1962

Trusts and Succession in Missouri

William F. Fratcher

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

Part of the Law Commons

Recommended Citation
William F. Fratcher, Trusts and Succession in Missouri, 27 Mo. L. Rev. (1962)
Available at: https://scholarship.law.missouri.edu/mlr/vol27/iss1/12

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.
TRUSTS AND SUCCESSION IN MISSOURI*

WILLIAM F. FRATCHER**

I. Rule Against Perpetuities

Probably the most interesting decisions of the period under review were two involving the application of the common law Rule Against Perpetuities to trusts. In Nelson v. Mercantile Trust Co.1 a settlor made an inter vivos transfer of assets to trustees upon trust, the significant terms of which were: (1) income to be paid to the settlor and his son during their joint lives and thereafter to the survivor of them during his life; (2) after the death of the settlor and his son, income to be paid to three named children of the son, and to any afterborn children of the son, each child to receive the income from his share of the principal; (3) partial distribution of each child’s share of the principal authorized to be made to him on reaching age twenty-one and directed on reaching age thirty; (4) upon the death of any child of the son, his share of the principal to be distributed to persons who could not be ascertained until that time. The trust instrument empowered the settlor to revoke the trust while he and his son were both alive and provided:

The trust hereby created shall in no event continue for a period longer than the lives of all of said children [of the son] and the survivor of all of them, and twenty-one (21) years thereafter, at the end of which time distribution shall be made in the manner herein provided, irrespective of any other provision of this agreement.

The son, who had no children born after the creation of the trust, survived his father and died, survived by the three children named in the trust instrument. One of these sought a determination that the trust violated the common law Rule Against Perpetuities. The circuit court held the entire trust void and decreed that its assets were part of the estate of the settlor. The Supreme Court reversed the decree, holding: (1) be-

---

*This article contains a discussion of selected Missouri court decisions reported in Volumes 333-347, South Western Reporter, Second Series.

**Professor of Law, University of Missouri; member of the Michigan and Missouri Bars.
1. 335 S.W.2d 167 (Mo. 1960).
cause of the power of revocation, the period of the Rule Against Perpetuities began to run at the death of the settlor, when the power expired, rather than at the date of the creation of the trust; (2) in the absence of the quoted saving clause, the ultimate remainder would have violated the Rule because it might vest on the death of a child of the son who was born after the death of the settlor and survived the son and his then living children by more than twenty-one years; and (3) the phrase "said children" in the quoted saving clause should be construed to refer to the previously named living children of the son, so that the clause would prevent the vesting of any interest at a time beyond the period of the Rule.

To be valid under the common law Rule Against Perpetuities an indestructible future interest must be so limited that it must necessarily vest, if at all, within lives in being plus one or more actual periods of gestation, plus an actual minority or twenty-one years in gross. Ordinarily a future interest is indestructible from the time of its creation. Consequently the period of the Rule is normally computed from the time when the instrument creating the interest becomes effective. In the case of a deed, this is the time of delivery; in the case of a will, the death of the testator. A future interest is destructible for purposes of the Rule Against Perpetuities while some living person has unlimited and unconditional power to vest it in himself for his own exclusive benefit. Hence, when the settlor of an inter vivos trust reserves an unconditional power to revoke during his lifetime, the period of the Rule does not commence, for purposes of determining the validity of the trust provisions, until the death of the settlor. On this point the opinion in Nelson is clearly sound.

The opinion is also correct in observing that, as of the time of the settlor's death, it was possible for his son to have more children who might survive the son and his then living children by more than twenty-one years. Interests limited to vest upon the death of such afterborn children would, therefore, be invalid under the Rule Against Perpetuities because they might vest too remotely. However, the trust instrument made it clear that the share of the principal from which each child of the son received income would vest not later than the death of that child. In such a case,

2. Restatement, Property § 373, comment c (1944). The cases are collected in Simes & Smith, Law of Future Interests § 1252 (2d ed. 1956) and 1961 Supp. (Fratcher ed.). See also Fratcher, Perpetuities and Other Restraints 269, 280, 283, 284 (1954). This work has no more authority than the present article but it will be cited occasionally because it contains more complete discussions of some questions.
the remainder limitation as to each share should be treated separately for purposes of determining its validity under the Rule. So treated, the remainder limitation as to the share of any child who was in being at the commencement of the period of the Rule was certain to vest at the end of a single life in being and so was valid. As all of the children of the son were in being when the settlor died, all of the remainder limitations were good. Therefore, it would seem that the opinion is unsound in suggesting that the remainder limitations would have violated the Rule but for the quoted saving clause.

Professor John Chipman Gray thought that an instrument creating future interests should be construed as if the Rule Against Perpetuities did not exist, "and then to the provision so construed the Rule is to be remorselessly applied." Some courts follow Professor Gray's view. Others take the position that a conveyance must be presumed to have intended to make a valid disposition rather than one which is void under the Rule and that, therefore, "where an instrument is fairly open to two constructions, it is the court's duty to adopt the one which will not offend against the rule against perpetuities." The latter view is adopted by the Restatement of Property and by a number of Missouri decisions, including the one under discussion. As the opinion points out, the quoted saving clause was evidently inserted by the settlor in order to prevent violating the Rule and so should be construed, if possible, in a manner which would effectuate that purpose.

Even if the directions of the trust instrument for partial distribution of each child's share in the principal upon his reaching age thirty and for complete distribution of such share upon his death should be deemed to postpone vesting for a period which might exceed that permitted by the common law Rule Against Perpetuities, it seems clear that the directions

3. Restatement, Property § 389 (1944); Gray, Rule Against Perpetuities § 391 (3d ed. 1915); Simes & Smith, op. cit. supra note 2, § 1267; Fratcher, op. cit. supra note 2, at 364-65.
5. Davis v. Rossi, 326 Mo. 911, 944, 34 S.W.2d 8, 21 (1930).
7. St. Louis Union Trust Co. v. Kelley, 355 Mo. 924, 199 S.W.2d 344 (1947); Carter v. Boone County Trust Co., 338 Mo. 629, 92 S.W.2d 647 (1935) (en banc); St. Louis Union Trust Co. v. Bassett, 337 Mo. 604, 85 S.W.2d 569, 101 A.L.R. 1266 (1935); Trautz v. Lemp, 329 Mo. 580, 46 S.W.2d 135 (1932) (en banc); Davis v. Rossi, supra note 5. There are other cases with language to this effect.
for payment of the income on each child’s share to that child during his lifetime and for partial distribution of his share in principal to him on reaching age twenty-one could not do so. The directions for payment of income to each child simply created equitable life estates, all of which were certain to vest not later than the death of the settlor’s son, who was a life in being at the commencement of the period of the Rule. A limitation of a life estate to an unborn person upon the sole contingency of his coming into existence does not violate the Rule Against Perpetuities if that person is certain to come into existence, if at all, within the period of the Rule. If every child of the settlor’s son was bound to come into being during his father’s lifetime and the partial distribution of principal to him upon reaching twenty-one would necessarily occur, if at all, within twenty-one years and a period of gestation after the son’s death. The circuit court concluded that if any part of the trust dispositions violated the Rule, the entire trust was void, and directed immediate distribution of the trust assets to the estate of the settlor. The Supreme Court expressly declined to decide whether this conclusion was correct.

Under English law, if a limitation of a future interest violates the Rule Against Perpetuities, that interest is void but all other provisions in the will or deed, including limitations of present or future interests in the same property which were to precede the void interest, take effect as if the void provision were struck out. In this country the usual rule is that, if a limitation of a future interest violates the Rule, all other limitations made by the same instrument are presumptively valid unless it may reasonably be inferred that the settlor or testator, if he had known of the partial invalidity, would have preferred to have some or all of the other limitations fail also. The Missouri decisions on the question appear to indicate that, if any part of a disposition of property violates the Rule Against Perpetuities, the entire disposition is void regardless of what the testator or settlor might have wished. The Missouri decisions have been ably criticized by Mr. Harry W. Kroeger of the St. Louis Bar.

9. 335 S.W.2d at 175.
10. *Gray*, op. cit. supra note 3, §§ 247-58; *Simes & Smith*, op. cit. supra note 2, §§ 1262-64. There are some English decisions indicating that a future interest limited to follow one which is void necessarily fails but this is probably no longer the English view. *Re Allan’s Will Trusts* [1958] 1 All E.R. 401.
11. *Restatement, Property* § 402 (1944); *Simes & Smith*, op. cit. supra note 2, § 1262.
As Mr. Kroeger suggests, limitations which violate the Rule Against Perpetuities are usually made to unborn persons in whom the settlor or testator has no real interest, following limitations in favor of the living children and grandchildren whom he knows, loves and wants to protect. If the testator or settlor’s lawful and reasonable provisions for the relatives whom he knows and loves are wholly destroyed solely because the instrument, due to the inadvertence or mistake of law of his lawyer, contains some remote provision in favor of a beneficiary who may never be born, the settlor or testator and his loved ones are being cruelly and quite unnecessarily punished for the lawyer’s mistake. Suppose, for example, a well-to-do man, after buying an annuity to provide for his own support, transfers all his other assets except some furniture to a trustee for his children and grandchildren, with a limitation over to charity if all the grandchildren die without issue. Thereafter, believing that he has no assets except the furniture, he executes a will bequeathing all his property to his housekeeper or chauffeur. If the invalidity of the remote limitation to charity, which, even if valid, would almost certainly never take effect, causes the interests of the children and grandchildren to fail, the housekeeper or chauffeur will take all the trust assets, to the complete exclusion of the children and grandchildren to whom the settlor wanted them to go. Mr. Kroeger urges that something be done to change the unsatisfactory Missouri law on the effect of violation of the Rule Against Perpetuities. Professor Eckhardt and the writer are in hearty accord with this view.13

In Applegate v. Brown14 the testator was a bachelor domiciled in


13. We do not, however, favor enactment of the type of legislation which was proposed by Mr. Kroeger in his article and failed of passage in the 1959 and 1961 General Assemblies. H.B. No. 341, 70th Gen. Ass.; H.B. No. 34, 71st Gen. Ass. These bills would have postponed determination of the validity of limitations of future interests until the expiration of the period of the Rule Against Perpetuities, based the determination upon the facts existing at that time, and directed the distribution of property invalidly limited to the persons then receiving income from it. Such legislation is objectionable because it would prevent determination of the validity of wills and trust instruments for perhaps a century after they become effective and provide for a distribution of ineffectively disposed of interests which would be inappropriate in many situations. A simple bill, adopting the Restatement view (note 11, supra) would be adequate to correct the existing unhappy situation and would, no doubt, be given sympathetic enforcement by the present Supreme Court. It may be, indeed, that the court will, without legislative prompting, take care of the situation.

14. 168 Neb. 190, 95 N.W.2d 341 (1959), noted in 44 Minn. L. Rev. 1031 (1960).
Nebraska who was survived by his mother, seven brothers and sisters, and numerous nieces, nephews, grandnephews and grandnieces. By his will he devised and bequeathed his entire estate to his executrices upon trust to sell all the property, invest the proceeds, and devote the income to the "use, benefit, comfort and maintenance of my nieces and nephews and such others of my relatives as may in the discretion of my said [trustees] warrant and require financial aid and assistance." The district court held that the trust was void and directed immediate distribution of the property as on intestacy. The Supreme Court of Nebraska reversed, holding that the Rule of Convenience closed the class of beneficiaries on the death of the testator, that there was a valid trust for the relatives in being at that time, and that, upon the death of the last such relative, the trustees would hold the property on resulting trust for the heirs of the testator. The Supreme Court of Missouri held that the construction of the will "for the purpose of ascertaining the testator's meaning and intention as expressed therein" was governed by Nebraska law, that the trust, as construed by the Supreme Court of Nebraska, did not violate the Rule Against Perpetuities, and that, therefore, land in Missouri owned by the testator was subject to the trust. 15

The application of the Rule Against Perpetuities to class gifts is peculiar. If the interest of any member of the class may possibly vest at a time beyond the period of the Rule, the entire class gift is void, even though the interests of some members are presently vested or will certainly vest within the period. 16 Hence, if the class may open to admit new members at a time beyond the period of the Rule, the whole class gift fails. This harsh rule is somewhat ameliorated by a well-settled rule of construction, known as the "Rule of Convenience," under which, in the absence of a manifestation of some other intention, a class closes when any member of it is entitled to possession of a share in the property. 17 It was by applying the Rule of Convenience that the Supreme Court of Nebraska concluded that the class of income beneficiaries of the trust closed at the death of the testator. There is considerable authority for the proposition that the Rule of Convenience does not apply to gifts of income or, to be more precise, that the class is redetermined at the time

17. Simes & Smith, op. cit. supra note 2, §§ 636, 638; Fratcher, op. cit. supra note 2, at 361-62.
of each distribution of income\(^{18}\) and Missouri appears to follow this view,\(^{19}\) at least in cases where the Rule Against Perpetuities is not involved. Consequently, it would be dangerous to assume that the Supreme Court of Missouri will regard *Applegate v. Brown*\(^{20}\) as a binding precedent in a case involving construction of a Missouri will.

**II. Marital Rights**

Under the Missouri statutes in force for many years prior to 1956 the widow of a childless husband was entitled to renounce the provision made for her in his will and take in lieu thereof one-half of his estate, "subject to the payment of the husband’s debts."\(^{21}\) In *Hammond v. Wheeler*\(^{22}\) the widow of a husband who died after the enactment of federal legislation granting a marital deduction, for Federal Estate Tax purposes, of half the value of the adjusted gross estate, elected to exercise this power. In addition to her interest in the probate estate the widow was entitled to life insurance proceeds and jointly held property which were part of the gross estate for Federal Estate Tax purposes. A circuit court determination that the widow’s half of the probate estate should be computed without first deducting the Federal Estate Tax, except to the extent that what she received added to the amount of that tax, was affirmed. The opinion observes that seventeen states have apportionment statutes providing for this result and that the authorities are in conflict in other jurisdictions, some of which deduct the entire Federal Estate Tax from the probate estate before computing the widow’s share. As the opinion relies in part upon a narrow interpretation of the word “debts” as used in the statute, 

---

18. Simes & Smith, op. cit. supra note 2, § 649; Restatement, Property § 295, comment i (1940). However, comment j states: "Whenever the increase in the period of postponement thus made would render invalid, under the applicable rule against perpetuities, either the disposition of income to this class, or part or all of the ultimate disposition of corpus, then such invalidity is sufficient to prevent the lengthening of the period during which the class can increase in membership, otherwise made because of the subject matter of the class gift. (see § 243, Comment o)."


20. Supra note 15.

21. §§ 469.090, .110, .120, .150, RSMo 1949. These statutes were repealed by the Missouri Probate Code of 1955 and replaced by § 474.160, RSMo 1959, which entitles the widow of a childless husband to elect to take against the will, in addition to exempt property and family allowance, “one-half of the estate, subject to the payment of claims.” (emphasis added.)

22. 347 S.W.2d 884 (Mo. 1961). See also Osborn v. Osborn, 334 S.W.2d 48 (Mo. 1960).
confining it to obligations of the decedent as distinguished from post-mortem obligations of the estate, it is not certain that the decision is applicable to distribution under the Probate Code.23

III. INTESTATE DESCENT AND DISTRIBUTION

The Uniform Simultaneous Death Law provides:

Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, as determined by a court of competent jurisdiction, the property of each person shall be disposed of as if he had survived...24

In Schmitt v. Pierce25 a husband and wife, each of whom was intestate and had children by a prior spouse, were killed as a result of an automobile collision. It was conceded that the husband died instantaneously. Although the testimony was conflicting, there was some evidence that the wife survived the collision by a few minutes without regaining consciousness. A determination that there was "sufficient evidence that the persons have died otherwise than simultaneously," that the wife survived and that she was an intestate distributee of the husband was affirmed. The Supreme Court held that, although the rule is otherwise as to certain marital rights under the Probate Code,26 surviving the intestate for any period whatever, however short, is sufficient to entitle the survivor to ordinary descent and distribution.

IV. CONTRACTS TO MAKE WILLS

Treon v. Coffelt27 was a suit against the executors and trustees under a will for "specific performance" of an alleged oral contract by the testatrix to devise her home to the plaintiff. The plaintiff resided in the testatrix's home for some thirty years prior to her death in 1956. Until 1946 they engaged in a minnow production business as partners. There was substan-

23. Which, as indicated in note 21 supra, uses the word "claims." Section 473.397, RSMo 1959, classifies as Class (1a) claims, "Debts, including taxes, to the United States."
24. § 471.010, RSMo 1959, enacted in 1947.
25. 344 S.W.2d 120 (Mo. 1961) (en banc).
26. § 474.200, RSMo 1959 (election to take against the will); § 474.300 (family and homestead allowances).
tial evidence to the effect that, when testatrix's health failed in 1946 and she was no longer able to work in the business, she agreed orally to devise her home to the plaintiff if he would continue to pay her half the profits of the business and care for her as long as she lived. There was also evidence that plaintiff performed these conditions and that the testatrix executed wills devising the home to plaintiff in 1951 and 1953. Testatrix gave the plaintiff her half interest in the business in 1954 and, in 1956, executed a will which devised her home to trustees for a hospital. Between 1946 and the date of trial the home increased in value from some 7,000 dollars to about 65,000 dollars. A judgment denying relief was affirmed in an opinion which states very positively that, in a suit for "specific performance" of an oral contract to devise land the contract must be proved beyond a reasonable doubt. 28

V. Execution, Revocation and Contest of Wills

Wilhoit v. Fite 29 was a will contest instituted on behalf of the sole surviving descendant of the testatrix, a grandson, by his guardian. After he was divorced by the mother of contestant, testatrix's son married the proponent. Testatrix and her son owned considerable property in common, the income from which was pooled and administered by testatrix. The son died, leaving a will by which he bequeathed a dollar to contestant and the residue to proponent. After this testatrix transferred some of her share in the property to proponent and they continued to pool the income. Proponent executed a will in favor of testatrix and, on proponent's suggestion that the scheme would be less expensive than a formal trust, testatrix executed the will in question, after her attorney had explained its effect to her out of the presence of proponent. The contested will bequeathed one dollar to contestant and the residue to proponent, expressed confidence that the proponent would provide for contestant, and provided that if proponent failed to survive testatrix, the estate should pass to a trustee for contestant. Proponent testified that she agreed orally with testatrix to pay small amounts to two sisters of testatrix, to provide for contestant's education and,

28. Day v. Blackbird, 331 S.W.2d 658 (Mo. 1960), noted in 25 Mo. L. Rev. 425 (1960), appears to follow the same rule. Compare Reighley v. Fabricius's Estate, 332 S.W.2d 76 (St. L. Ct. App. 1960), noted in 25 Mo. L. Rev. 425 (1960), holding that, in an action at law for damages for breach of a contract to bequeath a sum of money or the reasonable value of services, proof of the contract need only be by a preponderance of the evidence.

29. 341 S.W.2d 806 (Mo. 1960).
when contestant was mature enough to handle it, to turn over the whole balance of the residue to contestant. Proponent expressed her intention of carrying out the oral trust if the will was sustained. Judgment on a verdict against the will was affirmed on the ground that proof of a confidential relationship between a testator and the party charged with undue influence and that that party was active in procuring the execution of the will is sufficient to go to a jury on the issue of undue influence. It was held that the contestant and his guardian were competent witnesses on the issue of undue influence despite their interest.

Under the rules of the ecclesiastical courts, which had jurisdiction over the probate and contest of testaments of personality in England until the nineteenth century, persons who had an interest in the outcome of litigation and their servants and close relatives were incompetent to testify as witnesses. During the seventeenth century the common law courts, which had jurisdiction over proof of wills of real property, adopted, in part, the ecclesiastical rules by rendering incompetent as witnesses all persons who had pecuniary interests in the outcome of litigation, including the parties, their spouses, attorneys, trustees and guardians. Jeremy Benth- am's argument that interest in the outcome of litigation ought not to disqualify witnesses but only to affect the weight of their testimony gained gradual acceptance. Beginning in 1843 Parliament, by a series of statutes, gradually abolished the incompetency of witnesses because of interest.

An 1849 Missouri statute made persons interested in the outcome of litigation, other than parties, competent witnesses. Chapter 144 of the Missouri General Statutes of 1865 provided that "no person shall be disqualified as a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same as a party or otherwise," but enacted a so-called "dead-man" statute, barring testimony in his own favor by a party to a transaction with a person now deceased or insane. A later section provided that nothing in the section quoted, which included the "dead-man" statute, "shall in any manner affect the law relating to

30. 2 Wigmore, Evidence § 575, at 678 n (3d ed. 1940).
33. Mo. Laws 1848-1849, §§ 1, 2, at 99-100. It was held that this statute made the guardian of a party a competent witness. McCullough v. McCullough, 31 Mo. 226 (1860).
the attestation of the execution of last wills and testaments. A 1921 statute abolished the disqualification of spouses of parties.

Chapter 144 of the General Statutes of 1865 was entitled, "Of Witnesses and Depositions." It was contained in Part III "Of the Redress of Civil Injuries," Title XXXIII, "Of Courts of Record and Judicial Proceedings." Chapter 131, "Of Wills," which was contained in Part II, "Of Private Rights," Title XXXII, "Of the Estates of Deceased Persons," required wills to be "attested by two or more competent witnesses subscribing their names to the will, in the presence of the testator" and provided that devises and bequeaths to subscribing witnesses should be void to the extent that they exceeded the share to which the witness would be entitled on intestacy. It seems probable that the proviso in Chapter 144 that it should not "affect the law relating to the attestation of the execution of last wills and testaments" was designed to make it clear that that chapter did not modify Chapter 131 rather than to create an exception to the section abolishing disqualification by interest of witnesses in judicial proceedings. Nevertheless the Supreme Court, in Miltenberger v. Miltenberger, held that, because of the proviso, the seventeenth century law of disqualification of witnesses by interest is still in force as to proof in court of the execution of wills, so that a legatee or devisee in a will is not competent to testify to the facts of execution.

It has long been settled that the "dead-man" statute is inapplicable to will contests and that proposition is reaffirmed in the case under discussion. Hence the only vestige of disqualification of witnesses because of interest left in will contest cases is the rule of the Miltenberger case,

39. 78 Mo. 27 (1883), followed in Hogan v. Hinchey, 195 Mo. 527, 94 S.W. 522 (1906); Yant v. Charles, 219 S.W. 572 (Mo. 1920); Reiding v. Adams, 266 S.W.2d 610 (Mo. 1954). See Wright v. McDonald, 361 Mo. 1, 233 S.W.2d 19 (1950) (en banc). In the Yant case it was held that a legatee was incompetent to testify that the testatrix directed preparation of the will four years before its purported execution. The rule of the Miltenberger case does not, of course, disqualify a legatee who was a subscribing witness to the will because his interest is destroyed by statute. Note 38, supra, § 474.330, RSMo 1959.
40. Norris v. Bristow, 338 Mo. 1177, 219 S.W.2d 367 (Mo. 1949); Harris v. Hays, 53 Mo. 90 (1873); Gamache v. Gambs, 52 Mo. 287 (1873); Garvin's Adm'r v. Williams, 50 Mo. 206 (1872). Missouri follows the majority rule on this question. Annots., 115 A.L.R. 1425 (1938), 173 A.L.R. 1282 (1948).
which is very narrow. Although, under it, a devisee or legatee may not testify regarding the facts of execution of the will, he may testify as to the contents of a lost will,\(^41\) the mental capacity of the testator\(^42\) or to facts bearing on the issues of fraud and undue influence.\(^43\) Moreover, in spite of his interest, an heir or distributee, who will take the estate if the will is denied probate, may testify on the issue of execution.\(^44\) This is absurd and unjust. If the heir and devisee were standing by the bedside when the will was signed, the heir is competent to testify that the testator did not sign but the devisee is incompetent to testify that he did sign.

The rule of the *Miltenberger* case should be abolished by statute.

*Yates v. Jeans*\(^45\) was a contest of a 1952 will on the theory that it was revoked by a 1954 will. Due execution of the 1954 will was proved by testimony of the subscribing witnesses. One of them testified that he drafted the 1954 will, that it was very short and that "as my recollection goes now" it was made to a Mr. Kenrick or Kendall and his wife. There was evidence that the 1954 will was last seen in the possession of the testatrix and that it could not be found after her death. The court mentioned the usual rule that a will last seen in the possession of the testator which cannot be found at his death is presumed to have been destroyed by him with revocatory intent.\(^46\) It also recognized the Missouri statutory rule that revocation of a revoking will does not revive the will revoked by it\(^47\) and the rule that a revoked will, although not admissible to probate,

\(^41\) Mann v. Balfour, 187 Mo. 290, 86 S.W. 103 (1905). See Wright v. McDonald, 361 Mo. 1, 233 S.W.2d 19 (1950) (en banc). In Harrell v. Harrell, 284 Mo. 218, 223 S.W. 919 (1920), it was indicated that the *Miltenberger* rule does not bar testimony by a legatee that the will was in existence after the death of the testator.

\(^42\) Norris v. Bristow, 358 Mo. 1177, 219 S.W.2d 367 (1949); Yant v. Charles, 219 S.W. 572 (Mo. 1920).

\(^43\) Norris v. Bristow, 358 Mo. 1177, 219 S.W.2d 367 (1949); Harris v. Hays, 53 Mo. 90 (1873); Gamache v. Gambs, 52 Mo. 287 (1873); Garvin's Adm'r v. Williams, 50 Mo. 206 (1872).


\(^45\) 345 S.W.2d 657 (Spr. Ct. App. 1961).

\(^46\) Board of Trustees of Methodist Church v. Welpton, 284 S.W.2d 580 (Mo. 1955); Beaumont v. Keim, 50 Mo. 28 (1872).

\(^47\) § 468.280, RSMo 1949, now § 474.410, RSMo 1959: "If, after making any will, the testator duly makes a second will, the destruction, canceling or revocation of the second will does not revive the first will, unless it appears, by the terms of such revocation, that it was his intention to revive and give effect to the first will, or unless he duly republishes his first will." The "terms of such revocation" appear to be limited to the terms of a written instrument effecting revocation. Barnett v. Bellows, 315 Mo. 1100, 287 S.W. 604 (1926). Cf. Beaumont v. Keim, 50 Mo. 28 (1872).
may be proved to establish that it revoked a prior will. Nevertheless, a judgment that the 1952 will remained in effect was affirmed on the ground that the contestants had not met their burden of proving that the 1954 will contained an express clause of revocation or that its provisions were so inconsistent with the 1952 will as to have revocatory effect.

VI. CONSTRUCTION OF WILLS

The Missouri Probate Code of 1955 provides that when it is necessary that there be an abatement of the shares of the distributees they shall, subject to the provisions of the will, abate in the following order: (1) intestate property; (2) residuary devises; (3) general legacies; (4) specific devises. Osborn v. Osborn involved the will of a testator who died before the effective date of the Probate Code which bequeathed described assets in paragraphs labelled “specific bequest” to his descendants by a prior marriage, an amount equal to the maximum marital deduction under the Internal Revenue Code, including described assets, to his widow, and the residue to his son by a prior wife. The paragraph relating to the widow provided that if the assets described therein were “insufficient to provide the requisite assets under the marital deduction . . . then the executors . . . shall satisfy the insufficiency either in cash or in kind but exclusively from assets qualifying for the said marital deduction.” The assets of the estate were insufficient to take advantage of the full marital deduction unless the widow was given some of the property specifically described in the paragraphs relating to the descendants. A judgment that the will manifested an intention that this should be done was affirmed. The opinion states that the mentioned section of the Probate Code has no application when the will provides otherwise but assumes its applicability in the absence of such provision.

Under the common law, which governed wills of land, the revocation of a revoking will revived the first will. Goodright ex dem. Glazier v. Glazier, 4 Burrow 2512, 93 Eng. Repr. 317 (1770). Under the ecclesiastical law, which governed testaments of personalty, revival was a question of intent, as to which there was no presumption. Wilson v. Wilson, 3 Phill. 543, 161 Eng. Repr. 1409 (1821). The American rules vary.

49. § 473.620, RSMo 1959. There was no equivalent statute in force prior to 1956.
50. 334 S.W.2d 48 (Mo. 1960).
51. Section 1 of the Probate Code (Mo. Laws 1955, at 390) provides:
"1. This Code shall take effect and be in force on and after January 1, 1956. The procedure herein prescribed shall govern all proceedings in probate brought
In re Fowler’s Estate was concerned with the effect of a will drafted by an elderly testator, who had no descendants, on his own typewriter. It appointed his widow “administrator,” authorized her access to his safety box, directed payment of debts, and bequeathed 500 dollars to a sister, 200 dollars to a nephew and 200 dollars to a cemetery for care of graves. After these provisions were carried out there was a residue of some 30,000 dollars in personalty. Despite evidence that the testator was acquainted with some of the remote relatives who were his intestate distributees and of his statements that he had left everything, except the three legacies, to his wife, a judgment directing distribution of the residue as intestate property was affirmed on the ground that the will contained no ambiguity which would warrant the use of extrinsic evidence to ascertain the testator’s intention.

Under both the ecclesiastical law and the common law the executor was presumptively entitled to keep beneficially personal property not disposed of by the will. An English statute enacted in 1830, which is not in force in Missouri, provides that the executor shall hold any residue undisposed of by the will upon trust for the intestate distributees “unless it shall appear by the will” that the executor was intended to take beneficially. In this country, either by statute or by judicial fiat, there has been a tendency to reach approximately the result called for by the English statute. There is no Missouri statute expressly abrogating the common law on this question. In the case under discussion the common law pre-

after the effective date of the Code and also all further procedure in proceedings in probate then pending, except to the extent that in the opinion of the court their application in particular proceedings or parts thereof would not be feasible or would work injustice, in which event the former procedure shall apply.

“2. No act done in any proceeding commenced before this Code takes effect and no accrued right shall be impaired by its provisions . . . .”

52. 338 S.W.2d 44 (Mo. 1960).
54. The Executors Act, 1830, 11 Geo. 4 and 1 Will. 4, c. 40. The statute preserves the right of the executor to retain undisposed of property beneficially when there are no next of kin.
55. 2 Redfield, Wills 490-91 (2d ed. 1870); Schouler, Executors § 494 (1883); 3 Woerner, American Law of Administration § 462 (3d ed. 1923).
56. Section 473.260, RSMo 1959, provides: “When a person dies, his real and personal property, except exempt property, passes to the persons to whom it is devised by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as his heirs . . . .” This does not negate the common law presumption that the appointment of an executor is a bequest of the residue to him unless a contrary intent is manifested.
sumption would have effected a more just result than a finding of partial intestacy.

_In re Tompkins' Estate_\(^57\) was concerned with a direction in a will that the executrix pay from assets owned by the testatrix all inheritance taxes, including all "succession taxes for the payment of which my executor, or any legatee, devisee or appointee, is liable." It was held that the Missouri inheritance tax applies to assets passing by virtue of the exercise of a power of appointment as part of the estate of the donee of the power as well as in the estate of the donor of the power\(^58\) and that, because of the quoted language, the tax on assets appointed by the will was payable from the probate estate of the testatrix. The tax aspect of this case is discussed in Professor Lowe's article.

_Morisseau v. Biesterfeldt\(^59\)_ involved construction of a will which bequeathed a substantial amount of corporate stock to a brother of the testatrix for life "with the right and power in him to sell, lease, pledge, hypothecate, invest and reinvest all or any part thereof, and to use, employ or dispose of the same, whether corpus or income, as he may deem necessary for his proper support and maintenance." Although he owned other property of his own, the life tenant sold a good deal of this stock and used the proceeds in part for his support and in part to pay off a mortgage on his own land which he had given in order to secure funds for support. At suit of the remainderman, the court refused to require the life tenant's administrator to account for the proceeds so used on the ground that the words "as he may deem necessary" excused the life tenant from showing a reasonably demonstrated necessity as a prerequisite to exercise of the power to consume. The opinion suggests that, even when the language of a will is construed to make the exercise of a life tenant's power to consume corpus dependent upon the existence of a reasonable necessity, destitution may not be required for necessity to exist.

_In Shriners Hospitals for Crippled Children v. Emrie\(^60\)_ a testatrix who owned more than 10,000 such shares bequeathed 200 shares of stock in a named corporation to the plaintiff. Three years after the execution

---

57. 341 S.W.2d 866 (Mo. 1961).
58. § 145.030, RSMo 1959, originally enacted as Mo. Laws 1917, at 114. In the absence of such a statute appointed property is normally taxed only in the estate of the donor of the power. Simes & Smith, Law of Future Interests § 948 (2d ed. 1956).
59. 345 S.W.2d 210 (Mo. 1961). For other cases on the construction of such powers see Simes & Smith, op. cit. supra note 58, § 1716.
60. 347 S.W.2d 198 (Mo. 1961).
of the will the corporation made a five-for-one stock split, so that the
testatrix owned more than 50,000 shares of its stock when she died four-
teen months later. It was held, upon consideration of the whole will, in-
cluding similar legacies to persons who were also residuary legatees, that
the bequest to the plaintiff was specific and that the plaintiff was entitled
to 1,000 shares of the stock. The opinion concedes that there is reluctance
to construe legacies as specific when this will result in their being defeated
by ademption and refuses to lay down any rigid rule of construction other
than an effort to ascertain the true intent of the testator. The decision
illustrates the fact that the classification of legacies as specific, general
or demonstrative tends to be influenced by the effect which such classification
will have on the validity and extent of the legacy, even though this in-
volves consideration of facts which occur after the execution of the will.61

VII. Administration of Estates

Traditionally probate jurisdiction has been conditioned upon the
decedent being domiciled or leaving assets within the state. Legislation of
1947 provided that causes of action for wrongful death should survive
against the “legal representatives” of the tortfeasor62 and a 1949 amend-
ment authorized the probate court of the county where the casualty oc-
curred to appoint a representative of a deceased nonresident for the pur-
pose of being sued in such an action.63 In 1954 the Supreme Court, by
very narrow construction of this and other statutes, ruled that there was
still no jurisdiction to appoint a Missouri legal representative for a non-
resident motorist who caused death in the state but left no assets in it.64
In State ex rel. McCubbin v. Ginn65 it was held that 1955 legislation66
authorized such appointment and that the representative so appointed
should be termed an administrator. The opinion is of interest in suggesting
that the jurisdiction of Missouri probate courts may be expanded by statute

61. ATKINSON, LAW OF WILLS § 132 (2d ed. 1953).
62. 2 Mo. Laws 1947, at 225, amending § 3670, RSMo 1939.
64. Crump v. Treadway, 276 S.W.2d 226 (Mo. 1955); Harris v. Bates, 270
S.W.2d 763 (Mo. 1954).
65. 347 S.W.2d 119 (Mo. 1961) (en banc).
66. Notably § 30 of the Probate Code of 1955 as amended by Mo. Laws 1959,
S.B. No. 141, now § 473.010.1(3), RSMo 1959, which provides that letters of
administration shall be granted, “If the decedent had no domicile in this state and
left no property therein, in any county in which the granting thereof is required
in order to protect or secure any legal right.”
beyond that expressly conferred by the 1945 Constitution. The decision may, therefore, be an important precedent in determining the validity of recent legislation conferring on probate courts jurisdiction over the administration of testamentary trusts.

One section of the Probate Code gives the surviving spouse and distributees of an intestate a preferential right to appointment as administrator. Another provides that if no application for letters is filed by a person with such preferential right within twenty days after death, any interested person may apply, in which case the petition shall be set for hearing and the persons with preferential right notified. A third section authorizes a grant of letters at any time to any person deemed suitable if the persons entitled to preference renounce in writing or if proof is made that no such persons reside in the state. In re Norman's Estate held that the appointment of an administrator eleven months after the intestate's death, on petition of a person who had no interest in the estate, without notice to or renunciation by the persons with preferential right, was valid under the third section where the applicant's attorney informed the probate judge that the intestate's widow and sole heir was a nonresident of the state. The opinion relies in part upon a fourth section of the Probate Code which provides that no notice of administration proceedings is jurisdictional except the notice by publication that letters have been issued. Unfortunately the opinion makes no mention of a 1957 statute granting a preferential right to appointment as administrator of a nonresident intestate to the resident nominee of a nonresident spouse or distributee.

Under the English common law and the law of Missouri in force prior to 1956, while title to real property passed directly to the heirs or devisees at the moment of the owner's death, title to personal property passed at death to the executor or administrator and the distributees or legatees acquired no title until an actual transfer was made to them by the executor or administrator. The Missouri Probate Code of 1955 changed the common

69. § 473.110, RSMo 1959.
70. § 473.020, RSMo 1959.
71. § 473.113, RSMo 1959.
73. § 473.013, RSMo 1959.
74. § 473.681, RSMo 1959, enacted by Mo. Laws 1957, at 860.
75. Smith v. Denny, 37 Mo. 20 (1865).
law on this point by providing that title to personal property passes to the
distributees or legatees at the death of the owner, subject to a right of
possession in the executor or administrator.\textsuperscript{76} This change was overlooked
in \textit{Ratermann v. Ratermann Realty \& Inv. Co.}\textsuperscript{77} In that case the two
plaintiffs were executors of the wills of a husband and wife. As executors
of the husband they sued a corporation and its president to compel issuance
of certificates for ninety-eight shares of stock allegedly owned by the
deceased. In their petition they alleged that the corporation had wrongfully
refused to issue certificates not only for these shares but for other shares
which, together with them, constituted a majority of the total stock, and
prayed that the court compel issuance of the other shares also and the
convening of a stockholders' meeting to elect directors. The "heirs"\textsuperscript{78} of the
wife petitioned to intervene on the ground that the plaintiffs were claiming
the other shares as individuals when they should be claiming them as exec-
utors of the wife. An order denying intervention was affirmed on the ground,
\textit{inter alia}, that executors have the sole legal title to personal property until
distribution and the heirs have no such title.

Two cases involved the statutes authorizing proceedings in the probate
court to discover assets wrongfully withheld from or by an executor or
administrator.\textsuperscript{79} In \textit{Courier v. Scott}\textsuperscript{80} an administratrix commenced such
a proceeding against the widower of the intestate to recover cash which he
had withdrawn from a bank account of the decedent. While this proceeding
was pending the widower commenced an action for a declaratory judgment
against the administratrix and children of the intestate to determine title
to the cash and to certain bonds in the possession of the administratrix.
A judgment determining title in the declaratory judgment action was re-
versed on the grounds that the commencement of the discovery proceeding
gave the probate court exclusive jurisdiction to determine title to the cash

\textsuperscript{76} § 473.260, RSMo 1959.
\textsuperscript{77} 341 S.W.2d 280 (St. L. Ct. App. 1960).
\textsuperscript{78} The opinion does not explain why persons claiming under a will are referred
to as "heirs."
\textsuperscript{79} §§ 462.400-440, RSMo 1949, superseded Jan. 1, 1956, by §§ 473.340-357,
RSMo 1959. The last section, which was new, permitted such proceedings against
as well as by an executor or administrator. It was amended by Mo. Laws 1959,
S.B. No. 141.
\textsuperscript{80} 336 S.W.2d 375 (Mo. 1960). Compare Security-Mut. Bank \& Trust Co.
v. Buder, 341 S.W.2d 782 (Mo. 1961), holding that, where funds deposited in a
bank were claimed by the executors of two different estates the bank could main-
tain an interpleader action against the two executors despite a prior order of a
probate court relating to the fund as part of one of the estates.
and that the title to the bonds was so interrelated that it should be determined in the same proceeding. *In re Frech's Estate* was a discovery proceeding against the trustee of a revocable inter vivos trust created by the intestate to recover the trust assets on the ground that the intestate had revoked the trust in his lifetime. A dismissal of the proceeding for lack of jurisdiction was affirmed on the ground that discovery proceedings are in the nature of actions at law and that the creation and revocation of inter vivos trusts, the liability of their trustees for breach of trust, tracing trust assets and accounting by the trustees are matters of exclusively equitable cognizance, beyond the jurisdiction of probate courts.

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. 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. 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 action even though the sole purpose of the action was to collect from the decedent's liability insurer rather than from probate assets. In *Rabin v. Krogsdale* 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.

---

82. § 473.360(2), RSMo 1957 Supp.
83. § 473.360(2), RSMo 1959, Mo. Laws 1959, S.B. No. 305, § 1.
84. Clarke v. Organ, 329 S.W.2d 670 (Mo. 1959) (en banc), noted in 25 Mo. L. Rev. 432 (1960); Smith v. Maynard, 339 S.W.2d 737 (Mo. 1960) (en banc). Judge Storckman dissented in both cases and Chief Justice Hyde joined him in the second 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. Note 66, *supra.*
85. 346 S.W.2d 58 (Mo. 1961).
Under English law an executor or administrator has broad powers to collect, sell and lease assets, borrow money, make investments, settle and compromise claims by and against the estate, make necessary expenditures, and distribute, without direction or approval by any court. In the administration of a typical estate in England there are no court proceedings whatever after the admission of the will to probate or the issuance of letters of administration. In this country there has been increasingly a tendency to reduce executors and administrators to the status of mere ministerial agents of probate courts, incapable of doing any act requiring discretion without advance direction or subsequent approval by the court. The Missouri Probate Code of 1955 is a prime example of the recent American tendency to deprive executors and administrators of virtually all their independent powers. Under its paternal provisions an executor may not sell the egg which the testator’s hen laid on the day of his death without court approval or throw out the day before’s crumpled newspaper without a prior court order. With such legislation in force it is startling to read the opinion in Wiggins v. Weston, holding that an administratrix, without court direction or approval, could bind a debtor to the estate by an account stated. Robb v. Casteel also tends to raise the personal representative.


88. E.g., § 473.257, RSMo 1959 (may not examine assets without presence of court-appointed appraisers); § 473.260 (deprived of title to assets); § 473.277 (compromise of claims in favor of estate not binding unless authorized or approved by court); § 473.293 (court direction required for abandonment of worthless property); § 473.297 (court approval required for expenditures to preserve estate); § 473.333 (court order required for most investments); § 473.403 (may not pay claims against estate without allowance or approval by court); § 473.427 (may not compromise claims against estate without court authorization or approval); § 473.483, § 473.487 (may not sell, mortgage or lease even perishable assets without court authorization or approval); § 473.540 (must file periodic and final settlements); § 473.613, § 473.617 (distribution to be on court order).

89. 339 S.W.2d 781 (Mo. 1960).
above the level of a mere custodian. It was held in that case that a circuit court, on transfer from the probate court,\textsuperscript{91} had jurisdiction to approve a compromise of a substantial claim against an estate on the mere statements of the administrator and his counsel that they had made a full and complete investigation of the facts before entering into the compromise.

In \textit{Edwards v. Durham}\textsuperscript{92} it was held that an executor, suing a debtor of the estate, was not precluded from asserting the "dead-man" statute\textsuperscript{93} as a bar to the defendant's testimony by the fact that, as attorney for a legatee under the will of a different decedent, he had taken the deposition of the defendant as to the same transaction in litigation relative to the other estate.

In \textit{Street v. Lincoln Nat'l Life Ins. Co.}\textsuperscript{94} the decedent assigned an insurance policy on his life in which his mother was the named beneficiary to a bank as security for a promissory note on which he was primarily liable and his mother was an accommodation co-maker. Decedent later changed the designation of beneficiary under the policy to his wife. After his death the bank collected the insurance proceeds and applied them to payment of the note. Decedent's wife sought subrogation to the bank's claim against the decedent's mother as co-maker. Subrogation in this situation was denied in an opinion which suggests that, under some circumstances, the beneficiary under a life insurance policy assigned as security may be entitled to subrogation to the creditor's claim against the estate of the insured.

Several cases relating to claims against estates turned on questions of sufficiency of evidence and propriety of instructions.\textsuperscript{95}

\textbf{VIII. Creation, Modification and Termination of Trusts}

In \textit{Masterson v. Plummer}\textsuperscript{96} an elderly woman deposited money in a bank and took two certificates, one payable to the order of herself or her son, "beneficiary," the other to the order of herself, if living, if not living to her son, "beneficiary." A determination in a probate court discovery

\footnotesize

\begin{itemize}
  \item 91. § 473.420(2), RSMo 1959.
  \item 92. 346 S.W.2d 90 (Mo. 1961).
  \item 93. § 491.010, RSMo 1959.
  \item 94. 347 S.W.2d 455 (K.C. Ct. App. 1961).
  \item 96. 343 S.W.2d 352 (Spr. Ct. App. 1961). Compare Longacre v. Knowles, 333 S.W.2d 67 (Mo. 1960), noted in 25 Mo. L. Rev. 417 (1960), holding that a promissory note payable to one person if living, otherwise to another, was testamentary and invalid as to the second payee.
\end{itemize}
proceeding, instituted in connection with the administration of the depositor's estate, that the son was entitled to the deposits as beneficiary of an express trust, was affirmed. The decision is, of course, in conflict with In re Frech's Estate, which held that the creation of a trust may not be litigated in probate court discovery proceedings. As to the substantive question involved, Missouri has several statutes relating to so-called "Totten" or bank account trusts. The decisions in this field are so numerous and confusing as to require a whole article for adequate discussion. Accordingly, no comment is offered on the Masterson case except the remark that the intention of the depositor that her son should have her money after her death was effectuated.

It was said in Greenburg v. Burnstein that the giving of a check marked "loan" to a mother, on the oral understanding that the proceeds would be used by her son to buy the interest of his partner in a business, did not constitute the payee a trustee for her son. The relevance of the statement to the issue in the case, whether the payee was obligated to repay the drawer of the check, is not apparent.

IX. Trust Administration

Plymouth Sec. Co. v. Johnson involved the operations of a business trust created by a declaration of trust which empowered the trustees to select their own successors and, with the consent of the holders of two-thirds of the certificates of beneficial interest, to amend the declaration. A transaction by which the trustees, who themselves owned more than two-thirds of the certificates of beneficial interest, sold a tract of land which was the sole trust asset on credit, with no down payment, the price to be paid over a period of some sixteen years, amended the declaration to increase the number of trustees and elected the purchasers trustees, was enforced without mention of the usual rule that a trustee may not sell trust property on credit without express authorization by the terms of the trust.

In Sheets v. Thomann it was held that one of 237 beneficiaries of a trust could maintain an action against four of the beneficiaries, three of

97. 347 S.W.2d 224 (Mo. 1961), discussed also in text at note 81, supra.
100. 335 S.W.2d 142 (Mo. 1960).
102. 336 S.W.2d 701 (St. L. Ct. App. 1960).
whom were also the trustees, as representatives of the whole group, to attack the validity of an amendment to the trust instrument. The court assumed that the beneficiaries not joined as parties could be bound only under the theory of virtual representation by members of a class. The opinion does not discuss the possibility that the trustees, as such, who were defending the validity of the trust, were competent to represent the beneficiaries without reliance upon the doctrine of virtual representation.\(^\text{103}\)

*Euge v. Blase\(^\text{104}\)* was a suit to set aside a foreclosure sale by which the trustee under a deed of trust given to secure a promissory note sold to the payee of the note. It appeared that, at the time when the note and deed of trust were executed, the trustee was the actual lender and the payee named in the note, the trustee’s father, was merely a nominal party. Subsequently the trustee transferred his beneficial interest in the note to the named payee. It was held that, so long as the trustee owned no interest in the note at the time of the foreclosure and acquired no interest by the foreclosure sale, the sale was not irregular.

In *Schlanger v. Simon\(^\text{105}\)* the terms of a testamentary trust provided for the payment of income to the testator’s son and grandson and their wives during their lives, with remainder to the children of the grandson. The will provided: “My trustees shall also have the right to pay a part of the principal of said fund to the beneficiaries under this trust, if, at any time during the period of the trust, they deem it advisable to do so.” During a period of twenty-two years the trustee made payments, from time to time as needed to meet medical and living expenses, aggregating 37,000 dollars to the son and grandson from the approximately 59,000 dollar principal of the trust. The only child of the grandson contended that the quoted language empowered the trustees to make only one payment from principal to the income beneficiaries and required that the amount paid to an income beneficiary be proportioned to his right to income. It was held that there were no such restrictions on the power to invade principal.

**X. Resulting Trusts and Resulting Uses**

By an ancient doctrine of equity, which has been continued in modern law, if one person pays the purchase price for a conveyance of property

---

103. *Boatmen’s Nat’l Bank v. Rogers*, 352 Mo. 763, 179 S.W.2d 102 (1944); *Fratcher, Law of Trusts and Trustees* § 593 (1946); *Simes & Smith, Law of Future Interests* § 1811 (2d ed. 1956).
104. 339 S.W.2d 807 (Mo. 1960).
105. 339 S.W.2d 825 (Mo. 1960).
to another, the latter presumptively holds upon resulting trust for the former.\textsuperscript{106} If the transferee is a natural object of the bounty of the payor, such as his wife or child, the presumption is prima facie rebutted and a gift is inferred, in the absence of evidence of other intention.\textsuperscript{107} As resulting trusts are trusts arising by implication of law and so expressly exempt from the requirement of manifestation and proof by a signed writing imposed on express trusts of land by the Statute of Frauds,\textsuperscript{108} oral evidence is admissible to support or rebut the presumption even though land is involved.\textsuperscript{109}

In \textit{Isenman v. Schwartz}\textsuperscript{110} land was conveyed to the plaintiff and defendant as tenants in common in consideration of 16,000 dollars, of which 2,000 dollars was provided by the plaintiff, 7,000 dollars was secured by sales of timber on the land negotiated by the defendant, and 7,000 dollars was borrowed from a bank on a promissory note signed by the plaintiff, the defendant and their wives. At the time of this transaction the parties agreed orally that the land should be sold, that the sale price should first be devoted to repaying the plaintiff the money which he contributed and that the balance should be divided equally between the parties. Plaintiff contends that the defendant held the whole of his undivided half of the title on purchase money resulting trust for the plaintiff. It was held, understandably, that as the plaintiff did not contribute the whole purchase price he was not the beneficiary of a resulting trust of the whole and that the oral agreement rebutted any inference of resulting trust as to part.

The purchase money resulting trust doctrine has been the basis of a considerable volume of litigation in Missouri and other states. An equally ancient and closely related doctrine, the gratuitous conveyance resulting use doctrine, is rarely mentioned in the American cases. Under this doctrine, when land was conveyed without consideration the transferee presumptively held upon resulting use for the transferor.\textsuperscript{111} The doctrines differed on one

\textsuperscript{106} 4 \textsc{Scott}, \textsc{Trusts} §§ 440-40.4 (2d ed. 1956). Purchase money resulting trusts have been abolished by statute in New York and some other states.

\textsuperscript{107} 4 \textsc{Scott}, \textsc{Trusts} §§ 442-43 (2d ed. 1956).

\textsuperscript{108} \textsc{Sanders, Uses and Trusts} 124 (1792); §§ 456.010, .030, RSMo 1959.

\textsuperscript{109} 4 \textsc{Scott}, \textsc{Trusts} §§ 441, 443 (2d ed. 1956).

\textsuperscript{110} 335 S.W.2d 112 (Mo. 1960). A purchase money resulting trust theory was asserted in \textit{Rubbelke v. Aebl\textsubscript{i}}, 340 S.W.2d 747 (Mo. 1960), but the question involved on appeal was purely procedural.

\textsuperscript{111} Armstrong \textit{ex dem.} Neve \textit{v. Wolsey}, 2 Wils. K.B. 18, 95 Eng. Repr. 662 (C.P. 1775); \textsc{Perkins, Profitable Bookes} § 533 (1642); 2 \textsc{Blackstone, Commentaries} *296, *330; \textsc{Sheppard, Touchstone of Common Assurances} 501-02, 512 (8th ed. 1826); 4 \textsc{Scott, Trusts} § 405 (2d ed. 1956); \textsc{Restatement (Second)},
TRUSTS § 73, comment a (1959). This doctrine was not the same as the rule that bargains and sales and covenants to stand seized required consideration to raise uses. The doctrine applied to feoffments, fines, recoveries and other types of conveyance incident to which consideration was not essential to raise uses. SHEPPARD, op. cit. supra, at 510-11.

112. 4 SCOTT, TRUSTS § 440 (2d ed. 1956); RESTATEMENT (SECOND), TRUSTS § 440, comments d, e (1959). Resulting trusts have always been enforced by courts of equity, which go behind recitals of consideration and, since 1634, have enforced a use on a use as a trust. A resulting trust may be, and commonly is, a use on a use.

113. Lloyd v. Spillet, 2 Atk. 148, 26 Eng. Repr. 493 (Ch. 1740); SANDERS, USES AND TRUSTS 101 (1792); RESTATEMENT (SECOND), TRUSTS § 73, comment a (1959). See Parker v. Blakeley, 338 Mo. 1189, 1203, 93 S.W.2d 981, 989 (1936); Weiss v. Heitcamp, 127 Mo. 23, 30, 29 S.W. 709, 711 (1895); Bobb v. Bobb, 89 Mo. 411, 419 (1886); Hollocher v. Hollocher, 62 Mo. 267, 273-74 (1876); Henderson v. Henderson's Ex'rs, 13 Mo. 151, 153 (1850); Hickman v. Hickman, 55 Mo. App. 303, 312 (K.C. Ct. App. 1893). Cf. Jankowski v. Delfert, 356 Mo. 184, 201 S.W.2d 331 (1947); Taylor v. Thompson, 88 Mo. 86 (1885). Since the Statute of Uses resulting uses have been enforced by courts of common law, which do not go behind recitals of consideration and which have always treated a use as a use as void. A resulting use is never a use on a use.


115. SANDERS, USES AND TRUSTS 97-101 (1792); RESTATEMENT (SECOND), TRUSTS § 73, comment a (1959). The Restatement takes the position that the Statute does not execute resulting and constructive trusts. 1 SCOTT, TRUSTS § 73 (2d ed. 1956).

116. 15 Geo. 5, c. 20, § 60 (3) (1925). Section 442.460, RSMo 1959, originally enacted as RSMo 1835, at 119, provides, "every conveyance of real estate shall pass all the estate of the grantor therein, unless the intent to pass a less estate shall expressly appear, or be necessarily implied in the terms of the grant." It could be argued that this provision abrogates the gratuitous conveyance resulting use doctrine.
Frauds.117 Before the Statute of Frauds an oral or unsigned written declara-
tion of uses incident to a conveyance of land was just as effective to raise
an express use as a signed written declaration.118 After the Statute of Frauds,
an oral or unsigned declaration of uses could have effect only if made in
a situation where "a trust or confidence shall or may arise or result by the
implication or construction of law."119 The gratuitous conveyance situation
was, of course, one of these.

Because American conveyancing has tended to be by deed, reciting
a consideration and including an habendum clause to the use of the grantee,
the situation to which the gratuitous conveyance resulting use doctrine
applies rarely arises here. The Restatement of Trusts states that the doc-
trine "has not been applied in the modern law of trusts."120 This statement
is correct but its precise meaning may not be apparent. The modern law
of trusts deals with uses only to the extent that they are excepted from
execution by the Statute of Uses;121 that is, only when the beneficiary's
interest is equitable. The gratuitous conveyance resulting use doctrine ap-
plies only to uses which are executed by the Statute of Uses, so that the
interest of the cestui que use is legal, not equitable.122 Hence, the statement
that the doctrine is not applied in the modern law of trusts does not neces-
sarily mean that the doctrine no longer exists.

In the light of this background, the opinion in Long v. Kyte123 has

117. 29 Car. 2, c. 3, §§ VII, VIII, IX (1676), reenacted by Mo. Rev. Laws
1825, at 401, and now §§ 456.010, .030, RSMo 1959. Section VII required creations
of trusts of land to be manifested and proved by a signed writing. Section VIII
excepted trusts which arise or result by the implication or construction of law.
Section IX required assignments of beneficial interests under trusts to be by signed
writing. It is clear that § VIII excepted resulting and constructive trusts from the
requirement of § VII. It has been suggested that none of these sections was in-
tended to apply to uses which were not trusts. Sanders, Uses and Trusts 124
(1792). If they do apply, § VIII must be deemed to except resulting uses from
the requirement of § VII. Hence, whether or not the sections apply to uses, parol
evidence may be used to establish or rebut a resulting use.

118. Sanders, Uses and Trusts 167 (1792); Sheppard, Touchstone of Com-
mon Assurances 519 (8th ed. 1826).

119. 29 Car. 2, c. 3, § VIII; § 456.030, RSMo 1959.

120. Restatement (Second), Trusts § 405, comment a (1959). See also id.,
§ 73, comment a.

121. The Statute of Uses does not execute a use if (1) the trustee's interest
is not a freehold estate in land; (2) it is a use on a use; or (3) the
trustee has active duties. Digby, History of the Law of Real Property 324-28
(2d ed. 1884); Restatement (Second), Trusts §§ 69-71 (1959).

122. Sanders, Uses and Trusts 181 (1792); Restatement (Second), Trusts
§ 73, comment a (1959).

123. 340 S.W.2d 623 (Mo. 1960). The opinion does not indicate whether the
deeds contained recitals of consideration or habendum clauses to the use of the
grantees. However, it does quote a passage from Parker v. Blakeley, supra note 113,
most interesting implications. A corporation purchased land in 1930. In 1946 the corporation conveyed the land by quit-claim deed to a straw party who immediately gave the sole stockholder of the corporation a promissory note secured by a deed of trust of the land and a warranty deed of the land in which the grantee's name was left blank. In 1955 the sole stockholder of the corporation released the note and deed of trust, filled in the defendant's name as grantee in the warranty deed, recorded the deed and delivered it to the defendant. The heirs of the sole stockholder sued the defendant on the theory that she held the land on purchase money resulting trust. The opinion observes, correctly, of course, that this theory was inapplicable to the facts but bases denial of any relief to the plaintiffs upon extrinsic evidence, partly of oral statements, indicating that the sole stockholder intended the defendant to have the entire beneficial interest in, as well as the record title to, the land. It is clear that, in applying the gratuitous conveyance resulting use doctrine, parol evidence was admissible under the Statute of Frauds to rebut the presumption of resulting use. Consequently, the opinion may indicate that the venerable gratuitous conveyance resulting use doctrine is still in force in Missouri.

---


125. The Missouri cases cited in note 113, supra, appear to assume that the doctrine is still in force but none goes so far as the case under discussion in considering parol evidence to rebut the presumption of resulting use. The result reached in Long v. Kyte would seem to be sound whether or not the doctrine is in force.