

1962

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### Recommended Citation

William F. Fratcher, *Trusts and Succession in Missouri*, 27 MO. L. REV. (1962)

Available at: <https://scholarship.law.missouri.edu/mlr/vol27/iss4/6>

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## TRUSTS AND SUCCESSION IN MISSOURI\*

WILLIAM F. FRATCHER\*\*

Probably the most interesting decision of the period under review, because of its significant contribution to the theory of the pour-over trust, was that in *St. Louis Union Trust Co. v. Blue*.<sup>1</sup> The decedent created a revocable and amendable insurance trust for the benefit of members of his family. Eighteen years later he created an irrevocable trust for the benefit of members of his family with specific provision for later additions of principal. Two years after this the decedent executed a will by which he devised to the trustees of the irrevocable inter vivos family trust, to be held under its terms, so much of his residuary estate as should be necessary to bring the trust estate up to \$800,000. Later in the same year the decedent amended the insurance trust to require payment of the insurance proceeds to the two trustees of the irrevocable family trust, "as Trustees under the terms" of that trust. The trustees of the irrevocable family trust, one of them also suing as trustee of the insurance trust and as executor of the will, sought a declaratory judgment as to whether the proceeds of the insurance were intended to become a part of the original irrevocable inter vivos family trust and so to be considered in computing the \$800,000, or whether the amendment to the insurance trust contemplated a separate trust with merely the same terms as the irrevocable family trust. A judgment that the amendment created a separate trust was reversed, and it was held that both the insurance proceeds and the amount payable from the residuary estate became part of the irrevocable family trust, which was and remained a single inter vivos trust. The opinion expressly rejects the argument that the amendment to the insurance trust merely incorporated by reference the terms of the irrevocable family trust.

In recent years the pour-over trust has become a useful and valued device in estate planning. Typically the settlor creates an inter vivos trust for his family and puts into it such assets as he can do without during his

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\*This article contains a discussion of selected Missouri court decisions reported in Volumes 349-357, Southwestern Reporter, Second Series.

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1. 353 S.W.2d 770 (Mo. 1962).

lifetime. He may make additions to the trust from time to time before his death. By his will the settlor bequeaths what is left of his assets to the trustee of the inter vivos trust, to be held and administered under the terms of that trust. In many cases the device affords substantial tax advantages because gift tax rates are less than those of the estate tax. In any case, it avoids setting out the terms of a long and complicated trust in the will, with attendant publicity and expense incident to copying in abstracts of title and public records.

The first serious problem in the pour-over trust field is that of the validity of the device. This stems from the statutory requirement that wills be in writing and the fact that the terms of the trust are not set out in the pour-over will. England and the great majority of American states recognize the doctrine of incorporation by reference, under which a document not executed with testamentary formalities may be treated as part of a will if: (1) the will manifests an intention to incorporate the document; (2) the will contains a sufficient description of the document to permit its identification with reasonable certainty; (3) the will refers to the document as being already in existence; (4) the document actually was in existence before the will was executed; and (5) the document can be proved to be the identical one referred to in the will.<sup>2</sup> These requirements can be met readily in the case of an irrevocable inter vivos trust created by a writing signed on a date prior to that of the will. If, however, the inter vivos trust is amendable by the settlor during his lifetime, amendments to it made after the date of the will do not meet these requirements. As the testator ordinarily intends to refer to the terms of the inter vivos trust as they are at the date of his death, that is, including the amendments made after the date of the will, courts relying upon the doctrine of incorporation by reference have had great difficulty with this situation. One approach has been to hold the pour-over bequest void on the grounds that the testator did not intend to incorporate by reference the trust instrument as it existed on the date of the will, and could not incorporate it by reference as it existed at the date of his death.<sup>3</sup> Another approach has been to hold the pour-over bequest valid, but on the terms of the trust as they were at the date of the will, so that the assets added to the trust by the

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2. ATKINSON, *WILLS* § 80 (2d ed. 1953).

3. *Atwood v. Rhode Island Hospital Trust Co.*, 275 Fed. 513 (1st Cir. 1921); *President and Directors of Manhattan Co. v. Janowitz*, 260 App. Div. 174, 21 N.Y.S. 2d 232 (1940).

will be administered on different terms than those placed in the trust during the settlor's lifetime.<sup>4</sup>

It is well-established in all Anglo-American jurisdictions that a disposition by will may be by reference to a fact or act having independent significance apart from its effect upon the testamentary disposition, even though such fact or act is to occur after the execution of the will.<sup>5</sup> For example, a bequest of "such furniture as I may purchase to such person as I may marry" is valid even though it involves acts of the testator, done after the execution of the will, in selecting furniture and a wife, because these selections have independent significance apart from their effect upon the testamentary disposition. Professor Scott has long taken the position that an inter vivos trust, as amended after the date of execution of a will, is such a fact having independent significance.<sup>6</sup> If so, it should be possible to make a bequest to the trustee of an amendable inter vivos trust, to be held upon the terms of the trust as they may be at the time of the testator's death. This position has been adopted by the *Restatement of Trusts, Second*, and has some judicial support.<sup>7</sup>

The second serious problem is whether a pour-over provision creates a new testamentary trust or merely adds to an existing inter vivos trust. A rigorously logical application of the incorporation by reference theory might result in a pour-over provision being deemed to create a testamentary trust separate and distinct from the inter vivos trust, the terms of which have been incorporated by reference. In almost every case, however, the creation of two trusts instead of one would be contrary to the intent of the settlor and would complicate and increase the expense of administration. In a state where testamentary trusts are subject to close supervision by probate courts but inter vivos trusts are not, confusion would result. Thus some courts have gone to considerable lengths to carry out the settlor's intent that there should be only one trust and that inter vivos.<sup>8</sup>

Because of the conflicting decisions regarding the validity and effect of a pour-over provision into an amendable inter vivos trust and the doubt

4. *Old Colony Trust Co., v. Cleveland*, 291 Mass. 380, 196 N.E. 920 (1935); *Koeninger v. Toledo Trust Co.*, 49 Ohio App. 490, 197 N.E. 419 (1934).

5. ATKINSON, *op. cit. supra* note 2, § 81.

6. 1 SCOTT, TRUSTS 299 (1939); 1 SCOTT, TRUSTS § 54.3 (2d ed. 1956).

7. RESTATEMENT (SECOND), TRUSTS § 54, comment *i* (1959); *Second Bank-State St. Trust Co. v. Pinion*, 170 N.E.2d 350 (Mass. 1960), 59 MICH. L. REV. 1276 (1961).

8. *In re York's Estate*, 95 N.H. 435, 65 A. 2d 282 (1949); 1 SCOTT, TRUSTS § 54.3, at 382-84 (2d ed. 1956).

as to whether the assets passing by will merely add to the inter vivos trust or constitute a separate testamentary trust, the literature tends to suggest the necessity of pour-over trust legislation, and a number of states have adopted statutes on the subject.<sup>9</sup> The *Uniform Testamentary Additions to Trusts Act*,<sup>10</sup> for example, permits a pour-over into an amendable inter vivos trust, on the terms of that trust as amended before or after the testator's death, and provides that, unless a contrary intent is manifested, the result will be a single inter vivos trust.

A 1956 Missouri decision raised doubt as to whether it was possible to make a testamentary addition to an inter vivos trust without creating a separate testamentary trust.<sup>11</sup> The *Blue* case<sup>12</sup> makes it clear that this can be done. As both pour-overs involved in the *Blue* case were to an irrevocable and unamendable inter vivos trust, it is not a decision as to the validity and effect of a testamentary addition to an amendable inter vivos trust, but the theory followed in the opinion indicates that the effect of the *Uniform Testamentary Additions to Trusts Act* may be achieved in Missouri by judicial decision, without the necessity of resort to legislation.

#### MARITAL RIGHTS

*Wilson v. Wilson*<sup>13</sup> is of some interest on the question of ante-nuptial contracts. A physician worth some \$150,000, with annual earnings of about \$14,000, demanded that his seventh wife sign a contract by which her interest in his property was limited to one third in the event the marriage was terminated by death and to \$5,000 in the event of termination by other means. Both parties testified that the husband suddenly pulled the contract

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9. FIRST REPORT OF THE TEMPORARY STATE COMMISSION ON THE MODERNIZATION AND SIMPLIFICATION OF THE LAW OF ESTATES, STATE OF NEW YORK 26 (1962); Hobson, *Testamentary Additions to Inter Vivos Trusts—The Present State of the Law in Ohio*, 30 CLEV. B. A. J. 99, 115 (1959); Palmer, *Testamentary Dispositions to the Trustee of an Inter Vivos Trust*, 50 MICH. L. REV. 33 (1951); Polasky, *'Pour-Over' Wills and the Statutory Blessing*, 1959 PROCEEDINGS, SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, A.B.A., Part I, 45, 98 TRUSTS & ESTATES 949 (1959); Trachtman, *Pour Overs*, 97 TRUSTS & ESTATES 416 (1958); Comment, 57 MICH. L. REV. 81 (1958); Note, 41 BOSTON U. L. REV. 520 (1961); Note, 45 CORNELL L.Q. 135 (1959); Note, 44 MINN. L. REV. 131 (1959); Note, 34 N.Y.U.L. REV. 1106 (1959).

10. 9C UNIFORM LAWS ANN. 86 (Supp. 1961). This was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1960. It has been enacted in several states.

11. *State v. Strother*, 289 S.W.2d 73 (Mo. 1956) (en banc), 22 Mo. L. REV. 403 (1957).

12. *Supra* note 1.

13. 354 S.W.2d 532 (Spr. Ct. App. 1962).

out of the glove compartment of his automobile and requested the wife's signature, without giving her information as to his assets or the terms of or need for the contract. The husband testified that this occurred a night or two before the marriage. The wife testified that it occurred immediately after the marriage ceremony while the wedding guests were standing by the car. A judgment incident to granting the wife a divorce, refusing to enforce the contract on the ground of duress, was affirmed on the grounds that the contract was not entered into freely, fairly, knowingly, understandingly and in good faith and that the husband unfairly failed to disclose the extent of his property.<sup>14</sup>

#### INTESTATE SUCCESSION

*In re Smith's Estate*<sup>15</sup> involved a bachelor's will which devised his entire estate to his sister of the whole blood and expressed the wish that his half-sister should not take any part or share. The sister of the whole blood predeceased the testator without surviving descendants. At his death the testator's relatives were his half-sister, her descendants, and several cousins. The probate court determined that the cousins were entitled to the estate. The circuit court determined that the half-sister was entitled to the estate as sole heir on intestacy despite the language of the will disinheriting her, and the supreme court affirmed. The opinion cites a number of Missouri cases following the English and majority American<sup>16</sup> view that intestate succession cannot be prevented by will unless the will effectively disposes of the property to someone other than the heir. In this case the attempted disposition to the sister of the whole blood was ineffective by reason of lapse.

#### WILL CONTESTS

*Ebling v. Hardesty*<sup>17</sup> was an appeal in a contest, instituted in the circuit court by the heirs on the grounds of incapacity, coercion and undue

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14. There is authority for these requirements. See, e.g., *Jones v. McGonigle*, 327 Mo. 457, 37 S.W.2d 892 (1931). See generally ATKINSON, *op. cit. supra* note 2, § 31. The contract involved in the *Wilson* case was signed in 1949, before the enactment of § 474.220, RSMo 1959, which requires full disclosure and fair consideration for a waiver of the right to elect to take against a spouse's will. Cf. § 474.120, RSMo 1959, reenacting the substance of § 469.160, RSMo 1949.

15. 353 S.W.2d 721 (Mo. 1962).

16. *Pickering v. Stamford*, 3 Ves. Jr. 492, 30 Eng. Rep. 1121 (1797); Note, 38 MICH. L. REV. 575 (1940).

17. 354 S.W.2d 348 (St. L. Ct. App. 1962).

Another case of some interest in this area, *Carlson v. First Nat'l Bank of Kansas City*, 355 S.W.2d 928 (Mo. 1962), involved questions of admissibility of evidence in a will contest.

influence, of a will which disinherited the testator's heirs by devising his estate to proponents. Proponents' motions to dismiss and strike the petition, supported by evidence that testator had executed five previous wills disinheriting his heirs, were granted by the circuit court. The court of appeals reversed on the ground, *inter alia*, that the circuit court could not sustain the motions without a determination that one or more of the prior wills was valid, a question within the exclusive original jurisdiction of the probate court. The result reached is consistent with the generally accepted view that an heir at law has standing to contest a will disinheriting him even though an earlier unprobated will also disinherited him, unless he admits the validity of the earlier will.<sup>18</sup>

*McGrail v. Schmitt*<sup>19</sup> was a second appeal in a contest of a will which gave \$500 to the testator's only child, a daughter, and the residue of his substantial estate to his sisters. In the first appeal a judgment for the contestant was reversed on the ground that the evidence of an insane delusion that the contestant was not the testator's daughter was insufficient for submission to a jury.<sup>20</sup> In the second trial additional evidence was introduced, tending to show brain impairment from long-continued alcoholism, peculiar conduct, and severe mental confusion. In the second appeal another judgment for the contestant was affirmed in a per curiam opinion which states that the evidence of delusion and general mental incapacity, coupled with the unfairness of the will, was sufficient to support the verdict.

#### CONSTRUCTION OF WILLS

*Crist v. Nesbit*<sup>21</sup> was a circuit court proceeding to construe a will. The will, which was executed in the morning, devised to the testator's wife "such part of my estate as under the laws of the State of Missouri my said wife would be entitled, and no more,"<sup>22</sup> bequeathed one dollar to his son, and devised the residue to the wife's sister and her husband. That afternoon the testator entered into a property settlement with his wife, who was about to sue him for divorce. He died the next morning. The will was admitted to probate without contest and the widow did not elect to

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18. ATKINSON, *op. cit. supra* note 2, § 99.

19. 357 S.W.2d 111 (Mo. 1962).

20. *McGrail v. Rhoades*, 323 S.W.2d 815 (Mo. 1959), 35 N.Y.U.L. REV. 478 (1960), 25 Mo. L. REV. 426 (1960).

21. 352 S.W.2d 53 (Spr. Ct. App. 1961).

22. *Id.* at 55.

take against it. There was extrinsic evidence that the testator did not want his wife to take anything under the will. The residuary devisees contended that the will devised to the wife only so much as she would be entitled to upon election to take against the will, which would be a third of the estate after deduction of exempt property and family allowance.<sup>23</sup> They also contended that the wife was estopped by the property settlement to take anything under the will. Both contentions were rejected and a judgment giving the widow the full share which she would have taken on intestacy,<sup>24</sup> that is, exempt property, family allowance and half the balance, was affirmed by an opinion stating that there was "no ambiguity whatever" in the will.<sup>25</sup> Whatever one's view as to the result reached, this statement scarcely seems justified in view of the probability that the testator did not intend to devise to his wife more than she would be entitled to receive upon election to take against the will.

*Johnson v. Woodard*<sup>26</sup> was a suit for partition of land devised to the plaintiff and the two defendants "to share equally, and to the survivor of them." The circuit court granted the defendants' motion to dismiss on the ground that, by statute,<sup>27</sup> compulsory partition may not be had contrary to the intention expressed in a will under which the parties claim. The plaintiff appealed to the St. Louis Court of Appeals, which transferred the case to the supreme court on the ground that the case involved title to real estate.<sup>28</sup> The supreme court retransferred the case to the court of appeals, holding that title to real estate in the constitutional sense was not involved because, it being conceded that the interests of the parties in the land were equal, the only question was one of construction of the will to determine whether it forbade partition. Upon retransfer, the plaintiff contended that the parties took under the will as tenants in common in fee simple because of the statutory provision that a devise to two or more persons creates a tenancy in common unless expressly declared to be in joint tenancy.<sup>29</sup> The court of appeals affirmed the dismissal, holding that the will created a joint

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23. §§ 474.160, .250, .260, RSMo 1959.

24. §§ 474.010, .250, .260, RSMo 1959.

25. *Supra* note 21, at 56.

26. 352 S.W.2d 9 (Mo. 1961).

27. § 528.130, RSMo 1959.

28. *Johnson v. Woodard*, 343 S.W.2d 646 (St. L. Ct. App. 1961).

29. § 442.450, RSMo 1959. This section excepts devisees to executors, trustees and husband and wife.



tenancy for lives with contingent remainder in fee to the survivor and forbade compulsory partition.<sup>30</sup>

#### ADMINISTRATION OF ESTATES

When a person has been missing and not heard from for more than seven years it is possible to commence ordinary proceedings for the administration of his estate, relying upon the common law presumption of death.<sup>31</sup> Because the fact of death is jurisdictional in such proceedings, they are void if the missing person is alive.<sup>32</sup> Missouri, like many other states, has legislation authorizing a special type of proceeding for the administration of estates of missing persons.<sup>33</sup> Under this legislation, the proceedings are not void if the missing person is not dead but the distributees take subject to the right of the missing person to recover the property distributed to them or its value.<sup>34</sup> *Replogle v. Replogle*<sup>35</sup> involved land which belonged to a man who died in 1937, survived by two sons who were his sole heirs. In 1938 a missing person administration proceeding was conducted as to the estate of one of the sons, who had been missing for more than seven years, and his assets were distributed to the other son, who retained possession of all the father's land. More than twenty years later the missing brother reappeared and sued for partition of the land. The court, mentioning the fact that, prior to 1956, orders of distribution did not include land, held that the missing person administration proceeding did not prevent a defense of adverse possession. As orders of distribution issued under the Missouri Probate Code of 1955 do include land<sup>36</sup> the same result might not be reached in the case of a missing person administration proceeding commenced since its enactment.

*Yonke v. Alber's Estate*<sup>37</sup> involved a claim against an estate for a \$10,000

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30. *Johnson v. Woodard*, *supra* note 28, relying upon *Hunter v. Hunter*, 320 S.W.2d 529 (Mo. 1959) (criticized, Eckhardt, *Property Law in Missouri*, 24 Mo. L. Rev. 456 (1959)), and distinguishing *McClendon v. Johnson*, 337 S.W.2d 77 (Mo. 1960), on the ground that the latter case involved construction of a deed rather than a will.

31. § 490.620, RSMo 1959, originally enacted as c. 62, § 44, RSMo 1855, codifies and extends part of the common law rule by creating a presumption that a resident of Missouri who has been absent from the state for seven years is dead.

32. *Scott v. McNeal*, 154 U.S. 34 (1894).

33. §§ 473.697-720, RSMo 1959, originally enacted as Mo. Laws 1909, at 99.

34. § 473.713, RSMo 1959.

35. 350 S.W.2d 735 (Mo. 1961).

36. § 473.617, RSMo 1959.

37. 351 S.W.2d 794 (K.C. Ct. App. 1961).

attorney fee for procuring a divorce for the decedent in Kansas. During the pendency of the divorce proceeding the parties thereto entered into a property settlement, one clause of which provided that a farm should be conveyed to a trustee who was to sell it and apply the proceeds to the payment of a \$10,000 attorney fee to each party's lawyer, any surplus to be paid to the husband. The land was so conveyed. Subsequently the Kansas court disapproved the mentioned clause of the property settlement but entered a default decree of divorce against the husband, approving the other clauses of the settlement. The wife's will was admitted to probate in Kansas and her lawyer in the divorce case filed a claim for a \$10,000 fee in the administration proceeding for her Missouri assets, describing his security under the Kansas trust. Judgment on a directed verdict for the claimant for the full amount of his claim was affirmed. It was held that, under the governing provision of the Missouri Probate Code,<sup>38</sup> a secured claimant is entitled to the same amount as if his claim were unsecured and that the claimant was entitled to a directed verdict for the full amount despite the fact that his claim rested upon an oral contract of retainer, because the disapproved clause of the property settlement amounted to an agreement as to the amount due.

*Ballard's Estate v. Clay County*<sup>39</sup> involved the effect of a decision rendered last year,<sup>40</sup> that probate courts have no jurisdiction to give equitable relief under the statutes authorizing proceedings to discover assets wrongfully withheld from or by an executor or administrator.<sup>41</sup> The decedent paid the county \$10,000 in consideration of its agreement to allow him to live in the county home as long as he chose to do so. He resided in the county home until his death, a period of some three and a half years. His administratrix instituted a discovery proceeding against the county to recover so much of the \$10,000 as was not expended by the county for his care. A judgment for the county was reversed, the court holding that the contract, being beyond the powers of the county, was wholly void and that resort to equity was unnecessary in order to secure restitution of the money paid. It was also held that a provision of the discovery statutes that "if the party cited does not admit the allegations in the affidavit, he shall

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38. § 473.387, RSMo 1959.

39. 355 S.W.2d 894 (Mo. 1962).

40. *In re Frech's Estate*, 347 S.W.2d 224 (Mo. 1961), 27 Mo. L. Rev. 111 (1962).

41. §§ 473.340-.357, RSMo 1959.

be examined under oath"<sup>42</sup> does not impose a jurisdictional requirement that the defendant in the proceeding be examined under oath. Consequently, the administratrix could waive such examination.

*Cable v. Wilkins*<sup>43</sup> was an interpleader suit brought by an administrator in the circuit court to determine whether a son of the decedent or the son's security assignee was entitled to distribution of the son's share in the estate. A judgment for the assignee was affirmed without mention of the question of whether the issue should have been litigated in the probate court instead of the circuit court.

The plaintiff in *Stark v. Moffit*<sup>44</sup> bailed a number of hogs. The bailee died and his executrix sold the hogs and placed the proceeds in escrow with a bank to await determination of adverse claims to the hogs. The plaintiff filed a claim for the value of the hogs in the probate court against the estate of the bailee. The plaintiff later commenced a suit in the circuit court against the executrix and the escrow agent to impose a constructive trust upon the fund in escrow, alleging that the bailee's estate was insolvent. This suit was dismissed on the ground that the circuit court could not take jurisdiction while a claim based on the same cause of action was pending in the probate court. The judgment of dismissal was reversed on the ground that the probate court, lacking general equity jurisdiction, could not impose a constructive trust on the fund in escrow, the relief sought in the circuit court suit.

As originally enacted in 1955 the nonclaim statute provided that actions revived or commenced against the estate of a deceased person should be barred unless notice of their revival or institution was filed in the probate court within nine months after the first published notice of letters.<sup>45</sup> The statute was amended in 1959 to provide that, unless notice of the revival or institution of such an action is filed in the probate court within the nine month period, no recovery may be had on any judgment therein out of assets administered in the probate court.<sup>46</sup> Even after this amendment, the supreme court held that, as to cases governed by the original statute, the personal representative could not waive or be estopped to assert the bar of the statute, and that it prevented entry of a judgment in the barred

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42. § 473.343, RSMo 1959.

43. 352 S.W.2d 50 (Spr. Ct. App. 1961).

44. 352 S.W.2d 165 (St. L. Ct. App. 1961).

45. § 473.360(2), RSMo 1957 Supp.

46. § 473.360(2), RSMo 1959.

action even though the sole purpose of the action was to collect from the decedent's liability insurer rather than from probate assets.<sup>47</sup> In *Rabin v. Krogsdale*<sup>48</sup> a personal injury action was pending against her when the decedent died on January 6, 1959. The plaintiff revived the action against her executor but did not file notice of revival in the probate court. It was held that, although the 1959 amendment did not become effective until August 29, 1959, more than seven months after the decedent's death, it governed the case. Accordingly, the plaintiff could proceed to judgment in the personal injury action although he could not collect it from probate assets. In *Darrah v. Foster*<sup>49</sup> the same result was reached as to a proceeding commenced against an administrator in February, 1959. In the latter case the decedent died December 9, 1958, and the first published notice of letters was on January 16, 1959.

*Nebraska Hardware Mut. Ins. Co. v. Brown*<sup>50</sup> was another in the series of cases applying a rigidly literal interpretation to the nonclaim provisions of the Missouri Probate Code.<sup>51</sup> One section of the code bars claims which are not filed in the probate court within nine months after the first published notice of letters testamentary or of administration.<sup>52</sup> Another provides that an action commenced against an executor or administrator is considered a claim duly filed from the time of serving the original process on the executor or administrator and the filing of a written notice in the probate court of the institution of the action.<sup>53</sup> In the instant case the action against the administrator was commenced in the circuit court and a copy of the petition filed in the probate court within nine months after the first published notice of letters. It was impossible to serve the administrator until nine days after the expiration of the nine-month period because he was out of the state from a time before the commencement

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47. *Smith v. Maynard*, 339 S.W.2d 737 (Mo. 1960) (en banc); *Clarke v. Organ*, 329 S.W.2d 670 (Mo. 1959) (en banc), 25 Mo. L. REV. 432 (1960). Judge Storckman dissented in both cases, and Chief Justice Hyde joined him in the *Smith* case, pointing out that an administrator may now be appointed for the sole purpose of being sued in a wrongful death or personal injury action although the decedent has no assets whatever.

48. 346 S.W.2d 58 (Mo. 1961), 27 Mo. L. REV. 111 (1962).

49. 355 S.W.2d 24 (Mo. 1962).

50. 355 S.W.2d 395 (K.C. Ct. App. 1962).

51. For other cases in this series see 25 Mo. L. REV. 432 (1960), 27 Mo. L. REV. 111 (1962).

52. § 473.360, RSMo 1959.

53. § 473.367, RSMo 1959. Prior to its amendment in 1959 this section required the filing of a copy of the process and return of service in the probate court.

of the action until eight days after the expiration of the nine months. A judgment dismissing the action was affirmed. The palpable injustice of the result reached is apparent. Under this interpretation of the statute an executor or administrator can effectively prevent the institution of any action or suit against the estate by merely absconding or concealing himself.

The litigation involved in *State ex rel. McCubbin v. McMillian*<sup>54</sup> arose out of a 1953 automobile collision in which a Texan driving one of the vehicles was killed and a passenger in the other vehicle was injured. The injured passenger, suing on the theory that the two drivers were joint tortfeasors, recovered a judgment for \$35,000 against the surviving driver and the Missouri administrator of the deceased Texan. He then commenced a suit in equity against the judgment defendants, the Missouri insurer of the surviving driver and the Texas insurer of the deceased driver. The plaintiff dismissed this suit as to the Texas insurer in consideration of \$10,000, and recovered \$25,000 from the Missouri insurer of the surviving driver. The latter filed a cross-claim for contribution against the administrator and the Texas insurer, which sought prohibition of proceedings on the cross-claim on the ground, *inter alia*, that it was barred by the nonclaim provisions of the Missouri Probate Code.<sup>55</sup> It was held that the nonclaim statutes did not affect the Missouri insurer's claim for contribution against the Texas insurer.

In *State ex rel. Reis v. Nangle*<sup>56</sup> a probate court removed an administrator and appointed an administrator de bonis non. The exceptions of the administrator de bonis non to the settlements of the former administrator were referred to a commissioner for hearing. Both the former administrator and the administrator de bonis non filed exceptions to the commissioner's report but only the former administrator and his surety appealed from the probate court order entered pursuant to the report. On appeal the circuit court granted a motion to limit testimony in the trial de novo to matters raised by the appellant former administrator's exceptions to the commissioner's report. The court of appeals, holding that, on an appeal from a probate court order, all issues adjudicated by the order are opened to readjudication, granted mandamus to compel the circuit judge to hear testimony as to

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54. 349 S.W.2d 453 (St. L. Ct. App. 1961).

55. § 464.020, RSMo 1949, superseded on January 1, 1956, by what is now § 473.360, RSMo 1959.

56. 349 S.W.2d 508 (St. L. Ct. App. 1961).

matters raised by the administrator de bonis non's exceptions to the commissioner's report, although he had not appealed from the probate court order.

#### CREATION OF TRUSTS

*Duncan v. Academy of the Sisters of the Sacred Heart*<sup>57</sup> was a suit by the heirs of the grantors in an 1854 deed by which the grantors, in consideration of \$630, conveyed some three acres of land to Ann Shannon with the following proviso:

Provided however and these presents are upon this express condition that she the said Ann Shannon shall hold said land for the sole use and benefit of the order of the sisters of the Sacred Heart of the City of St. Joseph in the County and State aforesaid and for no other use or purpose whatever.

Ann Shannon and others later incorporated the defendant academy, which acquired title from her. Plaintiffs, alleging that the defendant was about to sell or lease the land to another order of nuns so that it could move its academy elsewhere, sought relief on three different theories: (1) that the 1854 deed was a conveyance on special limitation which left a possibility of reverter in the grantors, so that the title automatically reverted when the land ceased to be used as an academy; (2) that the proviso was a condition subsequent under which the grantors retained a right of entry upon breach; and (3) that the proviso imposed an equitable use restriction. The court affirmed a judgment for the defendants in an opinion which rejected the first two theories as a matter of construction.<sup>58</sup> Assuming, without deciding, that the proviso imposed an equitable use restriction, the court ruled that the plaintiffs could not enforce it because they did not assert ownership of other land to which the restriction was appurtenant and because of the lapse of time and inequity of enforcement. The court could have reached the same result with less difficulty by construing the proviso as merely requiring Ann Shannon to hold in trust for the sisterhood.

#### TRUST ADMINISTRATION

*Sebree v. Rosen*<sup>59</sup> involved a number of trust administration questions.

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57. 350 S.W.2d 814 (Mo. 1961).

58. As to them, see SIMES & SMITH, *LAW OF FUTURE INTERESTS* §§ 247, 248, 286 (2d ed. 1956); Fratcher, *Defeatance as a Restrictive Device in Michigan*, 52 MICH. L. REV. 505 (1954).

59. 349 S.W.2d 865 (Mo. 1961).

An instrument creating an inter vivos trust of real estate worth about a million dollars empowered the trustee to invest and reinvest the principal and to pay himself five per cent of income as his fee. One of the properties having been condemned, the trustee used the proceeds to purchase a hotel from a partnership of which his brother-in-law was a member. The hotel was subject to three deeds of trust, one of which secured a note given by the trustee's mother-in-law. Another of the trustee's brothers-in-law received a real estate commission from the vendors for effecting the sale. After the purchase, the trustee employed this brother-in-law to manage the hotel, paying him five per cent of gross rentals for his services and taking an additional five per cent of gross rentals as his trustee's fee. It was held that the purchase of the hotel as a trust investment was not in itself improper but that the trustee acted improperly in operating it directly and in treating the gross rentals as income for the purpose of computing his fee. The decision is in accord with the great weight of authority in holding that a trustee may not operate an active business without express authorization in the terms of the trust.<sup>60</sup> It seems unfortunate, however, that the opinion fails to discuss the difficult question of whether the purchase of a trust investment, when close relatives of the trustee are financially interested in the transaction, is a breach of the trustee's duty of loyalty.<sup>61</sup>

*Berger v. Mercantile Trust Co.*<sup>62</sup> raised an interesting problem of election of remedies for breach of trust. The defendant trust company held all the stock of a national bank. It transferred the bank stock to trustees for the benefit of holders of certificates of beneficial interest to be issued to the stockholders of the trust company. The trust instrument gave the trust company an option to repurchase the bank stock at book value. Seventeen years later the trust company exercised the option. Two certificate holders then instituted a class suit to compel the calculation of book value at a higher figure than that computed by the trust company and the trustees. This suit was successful and the certificate holders were paid the book value computed at a higher figure.<sup>63</sup> While the first suit was pending,

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60. BOGERT, TRUSTS AND TRUSTEES § 571 (2d ed. 1960); RESTATEMENT (SECOND), TRUSTS § 227, comment f, § 230, comment m (1959); Adelman, *The Power to Carry on the Business of a Decedent*, 36 MICH. L. REV. 185 (1937).

61. Cf. RESTATEMENT (SECOND), TRUSTS § 170, comments h, g (1959); Scott, *The Trustee's Duty of Loyalty*, 49 HARV. L. REV. 521 (1936).

62. 352 S.W.2d 644 (Mo. 1961).

63. Moser v. Keller, 303 S.W.2d 135 (Mo. 1957).

two certificate holders, one of whom was a named plaintiff in the first suit, instituted another suit for a determination that the option was void because, under both federal and state law, the trust company was ineligible to purchase the bank stock. It was held that by proceeding to judgment in the first suit to enforce the option, the individual plaintiffs in the first suit and all members of the class for which they sued were precluded, by the doctrine of election of remedies, from proceeding with another suit to declare the option void.<sup>64</sup>

### CONSTRUCTIVE TRUSTS

*Cohn v. Jefferson Sav. & Loan Ass'n*<sup>65</sup> involved a somewhat complicated series of transactions relating to some 84 acres of land. The plaintiff, who had developed a subdivision in the vicinity, discovered that one Buckel had a contract, dated August 29, 1958, for purchase of the tract in question for \$540,000 cash on October 1, 1958, which contract was not assignable without the consent of the vendor, but which Buckel was willing to assign for \$12,500. On September 24 the plaintiff informed the defendant of these facts and proposed that the plaintiff purchase the tract with \$100,000 of his own money, the other funds needed to be lent to plaintiff by the defendant. Buckel was then brought into the conversation, and executed an assignment of his contract to the defendant in consideration of \$12,500, paid by the defendant. Buckel undertook to secure from the vendor a consent to the assignment and an extension of the closing date. On October 3 plaintiff and defendant met with the vendors' agents and learned that, Buckel's August 29 check for earnest money having been returned for insufficient funds, the vendors had rescinded his contract as of September 23. An understanding was reached at this meeting that the vendors would sell to the defendant for \$540,000. A contract between the vendor and defendant was executed on October 10 and the sale was later closed. Thereafter the plaintiff sued to compel the defendant to hold the land on constructive trust for him, alleging that it had acquired title thereto incident to a confidential relationship in the nature of an agency. A judgment for the plaintiff was reversed on the ground that plaintiff and defendant were dealing at arm's length, and that the most plaintiff established was an unenforceable oral promise to purchase land and convey it to him.

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64. Citing RESTATEMENT (SECOND), TRUSTS § 218 (1959), which contains language to this effect.

65. 349 S.W.2d 854 (Mo. 1961).



In *Townesley v. Thielecke*<sup>66</sup> the plaintiffs were in default on two deeds of trust. When the creditor secured by the second deed of trust mentioned foreclosure, they quit-claimed the property to his mother in consideration of \$20. Nearly two years later, after the second deed of trust had been foreclosed and the title conveyed through a straw party to the creditor's mother, the plaintiffs sued to impose a constructive trust on the property in the hands of the grantee on the theory that her son had promised to refund any surplus obtained from the property over the amounts due on the deeds of trust. A decree denying relief on the ground of inadequate proof of the alleged promise was affirmed.

*Hall v. Smith*<sup>67</sup> was a suit to establish a constructive trust. In 1958 the attorney for one of the four co-tenants of a hundred-acre tract of land commenced a partition suit against the other three co-tenants. The land was sold at partition sale to Smith, for \$1,000. The sale was approved by the court, the attorney for the plaintiff in the partition suit received a \$100 fee, and the balance of the sale price was paid to the parties, who receipted therefor. More than two years later the parties to the partition suit commenced the present proceeding against Smith, alleging that he was the son and office manager of the attorney for the plaintiff in the partition suit, that he directed the sheriff in the conduct of the partition sale, discouraged other purchasers from bidding at the sale, shared in the attorney's fee, and "on or about the date the said sale was approved by the court, . . . informed these plaintiffs that he had purchased the land for their benefit and protection."<sup>68</sup> The petition also alleged that the price at the partition sale was grossly inadequate and offered to repay the \$1,000. The trial court granted a motion to dismiss on the ground that the petition failed to state a claim upon which relief could be granted. Judgment of dismissal was affirmed on the ground that the judgment in the partition suit was res judicata of the issues raised.

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66. 349 S.W.2d 902 (Mo. 1961).

67. 355 S.W.2d 52 (Mo. 1962).

68. *Id.* at 54.