate tail under this limitation; if she did not, or her issue became extinct, the land would revert to Lord Stone's family.

The first purpose of *De Donis*, the creation of indestructible perpetuities, ceased in 1472 when the courts decided that a tenant in tail in possession

86. Note 81 *supra*. For the development prior to *De Donis* and the effect of the statute, see FRATCHER, PERPETUITIES AND OTHER RESTRAINTS 17-27 (1954).

87. Statute of Wills, 32 Hen. 8, c. 1 (1540).

88. 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 134-136 (3rd ed. 1923).

89. *Duncomb v. Duncomb*, 3 Lev. 437, 83 Eng. Rep. 770 (1697); Fratcher, *Trustor as Sole Trustee and Only Ascertainable Beneficiary*, 47 MICH. L. REV. 907, 913 (1949).

90. 1 Co. Rep. 93b, 104a, 76 Eng. Rep. 206, 234 (1581). If this was attempted, the life tenant took an estate in fee.

could bar both the heirs in tail and the reversioner or remainderman by suffering a common recovery, a default judgment in a collusive suit brought by one who was feigned to have a title superior to that of the tenant in tail.⁹¹ After this decision a tenant in tail could bar the entail and vest a fee simple in himself or a purchaser with relative ease. The second purpose of *De Donis*, the establishment of special courses of descent, continued to exist and had importance, particularly because of the restrictive effect of the Rule in *Shelley's Case*.

Spanish law permitted perpetually unbarrable entails. Entailment was the bulwark which supported the Spanish feudal system under which a few noble families owned all the land in Spain and the rest of the populace was reduced to the status of poverty-stricken peasantry.⁹² Such a system prevents improvements in agricultural methods, impedes the development of industry and commerce and makes democracy impossible.⁹³ The original Missouri legislation abolishing entails was a provision in the statute of 1816 adopting English law which declared, "The doctrine of entails shall never be allowed."⁹⁴ The legislators of 1816 who made that ringing declaration were aware that entailment was a buttress of aristocracy and an implacable obstacle to liberty, equality and general prosperity. They also knew that, under English law, a tenant in tail could bar the entail only by a judicial proceeding and that a tenant for life could destroy contingent

91. *Taltarum's Case*, Y.B. 12 Edw. 4, Mich., pl. 25 (1472). This case was decided the year after the short-lived restoration of Henry VI to the throne. There is a tradition that the decision was dictated by Edward IV with a view to minimizing the amount of land which was exempt from forfeiture for treason. PIGGOTT, *COMMON RECOVERIES* 8-9 (1739). By the seventeenth century it was settled law that the tenant in tail could not be prevented from barring the entail by a trust or any other device. *Portington's Case*, 10 Co. Rep. 35b, 77 Eng. Rep. 976 (1613); *North v. Way*, 1 Vern. 13, 23 Eng. Rep. 270 (1681). Estates tail were subjected to forfeiture for treason by 26 Hen. 8, c. 13, § 5 (1534) and 33 Hen. 8, c. 20, § 3 (1541). Stat. 21 Jac. 1, c. 19, § 12 (1623) permitted creditors of the tenant in tail to reach them through bankruptcy proceedings.

92. HERR, *THE EIGHTEENTH-CENTURY REVOLUTION IN SPAIN* 91-97, 393-394 (1958); OLIVEIRA, *POLITICS, ECONOMICS AND MEN OF MODERN SPAIN* 59-60, 211-236 (1946).

93. DALRYMPLE, *GENERAL HISTORY OF FEUDAL PROPERTY*, c. 4 (1758); ADAM SMITH, *WEALTH OF NATIONS*, Bk. III, c. 2 (1776); SCRUTTON, *LAND IN FETTERS* (1886); W. C. Smith, *Entail*, 8 *ENCYCLOPAEDIA BRITANNICA* 450 (9th ed. 1892); Fratcher, *Legal Servitudes as Devices for Imposing Use Restrictions in Michigan*, 2 *WAYNE L. REV.* 1, 3 (1955).

94. 1 *MO. TERR. LAWS* 436 (January 9, 1816). The 1816 statute is printed in the historical note to § 1.010 V.A.M.S.

remainders without one. They hated the very name of entails.⁹⁵ Is it probable that they intended by their declaration to make every entail unbarrable for a whole lifetime, a clog on alienability and development which had not been permitted in England since 1472? Is it not more likely that, in their eagerness to do away with entails, they sought to empower every tenant in tail to bar the entail at once, without the expense of litigation and without waiting for the next term of court?⁹⁶

The Missouri statute abolishing entails, as interpreted in *Moore v. Moore*, makes a conveyance or devise which would have created an estate tail under *De Donis* operate to vest a life estate in the donee in tail with an indestructible contingent remainder in the heirs of his body, who, of course, cannot be ascertained until his death. As Missouri has abolished the Rule in *Shelley's Case*,⁹⁷ it is possible to effect this result by an express conveyance or devise for life, with remainder to the heirs or heirs of the body of the life tenant. Hence the entail statute no longer serves a useful purpose. Because it is relatively easy to use, by inadvertence, words which technically limit an estate tail, the statute is a dangerous trap for grantors and testators who really intend to create an estate in fee simple. Falling into this trap may impose heartrending suffering on the grantee or devisee whom the grantor or testator intended to benefit and protect. Being only a life tenant, he cannot convey or mortgage the fee simple for his own benefit and may well be unable to finance necessary improvements or the purchase of implements, fertilizer and seed.⁹⁸

The statute abolishing entails is defective, moreover, in failing to specify clearly who takes the fee simple upon the death of the donee in tail (life

95. The abolition of entails was one of the major objects of the eighteenth and nineteenth century revolutionary movements in Europe and America. It may be recalled that Thomas Jefferson resigned from the Continental Congress in 1776 to devote himself to revising the laws of Virginia to eradicate aristocracy. The first item on his list of needed reforms, and the first adopted, was the abolition of entails. 15 ENCYCLOPAEDIA BRITANNICA 302 (11th ed. 1911).

96. See Ely, *Can an Estate Tail be Docketed During Life of First Taker?*, 45 U. MO. BULL. L. SER. 3 (1931). At one time Professor Eckhardt thought that the contingent remainders created by the Missouri statute abolishing entails should be deemed indestructible. Eckhardt, *The Destructibility of Contingent Remainders in Missouri*, 6 MO. L. REV. 268, 279-280 (1941). He has since modified his views. Eckhardt and Peterson, *Possessory Estates, Future Interests and Conveyances in Missouri*, 23 V.A.M.S. 1, 23 (1952).

97. § 442.490, RSMo 1949. This section was first enacted in 1845.

98. § 528.010, RSMo 1949 permits, under some circumstances, a judicially directed sale of the fee simple but the proceeds are subject to the contingent remainder.

tenant). It was thought at one time that the heirs of the body were to be determined according to the common law Canons of Descent, under which, by the rule of primogeniture, the eldest son took to the exclusion of all other children.⁹⁹ Later it was decided that the statutory scheme of descent applicable to estates in fee simple, under which all children took equal shares, should determine the ownership of the remainder.¹⁰⁰ The effect of the Missouri Probate Code of 1955, which makes a surviving spouse a co-heir with the children,¹⁰¹ has not been decided. In its present form the statute contributes to doubtful titles and expensive litigation.

A third objectionable feature of the Missouri statute abolishing entails is that it may validate indestructible contingent remainders which do not vest within the period of the Rule Against Perpetuities. Suppose that Andrew Baker dies in 1960 leaving a will by which he devises Missouri land to his eldest son, Benjamin (aged 34), for life, remainder to Benjamin's eldest son, Charles (aged 4), for life, remainder to the eldest son of Charles and the heirs male of his body. This limitation would not violate the Rule Against Perpetuities if the eldest son of Charles took an estate tail because that estate would vest in him, if at all, not later than nine months after the death of Charles, who is a life in being. The statute seems to say that the heirs male of the body of the eldest son of Charles will take a contingent remainder despite the Rule Against Perpetuities. Such a remainder cannot vest until the end of a life not now in being. If the eldest son of Charles is born in 2000 A.D., posthumously to his grandfather, Benjamin, and his father, Charles, and dies in 2080 A.D., the contingent remainder will remain unvested, leaving the fee simple in abeyance, for two lives in being plus 80 years or a total of 120 years. Regardless of what the legislators of 1816 thought desirable, does the present generation of Missouri lawyers think it wise to license 120-year perpetuities which discourage or prevent the improvement and optimum use of the land which they fetter?

The Missouri statute abolishing entails should be repealed and replaced by legislation which is better related to the public need. One possible solution would be a statute providing that a conveyance or devise which would have created an estate tail under *De Donis* shall create an estate in fee simple. Such legislation could provide that any remainder

99. *Frame v. Humphreys*, 164 Mo. 336, 64 S.W. 116 (1901).

100. *Gillilan v. Gillilan*, 278 Mo. 99, 212 S.W. 348 (1919) (en banc). Professor Hudson's article, *supra* note 82, discusses this problem.

101. § 474.010, RSMo 1957 Supp.

limited on an estate tail shall take effect as a shifting executory interest on the death of the grantee without surviving issue.¹⁰² Another possible solution would be to reenact the statute *De Donis Conditionalibus*, thus restoring estates tail, with provisions abolishing primogeniture and the preference for males in determining the heirs in tail and empowering the tenant in tail to convey a fee simple by ordinary deed. This would permit the creation of a destructible family perpetuity under which, so long as it was not destroyed, the surviving spouses in each successive generation would have no marital or inheritance rights in the land.¹⁰³

102. For the way in which this type of legislation operates, see Fratcher, *Fees Tail in Michigan*, 4 U. DET. L. J. 19 (1940).

103. For the undesirable tendency of the marital rights provisions of the Missouri Probate Code to take property out of the family, see 24 Mo. L. REV. 498-501 (1959).