Missouri Law Review

Volume 6
Issue 2 *April 1941*

Article 4

1941

Comments

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Recommended Citation
Comments , 6 Mo. L. Rev. (1941)
Available at: https://scholarship.law.missouri.edu/mlr/vol6/iss2/4

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Comments

CONTRACTS—SUBSCRIPTION AGREEMENTS—CONSIDERATION

In the recent Missouri decision of *Missouri Wesleyan College v. Shulte*,[1] the important question of the validity and enforcement of charitable subscriptions was considered. In the typical charitable subscription case there is a "drive" for funds by the charitable institution and the (later) defendant indicates his willingness to contribute a named sum to the worthy cause—that is to say, he "subscribes." Later he declines to make the pledged contribution and action is brought against him for the amount thereof. The legality of such agreements to subscribe is obviously of great importance in the affairs of all such charitable institutions. The theories as applied by the various courts in these difficult cases are also of importance quite apart from the result reached, in that they indicate trends of development in the law of contracts.

The most elusive element of a contract is the consideration which makes it binding—that which transforms a moral obligation into a legally enforceable right. The traditional concept of consideration is that of inducement and exchange; the promise must be induced by the detriment on the part of the promisee, and the detriment must be induced by the promise on the part of the promisor. Furthermore, the two must be exchanged, the one being given for and induced by the other. This element of a bargain is, under the orthodox view of consideration, regarded as essential.[2]

In no field of contracts has the search for consideration taken more varied turnings than in the attempts of the American courts to uphold subscriptions made to charitable institutions.[3] In England the doctrine of *stare decisis* has rigidly held the courts to the pure and orthodox view of consideration, and the rule long has been that subscriptions for charitable purposes are not binding, inasmuch as none of the essentials of true consideration is present.[4] The English courts thus have taken the coldly logical view that since all charitable sub-

1. 142 S. W. (2d) 644 (Mo. 1940). Testator signed a subscription agreement "in consideration of my interests in Christian education and in consideration of others subscribing" for the purpose of paying the debt of plaintiff College and providing capital for operations and improvements. The amount of the subscription was to become due and payable one day after testator's decease, and was to be paid out of the estate. Many others signed similar agreements. In an action by the College against the executor, the court stated that until the College had acted upon the promise, the subscription was a mere offer. But since the College had continued operating for twelve years after the subscription in controversy and like subscriptions were made, there was evidence that the College had "expended money and labor" in reliance upon the promises of subscribers, and that therefore there was good consideration, that a valid contract resulted, and that the amount of the subscription could be collected.

2. See a clear statement of the "bargained-for" element in (1938) 22 MINN. L. REV. 843.

3. 1 WILLISTON, CONTRACTS (Rev. ed., 1936) § 116.

4. *Ibid.* See also *In re* Hudson, 54 L. J. 811 (Ch. 1885).

Published by University of Missouri School of Law Scholarship Repository, 1941

scriptions are intended as gifts, there is no inducing of the promise by the detriment to the promisee—and hence the element of inducement or exchange is not present. The earliest American case involving the point adopted the holding and argument of the English courts that there was no consideration to render the subscription agreement binding.[5] Two years later, when the same court non-suited a plaintiff college seeking to enforce a charitable subscription, it expressed most tersely its former view, saying "no mutuality, no parties, no valuable consideration."[6]

From the earliest days in the United States it has been the opinion of many that of prime importance in making democracy work are the education of the masses and the care of the helpless. But there were in the beginning no such centuries-old institutions of learning and care as existed in England. Here such institutions had to be built from the ground up. It was the general feeling that all should aid in the financing who were able. What better manner than that many should subscribe small amounts, and that by their combination they should give a large aggregate sum? Then, as today, many institutions relied upon subscriptions as their sole means of support. So, even as the first American opinions on subscriptions agreements were written, it was realized that it was to the best public interest to encourage these donations. The American courts, reflecting this view, apparently felt that they must find a way to enforce such agreements. Two ways were then seen as open. First, to make exceptions to the general rule. Second, to warp the general rule into new and tortuous forms. The courts did both.

In 1817 the first solution appeared: that although the payees could not recover on the original subscription for want of consideration, yet if they had properly expended money or labor in reliance thereon they might recover.[7] Shortly thereafter another solution made its appearance—when several persons subscribe for a charitable purpose, the promise of each is a consideration for the promises of others, and the payee may enforce the promise against each and all. This was the finding of a consideration from the beginning, and could be used, among others, by those jurisdictions allowing the enforcement of third party beneficiary contracts.[8] Another method was first promulgated in 1847, when the subscription was upheld *ab initio* on the ground of an implied promise by the promisee to carry out the purposes and objects of the subscription, such being "a sufficient consideration on familiar principles."[9] In recent years still another method of enforcement has developed through the application of promissory estoppel in those instances where work has been done or labor expended in reliance upon the promise.[10]

Today in the United States all of these views are in use in some jurisdictions,

5. Boutell v. Cowdin, 9 Mass. 254 (1812).
6. Limerick Academy v. Davis, 11 Mass. 112 (1814).
7. Farmington Academy v. Allen, 14 Mass. 171 (1817).
8. Cong. Society v. Perry, 6 N. H. 164 (1833).
9. Troy Academy v. Nelson, 24 Vt. 189 (1847).
10. Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325 (1901).

and, in fact, some courts use them all.[11] The view which most courts follow is that a charitable subscription is an offer to "contract" which becomes binding as the work embraced in the agreement is begun or done, or liability is incurred, on faith of the subscription.[12] This seems to be the present view in Missouri.[13] The subscription thus being analogous to a mere offer, the courts adopting this view hold that there is no consideration until, as noted, the acts requested are done, or begun.[14] The courts in this case, then, are primarily weighing the detriment to the beneficiary. But it cannot in any accurate sense be said that there is an offer to "contract." Such subscriber has no thought of legally enforceable rights and duties in mind—he clearly intends to make a gift. His decision to part with his money is in no way induced by any thought of detriment to the beneficiary, or benefit to himself.

The theory that consideration is supplied by the mutual promises of the subscribers is followed by a large number of jurisdictions.[15] The greatest difficulty with this solution is clearly indicated by Williston: "It is doubtless possible for two or more persons to make mutual promises that each will give a specified amount to a charity or other object, but in the case of ordinary charitable subscriptions, the promise of each subscriber is made directly to the charity or to its trustees, and it is frequently made without any reference to the subscriptions of others."[16] It should be emphasized that in such case the difficulty of inducement remains, and particularly is this apparent where the subscriptions are made at different times. The bargain element seems clearly lacking. And if there is not a valid contract between the subscribers, it would seem impossible for the beneficiary to sue. This theory of mutual promises of subscribers was urged on the Missouri court at an early time in the case of *Methodist Orphans' Home Assn. v. Sharpe's Executor*,[17] but the court said ". . . such promises as

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11. See discussion of and cases cited by Billig, *The Problem of Consideration in Charitable Subscriptions* (1927) 12 CORN. L. Q. 467; (1924) 10 ST. LOUIS L. REV. 42; (1920) 34 HARV. L. REV. 220; (1923) 22 MICH. L. REV. 260; (1925) 23 MICH. L. REV. 910; (1921) 6 MINN. L. REV. 167; (1914) 62 U. OF PA. L. REV. 296; (1925) 11 VA. L. REV. 643; (1925) 3 WIS. L. REV. 275; (1924) 34 YALE L. J. 99. Notes (1894) 24 L. R A. 80; (1914) 48 L. R. A. (N. S.) 783; (1922) 16 A. L. R. 46.

12. Brokaw v. McElroy, 162 Iowa 288, 143 N. W. 1087 (1913); Stone v. Prescott School Dist., 119 Ark. 553, 178 S. W. 399 (1915); University of Pennsylvania v. Cadwalader, 277 Pa. 512, 121 Atl. 314 (1923); Y. M. C. A. v. Estill, 140 Ga. 291, 78 S. E. 1075 (1913).

13. Brooks v. Owens, 112 Mo. 251, 19 S. W. 723 (1892); Corrigan v. Detsch, 61 Mo. 290 (1875); Hardin College v. Johnson, 221 Mo. App. 285, 3 S. W. (2d) 264 (1909); James v. Clough, 25 Mo. App. 147 (1887); Koch v. Lay, 38 Mo. 147 (1866); Pitt v. Gentle, 49 Mo. 74 (1871); School Dist. v. Sheidly, 138 Mo. 672, 40 S. W. 656 (1896); Westminster College v. Gamble, 42 Mo. 411 (1868); Christian University v. Hoffman, 95 Mo. App. 488, 69 S. W. 474 (1902); Workman v. Campbell, 46 Mo. 305 (1870).

14. The cases are collected in (1932) 60 C. J. 955, and (1919) 25 R. C. L. 1399.

15. Board of Home Missions v. Manley, 129 Cal. App. 541, 19 P. (2d) 21 (1933); Cotner College v. Hyland, 133 Kan. 322, 299 Pac. 607 (1931); Greenville Supply Co. v. Whitehurst, 202 N. C. 413, 163 S. E. 446 (1932); LaGrange College v. Cary, 168 Ga. 291, 147 S. E. 390 (1929); Petty v. Church of Christ, 95 Ind. 278 (1883); Waters v. Trust Co., 129 Mich. 640, 89 N. W. 687 (1902).

16. See note 3, *supra*.

17. 6 Mo. App. 150 (1878).

the one at bar cannot be enforced, and it cannot be said, without departing from principle, that there is any consideration to support them." Since this early case the argument has apparently not been pressed upon the Missouri courts nor squarely ruled upon by them, although there is a recent *dictum* in a federal decision that the mutual promises doctrine is not followed in Missouri.[18]

Another theory, that involving the finding of an implied promise by the promisee charity that the subscription will be properly applied in fulfillment of the object of the "drive" for funds, thus establishing a bilateral contract with the necessary consideration, also has a substantial following in the courts.[19] In theory, however, the finding of consideration from the implication of such a promise by the beneficiary is vulnerable on several grounds. The action on the part of the beneficiary in doing those things consonant with its assumed function is, in most cases, established by the charter of the institution or the law of the state. In such case it seems far from correct to imply a promise on the institution's part from the imposition of this duty upon it. The trustee of the fund is doing no more than is legally required of him. And even conceding that a promise may be implied in proper cases, there remains a failure in the establishing of the bargain element—the element of exchange is missing.

The Missouri courts have considered the problem many times. In 1878 the case of *Methodist Orphans' Home Assn. v. Sharpe's Executor* squarely presented the problem whether the courts of Missouri, in absence of detrimental action by the beneficiary, would hold a subscription binding. In that case the mutual promises doctrine was urged upon the court, it being recognized widely by 1878, but as noted heretofore, the court rejected the argument. The principal case continues the Missouri doctrine that the subscription will be upheld in those cases in which it appears that the beneficiary has acted in reliance upon the subscription. Whether our court will in the future expand this doctrine remains a matter of conjecture.[20] It is possibly of significance that the mutual promises theory has not been relied upon to ground recovery, but too much emphasis should not be placed upon this element in view of the fact that, as far as we know, no recent decision has squarely passed upon the question. The general problem, it may be noted in passing, is doubly interesting in Missouri because of the statutory provision that ". . . all instruments in writing . . . shall import a consideration."[21] This statute has been held uniformly to mean that consideration will be presumed, and the burden of proof as to its existence is on the party denying it.[22] So, when money and labor have been expended by the beneficiary in reliance upon the subscription, the beneficiary is further aided, where there is a writing, by the fact that the subscriber has the burden of

18. Baker University v. Clelland, 86 F. (2d) 14 (1936).
19. Barnett v. Franklin College, 10 Ind. App. 103, 37 N. E. 427 (1894); Central Maine Hospital v. Carter, 125 Me. 191, 132 Atl. 417 (1926); *In re* Griswold's Estate, 113 Neb. 256, 202 N. W. 609 (1925).
20. See able discussion in (1936) 22 WASH. L. Q. 434.
21. MO. REV. STAT. (1929) § 2958.
22. Fleming v. Mulloy, 143 Mo. App. 309, 127 S. W. 105 (1910); Swift v. Fire Ins. Co., 279 Mo. 606, 216 S. W. 935 (1919); Smith v. Ohio Ins. Co., 330 Mo. 236, 49 S. W. (2d) 42 (1932).

denying the existence of consideration. Hence Missouri and many other states continue to hold to the view that consideration for a subscription agreement can be found within the framework of the traditional concept of consideration, a straining of orthodox principles not meeting with unanimous approval.[23]

The use of the relatively recent doctrine of promissory estoppel has also entered into the subscriptions cases in those cases in which the beneficiary has acted in reliance upon the subscription.[24] This doctrine was fully considered in the landmark case of *Allegheny College v. National Chatauqua Bank*,[25] wherein Mr. Justice Cardozo clearly points out the shortcomings of the orthodox theory of consideration as applied to this type of case and the confusion resulting. In this case the development of the theory of promissory estoppel in New York was considered as possibly obviating the necessity for resorting to a strained construction of consideration in order to uphold promises to charitable institutions, the court saying, in part: "Certain, at least, it is that we have adopted the doctrine of promissory estoppel as the *equivalent* of consideration in connection with our law of charitable subscriptions." Another New York case has called the doctrine of promissory estoppel "a substitute for consideration, or an exception to its ordinary requirements. . . ."[26] That perhaps Missouri is following along the same line as New York in its reasoning is shown in the *Shulte* case by the quotation, in that case, of the following significant statement made by the Missouri court in the case of *School District v. Sheidley*,[27] decided in 1896: "If the expenses were incurred and the liability created in furtherance of the enterprise the donor intended to promote, and in reliance upon the promises, they will be taken to have been incurred and created at his instance and request, and his executors will be *estopped to plead want of consideration.* The gratuitous promises will thus be converted into valid and enforceable contracts." (Italics mine)

Upon grounds of policy heretofore discussed, there is no doubt that the courts will attempt to enforce charitable subscriptions. The language used (except in such cases as those involving either subscribers' mutual promises or an implied promise on the part of the charitable institution) is generally to the effect that the promises of the subscriber will be enforced where the charitable institution has expended funds or labor in reliance upon the promise.[28] Whether this enforcement proceeds upon the theory that the action thus taken by the charitable institution is in effect its acceptance of an offer for an unilateral contract, or whether it proceeds upon the theory that under these circumstances the subscriber will be estopped to deny the validity of the promise, is not clear from the cases. Certain cases indicate that the court is considering the situation

23. Note Williston's comments, note 3, *supra*.
24. RESTATEMENT, CONTRACTS (1932) § 90. See discussion in (1938) 22 MINN. L. REV. 843.
25. 246 N. Y. 369, 159 N. E. 173 (1927).
26. Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325 (1901).
27. 138 Mo. 672, 40 S W. 656 (1896).
28. See note 12, *supra*.

as analogous to the acceptance of an offer for a unilateral contract.[29] It should be noted in this respect that under normal unilateral contract theory the offeree is required to do all of the act requested—hence merely commencing the performance requested is not enough.[30] However, there is ample authority in the field of subscription contracts that courts adopting this theory do not require performance of the entire act "requested"—a mere beginning being enough for acceptance.[31] This requirement of complete performance, however, is not necessarily involved in the estoppel theory, since the change of position to one's detriment may take place as irrevocably upon commencing performance as completing it. "Consideration by acceptance" and "consideration by estoppel" are not, then, the same in theory, and should not be confused.[32]

The greatest merit in the use of promissory estoppel lies in its release of the courts from the warping of orthodox principles necessary in order to find consideration in the traditional sense. Its adoption as an independent basis for upholding subscription would not necessarily change the results of the decisions, but it would avoid the ambiguities and logical contradictions inevitably resulting from efforts to fit this type case within the conventional framework of contract law. As noted in the *Missouri Annotations to the Restatement of the Law of Contracts*, "Promissory estoppel is not at variance with the Missouri decisions" but, as it adds, "There is a variance between the doctrine underlying estoppel and the theoretical justifications that have been advanced by the Missouri decisions."[33] Thus, consistent with the results of past decisions, the courts of Missouri can use either theory, but it is well to recognize that there are two separate theories involved and available, each of which has both advantages and disadvantages. Such recognition may result in no change in result in the typical case, but there will be a great elimination of confusion in theory.[34]

But promissory estoppel should not be thought a perfect answer. It has obvious disadvantages, from the point of view of the charity at any rate. Thus it is ordinarily said that it can only be used where there has been some clear action resulting in detriment to the promisee.[35] Accordingly, it cannot be used where the beneficiary attempts to enforce the subscription agreement before acting at all. In such case those courts not utilizing some theory other than promissory estoppel may refuse to enforce the agreement. This means, as a practical matter, that the institution in such cases may feel that it must first act and then make its endeavor to get the money—a procedure of questionable

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29. Troy Academy v. Nelson, 24 Vt. 189 (1847); Stone v. Prescott School Dist., 119 Ark. 553, 178 S. W. 399 (1915); Converse's Estate, 240 Pa. 458, 87 Atl. 849 (1913); *cf.* Workman v. Campbell, 46 Mo. 305 (1870).

30 I Williston, *op. cit. supra* note 3, § 73.

31. See note 29, *supra*.

32. Taylor, *Charitable Subscription Contracts and the Kentucky Law* (1940) 29 Ky. L. J. 23.

33. (1933) § 90.

34. But see the argument against the use of estoppel in the dissent of Mr. Justice Martin in I. & I. Holding Co. v. Gainsburg, 251 App. Div. 550, 296 N. Y. Supp. 752 (1937).

35. Grand Lodge v. Farnham, 70 Cal. 158, 11 Pac. 592 (1886); Sullivan v. Corbett, 3 Kan. App. 390, 42 Pac. 1105 (1896).

soundness from a business point of view. As a remedy for this and other problems presented by the charitable "subscription," some writers have suggested that such subscriptions, being *sui generis*, should be held binding without consideration.[36] However ideal this solution may be, it seems impossible of adoption in most jurisdictions in view of the case authority now existing. Another remedy, however, may be found. As Martin, J., dissenting in *I. & I. Holding Co. v. Gainsburg* observed: "Recognizing the fact that a charitable subscription is intended as a gift and not a bargain, it may well be that the time has come for the Legislature to say that a charitable subscription requires no consideration to make it enforceable."[37] It would seem that this suggestion is worthy of consideration in all jurisdictions. The cases are now in the utmost confusion. No donor, no charity, can say with any degree of assurance what their respective rights and duties may be. As long as charitable institutions are looked upon as being necessary, and their operation encouraged, their primary means of support should be placed upon a secure basis.

ROBERT J. FOWKS

REAL ESTATE MORTGAGE THEORY IN MISSOURI

The implications of recent Missouri holdings present a problem which is by no means novel but which has for some time deserved comment. Mortgage theory is foremost among the hopelessly confused fields of law, as evidenced by theoretically irreconcilable case holdings. The probable cause of the many conflicting holdings of the case law in this field is the seemingly simple, but actually evasive and difficult, concept of "title." Missouri shows no more lucidity in disentangling the inconsistency of her case law than does any of her sister states. Were it not for the lawyer's devotion to the title fetish—title as a thing, a reality, inhering in some one human being at all times—there would be little in the cases to confound him. Allied with this concept are the many results and consequences of the fixing of "title" in some person, which have been developing for centuries with the evolution of our property law. Each of the incidents of ownership of property have traditionally been established as belonging to one party or another as an incident of title. Perhaps under the simplicity of business relations and transactions at an earlier time, "title" was a usable and satisfactory generalization for explaining the results of most cases involving property ownership, but with the complexity of modern business, this generalization no longer satisfactorily rationalizes the holdings of the cases.

Most lawyers are sufficiently acquainted with the history and evolution of mortgage theory to make unwarranted any detailed discussion here.[1] Suffice it to

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36. Billig, *supra* note 11. See also (1925) 23 MICH. L. REV. 910.
37. See note 34, *supra*.

1. WALSH, MORTGAGES (1934) c. 1; Wakefield v. Dinger, 135 S. W. (2d) 17, 21 (Mo. App. 1939). For a general discussion see 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) §§ 1179-1185, commented upon in (1928) 37 YALE L. J. 691.

say that the early common law theory of mortgages involved a transfer of legal title to the mortgagee on condition subsequent of payment of a debt. Technically the mortgagee was said to have a fee simple defeasible and the mortgagor a right of entry for condition broken. Gradually, and especially in the United States, great defection from this theory arose largely as a result of the adoption of the equitable principles in courts of law, equity regarding the whole transaction as being essentially a security device, resulting in a retention of beneficial ownership in the mortgagor, and the creation of a security interest in the mortgagee. Thus in courts of law the mortgagor is said to have legal title, and the mortgagee a legal,[2] non-possessory lien. As this original common law theory, now termed the "title theory," was discarded for the equitable, or "lien theory," some conflict of opinion between the states arose. An intermediate position soon became apparent in the cases which in time caused the states giving it voice to be known as "intermediate theory" states. The mortgagor under such a view retains title until default, at which moment it magically shifts to the mortgagee. This discussion is directed to a consideration of the Missouri cases, with an attempt to allocate Missouri to one of those groups.

Ejectment for the recovery of land lies in behalf of the person entitled to possession, and that one, absent a demise, is usually the person in whom legal title is found.[3] Equitable title is insufficient to grounds such an action, and hence under the "title theory" the mortgagee is held entitled to possession, since legal title to the land reposes in him.[4] The mortgagor having a mere equity is left without possession, although courts of equity proceed to force the mortgagee to account to the mortgagor for the rents and profits.[5] Likewise in a state applying the equitable theory (*i. e.*, "lien theory"), the title remains in the mortgagor so that he retains the right to possession. Under the "intermediate theory," the mortgagor is entitled to retain possession until default, at which time title passes to the mortgagee, carrying with it, as an incident, the right to possession. It would seem to follow that by determining who has the right to possession one has a possible criterion for determining and denominating the mortgage theory of a particular jurisdiction. Indeed this is what is commonly done, and with respect to Missouri, this approach has driven Jones to the conclusion that Missouri is an "intermediate theory" state,[6] though he is by no means the only author so concluding.[7]

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2. Durfee, *The Lien or Equitable Theory of the Mortgage* (1912) 10 MICH. L. REV. 587.
3. Rollins v. Shaner, 316 Mo. 953, 292 S. W. 419 (1927); (1920) 19 C. J. 1028-1031.
4. (1926) 41 C. J. § 573; WALSH, *op. cit. supra* note 1, at 91, § 18.
5. (1926) 41 C. J. § 606; WALSH, *op. cit. supra* note 1, at 91, § 18.
6. JONES, MORTGAGES (8th ed. 1928) § 41. "In Missouri a mortgage is only a security for a debt, and remains so even after a condition broken; but upon default in the payment of the debt, the mortgagee may maintain ejectment, because he is then in law regarded as the owner of the estate; but the legal title vests in him only for the purpose of protecting his debt. By a mortgage, or a deed of trust in the nature of a mortgage, the legal title, after condition broken, passes to the mortgagee or trustee."
7. In PINGREY, MORTGAGES (1893) § 57, Missouri is classified as a state

The first insight into the Missouri position is found in *McNair v. O'Fallon*,[8] where in *dictum*, the court said that the authorities in courts of law were then converging their opinion on mortgage theory to a focal point of acceptance of equitable principles, resulting in the fundamental view that a mortgage is but a lien, in its legal effect. That case involved the question of the validity of a levy of execution on the possessory interest of the mortgagor under a straight mortgage before default, and held that his interest is to be subjected to the levy of the judgment creditor.

In *Kennett v. Plummer*,[9] Missouri found title in the mortgagor until default, as far as a straight mortgage is concerned, by holding that the mortgagor's lessee could maintain trespass, and saying:

> "The modern doctrine is well established that a mortgage is but a security for the payment of the debt or the discharge of the engagement for which it was originally given, and until the mortgagee enters for breach of condition, and in many respects until final foreclosure of the mortgage, the mortgagor continues the owner of the estate, and has a right to lease, sell, and in every respect to deal with the mortgaged premises as owner . . ."

The only authority for this statement is Kent,[10] and the case deals with a straight mortgage, so that it is not necessarily authoritative as far as trust deeds are concerned. Moreover, the facts do not justify the conclusion that the mortgagee may enter upon breach of condition, because the mortgage there involved was not in default.[11]

In *McCormick v. Fitzmorris*,[12] can be found *dictum* to the effect that a trustee in possession after default of a trust deed can defeat a mortgagor's action of ejectment, and from here we proceed to a maze of *dicta* in the cases, all in substance saying that title remains in the mortgagor until default, at which time it shifts to the mortgagee; with the attendant incident of possession, adhering to title.[13] In many of these cases, the court cites *Kennett v. Plummer* in situations

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adopting a modification of the common law rule; 1 POMEROY, *op. cit. supra* note 1, at § 163: "Between the immediate parties—the mortgagor and mortgagee and persons holding under them—the legal conception is acknowledged, and the legal rights and duties flowing from the mortgage as a conveyance of the legal estate are recognized and enforced by the courts of law. But as between the mortgagor and his representatives and all other persons not holding under or through the mortgagee, the legal conception has been entirely abandoned, and the equity view has been adopted by all courts of law as well as of equity."

8. 8 Mo. 188 (1843).
9. 28 Mo. 142, 145 (1859).
10. 4 KENT'S COMMENTARIES *127.
11. Case discussed by Eckhardt, *The Work of the Missouri Supreme Court for the Year 1938 (Property)* (1939) 4 Mo. L. REV. 419, 424.
12. 39 Mo. 24 (1866).
13. Hubble v. Vaughan, 42 Mo. 138, 141 (1868), saying: "The legal estate had passed by the mortgage . . ." seemingly casts Missouri back into the "title theory." Happily the mortgage there was in default, so that the mortgagee could be said to be entitled to possession by virtue of the breach of condition; Reddick v. Gressman, 49 Mo. 389 (1872); Masterson v. West End Narrow Gauge R. R., 72 Mo. 342 (1880); Bailey v. Winn, 101 Mo. 649, 12 S. W. 1045 (1889); Jones v. Shepley, 90 Mo. 307, 2 S. W. 400 (1886); Dickerson v. Bridges, 147 Mo. 235, 48 S. W. 825 (1898); Bassett v. O'Brien, 149 Mo. 381, 51 S. W. 107 (1899); Hurst Automatic Switch & Signal Co. v. Trust Co., 216 S. W. 954 (Mo. 1918); Missouri Real Estate & Loan Co. v. Gibson, 282 Mo. 75, 79, 220 S. W. 675, 676

involving trust deeds and straight mortgages alike, leaving the reader to hazard his own guess as to whether the doctrine is thus applied wittingly or not to both situations. Ordinary mortgage principles are used even in cases where a deed absolute on its face was given,[14] amounting to an equitable mortgage, when the universal holding gives the mortgagee legal title in every respect regardless of which theory is applied in the particular jurisdiction.[15]

In *Johnson v. Houston*,[16] where the mortgagee entered after the default of the trust deed and conveyed to the defendant, the court held that the mortgagor was to be denied his cause of action in ejectment, saying:

> "But in a mortgage, or a deed of trust in the nature of a mortgage, the legal title, after condition broken, passes to the mortgagee or trustee."

The court admits that little authority is to be found in the earlier cases since they involve straight mortgages, but says the rule to be applied in both situations is the same.

In *Siemers v. Schrader*,[17] the holder of the note under a deed of trust after default was held not entitled to possession, the court saying that title is in the trustee under a trust deed after default and reposes in a mortgagee only under a straight mortgage, so the suit must be brought in the trustee's name. The court expressly denies that Missouri has ever precisely decided whether the trustee himself could maintain the action, although *Johnson v. Houston* is acknowledged as approaching the problem in *dictum*; thus pointing by implication to the existence of a difference in the rule to be applied to the trust deed and the straight mortgage, although the later cases fail entirely to so distinguish.[18] However, a

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(1920), was a suit to enforce tax bills where the question arose of the mortgagee's title, and the court said: ". . . we hold that after condition broken the legal title to mortgaged land vests in the mortgagee and he can maintain ejectment, yet we further hold that such vesting of the title is for the protection of the debt and for no other purpose, and when the debt is paid the mortgagee's interest is extinguished without reconveyance." ". . . a mortgage, or deed of trust in the nature of a mortgage . . . is now regarded in this State as being, in its last analysis, a lien and nothing more. So viewed, it is neither an estate in land, nor a right to any beneficial interest therein. . . . The debt is the essence of the mortgage, the lien a mere incident that follows it as a shadow . . ."; Grafeman Dairy Co. v. Mercantile Club, 241 S. W. 923 (Mo. 1922); Springfield *ex rel.* Trust Co. v. Ransdell, 305 Mo. 43, 264 S. W. 771 (1924); Farmer's Bank v. Bradley, 315 Mo. 811, 288 S. W. 774 (1926); Reynolds v. Stepanek, 339 Mo. 804, 99 S. W. (2d) 65 (1936); Eurengy v. Equitable Realty Corp., 341 Mo. 341, 107 S. W. (2d) 68, 71 (1937); Hunter v. Henry, 181 S. W. 597 (Mo. App. 1916); Wakefield v. Dinger, 135 S. W. (2d) 17 (Mo. App. 1939).

14. Walcop & Griswold v. McKinney's Heirs, 10 Mo. 147 (1846); Sutton v. Mason, 38 Mo. 120 (1866).

15. WALSH, *op. cit. supra* note 1, at 34; JONES, *op. cit. supra* note 6, c. 5, §§ 225-254.

16. 47 Mo. 227, 230 (1871).

17. 88 Mo. 20 (1885).

18. Schanewerk v. Hoberecht, 117 Mo. 22, 22 S. W. 949 (1893); Missouri Real Estate & Loan Co. v. Gibson, 282 Mo. 75, 220 S. W. 675 (1920); Benton Land Co. v. Zeitler, 182 Mo. 251, 81 S. W. 193 (1904); Wilson v. Reed, 270 Mo. 400, 193 S. W. 819 (1917); Hurst Automatic Switch & Signal Co. v. Trust Co., 216 S. W. 954 (Mo. 1918). Quite often is the phrase "in a mortgage, or deed of trust in nature of a mortgage," found in these cases, indicating that the rules to be applied in the two cases are the same.

rationalization of the language would permit of an interpretation that the court merely declines to pass on that precise point. The mortgagor was held entitled to possession until default under a trust deed in *In re Life Ass'n of America*,[19] though the converse of that situation—whether the trustee was entitled to possession after default—was a problem not presented for decision.

In *Logan v. Wabash Western Ry.*,[20] the St. Louis Court of Appeals held the mortgagor in possession under a trust deed not yet in default the sole person entitled to sue for a negligent injury to the mortgaged premises, but in so holding the court also cast grave doubts upon any view of complete title in the trustee even after default by saying:

> "It is the recognized law . . . that in this state a mortgage of real estate, although a conveyance in fee upon a condition, is merely a security for a debt, and so remains even after condition broken. Until there is a sale under the mortgage, the mortgagor is regarded as the beneficial owner. It is true that the mortgagee after condition broken has the right of entry, and may maintain ejectment if his right is denied him, but, whenever and however he gets possession, he must hold the premises for the mortgagor and apply the rents to the extinguishment of his debt. . . . Therefore, strictly speaking, a mortgage is only a lien upon, and not a title to, land. It will be observed, however, in this case that, at the time the mill was burned, the debt secured by the deed of trust on the land was not due. At that time, although the legal title was nominally vested in Morsey [the trustee], yet he neither had the possession nor did he have the right to possession. The plaintiff was for every purpose the owner, and, until default in the payment of the debt, he alone was entitled to possession."[21]

In *Pease v. Pilot Knob Iron Co.*,[22] the mortgagee after default, defectively exercising his express power of sale under the mortgage, was held to have conveyed his own legal title nevertheless, sufficient to enable his grantee to maintain ejectment. *Schanewerk v. Hoberecht*[23] smacks of title theory by saying the deed of trust places legal title in the trustee, which he can convey to another even in breach of trust; but upon analysis, the language is tempered by the element of a default prior to the date of conveyance. *Wilson v. Reed*[24] is a direct holding that a trustee under a deed of trust may maintain ejectment after default.

At this point it may be observed that by virtue of these cases, Missouri has held that the "intermediate theory" as to title with its incidental right of possession is law in this state with regard to straight mortgages; and, that in the case of deeds of trust, the trustee may secure possession after default at least, but there is no case holding directly that the trustee does not have legal title at the time of execution of the instrument. This doubt was resolved in 1938 by the holding in *Lustenberger v. Sarkesian*,[25] so that it may now safely be said that any mortgagor, in the absence of stipulation, may retain possession of the mortgaged premises until default, at which time the trustee or mortgagee, as the case

19. 96 Mo. 632, 10 S. W. 69 (1888).
20. 43 Mo. App. 71 (1890).
21. *Id.* at 75.
22. 49 Mo. 124 (1871).
23. 117 Mo. 22, 22 S. W. 949 (1893).
24. 270 Mo. 400, 193 S. W. 819 (1917).
25. 343 Mo. 51, 119 S. W. (2d) 921 (1938); discussed by Eckhardt, *supra* note 11, at 423.

may be, can demand possession and enforce his right thereto by ejectment. It would seem to follow, therefore, that Missouri is an "intermediate theory" state in respect to both straight mortgages and deeds of trust, and could the problem be declared ended at this point, little of consequence would discourage a dogmatic statement of conclusion. But when other incidents of title are considered, one becomes less certain that generalities can be discriminately uttered.

Proceeding now upon the postulate that Missouri is an "intermediate theory" state, it becomes consistent with theory to conclude that before default, the legal title of the mortgagor is subject to levy of execution, and that upon default, the property is beyond the process of judgment creditors of the mortgagor, and becomes available for execution by the judgment creditors of the mortgagee. Missouri has held that the creditors can levy upon the mortgagor's interest before default,[26] but they also have said in *dictum*, that at no time can the interest of the mortgagee be taken on execution.[27] One writer feels that insurmountable logical difficulties are presented through the fact that nowhere can the mortgagee after suit upon the debt, have execution on the property without abandoning his mortgage security.[28]

An analysis of the dower cases presents further difficulties. Before default the interest of the mortgagor is legal, and dower should attach. Likewise the interest of the mortgagee is equitable,[29] and results in no dower rights in his widow. Thus far the Missouri cases are in accord.[30] The same line of reasoning applied to the situation after default would disallow the attachment of dower to the mortgagor's interest and permit the mortgagee's widow to claim it. Here a mental reversal is incurred and the contrary result is reached.[31] Similarly, the Missouri court holds that a purchase money mortgagee takes priority over the dower rights of the mortgagor's widow,[32] although at the moment the mortgagor takes title, it cannot be doubted that his interest is legal and not equitable. The dower cases are consistent in nearly every jurisdiction, regardless of whether

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26. McNair v. O'Fallon, 8 Mo. 188 (1843); Benton v. O'Fallon, 8 Mo. 650 (1844); Brant v. Robertson, 16 Mo. 129 (1852); Holloway v. Holloway, 103 Mo. 274, 15 S. W. 536 (1890); Wakefield v. Dinger, 135 S. W. (2d) 17 (Mo. App. 1939).

27. Wakefield v. Dinger, 135 S. W. (2d) 17 (Mo. App. 1939); Walcop & Griswold v. McKinney's Heirs, 10 Mo. 147 (1846). But see McNair v. O'Fallon, 8 Mo. 188 (1843): "The interest of a mortgagor or mortgagee in possession is bound by a judgment, and may be sold, but out of possession, neither has an interest upon which the lien of a judgment can attach"; JONES, *op. cit. supra* note 6, at § 867.

28. Sturgis & Clark, *Legal Theory and Real Property Mortgages* (1928) 37 YALE L. J. 691, 704.

29. At least the mortgagee is not seised, though he may have a legal lien as pointed out in note 2, *supra*.

30. Jones v. Bragg, 33 Mo. 337 (1863); Atkinson v. Steward, 46 Mo. 510 (1870); Sweaney v. Mallory, 62 Mo. 485 (1876); Casteel v. Potter, 176 Mo. 76, 75 S. W. 597 (1903); Wakefield v. Dinger, 135 S. W. (2d) 17 (Mo. App. 1939); and the same is true in the case of curtesy, Casler v. Gray, 159 Mo. 588, 60 S. W. 1032 (1900).

31. Walcop & Griswold v. McKinney's Heirs, 10 Mo. 147 (1846); Wakefield v. Dinger, 135 S. W. (2d) 17 (Mo. App. 1939).

32. Ragsdale v. O'Day, 61 Mo. App. 230 (1894), citing Demeter v. Wilcox, 115 Mo. 634, 22 S. W. 613 (1893).

the state is denominated "title," "lien," or "intermediate."[33] If dower is to follow title as a matter of course, the case law in this field is irreconcilable.[34]

A mortgagor who represents himself to be the sole and unconditional owner of the mortgaged property is held to have correctly stated his title in Missouri,[35] even though he be in default,[36] and entitled to recover on a policy of insurance procured under those representations. Perhaps extraneous matters of policy compel this result, but undoubtedly it does violence to the theory that title springs into the mortgagee upon default. Here, too, states adopting the "title theory" do not blush as a similar holding.[37]

The case results just considered are suggestive of two solutions: (1) that a state becomes a "lien," "title," or "intermediate" theory state solely and only because it reaches a conclusion with respect to the most important incident of ownership of property—the right to possession; and/or, (2) that "title" is a nebulous and vague term, tacked onto the conclusion reached as a practical solution for a fact situation, to justify the holding that was in truth reached without its consideration, but which is used to conceal from the näive mind the method by which that conclusion was reached. One is hardly pressed to a choice of one of those solutions, both likely existing simultaneously. An examination of the cases in any jurisdiction will probably reveal that the first solution is accurate and that a state is classified on the ground of the right to possession. At the same time, a woeful lack of adequate terminology to express the concept of divided ownership of property is apparent. That is, the cases show that one person is regarded as owner for one purpose and another person as owner for another purpose, and the one word "title" is used to justify the results in both situations.

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33. (1920) 19 C. J. § 78d.
34. Durfee, *loc. cit. supra* note 2.
35. Gaylord v. Lamar Fire Ins. Co., 40 Mo. 13 (1867); Standard Leather Co. v. Mercantile Town Mut. Ins. Co., 131 Mo. App. 701, 111 S. W. 631 (1908); Terminal Ice & Power Co. v. American Fire Ins. Co., 196 Mo. App. 241, 194 S. W. 722 (1917).
36. See Holloway v. Dwelling-House Ins. Co., 48 Mo. App. 1 (1891); Hubbard v. North British & Mercantile Ins. Co., 57 Mo. App. 1 (1894); Standard Leather Co. v. Mercantile Town Mut. Ins. Co., 131 Mo. App. 701, 111 S. W. 631 (1908).
37. Westchester Fire Ins. Co. v. Green, 223 Ala. 121, 134 So. 881 (1931); National Liberty Ins. Co. v. Rogers, 2 Tenn. App. 253 (1926); Teter v. Franklin Fire Ins. Co., 74 W. Va. 344, 82 S. E. 40 (1914).