

Missouri Law Review

Volume 4
Issue 2 April 1939

Article 5

1939

Comments

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



Part of the [Law Commons](#)

Recommended Citation

Comments, 4 Mo. L. REV. (1939)

Available at: <https://scholarship.law.missouri.edu/mlr/vol4/iss2/5>

This Comment 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.

Comments

FORECLOSURE BY POWER OF SALE INSERTED IN A MORTGAGE OR DEED OF TRUST

Of the several methods of foreclosing mortgages, probably the most favorable for the mortgagee is by the exercise of a power of sale included in the mortgage or deed of trust.¹ This method of foreclosure is favored by the creditor, because it removes the necessity for judicial action that other forms of foreclosure require.² A few states, by statute or judicial decision, hold a power of sale void as against public policy and require that the foreclosure be carried on by other means.³ These latter states are more favorable to the debtor, and give the mortgagor a greater degree of protection for his property interests. However, where the power of sale is allowed, the courts commonly require strict compliance with the terms of the power as included in the instrument.⁴

Where a power of sale is allowed, as it generally is, a provision is inserted in the instrument empowering some person to sell the mortgaged property without resort to judicial proceedings.⁵ There is little variation among the states following the majority view as to who may exercise the power. In general, any person of legal capacity in whom the legal estate or title under the mortgage is vested may exercise the power.⁶ The person doing so must hold the legal title,⁷ some states require, except in exceptional cases.⁸ Thus, in the majority of the states today, either the mortgagee or trustee in a trust deed form of mortgage can exercise the power of sale. It would seem preferable to limit the exercise of the power to someone other than the creditor—the trustee of the deed of trust, for example, for the trustee stands in fiduciary relationship to both the mortgagor and mortgagee.⁹ This limitation of the exercise of the power

1. The validity of the power of sale is now recognized by the large majority of the states. 19 R. C. L. 587; 3 JONES, MORTGAGES (8th ed. 1928) 788, 790; 41 C. J. 923.

2. 3 JONES, *op. cit. supra* note 1, at 786; 11 C. J. 704; 41 C. J. 922.

3. Idaho: Brown v. Bryan, 6 Idaho 1, 51 Pac. 995 (1898); Illinois: ILL. REV. STAT. (Cahill, 1927) c. 95, § 24; Indiana: IND. STAT. ANN. (Burns, 1926) § 13,474; Iowa: IOWA CODE (1924) §§ 12,372 and 12,373; Kansas: Samuel v. Holliday, 1 Kan. 612 (1863); Kentucky: Campbell v. Johnston, 4 Dana 177 (Ky. 1836); Nebraska: Comstock v. Michael, 17 Neb. 288, 22 N. W. 549 (1885); Oklahoma: OKLA. STAT. (Harlow, 1931) § 424.

4. Wolff v. Ward, 104 Mo. 127, 16 S. W. 161 (1891).

5. American Blower Co. v. MacKenzie, 197 N. C. 152, 147 S. E. 829, 64 A. L. R. 1047 (1929). 2 JONES, CHATTEL MORTGAGES (Bower's ed.) 561.

6. 3 JONES, *op. cit. supra* note 1, at 819.

7. Miller v. Clark, 56 Mich. 337, 23 N. W. 35 (1885); Burke v. Backus, 51 Minn. 174, 53 N. W. 458 (1892); H. Weil & Bros. v. Davis, 168 N. C. 298, 84 S. E. 395 (1915); Morris v. McKnight, 1 N. D. 266, 47 N. W. 375 (1890).

8. Stevens v. Shannahan, 160 Ill. 330, 43 N. E. 350 (1896).

9. A trustee in a deed of trust to secure a debt is the agent of the owner of the property as well as the owner of the secured debt. Cassady v. Wallace, 102 Mo. 575, 15 S. W. 138 (1890); Axman v. Smith, 156 Mo. 286, 57 S. W. 105 (1900); Polliham v. Reveley, 181 Mo. 622, 81 S. W. 182 (1904).

1939]

to some disinterested person would seem to assure the mortgagor a greater degree of protection than if the interested creditor himself were allowed to conduct the sale.¹⁰ The creditor can sell the property in such a way as to bind the debtor, and leave him with no recourse to any judicial proceedings,¹¹ unless the creditor sells to himself or agent, in which case the debtor has an equitable power to rescind.¹² It would seem that some check should be placed on the creditor in these cases.

Missouri makes valid the power of sale, when included in a chattel mortgage, real estate mortgage, or deed of trust mortgage.^{12a} Thus under the law of Missouri, the power of sale can be exercised by a trustee of a deed of trust,¹³ a mortgagee of realty,¹⁴ or a mortgagee of chattels,¹⁵ where such a power is contained in the instrument.

May the sale conducted under such a power be a private sale, or must it be a public sale? It seems that the sale may be conducted privately, unless a public sale is expressly required by the instrument itself or by statute.¹⁶ But where the instrument itself,¹⁷ or a statute,¹⁸ requires the use of the public sale, a private sale is void. There is a little more justification for allowing the private sale where only the trustee can conduct the sale, than where the mortgagee himself can be granted the power; but in either case, it seems rather hard to justify the private sale. What harm can arise from requiring a public sale and notice to the public? It is commonly stated by the courts that the purpose of the sale is to get bids as favorable as possible for the mortgagor,¹⁹ and yet it seems obvious that this aim will be furthered by a public, and frustrated by a private, sale. The Missouri Supreme Court has said²⁰ that "In selling mortgaged property under a deed of trust, the trustee must not indulge the slightest favoritism or do aught to make the property bring less than otherwise it would." It seems

10. While in theory the trustee is a disinterested third party, in most instances he is the nominee of the creditor. Often the trustee is partial to the creditor. See, on this point, *First National Bank v. Wright*, 104 Mo. App. 242, 78 S. W. 686 (1904).

11. 41 C. J. 922; 3 JONES, *op. cit. supra* note 1, at 810.

12. *Pueblo Real Estate, Loan & Inv. Co. v. Johnson*, 119 S. W. (2d) 274 (Mo. 1938).

12a. MO. REV. STAT. (1929) § 3074.

13. *Cassady v. Wallace*, 102 Mo. 575, 15 S. W. 138 (1890).

14. *Pickett v. Jones*, 63 Mo. 195 (1876).

15. *Waltner v. Smith*, 274 S. W. 526 (Mo. App. 1925).

16. *Marsh v. Elba Bank & Trust Co.*, 221 Ala. 683, 130 So. 323 (1930); *Marston v. Brittenham*, 76 Ill. 611 (1875); *Hebb v. Mason*, 143 Md. 345, 122 Atl. 318 (1923); *Martin v. Paxson*, 66 Mo. 260 (1877); *Mowry v. Sanborn*, 68 N. Y. 153 (1877).

17. *Greenleaf v. Queen*, 1 Pet. 138 (U. S. 1828); *Griffin v. Marine Co.*, 52 Ill. 130 (1869); *Williamson v. Stone*, 128 Ill. 129, 22 N. E. 1005 (1889); *Heermans v. Montague*, 20 S. E. 899 (Va. App. 1890).

18. *Melsheimer v. McKnight*, 92 Miss. 386, 46 So. 827 (1908); *Lawrence v. Farmer's Loan & Trust Co.*, 13 N. Y. 200 (1855).

19. *Stoffel v. Schroeder*, 62 Mo. 147 (1876).

20. *Borth v. Proctor*, 219 S. W. 72 (Mo. 1920).

that such ideals will be better protected where the sale is required to be in public, and the element of competition is allowed more opportunity to operate.

In Missouri, the law has gone far toward destroying the protection that seemingly should be granted the debtor in the field of chattel mortgages, but has not been quite so harsh in the case of the real estate mortgage. As to chattel mortgages, it has been held in several decisions, either expressly or by necessary implication, that the sale can be conducted privately, with no notice to the public or the mortgagor.²¹ However, by statute in Missouri^{21a} it is required that in any mortgage or trust deed of realty, where a power of sale is to be carried out, there must be at least twenty days notice to the public.²² A recent case shows the court's criterion of what is a public sale sufficient to make the sale valid.²³

A third question arises as to who can purchase at a sale conducted under the exercise of a power of sale. Most courts have held that neither the trustee of a deed of trust nor his agent can purchase at such a sale conducted by the trustee;²⁴ nor can the mortgagee nor his agent purchase at such a sale conducted by the mortgagee,²⁵ unless this right be specifically given by the terms of the power.²⁶ (There seems to be no objection to a mortgagee purchasing at a trustee's sale.) This rule seems eminently just, for in spite of other safeguards furnished by the law, it would seem that allowing such parties to purchase at sales conducted by themselves would be making it much easier for the perpetration of fraud upon the debtor. Other courts, however, have allowed the mortgagee to purchase at his own sale (public or private), but are much more

21. *Parker v. Roberts*, 116 Mo. 657, 22 S. W. 914 (1893); *First National Bank v. Wright*, 104 Mo. App. 242, 78 S. W. 686 (1904); *Nichols & Shepard Co. v. Stokes*, 196 S. W. 1075 (Mo. App. 1917).

21a. MO. REV. STAT. (1929) § 3076.

22. *Snell v. Harrison*, 104 Mo. 158, 16 S. W. 152 (1891); *Hoffman v. Bigham*, 324 Mo. 516, 24 S. W. (2d) 125 (1930); *Judah v. Pitts*, 333 Mo. 301, 62 S. W. (2d) 715 (1933).

23. *Bruner v. Stevenson*, 73 S. W. (2d) 413 (Mo. App. 1934). Here no one but the auctioneer and mortgagee paid any attention, although other persons were within earshot.

24. *Stephen v. Beall*, 22 Wall. 329 (U. S. 1874); *Holman v. Ryon*, 56 F. (2d) 307 (App. D. C. 1932); *Lockridge v. Smith*, 206 N. C. 174, 173 S. E. 36 (1934); *Collier v. Ford*, 81 S. W. (2d) 821 (Tex. Civ. App. 1935); *Harrison v. Manson*, 95 Va. 593, 29 S. E. 420 (1898); *Robinson v. Robinson*, 112 W. Va. 39, 163 S. E. 633 (1932).

25. *Lockett v. Hill*, 15 Fed. Cas. No. 8,443 (C. C. N. D. Ga. 1874); *Jackson v. Blankenship*, 213 Ala. 607, 105 So. 684 (1925); *Watson v. Sherman*, 84 Ill. 263 (1876); *Cambridge Savings Bank v. Cronin*, 289 Mass. 379, 194 N. E. 289 (1935); *Byrd v. Clarke*, 52 Miss. 623 (1876); *Very v. Russell*, 65 N. H. 646, 23 Atl. 522 (1874); *Cleveland v. Bateman*, 21 N. M. 675, 158 Pac. 648 (1915); *Morris v. Carroll*, 171 N. C. 761, 88 S. E. 511 (1916); *Galvin v. Newton*, 19 R. I. 176, 36 Atl. 3 (1895).

26. Mortgage contracts, perhaps, should be considered contracts of adhesion, since they are not contracts which are the result of negotiations of well-matched opponents. Should not the court step in here and protect the mortgagor from his utter inability to exclude such powers in the mortgagee to sell privately to himself, as against public policy?

strict in the case of the trustee.²⁷ In the Missouri case, *Parker v. Roberts*,²⁸ it was held that the chattel mortgagee could purchase at his own private sale.

Missouri is among the latter group of courts,²⁹ and holds that either the chattel or real estate mortgagee can sell to himself or agent, although it alleviates the harshness of this rule somewhat by allowing the mortgagor to disaffirm the sale within a reasonable time thereafter. If the mortgagor tenders the debt due within such reasonable time after such sale, he can redeem land or chattel from the mortgagee, or his agent.³⁰ Even so, this doctrine of Missouri seems to favor the creditors, as it puts the burden on the debtor to take steps in abrogating a sale which is unfavorable to him. However, it has been held that the trustee in Missouri can neither directly nor indirectly become the purchaser at his own foreclosure sale, and such a sale has been held absolutely void.³¹

In summarizing the Missouri law as to the scope and effect of the power of sale as exercised under a mortgage or deed of trust, we see that Missouri has gone very far in protecting creditors, especially in the field of the chattel mortgage. Where the power is authorized in the chattel mortgage instrument,³² the power can be exercised either by the creditor himself³³ or by the trustee, who may in reality be practically the agent of the creditor;³⁴ it can be conducted in private, for no notice is required either to the public or the mortgagor;³⁵ and the person conducting the sale can sell either to himself or his agent, subject only to the equitable power of redemption in the debtor.³⁶

In the mortgage, or deed of trust, of real estate, the debtor is better protected, for although the mortgagee or his agent can purchase at a public sale conducted by the mortgagee in exercising the power of sale,³⁷ the sale must be preceded by twenty days' notice to the public,³⁸ and if the mortgagee or his agent buys, the mortgagor's power of redemption is not cut off.³⁹

27. The mortgagee must, as a matter of practical necessity, purchase at the foreclosure, ordinarily. See the case of *Brewer v. Harrison*, 27 Colo. 349, 62 Pac. 224 (1900).

28. 116 Mo. 657, 22 S. W. 914 (1893).

29. *Thornton v. Irwin*, 43 Mo. 153 (1869); *Allen v. Ranson*, 44 Mo. 263 (1869); *Medsker v. Swaney*, 45 Mo. 273 (1870); *Reddick v. Gressman*, 49 Mo. 389 (1872).

30. See the recent Missouri case, *Pueblo Real Estate, Loan & Inv. Co. v. Johnson*, 119 S. W. (2d) 274 (Mo. 1938).

31. *Thornton v. Irwin*, 43 Mo. 153 (1869); *Duncan v. Home Co-operative Co.*, 221 Mo. 315, 120 S. W. 733 (1909); *Northcutt v. Fine*, 44 S. W. (2d) 125 (Mo. 1931); *Stark v. Love*, 128 Mo. App. 24, 106 S. W. 87 (1907).

32. *Keating v. Hannenkamp*, 100 Mo. 161, 13 S. W. 89 (1889).

33. *Waltner v. Smith*, 274 S. W. 526 (Mo. App. 1925).

34. *First National Bank v. Wright*, 104 Mo. App. 242, 78 S. W. 686 (1904).

35. *Parker v. Roberts*, 116 Mo. 657, 22 S. W. 914 (1893). See *First National Bank v. Wright*, 104 Mo. App. 242, 78 S. W. 686 (1904); *Nichols & Shepard Co. v. Stokes*, 196 S. W. 1075 (Mo. App. 1917).

36. *Parker v. Roberts*, 116 Mo. 657, 22 S. W. 914 (1893). Here the mortgagee exercised the power of sale by selling to his own agent at a private sale.

37. *Reddick v. Gressman*, 49 Mo. 389 (1872).

38. Mo. REV. STAT. (1929) § 3076.

39. *Pueblo Real Estate, Loan & Inv. Co. v. Johnson*, 119 S. W. (2d) 274 (Mo. 1938).

It seems rather surprising that Missouri has gone so far in protecting the creditor, rather than in safeguarding the debtor. The West has traditionally favored the rural, debtor classes. It is submitted that this almost untrammelled power of sale by the mortgagee might well be curtailed, for the creditor is adequately protected by his right to possession after default, to public sale by a disinterested trustee, and to judicial foreclosure. It should be recognized that the debtor is actually, if not theoretically, at a disadvantage in dealing with his creditor in the majority of the cases, and the law should give him reasonable protection. In justification of the Missouri rule it is sometimes contended that easy foreclosure is really to the advantage of the mortgagor, because he can borrow more freely. Yet persons with adequate security have no trouble borrowing in states with relatively more expensive foreclosure procedure, and in some states at lower rates of interest. Persons without adequate security will have great difficulty in borrowing, even with easy foreclosure laws.

GEORGE W. WISE

LIABILITY OF MASTER FOR ASSAULT COMMITTED BY SERVANT EMPLOYED AS A
SPECIAL POLICE OFFICER

The liability of a master to third persons for the torts of his servant is said to depend upon whether the servant was acting within the scope or course of his employment.¹ Various factors are weighed and diverse tests employed in deciding this question. None in and of itself alone is conclusive,² the phrase "course of employment" or "scope of authority" having no fixed legal meaning.³ The primary difficulty with cases involving assault usually lies in the element of motive—assault being a willful act of the type usually done to serve the actor's own personal ends. In order to hold the master liable, it is ordinarily stated that the act under consideration must be done with the purpose, in some part at least, of furthering the master's business.⁴ Where the servant's assigned

1. MECHEM, LAW OF AGENCY (3rd ed. 1923) § 499; RESTATEMENT, AGENCY (1933) § 219 (1); *Saucer v. Willys-Overland*, 49 F. (2d) 385 (S. D. Fla. 1935); *Eyerly v. Baker*, 168 Md. 599, 178 Atl. 691 (1935); *Nelson Business College Co. v. Lloyd*, 60 Ohio St. 448, 54 N. E. 471 (1899); *Union Gas & Electric Co. v. Crouch*, 123 Ohio St. 81, 174 N. E. 6 (1930); *Westerland v. Argonaut Grill*, 185 Wash. 411, 55 P. (2d) 819 (1936).

2. (1931) 6 WIS. L. REV. 239; RESTATEMENT, AGENCY (1933) § 229.

3. 39 C. J. 1282; *Loper v. Yazoo & M. V. R. R.*, 166 Miss. 79, 145 So. 743 (1933).

4. *Mullins v. Ritchie Grocer Co.*, 183 Ark. 218, 35 S. W. (2d) 1010 (1931); *Stinson v. Prevatt*, 84 Fla. 416, 94 So. 656 (1922); *Alden Mills v. Pendergraft*, 149 Miss. 595, 115 So. 713 (1928); *State ex rel. Gosselin v. Trimble*, 328 Mo. 760, 41 S. W. (2d) 801 (1931); *Collette v. Rebori*, 107 Mo. App. 711, 82 S. W. 552 (1904); *Wrightsmen v. Glidewell*, 210 Mo. App. 367, 239 S. W. 574 (1922); *Sturgis v. Kansas City Rys.*, 228 S. W. 861 (Mo. App. 1921); *Grier v. Grier*, 192 N. C. 760, 135 S. E. 852 (1926); *Westerland v. Argonaut Grill*, 185 Wash. 411, 55 P. (2d) 819 (1936).

1939]

duties are such that conflicts ordinarily arise in their performance, and the servant does commit an assault in the course of his attempted performance of those duties, most courts experience little trouble in holding the master liable.⁵ An example of employment which is likely to lead to conflict is employment as a detective or police officer, or employment for police purposes. In such cases it would seem easier to find the assault within the scope of the servant's employment than where he is engaged in other more placid employment. The intent to further the master's business can well be found here, not only partially, but predominantly. The master might reasonably be held to have expected and have foreseen violence as a consequence of the assigned duties.

When the special police officer is attempting to secure a confession from a person suspected of stealing from his employer and during his attempt commits assault, it requires no stretch of the imagination to say the servant acted with the intent of furthering his master's business and in a manner reasonably to be expected. In *White v. Pacific Telephone and Telegraph Co.*,⁶ a case of assault by the chief special agent of the telephone company during an attempt to secure a confession from a person suspected of robbing the company's office, the court, quoting the *Restatement of the Law of Agency*,^{6a} stated three general criteria of scope of employment: (1) the conduct must be of the type the servant is employed to perform; (2) it must take place substantially within the authorized time and space limit; and (3) the act must be done with at least the partial purpose of furthering the master's business. The court held that on the record no question of fact was presented as to (1) and (2), and that only as to the third test was there any question. As to this, the opinion states that because of the nature of the employment, the jury could well find, as it did, that the servant was actuated, in part at least, by a desire to serve his master. The master, the telephone company, was held liable. In *Mansfield v. Burns International Detective Agency*,⁷ a somewhat similar case of assault while attempting to obtain a confession, emphasis was placed upon the test of intent to forward the master's business. Because of the type of work the detective was hired to do, the court held that the necessary intent could reasonably be found. The cases indicate that courts emphasizing the requirement of intent to forward the master's business have a tendency to construe broadly the intent of the servant to serve the master and to hold the master liable in an assault case arising out of the servant's performance of duties in the nature of a policing function.⁸

5. RESTATEMENT, AGENCY (1933) §§ 212(e), 215, 245; MECHEM, LAW OF AGENCY (3rd ed. 1923) § 545; *Shear v. Singer Sewing Mach. Co.*, 171 Fed. 678 (E. D. Pa. 1909); *Johnson v. Monson*, 183 Cal. 149, 190 Pac. 635 (1920); *Howe v. Newmarch*, 94 Mass. 49 (1866).

6. 24 F. Supp. 871 (D. Ore. 1938).

6a. § 228.

7. 102 Kan. 687, 171 Pac. 625 (1918).

8. *McClure Ten Cent Co. v. Humphries*, 33 Ga. App. 523, 127 S. E. 151 (1925); *Personal Finance Co. of Macon v. Whiting*, 48 Ga. App. 154, 172 S. E. 111 (1933); *Matthews v. New York, C., & St. L. R. R.*, 93 Ind. App. 618, 161

Where the company policeman is instructed to conduct investigations generally and to engage in similar functions without making arrests or personal contacts, it is more difficult to discover an intent to forward the company's business when assault is committed. Of course, an instruction not to use violence will not prevent an assault from being within the scope of employment.⁹ In such situations the master has been held on the theory that the servant's duties being such that conflicts ordinarily arise from them, the master cannot be insulated from liability when the foreseen conflict does arise by a direction to use no force. In *Pilipovich v. Pittsburgh Coal Co.*,¹⁰ an industrial policeman of the coal company killed an innocent bystander several minutes after a dispute between employees and strikers had occurred. The court held that if a special policeman is placed in a position of responsibility where conflict may arise and force may have to be used, following which the special officer uses more force than necessary, he is not acting outside of the scope of his employment as a matter of law. Authority seems abundant on the point that the work of a private detective or policeman is of the type from which conflict may be expected and that the employer is liable for assault arising out of the conflict.¹¹ Occasionally, however, a modern case disregards the social basis of *respondet superior* and reverts to the older form of statement that a master is not liable for the willful act of his servant unless he authorized or directed the willful act.¹² These cases, however, in the recent reports, seem to be few in number. It is submitted that such a test fails to stress the social policy which is the basis of the doctrine of *respondet superior*.¹³

If the special officer is commissioned by a municipality or a state but receives his remuneration from a private employer, another element is injected.¹⁴ In making the assault was the special officer performing his public duties or was he serving his private master? The fact that the special officer was commissioned by a unit of the government does not in itself prevent his act from being within the scope of employment of the private individual employing him.¹⁵ There are cases stating that where the special agent holds a commission,

N. E. 653 (1928); *Knowles v. Bullene & Co.*, 71 Mo. App. 341 (1897); *W. T. Grant Co. v. Owens*, 149 Va. 906, 141 S. E. 860 (1928). In general, as to test of intent to further master's business, see Note (1909) 18 L. R. A. (N. S.) 416.

9. RESTATEMENT, AGENCY (1933) § 212 (b), (e); *Ford v. Grand Union Co.*, 240 App. Div. 294, 270 N. Y. Supp. 162 (3rd Dep't 1934).

10. 314 Pa. 585, 172 Atl. 136 (1934); see RESTATEMENT, AGENCY (1933) § 230 (c).

11. *New Ellerslie Fishing Club v. Stewart*, 123 Ky. 8, 93 S. W. 598 (1906); *Deck v. Baltimore & O. R. R.*, 100 Md. 168, 59 Atl. 650 (1905); *Adams v. St. Louis-San Francisco Ry.*, 251 S. W. 124 (Mo. App. 1923); *Robbs v. Missouri Pac. Ry.*, 210 Mo. App. 429, 242 S. W. 155 (1922); see MECHEM, LAW OF AGENCY (3rd ed. 1923) §§ 545, 546; Note (1931) 75 A. L. R. 1176, 1178.

12. *St. Louis & S. F. R. R. v. Wyatt*, 105 S. W. 72 (Ark. 1907); *Wright v. Automobile Gasoline Co.*, 250 S. W. 368 (Mo. 1923).

13. *Smith, Frolic and Detour* (1923) 23 COL. L. REV. 716.

14. For general discussion on the similar problem of liability for false arrest, see Notes (1925) 35 A. L. R. 681, (1932) 77 A. L. R. 933.

15. *Alabama Fuel & Iron Co. v. Baladoni*, 15 Ala. App. 316, 73 So. 205 (1915); *Matthews v. New York, C. & St. L. R. R.*, 93 Ind. App. 618, 161 N. E. 653 (1928); *Neallus v. Hutchinson Amusement Co.*, 126 Me. 469, 139 Atl. 671

a presumption arises that he was acting in his capacity as a public official.¹⁶ The desirability of the use of a presumption, rebuttable or otherwise, is questionable. The problem is one of scope of employment only. The officer might have acted in either a public or private capacity. Or he might have acted in a dual capacity. The fact that he received a municipal or other commission in the past seems to have little bearing upon the question of whether or not he has acted under the commission in the incident under consideration. This is recognized by the majority of cases.¹⁷ If the officer was acting entirely or partly in the scope of the private employer's business, the employer is liable for the tortious act.¹⁸ If he was acting in his public capacity, the private employer is not liable.¹⁹ Thus, in *Maggi v. Pompa*,²⁰ a special policeman, paid by Pompa but commissioned by the city of San Francisco, injured an innocent bystander when attempting to make an arrest for a disturbance of the peace. It was held that the private individual was not liable because the injury was caused by the special policeman's attempt to perform his public duty.

As in other agency cases involving tort liability, the special agent may be an independent contractor or furnished by an independent contractor.²¹ If so, the independent contractor is liable and not the person (the alleged "master") who has entered into the contract with him. Thus in *Niles v. Marshall Field & Co.*,²² a special detective commissioned by the city of Chicago assaulted a customer of the Marshall Field Company. The detective was paid by a detective agency from which he received his orders, the Marshall Field Company having entered into a contract with the agency whereby the agency agreed to furnish

(1927); *Walters v. Stonewall Cotton Mills*, 136 Miss. 361, 101 So. 495 (1924); *Brady v. Gulf, C. & S. F. Ry.*, 71 S. W. (2d) 303 (Tex. Civ. App. 1934); *Wilhelm v. Parkersburg, M. & I. Ry.*, 74 W. Va. 678, 82 S. E. 1089 (1914).

16. *Maggi v. Pompa*, 105 Cal. App. 496, 287 Pac. 982 (1930); *LaChance v. Berlin Street Ry.*, 79 N. H. 291, 109 Atl. 720 (1919); *Bunting v. Pennsylvania R. R.*, 284 Pa. 117, 130 Atl. 306 (1925); *McKain v. Baltimore & O. R. R.*, 65 W. Va. 233, 64 S. E. 18 (1909); *Moss v. Campbell's Creek R. R.*, 75 W. Va. 62, 83 S. E. 721 (1914).

17. *Zygmuntowicz v. American Steel & Wire Co. of N. J.*, 240 Mass. 421, 134 N. E. 385 (1922); *Hudson v. St. Louis, Southwestern Ry.*, 293 S. W. 811 (Tex. App. 1927); *Brady v. Gulf, C. & S. F. Ry.*, 71 S. W. (2d) 303 (Tex. Civ. App. 1934); *Notes* (1925) 35 A. L. R. 681. (1932) 77 A. L. R. 933, L. R. A. 1915C, 1183.

18. *Kusnir v. Pressed Steel Car Co.*, 201 Fed. 146 (S. D. N. Y. 1912); *Mass. Cotton Mills v. Hawkins*, 164 Ga. 594, 139 S. E. 52 (1927); *Matthews v. New York, C. & St. L. R. R.*, 93 Ind. App. 618, 161 N. E. 653 (1928); *Armstrong v. Stair*, 217 Mass. 534, 105 N. E. 442 (1914); *Walters v. Stonewall Cotton Mills*, 136 Miss. 361, 101 So. 495 (1924); *Brady v. Gulf, C. & S. F. Ry.*, 71 S. W. (2d) 303 (Tex. Civ. App. 1934).

19. *Roll v. Springfield Cons. Ry.*, 225 Ill. App. 411 (1922); *Neallus v. Hutchinson Amusement Co.*, 126 Me. 469, 139 Atl. 671 (1927); *Ruffner v. Jamison Coal & Coke Co.*, 247 Pa. 34, 92 Atl. 1075 (1915); *Lawrence v. Crescent Amusement Co.*, 8 Tenn. App. 216 (1928); *Note* (1932) 77 A. L. R. 933.

20. 105 Cal. App. 496, 287 Pac. 982 (1930).

21. *Note* (1932) 19 VA. L. REV. 83.

22. 218 Ill. App. 142 (1920).

and take charge of the house detectives. It was held that the detective was in the employ of an independent contractor and, therefore, the Marshall Field company was not liable for his actions. In the type situation involving the private detective, or watchman, the alleged master's defense of independent contractor might be attacked as in similar situations where such defense is set up, by showing such master's personal fault—for example, his selection of an individual with a known proclivity towards violence. That is, while it is undoubtedly true as a general proposition that an independent contractor and not his employer is liable for injuries caused by the work,²³ nevertheless the master remains liable for his own faults in selection or delegation.²⁴ Should he employ an incompetent or improper contractor, as for instance, in this case one with known tendencies to use excessive force, then the alleged master is liable on general principles of tort, aside from any doctrines peculiar to the law of agency.

HARRY P. THOMSON, JR.

MEASURE OF DAMAGES WHERE BREACH OF COVENANT FOR TITLE

Where there is a breach of a covenant for title contained in a deed of land, there is an action for damages by the grantee-covenantee against the grantor-covenantor, and the court is confronted with the often perplexing problem of what is the proper measure of damages assessable to compensate the covenantee for his loss. It would seem to be a relatively simple matter to lay down a rule for the determination of such, but upon closer analysis, it is evident that various factual situations will arise which make it impossible to set out an abstract rule which will do justice in all cases.

The damages generally assessed for breach of any contract are in accordance with the loss actually suffered by the complaining party at the time of the breach. This is true at least in so far as that loss may be said to have been contemplated by the parties at the time of entering into the contract. In determining what damages were contemplated by the parties, we look to evidence of conditions as they existed at the time the contract was entered into, and the breaching party will be liable only for such damages as might have been reasonably foreseen by the parties at that time.

23. *Thayer v. Kirchof*, 83 Colo. 480, 266 Pac. 225 (1928); *General Refractories Co. v. Mozier*, 235 Ky. 252, 30 S. W. (2d) 952 (1930); *Aubuchon v. Security Const. Co.*, 291 S. W. 187 (Mo. App. 1927); *Kuhn v. P. J. Carlin Const. Co.*, 154 Misc. 892, 278 N. Y. Supp. 635 (Sup. Ct. 1935); *Riverland Oil Co. v. Chisholm*, 143 Okla. 120, 287 Pac. 379 (1930).

24. *MECHER, LAW OF AGENCY* (3rd ed. 1923) §§ 497, 498, 511; *RESTATEMENT, AGENCY* (1933) § 245(e); *Baker v. Scott County Milling Co.*, 323 Mo. 1089, 20 S. W. (2d) 494 (1929); *Kuhn v. P. J. Carlin Const. Co.*, 154 Misc. 892, 278 N. Y. Supp. 635 (Sup. Ct. 1935); see *Eger v. Helmar*, 272 Mich. 513, 262 N. W. 298 (1935).

However, when dealing with a breach of a covenant for title, even though certain damages were or clearly should have been within the contemplation of the parties at the time of making the covenant, and could have been reasonably foreseen, they may not be recoverable by the covenantee against the covenantor. For example, in such a sale of real estate it is clearly within the contemplation of the parties that the value of the land may be either increased or decreased, either through the efforts of the covenantee, or due to other causes. However, according to a majority of the decisions, this is not considered a proper element of damages.¹ The reason for this attitude of the courts is not altogether clear, but it is often intimated that such increase or decrease would be too much a matter of conjecture.

Where there has been a total failure of title to the estate conveyed, the general rule as to the measure of damages for breach of a covenant which is breached at the time of making is the value of the property at such time, plus whatever interest might have accrued.² This is determined by the amount of consideration paid by the covenantee to the covenantor. The consideration paid is, in fact, generally deemed conclusive as to the value of the land.³ However, whether the consideration paid was or was not considered conclusive would make little difference, because the reason for using the amount of consideration as the measure of damages is that the courts feel the covenantee should be compensated for the actual loss suffered at the time of making, and this would, in any event, be the consideration he had paid to the covenantor.⁴ So, in any case, the most that could be recovered would be the consideration paid because this is the extent of the loss.

1. *Prestwood v. Carlton*, 162 Ala. 327, 50 So. 254 (1909); *Wade v. Texarkana Bldg. & L. Ass'n*, 150 Ark. 99, 233 S. W. 937 (1921); *Emmert v. Jelsma*, 191 Iowa 424, 182 N. W. 652 (1921); *Grenshaw v. Williams*, 191 Ky. 559, 231 S. W. 45 (1921); *Staton v. Henry*, 130 Miss. 372, 94 So. 237 (1922); *Lawless v. Collier's Ex'rs*, 19 Mo. 480 (1854); *Hazelett v. Woodruff*, 150 Mo. 534, 51 S. W. 1048 (1899); *Staed v. Rossier*, 157 Mo. App. 300, 137 S. W. 901 (1911); *Quick v. Williams*, 219 Mo. App. 336, 271 S. W. 834 (1925); *Campbell v. Bentley*, 159 App. Div. 522, 145 N. Y. Supp. 92 (4th Dep't 1913).

2. *Lloyd v. Sandusky*, 203 Ill. 621, 68 N. E. 154 (1903); *Rockafellor v. Gray*, 194 Iowa 1280, 191 N. W. 107 (1922); *Hutchins v. Roundtree*, 77 Mo. 500 (1883); *Adkins v. Tomlinson*, 121 Mo. 487, 26 S. W. 573 (1894); *Hazelett v. Woodruff*, 150 Mo. 534, 51 S. W. 1048 (1899). In *Lawless v. Collier's Ex'rs*, 19 Mo. 480, 483 (1854), the court said: "The weight of American authority has determined that the covenant for seizin is broken, if broken at all, as soon as it is made, and thereby, an immediate right of action accrues to him who has received it. . . . The damages to be recovered are measured by the actual loss at that time sustained." But see the subsequent development in the treatment of this covenant, in *Note* (1938) 3 Mo. L. Rev. 48. Also see *Werner v. Wheeler*, 142 App. Div. 358, 127 N. Y. Supp. 158 (1st Dep't 1911); *Murphy v. Price*, 48 Mo. 247 (1871); *Falk v. Organ*, 160 Mo. App. 218, 141 S. W. 1 (1911); *Frank v. Organ*, 167 Mo. App. 493, 151 S. W. 504 (1912); *Jeffords v. Dreisbach*, 168 Mo. App. 577, 153 S. W. 274 (1913). See also RAWLE, COVENANTS FOR TITLE (5th ed. 1887) §§ 184, 186.

3. See *Collier v. Gamble*, 10 Mo. 467 (1847); *Bircher v. Watkins*, 13 Mo. 522 (1850). See also the cases cited note 2, *supra*.

4. *Lawless v. Collier's Ex'rs*, 19 Mo. 480 (1854); *Brusco v. Pate*, 51 R. I. 222, 153 Atl. 311 (1931). See the cases cited note 2, *supra*.

Often, when there is a breach of such covenant, although the breach occurs immediately, the holder of the paramount title will not evict the covenantee for some time, or in some instances, not at all. Thus it would seem to follow logically that where this covenant is broken, the covenantee is entitled to recover no more than nominal damages⁵ until he has bought in the adverse rights or has been actually deprived of the whole subject of his bargain, in either of which latter events he is entitled to recover substantial damages.⁶ Until there has been an injury of some kind to the covenantee, there has obviously been only a technical legal breach and he should not be permitted to recover damages for an injury not actually suffered.

There are a few cases however, which have permitted the recovery of substantial damages even though the covenantee has not been evicted and apparently suffered no substantial loss.⁷ These cases reason that a covenant of seisin is breached when made, if there is an outstanding paramount title or encumbrance, even though the grantee takes and retains possession of the premises. From this it follows that the measure of damages would be the consideration paid if there was a total failure of title, and a proportionate part of the consideration if the title to only a part failed. This is clearly a minority view.

Where there is a breach of the covenant of warranty or other covenants where breach does not occur at the time of making, but which is prospective in character, the measure of damages is likewise generally said to be the value of the property at the time of making the covenant, and this value is also determined by the consideration paid the covenantor.⁸

5. *Alger-Sullivan Lbr. Co. v. Union Trust Co.*, 218 Ala. 448, 118 So. 760 (1928); *Collier v. Gamble*, 10 Mo. 467 (1847); *Bircher v. Watkins*, 13 Mo. 522 (1850). In *Duke v. Tyler*, 209 Iowa 1345, 230 N. W. 319 (1930), the court held that the breach was only technical and recovery of substantial damages was not authorized until some loss or injury has been suffered by the covenantee. Also see *Anderson v. Olson*, 65 N. D. 550, 260 N. W. 407 (1935).

6. *Prescott v. Trueman*, 4 Mass. 627 (1808); *Lawless v. Collier's Ex'rs*, 19 Mo. 480 (1854); *Henderson v. Henderson's Ex'rs*, 13 Mo. 151 (1850); *Magwire v. Riffin*, 44 Mo. 512 (1869); *Walker's Adm'r v. Deaver*, 79 Mo. 664 (1883); *Matheny v. Stewart*, 108 Mo. 73, 17 S. W. 1014 (1891); *Holladay v. Menifee*, 30 Mo. App. 207 (1888). But see *Mitchell v. Hazen*, 4 Conn. 495 (1823).

7. *Mather v. Stokely*, 218 Fed. 764 (C. C. A. 1st, 1915); *Harris v. Newell*, 8 Mass. 262 (1811). In *Parkinson v. Woulds*, 125 Mich. 325, 84 N. W. 292 (1900), defendant had conveyed land to the plaintiff to which he had no title and plaintiff went into possession. Subsequently an action was brought for breach of a covenant of warranty. Plaintiff was entitled to recover the consideration paid, with interest, notwithstanding her possession had been undisturbed, since the breach accrued when the deed was made. See *Hilliker v. Rueger*, 228 N. Y. 11, 126 N. E. 266 (1920); also *RAWLE, COVENANTS FOR TITLE* (5th ed. 1887) § 186.

8. *Beach v. Nordman*, 90 Ark. 59, 117 S. W. 785 (1909); *Brawley v. Copelin*, 106 Ark. 256, 153 S. W. 101 (1913); *Hanlon v. Conrad-Kammerer Glue Co.*, 53 Ind. App. 504, 102 N. E. 48 (1913); *Alexander v. Staley*, 110 Iowa 607, 81 N. W. 803 (1900); *Staton v. Henry*, 130 Miss. 372, 94 So. 237 (1922); *Tong v. Matthews*, 23 Mo. 437 (1856); *Murphy v. Price*, 48 Mo. 247 (1871); *Matheny v. Stewart*, 108 Mo. 73, 17 S. W. 1014 (1891); *Hazelett v. Woodruff*, 150 Mo. 534, 51 S. W. 1048 (1899); *Coleman v. Lucksinger*, 224 Mo. 1, 123 S. W. 441 (1909); *Quick v. Walker*, 125 Mo. App. 257, 102 S. W. 33 (1907); *Quick v.*

When the failure of title is only to a portion of the land, there would seem to be little difficulty in reaching a correct result if the general rule is carried to its reasonable and logical end. Such an application of the rule as aforementioned would logically result in the awarding of damages to the covenantee by determining what amount of the purchase price was paid for the portion of land to which title failed. A correct statement of this application was made in the Missouri case of *Quick v. Williams*,⁹ where the court said: "The general rule for the measurement of the damages in case of failure of title to a portion of the land conveyed is that the vendee can recover only such part of the original purchase price as bears the same ratio to the whole consideration that the value of the land to which the title has failed bears to the value of the whole premises, such relative values to be ascertained as of the time of the conveyance instead of the time of the trial, together with interest and costs."

It is also quite possible that, before or after the grantee-covenantee has been evicted from all or a part of the land conveyed by the person holding the paramount title thereto, the covenantee will buy in the paramount title and re-enter the premises. In such a situation as this, applying the general rule that the covenantee can recover from the covenantor for the actual loss sustained, it would seem logically to follow that the covenantee could only recover the amount expended by him in obtaining such paramount title, provided, of course, that such amount be less than the original consideration paid to the covenantor.¹⁰

There are some cases which follow the rule commonly known as the New England rule. This view distinguishes between covenants which are breached immediately upon being made, and those which are prospective in character and are not breached until some time following the conveyance and after the covenantee has obtained possession and enjoyment of the land.¹¹ Where such a distinction is made, in assessing the damages for breach of a covenant prospective in character, the general rule of damages is applied, but, at the same time, there is care exercised so that no unfairness will be done to either party. The idea of this rule is to give effect to the real intention of the parties. It appears reasonably certain that both parties intend that title to the land should become vested in the purchaser. It is also contemplated that, if the value of the land increases, he should receive the benefit therefrom, and, if such value decreases, he

Williams, 219 Mo. App. 336, 271 S. W. 834 (1925); *Hunt v. Hay*, 214 N. Y. 578, 108 N. E. 851 (1915).

9. 219 Mo. App. 336, 339, 271 S. W. 834 (1925).

10. *McGary v. Hastings*, 39 Cal. 360 (1870). See, also, the cases cited in notes 2 and 7, *supra*.

11. *Horsford v. Wright*, 3 Kirby (Conn. 1786); *Sterling v. Peet*, 14 Conn. 245 (1841); *Beecher v. Baldwin*, 55 Conn. 419, 12 Atl. 401 (1887); *Cushman v. Blanchard*, 2 Me. 266 (1823); *Hardy v. Nelson*, 27 Me. 525 (1847); *Gore v. Brazier*, 3 Mass. 523 (1807); *Norton v. Babcock*, 2 Metc. 510 (Mass. 1841); *Ceconi v. Rodden*, 147 Mass. 164, 16 N. E. 749 (1888); *Park v. Bates*, 12 Vt. 381 (1840). To distinguish, see the following cases where breach of the covenant of seisin: *Montgomery v. Reed*, 69 Me. 510 (1879); *Staples v. Dean*, 114 Mass. 125 (1873); *Downer's Adm'rs v. Smith*, 38 Vt. 464 (1866).

should sustain the loss. To effectuate this result the New England courts have adopted the rule that damages shall be assessed according to the value of the land at the time of eviction. This rule is clearly stated in the early Connecticut case *Sterling v. Peet*,¹² where the court said: "We consider the rule to have been long since settled in this state, that upon the covenant of seisin, the plaintiff has a right to recover the consideration money, and the interest, and on the covenant of warranty, the value of the land, at the time of eviction."

Clearly, the rigid application of this New England rule for measuring the damages will effectuate results widely varied from those that would be reached under the general rule of assessing damages according to the value at the time of the conveyance. But, from the covenantee's position at least, the fairness of this rule seems clear if cognizance is taken of the possible hardship to him which would frequently be meted out if the general and majority rule were strictly followed. If the covenantee is deprived of the benefit of an increased value, or if the covenantor is required to bear the burden of a depreciation in value, there would seem to be effected a perversion of the basic principles applicable to the assessment of damages for breach of contract. This view is followed in the New England states, at least so far as the extent of the profits from the increase in value can be said to have been fairly within the contemplation of the parties at the time of the making of the covenant.¹³

It is clear that under the majority rule which limits the damages recoverable by the covenantee, where breach of a covenant prospective in nature, to the consideration actually paid or to the actual value of the land at the time of entering into the covenant, there may result unlimited hardship to the covenantee. In view of this, the first question which invariably comes up is: What induced the courts to establish and follow such a rule that obviously violates the well established principles for assessing damages in breach of contract actions, that a man can recover in damages for the loss he has sustained?¹⁴ The majority rule hardly seems in accordance with these general principles.

One strong reason for adopting the majority rule was the fear that to assess the damages as of the time of eviction would put an extreme burden on the covenantor.¹⁵ This was probably the most important reason for the adoption of such a rule, and under such reason the rule has been termed meritorious because it limits the liability of the covenantor to the contract, and he cannot be held for unforeseen damages arising through the appreciation in the value of the

12. 14 Conn. 245, 254 (1841).

13. See the cases cited in note 11, *supra*.

14. *Kahn v. Schoen Silk Corp.*, 147 Md. 516, 533, 128 Atl. 359 (1925) ("The underlying principle of damages for the breach of a contract is compensation; or, in other words, to award such a sum in money as would put the injured party in the same position as if the contract had been fully performed by the party responsible for its breach").

15. *Pitcher v. Livingston*, 4 Johns 1 (N. J. 1809); *Moreland v. Metz*, 24 W. Va. 119 (1884).

premises.¹⁶ Usually the covenantor believes his title is good, else he would not be willing to insert covenants. Therefore, courts have tried to protect him by limiting the extent of his liability. But the same argument may be made to all contracts entered into.

The fallacy of any reason given in favor of the rule is made obvious by attempts to apply the rule to concrete sets of facts. Such practical application shows clearly the desirability of the minority rule.¹⁷ Thus the result seems to be that the courts following the majority view have elected to favor the wrongdoer at the expense of the party wronged.

If the minority rule is properly applied, it is sufficiently flexible to permit damages to be regulated so as to avoid undue hardship to the covenantor. For example, damages for extensive improvements generally would not be recovered from the covenantor because the covenantee would probably have been allowed compensation for them as a condition precedent to the eviction, and if not, such would not normally be within the contemplation of the parties, and hence not recoverable. If such improvements were within the contemplation of the parties, there would seem to be little doubt that the wrongdoer should be the one to bear the loss.

A final, though relatively unimportant, advantage which the minority rule seems to have is that in applying the other rule, often it proves difficult to determine the consideration paid or the actual value of the land at the time of entering into the covenant, because so often the consideration is not stated in the deed and there may have been a considerable lapse of time since the deed was delivered; but it would seem a comparatively simple matter to secure evidence to prove the value of the premises at the time of eviction.

In such actions for breach of a covenant for title there is generally the question of whether or not the covenantee will be permitted to recover interest on the money expended by him. Where the covenant is one which is breached immediately upon being entered into, the general rule is that the measure of damages is the amount of consideration paid plus interest thereon.¹⁸ On the question of whether or not such interest should be recovered where no title or pos-

16. *Wiggins v. Stephens*, 246 S. W. 84 (Tex. App. 1922) where the court said: "The liability of the covenantor is fixed by his contract, and so firmly is it thus fixed, in reason and in the decisions of our courts, that the person evicted has as many different measures of damages from which to choose as there are different considerations stipulated in the deeds of the various grantors in his chain of title."

17. *Matheny v. Stewart*, 108 Mo. 73, 17 S. W. 1014 (1891); *Coleman v. Lucksinger*, 224 Mo. 1, 123 S. W. 411 (1909); *Threlkeld v. Fitzhugh*, 2 Leigh 451 (Va. 1830).

18. *Peters v. Bowman*, 98 U. S. 56 (1878); *Burton v. Price*, 105 Fla. 544, 141 So. 728 (1932); *McInnis v. Lyman*, 62 Wis. 191, 22 N. W. 405 (1885). In *Otey v. Oakey*, 157 Va. 314, 321, 160 S. E. 8 (1931), the court said: "It is settled in Virginia that the measure of damages for breach of the covenant of the right to convey where nothing passes by the deed is the consideration paid, with interest." See *Hutchins v. Roundtree*, 77 Mo. 500 (1883). Also, see cases cited in note 2, *supra*.

session passes, the fairness of allowing such recovery seems unquestionable, and the courts permit it as a matter of course without giving the question much consideration.¹⁹

When the covenant breached and sued on is one prospective in character, the rule is generally stated to be that the covenantee is entitled to recover the original purchase money with interest.²⁰ However, where the covenantee has had the possession and enjoyment of the land for a period prior to the eviction, the courts are confronted with a more difficult problem, if they choose to recognize it. Even here the courts often overlook the fact that the covenantee has had possession in return for the use of his money, and simply apply the abstract rule for measuring the damages by awarding the covenantee the purchase price plus interest.²¹ From a practical point of view it seems wholly unjust to permit the covenantee to receive both the use of the land and interest on the money expended by him. What seems to be the correct and just principle to apply was set out by the Supreme Court of Missouri in the early case of *Hutchins v. Roundtree*,²² where the court said: "Between vendor and vendee the conceded rule is to regard the interest the equivalent of the use of the land and, *e converso*, the use of the land the equivalent of the use—the interest—of the purchase money." On this principle then, it would seem that where the covenantee has had the use of the land for a certain time, he should not be allowed recovery of interest on the purchase money during such period.

The final problem usually presented is whether or not the covenantee can recover for the expenses of litigation incurred in defending the title conveyed to him by the covenantor. It is generally held that the grantor-covenantor is not liable for such expenses incurred in a suit by a third person against the grantee, if such suit is successfully defended by the grantee, and it appears that the third person had neither a legal nor equitable claim to the premises granted. The reason given for such a rule is that, since the action is determined favorably to the covenantee, this establishes the fact that there was no flaw in the title, and if there is no flaw in the title, then there has been no breach of the covenant for title.²³ This rule is well founded and the good faith of the

19. See note 18, *supra*.

20. See *Beach v. Nordman*, 90 Ark. 59, 117 S. W. 785 (1909); *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449 (1913); *Eaton v. Hopkins*, 71 Fla. 615, 71 So. 922 (1916); *Rowan v. Newbern*, 32 Ga. App. 363, 123 S. E. 148 (1924); *Crowley v. McCambridge*, 154 Ill. App. 135 (1910); *Emmert v. Jelsma*, 191 Iowa 424, 182 N. W. 652 (1921); *Staton v. Henry*, 130 Miss. 372, 94 So. 237 (1922); *Matheny v. Stewart*, 108 Mo. 73, 171 S. W. 1014 (1891); *Quick v. Williams*, 219 Mo. App. 336, 271 S. W. 834 (1925).

21. See cases note 20, *supra*.

22. 77 Mo. 500, 505 (1883). See also, *Frazier v. Bd. of Supervisors of Peoria*, 74 Ill. 282 (1874); *Collins v. Thayer*, 74 Ill. 138 (1874).

23. *Rittmaster v. Richner*, 14 Colo. App. 361, 60 Pac. 189 (1900); *Upchurch v. White*, 37 Ga. App. 100, 139 S. E. 81 (1927); *Mackenzie v. Clement*, 144 Mo. App. 114, 129 S. W. 730 (1910); *Eaton v. Clarke*, 80 N. H. 577, 120 Atl. 433 (1923); *Smith v. Parsons*, 33 W. Va. 644, 11 S. E. 68 (1890).

covenantee in defending the title or the formidable appearance of the third party's claim will make no difference, since the rule is based on the fact that there was no failure of title rather than the appearance of failure.²⁴ It has been reasoned that such a rule does not put an intolerable burden on the grantee for when he is sued by the adverse claimant he may, by proper notice and demand made upon the grantor, relieve himself of all duty, and transfer to those liable on the covenant the peril of defending or allowing a default judgment to be entered.²⁵ Whether this would give the grantee full protection or not seems doubtful since he may have made improvements or otherwise altered his position with respect to the premises so as to make it imperative that an effective defense be established.

Where the adverse claim had a legal, even though not an equitable, foundation, the grantee may often recover the expenses of successfully defending against it if he has complied with the requirements of notice to, and demand upon, the grantor.²⁶ Examples of such cases are where the adverse claimant had the legal title but had been barred by the statute of limitations;²⁷ or where the action was dismissed for some other reason.²⁸ The reason assigned for such decisions is that the covenantee is entitled to reimbursement for costs incurred in defending all lawful claims, and since the adverse claimant in these cases has legal title, he has a lawful claim even though his remedy may be barred or fail for other reasons.

The same general principles are applicable to a suit brought by the grantee to establish his title against third persons, as where he is defending his title in a suit brought against him. Before the grantor can be held liable for the expenses of litigation, the third party must have a lawful claim. So, when the grantee successfully brings suit to establish his title against third persons who were without any valid claim to the premises, he cannot recover the expenses of the litigation from the grantor.²⁹

In general, when the expenses of litigation are recoverable, a reasonable at-

24. In *Mackenzie v. Clement*, 144 Mo. App. 114, 129 S. W. 730 (1910), the court said: "To allow the mere good faith of the grantee, based on the formidable appearance of the claim made by one assailing his title, to be the criterion governing the liability of the warrantor on his warranty against 'lawful claims,' would render the position of such warrantor exceedingly hazardous. . . . The claim of the claimant must be superior to the title conveyed. 'The grantor does not warrant that no one shall make a claim of adverse title but only that no one shall make a claim which shall be adjudged paramount to the title conveyed by this deed.'"

25. *Eaton v. Clarke*, 80 N. H. 577, 120 Atl. 433 (1923).

26. *Meservey v. Snell*, 94 Iowa 222, 62 N. W. 767 (1895); *Smith v. Keeley*, 146 Iowa 660, 125 N. W. 669 (1910); *Hazelett v. Woodruff*, 150 Mo. 534, 51 S. W. 1048 (1899).

27. *Smith v. Keeley*, 146 Iowa 660, 125 N. W. 669 (1910).

28. *Hazelett v. Woodruff*, 150 Mo. 534, 51 S. W. 1048 (1899).

29. *Rittmaster v. Richner*, 14 Colo. App. 361, 60 Pac. 189 (1900); *Thorne v. Clark*, 112 Iowa 548, 84 N. W. 701 (1900); *Luther v. Brown*, 66 Mo. App. 227 (1896); *Fishel v. Browning*, 145 N. C. 71, 58 S. E. 759 (1907).

torney's fee is considered as a proper expense and is recoverable along with the purchase money, interest, and other costs. But in Missouri, an early case³⁰ contained a dictum that the measure of damages is limited to the purchase money, interest, and costs. However, this dictum was overruled by a later decision³¹ by the Missouri Supreme Court which established, in Missouri, the general rule that attorney's fees are recoverable where a breach of the covenant for warranty, if the grantee notified the grantor to defend and the grantor failed. There would seem to be no reason why this rule should not be extended to breaches of the other covenants for title.

DAVID R. HARDY

30. *Matheny v. Stewart*, 108 Mo. 73, 17 S. W. 1014 (1891), where the grantee defended a useless cause and was refused recovery of attorney's fees.

31. *Hazelett v. Woodruff*, 150 Mo. 534, 51 S. W. 1048 (1899).