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Willard L. Eckhardt

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PROPERTY LAW IN MISSOURI*

WILLARD L. ECKHARDT**

I. CONSTRUCTION AND INTERPRETATION OF LIMITATIONS— IMPLICATION OF REMAINDERS

*Mercantile Trust Company v. Sowell*¹ is concerned with a very baffling problem of will interpretation and construction, and is one of those rare Missouri cases in which the court is not unanimous. The case was heard first in division two and resulted in two conflicting opinions. On transfer to banc, the court split four to three, with a majority and two dissenting opinions. The majority opinion by Westhues, C.J., was concurred in by Storckman, Leedy, and Dalton, JJ. Hollingsworth, J., dissented without opinion. Eager, J., dissented in an opinion in which Hyde, J., concurred; this opinion was based, in part at least, on an original opinion by Bohling, C. Hyde, J., also wrote a separate dissenting opinion. Seldom have the lapses of a scrivener been so minutely examined by so notable an array of able legal minds. One can only speculate whether the lacunae in the will which created the problem were the consequence of faulty original draftsmanship or resulted from a stenographer's errors in copying, but the former is more probable.

To facilitate a consideration of the problem, the residuary clause of the will has been recast into hypothetical form, but the original paragraph and sub-paragraph numbers have been retained for easy cross-reference to the verbatim wording of the will as set out in the opinions. The residuary clause provided (emphasis added):

¶ 5. Residue in trust.

(a) For Widower for life.

(c) On Widower's death, to divide the principal into five parts, one share for each of the following:

(1) Church.

(2) Niece-1 [53 years old].

*This article contains a discussion of selected Missouri court decisions appearing in Volumes 357-370, inclusive, of the South Western Reporter, Second Series.

**Professor of Law, University of Missouri.

1. 359 S.W.2d 719 (Mo. 1962).

- (3) Niece-2 [55 years old].
- (4) Sister-in-law [59 years old].
- (5) Grandniece, namesake, granddaughter of sister-in-law next above [under six years].²
- (d) To hold in trust for ten years after Widower's death.
- (f) Cross remainders for survivors of the four individual beneficiaries in case any or several of them die before or during the term of the ten-year trust; *"except that if all of the individual beneficiaries above named shall predecease me or shall die within the ten (10) year period and if my husband shall then be dead, the trust shall cease and terminate and my Trustees shall pay over the property then constituting such trust absolutely and forever and free from any trust, as follows:"*
 - (1) 90% to University.
 - (2) 10% to Church.

The widower died two years after the testatrix, and his life estate expired. The plaintiffs, executor and testamentary trustees, brought a declaratory judgment action for construction of the will. All of the named individual beneficiaries were still alive, and the ten-year trust would not expire until 1967, unless all of the individual beneficiaries died before 1967.

The will made an express disposition of the corpus in the event all four individual beneficiaries died before the normal termination date of the ten-year trust, 1967, viz., ninety per cent to the university and ten per cent to the church. But the great fault of the will was that it made no express disposition of the corpus in the event any of the individual beneficiaries survived the ten year period, and in view of the ages of the individual beneficiaries, it was probable that one or more of the older beneficiaries, and it was almost certain that the grandniece, would survive the ten year period. In interpreting or construing the will as to what would happen if any of the individual beneficiaries survived the ten-year trust period, the court had three principal possibilities.

First, that the corpus will pass under the will to the university and church on the contingency therein expressly provided for, viz., all of the individual beneficiaries die before the end of the ten-year trust period, and under any other circumstances there is partial intestacy and the

2. The ages given are those in 1949 when the will was executed. Each was six years older than the stated age when the testatrix died in 1955. Each was eight years older than the stated age when the widower died and the ten-year trust began in 1957.

corpus will go by intestate descent to the heirs of the testatrix. Eager, J., dissenting, took this view, and Hyde, J., concurred with him to the extent that he considered this result preferable to the result reached by the majority. Judge Eager's opinion was based on the family situation, the complete omission of any express disposition under the circumstances supposed, and his view that the construction of any disposition of the corpus would be purely speculative.

Second, that the corpus will pass under the will to the university and church on the contingency therein expressly provided for, viz., all the individual beneficiaries die before the end of the ten-year trust period, and by implication the corpus will pass to the church and such of the four individual beneficiaries as survive the ten-year trust period, to the exclusion of the university. Hyde, J., dissenting, took this view, his argument being based in part on the family situation and in part on several uses of the word "principal."

Third, that the corpus not only will pass to the church and university on the contingency expressly stated, but also by implication in any event at the end of the ten-year trust period. The majority opinion by Westhues, J., took this view, his argument being based on the intention of the testatrix as found in several words, phrases, and clauses.

A fourth possibility, apparently not contended for by any of the parties, would be that the will is so patently defective that it is void, and all of the property passes by intestate descent. I do not know how far the case authorities would support such a contention in view of the fact that a part of the will is clear and explicit. One strange provision, not mentioned in any of the opinions, is that the church which has a twenty per cent interest during the ten-year trust period is cut down to a ten per cent interest in the express limitation as to the corpus. This would seem to indicate that the will was a rough draft which not only was incomplete, but in which the inconsistencies had not been worked out.

A discussion and critical examination of the detailed arguments presented in each opinion would require more space than the opinions themselves. Each opinion is closely reasoned, and any of the opinions read in isolation is convincing. None of the opinions relies on any case authority interpreting or construing any similar limitation, but each deals with the limitation as unique. My own preference is for the dissenting opinions, either of which would do more justice to the natural objects of the testatrix' bounty.

The interpretation of a limitation needs to be distinguished from the construction of a limitation. A court *interprets* a limitation when it ascertains the intention of the testator, from the family situation of the testator and from the words, phrases, or clauses used in the will by the testator. *Construction* of a limitation occurs where the intention of the testator cannot be ascertained, typically because the testator never envisaged the situation that actually arises, and consequently never had any intention to express. Professor Leach states with reference to construction: "Thus it is the task of the court less to find an existent meaning than to supplement a defective imagination."³ The principal case, in my opinion, has elements both of interpretation and construction.

In most cases where courts create future interests by implication⁴ the dispositive scheme is clear, and the implication of the estate completes that clear scheme. For example, *A devises to B for life, and if B dies without lineal descendants him surviving, to C in fee*. If *B* is survived by lineal descendants it is clear that *C* cannot take, but there is no express gift of a remainder to *B*'s lineal descendants who survive *B*. It is clear that the testator intended *B*'s issue to take if *B* died survived by issue. About two-thirds of the courts which have considered this problem have implied a remainder to *B*'s lineal descendants.⁵ Again, *A devises to B in fee, but if B predeceases the testator not survived by lineal descendants, to C in fee*. If *B* is survived by lineal descendants (at least if some of them survive the testator) it is clear that *C* cannot take, but there is no express gift of a present fee by way of substitution to such of the lineal descendants of

3. LEACH & LOGAN, CASES ON FUTURE INTERESTS AND ESTATE PLANNING 243 (1961). See GRAY, NATURE AND SOURCES OF LAW, APP. VII, RULES OF CONSTRUCTION, §§ 700-705 (1909); cf. Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379 (1907) ("interpretation" of laws and constitutions).

A good example of a Missouri case involving the interpretation of a unique limitation is *In re Yeater's Trust Estate*, 295 S.W.2d 581 (K.C. Mo. App. 1956). The opinion in that case is not very explicit as to how the court arrived at its conclusion, and there is a much more explicit analysis in Eckhardt, *Work of the Missouri Supreme Court for 1956—Property*, 22 Mo. L. Rev. 373, 378 (1957). The case is briefed in Fratcher, *Work of the Missouri Supreme Court for 1956—Trusts and Succession*, 22 Mo. L. Rev. 390, 400 at n. 42 (1957), but with no indication as to the basis for the decision. See also discussing this case, Crow, *Future Interests—Contingent Remainders—Implied Condition of Survivorship*, 23 Mo. L. Rev. 87 (1958), indicating that the case is one of interpretation but not giving any detailed analysis and failing to cite my analysis of the case.

4. On the problem of the implication of future interests, see generally 2 SIMES & SMITH, FUTURE INTERESTS §§ 841-845 (2d ed. 1956). § 844, "Implication of Gifts to Complete the 'General Plan' of the Testator," is closest to the problem in the principal case.

5. 2 *id.* § 842.

B as survive the testator. Here again it is clear that the testator intended *B*'s issue to take if *B* predeceased the testator survived by issue, and some courts would imply a substitutional gift in favor of the issue. Again, *A* devises to *B-1* and *B-2* for life, and on the death of the survivor to *C* in fee. If *B-1* is the first to die, it is easy to imply a cross-remainder of *B-1*'s half in favor of *B-2* for the life of *B-2*, rather than letting the interest go by intestate descent. Even in these relatively easy cases for the implication of estates, cases where the dispositive scheme is obvious, many courts balk at completing the dispositive scheme by implication, but let the undisposed-of portion go by intestate descent.

The express parts of the will in the principal case do not indicate any rather clear dispositive scheme. As pointed out above, the church was cut from one-fifth to one-tenth in the provisions expressly providing for the church, but there is no apparent reason for this reduction. It was perfectly reasonable for the testatrix to make initial provision for an adequate income for the widower for life (none of the opinions indicate the size of the corpus of the estate). As suggested by Hyde, J., it was wholly unreasonable to make income provisions for ten years for the three adult individual beneficiaries (ages about 59 to 65 when the testatrix died, two years older when the ten-year trust began) and to cut them off with nothing ten years later (at ages 71 to 77, as it turns out), and to make an income provision for the minor beneficiary (under twelve when the testatrix died) and to cut her off with nothing ten years later when her needs for education and support would be greatest.⁶ A reasonable dispositive scheme might have been to provide income for the three elderly beneficiaries for life, and for the minor beneficiary for life (or until she completed her education, or attained twenty-five, etc.), with the corpus ultimately going to the university and the church upon the expiration of the life estates. Another reasonable dispositive scheme might have been to provide income for each of the individual beneficiaries for a period of years with a gift of a share of the corpus to the individual if she survived the stated period, with the corpus going over to the university and church only if none of the individual beneficiaries survived the stated period. If the will had expressly indicated either one of these reasonable dispositive schemes (or any other reasonable dispositive scheme), it would be proper for a court to fill in minor lacunae by implication to complete either scheme. On the other

6. Additional facts, such as a separate inter vivos trust coming in for the individual beneficiaries at the end of the ten-year trust period, would explain this odd provision, but there is no indication of any such reasonable explanation.

hand, the dispositive scheme created by the majority of the court by implication follows no typical pattern and is not a reasonable pattern; rather it is a distorted pattern which cuts out the natural objects of the testatrix' bounty. Insofar as the implication of the gift of the corpus to the university and church is based on the testatrix' use of certain words, phrases, and clauses, an equally strong argument can be made in favor of a gift of the corpus to the church and the four individual beneficiaries.

Where the interpretation of words, phrases, and clauses leads substantially in one direction only, and results in a reasonable dispositive scheme, the creation of a remainder by implication is justified. But where the interpretation of words, phrases, and clauses pulls more or less equally in two opposite directions, it is respectfully submitted that the creation of a remainder by implication is not justified, particularly where the end result is an unreasonable dispositive scheme. Fortunately, the will in issue is unique; other draftsmen will make other mistakes, but none is apt to make substantially the same mistake. Consequently, this case with its two dissenting opinions sets no real precedent for future cases, except to the extent that it indicates a willingness on the part of the majority of the court on less than clear and convincing arguments to interpret or construe a will to exclude by implication the natural objects of a testator's bounty.

II. TRANSACTIONS AFFECTING ENTIRETIES PROPERTY EXECUTED BY ONLY ONE SPOUSE

A. *Mechanics' Liens*

The disability of one spouse to deal effectively with an undivided interest in property held by entireties increases the hazard in transactions affecting property in Missouri. The mechanics' lien problem, where a contract to improve entireties property is made by the husband alone, has been noted previously in the Missouri Law Review.⁷ Many liens have been lost because the husband's agency, or estoppel of the wife, could not be established by the person seeking the lien. Relief by legislation probably is the only practical solution.

A bill, drafted by several able Kansas City lawyers and extensively revising the mechanics' lien law, was considered by the Missouri General

7. Eckhardt, *Work of Missouri Supreme Court for 1953—Property*, 19 Mo. L. REV. 335, 342 (1954). See also 2 PETERSON & ECKHARDT, MISSOURI LEGAL FORMS § 951 (1960).

Assembly in 1963.⁸ This bill was "approved in principle" by the Board of Governors of The Missouri Bar.⁹ Section 429.021 of the bill was the basic section creating mechanics' liens, and the last sentence provided as follows (emphasis added):

Where the contract for an improvement is made with a husband or wife and the property belongs to the other or both, the husband or wife so contracting shall be *presumed* to be the agent of the other, *unless such other having knowledge of the improvement shall, within ten days after learning of the contract, give the contractor written notice of his or her refusal to consent to the improvement.*

This sentence was unchanged in the House Judiciary Committee substitute reported out favorably. In my opinion this provision was a satisfactory solution of the problem, and did not raise any serious question as to validity in the case of entireties property and might well be valid even where one spouse entered into a contract for the improvement of property owned solely by the other spouse.

In House Bill No. 404, as perfected and passed by the House, the word "presumed" was changed to "deemed," and the proviso clause was deleted, so that the sentence read (emphasis added):

Where the contract for an improvement is made with a husband or wife and the property belongs to the other or both, the husband or wife so contracting shall be *deemed* to be the agent of the other.

This floor amendment was most unfortunate in two respects. First, the word "deemed" is ambiguous. Applying its more usual meaning, an irrebuttable presumption of agency is created by the statute. The editor of The Missouri Bar Legislative Digest evidently gave "deemed" this reading because he described the effect of the deletion as follows: "providing a husband or wife shall be deemed the agent of the other, and one cannot refuse to consent to improvement contracted by the other."¹⁰ If the statute were construed to create an irrebuttable presumption, it probably would be void on constitutional grounds in the case of jointly owned property, and clearly would be void in the case of property owned solely by the non-contracting, non-assenting spouse, who in fact might be

8. House Bill No. 404, 72nd General Assembly.

On the deficiencies of the existing statute, see generally Chaney, *The Missouri Mechanics' Lien Statute—Is it Adequate?*, 26 Mo. L. REV. 53 (1961).

9. 3 Mo. BAR LEGIS. DIG., No. 5, p. 6, Mar. 29, 1963.

10. Vol. 3, No. 8, p. 1, May 24, 1963.

vigorously dissenting. In any event, if "conclusively presumed" is what was meant, that is what should have been said.

"Deemed" sometimes is construed as creating only a rebuttable presumption. If the statute were so construed, the statute probably would be valid, but the person making the improvement would receive little or no benefit from the statute.

The problem as to the meaning of "deemed" became moot when the bill did not get through the Senate, but in view of the fact that this bill probably will be reintroduced in 1965, careful consideration should be given to the husband and wife agency problem.

B. *Contracts for Sale and Leases*

Contracts for sale or leases of property owned by entireties, but executed by only one spouse, have been frequent sources of litigation. This problem has been noted previously in the Missouri Law Review.¹¹ *Austin & Bass Builders, Inc. v. Lewis*¹² was concerned with a subdivision owned by *H* and *W* as tenants by the entirety, and a contract for the sale of part of the lots naming *H* and *W* as vendors but signed only by *H* and the purchaser. The contract was drafted by the purchaser, a layman. The transaction was never closed, and the purchaser brought an action against *H* and *W* as vendors solely for damages and solely on the theory of joint liability. The trial court entered judgment for substantial damages in favor of the purchaser against both vendors, and on appeal the Kansas City Court of Appeals affirmed that judgment. On transfer to the Supreme Court by that court's order, the judgment was reversed with direction to enter judgment for the vendors.

The facts in the principal case are recited in both opinions on appeal, but each opinion states certain facts not included in the other opinion. It would serve no useful purpose here to attempt to summarize the facts, and it is sufficient to state that the Supreme Court's observation as to the "vagueness of the whole deal" is apt.

The purchaser, as noted above, brought his action solely on a theory of joint liability for damages, and based his case on agency (*H* for *W*) and ratification (by *W* of *H*'s contract). The Supreme Court held that a deed

11. Eckhardt, *Work of Missouri Supreme Court for 1952—Property*, 18 Mo. L. Rev. 366, 371 (1953), discussing *Bobst v. Sons*, 252 S.W.2d 303 (Mo. 1952).

12. 359 S.W.2d 711 (Mo. 1962), reversing, 350 S.W.2d 133 (K.C. Mo. App. 1961).

by *H* alone would bind *W* only if *H*'s authority was in writing, Section 432.010, RSMo 1959, the contracts section of the Statute of Frauds. The court also held that the same necessity for a writing applies to *W*'s alleged ratification. It was emphasized that no question of fraud or unfair dealing was in the case as tried.

In its careful opinion the Supreme Court expressly reserved two questions not present in the case as tried. First, would the facts be sufficient in a suit in equity for specific performance to take the case out from under the Statute of Frauds? Second, could the purchaser recover damages at law from the husband-vendor alone? On the latter problem, it should be noted that in the case of property held by entireties, a contract naming *H* and *W* as vendors, but signed by *H* alone, is not necessarily the same as a contract signed by *H* alone, but naming only *H* as vendor; in the latter case *H* is liable in damages.¹³

From a purchaser's point of view, it is essential that the marital status of the vendors be ascertained; and if a vendor is married not only must the contract name both *H* and *W* as vendors, but also both *H* and *W* must execute the contract. This is true whether the property is owned by the entirety or is owned as separate property by one of the spouses.¹⁴ In the case of property owned by the entirety, failure of both to sign may be fatal. In the case of separate property, the contract may be valid even though ratification (by *W* of *H*'s contract). The Supreme Court held that a deed executed only by the spouse owning the property (not in fact being a fraud on marital rights, Section 474.150, RSMo 1959), but there is potential litigation by the non-signing spouse, and title will be unmarketable of record unless both spouses sign the deed.¹⁵

III. ADVERSE POSSESSION AND USER—PRESUMPTIONS— PERMISSIVE OR ADVERSE

In 1956 a recent case note in the Missouri Law Review discussed the issue raised by *Miller v. Berry*,¹⁶ whether user of a roadway over the land of another person is presumed to be adverse or permissive, and noticed the

13. See *Bobst v. Sons*, *supra* n. 11.

14. In case of separate property, a recital in the contract should make it clear that the spouse who joins simply to subject marital rights to the contract is not assuming full liability for the performance of the contract.

15. If the property is homestead, joinder of the wife still is essential for a valid transaction, § 513.475 (2), RSMo 1959. Where she does not join, the transaction is "null and void" as to the homestead.

16. 270 S.W.2d 666 (Mo. App. 1954).

uncertain state of Missouri authorities in this area.¹⁷ The problem of presumptions became critical in *Saville v. Bradshaw*,¹⁸ but the case was remanded for retrial to develop the facts, and the legal issue still is without a definitive answer.

Saville v. Bradshaw was a suit to quiet title. The plaintiffs claimed through their deceased father who had purchased the land in 1928 and had lived on the land until he died in 1956, having recorded his deed in 1939. Defendant claimed through a 1934 tax deed recorded in 1944. The trial court entered judgment for the defendant on the theory that possession after 1934 was permissive, not adverse, based on testimony of the defendant as to a conversation with the father (now deceased) of the plaintiffs. Timely objection that this testimony was inadmissible under the Dead Man's Statute¹⁹ was overruled, but on appeal the judgment was reversed because the testimony was admitted erroneously. Barrett, C., in his incisive opinion called attention to the problem of presumptions, but properly did not indicate what presumption might be applied in the absence of evidence as to permissive possession.²⁰

If, in fact, possession was permissive (through charitable motives) from and after the 1934 tax sale, the owner of the tax title who gave the permission to the deceased occupant is in a very difficult position. By reason of the Dead Man's Statute he may have no admissible proof as to the permissive character of the occupancy. In the absence of any proof as to the permissive character of the occupancy, the case will turn on a presumption

17. Parish, *Real Property—Easements—Prescriptive Right—Presumption that User is Permissive or Adverse*, 21 Mo. L. REV. 91 (1956).

18. 359 S.W.2d 676 (Mo. 1962).

19. § 491.010, RSMo 1959.

20. In another case decided by the same division several months earlier, *White v. Wilks*, 357 S.W.2d 908, 912 (Mo. 1962), the court flatly states that proof of adverse possession is insufficient where the one who claims title by adverse possession simply shows possession for fifty-seven years. "But proof of title by adverse possession requires much more, and the burden is on those asserting such a title." The court then sets out the several elements of adverse possession which must be proved, that the possession was actual, hostile, under claim of right, open and notorious, exclusive, and continuous, as well as of sufficient duration. The court does not notice any room for indulging in presumptions. The court in *White v. Wilks* had no real occasion to examine any of the refinements as to adverse possession because the proof in the case affirmatively showed that the "adverse possessor," a life tenant under a fee tail limitation, claimed a life estate only and recognized the defeasibly vested reversion in fee in the grantor and his heirs. The real issue in the case, insufficiently pleaded and developed by proof, was this: assuming the grantor of the fee tail had no title, did the life tenant by adverse possession acquire title in fee for herself to the exclusion of the reversioners, or did the life tenant acquire title for herself for life and also for the reversioners in fee by application of the "estoppel by will" theory to a deed.

as to the nature of the occupancy, and in some cases this might even turn on whether the record title holder is a plaintiff with the burden of proof, or is a defendant.

Saville v. Bradshaw, the principal case, points up the fact that a landowner who is a good neighbor and generous by letting another use or occupy land may end up by losing his land or an interest therein. It is imperative that permissive user or occupancy be evidenced by a written instrument signed by the user or occupant (preferably acknowledged so as to be recordable) so that there can be no later dispute as to how the user or occupancy was initiated.