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*"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."*—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

## Comments

### EXTENT OF AUTHORITY OF AN AUTOMOBILE SALESMAN TO EXCHANGE

This note deals primarily with the problem arising when an agent authorized to sell an automobile for his principal is expressly instructed not to accept another car in trade. In violation of his instructions he accepts from the vendee, as part payment of the purchase price, a used car. The problem presented has numerous

aspects, two of which will be considered in some detail: first, that presented if the agent has been intrusted with the possession of the car, with his power of disposition limited as above; and second, that presented if the agent has similar limited authority but does not have possession.

The question presented is primarily one of the agent's authority. We may start with the proposition that one appointing an agent to act for him may invest that agent with as much or as little of his legal personality as he sees fit, *i. e.*, the agent's authority may be broad or narrow.<sup>1</sup> We may note also at the outset that the principal is bound by the acts of such agent only within the scope of the authority thus granted.<sup>2</sup> If these were the only considerations involved, the answer to the question put would be simple indeed—the principal has not authorized the agent to take cars in trade and hence the principal is not bound by such trades.

The concept of apparent authority, however, may, and often does, alter the result reached. We will not argue the terminology involved, though it might well be said that what is "apparent" to one is also "real" to him. It seems futile, for instance, to argue whether the clouds visible in the sky are "apparent" or "real." So with "apparent" authority. If a third party reasonably believes from the principal's conduct that the agent has, in fact, the authority he purports to possess, such authority would seem to be "real" to such third person and, being "real," worthy of reliance, and acts done in conformity therewith would seem to be binding upon the principal. Such is, in fact, the case. When in a given situation a court holds that an agent has "apparent" authority to bind his principal, the contract is as binding on the principal as it would have been had the principal given the agent express or "real" authority.<sup>3</sup> On our facts, since the agent has no express authority to accept trades, and it would seem difficult to "imply" such authority in the face of express orders to the contrary, our inquiry seems to center around the concept of apparent authority. Broadly put, our first question is this: What is the extent of the apparent authority vested in an agent by reason of his principal's grant to him of the possession of a chattel with a limited power of disposal thereof?

The answer depends largely upon the character of the agent. It has been well established in our common law from early times that the mere intrusting of possession of a chattel to another did not invest that other with any authority, real or apparent, to dispose of the chattel in any way.<sup>4</sup> Possession was a neutral circumstance. It might mean anything in general, and actually meant nothing

1. 1 MECHEM, AGENCY (2d ed. 1914) § 709.

2. 2 MECHEM, AGENCY (2d ed. 1914) § 1709.

3. *Boylan v. Workman*, 206 Ia. 469, 220 N. W. 49 (1928); *Daly Lumber Co. v. Brunswick-Walke-Collender Co.*, 263 N. W. 234 (Iowa 1934); *Fidelity & Casualty Co. v. Waugh*, 222 Ky. 198, 300 S. W. 592 (1927); *National Deposit Bank v. Ohio Coal Co.*, 250 Ky. 288, 62 S. W. (2d) 1048 (1933).

4. *Young v. Harris-Cortner Co.*, 152 Tenn. 15, 268 S. W. 125 (1924); *Collins v. Rulli*, 20 Hun 246 (N. Y. 1880); *Romeo v. Martucci*, 72 Conn. 504, 45 Atl. 1 (1899); *Drain v. LaGrange State Bank*, 303 Ill. 330, 135 N. E. 780 (1922); *Moe Co. v. Logue Co.*, 108 Ill. App. 128 (1903). 1 WILLISTON, SALES (1924) § 313; VOLD, SALES (1931) 398.

in particular. If, however, possession were intrusted to an agent who was himself a selling agent for similar commodities,<sup>5</sup> or a dealer in like articles,<sup>6</sup> the same result did not inevitably follow. It has been the feeling of a substantial number of courts that one in possession of an article who was a dealer in similar articles was "apparently" authorized to sell it.<sup>7</sup> This result has been reached on the theory, among others, that although naked possession confers no apparent authority to deal with the article, if other indicia of authority be added to bare possession, apparent authority to deal with the article may follow. The fact that the possessor-agent is a dealer in similar articles is a circumstance, it is said, indicating that such possessor may have received authority from the owner to sell.<sup>8</sup>

There is, however, another line of authority taking the opposite position.<sup>9</sup> The agent, it is said, had no express authority to sell. Possession, moreover, means nothing.<sup>10</sup> It inevitably follows that there was no apparent authority to sell.<sup>11</sup> We might suggest that the difference between the two views lies in the different feelings of the courts involved as to the relative equities of the defrauded owner and the purchaser. To one group of courts the owner has helped create a situation rife with potentialities for fraud, and for his misplaced confidence in the alter ego of his choice he must suffer. To the other group of courts the purchaser is a somewhat gullible adventurer for whose welfare the owner was no insurer. He should have known that possession meant nothing, and yet he made no inquiry as to the dealer's authority. Consequently, the fault is his, and his the burden.

But it is not the agent's power to sell that is denied in the automobile cases. The owner freely admits the agent's power to dispose of the chattel by sale.

5. *Pickering v. Busk*, 15 East 38 (K. B. 1812); *Cable Co. v. Hunt*, 8 Ga. App. 562, 70 S. E. 70 (1911); *Ex parte Dixon*, 4 Ch. D. 133 (1876).

6. *Carter v. Rowley*, 59 Cal. App. 486, 211 Pac. 267 (1922); *Moore v. Ellison*, 82 Colo. 478, 261 Pac. 461 (1927); *Commercial Acceptance Trust Co. v. Bailey*, 87 Cal. App. 117, 261 Pac. 743 (1927); *Glass v. Continental Guaranty Corp.*, 81 Fla. 687, 88 So. 876 (1921); *Commonwealth Finance Corp. v. Schutt*, 97 N. J. Law 225, 116 Atl. 722 (1922); *Clark v. Flynn*, 120 Misc. 474, 199 N. Y. Supp. 583 (1923); *Jones v. Commercial Inv. Trust*, 64 Utah 151, 228 Pac. 896 (1924); *Harrison v. Auto Securities Co.*, 70 Utah 11, 257 Pac. 677 (1927).

7. See note 6, *supra*.

8. *Ibid.*

9. *Biggs v. Evans*, [1893] 1 Q. B. 88; *Utica Trust & Deposit Co. v. Decker*, 244 N. Y. 340, 155 N. E. 665 (1927); *Silberfeld v. Solomon*, 70 Colo. 413, 202 Pac. 113 (1920); *Parsons v. Webb*, 8 Me. 38 (1831); *Levi v. Booth*, 58 Md. 305 (1882); *Warner v. Martin*, 11 How. 209 (U. S. 1850).

The *Restatement of Agency* under § 175, seemingly, has adopted a compromise position between the two views noted. RESTATEMENT, AGENCY (1933) § 175. See (1930) 16 A. B. A. J. 117, 120. The *Restatement of Agency* states the principle to be that: "(1) A disclosed or partially disclosed principal who entrusts a special agent with the possession of a chattel other than a commercial document . . . with directions to deal with it in a particular way, as by sale, barter, pledge, or mortgage, is not thereby affected in his interests by a transaction of a kind different from that authorized. (2) The principal is affected in his interests by a transaction of the same kind as that authorized if it is conducted in the usual course of business by an agent dealing in such chattels with one who reasonably believes that the agent is authorized."

10. See note 4, *supra*.

11. See note 9, *supra*.

What he denies is the agent's power to dispose of it by barter or exchange. The bearing upon this issue of the agent's power to sell, discussed heretofore, seems, however, to be this: if the agent, from his possession as a dealer, has the appearance of ownership, it would seem to follow that he also has the full range of an owner's powers, which would, of course, include the power to barter or exchange as well as to sell for cash.<sup>12</sup>

If, however, the circumstances were such that the possessor of the car remained merely an agent, and was not apparently a dealer (the typical car salesman case), the owner of the car being either the salesman's employer or a private party, it remains to consider his position apart from any usage as to trade-ins. The agent, upon this hypothesis, is concededly an agent for the purpose of sale, but he is merely that and nothing more. Such being the case, the orthodox dogma is that he can sell only for cash.<sup>13</sup> His apparent authority goes no further than the acceptance of money for the sale.<sup>14</sup> This principle was enunciated as the logical result of a long line of precedent that a special agent for the purposes of sale did not have the authority to barter or exchange.<sup>15</sup>

This doctrine was based in large part upon a reasonable construction and interpretation of the agent's authority. Certainly the agent had no express authority to barter or exchange. Although an agent concededly has implied authority to do those acts which are reasonably necessary and incidental to the express authority granted, a sale of goods can be accomplished without a barter or exchange. Nor was this a power that the agent must be given in order to effectuate the principal's grant of authority.<sup>16</sup> As to apparent authority, the principal has not, by merely creating an agency for sale, held out the agent as an owner, nor does the authority of the agent reasonably appear to be greater than that of a mere selling agent. A prudent third party, conversant with the usages of the business world, knows or is held to know, that a selling agent cannot deal with the owner's goods as he wishes. He can sell and only sell, which means "to dispose of for cash."<sup>17</sup> To permit the agent to barter or exchange would give the agent a dominion over the goods far in excess of his real or apparent authority, a dominion that only an owner, or one who reasonably appears to be

12. See the remarks of Professor Mechem in (1928) 22 ILL. L. REV. 652.

13. *Holmes v. Tyner*, 179 S. W. 887 (Tex. Civ. App. 1915); *Davidson v. Parks*, 79 N. H. 262, 108 Atl. 288 (1919); *Royle v. Worcester Buick Co.*, 243 Mass. 143, 137 N. E. 531 (1922) *semble*. In the following cases from the stated facts it cannot be determined whether the agent was possessed of the principal's chattel. *Eaton v. Hattiesburg Auto Sales Co.*, 151 Miss. 211, 117 So. 534 (1928); *Reo Motor Car Co. v. Barnes*, 9 S. W. (2d) 374 (Tex. Civ. App. 1928), (1929) 42 HARV. L. REV. 570; *Lee v. Dixie Motor Sales Co.*, 155 Miss. 393, 124 So. 487 (1929); *cf. Salley v. Jones Motor Co.*, 12 La. App. 150, 125 So. 599 (1929).

14. See note 13, *supra*.

15. *Kearns v. Nickse*, 80 Conn. 23, 66 Atl. 779 (1907); *Victor Sewing Machine Co. v. Heller*, 44 Wis. 265 (1878); *Guerreiro v. Peile*, 3 Barn. & Ald. 616 (1820); *Brown v. Smith*, 67 N. C. 245 (1872); *Taylor & Farley Organ Co. v. Starkey*, 59 N. H. 142 (1879); *Trudo v. Anderson*, 10 Mich. 357 (1862); *Jones v. Richards*, 50 Misc. 645, 98 N. Y. Supp. 698 (1906); *Roberts v. Francis*, 123 Wis. 78, 100 N. W. 1076 (1904); *Cleveland v. State Bank of Ohio*, 16 Ohio St. 236 (1865); *Liebhart v. Wilson*, 38 Colo. 1, 88 Pac. 173 (1906).

16. See note 15, *supra*.

17. 2 C. J. § 234, p. 599.

in the position of an owner, would have. It seems clear that there is here, as in other analogous situations, a well defined policy to discourage the casual transfer of "ownership."

Following the long line of precedent established in the earlier barter cases, the doctrine has been extended to automobile exchange transactions,<sup>18</sup> as to which it has been accorded considerable acceptance by American courts. It should be noted, however, that its application to automobile exchange transactions has been confined, so far as the writer's research has determined, exclusively to cases in which the authority of a mere salesman to deal in this manner was contested. We have found no cases in which a salesman in fact reasonably appeared to be the owner of the car he was attempting to sell.

An additional large class of cases is that class wherein an agent, who has been authorized to make contracts in regard to the sale or disposition of the principal's chattel, has not been given possession of the chattel. Again the agent, in violation of his instructions, purports to barter or exchange the chattel rather than to dispose of it by sale. Express authority to do so is lacking, and similarly implied authority. As to apparent authority, whatever slender indication of authority might arise from possession is here lacking, and on these facts alone, other indicia of title being absent, courts will not recognize any greater authority in such an agent than that expressly granted by his principal.<sup>19</sup> The authority to barter is not, by hypothesis, included with the authority expressly granted. The prevailing view of the American courts is expressed in the *Restatement of Agency* to be:

"Unless otherwise agreed, authority to sell includes only authority to sell for money payable at the time of the transfer of the title."<sup>20</sup> (italics mine)  
Comment (a) to above: "Unless otherwise agreed, authority to sell does not include authority to mortgage the subject matter, to exchange it, to make a gift of it, to grant an option of purchase, or to partition it."

Upon the reasoning indicated herein, which is supported by ample authority, it would seem clear that an automobile sales agent without possession of the chattel would be no more favored than any other agent similarly situated.

We conclude, then, that possession alone, save in those jurisdictions following the "dealer" exception, and *a fortiori* a mere grant of express power to sell,

18. See note 13, *supra*. In an effort to alleviate the hardship upon third persons who dealt with a factor in the belief that he was the true owner (Bronson, J., in *Stevens v. Wilson*, 6 Hill 512 (N. Y. 1844)) some states have passed the so-called Factors' Acts. The effect of those statutes upon the instant problem is outside the scope of this note as the effect given the statutes depends in each case upon the language of the particular statute and the construction which the courts in the jurisdiction involved have placed upon that statute. However, a query may be raised as to whether or not an agent who has possession of a demonstrator (which may be accepted and treated by the parties as a facsimile of the automobile to be sold) can be considered for the purpose of the Factors' Acts as in "possession" of the automobile actually sold. That car may in fact be in the principal's warehouse or still in the manufacturer's assembly line. 1 WILLISTON, SALES (1924) §§ 318-323; VOLD, SALES (1931) 402; (1921) 14 A. L. R. 431.

19. *Elfring v. New Birdsall Co.*, 16 S. D. 252, 92 N. W. 29 (1902); *Fay & Eagan Co. v. Causey*, 131 N. C. 350, 42 S. E. 827 (1902); *Hayes v. Colby*, 65 N. H. 192, 18 Atl. 251 (1889); *Sioux City Nursery & Seed Co. v. Magnes*, 5 Colo. App. 172, 38 Pac. 330 (1894).

20. RESTATEMENT, AGENCY (1933) § 65.

conveys no "apparent" authority to the agent to deal with the car other than in accordance with his instructions, which do not include barter or exchange.

Our next consideration concerns the effect of a trade usage of exchange upon the authority of the agent. In the ordinary contract relationship, if the parties, having knowledge of the existence of a usage in a particular business, manifest their assent to be bound by such usage, the contract will be so interpreted,<sup>21</sup> and their manifestation of such assent may be implied as well as expressed.<sup>22</sup> Whenever a usage in a particular business has become so well known, so notorious, that any reasonably prudent person in such business would have known of its existence, parties dealing in the business will be charged with knowledge of the usage.<sup>23</sup> Similarly, a principal acting through an agent is bound by the proper usages of the business concerning which the agent is instructed to act.<sup>24</sup> The principal is presumed to have conferred authority upon the agent in contemplation of the trade usage. Although the effect of a trade usage, once established, upon an agent's authority is clear, the proof of the existence of a usage so well-known and notorious that the principal may be held to have manifested his consent with reference to it may and often does raise a difficult problem of proof, particularly in view of the fact that it must be shown that the usage included relates not only to the performance of the act in question but by the particular agent involved. Specifically where the authority of an automobile salesman has allegedly arisen from the effect of a trade usage upon the express grant of power, the proof of the usage, if attempted, has been, apparently, an almost insurmountable obstacle. In this situation, while the courts repeat that:

"A salesman's authority to sell automobiles for the owner does not confer on him authority to exchange them for other automobiles, *in the absence of proof of special authority so to do or a general custom or usage from which such special authority can be inferred,*"<sup>25</sup> (italics mine)

we have found no case wherein the court has been convinced by the evidence introduced, if any, that such a usage did exist.<sup>26</sup> At the other extreme, in one of the leading cases in this field the court took judicial knowledge of the existence of such a usage. This was the case of *Voell v. Klein*,<sup>27</sup> in which the court said:

21. See *Weisberg v. Hunt*, 239 Mass. 190, 131 N. E. 471 (1921); *Walters v. Albee*, 245 Mass. 216, 139 N. E. 521 (1923); *Shuman v. Goldsmith*, 115 Misc. 327, 183 N. Y. Supp. 84 (1921).

22. *Neer v. Lang*, 252 Fed. 575 (C. C. A. 2d, 1918). See *Pfiester v. Western U. Tel. Co.*, 282 Ill. 69, 118 N. E. 407 (1917); *Goben v. Akin*, 208 Ia. 1354, 227 N. W. 400 (1929); *Long Bros. v. Armsby Co.*, 43 Mo. App. 253 (1891); *Stephens v. Chicago & N. W. Ry.*, 200 Wis. 181, 227 N. W. 875 (1929).

23. *Federal Reserve Bank v. Malloy*, 264 U. S. 160 (1924); *Continental Coal Co. v. Birdsall*, 108 Fed. 882 (C. C. A. 4th, 1901); *Central Commercial Co. v. Jones-Dusenbury Co.*, 251 Fed. 13 (C. C. A. 7th, 1918).

24. *Watts v. Howard*, 70 Minn. 122, 72 N. W. 840 (1897); *Westurn v. Page*, 94 Wis. 251, 68 N. W. 1003 (1896); *Milwaukee & Wyo. Inv. Co. v. Johnston*, 35 Neb. 554, 53 N. W. 475 (1892); *Durkee v. Carr*, 38 Ore. 189, 63 Pac. 117 (1900); *Adams v. Pittsburgh Ins. Co.*, 95 Pa. St. 348 (1880); *Williams v. Getty*, 31 Pa. St. 461 (1858); *Larson v. Aultman & Taylor Co.*, 86 Wis. 281, 36 N. W. 915 (1893); *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 400 (1873); *Brady v. Todd*, 9 C. B. N. S. 592 (1861).

25. *Lee v. Dixie Motor Sales*, 155 Miss. 393, 124 So. 487, 488 (1929).

26. See note 13, *supra*.

27. 184 Wis. 620, 623, 200 N. W. 364 (1924), (1925) 10 IOWA L. BULL. 144, (1925) 3 WIS. L. REV. 190.

“ . . . it is a matter of common knowledge that in the sale of automobiles at the present time an old car is frequently, if not usually, accepted as part payment . . .,” and in the subsequent case of *Reader v. Applegate*,<sup>28</sup> the Wisconsin court by *dictum* reiterated this position. Although the position of the Wisconsin court in 1924, the date of the *Voell* decision, might have aroused valid criticism at the time,<sup>29</sup> there seems considerable justification for it today. At the present time it is a well established fact that a large percentage of automobile sales involve an exchange transaction. To the layman it is a “customary” feature of the automobile sales transaction.<sup>30</sup> In fact, from statistics compiled by the Association of Sales Finance Companies, the percentage of trade-ins on the sale of new cars increased from 73 per cent in 1929 to 88 per cent in 1938. The percentage of trade-ins on the sales of used cars for the same period increased from 46 to 59 per cent.<sup>31</sup> Although it cannot be determined how many of these sales were consummated by agents with or without authority to make exchanges,<sup>32</sup> these facts seem to indicate that there does exist in the automobile business generally over the United States a usage to take in barter or exchange a used car at the time of the sale of a new car. However, whether the particular usage exists in a given locality or not, or with regard to agents of the particular type involved, are questions of fact to be determined in each particular case.

Missouri has voiced its approval of the doctrine, previously noted, that an agent who is authorized to sell his principal's personalty does not have authority to barter or exchange that property.<sup>33</sup> So much is settled. The applicability of the doctrine to the automobile cases in this state, however, involving as it does the problem of the possible trade usage, remains a matter of conjecture. It is not inconceivable that the automobile cases may be distinguished from the orthodox

28. 224 Wis. 574, 271 N. W. 839 (1937), (1937) 21 MARQ. L. REV. 148.

29. See Comment (1925) 10 IOWA L. BULL. 144.

30. In a nationwide broadcast by Mr. W. J. Cameron of the Ford Motor Co. on March 6, 1938, he described certain features of the “used car problem,” and in his concluding remarks stated in part that the trade-in had “become *customary*” in the American automobile business. (*italics mine*)

31.

<i>Percent Trade-ins.</i>		1929	1932	1933	1935	1936	1937	1938
On sales of new cars . . . . . (a)		73	89	86	85	85	84	88
On sales of used cars . . . . . (a)		46	48	52	55	51	55	59
Used cars sold, % of new . . . . (b)			209	162	140	151	162	216

(a) Source: Association of Sales Finance Companies; (b) Source: Automobile Manufacturer's Association. The figures after 1938 were not available to this writer.

32. Thus in *Salley v. Jones Motor Co.*, 12 La. App. 150, 125 So. 599 (1929), the court concedes the proof of usage to take trade-ins but not as to the particular salesman involved.

33. In *Benny v. Rhodes*, 18 Mo. 147 (1853), the principal consigned goods to an agent for the purpose of sale. A third party who dealt with the agent was fully aware that the agent was acting in the capacity of a factor. The contract for the sale of the goods provided that payment was to be made by cancelling an antecedent debt owed by the agent to the third party. The court held that “. . . in the absence of special instructions, the agent was authorized to sell according to the usual mode of dealing in the particular trade with which he was conducting. If the consignee sells in an unusual manner, not warranted by the custom of the trade, and without express authority, the principal is not bound by his act. An agent for sale cannot barter the goods of his principal.” *Accord: Wheeler & Wilson Mfg. Co. v. Givan*, 65 Mo. 89 (1877).



barter cases on the ground of a usage in the business that the selling agent may accept used cars in trade as a part of the normal sales transaction.

SIMON POLSKY

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INSURANCE—AUTOMATIC PREMIUM LOAN POLICIES AND THE NON-FORFEITURE STATUTES

Missouri, as most states, has a statute designed to prevent the forfeiture, for non-payment of premiums, of life insurance policies which have accumulated a reserve.<sup>1</sup> Begot by a widespread distrust and a knowledge of unjust practices of the increasingly affluent insurance companies, and nurtured by courts indulgent of the policy holders, the non-forfeiture statutes have enjoyed a history of strict construction against the companies. However, in a recent decision, *Heuring v. Central States Life Ins. Co.*,<sup>2</sup> the Missouri Court of Appeals at Springfield went to lengths to hold for a beneficiary to which it is doubtful whether many courts would go.

The question in the *Heuring* case was whether an automatic premium loan provision was void because it conflicted with the non-forfeiture statutes. Briefly, the statutes provide that no life insurance policy on which premiums have been paid for three years shall be forfeited by reason of non-payment of premiums but, instead, the reserve shall be used to purchase extended insurance.<sup>3</sup> The automatic premium loan clause in the policy was of the usual kind and provided that if the insured so requested in his application, or later, any premium still unpaid on the last day of grace would be advanced by the company as a loan against the reserve.<sup>4</sup> The insured had requested the automatic loan privilege in her application and when she did not pay her premium it was paid by the company in pursuance thereto. The reserve was sufficient to keep the policy in force in this manner for a little more than ten months, but if it had been applied to purchase temporary (extended) insurance under the statute the temporary insurance would have been in force for twelve months and twenty-two days. It so happened that the insured died in twelve months and ten days. The first trial resulted in a judgment for the insurance company,<sup>5</sup> the court holding the insured could enter into any contract he wished and would be bound thereby. The statutes were not considered. On *certiorari* the Supreme Court of Missouri<sup>6</sup> found the decision to conflict with its own prior decisions to the effect that there was no such freedom

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1. MO. REV. STAT. (1929) §§ 5741-5744.

2. 232 Mo. App. 731, 120 S. W. (2d) 176 (1938).

3. MO. REV. STAT. (1929) § 5741. The following sections contain provisions relieving a policy from the application of the statute if certain other methods of settlement upon lapse were prescribed in the policy contract. The automatic premium loan provision clearly was not, and was not contended to be, within the exceptions, and so they will not be discussed here.

4. See note 2, *supra*, 179.

5. *Heuring v. Central States Life Ins. Co.*, 230 Mo. App. 42, 87 S. W. (2d) 661, 668 (1935).

6. *State ex rel. Heuring v. Allen*, 342 Mo. 81, 112 S. W. (2d) 843 (1938).

to contract within the field occupied by the non-forfeiture laws. The case was reversed and remanded, but the question of whether the statutes were violated was left expressly up to the court of appeals. Upon a second trial the beneficiary was allowed to recover, the court holding that the statute nullified the automatic loan clause and that the reserve should have been used to extend the insurance.<sup>7</sup>

Since a great many Missouri insurance contracts contain a similar automatic premium loan provision, by which their premiums have, at one time or another, been paid, this decision, challenging the provision, has caused the life insurance companies no little concern. Logically it would seem that all such policies are no longer in force in their original form but have lapsed and now exist, if at all, only by force of the statute, and in the form prescribed therein. The matter could become more acute where the insured has resumed payment of premiums in cash after one premium has been paid by automatic loan. It is likely that the acceptance, on the company's part, and the payment, on the insured's part, of further premiums in cash would estop either party to deny the vitality of the original policy contract. At any rate it is doubtful whether the courts would extend the ruling of the *Heuring* case to such dryly logical extreme. Any safe conclusion in this respect must await further decisions.

For the present it is of interest to examine the final decision of the Springfield Court. It is well-settled that the non-forfeiture statutes are constitutional,<sup>8</sup> that they apply to all Missouri old-line insurance contracts,<sup>9</sup> and that they are mandatory, overriding all antagonistic policy provisions.<sup>10</sup> Conceding that the policy provision was doomed once it was found to conflict with the statute, the question is,—was there a conflict? The court answered in the affirmative, saying that upon "*default . . . the reserve . . . shall be applied as a net single premium for extended insurance . . . that such action is made mandatory . . . that as the special automatic loan privilege clause provides a method . . . not contemplated in section 5741 . . . it is void.*"<sup>11</sup> (italics the writer's). This reasoning recognizes that the statute contemplates default, that is, non-payment of premiums, and operates only as a consequence of a default,

7. See note 2, *supra*.

8. *Dodge v. New York Life Ins. Co.*, 189 S. W. 609 (Mo. App. 1916), *rev'd*, 246 U. S. 357 (1918); *Burridge v. New York Life Ins. Co.*, 211 Mo. 158, 109 S. W. 560 (1908); *Whitfield v. Aetna Life Ins. Co.*, 205 U. S. 489 (1907); *New York Life Ins. Co. v. Cravens*, 178 U. S. 389 (1900); *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246 (1906); *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28 (1900); *Daggs v. Orient Ins. Co.*, 136 Mo. 382 (1896), *aff'd*, 172 U. S. 557 (1898); *State ex inf. Hadley v. Standard Oil Co.*, 194 Mo. 124, 91 S. W. 1062 (1906); *Paul v. Virginia*, 8 Wall. 168 (U. S. 1868); *State v. Stone*, 118 Mo. 388, 24 S. W. 164 (1893); *Hooper v. California*, 155 U. S. 648 (1894).

9. *Smith v. Mutual Benefit Life Ins. Co.*, 173 Mo. 329, 72 S. W. 935 (1903); *Horton v. New York Life Ins. Co.*, 151 Mo. 604, 52 S. W. 356 (1899); *Whittaker v. Mutual Life Ins. Co.*, 133 Mo. App. 664, 114 S. W. 53 (1908); *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 50 S. W. 519 (1899), *aff'd*, 178 U. S. 389 (1900). *Cf. Smoot v. Bankers Life Ass'n*, 138 Mo. App. 438, 120 S. W. 719 (1909) (the statute does not apply to assessment companies); *Garretson v. Sovereign Camp, W. O. W.*, 210 Mo. App. 539, 547, 243 S. W. 257 (1922) (statute does not apply to fraternal beneficiary associations).

10. *McKinney v. Fidelity Mutual Ins. Co.*, 270 Mo. 305, 193 S. W. 564 (1917); *Saunders v. Union Central Life Ins. Co.*, 212 Mo. App. 186, 253 S. W. 177 (1923).

11. See note 2, *supra*, 182.

and, *a fortiori*, that until default calls it into play the statute cannot conflict with anything in the policy. It has been urged that an automatic premium loan clause, instead of following a default, actually prevents it; that by requesting that all premiums unpaid on the last day of grace be paid from the loan value the insured has chosen not to allow a default.<sup>12</sup> So found the Michigan Supreme Court<sup>13</sup> in a case where a similar statute and policy provision were held not to conflict. Called upon to determine the effect of an automatic premium loan, the Kansas City Court of Appeals<sup>14</sup> adopted the Michigan opinion, adding that, "The situation would have been no different than if he had paid the assessments out of his own pocket or had he borrowed the money from a bank or a friend."<sup>15</sup> True, the latter case did not involve the non-forfeiture statute,<sup>16</sup> but the presence in the case of the statute should not necessarily lend a different meaning to "default." In fact, on the reasoning of the Michigan court, the statute is not properly in the case until the naked non-payment question has been decided, and on this precise point the holdings of the two Missouri courts of appeals are contrary. It is submitted that a promisor is not in default when the debt has been paid by his direction out of funds subject to his order, even though such funds are in the hands of the obligee. In effect this is no different from where the insured signs a premium lien note in payment of a premium, and it is well-settled in Missouri that there is no default in the latter instance.<sup>17</sup>

The court in the *Heuring* case explained away the holding of the Michigan court with the terse statement that the Michigan act was different. However, that act, while worded differently, seems to attain the same general object, namely,

12. Mutual Benefit Life Ins. Co. v. Commissioner of Insurance, 151 Mich. 610, 115 N. W. 707 (1908); *Barthel v. Sovereign Camp, W. O. W.*, 230 Mo. App. 247, 93 S. W. (2d) 285 (1936); *Massachusetts Mutual Life Ins. Co. v. Jones*, 44 F. (2d) 540 (C. C. A. 4th, 1930); *Spratling v. International Life Ins. Co.*, 23 Ga. App. 609, 99 S. E. 162 (1919); *Perkins v. Empire Life Ins. Co.*, 17 Ga. App. 658, 87 S. E. 1094 (1916); *Missouri State Life Ins. Co. v. Ross*, 185 Ark. 556, 48 S. W. (2d) 230 (1932); *Sovereign Camp, W. O. W. v. Easley*, 188 Ark. 1012, 69 S. W. (2d) 273 (1934). In most of these cases the automatic loan provision was not examined in connection with a non-forfeiture law, and so, although the opinions are relevant to the question in the *Heuring* case, they are not strictly in point.

13. *Mutual Benefit Life Ins. Co. v. Commissioner of Insurance*, 151 Mich. 610, 115 N. W. 707 (1908).

14. *Barthel v. Sovereign Camp, W. O. W.*, 230 Mo. App. 247, 93 S. W. (2d) 285 (1936).

15. *Id.* at 290.

16. The case involved an assessment company, to which the non-forfeiture law does not apply. The question was whether the payment of premiums under the automatic loan provision continued the policy in full force so that the loan value would increase each year just as though premiums had been paid in cash. It was held such payment of premiums did not change the status of the policy and that the increased loan values of each subsequent year were available to the insured. It is interesting to note that giving efficacy to the automatic loan clause was in favor of the insured, while in the *Heuring* case it was to the insured's advantage to deny the validity of the clause.

17. *McCall v. International Life Ins. Co.*, 196 Mo. App. 318, 193 S. W. 860 (1917); *Rick v. John Hancock Mutual Life Ins. Co.*, 230 Mo. App. 1084, 93 S. W. (2d) 1126 (1936); *McGinnis v. Aetna Life Ins. Co.*, 78 S. W. (2d) 501 (Mo. App. 1934); *Insurance Co. v. Dutcher*, 95 U. S. 269, 272 (1877) (court said that payment by note was the same as paying in cash, the only difference being that it lacked the formality of money changing hands, and that the law does not require an idle thing to be done).

to prescribe that every insurance policy, "in event of default, shall secure to the owner a stipulated form of insurance, the net value of which shall be at least equal to the reserve at date of default."<sup>18</sup> This is a mandatory consequence of *default*. It is quite different from the automatic premium loan agreement, and conflict was avoided only because the Michigan court found there was no default. The summary dismissal of the Michigan case, without pointing to the controlling difference in the statute, is not convincing.

It may be argued with reason that the terms "default" or "non-payment of premiums" are not words of a single inevitable connotation, but are ambiguous and subject to construction. Indeed, this is suggested by both the Michigan Supreme Court and the Kansas City Court of Appeals.<sup>19</sup> However, there is nothing in its opinion to indicate the Springfield Court found default by construction of the act. On the contrary, default is assumed. It is at best debatable whether even so gymnastic a process as construction would lead to the conclusion that there was non-payment of premiums within the meaning of the statute. In its search for the meaning of ambiguous words in the non-forfeiture law the courts are guided mainly by two inquiries: (1) What was the intended meaning as ascertainable from the purpose of the act,<sup>20</sup> and (2) what interpretation will favor the insured?<sup>21</sup> The obvious purpose of the law was to prevent the insurance companies from avoiding policies for non-payment of premiums and confiscating the reserves belonging by right to the insured. Since under the automatic loan provision the insured gets the benefit of the reserve it does not seem that the general purpose of the act is being violated. Nor would the second inquiry compel the finding of non-payment. Undoubtedly so finding in the instant case favored the particular beneficiary, but whether the holding would be to the advantage of policy holders generally is doubtful. There are instances where the operation of the automatic loan would be a definite advantage; for example, where the insured is temporarily embarrassed but wishes to keep his insurance in full force in its original form until such time as he is able to resume payments. Under the extended insurance provision the reserve is applied as a single premium to purchase term insurance in the amount of the face of the policy. If the insured lives beyond the term for which the insurance will be extended he is without insurance, and to get more he would have to take out a new policy at a rate higher in proportion to his increased age. Furthermore, the policy holder may have become unable to pass the medical examination necessary in order to qualify

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18. MICH. COMP. LAWS (1929) § 12427(8).

19. *Mutual Benefit Life Ins. Co. v. Commissioner of Insurance*, 151 Mich. 610, 115 N. W. 707 (1908); *Barthel v. Sovereign Camp, W. O. W.*, 230 Mo. App. 247, 93 S. W. (2d) 285 (1936) (it was there said, "there was default on insured's part in the sense that insured failed to continue to pay his assessments in the ordinary way but there was no default in the sense that the policy was ended by the non-action of the insured in this respect".)

20. *Westerman v. Supreme Lodge Knights of Pythias*, 196 Mo. 670, 710, 714, 94 S. W. 470 (1906).

21. *Gooch v. Metropolitan Life Ins. Co.*, 333 Mo. 191, 61 S. W. (2d) 704 (1933); *Howell v. Security Mutual Life Ins. Co.*, 215 Mo. App. 692, 253 S. W. 411 (1923), *cert. denied*, *State ex rel. Security Mutual Life Ins. Co. v. Allen*, 305 Mo. 607, 267 S. W. 379 (1924).

for a standard risk policy. The only situation in which extended insurance would clearly be to the insured's advantage is where he will die within the extended period, and that contingency is unpredictable. To be consistent with an earlier opinion the Springfield court would concede the extended insurance provision is not necessarily the better plan for the insured.<sup>22</sup> So these two imposing tenets of construction hardly support the result reached.

In summary, the *Hearing* case is certainly right if there was conflict. There was conflict if automatically charging one's premium, on the last day of grace, to the loan value by the company at the insured's request, made when the policy was purchased, is "non-payment of premiums" within the meaning of the statute; otherwise there was not. Non-payment, or default, may be a term of technical significance, in which case the view that this was payment, although in a slightly different manner, would seem logical. On the other hand, it may be an ambiguous term that must be construed, in which case at least two devices of construction point likewise to the conclusion that there was no default. How the court arrived at default in the principal case is not clear, nor is lucidity added by the final statement in the opinion to the effect that the policy provision is void because it conflicts with the statute, and a void provision cannot prevent a default.<sup>23</sup> If the court had added, "and, there being a default, therefore there was a conflict," the circuitry of the proposition would have been complete. The court assumes there was the necessary default and then reasons from that assumption to find default. It is submitted that until there was a non-payment, calling the statute into the arena, there could be no conflict nullifying the policy provision.

Possibly the real explanation of the holding lies beneath the legalistic reasoning of the court and is founded on policy. It is well-settled that there would not be "non-payment" if the insured requested the loan to pay his premiums at the time the premiums became due.<sup>24</sup> The only feature distinguishing the principal case from such a procedure is the fact the request for the loan was made at the time the policy was taken out, and so it must be this feature that is objectionable. No court would condemn the farsightedness that would prompt an insured to provide ahead against default. Could it be the court was thinking that, as a matter of fact, the insured was not being farsighted; that the request was the result, not of the insured's vision, but of high pressure salesmanship; that when the insured failed to act when his premium became due he was actually a defaulter, so far as he knew, and should be subject to the non-forfeiture laws? That the court had this in mind is indicated by the meaning the case imputes to non-payment, namely, the failure to do an affirmative act, whether borrowing to pay or paying in cash, *at the time the premium is due*. Why require an affirmative act "on the spot" if not to bring home to the policy holder what he is doing? No other reason is apparent. In view of the historic solicitude of the courts for policy holders and the suspicious resemblance of the automatic

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22. *Hearing v. Central States Life Ins. Co.*, 230 Mo. App. 42, 87 S. W. (2d) 661, 668 (1935).

23. See note 2, *supra*, 183.

24. See note 17, *supra*.

loan clause to a design to skirt the non-forfeiture laws, it is not unlikely this is the real explanation for the holding. While this explanation would seem somewhat more understandable than the legalistic explanation in the opinion, it is questionable whether such judicial paternalism is justifiable. Probably many applicants for insurance are "taken in", but there are also many today who well known what they are doing, and who should be allowed to purchase the plan which would avoid default and its consequences if they prefer. It is doubtful whether there is such widespread naiveté among insurance purchasers as to justify the holding of the principal case notwithstanding the policy of the law to shelter insureds.

JESSE D. JAMES

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VALIDITY OF SERVICE UPON SUPERINTENDENT OF INSURANCE IN SUITS AGAINST  
FOREIGN INSURANCE COMPANIES

A foreign insurance company may be sued in Missouri if the company comes into the state and does business here, or if the company has consented to such suit. The consent of the company may be express or may result from compliance with the provisions of the Missouri statute pertaining to such insurance companies, which reads: "Any insurance company not incorporated by or organized under the laws of this state, desiring to transact any business . . . in this state, shall first file with the superintendent of the insurance department a written instrument or power of attorney . . . appointing . . . said superintendent to . . . receive service of process . . . and upon whom such process may be served for . . . such company, in all proceedings . . . against such company, in any court of this state or in any court of the United States in this state. . . . Service of process . . . issued . . . as aforesaid, upon the superintendent, shall be . . . deemed personal service upon such company, so long as it shall have any policies or liabilities outstanding in this state, although such company may have withdrawn, been excluded from or ceased to do business in this state . . ." <sup>1</sup>

Under very similar statutes, it has been held that a foreign insurance company authorized to do business in the state is, for the purpose of venue, a resident of each county in the state, and a service on the superintendent of insurance in any county is good service regardless of the county in which the suit is brought.<sup>2</sup> It has been further held that if the superintendent is in a county other than the one in which suit is brought, the court of the county where suit is brought has implied power to issue process to the sheriff of the other county

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1. MO. REV. STAT. (1929) § 5894. This statute is discussed by Bour, *Recent Missouri Decisions and The Restatement of the Conflict of Laws* (1938) 3 Mo. L. REV. 143, 148.

2. *Curfman v. Fidelity & Deposit Co.*, 167 Mo. App. 507, 152 S. W. 126 (1912); *Renshaw v. Fidelity & Deposit Co.*, 152 S. W. 129 (Mo. App. 1912); *Pittsburg Plate Glass v. Fidelity & Deposit Co.*, 152 S. W. 129 (Mo. App. 1912); *Meyer v. Phoenix Ins. Co.*, 184 Mo. 481, 83 S. W. 479 (1904).

for service upon the defendant company,<sup>3</sup> and process from any court of record confers jurisdiction.<sup>4</sup> That this statute provides the only method by which foreign insurance companies may be served with process is well settled by Missouri decisions.<sup>5</sup> Such service is considered personal service on the corporation, and not mere constructive notice.<sup>6</sup> Being personal notice, slight errors and mistakes in the returns are not so strictly regarded as they would be were the service constructive. But the statute is by no means followed loosely and it has been recently held that if the return failed to show that three copies of process were left with the superintendent as required by statute,<sup>7</sup> the court would lack jurisdiction.<sup>8</sup> This statute is a service statute concerning jurisdiction over the person, and is not a venue statute,<sup>9</sup> nor does the statute concern the suability of the foreign insurance company, *i. e.*, jurisdiction over the subject matter.<sup>10</sup> Furthermore, it only provides for service in suits against the foreign company arising out of its insurance business and is not a good basis for service in purely extraneous matters, such as contracts for sale of land.<sup>11</sup>

The first Missouri case really to bring up for construction the Missouri statute regarding service on foreign insurance was *Gold Issue Mining & Milling Co. v. Pennsylvania Fire Ins. Co.*<sup>12</sup> Plaintiff was an Arizona corporation, while defendant was a Pennsylvania company which was authorized to carry on business in Missouri and which had elected to come under Missouri's service statute. The insured property was in Colorado. The property was destroyed, and service was had upon the superintendent of insurance. Here, despite defendant's contention that the statute was only to apply to foreign insurance companies doing business in this state and to suits founded upon contracts of insurance made in this state, the court held that the foreign company was liable on the cause of

3. *Stone v. The Travelers Ins. Co.*, 78 Mo. 655 (1883).

4. *Fink v. Lancashire Ins. Co.*, 60 Mo. App. 673 (1895).

5. *State ex rel. Maryland Casualty Co. v. Allen*, 239 Mo. 189, 143 S. W. 500 (1911); *State ex rel. General Accident Ins. Co. v. Fisher*, 239 Mo. 195, 143 S. W. 500 (1911); *State ex rel. General Accident Fire & Life Assur. Corp. v. Shields*, 239 Mo. 190, 143 S. W. 500 (1911); *State ex rel. Pacific Mut. Life Ins. Co. v. Grimm*, 239 Mo. 135, 143 S. W. 483 (1911); *State ex rel. Casualty Co. of America v. Muench*, 239 Mo. 191, 143 S. W. 500 (1912); *State ex rel. Employers' Liability Assur. Corp. v. Fisher*, 239 Mo. 192, 143 S. W. 501 (1912); *State ex rel. Fidelity-Phenix Fire Ins. Co. v. Barnett*, 239 Mo. 193, 143 S. W. 501 (1912); *State ex rel. Continental Casualty Co. v. Homer*, 239 Mo. 194, 143 S. W. 501 (1912); *Baile v. Equitable Fire Ins. Co.*, 68 Mo. 617 (1878).

6. *Cox v. American Ins. Co.*, 137 Mo. App. 40, 119 S. W. 476 (1909).

7. *Mo. REV. STAT.* (1929) § 5969.

8. *State ex rel. Adler v. Ossing*, 336 Mo. 386, 79 S. W. (2d) 255 (1934).

9. *State ex rel. Standard Fire Ins. Co. v. Gantt*, 274 Mo. 490, 203 S. W. 964 (1918).

10. *State ex rel. Richardson v. Mueller*, 230 Mo. App. 962, 90 S. W. (2d) 171 (1936).

11. *State ex rel. Federal Reserve Life Ins. Co. v. Wright*, 88 S. W. (2d) 427 (Mo. App. 1935).

12. 267 Mo. 524, 184 S. W. 999 (1916). See also *State ex rel. Pacific Mutual Life Ins. Co. v. Grimm*, 239 Mo. 135, 143 S. W. 483 (1912), where it was said that the terms of the statute were general, authorizing service of summons in all suits against foreign insurance companies, and there was no reason to qualify the statute by reading into it words limiting its application to cases brought by resident plaintiffs or based upon contracts issued in Missouri.

action which accrued in Colorado. The decision was based largely on the fact that there was omitted from the existing statute the provisions inserted in the early service statutes, which had stated that they were to apply only to causes of action arising from contracts made in this state, and the resulting inference that service on the superintendent for the foreign company would be good service in all transitory actions which might be brought against the company in this state. The court further held that the amendment, that the superintendent can only accept service for the company "so long as it shall have any policies or liabilities outstanding," is a time limitation on the authority of the superintendent of insurance to act, and not a restriction upon the character of suits.

It was argued that the decision of the *Gold Issue Mining Co.* case deprived the insurance company of due process of law, reliance being placed upon *Simon v. Southern Ry.*<sup>13</sup> and *Old Wayne Mutual Life Ass'n v. McDonough.*<sup>14</sup> The contention was rejected both by the Missouri Supreme Court and, on writ of error, by the United States Supreme Court.<sup>15</sup> In the first place, in the cases cited by the insurer, the foreign corporations were not shown to have been doing business in the states in which the suits were brought. (In the *Simon* case there was a positive finding that it was not doing business in the state.) In the second place, the statutes under which service was there had upon the state officials dealt with foreign corporations which were doing business within the state without appointing agents for service as other statutes required.<sup>16</sup> A constitutional limitation that service could be obtained on such an involuntarily appointed agent only in suits founded upon transactions of the corporation within the state of suit (or more realistically, that jurisdiction might be obtained without personal service at all only in limited circumstances) is not applicable to service upon an agent designated by the foreign corporation voluntarily, albeit such appointment was required as a condition of lawfully doing business within the state. The distinction serves to emphasize the characterization of this service as personal rather than constructive.

The next landmark in the construction of this service statute was *State ex rel. American Central Life Ins. Co. v. Landwehr.*<sup>17</sup> In this case the insurance company was organized under Indiana laws. The insured was a resident of Kansas, the beneficiary was at all times a resident of Kansas and the policy was issued in Kansas. The insurance company had designated the superintendent of insurance its agent for service of process, pursuant to the requirements of the Missouri statute, and service was had on him. The court took the same steps to construe the statute as were taken in the *Gold Issue Mining Co.* case, but to a

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13. 236 U. S. 115 (1915).

14. 204 U. S. 8 (1907).

15. *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U. S. 93 (1916).

16. The corresponding Missouri statute is Mo. REV. STAT. (1929) § 5897. This statute provides for additional service on foreign companies. It, too, is for illegal business within the state and if applied to suits upon policies issued in other states, or lawfully issued in this state, it would be void.

17. 318 Mo. 181, 300 S. W. 294 (1927).



different conclusion. The early statutes of 1845 and 1855 by express language applied only to contracts of insurance made in Missouri, but continued amendments up to 1879 changed the statute to the ambiguous phraseology that service of process on the superintendent would "be deemed personal service on the company so long as it shall have any policies or liabilities outstanding in the state." In the *Gold Issue Mining Co.* case it had been said that the amendment providing that the superintendent could accept service "so long as it [the insurance company] shall have any policies or liabilities outstanding in the state" was a limitation upon the types of causes of action in which such service could be employed. This point was expressly overruled in the *Landwehr* case. The court said that the form of the statute in force at the particular time when this amendment was added (1869) did not limit its applicability to actions based upon contracts of insurance made in the state. The court pointed out that this amendment thus had a different meaning than it would have had had it amended the earlier statute which by its other provisions was confined to contracts of insurance made in the state, and consequently the amendment would seem to limit the class of proceedings as well as the time of service. It is submitted that the court's conclusion is not inevitable. Granting that such a provision, added to a statute already limited to actions based on Missouri contracts, would normally have no significance beyond limiting the time within which the service would be effective, it does not follow that in the absence of other stipulations confining such service to actions on Missouri contracts, that this provision was meant to have a greater significance, namely, to supply the omission (replacing what previously had been deleted) as well as furnish a time limitation, unless you assume the point in controversy, that such limitation is so desirable that it must have been intended. Because the contract in the principal case was not made and was not outstanding in Missouri, the court held that no jurisdiction was acquired by the service on the superintendent of insurance, overruling *Gold Issue Mining & Milling Co. v. Pennsylvania Fire Ins. Co.* and *State ex rel. Pacific Mutual Life Ins. Co. v. Grimm*.<sup>18</sup>

In *State ex rel. Liberty Life Ins. Co. v. Masterson*,<sup>19</sup> the insurance company was incorporated in Kansas and the policy involved was issued in Kansas. The insured was a citizen of Kansas at the time of issuance, but was a citizen of Missouri at the time of the suit. After the policy of insurance was executed, the insurance company complied with the law of Missouri regarding service and was authorized to do business there at the time of the suit. Service on the superintendent of insurance was held good. The court apparently considered the status of the parties at the time the suit was brought, and not at the time the contract of insurance was entered into, as controlling. The decision in this case did not extend the service statute to apply to citizens of foreign states, the court apparently reasoning that since the insured was a citizen at the time of bringing suit, the policy then being outstanding in Missouri, and as

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18. 239 Mo. 135, 143 S. W. 483 (1912).

19. 231 Mo. App. 68, 95 S. W. (2d) 864 (1936).

the insurance company was licensed to do business in Missouri at the time of the suit, this could be considered a suit brought by a citizen of Missouri against a corporation which, at the time of the suit, was considered a resident of every township of Missouri, and the service was therefore good. This doctrine was reinforced by the case of *Woelfle v. Connecticut Mutual Life Ins. Co.*,<sup>20</sup> where defendant, a Connecticut corporation, issued a policy to the insured in Illinois. Plaintiff, the beneficiary, was a resident of Illinois when her cause of action accrued, but moved to Missouri before suit. The company had come under the Missouri service statute and service was on the superintendent of insurance. The court held that plaintiff's right to have service on the superintendent depended upon whether the policy was outstanding in the state. It further held that to be "outstanding in Missouri" the policy need not have been written in Missouri, nor need plaintiff have been a citizen thereof at the time of insured's death. Included within this phrase, it said, were all policies written or liabilities assumed within or without the state, but which were owned by residents of the state at the time suit was brought.

However, mere service on the superintendent of insurance was not enough to give the court jurisdiction over this foreign insurance company where plaintiff failed to allege that the insured or the beneficiary was at the time of suit, or ever had been, a citizen of Missouri, or that the policy was issued in the state.<sup>21</sup>

Then a recent case gave a new interpretation of our statute—*State ex rel. Phoenix Mutual Life Ins. Co. v. Harris*.<sup>22</sup> Here a Connecticut life insurance company licensed to do business in Missouri issued a policy of insurance to the insured in Missouri. Upon insured's becoming disabled, the policy was assigned to *B*, a resident of Connecticut, who instituted suit in Missouri by serving the defendant through the superintendent of insurance. The statute provided, "Service of process . . . shall be valid and binding . . . so long as it [the company] shall have any policies or liabilities outstanding in this state, although such company may have withdrawn, been excluded from or ceased to do business in this state." The Supreme Court of Missouri held that this section required (1) that the suit be based on a policy issued or a liability incurred in Missouri while the company was licensed to do business here, and (2) that the policy must be outstanding in this state in the sense of being due here. This case established the rule that for the service to be proper, both of these factors must be present and the presence of only one would not be sufficient. This decision maintained the view of the *Landwehr* and subsequent cases that the "so long as" clause was one limiting the character of suits to which the statute applied, but in addition it announced that this clause was not an alternative one and to this extent seemed to overrule the *Masterson* and *Woelfle* cases which

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20. 112 S. W. (2d) 865 (Mo. App. 1938).

21. *Crabtree v. Aetna Life Ins. Co.*, 341 Mo. 1173, 111 S. W. (2d) 103 (1937).

22. 121 S. W. (2d) 141 (1938).

held that "policies outstanding in the state" necessarily included policies written outside the state but which were owned and held by residents of the state where suit was instituted. The *Phoenix* case regarded a policy issued in Missouri as outstanding in this state, within the meaning of the statute, so long as it remained in force covering a life, person, or property in this state. The fact that plaintiff-assignee was a non-resident was held immaterial.

*Fogle v. Equitable Life Assur. Co.*,<sup>23</sup> a court of appeals case, presented the converse situation. This time the policy was issued in Louisiana, payable to a Louisiana beneficiary. Upon maturity of the policy, the beneficiary assigned to *F* of New York and *H* of Missouri. Suit was brought in Missouri and process served upon the superintendent of insurance. The court held that the assignment created an obligation in Missouri, and, therefore, it authorized service under Section 5894 of our Revised Statutes. On rehearing, the doctrine of the *Phoenix* case was considered, but despite the assertion of the Supreme Court in that opinion that the statute was available only when the policy was issued or liability was incurred in Missouri and the policy or liability was outstanding in Missouri in the sense of being due here, still the Springfield Court of Appeals insisted that the *Phoenix* case was not in point, for that was a suit by non-resident (though on a Missouri contract). It was not believed that the Supreme Court intended to deprive a Missouri citizen, a *bona fide* assignee of a foreign contract, from a remedy in his own state against a foreign insurance company presently doing business in the state and having other policies outstanding here. The *Fogle* case was taken to the Missouri Supreme Court by *certiorari*<sup>24</sup> and it was there declared that the decision of the court of appeals was in direct conflict with the *Phoenix* case. The authority for the doctrine of that case was then complete.

This statute for service on foreign insurance companies had for years been a constant sore thumb in litigation in Missouri courts and the numerous reversals and great instability of decisions prevented attorneys from predicting with any confidence the outcome of any case, even though the very facts had previously been litigated. The natural result of such a situation was the repeal of Section 5894 as it had previously existed and the substitution therefor of the following statute: "No insurance company . . . not incorporated . . . under the laws of this state shall . . . issue policies, take risks, or transact business in this state, until it shall have first executed an irrevocable power of attorney in writing, appointing . . . the superintendent of insurance of this state, to . . . receive service of all lawful process, for . . . the company, in any action against said company instituted in any court . . . of this state, and . . . that . . . service . . . shall be deemed personal service upon said company . . . Service . . . shall be valid and binding in all actions brought by residents of this state upon any policy issued or matured, or upon any liability accrued in this state, or on any policy issued

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23. 123 S. W. (2d) 595 (Mo. App. 1938).

24. 136 S. W. (2d) 309 (Mo. 1940).

in any other state in which such resident is named as beneficiary, and in all actions brought by non-residents of this state on a cause of action, other than an action on a policy of insurance, which arises out of business transacted, acts done, or contracts made in the state. . . . and if any such company shall fail . . . to appoint . . . an attorney or agent in the manner herein-before described, it shall forfeit the right to do or continue business in this state. Whenever process shall be served on the superintendent of insurance . . . such process shall immediately be forwarded . . . to the secretary of the company . . ."<sup>25</sup>

The legislators, in setting up this statute, apparently realized the vagueness of the old statute and its susceptibility to various interpretations, and relying on this knowledge, attempted to omit all previous troublesome phrases and to recite specifically the suits which might properly be instituted in Missouri against foreign insurance companies by service upon the superintendent of insurance, but not with complete success. Previously mentioned cases, if their fact situations were to once more be presented to the courts of Missouri, with the courts' decisions to be based upon the new statute, might now be decided as follows:

1. *Gold Issue Mining & Milling Co. v. Pennsylvania Fire Ins. Co.* Plaintiff of State A sued defendant of State B in State C (Missouri) on a policy issued in State D on property there. This case would not fall within the new statute and the service would be invalid.

2. *State ex rel. American Central Life Ins. Co. v. Landwehr.* Plaintiff of State A sues defendant of State B in State C (Missouri) on a policy issued in State A. This case would not fall within the new statute and the service would be invalid.

3. *State ex rel. Liberty Life Ins. Co. v. Masterson.* Defendant of State B issued a policy in State B to plaintiff of State B. Plaintiff then became a citizen of State C (Missouri) and sues in State C. This falls within the statute for it seems that the liability accrued in Missouri. It is also possible that the service might be validated by the fact that the plaintiff was a Missouri beneficiary prior to the maturity of the policy, though not at its inception. The statute is not clear as to the time when the residence of the plaintiff-beneficiary is to be tested.

4. *Woelfe v. Connecticut Mutual Life Ins. Co.* Defendant of State A issued a policy in State B. Plaintiff-beneficiary was a citizen of State B when the cause of action arose, but moved to State C (Missouri) and then brought suit in State C. It is questionable whether this falls within the statute, for the policy was neither issued nor matured in Missouri, nor did the liability accrue in Missouri. It is probable that that provision of the statute validating service upon the superintendent of insurance in "actions brought by residents of this state . . . on any policy issued in any other state in which such resident

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<sup>25</sup> Mo. Laws 1939, p. 451.

is named as beneficiary" refers only to cases in which the plaintiff was a resident of Missouri prior to accrual of his cause of action (an hypothesis emphasized by the conspicuous omission of reference to a Missouri assignee of the beneficiary of a foreign policy) and possibly only to cases in which he was a resident of Missouri when the policy was issued, but the matter cannot be deemed free from doubt and a literal reading of the act would validate the service.

5. *State ex rel. Phoenix Mutual Life Ins. Co. v. Harris*. Defendant of State B issued a policy in State C to beneficiary of State C (Missouri). Upon a cause of action accruing, the beneficiary assigned to plaintiff of State B, who brought suit in State C. This case would fall within the statute and service would be valid.

6. *Fogle v. Equitable Life Assurance Co.* Defendant issued a policy in State A, payable to a beneficiary of State A. Upon the cause of action accruing, X assigned to plaintiff of State B and plaintiff of State C (Missouri). Suit was brought in State C. This suit would probably not be allowed under the new statute. Here there were two plaintiffs, one a resident of C and the other a non-resident. Had the suit been brought by plaintiff of B alone, suit would not have been allowed. Had suit been brought by plaintiff of C alone, suit would not have been allowed under the literal wording of the statute, for the Missouri plaintiff was not the beneficiary of a foreign policy but the assignee of the beneficiary. In this respect there seems to be an unreasonable distinction in the new statute. If, in an action on a foreign policy, such service is valid when the plaintiff is a Missouri beneficiary, why not also when he is a Missouri *bona fide* assignee of the beneficiary (domestic or foreign)? Are there any reasons of policy for denying him relief in the Missouri courts?

7. *State ex rel. Federal Reserve Life Ins. Co. v. Wright*. Defendant insurance company of State A contracted to sell land in State C (Missouri) to plaintiff of State C. Plaintiff sued for breach of contract. This would by express provision fall within the new statute of service if the contract were made in State C, but not if the contract were made in State A. It should be noticed that if the contract were made in Missouri, even a non-resident plaintiff might obtain service under the statute. But the statute does not validate service at the instance of a non-resident beneficiary of a Missouri insurance policy. *Quaere*, what reason of policy supports the distinction?

RALPH J. TUCKER

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#### THE RIGHT OF PRIVACY

The common law developed to give protection only to the physical person and to tangible property interests. Later the law expanded so as to protect all types of proprietary interests. Then the action for defamation was recognized, as it was realized that reputation was such a proprietary interest as

the law should protect. But the law of libel and slander gave relief only against defamatory publications; and truth was a defense to any such action.<sup>1</sup>

As civilization grew more complex and men's relations with one another grew more impersonal, it was felt that certain aspects of life, other than those physical or pecuniary, demanded protection. As newspapers became more sensational and the use of pictures became common, columnists and tabloids found high salaries and profits in being as venturesome as possible into the private lives of others. "Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature."<sup>2</sup>

The right to privacy is the right to be let alone; it is the right of the individual to be free from unwarranted public scrutiny if he so chooses.<sup>3</sup>

After the courts first recognized the need for the protection of this new interest, they gave relief based upon the violation of a property right,<sup>4</sup> or on the ground that the publication would be a violation of a contract, confidence or trust.<sup>5</sup> Up until 1890 the doctrine of the "right of privacy," as such, was unheard of. In that year there appeared in the *Harvard Law Review* an article,<sup>6</sup> by Brandeis and Warren, which gave birth to the idea that a man had a right, within certain limitations, to live to himself, and that this right should be protected as a natural right quite apart from a property or contract right.<sup>7</sup>

The claim for protection of this interest was first presented to a state court of last resort in 1896, when the New York Court in *Schuyler v. Curtis*,<sup>8</sup> by *dictum*, recognized that such a right might exist, but said it was a personal right which did not survive the death of the person injured. The first decision squarely on the point came in 1902, in the case of *Roberson v. Rochester Folding Box Co.*,<sup>9</sup> when the majority of the court refused to admit the existence of the right. In this case the defendants, without authority, used the plaintiff's picture for commercial purposes—in the advertising of flour. The court refused to recognize the right because of two reasons: first, because they found

1. HARPER, TORTS (1933) § 241.

2. Brandeis and Warren, *The Right to Privacy* (1890) 4 HARV. L. REV. 193, 195.

3. HARPER, *op. cit. supra* note 1, 277; 21 R. C. L. §§ 1197, 1198; Brandeis and Warren, *supra* note 2.

4. Prince Albert v. Strange, 1 Mac. & G. 25 (1849) (an injunction granted to restrain a workman from publishing private etchings which the queen and prince were having published for themselves on the ground that the property rights of Prince Albert had been infringed, and that there was a breach of the trust by the workman in retaining the impressions for himself); Comments (1908) 18 YALE L. J. 123, (1910) 20 YALE L. J. 149.

5. Abernethy v. Hutchinson, 3 L. J. Ch. 209 (1825) (an injunction granted restraining a pupil from publishing the lectures of a teacher on the ground that it was a breach of confidence on the part of the pupil who was admitted to hear them only for his own information); Pollard v. Photographic Co., 40 Ch. D. 345 (1888).

6. Brandeis and Warren, *supra* note 2.

7. *Id.* at 205.

8. 147 N. Y. 434, 42 N. E. 22 (1895).

9. 171 N. Y. 538, 64 N. E. 442 (1902).

no precedent for the protection of such a right; and second, because they believed the recognition of such a principle would result in a vast amount of litigation, as there would be no means of limiting the right. These same reasons are often found where a new interest demands recognition. Justice Gray, in a very vigorous dissent, after pointing out that the lack of precedent was no valid reason for refusing the relief, said, "Security of person is as necessary as the security of property; . . . there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, but against the display and use thereof for another's commercial purposes . . ."10

As a result of the decision in the *Roberson* case, the legislature of New York passed a statute,<sup>11</sup> protecting one against the publication of a picture for commercial purposes, without his consent.

The right of privacy was recognized and protected for the first time in 1905. In that year the Supreme Court of Georgia, in the case of *Pavesich v. New England Life Ins. Co.*,<sup>12</sup> held that an invasion of a personal right of privacy was actionable, regardless of the special damages to person, property, or character. This court called the right of privacy a natural right, but failed to indicate just what was meant by the term "natural right". The court relied heavily upon the dissenting opinion of Justice Gray in the *Roberson* case.

Since 1905, the courts of California,<sup>13</sup> Kansas,<sup>14</sup> Kentucky,<sup>15</sup> Louisiana,<sup>16</sup> Missouri,<sup>17</sup> New Jersey,<sup>18</sup> and North Carolina<sup>19</sup> have recognized the existence of the right of privacy as a common law right. The Supreme Court of Arkansas, by *dicta*, has approved of the doctrine.<sup>20</sup> The courts of Rhode Island<sup>21</sup> and Washington,<sup>22</sup> following the holding of the *Roberson* case, have declared that

10. *Id.* at 563, 64 N. E. at 450.

11. N. Y. CIVIL RIGHTS LAW (1916) §§ 50, 51.

12. 122 Ga. 190, 50 S. E. 68 (1905).

13. *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931); see *Metter v. Los Angeles Examiner*, 95 P. (2d) 491 (Cal. App. 1939).

14. *Kunz v. Allen*, 102 Kan. 883, 172 Pac. 532 (1918).

15. *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S. W. 364 (1909); *Douglas v. Stokes*, 149 Ky. 506, 149 S. W. 849 (1912); *Brents v. Morgan*, 221 Ky. 765, 299 S. W. 967 (1927); *Rhodes v. Graham*, 238 Ky. 225, 37 S. W. (2d) 46 (1931); see *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S. W. (2d) 972 (1929).

16. *Izkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905); *Schulman v. Whitaker*, 117 La. 704, 42 So. 227 (1906).

17. *Munden v. Harris*, 153 Mo. App. 652, 134 S. W. 1076 (1911) (while admitting the existence of the right of privacy, the court speaks of it as a property right rather than a personal right).

18. *Edison v. Edison Polyform & Mfg. Co.*, 73 N. J. Eq. 136, 67 Atl. 392 (1907); *Brex v. Smith*, 104 N. J. Eq. 386, 146 Atl. 34 (1929).

19. *Flake v. Greensboro News Co.*, 212 N. C. 780, 195 S. E. 55 (1938).

20. *Mabry v. Kettering*, 89 Ark. 551, 117 S. W. 746 (1909), *modified by*, 92 Ark. 81, 122 S. W. 115 (1909).

21. *Henry v. Cherry & Webb*, 30 R. I. 13, 73 Atl. 97 (1909).

22. *Hillman v. Star Publishing Co.*, 64 Wash. 691, 117 Pac. 594 (1911).

the right does not exist. Virginia<sup>23</sup> is the only state, other than New York,<sup>24</sup> which has protected the right of privacy by a statutory enactment.

A survey of the cases shows that the question most often arises in cases involving the publication of pictures for commercial purposes without the consent of the owner.<sup>25</sup> However, there are other situations in which the right of privacy has been protected. Motion pictures have been held to violate the right.<sup>26</sup> In *Melvin v. Reid*,<sup>27</sup> the California court held that a motion picture portraying the past life of the plaintiff, a former prostitute, who was tried for murder, acquitted, and after her acquittal "abandoned her life of shame" and became entirely rehabilitated, was violative of her right of privacy. The placarding of a debtor has been held to violate the right,<sup>28</sup> as has the unwarranted placing of one's picture in a rogue's gallery.<sup>29</sup> Relief has also been given against the

23. VA. CODE ANN. (Michie & Sublett, 1936) § 5782.

24. N. Y. CIVIL RIGHTS LAW (1916) §§ 50, 51; *D'Altomonte v. New York Herald Co.*, 208 N. Y. 596, 102 N. E. 1101 (1913); *Binns v. Vitagraph Co. of America*, 210 N. Y. 51, 103 N. E. 1108 (1913); *Middleton v. News Syndicate Co.*, 162 Misc. 516, 295 N. Y. Supp. 120 (1937); see Comment (1939) 13 SO. CALIF. L. REV. 81.

25. *Corliss v. Walker Co.*, 64 Fed. 280 (C. C. D. Mass. 1894); *Paramount Pictures, Inc., v. Leader Press, Inc.*, 24 F. Supp. 1004 (W. D. Okla. 1938); *Metter v. Los Angeles Examiner*, 95 P. (2d) 491 (Cal. App. 1939); *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68 (1905); *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S. E. 194 (1930), (1931) 31 COL. L. REV. 175, (1931) 29 MICH. L. REV. 649; *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S. W. 364 (1909); *Douglas v. Stokes*, 149 Ky. 506, 149 S. W. 849 (1912); *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S. W. (2d) 972 (1929); *Munden v. Harris*, 150 Mo. App. 652, 134 S. W. 1076 (1911); *Atkinson v. Doherty*, 121 Mich. 372, 80 N. W. 285 (1899); *Flake v. Greensboro News Co.*, 212 N. C. 780, 195 S. E. 55 (1938); *Edison v. Edison Polyform & Mfg. Co.*, 73 N. J. Eq. 136, 67 Atl. 392 (1907); *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902); *Henry v. Cherry & Webb*, 30 R. I. 13, 73 Atl. 97 (1909); *Hillman v. Star Publishing Co.*, 64 Wash. 691, 117 Pac. 594 (1911).

26. *Sweenek v. Pathe News, Inc.*, 16 F. Supp. 746 (E. D. N. Y. 1936); *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931); *Kunz v. Allen*, 102 Kan. 383, 172 Pac. 532 (1918) (plaintiff's picture being taken without her consent while she was shopping in a dry goods store, the later exhibition of the picture in a theater for the purpose of exploiting the publisher's business was held to be a violation of the right of privacy); *Binns v. Vitagraph Co. of America*, 210 N. Y. 51, 103 N. E. 1108 (1913) (an action against a moving picture company which used the name and pictures of a person as a feature in a film, not for the purpose of educating those who saw it but only to amuse them, in which the court held the plaintiff could restrain the defendant's further showing of the picture and could recover in an action for damages).

27. 112 Cal. App. 285, 297 Pac. 91 (1931).

28. *Brents v. Morgan*, 221 Ky. 765, 299 S. W. 967 (1927). The defendant caused a notice to be placed on a show window fronting a principal street, stating that "Dr. Morgan [the plaintiff] owes an account here of \$49.67 and if promises would pay an account, this account would have been settled long ago." The court held this to state a cause of action in tort for invasion of the right of privacy.

29. *Itzkovitch v. Whitaker*, 115 La. 479, 30 So. 499 (1905); *Schulman v. Whitaker*, 117 La. 704, 42 So. 227 (1906); cf. *Mabry v. Kettering*, 89 Ark. 55, 117 S. W. 746 (1909).



disclosure of bank accounts,<sup>30</sup> shadowing,<sup>31</sup> and wire tapping.<sup>32</sup> And in *Mau v. Rio Grande Oil Co.*,<sup>33</sup> a lower federal court held that one whose name was used without his consent in a radio broadcast dramatization of a holdup and shooting of which he was victim may recover damages from the program sponsor and the broadcasting company for violation of his right of privacy.

As in other instances in the development of the law of torts, as soon as there are a few cases the courts begin to describe the interest protected according to the types of cases in which protection has been accorded. It has been suggested<sup>34</sup> that the cases may be grouped into three classes. In the first class, which covers all unwarranted, unprivileged, and intentional intrusions on the personal life and affairs of others which cause mental or physical pain, would be placed such cases as wire tapping, shadowing, and the disclosure of bank accounts. The second class covers all unwarranted and unprivileged disclosures of personal thoughts, habits, manners, affairs, appearance, and history of individuals to whom such disclosures occasion emotional disturbances. Typical examples of this class are the rogue's gallery, and debt placarding cases. The third class, which includes the bulk of the cases that have come before the courts, covers the unwarranted, unprivileged, intentional uses of another's name, likeness, appearance, history, or reputation for the primary purpose of advancing the user's commercial interest. Into this group falls all of the cases dealing with the use of pictures for advertising purposes. The only thing that distinguishes the second class from the third is that in the latter we find the primary motive is one of financial gain. An attempt has been made at a somewhat more exhaustive classification by grouping the cases according to the nature of the injury rather than as to the nature of the wrong.<sup>35</sup> There would seem to be more merit in this approach; but is this not a type of interest which should not be straightjacketed into categories so early in its existence? It crowds future growth. It may be true that newspapers and journals desire to know the lawful bounds, yet common sense would seem to be a sufficient guide.

The scope of the doctrine of the right of privacy is not without certain limitations. It is somewhat analogous to privileged communications in the law of libel and slander. Any person who engages in an occupation which calls for the approval or patronage of the public is said to submit his life to its exam-

30. *Brex v. Smith*, 104 N. J. Eq. 386, 146 Atl. 34 (1929).

31. *Schultz v. Frankfort Marine Accident & Plate Glass Ins. Co.*, 151 Wis. 537, 139 N. W. 386 (1913), (1913) 26 HARV. L. REV. 658. Plaintiff, who had been a witness adverse to the defendants in an action pending a motion for a new trial, was openly shadowed at defendants' instance by detectives. The court held this was actionable treating it as an action for defamation. This case could have been better justified as a violation of the right of privacy.

32. *Rhodes v. Graham*, 238 Ky. 225, 37 S. W. (2d) 46 (1931). Defendants tapped telephone wires running into the plaintiff's house and transcribed conversations the plaintiff had over the telephone. The court held this violated the privacy of those talking over the telephone.

33. 28 F. Supp. 845 (N. D. Cal. 1939).

34. *Dickler, The Right of Privacy, A Proposed Redefinition* (1936) 70 U. S. L. REV. 435; see Comment (1939) 13 So. CALIF. L. REV. 81.

35. *Green, The Right of Privacy* (1932) 27 ILL. L. REV. 237.

ination to any extent that may be necessary to determine whether it is desirable to give him the approval or patronage which he seeks.<sup>36</sup> In the case of *Corliss v. Walker*,<sup>37</sup> the defendant inserted a print of Corliss<sup>38</sup> in a biographical sketch that was about to be published. The plaintiff sought an injunction to restrain the defendant. The court held that while a private individual may enjoin the publication of his portrait, a *public character* cannot. In *Paramount Pictures, Inc. v. Leader Press, Inc.*,<sup>39</sup> the defendant used the names and pictures of motion picture stars in his business of producing, printing, selling and distributing accessories for use in advertising and exploiting motion pictures in motion picture theaters. The accessories included the names, drawings, cartoons and caricatures of prominent actors and actresses, with the title of the motion picture in which they appeared. The plaintiff picture company, a producing and distributing company, brought an action for damages and injunctive relief contending, among other grounds, that the use of the names and pictures of these stars was an invasion of the stars' right of privacy. The court held that this was not an invasion of the stars' legally protected right of privacy in view of the fact that the stars' "faces and names were sold to the public." However, the statement by the court must be limited to the facts and the issue here under discussion. The use by the defendant in this particular form of advertising was within the scope of the surrender by the motion picture star of her privacy. It may have invaded the property right of the star and her producer in her name and picture, a special property right dependent upon the peculiar nature of the star's business and protected only upon principles of unfair competition or appropriation.

The Kentucky court, in *Jones v. Herald Post Co.*,<sup>40</sup> a case involving the publication of pictures and a story of a woman who fought with two bandits while they were killing her husband, after admitting the existence of the right of privacy, said: "There are times, however, when one, whether willingly or not, becomes an actor in an occurrence of public or general interest. When this takes place, he emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with an account of such occurrence."<sup>41</sup>

A right of action for the violation of the right of privacy is purely personal,

36. *Sweenek v. Pathe News, Inc.*, 16 F. Supp. 746 (E. D. N. Y. 1936) (the court held that no cause of action was created in favor of a number of corpulent women shown in a newsreel attempting to reduce with the aid of novel apparatus, since the newsreel involved "public interest"). In *Mietter v. Los Angeles Examiner*, 95 P. (2d) 491 (Cal. App. 1939), the wife of plaintiff had committed suicide by jumping from the twelfth floor of an office building. Defendant published a picture of deceased together with a news story of the incident. The court held that the right of privacy did not prevent publication of anything that was of public interest. See also, Brandeis and Warren, *supra* note 2.

37. 64 Fed. 280 (C. C. D. Mass. 1894).

38. Corliss was one of the early American inventors.

39. 24 F. Supp. 1004 (W. D. Okla. 1938), *rev'd on other grounds*, 106 F. (2d) 229 (C. C. A. 10th, 1939).

40. 230 Ky. 227, 18 S. W. (2d) 972 (1929).

41. *Id.* at 228, 18 S. W. (2d) at 973.

and one cannot recover for the violation of the right of a relative, whose right does not survive but dies with the person.<sup>42</sup> This limitation was laid down even before the doctrine was accepted by any court. *Schuyler v. Curtis*, the New York case which came up six years before the *Roberson* case, involved a situation whereby certain persons attempted to erect a statute of a woman, no longer living, and one of her relatives commenced an action to restrain it, alleging the feelings of the relatives of the deceased would be injured. The court held that it was a personal right which did not pass to the relatives. Three years later, in 1899, the Michigan court, in *Atkinson v. Doherty*<sup>43</sup> held that a widow could not restrain the use of the name and likeness of her deceased husband as a label for a brand of cigars, as the right of privacy, if it existed, was a purely personal right.

An interesting question arises as to whether a child of tender years has a legally protectable right of privacy. A Missouri court, in *Munden v. Harris*,<sup>44</sup> held that a child of five years had an action for violation of his right of privacy. In that case the defendant jewelry company published the child's picture in connection with an advertisement. It would seem that the court pushed the doctrine to an extreme in this particular case, as a child of that age is generally recognized to be insensitive to social criticism.<sup>45</sup> A year later a lower federal court, sitting in Missouri, held that a corporation can have no true right of privacy, as that right is limited to natural persons.<sup>46</sup>

The exact theory of the interest to be protected has confused the courts a great deal. Courts of equity have usually insisted upon some semblance of a property interest, but have managed to find it in an artificial way. In some instances equitable relief has been given by the court without apparent recognition of the problem. The use of the term "natural right" is not very elucidating, and the contract or trust doctrine is only applicable to certain cases. Early courts, when faced with the problem, looked for some existing analogous theory, and by the use of a legal fiction found a property interest. The property interest theory, even when stretched far beyond any orthodox concept of the term, will answer only those cases involving the use of names and pictures, but can never be manipulated to cover the cases dealing with wire tapping, shadowing, and the disclosure of bank accounts. Sounder reasoning would result if the courts recognized, as many do, that they are now protecting a new interest in personality instead of giving continued lip service to a doctrine laid down only to be evaded.

42. *Metter v. Los Angeles Examiner*, 95 P. (2d) 491 (Cal. App. 1939); *Atkinson v. Doherty*, 121 Mich. 372, 80 N. W. 285 (1899); *Schuyler v. Curtis*, 147 N. Y. 434, 42 N. E. 22 (1896); cf. *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S. E. 194 (1930); *Douglas v. Stokes*, 149 Ky. 506, 149 S. W. 849 (1912).

43. 121 Mich. 372, 80 N. W. 285 (1899).

44. 153 Mo. App. 652, 134 S. W. 1076 (1911).

45. Dickler, *The Right of Privacy, A Proposed Redefinition* (1936) 70 U. S. L. REV. 435, 450.

46. *Vassar College v. Loose-Wiles Biscuit Co.*, 197 Fed. 982 (W. D. Mo. 1912).

Forty years have passed since *Pavesich v. New England Life Ins. Co.*, the first case to give relief against an invasion of the right of privacy. A survey of the cases, in those jurisdictions recognizing the doctrine, produces no alarming results. The fear of the New York court, in the *Roberson* case, that a recognition of the doctrine would result in a vast amount of litigation as there would be no way of limiting the action, now seems to have been unjustified. The cases which have arisen in those jurisdictions recognizing the existence of a common law right of privacy have been comparatively few, and the courts, in most instances, have not applied the doctrine blindly, but have carefully restricted it to a proper case.

GENE M. UNTERBERGER

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#### TESTAMENTARY CHARACTER OF DEEDS IN MISSOURI

An owner of property has the power to transfer his property by deed or by will. The principal advantage of a will lies in the fact that it remains ambulatory and may be revoked as and when the testator desires; also the terms of a will are the testator's secret. The disadvantages of a will are numerous; it must be executed in the exact manner prescribed by statute; delay, expense and frequently litigation are involved in probate; and property passing under a will is subject to the expense and delay of administration.

A deed avoids the necessity for probate and administration and hence the accompanying delay and expense. It is easier to prepare and there is less chance for litigation over capacity of the grantor, proper execution, etc. But a deed also has its disadvantages. It is not revocable, unless made so by its terms, and if this is done it may be held testamentary in character and hence invalid as a deed.

The practical problem is to determine what provisions are valid in a deed although they result in retention of enjoyment and control by the grantor,<sup>1</sup> and on the other hand, what provisions will make the instrument testamentary and thus invalid as a deed. An instrument cannot be declared testamentary merely because its purpose was to avoid the statutes regulating the formation, execution and probate of a will. It can be declared testamentary only if it is in substance a will.<sup>2</sup>

The fundamental difference between a will and a deed is in the fact that the will remains ambulatory, and thus may be destroyed or changed at will, whereas a deed transfers or creates in the grantee a present possessory interest, or the

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1. Transfer of title may also be suspended by the delivery of a deed to a depository. McCleary, *Some Problems Involved in Conditional Deliveries of Deeds* (1931) 43 U. OF MO. BULL. L. SER. 5; Tiffany, *Conditional Delivery of Deeds* (1914) 14 COL. L. REV. 389; Bigelow, *Conditional Deliveries of Deeds of Land* (1913) 26 HARV. L. REV. 565.

2. *Bullen v. Wisconsin*, 240 U. S. 625 (1916); *Young v. Payne*, 283 Ill. 649, 119 N. E. 612 (1918); *Abbott v. Holway*, 72 Me. 298 (1881).

present right to future possession, the so-called future interest. The test of a deed is often stated to be whether "it is to take effect *in presenti* or after the death of the maker."<sup>3</sup> This test includes the creation of a present interest, but it may be capable of being misconstrued so as to exclude a present right to a future interest. The crucial matter in many of the cases is whether the provisions in the instrument give a present right to a future interest, or pass no interest at all until the death of the grantor. "There are few questions less clearly defined in the books 'than an intelligible, uniform test by which to determine' when an instrument conveys a present interest in real estate and when it is testamentary in character."<sup>4</sup> A general idea may be gained by the reading of many cases, but even then the results in various jurisdictions are far from agreement.<sup>5</sup>

At early common law, *inter vivos* conveyances of freehold estates were usually made by livery of seisin which had to be a present effective act. Hence, unless there was a conveyance to uses, it was impossible to create an estate to commence in futuro unless supported by a particular estate of freehold.<sup>6</sup> Today, in most, if not all states, an estate can be created to commence in futuro without conveying to uses.<sup>7</sup> Where a deed purports to give land at grantor's death, many courts say that the grantor has a reserved life estate and that the grantee has a vested remainder.<sup>8</sup> Following this analysis the grantor is not permitted to commit waste and his widow has no dower. Another view is that the grantor has a de-feasible fee and that the grantee has a springing executory interest.<sup>9</sup> Following this analysis, the grantor is not liable for ordinary waste<sup>10</sup> and his widow may be entitled to dower.<sup>11</sup> The latter view is more in accord with the orthodox concepts of estates.<sup>12</sup>

There is considerable conflict as to the character of a deed containing the provision, "this deed shall not take effect until the death of" the grantor. If the

3. *Murphy v. Gabbert*, 166 Mo. 596, 66 S. W. 536 (1902).

4. *Goins v. Melton*, 343 Mo. 413, 121 S. W. (2d) 821 (1938), commented on in (1939) 4 Mo. L. REV. 419.

5. *Ibid.* But see *Tennant v. John Tennant Memorial Home*, 167 Cal. 570, 140 Pac. 242 (1914).

6. *Eckhardt, Work of the Missouri Supreme Court for the Year 1938 (Property)* (1939) 4 Mo. L. REV. 419, 420; *KALES, FUTURE INTERESTS* (1905) § 68.

7. *MO. REV. STAT.* (1929) § 3112, ". . . hereafter an estate of freehold or of inheritance may be made to commence in future by deed, in like manner as by will." *Buxton v. Kroeger*, 219 Mo. 224, 117 S. W. 1147 (1909); *O'Day v. Meadows*, 194 Mo. 588, 92 S. W. 637 (1906); *Christ v. Kuehne*, 172 Mo. 118, 72 S. W. 537 (1903).

8. *Dozier v. Toalson*, 180 Mo. 546, 79 S. W. 420 (1904); *Priest v. McFarland*, 262 Mo. 229, 171 S. W. 62 (1914); *McAlister v. Pritchard*, 287 Mo. 494, 230 S. W. 66 (1921). In the *Pritchard* case there was a typical warranty deed in every respect, then: "The above to remain the property of C. M. Pritchard during the term of his natural life." The court said the grantor must have intended to make a present conveyance of the land, reserving a life estate. Otherwise the deed and the limitation could not stand together. The court overlooked the possibility of saying the grantor had a fee, and the grantee had a future executory interest. *Notes* (1921) 11 A. L. R. 51, (1932) 76 A. L. R. 643.

9. *KALES, FUTURE INTERESTS* (1905) c. 4.

10. *Abbott v. Holway*, 72 Me. 298 (1881).

11. *Buckworth v. Thirkell*, 1 Coll. Juris. 322, 4 Dougl. 323 (K. B. 1785), 3 Bos. & Pul. 652 n.

12. *KALES, FUTURE INTERESTS* (1905) §§ 158b and 159.

phrase is given a literal construction, as the Missouri courts give it, then clearly the instrument will be said to pass no present interest to the grantee, and will be declared testamentary in character.<sup>13</sup> There is something to be said for this view because the "language is suggestive of the ambulatory concept of a will and in it may lurk the idea that it is revocable by the maker."<sup>14</sup> However, most courts seem to give the words the more liberal construction of granting a fee to the grantee, subject to a life estate in the grantor.<sup>15</sup>

When the provision is: "this deed not to take effect in its full entirety—or absolutely—until after the death of" the grantors, Missouri is in accord with the majority of courts in construing it to merely reserve a right of possession in the grantors until after their death.<sup>16</sup>

The following provisions included in the form of a regular warranty deed are also said not to prevent the present passing of an interest: an estate "to commence at the death of" the grantor;<sup>17</sup> the grantor "reserves rents and profits for life;"<sup>18</sup> "during his lifetime retains possession and control;"<sup>19</sup> grantor reserves rents, profits, possession and control;<sup>20</sup> grantee "is not to come in possession

13. *Thorp v. Daniel*, 339 Mo. 763, 99 S. W. (2d) 42 (1936). In this case there was a warranty deed followed by these conditions: (1) "Reserving however to the (grantor) a life interest in the above described land." (2) "It being the intention that this deed shall not take effect till the death of the (grantor)." The court said that (1) standing alone would have created a life estate in the grantor, with a present remainder in the grantee: "But the last sentence is very clear and positive that the grantor intended to retain all title in herself." But is it? Can not the two conditions be construed to be consistent by the same process of reasoning as was used in *McAlister v. Pritchard*, 237 Mo. 494, 230 S. W. 66 (1921), cited *supra* note 8? Accord: *Murphy v. Gabbert*, 166 Mo. 596, 66 S. W. 536 (1902); *Terry v. Glover*, 235 Mo. 544, 139 S. W. 337 (1911); *Goodale v. Evans*, 263 Mo. 219, 172 S. W. 370 (1914); *Kanan v. Hogan*, 307 Mo. 269, 270 S. W. 646 (1925) (here the deed was reformed to create a life estate and pass a present interest to the grantee); *Turner v. Scott*, 51 Pa. 126 (1866); *Sperber v. Balster*, 66 Ga. 317 (1881); *Bigley v. Souvey*, 45 Mich. 370, 8 N. W. 98 (1881); *Shaull v. Shaull*, 160 N. W. 36 (Iowa 1916); *Cohn v. Klein*, 209 Cal. 421, 287 Pac. 459 (1930). *Contra*: *Glover v. Webb*, 205 Ala. 551, 88 So. 675 (1921); *Reynolds v. Balding*, 183 Ark. 397, 36 S. W. (2d) 402 (1931); *White v. Smith*, 338 Ill. 23, 169 N. E. 817 (1930); *Nalley v. First National Bank*, 135 Ore. 409, 293 Pac. 721 (1931).

14. *ATKINSON, WILLS* (1937) § 63, p. 145.

15. *White v. Smith*, 338 Ill. 23, 169 N. E. 817 (1930); *Shaull v. Shaull*, 182 Iowa 770, 166 N. W. 301 (1918); *Nalley v. First National Bank*, 135 Ore. 409, 293 Pac. 721 (1931); *Cox v. Reed*, 113 Miss. 488, 74 So. 330 (1917); *Trumbauer v. Rust*, 36 S. D. 301, 154 N. W. 801 (1915).

16. *Priest v. McFarland*, 262 Mo. 229, 171 S. W. 62 (1914); *Dawson v. Taylor*, 214 S. W. 852 (Mo. 1919); *Sutton v. Sutton*, 141 Ark. 93, 216 S. W. 1052 (1919); *White v. Willard*, 232 Ill. 464, 83 N. E. 954 (1908); *Timmons v. Timmons*, 49 Ind. App. 21, 96 N. E. 622 (1911); *Donnelly v. Eastes*, 94 Wis. 390, 69 N. W. 157 (1896).

17. *O'Day v. Meadows*, 194 Mo. 588, 92 S. W. 637 (1906); *Josey v. Johnston*, 197 Ala. 482, 73 So. 27 (1916); *Gay v. Gay*, 108 Ga. 739, 32 S. E. 846 (1898); *Noble v. Fickes*, 230 Ill. 594, 82 N. E. 950 (1907); *Lewis v. Curnutt*, 130 Iowa 423, 106 N. W. 914 (1906). *Contra*: *Hester v. Young*, 2 Ga. 31 (1847).

18. *Dozier v. Toalson*, 180 Mo. 546, 79 S. W. 420 (1904); *Knowling v. Fleming*, 165 Pa. 10, 30 Atl. 519 (1894); *McIntyre v. McIntyre's Estate*, 156 Mich. 240, 120 N. W. 587 (1909). *Contra*: *Jones v. Loveless*, 99 Ind. 317 (1884).

19. *Christ v. Kuehne*, 172 Mo. 118, 72 S. W. 537 (1903); *Hudspeth v. Grumke*, 214 S. W. 865 (Mo. 1919); *Ekblaw v. Nelson*, 124 Minn. 335, 144 N. W. 1094 (1914). *Contra*: *Crain v. Crain*, 21 Tex. 790 (1858).

20. *Hudspeth v. Grumke*, 214 S. W. 865 (Mo. 1919); *Vessey v. Dwyer*, 116 Minn. 245, 133 N. W. 613 (1911).

. . . not to exert any control over the same until after the death" of the grantors;<sup>21</sup> grantors "shall have all controlling power of premises during their lifetime, and then at their death title is to pass to" grantees.<sup>22</sup> In all of these situations Missouri is in accord with the majority of the courts.

Where the instrument is in the form of a deed granting all that the maker "may die possessed of," the courts are in disagreement.<sup>23</sup> Most of the courts hold that this provision renders the instrument testamentary in character. A typical opinion says: "nothing the grantor owned at the time the deed was made passed under the deed. The property that he then had remained his, and subject to his disposition, just as it was before. The operation of the deed is wholly contingent upon his having the property at his death."<sup>24</sup> There is much to be said for this view. The expressed intention of the maker of the instrument should be controlling, and such language does not indicate that the grantor thought he was passing a present interest. This is the usual basis of the cases holding such an instrument testamentary in character.<sup>25</sup>

In *Aldridge v. Aldridge*,<sup>26</sup> the instrument, otherwise in the form of a deed, contained the following provision: ". . . on this condition however, that if I, . . . outlive the (grantee) the land reverts back to me in fee. That if I should die first then the (grantee) shall have the land. . . ." This condition of survivorship was said to render the instrument testamentary in character. It is submitted that a deed conveying an interest made to commence in futuro upon the condition that A is elected President in November would be held to pass a present interest in a future estate, since the election of the President is a condition out of the control of the grantor.<sup>27</sup> The survivorship of the grantee is also a condition outside the control of the grantor. He has passed a present interest to the grantee, and the possibility of that interest reverting to him is based on a condition over which he has no authority. Upon this theory many courts have held that provisions similar to that in the *Aldridge* case do not invalidate the instrument as a deed.<sup>28</sup>

21. *Owen v. Trail*, 302 Mo. 292, 258 S. W. 699 (1924); *Craven v. Winter*, 38 Iowa 471 (1874); *Beebe v. McKenzie*, 19 Ore. 296, 24 Pac. 236 (1890).

22. *Wimpey v. Ledford*, 177 S. W. 302 (Mo. 1915); *Venters v. Wickens*, 224 Ill. 569, 79 N. E. 946 (1906); *Hitchcock v. Simpkins*, 99 Mich. 198, 58 N. W. 47 (1894); *Dick v. Miller*, 150 N. C. 63, 63 S. E. 176 (1908).

23. For cases holding such an instrument a valid deed see: *Goff v. Davenport*, 96 Ga. 423, 23 S. E. 395 (1895); *Ricker v. Brown*, 183 Mass. 424, 67 N. E. 353 (1903). *Contra*: *Brewer v. Baxter*, 41 Ga. 212 (1870); *Roth v. Michalis*, 125 Ill. 325, 17 N. E. 809 (1888); *Poore v. Poore*, 55 Kan. 687, 41 Pac. 973 (1895); *In re Lautenshlager*, 80 Mich. 285, 45 N. W. 147 (1890); *Nicolls v. Nicolls*, 168 Cal. 444, 143 Pac. 712 (1914).

24. *Ison v. Halcomb*, 136 Ky. 523, 124 S. W. 813 (1910).

25. See note 23, *supra*.

26. 202 Mo. 565, 101 S. W. 42 (1907).

27. *White v. Hopkins*, 80 Ga. 154, 4 S. E. 863 (1887); *Owen v. Smith*, 91 Ga. 564, 18 S. E. 527 (1892); *LEAKE, LAW OF PROPERTY IN LAND* (2d ed. 1909) 83.

28. *Bowler v. Bowler*, 176 Ill. 541, 52 N. E. 437 (1898); *Brady v. Fuller*, 78 Kan. 448, 96 Pac. 854 (1908); *West v. West*, 155 Mass. 317, 29 N. E. 582 (1892); *Bassett v. Budlong*, 77 Mich. 338, 43 N. W. 984 (1889); *Thomas v. Williams*, 105 Minn. 88, 117 N. W. 155 (1908). *Contra*: *Chaplin v. Chaplin*, 105 Kan. 481, 184 Pac. 984 (1919); *Pelley's Adm'r v. Earles*, 107 Ky. 640, 55 S. W. 550 (1900).

When the grantor, after creating an instrument in the form of a deed, expressly reserves the power to revoke the attempted deed most courts hold such an instrument ambulatory and hence invalid as a deed.<sup>29</sup> In *Goins v. Melton*,<sup>30</sup> the court held that a reservation of the power "to sell and deed" the land was equivalent to a reservation of the power to revoke. But could the grantor revoke? By reserving the power to "sell and deed" he has reserved only the right to make an *inter vivos* conveyance for valuable consideration. He has given up the right to convey the land as a gift *inter vivos*, or as a gift testamentary. "Thus, the grantor had very limited powers of revocation, and the grantee had a much more durable interest than she would have had in a mere expectancy under a will. It is submitted that the court might well have reached a contrary decision if the case had been adequately analyzed."<sup>31</sup>

It is said, in sustaining the decision in the *Goins* case, that although theoretically the grantor may have presently given an interest to the grantee, still when the grantor reserves a life estate and the complete power to revoke the deed, the grantee has actually gained nothing. But theoretically if a present interest passes to the grantee—the grantor divested to some extent of his title, at least to the extent of creating a liability of having it drawn out of him without further act on his part—there would seem to be little more reason for holding that such a provision renders a deed testamentary than there is in the case of a trust.

In the case of a trust "where by its terms an interest passes to the beneficiary during the life time of the settlor, the trust is not testamentary merely because the settlor reserves a beneficial life estate or because he reserves in addition a power to revoke the trust in whole or in part and a power to modify the trust."<sup>32</sup> In fact "courts of equity have always looked with suspicion upon voluntary trusts or settlements which do not reserve a power of revocation."<sup>33</sup> Wherein lies the mysterious factor that renders one instrument testamentary in character and permits the other to be a valid *inter vivos* trust?

29. *Butler v. Sherwood*, 114 Misc. 483, 186 N. Y. Supp. 712 (1921), *aff'd*, 233 N. Y. 655, 135 N. E. 957 (1922).

30. 343 Mo. 413, 121 S. W. (2d) 821 (1938). The instrument was in the general form of a warranty deed with the following provision: "It is the express understanding . . . that the grantor herein shall retain the possession and control of all profits therefrom for and during his natural life time, . . . at his death the title to all, or whatever part thereof remains unsold, to pass and vest in the grantee. . . ." The court said that the power of revocation was inconsistent with the passing of a present interest, and declared the instrument testamentary in character. But see *Tennant v. John Tennant Memorial Home*, 167 Cal. 570, 140 Pac. 242 (1914), commented on in (1915) 3 CALIF. L. REV. 256, in which the grantor reserved the exclusive possession and right of income, and the right to sell any of the property. Here the instrument was said to convey "a present interest in the remainder, upon contingency that the grantor should not, during her lifetime, convey to another or revoke the deed. . . . The contingencies did not happen; hence the estate is now absolute." In accord are *Smith v. Smith*, 167 Ga. 368, 145 S. E. 661 (1928); *Blanchard v. Morey*, 56 Vt. 170 (1883), saying that the above reservations are not inconsistent with a good grant *in presenti*, retaining a life estate and the power to revoke in the grantor.

31. *Eckhardt, Work of the Missouri Supreme Court for the Year 1938 (Property)*, (1939) 4 Mo. L. Rev. 419, 420.

32. RESTATEMENT, TRUSTS (1935) § 57; *Scott, Trusts and the Statute of Wills* (1930) 43 HARV. L. REV. 521, 526.

33. *Sims v. Brown*, 252 Mo. 58, 158 S. W. 624 (1913).



In *Sims v. Brown*,<sup>34</sup> the court said: "the words 'I hereby give, grant and relinquish' indicate an intention to pass a present interest." And "the only other words which would have any tendency to overcome the meaning and intent of the above words are the following: The grantor requests that the trustees 'at any time after my decease shall select and sell 80 acres of the land' said sum to be held for the benefit of the daughters and her bodily heirs. The phrase 'at any time after my decease' when fairly construed means nothing more than postponement of the time when the trustee is to take possession of the land for the purposes of the trust. The fact that the enjoyment of the estate is postponed to a future date does not change the instrument, otherwise a deed, to an instrument testamentary in character."<sup>35</sup> But cannot exactly the same reasoning be applied to the facts as they existed in *Goins v. Melton*? In both cases there was (1) the granting of an interest to become one of possession on the death of the grantor, and (2) a reservation in the grantor of the power to sell the land, which was held to be equivalent to the power to revoke the grant. The fact that in the *Sims* case the possession was to go to a trustee should make no difference. In neither case was there a present conveyance, only a grant of a present right to a future interest. It is difficult to see why it should be of importance that the enjoyment of the estate "at a future date" is to go to a grantee who is to hold for another, rather than for himself.

It is often said that, in the case of a trust, legal title to the future interest has passed to the trustee. The settlor has at least given up this much, although he has reserved a life estate and the power to revoke. Then in the case of a deed legal title to the remainder is said not to pass *because the grantor has reserved the power to revoke*. And since no present interest, or right to a future interest has been created, the instrument is testamentary in its nature. It is difficult to follow this distinction. The crux of the entire matter is whether a present right to a future interest has been created. And when it is assumed that because of the reservation of the power to revoke no present right to a future interest was created by the deed the answer has already been assumed. Such an assumption is not made in the case of a trust reserving a life estate and the power to revoke. In the *Goins* case the court casually makes the assumption by saying: "The trust feature of the *Sims* case, we think, clearly distinguishes it from the present case." Just why this distinction is made is not clear; nor is any reason mentioned in the opinion.

There is no reason why a deed should not be used to avoid the delay, expense, and frequent litigation involved in the probate and administration of a will. However, the Missouri courts seem somewhat illiberal in their interpretation of instruments as deeds.<sup>36</sup> The reason for this attitude is not expressed in the cases

34. 252 Mo. 58, 158 S. W. 624 (1913).

35. It is not absolutely clear when this trust was to commence. However the court seemed to treat it as if it were to commence only at the death of the settlor. Such treatment seems logical since there was no reason to have a trust until that time. That is, the trustee had no duties until the death of the settlor.

36. See notes 13, 15, 26, 28, and 30, *supra*.

and we can only offer possible explanations. It may be that the courts question the wisdom and safety of disposition after death by means of a deed, and want the grantor to be able to change the disposition of his property in the light of changing conditions. Or this may be the result or holdover of the common law rule that no estate could be conveyed in futuro. It is submitted that the courts should strive to uphold the instrument and declare it valid, and not be over zealous in declaring an instrument testamentary in its nature.<sup>37</sup> The more liberal result is technically sound, and it is socially desirable as an inexpensive and effective means of transferring property.

JAMES H. OTTMAN

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37. *McAlister v. Pritchard*, 287 Mo. 494, 230 S. W. 66 (1921).