

Winter 1967

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Willard L. Eckhardt, *Probate Court Sales and Exchanges of Real Property*, 32 MO. L. REV. (1967)
Available at: <https://scholarship.law.missouri.edu/mlr/vol32/iss1/9>

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PROBATE COURT SALES AND EXCHANGES OF REAL PROPERTY

WILLARD L. ECKHARDT*

This article is concerned with sales, mortgages, and exchanges of real property pursuant to probate court orders in the course of the administration of a decedent's estate. The major area of concern is with sales in lieu of partition or sales for some catchall reason, such as the best interests of the estate, rather than with sales for a clearly legitimate reason. The problem of exchanges of real property in the best interests of the estate is examined, as well as the somewhat easier problem of mortgages to raise money for a variety of purposes. Sales of personal property are excluded from consideration, along with sales by executors under express powers in wills. *McIntosh v. Connecticut Gen. Life Ins. Co.*,¹ a landmark decision, will be analyzed in depth, and frequently will be referred to simply as *McIntosh*.

I. MENE, MENE, TEKEL, UPHARSIN²

OR

HOW TO KILL THE GOOSE

It is no accident that Norman F. Dacey's book, *How to Avoid Probate!*, has been at or near the top of almost every nonfiction (or should it be fiction?) best-seller list almost from the day of its publication in 1965. Currently more than one-half million copies are in print.³ The public is fed up with the delays and the high fees and other expenses involved in the administration of a decedent's estate and is looking for a new Moses to lead the children out of the wilderness.⁴ Mr. Dacey somewhat over-

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1. 366 S.W.2d 409 (Mo. 1963).

2. *Daniel* 5:25 (King James 1611). Cf. Rev. St. Ver. (1952), "Mene, Mene, Tekel, and Parsin."

3. For an able brief analysis of the faults in Dacey's recommendations and forms see Blackmar, "Do It Yourself" Estate Plans, 22 J. MO. BAR 325 (1966).

Professor Henry T. Lowe, University of Missouri School of Law, is preparing an article on the self-declared revocable trust under Missouri law. This article will appear in a forthcoming issue of the *Missouri Law Review*.

4. During World War II this author came across an ingenious scheme said to have been devised by an officer who had been a life insurance salesman in real life and designed for use by servicemen at his post. At that time servicemen by the millions were executing simple wills and general powers of attorney, and

states the probate or milk-and-bilk scandal so far as the United States as a whole is concerned, and Missouri would seem to be relatively clean, but the problems and the public dissatisfaction are present to some extent in every state.⁵

The revocable inter vivos trust is a useful estate planning technique in skilled hands and can save the time and large fees involved in probate. Dacey served a useful function in bringing the technique to the attention of the public at large and of some lawyers as well.⁶ The *Workbook for Missouri Estate Planners*,⁷ distributed in the fall of 1966 in connection with the continuing legal education program of The Missouri Bar, briefly considers the revocable inter vivos trust.⁸

altogether too many were putting everything in sight into joint tenancy. Too often there was a sales pitch by an enthusiastic layman, not advice by a lawyer.

The particular instrument this officer invented included the beneficiary designations from a will and avoided the administration of the estate by naming an attorney-in-fact with broad authority under typical general power of attorney provisions. The power of attorney was not to be presently in operational effect, but was to be in full force and effect at the moment of the principal's death. The only difficulty with the scheme was that the death which was supposed to activate the power of attorney also, by operation of law, automatically revoked the power of attorney.

5. See DACEY, HOW TO AVOID PROBATE! 7-9 (1965). He especially condemns appraisal fees for no service rendered and the milking of the estates of minors and incompetents by guardians. Many of his examples are from his home state of Connecticut.

Time, Dec. 16, 1966, pp. 48-50, discusses the "problem" of appraisal fees in Cincinnati.

Recent stories in the Kansas City Star and Kansas City Times are illustrative of the current public interest. *Feature Story, His [Dacey's] Challenge Spurs New Look at Probate Setup*, K.C. Times, Dec. 8, 1966, p. 16D; Weimer, *No "Do-It-Yourself" Probate Role*, K.C. Star, Dec. 14, 1966, p. 12C; and Weimer, *Dangers in Probate Short Cuts*, K.C. Star, Dec. 18, 1966, p. 3A.

6. The prophet of the revocable inter vivos trust is Professor A. James Casner of the Harvard University School of Law. See Casner, *Estate Planning—Avoidance of Probate*, 60 COLUM. L. REV. 108 (1960), reprinted in ALI-ABA Study Outline No. 3, Casner, *The Revocable Trust—An Essential Tool for the Practicing Lawyer* 39 (1965), distributed at showings of the film of the same title. The substance of this article and some additional material are included in the chapter on the revocable inter vivos trust in CASNER, *ESTATE PLANNING* 92-147 (3d ed. 1961), and in CASNER, *ESTATE PLANNING* (Supp. 1966, at 86-135).

The temptation facing lawyers who do estate planning is such that a few may falter. An estate that might produce a \$2,000 lawyer's fee if handled by way of inter vivos trust might produce a \$50,000 probate fee for the lawyer if handled by way of will. The problem of fees is considered in some detail in notes 56, 69 and 74 below.

7. Bobbs-Merrill (1966). This was a Missouri adaptation of a Wisconsin book.

8. The table of contents and index are such that the reader must work to find this material. If one has enough imagination or perseverance to find Part E, "Gifts to Minors," in Chapter 6, "Purposes and Techniques of Making Gifts," he will find sections 6E2.1-6E2.11 on "Gifts to Revocable Trust," which includes section 6E2.7 on avoiding probate.

The monopoly enjoyed by lawyers is one which can be taken away if the public gets sufficiently aroused, as Arizona lawyers learned in 1962. In 1961 the Supreme Court of Arizona held in substance that title companies and real estate brokers and salesmen (except when acting as principals) could not draft or fill in blanks in contracts for the sale of real estate, deeds, etc.⁹ The real estate fraternity by initiative petition succeeded in bringing to a popular vote a constitutional amendment permitting limited practice of law by real estate brokers and salesmen. The amendment carried by a four to one margin.¹⁰

The real estate fraternity is well-organized, but there is no state-wide common voice for the families of decedents. The Missouri Farm Bureau Federation already has raised its voice against lawyers' fees in probate,¹¹ and other voices may join to make a chorus. Individual lawyers and the organized bar would do well to reexamine the entire problem of probate fees.

II. ESSENTIAL RESEARCH TOOLS

It is assumed that a Missouri lawyer who works on probate problems will have at hand the excellent treatise by Judge Maus, *Missouri Probate*

9. *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 95-97, 366 P.2d 1, 14-15 (1961).

On motion for rehearing, essentially to make an exception to allow real estate brokers and salesmen to draft or fill in blanks in contracts for the sale of real estate, the court on May 31, 1962, reversed its position and allowed this. But the reversal was too late to stem the tide. *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 91 Ariz. 293, 371 P.2d 1020 (1962). The court saved face by requiring that the terms of sale be included in the listing contract. Apparently the court had in mind a hybrid listing contract including a contract of sale form signed by the seller. This is wholly impractical because it leaves no room for dickering over the price.

Hulse v. Criger, 363 Mo. 26, 247 S.W.2d 855 (En Banc 1952), was a practical solution of a practical problem, and for Missouri settled the extent to which real estate brokers may "practice law." See "Unlawful Practice of Law in Real Estate Transactions" in Eckhardt, *The Work of the Missouri Supreme Court for the Year 1952—Property*, 18 MO. L. REV. 366, 368-71 (1953).

10. ARIZ. CONST. art. 26, § 1 (Nov. 6, 1962). See Adler, *Are Real Estate Agents Entitled to Practice a Little Law?*, 4 ARIZ. L. REV. 188 (1963); Riggs, *Unauthorized Practice and the Public Interest: Arizona's Recent Constitutional Amendment*, 37 SO. CAL. L. REV. 1 (1964); Note, *Unauthorized Practice of Law—Drafting of Legal Instruments by Real Estate Brokers*, 15 ALA. L. REV. 326 (1962).

Presumably the real estate broker who exercises the privileges conferred subjects himself to liability for malpractice.

11. See paragraph 2(h) of the report of the 1965-66 Probate and Trusts Committee of The Missouri Bar, 22 J. MO. BAR 522 (1966): "A resolution adopted by the Missouri Farm Bureau Federation calling for a repeal of Section 473.153, dealing with attorneys fees in probate. This matter is in the process of being resolved satisfactorily to the Farm Bureau Federation and the committee, and it is probable that no further action will be taken by the Bureau."

Law and Practice.¹² Two other works are essential in dealing with certain of the problems.

The first is Simes, *Model Probate Code*.¹³ The principal draftsmen of the *Model Probate Code* were three law teachers: Lewis M. Simes, then of the University of Michigan School of Law, Paul E. Basye, then a Research Associate at the University of Michigan School of Law, and the late Thomas E. Atkinson, then of the University of Missouri School of Law. The *Model Probate Code* consists of 260 sections, but does not purport to cover certain areas.¹⁴ It is not surprising, with so many sections on so complex a subject, that even able draftsmen faltered at times and that the *Model Probate Code* falls far short of perfection.¹⁵ The *Model Probate Code* includes not only the original text of the *Code*,¹⁶ but also valuable comments to many of the sections. The book also contains extensive statutory notes,¹⁷ and includes five significant monographs.¹⁸

The second additional essential research tool is the so-called Judge Douglas brief.¹⁹ This 116 page brief was prepared in behalf of the St. Louis Fiduciaries Association by the eminent law firm then styled Thompson, Mitchell, Thompson & Douglas, and was signed by three of the senior members, James M. Douglas, Robert Neill, and Richard D. Shewmaker.²⁰

12. This work is in three volumes, was published in 1960 by Vernon Law Book Co., and is kept up-to-date by pocket parts.

13. This one volume work was published in 1946 by The University of Michigan Press and by Callaghan & Company, 6141 N. Cicero Ave., Chicago, Illinois 60646.

14. See MODEL PROBATE CODE 19-22 (Simes 1946) on omitted matters.

15. R. G. Patton, Esq., stated modestly: "It would be too much to say the Code is free from all imperfection." MODEL PROBATE CODE 8 (Simes 1946).

How far the MODEL PROBATE CODE fell from grace is indicated at many places in the Judge Douglas brief, *supra* note 19.

16. The "Committee Comment" following each section of the 1955 Probate Code in Vernon's Annotated Missouri Statutes purports to state the *Model Probate Code* source or other source, but is not always reliable insofar as the *Model Probate Code* is concerned. For example, Committee Comment to § 473.460, paragraph 1, with which this article is largely concerned, is in part as follows: "Sub-section 1 is a copy of section 152 of the Model Probate Code . . ." (Emphasis added.) The fact is that Missouri omitted *Model Probate Code* § 152(f) which is the provision on probate court sales in lieu of partition. This vital omission is not noted in the Committee Comment. On the source of these Committee Comments, see note 51 *infra*.

17. MODEL PROBATE CODE 241-375 (Simes 1946).

18. MODEL PROBATE CODE 385-756 (Simes 1946).

19. Before the Senate Judiciary Committee, 68th General Assembly [1955]—Suggested Amendments to the Proposed [Mo.] Probate Code, House Bill No. 30.

20. Some copies of the brief may still be available for loan, or copies might be struck. After a division, the firms are now Thompson, Mitchell, Douglas & Neill, 705 Olive Street, St. Louis, Mo., 63101, and Thompson, Walther & Shewmaker, 407 N. 8th Street, St. Louis, Mo., 63101.

For years there had been sporadic agitation in Missouri to revise the probate law, and the matter was undertaken seriously in 1953 with the creation by the legislature of a Joint Probate Laws Revision Committee, which in turn created an Advisory Committee, both of which were assisted by the Committee on Legislative Research.²¹ The Joint Committee was appointed on May 31, 1953,²² and at best it had only a year and a half to take some 475 old sections, 260 Model Probate Code sections, and various new sections, and work them into an integrated and perfected whole 355 sections. In part it was like mixing oil and water, because the *Model Probate Code* was drawn on certain basic conditions precedent which did not then and do not now exist in Missouri.²³ The men who worked on the 1955 Probate Code were able, distinguished lawyers, but no group could have accomplished the task before them in the time available.

Many, if not most, lawyers in Missouri were under the impression that the changes under consideration were simply procedural and not changes of substance. It was not until March, 1955, that this author learned that there were major changes in substance, not only in areas such as marital rights and intestate descent, but in the jurisdiction of the probate court and the nature of probate proceedings. It is not known whether most of those engaged in drafting the new code adopted a calculated policy of secrecy, or whether this was simply the approach of a few. However, one person involved later voiced his feeling that if the lawyers saw the bill in advance there would be so many objections to so many sections that the bill could not be passed, and that it would be better to present the code to the legislature as a package, ram it through if possible, and then in 1957 do what perfecting was necessary. Imagine, if you will, a new probate code in the drafting of which there was no participation by the trust officers of major trust companies which handle the largest estates in Missouri.²⁴

21. See Summers, *Introduction* to 25 VERNON'S ANN. MO. STAT. at v (1956).

22. MO. H.R. JOURNAL, 67th General Assembly, 1925 (1953).

23. MODEL PROBATE CODE 12-13 (1946) discusses the adaptation of the *Model Probate Code* to local legislation, particularly with reference to questions of constitutionality. One basic condition was that the probate court not be an inferior court but on probate matters be coordinate with the court of general jurisdiction (the circuit court in Missouri). It was recommended that in a state like Missouri a constitutional change should be sought first.

24. See the Judge Douglas brief, p. 2. In this brief, designed to win friends for the extensive amendments proposed, the matter is put more gently. "Undoubtedly through some oversight (for the Chairman of the Joint Revision Committee was under the impression that they had been given opportunity to do so) our clients [St. Louis Fiduciaries Association] were not given opportunity to participate in the initial drafting of this bill."

The Judge Douglas brief was submitted to the Senate Judiciary Committee, after the bill had breezed through the House, in an effort to correct the most glaring errors in the bill. Specific amendments were suggested, along with discussion as to the reasons for the changes. Many of the amendments suggested by the Judge Douglas brief were adopted, and he and his colleagues deserve the principal credit for the fact that the 1955 Probate Code was infinitely better than the original draft bill. The Judge Douglas brief still is of real value in its discussion of constitutional problems and of real property titles, and should be consulted as the occasion arises.

III. DEVOLUTION OF REAL PROPERTY AT DEATH—SALES UNDER PROBATE COURT ORDER, IN GENERAL

The orthodox theory is that title to the real property of a decedent passes directly to his heirs or devisees, and not to his personal representatives. This was the common law view in Missouri²⁵ and is codified by the 1955 Probate Code.²⁶ Under this theory, the "personal" representative, not being a "real" representative, had no power to sell a decedent's real property to pay the debts of a decedent, absent a statute or some specific action by the decedent. In England, prior to reform legislation, the power of a creditor to reach the real property of a deceased debtor was very limited.²⁷ Almost all the states now provide by statute that a decedent's land may be sold by order of court to pay the decedent's debts.²⁸ Since 1807, statutes in what now is Missouri have provided for sales of real property to pay a decedent's debts.²⁹

The Missouri Constitutions of 1820 and 1865 did not expressly provide for probate court sales of real property in any case. The 1820 constitution

25. See Mo. DIG., *Descent and Distribution* § 75 (1956); Mo. DIG., *Wills* § 722 (1958); MAUS, MISSOURI PROBATE LAW AND PRACTICE § 781 (1960).

26. § 473.260, RSMo 1959. This section is almost verbatim *Model Probate Code* § 84. See *Clapper v. Chandler*, 406 S.W.2d 114 (Spr. Mo. App. 1966).

Under Missouri common law title to personal property went to the personal representative: Mo. DIG., *Descent and Distribution*, § 76 (1956); Mo. DIG., *Wills*, § 723 (1958); MAUS, MISSOURI PROBATE LAW AND PRACTICE § 781 (1960). This is changed by § 473.260 which follows *Model Probate Code* § 84. Judge Maus is of opinion that as to personal property there will not be any drastic change in practical effect.

27. See ATKINSON, *WILLS* § 123 (2d ed. 1953), and the late Professor Thomas E. Atkinson's more extended discussion in 3 *AMERICAN LAW OF PROPERTY* §§ 14.6-.7, 14.20-.21 (Casner ed. 1952).

28. ATKINSON, *WILLS* § 123 n.23 (2d ed. 1953).

29. Act of July 4, 1807, 1 Mo. Terr. Laws at 138, § 56, which as amended became pre-1956 § 463.170, RSMo 1949, as amended, and is now, as amended, § 473.460, para. 1, RSMo 1959.

simply provided that inferior tribunals shall be established for appointing guardians, for granting letters testamentary and of administration, and for settling the accounts of executors, administrators, and guardians.³⁰

This provision was broadened in the 1865 constitution to provide as follows:

In such courts [inferior tribunals known as county courts], or in such other tribunals, inferior to the circuit courts as the general assembly may establish, shall be vested the jurisdiction of all matters appertaining to probate business, to granting letters testamentary and of administration, to settling the accounts of executors, administrators and guardians, and to the appointment of guardians and such other jurisdiction as may be conferred by law.³¹

The last clause was particularly important in that it gave the legislature authority to broaden the jurisdiction of the probate court.

The Missouri Constitution of 1875 made two changes as to jurisdiction: first, the last clause giving the legislature authority to broaden the jurisdiction was eliminated; and second, jurisdiction over "the sale or leasing of land" was added.³² Both of these changes were carried forward into the 1945 Missouri Constitution.³³

Prior to the 1955 Probate Code the purposes for which the statutes authorized probate court sales of land were more limited than at present. A listing of these purposes, not necessarily exhaustive, is shown in the margin.³⁴ The 1955 Probate Code brought together some of these purposes

See also Act of Nov. 23, 1822, 1 Mo. Terr. Laws at 942, § 1, which as amended became pre-1956 § 463.160, RSMo 1949 (on selling realty rather than personalty to pay debts), and is now, as amended, § 473.460, para. 3, RSMo 1959.

30. Mo. CONST. art. V, § 12 (1820).

31. Mo. CONST. art. VI, § 23 (1865).

32. Mo. CONST. art. VI, § 34 (1875).

33. Mo. CONST. art. V, § 16 (1945). On sale or lease, see n.10 to this section in VERNON'S ANN. MO. STAT.; only five cases are cited.

34. Paying debts of the decedent: pre-1956 §§ 463.170, 160, RSMo 1949; MAUS, MISSOURI PROBATE LAW AND PRACTICE § 1067 nn.22-24 (1960); cf. present § 473.460, para. 1(1), RSMo 1959.

Paying legacies: pre-1956 § 463.170, RSMo 1949; MAUS, *op. cit. supra* § 1067 n.22; cf. present § 473.460, para. 1(3), RSMo 1959.

Paying statutory allowances for surviving spouse and minor children: pre-1956 § 462.450, RSMo 1949; MAUS, *op. cit. supra* § 1067 n.23; cf. present § 473.460, para. 1(2), RSMo 1959.

Paying expenses of administration, but only if sold primarily to pay debts or legacies: pre-1956 § 463.170, RSMo 1949; MAUS, *op. cit. supra* § 1067 n.25; cf. present § 473.460, para. 1(4), RSMo 1959.

Closing decedent's inter vivos contract to sell land: pre-1956 §§ 463.450-463,

and added others in section 473.460, paragraph 1, as well as continuing some purposes in separate sections.³⁵ The first five purposes stated in section 473.460, paragraph 1—payment of debts, of allowances to surviving spouse or minor children, of legacies, of expenses of administration, and of gift, inheritance, and estate taxes—fall easily into the prior Missouri pattern. While there are several technical problems and lacunae, there would seem to be no insuperable basic problems as to their validity and scope.³⁶ For the purposes of this article, these powers will not be examined further.

IV. MORTGAGES UNDER PROBATE COURT ORDER

As noticed above,³⁷ the Missouri Constitutions of 1875 and 1945 gave the probate courts jurisdiction over “the sale or leasing of lands” by personal representatives and guardians. Section 473.460, paragraph 1, in the 1955 Probate Code extended this authorization to cover mortgages or exchanges of real property in addition to sales or leases. The disjunctive “or” is used in both the constitution and in the implementing statute. There is no case construing the constitutional provision as to whether it is broader than its literal wording, insofar as mortgages or exchanges are concerned.

The statutory power to mortgage no doubt will be upheld as valid. This power is hallowed by time; the 1807 act on probate court sales included the power to mortgage.³⁸ Guardians have been given the power to

.530, RSMo 1949; *cf.* present §§ 473.303-313, RSMo 1959; MAUS, *op. cit. supra* § 1116 *et seq.*

Selling encumbered property instead of redeeming it: pre-1956 § 462.370, RSMo 1949; *cf.* present § 473.287, para. 3, RSMo 1959; MAUS, *op. cit. supra* § 854.

Selling decedent's interest in contract to purchase: pre-1956 § 462.320, RSMo 1949; *cf.* present § 473.320, RSMo 1959; MAUS, *op. cit. supra* § 1062 n.7.

Selling escheated property: pre-1956 § 463.040, RSMo 1949 (personal property only); *cf.* current § 473.463, RSMo 1959 (real and personal property); MAUS, *op. cit. supra* § 1076.

35. On the miscellaneous purposes, see note 34 *supra*.

36. In *McIntosh v. Connecticut Gen. Life Ins. Co.*, 366 S.W.2d 409, 412 (Mo. 1963), the court at point [2] expressly did not pass on the constitutionality of § 473.460, paragraph 1(6), but did say:

No reason is immediately apparent which would lead us to conclude that Section 16, Article V, Constitution of Missouri 1945, does not grant authority to the legislature to validly invest the probate courts with jurisdiction by virtue of Section 473.460 to order the sale, lease or exchange of real estate, when *necessary* for any of the purposes there listed, including the purpose stated in subparagraph 6.

On these five purposes for sale, see MAUS, MISSOURI PROBATE LAW AND PRACTICE §§ 1069-1073 (1960).

37. See notes 32-33 *supra*.

38. Act of July 4, 1807, 1 Mo. Terr. Laws at 138, § 56, previously considered at note 29 *supra*.

mortgage.³⁹ The power to mortgage is functionally sound. In many cases it would be preferable to mortgage land to get enough cash to satisfy claims, etc., rather than to make an irrevocable sale of the fee.

Where a mortgage has been executed pursuant to the order of a probate court under section 473.460, paragraph 1(1)-(5), there are three standards to be applied in evaluating the mortgage or title derived thereunder. First, is the mortgage good in fact so that it creates a valid security interest in the land? Second, should an individual title examiner approve the mortgage or title thereunder as marketable? Third, is the mortgage or title thereunder insurable by a title insurance company? The author is of the opinion that the mortgage or title thereunder is good in fact. As to whether such titles are marketable or insurable, the opinions of leading title examiners or of title insurance companies should be sought.

V. EXCHANGES UNDER PROBATE COURT ORDER

The Missouri Constitutions of 1875 and 1945, in giving probate courts jurisdiction over sales or leases of land,⁴⁰ did not mention exchanges. Section 473.460, paragraph 1, purports to extend this jurisdiction to cover exchanges. As indicated in the preceding section, the statutory extension of authority to add mortgages does not give the writer any great concern, but the statutory extension to include a power to exchange is not on the same footing. The power to exchange was brought into section 473.460, paragraph 1, by way of *Model Probate Code* section 152. The explanatory comment to *Model Probate Code* section 152 is concerned solely with sales, and the comment does not mention exchanges; hence this comment gives no assistance.

There is no functional reason for an exchange in connection with the first five purposes listed in section 473.460, paragraph 1 (payment of claims, etc.), all of which contemplate payments in cash. An exchange is related functionally only to the sixth purpose, "for any other purpose in the best interests of the estate." The implementing section on exchanges, section 473.537,⁴¹ makes it clear that this is the sole purpose for an exchange, by requiring petition and finding an exchange "to be to the best interests of the estate."⁴²

39. § 475.175, RSMo 1959; pre-1956 § 458.380, RSMo 1949. The broadened powers to mortgage date from 1935, Mo. Laws 1935, at 184.

40. See text at notes 32-33 and 37 *supra*.

41. This is an almost verbatim copy of *Model Probate Code* § 171.

42. Under *McIntosh*, "best interests of the estate" is meaningless and does not provide a valid ground for a sale. See material at notes 86-91 *infra*. Hence, *McIntosh* provides another ground, in addition to the constitutional ground

In drafting express powers in trustees, executors, and attorneys in fact, powers to exchange are included as a routine matter because the power to sell (for cash) does not include the power to exchange (for other property). Seldom, if ever, would there be a real need for a power to exchange in the administration of an estate where the testator has not seen fit to grant express powers. It is probable that the draftsman of *Model Probate Code* section 152 thoughtlessly and without any clear purpose included a power to exchange, and that thoughtlessly the power was carried forward into section 473.460, paragraph 1.

In view of the fact that the Missouri Constitution gives the probate court jurisdiction only over "sales or leases" and does not mention "exchanges," and the fact that exchanges serve no significant purpose or function, one has grave doubts as to the constitutionality of that part of section 473.460 which purports to authorize exchanges, and of section 473.537 in implementation thereof. Consequently, it is the author's opinion that any land title derived through such an exchange probably is bad in fact, and clearly is unmarketable. No guess is made as to the attitude of a title insurance company toward such exchanges. It may well be that an exchange is so far beyond the jurisdiction of a probate court that, even though the proceedings are regular in every respect, the order for exchange is void on its face and subject to collateral attack.⁴³

VI. PROBATE COURT SALES IN LIEU OF PARTITION OR IN THE BEST INTERESTS OF THE ESTATE

A. Background

The really radical innovation in section 473.460 of the 1955 Probate Code is paragraph 1(6) authorizing a sale, mortgage, lease, or exchange of real property when necessary "for any other purpose in the best interests of the estate."⁴⁴ This provision was taken verbatim from *Model Probate Code* section 152(g). The comment to that section indicates it was

discussed below, for refusing to pass a title depending on a probate court exchange.

Section 473.470 enables an interested person to post bond and prevent a sale of property for the payment of obligations of the estate. This section is an adaptation of *Model Probate Code* § 153, which applied to mortgages and leases as well as to sales. Neither § 473.470 nor its source applies to exchanges. Cf. pre-1956 § 463.050, RSMo 1949, on posting security to prevent the sale of personal property.

43. The dictum in *McIntosh* regarding exchanges, quoted note 36 *supra*, would seem to be of no significance because the special problem of an exchange was not briefed by the parties nor considered by the court.

44. See MAUS, MISSOURI PROBATE LAW AND PRACTICE § 1074 (1960).

derived from New York. A tracing of the New York provisions is helpful in seeing what the draftsmen of the *Model Probate Code* had in mind and what intent might be imputed to the 1955 Missouri General Assembly which enacted the 1955 Probate Code.

Prior to 1914, New York statutes authorized surrogate [probate] court sales, mortgages, or leases of real property for five fairly orthodox purposes: payment of debts, funeral expenses, expenses of administration, transfer taxes, and debts or legacies charged on real property. In the 1914 revision of that part of the Code of Civil Procedure which dealt with Surrogates' Courts and Proceedings Therein, a sixth subsection was added: "6. For the payment and distribution of their respective shares to the parties entitled thereto, where any or all of said parties are infants, proven or adjudged incompetents, absentees, or persons unknown, whenever in his discretion the surrogate may so direct."⁴⁵ The revisers' note was as follows: "Subsection 6 is inserted so that sale may be had on judicial settlement for distribution and so prevent partition." It should be noted that this new subsection was applicable only when at least one distributee was incompetent, etc.

A New York revision in 1929 eliminated the requirement that at least one of the distributees be incompetent, etc., and such sale, mortgage or lease was authorized even though all distributees were competent adults, known and present.⁴⁶ The revisers' note on the purpose of the amendment was as follows:

Under the section as now [1929] existing a sale, mortgage or lease may not be authorized for the purpose of distribution where the distributees are all competent adults; the amendment proposes to extend the authority of the surrogate to authorize such sale, mortgage or lease under such circumstances and so obviate the necessity and expense of a partition action.

This is further emphasized by the editorial note in a leading New York commentary: "The effect of the numerous amendments has been to sub-

45. N.Y. Laws 1914, ch. 443, p. 1735, at 1850; N.Y. CODE CIV. PROC. § 2703.

46. N.Y. Laws 1929, ch. 229, p. 499, at 513; N.Y. SURR. CT. ACT § 234:

6. For the payment and distribution of their respective shares to the parties entitled thereto, whether any or all of said parties are adults, infants, proven or adjudged incompetents, absentees, or persons unknown, whenever in his discretion the surrogate may so direct, either prior to or upon a judicial settlement of the accounts of an executor or administrator, and all such sales of such real property heretofore made pursuant to a decree of the surrogate entered prior to an application for a judicial settlement of the accounts of an executor or administrator which are otherwise regular are confirmed.

stantially broaden the section as substitute for the more technical and expensive remedy by partition. It is available to all parties and apparently without limitation."⁴⁷

In *Model Probate Code* section 152(f) this partition-by-sale purpose was stated as follows in a few words, without the elaborate detail of its New York source: "(f) For making distribution of the estate or any part thereof." The only functional justification of this provision is to provide a simpler and cheaper remedy than partition, as in New York, and the *Model Probate Code* should have included a caveat to omit this subsection where partition is no more complex nor expensive than a probate court sale. Missouri did *not* include this subsection in section 473.460, paragraph 1, and this indicates that it was intended that Missouri probate courts should not have the power to order a sale of real property in lieu of partition; the significance of this omission in Missouri is discussed at greater length below.⁴⁸

In 1936 New York added a seventh subsection: "7. For any other purpose deemed by the surrogate to be necessary."⁴⁹ This obviously was the source of *Model Probate Code* section 152(g): "(g) For any other purpose in the best interests of the estate." Missouri included this purpose verbatim in section 473.460, paragraph 1(6). Since the New York and *Model Probate Code* sources had a specific subsection on partition-by-sale, and an additional catchall subsection, it seems clear that the catchall subsection was not intended to include partition-by-sale.⁵⁰

47. 13B GILBERT-BLISS, CIVIL PRACTICE OF NEW YORK ANNOTATED, N.Y. SURR. CT. ACT § 234 (3d ed. 1953).

48. See notes 50-52 *infra*.

49. N.Y. Laws 1936, ch. 200, p. 517; N.Y. SURR. CT. ACT, § 234.

50. The comment to *Model Probate Code* § 152 confuses the specific partition-by-sale purpose of subsection (f) and the general catchall purposes of subsection (g). Some of the comment is almost unintelligible, and an attempt at clarification is included in square brackets. The comment is as follows:

In the absence of provisions in the will, a statute was necessary to authorize a sale in all cases where the decedent had not taken affirmative steps to make the land liable for his debts. Gradually these purposes have been broadened, many of the statutory purposes appearing in current statutes being that expressed in (g), viz., for any purpose beneficial to the estate. Thus [here the commentator overlooks his subsection (f) on partition by sale], if a small tract of land were to be divided among many heirs or devisees, some of whom were under disabilities, a serious problem of marketability would be presented if it were distributed to them in kind. [This sentence is confusing. The commentator is talking about "partition" or distribution in kind. "Marketability" as he uses the term apparently is not the marketability of title, but the practical effect on salability because of the smallness of the tracts.] Under this section it could be sold by the personal representative and the proceeds distributed, thus eliminating a difficult and otherwise expensive problem

In view of the fact that Missouri omitted *Model Probate Code* section 152(f) on partition-by-sale, it would seem to be clear that in Missouri it was intended that the probate court should *not* have the authority to order a sale in lieu of circuit court partition. The Missouri Committee Comment to section 473.460 states: "Subsection 1 is a *copy* of section 152 of the *Model Probate Code*" ⁵¹ (Emphasis added.) This simply is not true because subsection (f) had been omitted. ⁵²

B. *The Deems Case—Interest of the Estate—Milking*

Before considering the *McIntosh* case on probate court sales of real property "in the best interests of the estate," it will be helpful to notice the leading case, *State ex rel. Deems v. Holtcamp*, ⁵³ which was concerned

for the interested persons. [If the problem is simply the smallness of the parcels, the problem of sale of a parcel is neither legally difficult nor expensive, but is simple and cheap. The commentator here seems to have unwittingly shifted to thinking of the sale of the entire tract owned by numerous tenants in common, some under disabilities, which may become a difficult and expensive problem.] The above section was taken in part from N.Y. Surr. Ct. Act, § 234.

It should be noted that a sale cannot be ordered solely on the ground that there is any rule of law to the effect that it is necessary to make distribution in cash. See § 190 hereof. [One might inquire of the commentator, is there any rule that requires a distribution of real property in kind in separate parcels?]

51. The Final Report of the Joint Probate Laws Revision Committee to the Sixty-Eighth [Missouri] General Assembly (Jan. 5, 1955) is a mimeographed paperback of viii and 209 pages, containing a two page introduction and 355 sections of the proposed legislation which became House Bill No. 30 and Senate Bill No. 106 of that session. In this Final Report the several sections are followed by explanatory comments stating, among other things, the *Model Probate Code* source or other source. These source notes are reprinted as Committee Comments following the several sections in Vernon's Annotated Missouri Statutes.

The error noticed above is in the Final Report itself and did not originate in the reprinting thereof.

52. It is regrettable that counsel for the appellant in *McIntosh v. Connecticut Gen. Life Ins. Co.*, 366 S.W.2d 409 (Mo. 1963), did not bring the omission of *Model Probate Code* § 152(f) to the attention of the court and develop the line of argument indicated in the text. Brief for Appellant, p. 13. Perhaps counsel was misled by the inaccurate Committee Comment, discussed in the text at notes 16 and 51 *supra*.

This author was misled by the inaccurate Committee Comment and by the confusing comment to *Model Probate Code* § 152, *supra* note 50, last spring when preparing an unpublished memorandum for distribution on May 12, 1966, at a short course held on this campus for the Missouri Land Title Association. Later discovery of the variances led to modification of several opinions expressed in that memorandum.

It is possible that the omission of *Model Probate Code* § 152(f) was not deliberate, but was a stenographic error or a hasty draftsman's error resulting from an attempt to accomplish in a year or so what should have taken several additional years.

53. 245 Mo. 655, 151 S.W. 153 (En Banc 1912).

with a probate court sale of real property to "promote the interest of the estate." This case was cited and quoted in the appellant's brief in *McIntosh* but was neither cited nor quoted in the opinion in *McIntosh*.⁵⁴ The earlier case is so much on all fours with *McIntosh* that it deserves particular notice, and may well have provided the real but unstated basis for the holding in *McIntosh*.

Deems was concerned with proceedings for an administrator's sale of encumbered real estate under a statute construed to authorize such a probate court sale if it "will promote the interest of the estate and not be prejudicial to creditors."⁵⁵ Apparently there was no personal property in the estate and the sole assets were five encumbered parcels of land, with an unencumbered value of fifty to sixty thousand dollars, and with encumbrances in the principal amount of \$10,500. The administrator's fee would be nothing if only personal estate was administered but would be \$2500 to \$3000 if the real property could be brought into the estate by way of a probate court sale.⁵⁶

In the course of prohibiting further sale proceedings in probate court, the court said:

54. Brief for Appellant, pp. 10-13.

55. Pre-1956 §§ 462.360-370, RSMo 1949. The author does not read these sections as authorizing the sale of the encumbered land, but only of other land; this was not made an issue in the case.

As amended in the 1955 Probate Code, the current provisions are §§ 473.287, .437, RSMo 1959. Section 473.287, para. 1(1) includes the words "promote the interests of the estate," and § 473.437 includes the words "for the best interest of the estate."

56. See abstracts of briefs in the *Deems* case at 245 Mo., pp. 659-60. This, plus the quotation from the majority opinion in the text, note 57 *infra*, make it clear that the real problem in *Deems* was milking the estate, though there were additional technical problems. The dissenting opinion was on the technical requirement of notice.

The administrator's fee of \$2500 to \$3000 stated in the abstract of the relators' brief apparently was calculated at a straight 5%, as provided in pre-1956 § 465.100, para. 1, RSMo 1949. In addition the administrator was entitled to reimbursement for expenses for legal advice and service at reasonable rates, pre-1956 § 465.100, para. 1, RSMo 1949, and § 484.030, para. 2, RSMo 1949 (now repealed). Much of the work in the administration of an estate was not the practice of law and the personal representative was not entitled to reimbursement for such work even though it was performed by a lawyer: *Browning v. Richardson*, 186 Mo. 361, 385, 85 S.W. 518, 525 [3] (1904); *In re Claus' Estate*, 167 S.W.2d 372, 374-75 [6-12] (St. L. Mo. App. 1943) (in part considers what services in connection with a probate court sale of real property are practice of law).

Currently a probate court sale of real property would produce three fees, one each for the personal representative and lawyer on a bracketed scale, and, an additional fee for the lawyer possibly equal to a partition fee. See notes 69 and 74 *infra*.

Under the facts in the case before us, it is apparent that the administrator is proceeding with the sale of the real estate of deceased, not to "promote the interest of the estate," nor of the re-lators as heirs thereto, but to prevent mutual or judicial partition among the heirs and as nearly as possible to eat up in fees and commissions all the equities that may exist in favor of the heirs. Estates are not supposed to be administered for the sole benefit of administrators; but on the contrary, they must be so administered as to promote in the highest possible degree the welfare of the heirs, legatees, devisees and creditors.

Courts take judicial notice that a very large per cent of the lands of this commonwealth and some of the most valuable thereof, are incumbered for some amount, either great or small, and if such property is to be sold by administrators without giving the heirs an opportunity to partition the same among themselves and then pay off or assume the incumbrances (as may suit their convenience) many hardships and losses are likely to be sustained by persons who inherit incumbered property.

The right of persons who have inherited real estate to partition the same among themselves is a very valuable privilege, and it cannot be successfully contended that a sale by the administrator which would destroy that right, would in any manner "promote the welfare" of the heirs.

In the instant case, the administrator seems to be an heir of his wife, but in many cases administrators have no interest in the real estate of the person whose estate they are administering, and the fact that they are ordinarily not entitled to commissions on the real estate unless they sell the same, would be a strong incentive to them to sell the real estate in order to increase their fees.⁵⁷

Another matter of importance in *Deems* is the court's explicit equation of "estate" with "heirs, legatees or devisees." The court said: "The phraseology of the statute . . . clearly indicates that the sale to be made thereunder is . . . to 'promote the interest of the estate'; that is, the parties entitled to the estate as heirs, legatees or devisees . . ." ⁵⁸ As will be discussed in more detail later,⁵⁹ the court in *McIntosh*, without benefit of argument of counsel on a point raised by the court and not by the parties, construed "estate" in section 473.460, paragraph 1, to mean "estate *as such*." This is a wholly unjustifiable construction and one not in accord with the opinion of the court en banc in *Deems*.

57. State *ex rel.* *Deems v. Holtcamp*, *supra* note 53, at 668, 151 S.W. at 156.

58. *Id.* at 667, 151 S.W. at 156.

59. See discussion at notes 86-91 *infra*.

C. *The McIntosh Case, in Depth*

In 1963 the Supreme Court of Missouri in *McIntosh v. Connecticut Gen. Life Ins. Co.*⁶⁰ discussed the validity of probate court sales of real property "in the best interests of the estate" under section 473.460, paragraph 1(6).⁶¹ As a consequence it upset the marketability and perhaps the validity of a large number of Missouri titles, as well as upsetting title examiners and title insurers.

The *McIntosh* case has overtones of fee enhancement which must be discussed frankly for a proper understanding and evaluation of the case. The report of the case does not indicate who represented the administrator, but if the same firm represented the administrator as represented the respondents in *McIntosh*, the author wants to make it clear that he is certain that fee enhancement did not motivate the petition for a probate court sale, that the petition was filed only after possibilities of arriving at an agreement for voluntary partition had been exhausted, and that it was filed in the sound belief that a probate court private sale would yield more net for the heirs than a partition sale. There is no more able or reputable firm in Missouri than the firm which represented the respondents.

McIntosh is so important and the facts are so incompletely stated in the opinion that it is necessary to state and analyze the case in some detail to determine what was really involved and what was really held. In the discussion which follows the facts not stated in the opinion have been taken from the briefs submitted on appeal.

W. J. McMillen died intestate, and his estate was in the process of administration. The estate consisted of \$7,061.59 in personal property and \$70,170 in real property⁶² (title and right to possession of the real property going directly by descent to his heirs). On November 3, 1961, the administrator filed a petition in the probate court under section 473.493⁶³ to sell the real property in the best interests of the estate under section 473.460, paragraph 1(6). The two grounds alleged for the sale are set out verbatim in the opinion.⁶⁴ The first ground was that partition in kind was impossible, but the court stated that this ground was abandoned on appeal.⁶⁵ The second ground was as follows: "Petitioner further states

60. 366 S.W.2d 409 (Mo. 1963).

61. The derivation of this subsection from the New York original through the *Model Probate Code* is traced at notes 44-52 *supra*.

62. Brief for Appellant, p. 13.

63. The opinion erroneously cites § 473.487 on petitions for sales of personal property. *McIntosh v. Connecticut Gen. Life Ins. Co.*, *supra* note 60, at 410, col. 2.

64. *Id.* at 410, col. 2.

65. *Id.* at 412, col. 2. Respondents' Brief does not mention this ground.

that it would be most advantageous to the estate that said real estate be sold under the original inventory and appraisalment at a private sale for cash." This was the only ground considered by the court on appeal.⁶⁶ Due notice of a probate court hearing on the sale was given.

It appears from the briefs that the widow had a one-half interest as heir, and that the plaintiff Pauline McIntosh, decedent's niece, had a 1/48th interest. Seventeen other persons are listed as defendants, but no guardians are indicated, so it would appear that all of the heirs were competent adults. The short time between the petition for sale, November 3, and the date set for hearing, November 20, may indicate that all were residents of Missouri.

It was stated in appellant's brief⁶⁷ that without the sale of real estate the fees for administering the personal property in the estate would be \$332.46 for the administrator and \$332.46 for his attorney,⁶⁸ but that if a probate court sale of the real estate were held, the administrator would get a fee of \$2,616.93, and his lawyer would get a fee of \$2,616.93.⁶⁹ None of this is mentioned in the opinion, but could well be the unstated reason for the result reached in *McIntosh*, as it was the stated reasons in *Deems*.⁷⁰ In any event, it must be taken into account in evaluating *McIntosh* correctly and in evaluating the 1965 amendment to section 473.460, paragraph 1(6).⁷¹

The probate court hearing on the sale was set for the morning of November 20, 1961, but at the request of the lawyer for Pauline McIntosh (1/48th interest) the hearing was reset to December 4, 1961. The same day, November 20, 1961, Pauline McIntosh filed a petition in the

66. This ground was discussed in Brief for Respondent, p. 14.

67. Brief for Appellant, p. 13.

68. This figure is arrived at by applying the statutory minimum percentages under § 473.153, para. 1, RSMo 1959, to the \$7,061.59 of personal property. The arithmetic checks out.

69. This is the total fee at statutory minimum rates for both the personal and the real property. The additional fees at statutory rates for only the additional real property would be \$2,284.48 each.

These figures are based on the pre-1965 naive assumption that the lawyer is entitled to only one fee in a probate court sale of real property. An untapped rich vein of ore was brought to public view in 1965 in the RECOMMENDED SCHEDULE OF MISSOURI LEGAL FEES, § V(A) at 12-13, 21 J. MO. BAR (Supp. June 1965), 23 J. MO. BAR (Supp. Jan. 1967), under which the lawyer gets not only his basic fee under the statute but additional fees for doing many things the basic fee ought to cover, one of which is the sale of real property. See the fee discussion in note 74 *infra*.

On pre-1956 fees, see note 56 *supra*.

70. The *Deems* case is considered at notes 53-59 *supra*.

71. See discussion at notes 101-03 *infra*.

circuit court for partition.⁷² (This would seem to have been a maneuver to get into circuit court before a probate court order of sale could be entered. Apparently the probate court hearing on the sale never was held, and no probate court order of sale ever was entered.)

In the circuit court partition suit, the intestate's widow and the administrator (who was not a party in the partition suit) filed a motion to dismiss on the ground there was prior jurisdiction in the probate court. At the hearing on the motion to dismiss, there was evidence that land sold on a probate court sale or sold directly by the heirs would bring twenty-five to thirty per cent more than if the land were sold at a circuit court partition sale.⁷³ (It also is obvious that a direct sale by the heirs would yield substantially more net than a probate court sale, about \$4,600 more.) There was counter evidence that the costs of a circuit court partition sale would be more than \$3,000 less than the costs of a probate court sale.⁷⁴ (It also is obvious that a direct sale by the heirs would yield substantially more net than a circuit court partition sale.)

72. Neither the appellant's brief nor the opinion notices Mo. R. Civ. P. 96.14, § 528.140, RSMo 1959, on partition by heirs, subject to debts of the estate, pending completion of the administration of the estate. See notes 82 and 107 *infra*.

73. Brief for Respondent, p. 14.

74. Brief for Appellant, p. 4.

In a partition action the plaintiff's attorney is allowed a "reasonable fee" which is taxed and paid as other costs: Mo. B. Civ. P. 96.51, § 528.530 RSMo 1959.

In the RECOMMENDED SCHEDULE OF MISSOURI LEGAL FEES, *supra* note 69, fees for partition are set out in § VII(E) at 17 and range in bracketed levels from 100+% to 3% of the sale price, the former of course tending to make the bar appear somewhat ridiculous. The Property Law Committee of the Missouri Bar has discussed the problem of fees in partition for several years, particularly with a view of allowing fees to the lawyer who earns them, whether he be the plaintiff's lawyer or a lawyer for a defendant. This would do away with the undignified race to the circuit clerk's office to file for partition, another matter that does little to improve the public image of the lawyer.

In probate proceedings, the bracketed scale of minimum fees in § 473.153, paragraph 1, ranges from 5% to 2%, somewhat less than for partition, but there are two fees to be paid on this scale, one for the personal representative and a second for the lawyer, which makes the actual range from 10% to 4% somewhat higher than for partition.

To compound the injury, the RECOMMENDED SCHEDULE OF MISSOURI LEGAL FEES at § V(A) allows not only the basic fees on the proceeds of real estate sold under order of the probate court, but states that "Compensation in addition to that allowed under Missouri Revised Statute 473.153 shall be charged for: . . . 5. sale of land proceedings. . . ."

There is no indicated minimum fee (other than a minimum of \$25 per hour) for the sale of the real property, but inasmuch as the work involved in a probate court sale of real estate may be about the same as the work involved in partition it is entirely possible that the Bar has in mind a fee on the partition schedule. On private probate court sales in Boone County, the additional fee allowed is that provided in § VIII(A) for a "complete real estate transaction," viz., \$50 plus 0.5% of the excess of sale price over \$5,000.

The circuit court dismissed the partition action on the ground the probate court had prior jurisdiction. On appeal to the Supreme Court of Missouri, *held*, reversed and remanded for further proceedings in the circuit court partition action.

Appellant urged that section 473.460, paragraph 1(6), authorizing a probate court sale for the best interests of the estate, was unconstitutional for two reasons: first, the authority granted by the statute exceeds the jurisdiction vested in probate courts by the 1945 Missouri Constitution;⁷⁵ second, the statute is unconstitutional and void because "best interests of the estate" is "indefinite, meaningless, vague and uncertain."⁷⁶ The court then stated that appellant failed to develop the first contention of unconstitutionality in her argument.⁷⁷ As to the second point, that "best interests of the estate" is meaningless, the appellant had little to say, simply quoting a paragraph out of an earlier opinion, but without any argument as to why "best interests of the estate" was meaningless.⁷⁸

Appellant, however, devoted two pages to the first point on probate court jurisdiction, and while the argument is seen through a glass, darkly,⁷⁹ it is not quite fair to say it was not developed. The appellant's argument was that what really was sought in probate court was partition [by sale] and that the probate court has no jurisdiction over partition.⁸⁰

In very rough terms, a probate court sale of real property results in three fees, one for the personal representative and two for the lawyer.

Under these circumstances, it was not surprising when a friend told the author that in his county the petition in the probate court for the sale of real property usually is filed before the body of the deceased has gotten cold. No doubt the friend exaggerated a bit, but he pointed up the problem.

There is a serious fee gap in the Probate Code, and that is the problem of the indirect benefits conferred on real estate by administration proceedings. In many estates of modest size the only functional reason for administration of the estate is to make a marketable title for land.

This problem is recognized in the *Recommended Schedule of Missouri Legal Fees* at page 13, lines 6-10, but it is noteworthy that the schedule here suggested (assuming there is a client from whom it can be collected) is on a markedly lower scale than the other fees.

Wade F. Baker, Executive Director of the Missouri Bar, recently made a commendable and forthright suggestion in his monthly column, 23 J. MO. BAR 50 (Feb. 1967): "Moreover, where the work done by a lawyer in probating an estate does not justify the fee allowed by the statute, in all candor and honesty the fee should be reduced to a reasonable one. And vice versa, a larger fee should be charged where merited."

75. Mo. CONST. art. V, § 16, considered at notes 32-33 *supra*.

76. *McIntosh v. Connecticut Gen. Life Ins. Co.*, *supra* note 60, at 411.

77. *Id.* at 412.

78. Brief for Appellant, p. 6.

79. 1 *Corinthians* 13:12 (King James 1611). Cf. Rev. St. Ver. (1952), "in a mirror dimly."

80. Brief for Appellant, pp. 6-8.

The strongest argument for the appellant would have been that when Missouri omitted from section 473.460, paragraph 1, the *Model Probate Code* section 152(f) authority for partition-by-sale, the legislature intended that the probate court should not have that power. But appellant did not raise this point, possibly because of the error in the Committee Report in the annotations to the section.⁸¹ Another argument appellant might have made has been noticed previously.⁸²

Be that as it may, the court expressly did not pass on constitutionality. But the court did say by way of dictum:

No reason is immediately apparent which would lead us to conclude that Section 16, Article V, Constitution of Missouri 1945, does not grant authority to the legislature to validly invest the probate courts with jurisdiction by virtue of Section 463.460 to order the sale, lease or exchange⁸³ of real estate, when necessary for any of the purposes there listed, including the purpose stated in subparagraph 6.⁸⁴

This dictum is important to property lawyers in evaluating the effect of probate court sales actually made pursuant to section 473.460, paragraph 1(6), in the period January 1, 1956, and thereafter. In *McIntosh* the court expressed no doubts as to the jurisdiction of the probate court to order sales authorized by the legislature. Thus it would seem that at least some titles through such sales may be good in fact, even though clearly they are unmarketable.

The court then considered the merits of the allegations in the petition for this particular probate court sale on the only ground before the court, viz., "that it would be most advantageous to the estate that said real estate be sold . . . at private sale for cash," supported by opinion evidence that the land would bring more⁸⁵ at a private probate court sale than through a circuit court partition sale. The court was of opinion that this ground (and by dictum, the other ground that distribution in

81. See notes 51 and 52 *supra*.

82. See note 72 *supra*, on partition pending completion of administration. See also note 106 *infra*.

The interrelation of the pertinent provisions is obscure, to say the least. Section 528.140 (same as Mo. R. Civ. P. 96.14) dates from 1865; § 473.460, paragraph 1, dates from 1955; and Mo. R. Civ. P. 96.14 (same as § 528.140) dates from 1959.

83. Caveat as to "exchange." See the discussion at notes 40-43 *supra*.

84. 366 S.W.2d 409, 412 (Mo. 1963). (Court's emphasis omitted.)

85. The court uses the terms "more money" and "greater price," *ibid.* at 412, 413. Brief for Respondent, p. 14, indicates the amount would be 25% to 30% more. See discussion at notes 73-74 *supra*.

kind could not be made) did not meet the literal requirements of the statute that the sale was *necessary* in the best interests of the *estate* (the court emphasizing these two words). To this the court added its own gloss, estate *as such*.⁸⁶ It also added that section 473.460 deals with "estates as separate entities, distinct and apart from the individuals who are the decedent's heirs or distributees."⁸⁷

In this interpretation of the word "estate" the court struck out⁸⁸ completely on its own, as this literal reading and line of argument had not been suggested by appellant and, a fortiori, had not been suggested nor discussed by respondent. If the court deemed this unbriefed point the crucial one in the case, clearly it should have called for supplementary briefs. The Supreme Court of Missouri en banc in *Deems* in 1912 had said that the "interest of the estate" is the interest of "the parties entitled to the estate as heirs, legatees or devisees."⁸⁹ Clearly the reading of "estate" in *McIntosh* is too restricted. It is inconceivable for the "estate as such" ever to have any interest in any case. In every case all interests in every estate necessarily are in heirs, devisees, creditors, personal representatives, attorneys for the estate, or some other person who will gain or lose. It is submitted that, if the problem is raised and briefed in a subsequent case, the court will not stay with this too literal reading.⁹⁰

This fundamental error in *McIntosh*, if it was an error, was the foundation for the parenthetical dictum that has been so disturbing to titlemen:

(We are assuming for present purposes that facts or circumstances might exist which would make it *necessary* for the probate court to sell real estate for the best interests of "*the estate*" as such,

86. *McIntosh v. Connecticut Gen. Life Ins. Co.*, *supra* note 84, at 412, col. 2, and at 413, col. 1, ten lines from end.

87. *Ibid.* at 413, col. 1, lines 20-22.

88. No pun intended.

89. See opinion quoted at note 58 *supra*.

90. The term "interest of the estate" or its substantial equivalent was used in a number of sections in the pre-1956 Probate Code and is used in a number of sections in the 1955 Probate Code. When this issue again reaches the court, the lawyer briefing the case should search out all of these uses and analyze their meaning in context.

The author has assumed the court inadvertently read "estate" too literally. On the other hand, considering the fine legal mind of the writer of the opinion and the distinguished array of other talent in this division of the court, it is even more plausible to think that the court knew exactly what it was doing and why, viz., wiping out an ill-conceived grant by the legislature to the probate court of a power open to great abuses, and a power not at all needed in Missouri. If this was the true reason, the court probably will stand on this too literal reading in future cases.

although we note in passing that we have been unable to hypothesize such a situation, i.e., the existence of facts or circumstances which would make it necessary for the probate court to sell real estate for the best interests of an estate for some purpose not set forth in or necessarily a part of one or more of the purposes specified in the first five subparagraphs of Section 473.460.)⁹¹

If one accepts the court's basic premise that the sale must be in the interest of the estate *as such*, then one must agree that no such situation can be imagined. But if this is so, then one ought to back-track and construe "interests of the estate" to give the subparagraph some meaning, in accordance with well-accepted principles of statutory construction. The court still would not have to open the doors wide for the milking of estates, but could confine such sales to exceptional situations where a sale really is in the interest of heirs or devisees.

Some non-milking examples readily come to mind. First, there might be a rapid physical wasting of the land or improvements where possession by the personal representative under section 473.263, paragraph 2, might not provide an adequate remedy. Second, continuity of operation and competent management may be essential to avoid a rapid business fall-off and loss of value, as in the case of a hotel or motel where high percentage of occupancy and repeat business are important. Third, a short period of bad food or bad service in a restaurant may injure the business to the point that it will take years to rebuild it. Fourth, there may be an opportunity to sell at a very high price if the sale can be effected immediately, but only at a much lower price if the sale is delayed, e.g., a sale of lake property for a resort which will be developed on the estate land if the land is available immediately, but will be developed elsewhere if the estate land will not be available for months or years. No doubt there are numerous other examples. The term "best interests of the estate" in section 473.460, paragraph 1(6), was intended to cover exceptional situations like these and was never intended to provide a probate court substitute for partition.

As indicated above,⁹² *Model Probate Code* section 152(f), authorizing partition-by-sale in the probate court, was not included in section 473.460, paragraph 1, but was dropped. The New York source⁹³ no doubt fitted New York well, where apparently "circuit court" partition was more complex and expensive than "probate court" partition-by-sale. There is good

91. *McIntosh v. Connecticut Gen. Life Ins. Co.*, *supra* note 84, at 412. (Emphasis by the court.)

92. See material at notes 48-52 and 81 *supra*.

93. See statute quoted note 46 *supra*.

reason not to follow New York in a state like Missouri where the fees in circuit court partition are much smaller than the inflated probate court fees.⁹⁴ The Supreme Court of Missouri is to be commended for striking out, or at least narrowly confining, section 473.460, paragraph 1(6).

D. *Validity of Completed Probate Court Sales in the
Best Interests of the Estate*

What is the state of title to real property in the case of a probate court sale "in the best interests of the estate" on or after January 1, 1956? Clearly all such titles are now unmarketable, in view of *McIntosh*, but are they good in fact? Assuming the several statutory requirements all have been met, and the record so shows, in this writer's opinion such a title is good in fact if:

(a) The petition for sale states a substantial and meritorious reason as to the necessity for sale, and the probate court so finds. Sale in lieu of circuit court partition is not a substantial and meritorious reason unless there are most exceptional special circumstances;

(b) There is a proper notice of the hearing under section 473.493, paragraph 2, to all interested persons; in addition, there should be formal service or its equivalent, and each interested person should be served even though his name and address do not appear in the records and files of the case. There cannot be reliance on the alleged in rem nature of probate proceedings, section 473.013, nor of the notice under section 473.033,⁹⁵ and

(c) The period for appeal, section 472.160, paragraph 1(6), has expired, section 472.180.

It is submitted that the probate court sale at worst is voidable, not

94. Voluntary partition in kind or by sale is much better than judicial partition.

95. *Clapper v. Chandler*, 406 S.W.2d 114 (Spr. Mo. App. 1966), holds that notice under § 473.493(2) is mandatory and that a sale without such notice is void, not merely voidable. This author had written the original text as above before the case was reported and has simply cited the case in lieu of unsupported opinion. See also *Bollenger v. Bray*, 411 S.W.2d 65 (Mo. 1967), stating that special notice of final settlement under RSMo § 473.587 is mandatory and necessary to satisfy due process. The basic reasoning in this case supports *Clapper v. Chandler*.

Clapper v. Chandler is discussed at length and adversely criticized, *Are Probate Courts in Missouri Undergoing Retrogression?*, which will be published in 32 Mo. L. REV. (Spring 1967), the next issue. The author of the present article expects to answer some of Professor Basye's criticisms in a subsequent article.

Although not considered or discussed in the above cases, it may well be that even a literal compliance with the notice provisions of § 473.493, paragraph 2, is not enough to satisfy due process requirements.

void, if the above standards are satisfied.⁹⁶ Section 473.480, prohibiting collateral attacks, helps put the sale at rest.⁹⁷ Not only did the court not question probate court jurisdiction to order sales, insofar as the constitution is concerned,⁹⁸ but the Judge Douglas brief did not suggest that there were any constitutional problems.⁹⁹ It cannot be overemphasized that in *McIntosh* there never was a probate court sale, and that *McIntosh* did not hold void or set aside an accomplished probate court sale.

Clearly at the present time every title derived through a probate court sale in the best interests of the estate is unmarketable because there is a real possibility of litigation. An individual title examiner should not pass any such title as marketable,¹⁰⁰ and a title insurer should not insure any such title as marketable. Could a title insurance company insure such a title as good in fact, with slight business risk? This problem was discussed with several of the lawyer-officers who make these decisions for title insurers, and each was of opinion that the risk is too great.

VII. EFFECT OF 1965 AMENDMENT

Section 473.460, paragraph 1, the broad section on probate court sales, was amended effective October 13, 1965, to provide as follows (the changes being indicated by brackets and italics):

96. Here one must indulge in an act of faith that the court will make a broader reading of "estate" in the next case. See notes 89-90 *supra*.

If the court adheres to its reading of "estate" as meaning "estate *as such*," then any order of sale "for the best interests of the estate" probably is void on its face, and the sale would be void, not merely voidable, would be subject to collateral attack, and would not be helped by § 473.480. See note 97 *infra*.

97. Section 473.480 reads:

No proceedings for sale, mortgage, lease, exchange or conveyance by an executor or administrator of property belonging to the estate shall be subject to collateral attack on account of any irregularity in the proceedings if the court which ordered the same had jurisdiction of the estate.

But if the order for sale is void on its face, as it may be in the case of a sale in the best interests of the estate, see note 96 *supra*, then § 473.480 would seem to have no quieting effect.

The author has not overlooked § 473.617, paragraph 4, on the conclusiveness of the decree of final distribution, but views it with the title examiner's strong skepticism. The author hopes to deal with the broad problem of § 473.617 in a subsequent article.

98. See opinion quoted at note 84 *supra*.

99. Judge Douglas Brief, pp. 78-84, Before the Senate Judiciary Committee, 68th General Assembly [1955]—Suggested Amendments to the Proposed [Mo.] Probate Code, House Bill No. 30.

100. It is not intended to suggest that every such title was unmarketable prior to *McIntosh*. No doubt in the pre-*McIntosh* period a competent title examiner in the exercise of sound discretion would have been justified in approving at least some of such titles as marketable; it is not incompetence or negligence to lack the clairvoyance necessary to anticipate *McIntosh*. On the other hand, at least some title examiners would have been on guard in the partition-by-sale situation.

1. Real or personal property belonging to an estate may be sold, mortgaged, leased or exchanged under court order ["when necessary" deleted at this point] for any of the following purposes: . . . (6) For any other purpose in the best interests of the estate; or if it would be burdensome to the heirs or devisees to distribute the personal property or the real estate in kind.

This writer has no specific information as to who drafted the 1965 amendment.

The amendment strikes out the words "when necessary." As noticed above, the original source of this subsection was *Model Probate Code* section 152 which uses these words.¹⁰¹ The word "necessary" can have a broad range of legal meanings, running the gamut from substantial benefit, but no real necessity, to strict or absolute necessity. No doubt the proper construction in the present context is "reasonably necessary," a sufficiently flexible reading. The deletion of the word certainly cannot mean that the sale could be ordered at whim, but only in the exercise of sound discretion, which simply is another way of saying "reasonably necessary." It is felt that the court will read the words "when necessary" back into the statute, or apply the same standard as if the words were there, and therefore the deletion of the words is of no consequence. The general impression resulting from the deletion is an unfavorable one, that there was an attempt to overreach.¹⁰²

The original section referred to "real property," but the amended section starts with the term "real property" and then shifts to the term "real estate." This does not seem a matter of any consequence, but it does indicate the carelessness with which the amendment was drawn.

No change whatsoever was made in "the best interests of the estate" and hence the amendment has no effect whatsoever on this original part of section 473.460, paragraph 1(6). Until the court says otherwise, "estate" still means "estate *as such*" which under *McIntosh* is meaningless. The author has in his files a copy of a proposed amendment drafted in the spring of 1964 by the eminent late Judge Leslie A. Welsh of the Jackson County Probate Court, which included the following: "As herein used the term 'in the best interests of the estate' [means] that the sale would be

101. See note 51 *supra*.

102. In *McIntosh* the court emphasized the word "necessary," 366 S.W.2d at 412, but the court did nothing further with the word, and the case turned on the other word emphasized, "estate." Probably the court's emphasis of "necessary" was the motive behind its deletion in the 1965 amendment, a futile gesture, and indicative of a failure to understand the real theory in *McIntosh*.

to the probable financial benefit of the persons interested in the estate."¹⁰³ Judge Welsh understood the court's theory in *McIntosh*, and he proposed a direct attack at the heart of the problem. It is regrettable that the 1965 amendment made no attempt whatsoever to deal with the problem created by *McIntosh*.

This leaves as the only part of the 1965 amendment which can have any significance the new clause at the end: "or if it would be burdensome to the heirs or devisees to distribute the personal property or the real estate [*sic*] in kind." The author inclines to the opinion that the court will read out or invalidate this new purpose, keeping in mind that the real but unstated problem may be the milking of estates.

The amendment makes the case turn on whether it would be burdensome to the heirs or devisees to *distribute* the real property in kind. This is not a valid criterion. This presupposes that it is desirable to distribute in kind, or that there is some duty to distribute in kind. In many cases there is no need or desire on the part of the heirs or devisees that the property be distributed in kind; they may prefer to continue holding the property as tenants in common; and in any event, they should be privileged to effect their own private sale and avoid the excessive costs of a circuit court partition sale or its probate court equivalent.¹⁰⁴ Suppose the devise is of a house and lot, or store building and lot, to Husband and Wife as tenants by the entirety in fee, or to Daughter-1 and Daughter-2 as joint tenants in fee. Is there to be a probate court sale as a routine matter, pursuant to the amendment, just because the property cannot be divided in kind?

A more valid test for a probate court sale would be: (a) that it would be burdensome to *hold* the property in cotenancy; and (b) that it would be impracticable by reason of the number of owners, their disabilities, etc., to effect a sale or adjust their interests by mutual agreement; and (c) that at least one of the owners petitions for a sale; and (d) that a probate court sale probably would yield more net than a circuit court partition sale. The above is not suggested as what ought to be enacted into statute law, because it is not sufficiently refined or polished, and because it is only

103. In addition, Judge Welsh's draft stated four specific situations in which a sale would be authorized. This author did not see any perfected final draft by Judge Welsh.

104. In the long quotation from *Deems*, quoted at note 57 *supra*, the court said: The right of persons who have inherited real estate to partition the same among themselves is a very valuable privilege, and it cannot be successfully contended that a sale by the administrator which would destroy that right, would in any manner "promote the welfare" of the heirs.

one of several situations where a probate court sale might be to the benefit of all concerned.

To recapitulate, it is personally believed that the new ground stated in the 1965 amendment is so ineptly stated and so fundamentally unsound that no title examiner should pass a sale made thereunder without a definitive decision by the Supreme Court of Missouri. The title may be good in fact, but in this author's opinion it is not marketable.

VIII. HOW TO BLOCK A PROBATE COURT SALE

Section 473.460, paragraph 4, prevents a probate court sale under section 473.460, paragraph 1(6) "in any case where the heirs or devisees to whom such real estate passed by descent or under the will, have sold, mortgaged or leased or otherwise transferred such real estate at a time when no order was in effect under section 473.263 for the taking of possession of real estate by the executor or administrator." This subsection was not a part of *Model Probate Code* section 152, but was added by Senate amendment pursuant to the recommendation in the Judge Douglas brief.¹⁰⁵ It is not clear whether the sale, mortgage, lease, or other transfer by one of several heirs or devisees would be enough to invoke the protection of this subsection, or whether all would have to act; but unless it is enough that any heir or devisee has acted, the evident purpose of the subsection would be frustrated, viz., to enable an heir or devisee to deal effectively with the property during the pendency of the administration of the estate.

It is recommended that as a routine matter some heir or devisee should promptly mortgage his interest by a recorded deed of trust in order to invoke the shelter of this subsection. The lender should be someone who is willing to make a modest loan without all of the heavy acquisition costs incident to the usual secured loan, but the loan should be a genuine one for more than a nominal amount.

Other techniques would work in appropriate situations, but could not be used routinely. A sale or a lease would invoke the shelter of section 473.460, paragraph 4.¹⁰⁶ A circuit court partition action filed by an heir

105. Judge Douglas Brief, *supra* note 99, at ¶ 64, pp. 78-79.

106. In *McIntosh*, Brief for Appellant, pp. 8-9, raised the problem of a lease as preventing a probate court sale. Brief for Respondent, pp. 13-14, answered that no heir had leased the property, but the administrator was collecting rent under what apparently was an informal continuation under the terms of an expired lease originally executed by the decedent. The court ignored the problem, properly it would seem, in view of the state of the record.

while administration is pending might be effective, but it requires a high fee and involves the hazard of a low price at a forced sale.¹⁰⁷

Section 473.470, preventing a sale if a person interested in the estate posts bond, would not help in the situation under consideration because that section applies only where the sale is for the payment of obligations of the estate, and does not extend to sales under section 473.460, paragraph 1(6).

IX. CONCLUSION

Section 473.460, paragraph 1(6), on probate court sales in the best interests of the estate was ill-conceived when it was included in the 1955 Probate Code and was not helped by an inept amendment in 1965. Some action needs to be taken, and only two courses are open. The first course is for some lawyer or bar committee to draft an amendment that will serve legitimate, useful functions in the interest of heirs or devisees, and will have effective safeguards against the milking of estates. The second course, and the easier one, is to repeal the troublesome subparagraph which has operated and still operates to trap the trusting lawyer who takes the subparagraph at its face value.

107. Mo. R. Civ. P. 96.14, § 528.140, RSMo 1959. See notes 72 and 82 *supra*. See also *Clapper v. Chandler*, *supra* note 95, at 120.