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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 some profound interstitial change in the very tissue of the law."—Mr. Justice Holmes, Collected Legal Essays, p 269.

NOTES ON RECENT MISSOURI CASES

DIVORCE—JURISDICTION TO GRANT DIVORCE WHERE CAUSE AROSE WHILE PARTIES WERE DOMICILED IN ANOTHER STATE. *Hays v. Hays.*[1]

Plaintiff, a domiciled citizen of Missouri, brought an action for divorce, alleging as grounds therefor indignities. It appeared that defendant was never at any time domiciled in Missouri, and that plaintiff was not domiciled within the state at the time of the occurrence of the alleged indignities. Plaintiff had, however, acquired a domicil within the state, as required by the Missouri statute,[2] before she brought her action. Defendant appeared in the action, and claimed that the Court did not have proper jurisdiction to grant the divorce, because the grounds alleged therefor had happened before plaintiff had become a citizen or resident of Missouri. The trial Court sustained defendant's plea, the action was dismissed, and this judgment was affirmed by the Kansas City Court of Appeals. The latter Court, without referring in any way to the divorce statutes, stated "that a court has no jurisdiction over a divorce suit or the marital status, where the cause for divorce arose while the parties were domiciled in another state, or while the plaintiff was not a resident of the state in which the suit was brought . . . ."[3]

The Court of Appeals seemed to be of the opinion that, under such a state of facts, a court inherently lacked jurisdiction, and had no power to grant relief. The notion seemed to prevail that, from an international point of view, jurisdiction to grant a divorce depends not only upon the *forum's* being the plaintiff's domiciliary court, but also upon the additional fact that the plaintiff

1. (1927) 291 S. W. 508.
2. Section 1804, R. S. 1919.
3. 291 S. W. l. c. 508.

was domiciled within the *forum* when the cause for the divorce prayed for occurred. The case stands for the proposition that even though a plaintiff's domiciliary court has full jurisdiction over a defendant spouse,[4] it may not grant a valid decree unless, also, the plaintiff had a domicil within that court's jurisdiction at the time that the defendant violated his or her marital duties, and thereby furnished grounds for the action.

The decision does not turn merely upon the question of whether or not the Missouri statutes authorize a divorce upon the facts stated. The opinion does not purport to construe the statutes; quite the contrary, it seems to embody a positive rule of law to the effect that if a plaintiff's domicil has a statute authorizing or requiring its courts to grant a divorce where the cause therefor arose before the plaintiff acquired a domicil in such state, or while the parties were domiciled elsewhere, such legislation is invalid, and to be regarded as an unwarrantable attempt to regulate matters not within the legitimate control of such a domiciliary sovereign. Is it true that statutes of such a nature are an abuse of governmental power and, therefore, invalid?

It has generally been held that "every state or sovereignty has the right to determine the domestic relations of all persons having their domicil within its territory."[5] Such jurisdiction has usually been considered essential to proper regulation of domestic affairs. Governments must have power to control the marriages of their own citizens, because it is necessary for the preservation and development of the state. There would seem to be nothing underlying this theory of the right of a domiciliary sovereign to control the marriage relation of its citizens other than the fact that such a government has a vital interest in the domestic relations of the latter. Once the relation of sovereign and citizen is established, the sovereign has power to control and regulate the citizen's marriage in any proper manner. For these reasons, there is a considerable amount of authority holding that a sovereign may grant a divorce to its domiciled citizens for any cause whatever, and even though such cause may have occurred before a citizen gained his or her domicil within the state. The position taken is that, by the very act of acquiring a domicil within a state, the marriage becomes subject to the jurisdiction of the law of the domicil, and the *status* is necessarily controlled thereby.[6] Such a ruling seems to be sound, and quite in *accord* with the generally prevailing conception of the nature of jurisdiction to divorce. It hardly seems necessary to add that the decision in the case under review involves a repudiation of these more or less fundamental propositions.

4. The case was before the Kansas City Court of Appeals twice. Upon the prior hearing, the Court held that the trial Court had duly obtained jurisdiction of the defendant. See 282 S. W. 57, 58.

5. Gould v. Crow (1874) 57 Mo. 200, 204. The proposition is elementary. See, also, Haddock v. Haddock (1905) 201 U. S. 562, 569, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1; Ditson v. Ditson (1856) 4 R. I. 87. In the Haddock case, *supra*, the federal Supreme Court speaks of inherent jurisdiction that a state must possess over the marriage relations of its domiciled citizens, 201 U. S. l. c. 569. The question of jurisdiction to divorce must not be confused with the problem of when a court, possessing the power to divorce, has acquired jurisdiction of the defendant in a pending action. As already observed herein, that question was not present in the instant case, because the trial Court had full jurisdiction over the defendant's person. See *supra* note 4.

6. Thompson v. State (1856) 28 Ala. 12; Tolen v. Tolen (1831) 2 Black. (Ind.) 407, 21 Am. Dec. 742; Colburn v. Colburn (1888) 70 Mich. 647; Rose v. Rose (1916) 132 Minn. 340, 156 N. W. 664; Shreck v. Schreck (1870) 32 Tex. 578, 5 Am. Rep. 251; Cheever v. Wilson (1869) 9 Wall. (U. S.) 108, 19 L. Ed. 604 (*dictum*). See, also, Jones v. Jones (1889) 67 Miss. 195. "In this case the complainant, as he testifies, thought of making his home in the West and one of the reasons for selecting Michigan was because of her divorce laws. We think he had a right to leave New York because he was not satisfied with the laws of that state in reference to divorce or any other matter, and had a right to settle in Michigan because the

Moreover, it is believed that any other holding, than that advocated in the preceding paragraph, may well work an injustice upon an innocent husband or wife, and that the decision in the principal case, if it becomes the law of Missouri, may turn out to be a case of embarrassment to the courts. To illustrate, let it be supposed that H. and W., husband and wife, are living together domiciled in state 1; that, while the parties are so living, H commits adultery; that thereafter the parties remove to state 2, and establish a domicil there; that after such removal to 2, W. for the first time learns of H's misconduct in 1; will W. be able to obtain a divorce in 2 in the absence of condonation? If the case under review is to be followed, obviously, W will be unable to bring an action in 2, because the cause for divorce occurred while the parties were domiciled in another state. Yet, to deny W relief in 2's courts seems unjust, and may work a real hardship upon an innocent party. Indeed, it may well be asked, if W's action will not lie in 2, where may she procure a divorce? It seems open to grave question whether W. may return to 1 and bring her action there, because the proposition usually is that domiciliary courts have *exclusive* jurisdiction to divorce.[7] It might very properly be said, in the assumed case, that after W's removal from 1, 1's courts ceased to have jurisdiction over her marriage relation, the same being submitted to the jurisdiction of 2 and its courts, as a result of her establishing a domicil in that state. The courts of 1, if W brought an action for divorce there, might very well take the position that they were no longer concerned with W's marriage, because of her new domiciliary allegiance, and hold that it was for 2, and its courts, to determine whether the marriage should be dissolved or not. Of course, if 1's courts did dispose of W's action in this way, and the rule of law laid down in the principal case prevailed in 2, W's plight would be most unfortunate, and there would be no way for her to free herself from H, although his conduct had afforded an almost universally recognized ground for absolute divorce. It is urged that in cases of the kind last assumed that it is almost essential to clothe a domicilary court with full power to divorce its citizens no matter when the cause for divorce may have occurred; that in any event it is highly desirable so to do, and that in the assumed case, even though W might have returned to 1, and have been able to have gotten a divorce there, compelling her to follow this line of action would have served no useful purpose, but would merely have imposed an unnecessary hardship upon her.

Section 1804 of the Revised Statutes, 1919, provides that "no person shall be entitled to a divorce .... who has not resided within the state one whole

laws in this state suited him in relation to divorce or any other thing. Colburn v. Colburn, *supra*, 70 Mich 1. c. 649 *et seq.*

In Stone v. Stone (1908) 134 Mo. App. 242, 113 S. W. 1157, the Saint Louis Court of Appeals had the same question presented to it as was presented in the case under review. That court held that there was jurisdiction to grant a divorce. In commenting upon sec. 2924 R. S. 1899, which is identical with sec. 1804 R. S. 1919, it was said that "it is essential to confer jurisdiction, that the petition allege either that the plaintiff has resided in this State one whole year ..... or that the injury complained of was committed within this State.... The petition alleged that plaintiff had resided in the State one whole year next before the filing of the petition and therefore, as to jurisdiction, brought the case within the first clause of section 2924...." See, also, Cheatham v. Cheatham (1847) 10 Mo. 188; Coulter v. Coulter (1907) 124 Mo. App 149, 100 S. W. 1134; Johnson v. Johnson (1902) 95 Mo. App. 329, 68 S. W. 971, where it is assumed, without discussion, that there is jurisdiction to divorce regardless of where the grounds therefor occurred if only the plaintiff had a domicil in the state at the time that the action is brought. But there is authority elsewhere *contra*. See, Nicholas v. Maddox (1900) 52 La. Ann. 1492, 27 So. 966; Clark v. Clark (1835) 8 N. H. 21; Prosser v. Warner (1875) 47 Vt. 667, 19 Am. Rep. 132.

7. See, Clark v. Clark, *supra*, note 6, 8 N. H. 21, where this possible difficulty was suggested, but no solution therefor offered.

year next before filing of the petition, unless the offense or injury complained of was committed within this state, or whilst one or both of the parties resided within the state." Perhaps the statute is not as clearly worded as is desirable. It is always unfortunate when a statutory purpose is found only as a result of implication, and not because it is explicitly stated. But it seems clear enough that the Legislature intended Missouri courts to grant divorces in cases where (1) the offense occurred within this state or whilst one or both of the parties resided within the state without requiring any protracted period of domicil upon the part of the plaintiff, and (2) in other cases where the offense complained of occurred outside of the state, when neither of the parties were domiciled within the state at such time, but in this last case the plaintiff may not sue unless he or she has resided within the state during the year immediately preceding the bringing of the action.[8] It would seem then that under this statute the action in the principal case should have been entertained because the court not only had jurisdiction from an international point of view, but also because the statute clearly intends and provides for the exercise of jurisdiction under the existing facts.

The learned Court in the case under review cited *Stokes v. Stokes*[9] as authority for the proposition that the trial Court had no jurisdiction. In that case the parties were domiciled together, as husband and wife, in England until 1807, at which time they separated by agreement. Some nine years thereafter, the wife having acquired a domicil in Missouri, brought an action for divorce here, alleging as grounds therefor her husband's adultery, committed in England, after the parties' separation in 1807. The Supreme Court denied the divorce, Pettibone, J., saying that the plaintiff was not entitled to relief because "the laws of England offered her redress" and "if, for nine years, she could behold without complaining the open adultery and profligacy of her husband," he saw "no reason why the courts of this country, should, at this late hour, be called upon to interfere in her behalf. . ." The learned judge considered "the adultery in England as waived by the conduct of the complainant" and was unwilling "to establish the principle that parties may lie in their own country, under injuries of this kind, for years, and then come here and ask us for the redress which they might and ought to, have obtained there."[10]

To the writer, it seems that the *Stokes* case does not involve in any sense the question when a court has jurisdiction to divorce. It deals merely with the question of a plaintiff's *laches*, and holds that a delay of nine years is fatal to an action of divorce, at least if the plaintiff acquires a new domicil in the *interim* and had ample opportunity to sue at his or her old domicil before gaining the new one.[11] It is submitted that the *Stokes* case is not authority for the rule of

8. In Cheatham v. Cheatham, *supra*, note 6, the court said that the plaintiff's petition would be defective unless it alleged that "the complainant had resided within the State one whole year next before the filing of the petition" or "that the offense complained of was committed within the State . . . ." 10 Mo. l. c. 299. See also, Stone v. Stone, *supra*, note 6, 134 Mo. App. 242, 113 S. W. 1157.

9. (1823) 1 Mo. 320.

10. 1 Mo. l. c. 321 *et seq.* The statute in force at the time this action was brought provided that "No person shall be entitled to a divorce from the bonds of matrimony . . . . who has not resided within this territory one whole year previous to the filing his or her petition or libel." Laws of 1818, p. 171. There is nothing in the statutory provisions in force at that time limiting the court's jurisdiction to divorce for the causes enumerated other than this provision.

11. The court in Stokes v. Stokes cited as authority for its decision Williamson v. William-

law laid down in the principal case; that the Kansas City Court of Appeals was free under the Missouri decisions to have allowed the divorce, and by denying the plaintiff relief it disregarded well established principles concerning jurisdiction to divorce, and the plain dictates of the Missouri Statutes. It is to be hoped that this error may be remedied, and that the decision may not finally settle the question in this undesirable way.

J. L. P.

CONSTRUCTION OF DEEDS.....VESTED AND CONTINGENT REMAINDERS. *Donaldson v. Donaldson.*[1]

Real property was granted by deed as follows: "to the sole and exclusive use of the second party till his death; at the death of the second party the above decribed real estate shall vest in fee in his children, and if he have not children alive at his death one-third to his wife and the remainder back to his parents." The Supreme Court of Missouri held that the limitations over upon the death of the second party (*i. e.* the life tenant) were alternative contingent remainders. The decision raises the perplexing and interesting question as to when a limitation after a life estate should be construed as a contingent remainder rather than as one that is vested.

The books abound with statements to the effect that remainders should be held to be vested whenever this can be done consistently with the language used in the instrument creating the estate.[2] Such a construction is desirable because, (1) vested remainders are unaffected by the Rule against Perpetuities, and (2) because, a contingent remainder—contrary to the intention of the creator of the same—can be destroyed as the result of a merger, while a vested remainder may never be affected in this way.

Suppose that property is conveyed to A for life followed by a contingent remainder to B for life, which, in turn, is followed by a vested remainder to C and his heirs; under such a state of facts, if C acquired A's life estate, while B's remainder was still contingent, C would have the entire fee, the particular estate supporting B's remainder would be gone, and B's contingent remainder would be lost. According to common-law principles, and, in the absence of statutory provisions to the contrary, B could never take, even though the

son (1815) 5 Johns. Ch. (N. Y.) 488, an opinion by Chancellor Kent. In that case the action was brought by the husband, a domiciled citizen of New York, for the wife's adultery. The husband was domiciled in New York, when the offense was committed. The holding was that plaintiff could not succeed because "to sustain a bill of divorce for adultery, after the husband (as in this case) has acquiesced under a knowlege of it, for twenty years, would be repugnant to the institutions of all mankind." The question of jurisdiction to grant a divorce where the cause arose outside of the state and before the plaintiff acquired a domicil within the state was not present in the Williamson case, and was not considered.

The court in the Stokes case, *supra*, (1 Mo. l. c. 323) stated that "adultery is a good cause for divorce. . . .if committed within the State, or while the injured party is domiciled within this State." This portion of the opinion, taken alone, would seem to involve the proposition that if a defendant committed adultery without the state and while the plaintiff was not a domiciled citizen of the state that a divorce could not be granted for such adultery. It is believed that this statement of the Court was not necessary to the decision, and is to be regarded merely as *dictum*.

1. (1925) 311 Mo. 208, 278 S. W. 686.

2. Kales, Estates, (2nd Ed.) sec. 329 *et seq*; Tiedeman, Real Property, (2nd Ed.) sec. 401; Washburn, Real Property, (6th Ed.) sec. 1537 *et seq*; Chew v. Keller, (1889) 100 Mo. l. c. 368, 13 S. W. 395; Tindal v. Tindal, (1901) 167 Mo. l. c. 225, 66 S. W. 1092.

very contingency to his taking might later occur, and he might survive A.[3] The proposition is that a contingent remainder must vest at or before the termination of the particular estate that supports it. In the assumed case A's particular estate disappeared when C acquired the same. The same result would also be reached in the supposititious case for the same reason, if A had acquired C's remainder. The tenant of a particular estate may, at common law, destroy the contingent remainder by surrendering his estate to the owner of the next vested estate in remainder, at least as great in *quantum* as the surrendered estate, or by acquiring by purchase the next vested estate of inheritance, the particular estate supporting the contingent remainder in each instance being thereby merged," and destroyed.[4]

Again, assume that property is limited by way of devise to A for life, with a remainder to A's children, with a further remainder to B in default of such children, and let it be further assumed that A is the testator's heir at law, or residuary devisee. In such a case, A has a life estate, and until the birth of a child to A, there are outstanding alternative contingent remainders, the reversion in fee in the meantime remaining in A awaiting the vesting of the remainder either in a child of A or in B as the case may be. So long as A made no disposition of his interests, the contingent remainders would be unaffected. The common law did not defeat the testator's intention by saying that A's life estate merged with his fee in reversion.[5] But if A conveyed his interests to a stranger, X for example, a merger would occur, and neither contingent remainder could take effect. The particular estate (*i. e.* A's life estate) which supported the remainders was gone upon the conveyance to X; consequently a child subsequently born to A could not take; or if A died without ever having had a child, B could not take.[6]

At common law property could not be vested by *grant* subject to divestment in favor of another upon the happening of any specified contingency. For example, if property were limited to A and his heirs, but if A shall die without leaving a child surviving him, then to B and his heirs, the limitation to B and his heirs could not take effect. A fee could not be limited upon a fee.[7] This being so, if the limitations in the principal case are to be governed by common-law rules of conveyancing, the estates created after A's life estate could only take effect as alternative contingent remainders. Suppose that A had a child; if the estate given such child were to be held to vest in him on birth, and such child were thereafter to predecease A, the fee would at such time have to shift, one third to A's widow,and two thirds to A's parents. Such a shifting was not permissible. Therefore, the only possible way that these limitations could be effective at common law would be to hold that A took a life estate, and that the further future estates would be alternative contingent remainders

3. Tiedeman, Real Property, (2nd Ed.) sec. 421; Washburn, Real Property, (6th Ed.) sec. 1597.

4. Tiffany, Real Property, (2nd Ed.) sec. 506 *et seq.*

5. Hobbs v. Yeager, (Mo.) (1924) 263 S. W. 225.

6. Also, if there is a conveyance to A for life, then a contingent remainder to B, then a vested remainder to C, B's contingent remainder will be destroyed by a merger in a stranger, as where both A and B convey to X. See Bennett v. Morris (1834) 5 Rawle (Pa.) 9; Bond v. Moore (1908) 236 Ill. 576, 86 N. E. 386, 19 L. R.A. (N. S.) 540. Likewise a contingent remainder may be destroyed by a conveyance of the reversion to the life tenant, and also by the life tenant conveying to the reversioner. See Barr v. Gardner (1913) 259 Ill. 256, 102 N. E. 287.

7. Luddington v. Kime (1695) 1 Salk. 224, 1 Ld. Raym. 203, 3 Lev. 542.

taking effect for the *first time* at A's death in favor of A's children, if any were then living, otherwise going to A's wife and parents.[8]

Section 2271 R. S. 1919 provides in part that "an estate of freehold or of inheritance may be made to commence *in futuro* by deed in like manner as by will." Prior to this statute, it had always been possible to create shifting interests by will; property could first be devised to A and his heirs with a provision that it should thereafter, upon the happening of a specified contingency, shift to B and his heirs.[9]

In *O'Day* v. *Meadows*[10] our Supreme Court stated that this statutory provision changed the common law rule as to conveyances *inter vivos*, and, while there is no express ruling upon this specific question, it would seem to be entirely possible, with the aid of this statute, to create a shifting interest by deed,[11] just as it was possible to do so before the statute's enactment by will.

Section 2174 R. S. 1919 is to the effect that "Conveyances of lands, or of any estate or interest therein, may be made by deed executed by any person having authority to convey the same .... without any other act or ceremony whatever." It would seem that this statute would also make it possible to create shifting interests by deed, and while again there is no positive decision so holding in this state our Supreme Court has stated generally that this statute has done away with the technical requirements of the common law rules.[12]

Assuming, then, that it is possible to create shifting interests in Missouri by deed, and bearing in mind that all estates should be held to be vested whenever possible, should the limitations in the case under review have been construed as alternative contingent remainders, or should it have been held that A's children, as soon as born, took vested remainders in fee subject to being divested in favor of A's widow and parents in the event of A's children dying before A? A remainder is vested which "stands ready to take effect in possession whenever and however the preceding particular estate of freehold determines."[13] If all that a remainderman has to do to enjoy the property in possession is to await the termination of the particular estate supporting his remainder, he has a vested interest, and the mere fact that he must, to enjoy the property in possession, survive the life tenant does not render his remainder contingent.[14]

On the other hand, if by the language used in creating the estate a "conditional element is incorporated into the description of, or into the gift to the remainder-man, then the remainder is contingent; but if, after words giving

8. Tiedeman, Real Property, (2nd Ed.) sec. 415; Washburn, Real Property, (6th Ed.) sec. 1575; Luddington v. Kine, *supra*, note 7.

9. Tiedeman, Real Property, (2nd Ed.) Sec. 537; Washburn, Real Property, (6th Ed.) Secs. 1737-1739.

10. (1905) 194 Mo. 588, 92 S. W. 637, 112 Am. St. Rep. 542.

11. The writer submits that there is no distinction between shifting and springing interests so as to cause a different rule to be applied in construing these interests under the Missouri law above referred to. Both of these interests take effect by a changing of the seisin. If a springing interest may be created by deed there would seem to be no good reason for not allowing a shifting interest to be created in a like manner. For a discussion of this point, see an article by Professor Hudson in University of Missouri Bulletin, II Law Series 3.

12. O'Day v. Meadows (1905) 194 Mo. l. c. 623-625, the Court, quoting from Abbot v. Holway (1881), 72 Me. 298, said, "In other words the mere technicalities of the ancient law are dispensed with upon compliance with statute requirements." See, also, Buxton v. Kroeger, (1908) 219 Mo. l. c. 256, 117 S. W. 1147; Eckle v. Ryland (1913), 256 Mo. l. c. 454, 165 S. W. 1035. In regard to statutory changes in conveyances in general, see 3 Pomeroy, Eq. Jur. (4th Ed.) 214 n.; Parks, Declaration of Trusts and the Statute of Uses, Univ. of Mo. Bul. 27 Law Series 18, n.

13. Kales, Estates (2nd Ed.) sec. 308.

14. Webb v. Hearing, (1617) *Cro. Jac.* 415, Kales, *op. cit.* sec. 308 *et seq.* See, also, Warne v. Sorge (1914) 258 Mo. 162, 171, 167 S. W. 967.

a vested interest, a clause is added divesting it, the remainder is vested. Thus, on a devise to A for life, remainder to his children, but if any child dies in the lifetime of A his share to go to those who survive, the share of each child is vested, subject to be divested by its death. But on a devise to A for life, remainder to such of his children as survive him, the remainder is contingent."[15] Whenever it is possible to find a present gift to persons fulfilling the description of the remainderman contained in the instrument creating the estates, the remainder will be considered vested even though it may be divested at a later date by the happening of some condition, which will prevent the remainderman taking and enjoying the property. On the other hand, if the instrument, which creates the remainder, requires the remainderman to qualify as such by fulfilling certain conditions, the remainder can never be construed as vested until such qualifications have been met. . . .[16]

In the principal case the deed provided that upon the death of the life tenant the property should vest in fee in his children and if no children should be alive at his death, it should go over. Here there is first given a vested remainder; to enjoy in possession the children have merely to await the termination of their father's particular estate, the subsequent direction, that the property should go over in the event of the children not surviving their parent, should not convert it into a contingent remainder and it should be regarded as being vested subject to be divested in favor of the ultimate takers if the children did not survive. It is believed that the decision could have been to this effect without violating any fundamental rule of conveyancing, and that such would have been the more desirable decision for the reasons heretofore given. Every interest should be construed as a vested interest, if this can be done.

The Supreme Court in the principal case relied upon the cases of *Dickerson v. Dickerson*,[17] *Buxton v. Kroeger*[18] and *Eckle v. Ryland*[19] as authority. In the *Dickerson* case the wording used was: "and at her death the said farm to be divided between the .... surviving children and grandchildren if any whose parents are dead. . . ."[19a] It was rightly held in that case that the remainder to the children and grandchildren was contingent because the contingency was incorporated into the very description of the remaindermen; it was to the children and grandchildren surviving; to qualify as remaindermen, the children and grandchildren had to be *surviving* at the termination of the receding particular estate. In the principal case there was no such requirement as this. The property was limited to the children at the death of the life tenant with a provision for divestment in the event of any child's death before that of the life tenant. In the *Buxton* case the limitation was to "children then living."[19b] The decision there was that the children's estate was contingent and rightly so

15. Gray, Rule against Perpetuities, (3rd Ed.) sec. 108.

16. Gray, *op. cit.* sec. 85 *et seq.* One of the earlier cases on this point was Doe v. Scudamore, (1800) 2 B & P. 289. In that case the devise was to B for life, then to A in case she survive B, but not otherwise. The court held the remainder to A was contingent because A had to be living at the time B's estate terminated in order to take.

In the case of De Lassus v. Gatewood (1880) 71 Mo. 371, there was a devise to A for life, and at her death or remarriage to her children that were alive or their bodily heirs. The court held the remainder to the children was contingent; for the children would have to be living at the death or remarriage of their mother.

See, also, McWilliams v. Ramsey (1853) 23 Ala. 813; Chapin v. Crow (1893) 147 Ill. 219, 35 N. E. 536, 37 Am. St. Rep. 213; Smith v. Rice (1881) 130 Mass. 441; Buxton v. Kroeger (1908) 219 Mo. 224, 117 S. W. 1147.

17. (1907) 211 Mo. 483, 110 S. W. 700.

18. (1909) 219 Mo. 224, 117 S. W. 1147.

19. (1914) 256 Mo 424, 165 S. W. 1035.

19a. (1908) 211 Mo. l. c. 486, 110 S. W. 700.

19b. (1909) 219 Mo. l. c. 242-243, 117 S. W. 1147.

because again the contingency was incorporated into the description of the parties who were to take.

In *Eckle v. Ryland* the deed created a trust and provided that on the death of certain beneficiaries the trust should cease and the property should "go to and vest in" L and F "or to their heirs should they or either of them be dead."[20] The Court held that L had a contingent remainder, and that L took nothing under the deed unless he survived the prior beneficiaries. This decision would seem to be authority for the holding in the principal case, but seems unfortunate and to violate fundamental and well established rules of construction.

In *Warne v. Sorge*,[21] decided some six months after the *Eckle* case, the limitation was "to the child or children he may leave surviving him and, in default,"[22] over this remainder was held to be vested. Of course the limitation in the *Warne* case is not similar in its wording to that in the case under review, but the Court in the course of its opinion said that "when the language of an instrument creates a doubt as to whether it was the intention of the grantor to convey a contingent or a vested remainder, the doubt should be resolved in favor of the creation of a vested remainder."[23] It would seem that this rule of construction was overlooked in the *Eckle* as well as in the principal case, which is regrettable.

L. M. E.

POWER OF FEDERAL JUDGE TO COMMENT ON THE EVIDENCE.

Barham v. U. S.[1]

The defendant was convicted of feloniously possessing intoxicating liquor in Indian country. He assigns for error certain comments of the trial judge upon the evidence. "The language objected to is that in which the court stated that he drew certain inferences, and expressed the opinion that certain material facts were true, although, as the court says, 'there is no evidence of that.' It is then stated that the court not only did not believe the testmony of a deputy sheriff produced as a witness for the defense, but added that he had no respect and no regard for him, 'and my judgment is, as long as men like him wear a deputy sheriff's commission, why fifteen year old girls will be at dances drinking liquor. That is my opinion of his evidence. I don't give it any credence, have no respect for it, but that is only my idea of how his evidence appeals to me. You may look at it entirely different, and that is your business, and your responsibility.'" The court said that they had discussed the same question in Cook v. U. S.[2] decided the same day, and following it, they reversed the judgment without repeating their reasons, Judge Stone dissenting. In Cook v. U. S., *supra*, the same judges held the comment improper because the court repeated several times that he gave no credence to Cook's testimony. The Court there said, "these statements, ... partake of the nature of a partisan argument, very apt to convince the jury, by mere weight of reiteration, of the falsity of that part of the defendant's case ....."

The judge's comment in the case under review was improper for the reason given that his repeated emphasis of the falsity of the deputy's testimony was

20. (1914) 256 Mo. l. c. 433-435, 165 S. W. 1035
21. (1914) 258 Mo. 162, 167 S. W. 967.
22. (1914) 258 Mo. l. c. 165 *et seq.*, 167 S. W. 967.
23. (1914) 258 Mo. l. c. 171-172, 167 S. W. 967

1. (1926) 14 F. (2d) 835.
2. (1926) 14 F. (2d) 833.

not a fair expression of opinion. But we believe that the case presents the further questions not considered by the court; first, Can the judge express an opinion as to material facts of which there is no evidence? and second, Was the judge's reference to fifteen year old girls at dances drinking liquor such a fair and dispassionate comment as he is privileged to make?

In England,[3] and in our federal courts,[4] it has long been recognized that the judge may express his opinion upon the evidence in strong terms, provided he separates the law from the facts and makes clear to the jury that his opinion as to the facts is merely advisory, and that they are free to exercise their independent judgment and may totally disregard his opinion. In a leading case[5] frequently quoted by the federal courts, it is said that "a judge should not be a mere automatic oracle of the law, but a living participant in the trial, and so far as the limitations of his position permit should see that justice is done. But his comments upon the facts should be judicial and dispassionate, and so carefully guarded that the jurors, who are the triers of them, may be left free to exercise their independent judgment." This rule prevails in the courts of some of the eastern states,[6] but in most of the states this privilege has been denied by statute.[7]

The power of the federal judge to comment upon the evidence is very broad, and his opinion may be expressed in strong terms. Thus, the judge has been permitted to say[8] that "the court's opinion is that the defendant is guilty of the crime charged." A judgment was affirmed in a case in which the judge said[9] "in my judgment, in this case it was a plain case of a man violating the prohibition law by dealing in alcohol. This story (defendant's) ..... does not appeal to the judgment of this court as being credible. I have no faith in that

3. Belcher v. Prittie, (1834) 4 Moore & Scott 295, 3 L. J. C. P. 85; Foster v. Steele, (1837) 5 Scott 28, 6 L. J.C.P. 265; Davidson v. Stanley (1841) 2 Man. & G. 721, 3 Scott (N.R.) 49.

4. Carver v. Jackson (1830) 4 Pet. 1, 80, 7 L. Ed. 761; Mag iac v. Thomson (1833) 7 Pet. 348, 8 L. Ed. 709.

5. Rudd v. U. S. (1909) 173 F. 912, 97 C. C. A. 462.

6. Ware v. Ware, (1831) 8 Me. 42, 59; Mansfield v. Corbin (1849), 4 Cush. (Mass.) 213; Flanders v. Colby, (1853) 28 N. H. 34, 39; State v. Hummer (1906) 73 N. J. L. 714, 65 Atl 249; Rowell v. Fuller's Estate, (1887) 59 Vt. 688, 10 Atl. 853; Hurlburt v. Hurlburt, (1891) 128 N. Y. 420, 28 N. E. 651; Houghton v. City of New Hav n (1907) 79 Conn. 659, 66 Atl. 509; Ditmars v. Commonwealth (1864) 47 Pa. St. 335.

7. R. S. Mo. 1919, Sec. 4038 provides: "The court shall not, on the trial of the issue in any criminal case, sum up or comment upon the evidence, or charge the jury as to matter of fact, unless requested to do so by the prosecuting attorney and the defendant or his counsel; but the court may instruct the jury in writing on any point of law arising in the cause." This statute has existed since 1845.

In charging the jury, the federal judge is not bound to conform to the rule applicable to the state courts of the state in which he is sitting, even though it was declared by act of Congress of June 1, 1872, (17 Stat. 197. sec. 5) "that the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes, in the circuit and district courts of the United States, shall conform as near as may be" to the same things "existing at the time in like causes in the courts of record of the State within which such circuit and district courts are held." Nudd v. Burrows, (1875) 91 U. S. 426, 23 L. Ed. 286; Vicksburg, etc., R. R. Co., v. Putman (1886) 118 U. S. 545, 30 L. Ed. 257. The Sixth Amendment to the United States Constitution provides for a trial by jury in all criminal prosecutions. "Jury" has been interpreted by the courts of the United States to mean the English common law jury, because this was the only kind of a jury known to the framers at the time of the adoption of the Constitution and the Bill of Rights. The English common law jury was a jury which was subject to being charged by the judge both as to law and as to facts. Thus this amendment impliedly provides that in the courts of the United States the judge may express an opinion on the evidence to the jury, because that was one of the characteristics of the common law jury. Therefore, the practice conformity act is inoperative to limit a power of the judge impliedly granted by the Constitution.

8. Dillon v. U. S. (1921) 279 F. 639, 642.

9. Wiederman v. U. S. (1926) 10 F. (2d) 745.

statement, but I believe that the officers told the truth . . . . ." It has even been held that a judge might go so far as to say[10] "but I would be derelict in my duty if I did not say to you that, from my standpoint and viewpoint, this testimony, irresistibly and irrefutably points to the absolute guilt of these defendants" when such comment was coupled with an equally strong statement that the jury were not bound by his opinion. Again when the judge said[11], "I do not see any way that these defendants can be acquitted", it was held not to be reversible error, although this comment was disapproved on appeal.

But this power is not unlimited. It is difficult to lay down a general rule or establish a definite standard by which we can tell whether the comment in a particular case is within the limitations. "where the line must be drawn between comment upon the evidence of facts which is and that which is not permissible is determinable only by an examination of the language and a consideration of the circumstances of each particular case."[12] In the case under review, the judge surpassed the limits of proper comment. The first question is suggested by the statement in the opinion that "the court stated that he drew certain inferences, and expresses the opinion that certain material facts were true, although . . . . 'there is no evidence of that.' " While the judge has broad powers, it is clear that his comments upon the evidence must be limited to facts which have actually been brought out by the evidence in the case, and he cannot infer that certain facts are true unless evidence has been actually presented from which such inference might legally be made. In a case[13] in which the defendant was prosecuted for selling intoxicating liquor, and his employees testified in his behalf, the judge stated "Personally, I am inclined to believe practically all of them (defendant's witnesses) were engaged in the business out there." This was held to be an improper comment, because there was no evidence in the case on which to base such a belief. In another case,[14] the defendant was charged with conspiracy to keep negroes from voting. No evidence of his character was introduced. The judge said "If . . . anybody . . . . desired to have colored men deprived of the right of voting,. . . . . it is not improbable that just such men as these defendants would be chosen to carry that object into execution." Court held that this comment was improper because it was outside of the testimony. The rule laid down by a state court[15] which allows this privilege, was approved by the Supreme Court.[16] In that case, the judge drew deductions and theories, "which, if not wholly unsupported, should have been left for the jury." It was there held that "deductions and theories not warranted by the evidence should be studiously avoided."

The second question suggested by this case is whether the charge of the court was such a fair, judicial, and dispassionate comment as he is privileged to make, or, whether it was an appeal to the passions and prejudices of the jury. In one case,[17] a defendant, whose religion sanctioned polygamy, was indicted for bigamy. The judge directed the attention of the jury to "the consequences to the innocent victims of this delusion. As this contest goes on, they multiply, and there are pureminded women and there are innocent children . . . . These are to be the sufferers . . . ." In affirming the conviction, the court said, "while

10. Morsev. U. S. (1918) 255 F. 681.
11. Endleman et al. v. U. S. (1898) 86 F. 456, 462, 30 C. C. A. 186.
12. Stokes v. U. S. (1920) 264 F. 18, 25.
13. Kolp v. U. S. (1924) 2 F. (2nd) 953.
14. Mullen v. U. S. (1901) 106 F. 892, 46 C. C. A. 22.
15. Burke v. Maxwell's Admrs. (1876) 81 Pa. St. 139, 153.
16. Starr v. U. S. (1894) 153 U. S. 614, 14 S. Ct. 919, 38 L. Ed. 841.
17. Reynolds v. U. S. (1878) 98 U. S. 145, 167, 25 L. Ed. 244.

every appeal by the court to the passions or the prejudices of a jury should be promptly rebuked .... we see no just cause for complaint in this case." In another case,[18] the defendant was convicted of violation of the Espionage Act. Assignments for error relate to language used in the charge of the judge which defendant claimed tended to inflame and divert the jury. The language was used by way of illustration and explanation, and covered certain situations shown in the evidence which were not the particular ones covered by the indictment. In holding the comment improper, and reversing the judgment, the court said that justice should not be defeated by a confusion of issues due to patriotic sentiment and the jury's hatred of unpatriotic acts in general.

In the instant case, the judge's charge was an appeal to the passions and the prejudices of the jury. He might have unduly influenced them against the testimony of the deputy sheriff by picturing to them immoral conditions which would result from leaving the enforcement of the law in such hands as his. Since there was no evidence in the case of fifteen year old girls at dances drinking liquor, his charge was not a judicial and dispassionate comment on the evidence in the case, but was an appeal to the passions of the jury, which was not within the power of the judge.

The charge of the court must not partake of the nature of a partisan argument for either side. The judge is not permitted to attempt to persuade the jury as to the facts, or to throw the weight of his influence on the side of the prosecution by arguing the case for the government. In a prosecution under the Mann Act, the judge was not permitted to say[19] that to him the testimony of the defendant was wholly unreasonable, and that personally, he "would rather believe the girl who had been wronged than the man who would desert his wife and children to wrong her." This was held "to have the aspect of argument and advocacy beyond the permissible limit." In another case,[20] the defendant had been convicted of the murder of an officer who had attempted to arrest him under a warrant. The judge charged "How unjust, how cruel, what a mockery, what a shame, what a bloody crime it would be upon the part of this government to sent a man out into that Golgotha of officers, and command them in the solemn name of the President of the United State to execute these processes, and say to them: Men may defy you; men may arm themselves and hold you at bay; they may obstruct your process; they may intimidate your execution of it; they may hinder you in making the arrest; they may delay you in doing it by threats of armed violence upon you, and yet I am unable as chief executive of this government to assure you that you have any protection whatever" ..... The Supreme Court (of the United States) said that "argumentative matter of this sort should not be thrown into the scales by the judicial officer who holds them." The charge of the judge should not be one-sided,[21] but possible deductions in favor of the defendant should be made as well as those against him. The charge must be fair, and only such comments may be made as are justified by the circumstances of the particular case. However, the judge has been permitted to stress[22] "the importance of the case, because of the 'letting down of the bars' protecting property rights and the lowering of the standards of honesty", provided the duty of law enforcement was coupled with the duty of seeing that no innocent man was convicted.

18. Wolf v. U. S. (1919) 259 U. S. 388.
19. Parker v. U. S. (1924) 2 F. (2d) 710.
20. Starr v. U. S. (1894) 153 U. S. 614, 626, 14 S. Ct. 919, 38 L. Ed. 244.
21. Hickory v. U. S. (1895) 160 U. S. 408, 423, 16 S. Ct. 327, 40 L. Ed. 474.
22. U. S. v. Freedman (1920) 268 F. 655.

The court cannot use such language in his charge to the jury that he leaves with them the impression that they will be held up to ridicule, or that they will be deceived if they render a verdict contra to the views expressed in the charge. In one case, [23] the defendant was convicted of using the mails to defraud in selling the right to handle a certain machine. The machine was highly impractical, but the defendant testified that he honestly believed in its efficiency, and had no intent to defraud. The judge charged that no one with the slightest degree of intelligence above insanity could believe that the machine was practical. The court reversed the conviction, because "the jury may have believed a finding for the accused would have subjected them to ridicule." It was not sufficient that the words were withdrawn and the jury instructed that the question was for them. Again, the judge was not permitted to tell the jury[24] that they were not to be "hoodwinked and bamboozled" by unreasonable testimony when it was clear that he referred to the defendant's testimony. And when the judge told the jury[25] that they were "not to be misled or deceived by any subterfuge which may be resorted to by the defendant for the purpose of escaping the penalty . . . .", this was held to be a "disparagement of the defense", which could not be regarded as that judicial discussion which alone he is permitted to make.

The judge must leave the jury clearly to understand that they are free to exercise their own independent judgment. He cannot use such language in his comment upon the evidence that a jury might reasonably believe that they are bound by his views. Thus, the court was not permitted to say[26] that in his opinion, it was the duty of the jury to convict the defendant," or that "the evidence was legally conclusive against" the defendant[27] even though he thereafter cautioned them that they were free to exercise their own judgment, because these expressions were such that the jury might have believed that they were binding. In a case[28] in which the defendant had fled after the crime was committed, the judge charged that "the law recognizes another proposition as true, and it is that 'the wicked flee, when no man pursueth, but the innocent are as bold as a lion.' That is a self-evident proposition that has been recognized so often by mankind that we can take it as an axiom and apply it to this case." This charge was held to be erroneous, because it left the impression with the jury that if they found the defendant fled it was their duty to convict.

Any strong expression of opinion which the judge may desire to make should be made before the jury retire from the bar, because his right to comment at a later stage is more narrowly limited. In one case[29], the jury returned after they had been out some time, unable to agree. The judge said, "I feel that the court should have advised you, before you retired, that you should return a verdict of guilty in this case." It was held that "this statement, if made in the course of the original charge, safeguarded it as it was . . . . . would have been within the province of the court . . . . Coming at this state of the trial, however, it was inopportune, and was calculated to carry with it undue influence upon the jury."

The power of the judge to express his opinion upon the evidence is one of the most valuable features of the practice in the federal courts, and its aid

23. Rudd v. U. S. (1909) 173 F. 912, 97 C. C. A. 462.
24. Carney v. U. S. (1924) 295 F. 606.
25. Wallace v. U. S. (1923) 291 F. 972.
26. Breese v. U. S. (1901) 108 F. 804, 48 C. C. A. 36.
27. Cummins v. U. S. (1916) 232 F. 844.
28. Hickory v. U. S. (1895) 160 U. S. 408, 422, 16 S. Ct. 327, 40 L. Ed. 474.
29. Lewis v. U. S. (1925) 8 F. (2d) 849.

in the administration of justice is great. From the judge comes the only expert impartial aid that the jury receive in rendering the verdict. In state courts, the jury is frequently left to pass upon a mass of evidence and conflicting testimony lasting for several days, which they are unable to keep in mind. They are left to decide a question of fact which would be difficult for a trained mind. Sometimes they are left to the mercy of unscrupulous overly zealous attorneys, and the jury, which tries to decide the question correctly, is unable to properly decide because they have not been given the proper assistance. And the public wonders why more criminals are not convicted. When our judges become autocratic lords of oppression then we may fear this power of comment. But, at present, it is unfortunate that the circuit judges in Missouri are not permitted to say a single word by way of summing up or commenting on the evidence.

G. F. W.

MORTGAGES—TITLE BY ESTOPPEL BY DEED. *Ellsberry v. Duval-Percival Trust Co.*[1]

One Johnson purported to convey land by warranty deed to one Smiley, who, in turn, conveyed by deed of trust by way of mortgage to defendant to secure a note. The first of these deeds was recorded at 3:10 p. m. and the second at 3:15 p.m. on March 26, 1924. Johnson, when he conveyed to Smiley did not have title to the land nor did he appear on the record as the owner thereof. As a matter of fact, the only interest which he had in the property at that time was under a contract, which he had entered into with one Wealand whereby Wealand had bound herself to execute a warranty deed to him, and he, in turn, had agreed to give Wealand a deed of trust, covering the same land, to secure the purchase price. After defendant took its deed of trust from Smiley, Wealand, pursuant to her contract, conveyed the land to Johnson, and Johnson gave the stipulated deed of trust at Wealand's request to plaintiff. Wealand's deed to Johnson was recorded at 3:45 p. m. on March 26, 1924, and Johnson's deed of trust to plaintiff at 3:50 p. m. on the same day. This action was brought to determine whether plaintiff's lien was prior to that of defendant's. Plaintiff's had a decree in the Circuit Court, and upon appeal to the Springfield Court of Appeals, the decree of the Court below was affirmed, it being held that defendant's claim under its deed of trust from Smiley was junior to plaintiff's lien, given by Johnson under his deed of trust to secure the purchase price due to Wealand.

At common law, if A were to grant and convey Blackacre to B by warranty deed, he not having title himself at the time of the conveyance, any title that A might subsequently acquire would immediately pass to B; this later title was said to inure to B's benefit upon principles of estoppel by deed.[2] Moreover,

1. (1926) 282 S. W. 1054.

2. "At common law there were two classes of cases in which an estate actually *passed* by estoppel, and two only. The first of these was a feoffment, fine or common recovery. These acts were of such solemnity that they always passed an actual estate and divested the feoffor or consor and his heirs of whatever estate they then had and also of any estate that they night later acquire. The second was where the assurance was by lease under which estates could take effect in the future. There was an ordinary and an extraordinary effect attached to an estoppel. One was personal and estopped the grantor from doing anything contrary to the tenor of his sealed instrument. The other—the extraordinary effect—possessed the high function of actually transferring every estate to the feoffee, consee or lessee that the grantor might acquire." Rawle, Covenants for Title, (5th Ed.) sec. 243-246.

"In the United States where the deed contains recitals or averments relative to covenanting as to the title, as a general rule any after-acquired title will inure by virtue of the covenants to the party claiming under the conveyance by direct operation of law." Rawle, *op. cit.* Sec. 248.

this would be the result even though A, after he actually got title, conveyed the same to C, who took without actual notice of the prior conveyance to B.[3] The right, which B got under the warranty deed, was regarded as a legal right and not a mere equity. Accordingly, B's interest was not cut off by C's *bona fide* purchase.

Defendant, in the principal case, contended that plaintiff took Johnson's title under the deed of trust subject to the prior deeds to Smiley and to itself. To sustain this point, sec. 2198, R. S. 1919, and sec. 2199 *id.* were cited. Sec. 2198 makes it possible to record all instruments affecting title to real estate; sec. 2199 provides that "every instrument affecting real estate shall, from the time of its filing, impart notice to all persons of the contents thereof, and all purchasers and subsequent mortgagees shall be deemed in law and in equity to purchase with notice." But the Court held that these two statutory provisions were of no avail to defeat plaintiff's rights. It was stated that the mere fact that Johnson's deed to Smiley, and Smiley's deed to defendant were recorded at the time when plaintiff acquired her interest in the land from Johnson did not give plaintiff notice of defendant's claim against the land, and she took free from the same.

The result reached in the case under review is highly desirable; in fact, it seems it to be the only one consistent with the scheme of our recording statute. The statutes in substance purport to give assurance to one, who *bona fide*, and for value, purchases a title to real estate, that he will take such title in the condition that a proper search of the record reveals it to be in.[4] One who takes title to real estate ought to be privileged to assume that any outstanding titles, which due search of the record do not turn out, will be futile as against him, if he purchases for value, and without notice. If an attempt has been made to create an interest in the land by some deed or other instrument, and the same is recorded, but a proper search of the record will not reveal it, no right should vest under such attempt as against an innocent person, who has used the means provided by statute for the ascertainment of the true state of the land's title. If such undisclosed instrument is made effective as against such a purchaser, the recording statutes defeat their very purpose, and will mislead the buying public. They will not make the condition of real estate titles an "open story" available to all who take the trouble to make a diligent search.

The system of searching titles which the recording statutes invite[5] is to trace the line of record title and "search against each owner during the period that he held title."[6] If the record discloses a good title in a grantor or mortgagor on a certain date "and nothing done by him after that time to impair or encumber the title" a grantee or mortgagee should not "be bound to inquire further back and to ascertain whether the vendor" or mortgagor "has done acts which may impair his title prior to the time at which it was vested in him as indicated by the record."[7] "No one is supposed to convey or encumber property which

3. Rawle, *op. cit.* Sec. 259; White v. Patten, 24 Pick. (Mass.) 324.

4. See Ford v. Unity Church Society (1894) 120 Mo. 498, 25 S. W. 394; and Dodd v. Williams, (1877) 3 Mo. App. 278.

5. But compare the usual grantor-grantee indices method of registration of documents affecting land titles with the commonly called "lot and block "system. Also compare with the "Torrens System". In these systems all the instruments affecting title to a parcel of land are recorded on the same sheet in the registry book, irrespective of who executes them. See Tiffany, Real Property (2nd Ed.) p. 1101.

6. See Ely v. Pingrey (1895) 56 Kan. 17, 42 Pac. 330; Bingham v. Kirkland (1881) 34 N. J. Eq. 229, 234.

7. 2 Pomeroy, Eq. Jur. (4th Ed.) 1306; Tiffany, Real Property (2nd Ed.) sec. 545e.

he does not own .... A person would therefore naturally fail to inquire what some person had done about a property in which he had no interest."[8]

In the principal case, at the time that Johnson gave his deed of trust to plaintiff, he had just acquired title from Wealand, it would never occur to a reasonable person that Johnson, prior to such time, could have affected this title in such a way as to destroy plaintiff's rights, or that it was the duty of plaintiff and Wealand to search the records of deeds as against Johnson to ascertain whether or not he had granted away a title, which they knew was not vested in him, but quite to the contrary in Wealand. The decision, therefore, is just and in *accord* with the probable weight of authority.[9]

Sec. 2266 R. S. 1919 provides that where a "grantor, by the terms of his deed, undertakes to convey to his grantee an indefeasible estate in fee simple absolute, and shall not, at the time of such conveyance, have the legal title to the estate sought to be conveyed, but shall afterward acquire it, the legal estate subsequently acquired by him shall immediately pass to the grantee; and such conveyance shall be as effective as though such legal estate had been in the grantor at the time of the conveyance." Defendant in the principal case claimed the aid of this statute apparently urging that Johnson's deed to Smiley was within its operation so that his later-acquired title went to Smiley and from the latter to defendant as of the date of the execution of Johnson's and Smiley's respective deeds. The learned Court did not attempt to interpret this statute, but disposed of this contention by saying that "Because of our recording law a recorded deed executed by one who has not title, but who afterward acquires the title by recorded deed, is not constructive notice to a subsequent purchaser in good faith from the common grantor."[10] Apparently, the Court felt that the title by estoppel provided for in the statute, was to be limited to persons taking with actual notice, or to grantees other than *bona fide* purchasers, when the conveyance resulting in the estoppel, was out of the chain of title.

Certainly, such a construction of the above quoted statute is desirable, but is it justified? The statute's language is broad and sweeping; it provides that a grantor's future acquired title shall vest apparently in all grantees and "shall be as effective as though such title had been in the grantor [not a grantor within the record title] at the time of the conveyance." Literally construed, there is nothing in the statute's wording to restrict the scope of its operation in the way that the Court did limit it.

The statute contains some rather unusual provisions. In order that a grantor's subsequently acquired title may inure to a grantee's benefit, it requires the grantor to undertake to convey an "indefeasible estate in fee simple absolute." At the same time, if such an estate is granted, it seems that there will be an estoppel, even though the grant or conveyance is not by way of warranty deed.

At common law a grantee of any *quantum* of estate would take a title later acquired by his grantor.[11] Does the Missouri statute plan to limit the common law principles of title by estoppel to transactions where the title

8. Bingham v. Kirkland, *supra* note 6, 34 N. J. Eq. l. c. 234.

9. Taylor v. Debar (1910) 1 Ch. Cas. 374; In re Bridgewater's Settlement (1910) 2 Ch. Cas. 342; Hannon v. Christopher (1881) 34 N. J. Eq. 459; Builders' Sash and Door Co. v. Joyner (1921) 182 N. C. 518, 109 S. E. 259, 25 A. L. R. 81. Calder v. Chapman (1865) 52 Penn. St. 359, *accord.*

10. Ford v. Unity Church Society, *supra* note 4; Dodd v. Williams, *supra*, note 4; Conrey v. Pratt (1913) 248 Mo. 576, 154 S. W. 749; Rogers v. Tucker (1887) 94 Mo. 346.

11. Bigelow, Estoppel (5th Ed.) 385, 414-419; Co. Litt. 49a; Doe v. Oliver, 5 Man. & Ryl. 202, 3 Gray's Cas. Prop. 739.

purported to be conveyed is an out and out fee simple? Suppose, for example, that a life estate is conveyed, under an appropriate deed, will the grantee of such an interest not take his grantor's later acquired title? Of course, if this is the real meaning of the statute, a deed of trust does not convey an indefeasible title, and the defendant in the principal case could not have prevailed under any conditions.[12] Again, at common law a mere grant, without any warranty, would give no title by estoppel.[13] The Missouri statute does not specifically require the grantor to warrant his title in order that his grantee may claim the benefit of an estoppel. The statute provides for title by estoppel in all cases where a grantor "undertakes" to convey. Is undertaking to convey synonymous with conveying a title and warranting the same? If this is not the case, the statute considerably broadens the scope of operation of the orthodox rules governing title by estoppel.[14]

In the principal case, the Court also justified its conclusion on another ground, holding that where a grantee gives back to his grantor a purchase money mortgage or deed of trust at the time that he takes title such purchase money mortgage or deed of trust takes precedence over all liens created by the grantee prior to such time. Such a decision seems entirely proper, and is in *accord* with the best authority.[15] In such a transaction the purchaser and mort-

12. There have been relatively few cases in Missouri where the courts actually construe the meaning of the words in the statute. Perhaps a resume of those cases would not be out of place here.

In Gibson v. Chouteau, (1867) 38 Mo. 536, a deed purporting to convey "all the right, title and interest" of the grantor, was held to be a mere quit-claim and not to pass after-acquired title.

Likewise, in Valle v. Clemens (1853) 18 Mo. 486, a deed conveying the "interest of the grantors" was held not to convey after-acquired title. That a warranty deed passes the after-acquired title was held in Johnson v. Johnson (1902) 170 Mo. 34, 70 S. W. 241 and in St. J., St. L., & S. F. Ry. Co. (1902) 170 Mo. 327, 70 S. W. 700. The Court in Mathews v. O'Donnell (1921) 289 Mo. 270, 233 S. W. 457, l. c. 460, held that the "doctrine of after-acquired title does not apply to a married woman's deed (certainly not if the deed was made prior to the Married Woman's Act of 1889) and without regard to the form of the deed, only the interest that she had at its date passes her grantee."

In Vance v. Humphreys (1922) 210 Mo. App. 498, 241 S. W. 91, where remaindermen whose interest was contingent on their surviving a life tenant for the purpose of dividing the land conveyed by general warranty to each other *held*, "as soon as the title passes to the remaindermen on the death of the life tenant, it will pass to their grantees." In Graham v. Finerty (1921) 232 S. W. 129, it was held that "under a deed of trust of land held by the entireties containing statutory covenants of "grant, bargain and sell", on the death of the wife her interest thereby acquired by the husband passed by inurement to purchasers on foreclosure of the trust deed."

In Millerson v. Doherty Land & Cattle Co. (1922) 241 S. W. 907, it was held that where a purchaser of county land executed a deed to a third party before he received the patent from the county the title acquired after issuance of the patent inured to the benefit of the grantees. But it is evident from the above cases that the statute is not intended to apply strictly to the conveyance of a fee simple. The cases summarized above seem to hold that a mere quit-claim deed will not operate to convey after-acquired title, but any deed containing the statutory covenants of "grant, bargain and sell" or purporting to convey a definite estate as distinguished from a conveyance of the grantor's present interest will work such an inurement of title.

However, the holdings of the Missouri courts should not be taken as representing an approval of the doctrine of estoppel as represented by the decision of Tefft v. Munson (1874) 57 N. Y. 97, which is the leading case of a line of decisions that utterly disregards the interest of a *bona fide* purchaser of land from a grantor who has conveyed the land prior to his acquisition of title and holds that the one to whom it was previously conveyed takes title. The Missouri courts are inclined to protect the *bona fide* purchaser and to hold that the one purchasing previously to his grantor's acquisition of title merely acquires an equitable, as distinguished from a legal, title.

13. Right d. Jeffreys v. Bucknell, 2 Barn. & Adolph. 278; Kennedy v. Skeer, 3 Watts (Penn.) 98.

14. Bigelow, *op cit.* 429; Rawle, *op. cit* sec. 248.

15. Wendler v. Lambeth (1901) 163 Mo. 428, 63 S.W 684; Eyre v. Burmester (1868) 10 H. L. Cas. 90, Scott's Cas. on Trusts 671; Kelley v. Jensen (1862) 50 Me. 455; Rogers v. Tucker, *supra* note 10; Burchard v. Hubbard (1842) 10 Oh. St. Rep. 316.

gagor, had merely instantaneous seisin or title. He got it merely to give the same back as security; in substance, it is as if he never had title; as if the grantor and seller had never parted with the same. Surely, before any one can claim through a grantee, it should appear that the latter has acquired a beneficial interest in land. It seems obvious that a grantee, who has immediately upon receipt of title mortgaged the land back to his selling grantor to secure the purchase price, has not gotten, and will not gain any beneficial ownership in the land until the price secured by the mortgage has been duly discharged.

B. F. B.

FIRE INSURANCE—INSURABLE INTEREST— EFFECT OF INSURED'S MISREPRESENTATION UPON ASSIGNEE'S RIGHTS. *Hayward v. Fidelity Phoenix Fire Ins. Co.*[1]

In December, 1922 one M owned an elevator, which he "sold" to A, it being agreed that M should hold title to the premises until A could find a purchaser. At the time of this agreement the property was insured with defendant in favor of M, and it was arranged between the parties that M should not disclose to defendant A's interest under the contract, because A feared that defendant would not continue the insurance if it became known that the premises had come "into the hands of a trader."[2] In February, 1923, A, had not as yet found a purchaser, and M's insurance with defendant was about to expire. M, accordingly, renewed the same with defendant, but made no disclosure of the fact that he held the property for A under the contract made in December, 1922, apparently leading defendant to believe that he was still the absolute owner. Thereafter in August, 1923, A induced plaintiff to purchase the property, and M conveyed the same to plaintiff, at the same time assigning to the latter the insurance policy, which he had secured from defendant in February 1923. Defendant consented to this assignment. Plaintiff, at the time that he thus acquired the property and the insurance policy by way of assignment, did not know of M's misrepresentations to defendant, and had not been aware of the fact that title to the property was in M until the latter conveyed the property to him. Plaintiff did not know in what capacity A had been acting in the matter (whether as principal or as agent) until he took his deed from M After plaintiff acquired title to the elevator, it was destroyed by fire, and this action was brought upon the policy, issued originally to M, and assigned by him as aforesaid to plaintiff.

Defendant pleaded M's fraud as a defense to this action, claiming also that M, after he had contracted to hold title to the insured premises for A, had no insurable interest in the premises. But plaintiff had judgment in the Court below, which was affirmed by the Kansas City Court of Appeals. It was held: (1) that plaintiff did have an insurable interest; (2) that defendant could not avail itself of M's fraud in misrepresenting the true state of the title to the insured premises because it had not elected to rescind the contract of insurance, and offered to return the premiums that had been paid by M; and (3) that "when an assignment of the fire policy to a purchaser of the insured property has been consented to by the company, a new and independent contract arises between the insurer and the assignee, and the policy is not affected by the fraud of the party originally insured."[3]

1. (1926) 285 S. W. 144.
2. (1926) 285 S. W. l. c. 145.
3. (1926) 285 S. W. l. c. 146.

I

At the time that M. insured the premises with defendant under the policy in suit, he was in the position of a trustee, being obligated to hold the property for A, and to convey to any person that A might designate. It has been held that a trustee has an insurable interest, and there seems to be no dissent from this proposition. This is said to be so even though the trustee is under no duty to insure the trust property and has no pecuniary interest in it himself. The right to insure exists, under such conditions, because he should be privileged to protect the beneficiary from loss so that the trust property, or its value, in the event of its destruction by fire, may be turned over to the latter, when called for.[4] Clearly such a contract of insurance is unobjectionable, because the trustee, if he does insure, does so for the benefit of the *cestui que trust* and is responsible to him for any insurance collected. It is accordingly urged that the decisions to the effect that a trustee has an insurable interest are sound.

Conceding that M, had an insurable interest in the property covered by defendant's policy, the question is what was the effect of M's deliberately concealing his actual interest from defendant upon the latter's obligation under the policy to pay for the loss? It is probable that the policy contained a provision to the effect that it should be void if the interest of the insured in the property was not truly disclosed at the time of procuring the policy. Does such a stipulation *ipso facto* vitiate the policy, where, as in the principal case, the insured has fraudulently concealed the true state of the title, and falsely represented himself to be the true owner? Some courts have taken this position, holding that the condition in the policy is self-operating, and that the insured has no rights thereunder.[5]

On the other hand, a good many courts have taken the position that "void" as used in the policy does not mean that the policy is a nullity, but that the insurer may avoid the same,[5a] at his election, within a reasonable time after discovering the insured's fraud, but that to do so there must be a complete rescission of the agreement, which involves a return of premiums that have been paid in advance.[6] Courts, which hold to this view, argue that where the insured has an insurable interest, the insurer if inclined so to do, may elect to regard the policy as valid and waive the insured's fraud. If the insurer may elect to continue the policy, it is because there was a good and subsisting contract until avoided, and it could be avoided only by positive action on the part of the insurer amounting to rescission. Such a line of reasoning seems sound, and the decision in the principal case is proper. Certainly, if the insurance policy

4. Dick v. Franklin Insurance Co. 1883) 81 Mo. 103; Travis v. Continental Insurance Co. (1888) 32 Mo. App. 198; Insurance Co. v. Chase (1866) 5 Wall. (U. S.) 509, 10 L. Ed. 524; Lucena v. Crawford (1802) 3 Bos. Pul. 75; Wood, Fire Insurance (2nd Ed.) Section 306; Vance, Insurance, Section 47; 3 Kent's Commentaries (11th Ed.) 460 *et seq*; See Warren v. Indemnity Insurance Co. (1871) 45 N. Y. 606-612 for a valuable discussion of the principle underlying the proposition stated in the text. The case discusses a similar question.

5. National Insurance Co. v. Duncan (1908) 44 Colo. 472; American Cent. Insurance Co. v. Antram (1905) 86 Miss. 224, 38 So. 626.

5a. Burch v. Globe Mutual Ins. Co. (1862) 31 Mo. 546; Keet v. Roundtree Dry Goods Co. (1903) 100 Mo. App. 504, 74 S. W. 469; Baker v. N. Y. Life Ins. Co. (1896) 77 Fed. 550; Turner v. Meridian Ins. Co. (1873) 16 Fed. 454; Excelsior Mutual Aid Assn. v. Riddely (1883) 91 Ind. 84; Eagle Fire Ins. Co. v. Le Wallen (1908) 47 So. 947.

6. Union Trust Co. of St. Louis v. Wash. Ins. Co. (1899) 79 Mo. App. 362; Phoenix Ins. Co. v. Grove (1905) 215 Ill. 299, 74 N. E. 141; "Clearly the defendant insurance company could not assert a right to the premium for valid insurance and at the same time assert the insurance had never been effected." New Jersey Rubber Co. v. Insurance Co. (1900) 64 N. J. L. 580, 46 Atl. 477 *dictum*.

was merely voidable as against M it was likewise merely voidable as against M's innocent assignee, plaintiff.

II

The Court states in the case under review, probably by way of *dictum*, that where a person purchases property and takes an assignment of an insurance policy covering the same, the insurer consenting to the assignment, such policy is valid in the hands of the purchaser and assignee, in spite of any misrepresentations as to ownership that the assignor may have made to the insurer, when originally procuring the insurance. This is the usual holding, if the assignor had an insurable interest, when he got his policy. Such a rule reaches a desirable result. "It is customary for the seller to transfer to the purchaser his policy; and it would be a hard rule to hold such purchaser and transferee liable for the delinquencies of the party originally insured."[7] In fact, no good purpose would be furthered by penalizing the purchaser because he has an insurable interest, and the misrepresentation made by the assignor has in no way injured the insurer. If, therefore, the insurer can be held for a loss suffered by the assignee, consistently with principle, it will be desirable so to do.

It is usually said that the insurer is liable to the assignee, who has purchased the property, if the insurer consents to the assignment, because a new contract comes into being between the insurer and the assignee when the assignment is permitted. The proposition is that the insurer agrees to continue the insurance in favor of the assignee for the time mentioned in the policy, pursuant to the original terms thereof. Curiously enough, the situation has not often been critically examined and analyzed by the courts, the matter having been dismissed by the mere assertion that there is a new contract between the insurer and the assignee. Is it possible to find the elements of a new contract in such a transaction as it normally occurs in?

Take, for example, the transaction in the principal case, which is believed to be typical; it is easy, of course, to construe defendant's consent to M's assignment to plaintiff as a promise to pay the latter in the event of a subsequent loss covered by the assigned policy; it is easy, also, to find that plaintiff accepted such promise, but is there any consideration to support the same? It must be remembered that the premiums were paid by M. at the time the policy was issued to him; what has plaintiff afforded since then, which we may call consideration so as to make defendant's promise part of a new and binding contract?

A contract of insurance, prior to the time that a loss has accrued thereunder, is not freely assignable. The insured cannot at pleasure place another in his stead and insist that the insurer continue his liability to such other person. The insurer is privileged to refuse to continue the contract, but in such event, he would be bound to return any unearned premium to the insured's assignee.[8] The assignment is effective only to the extent of giving the assignee a right to have the unearned premium paid to him. It would seem that this would be the case even though the contract was voidable in the hands of the assignor, because of his misrepresentation as to his interest in the insured property, provided he had some insurable interest in the same. If this be a correct analysis of the parties' rights, plaintiff, in the case under review, could have demanded of defendant a return of the unearned premium, and defendant would have been bound to return the same. On the other hand, plaintiff

7. Bayless v. Merchants Ins. Co. (1904) 106 Mo. App. 684, 688, 80 S. W. 269.

8. Bealner v. Ins. Co. (1917) 193 S. W. 847; Ellis v. Ins. Co. (1887) 32 Fed. 646.

could have waived this right, and, in consideration thereof, defendant could have promised to continue the insurance in favor of plaintiff according to the terms of the original policy for the time mentioned therein. Under such circumstances defendant in effect would have said: "Let us keep the unearned premium, and we will insure you in place of M. M's contract is wiped out and a new one is now made with you identical in its terms with the old one."

Such courts, as have carefully considered this situation, have said that the new contract between the assignee and the insurer is that suggested in the last paragraph; that the insurer agrees to continue the insurance in return for the assignee's waiver of his right to a return of the unearned premiums.[9] Certainly such a contract *could* have been made. Certainly the assignee *did* have a right to a return of the unearned premiums, and he *did not* get them back. His not getting them back could have constituted consideration for the insurer's promise to continue the insurance. It appears doubtful, however, if the assignee was conscious of what he was doing. It is not believed that the average layman realizes that, when the insurer consents to an assignment, that he is surrendering his legal right to return of the unearned premium, due under the policy, as consideration for new insurance. The case then is one where the courts find that there could have been consideration, and, therefore, hold that that which might have been bartered away was in fact sold. As already remarked, the result of the decision is desirable and the courts take this position in order to hold the insurer to his solemn promise upon which the assignee has reasonably relied.

Suppose that A, having no insurable interest in property, nevertheless procures insurance thereon; that thereafter B obtains title to the property, takes an assignment of the policy issued to A, and the insurer consents to the assignment; may B recover under the policy in the event of a subsequent loss? It would be possible for A to have taken the policy either innocently, believing that he had an insurable interest, or fraudulently misrepresenting that he had such, knowing that in fact he did not. In the case where A knew that he had no insurable interest and deliberately misrepresented the condition of the title to the insurer, the cases hold, for the most part, that B may not recover under the policy even though he himself was innocent in taking the assignment of the policy, and relied upon the insurer's consent to the assignment.[10] The ruling is justified by saying that the contract, which A made with the insurer, was unenforceable because in the nature of a wager; that under a wagering contract the parties will be left where they are, and no one has the legal right to recover money paid under such a transaction. From this proposition it is easy to say that when A passed the policy on to B, he gave B no rights thereunder to have any premium paid back to him, and accordingly B surrendered no right to the insurer and afforded no consideration for the latter's promise to continue the insurance.

Technically, the decision, which denies the assignee any rights under the policy under the assumed conditions may be justified, but it seems most unjust, if the assignee was innocent of any fraud, and believed (as he did) that

9. Ins. Co. v. Bambrick Cons. Co. (1912) 166 Mo. App. 504, 143 S. W. 845; Ellis v. Insurance Co. (1887) 32 Fed. 646; Ins. Co. v. Munns (1889) 120 Ind. 30; Steen v. Niagara Ins. Co. (1882) 89 N. Y. 314; Shearman v. Ins. Co. (1871) 46 N. Y. 526 Hooper v. Ins. Co. (1858) 17 N. Y. 424; Ins. Co. v. Gunter (1896) 35 S. W. 715; Corpus Juris, Vol. 26, p. 134; (1912) 22 Jurid. L. Rev. 224; Wilson v. Hill (1841) 3 Metc. (Mass.) 66.

10. Frohley v. Ins. Co. (1888) 32 Mo. App. 302; Jecko v. Ins. Co. (1879) 7 Mo. App. 308; Merril v. Ins. Co. (1863) 48 Me. 285; Eastman v. Ins. Co. (1859) 45 Me. 307; Ins. Co. v. Doll (1871) 35 Md. 90; McClusky v. Ins. Co. (1879) 126 Mass. 306.

the insurer was continuing a valid policy. It is highly probable that the assignee never gave the question of the assignor's having an insurable interest any thought whatever, and to make the validity of the former's right to compensation dependent upon this fact, when he himself has such an interest, and the insurer has been paid his premium, seems to inflict a real injustice upon him. Of course, if the assignee's rights must be based upon the technical doctrine of consideration, the result which the cases reach seems unavoidable. The assignee furnished no consideration whatever. But why is there not room for the application of the doctrine of equitable estoppel? Certainly the insurer has represented to the assignee that the insurance is valid and the assignee has relied upon this representation to his detriment. The writer realizes that the normal rule is that no rights will be predicated upon a promissory estoppel. If A promises to pay B $1,000, receiving nothing in return for the same, B may not enforce the promise, even though he believes that A will pay him, and changes his position under such belief. Such a doctrine is perhaps sound, but the reason for the rule is that our economic policy is that a promise must be bought and paid for; if A gets nothing in return for his promise he will not be held to the same. We need not quarrel with that proposition to estop the insurer in the assumed case, however, because here the *insurer has been paid*; he was paid by the assignor, and his representation to the assignee in effect is: "the assignor paid me for a good contract of insurance, and I agree to substitute you in his place." It would seem that the assignor might be protected in this way, and that by so doing no important policy would be violated, and at the same time the assignee's reasonable expectations would be fulfilled.

In the case where the assignor had no insurable interest, but believed that he did have, perhaps the assignee may be protected under a more or less orthodox doctrine. The reason why a party who pays money under a wagering agreement cannot recover the same is, because he is at fault, and the policy of the law is to penalize him by leaving him where he has placed himself. It is a means adopted by the law, which is calculated to discourage wagers. The bettor may not enforce the promise given to him, neither will the law help him to extricate himself from the position into which he has gotten. But in the assumed case, the assignor was *innocent*; he was not conscious of the fact that he was making a mere wager. Surely there is no justification for making an example of such a person, nor any object in penalizing him; he has been guilty of no fraud or improper conduct, and should therefore be allowed to recover the premium that he has paid under mistake.[11] If this is the case, then the assignor did pass to the assignee, in the assumed case, the right to recover the premium that he paid, and this could have been left with the insurer, upon principles heretofore discussed, as consideration for a new contract of insurance entered into at the time that the insurer consented to the assignment of the policy.

C. F. S.

11. "While the insured cannot recover unearned premiums on account of a void policy, if there has been fraud practiced in its procurement, the rule is otherwise where the holder is innocent. If the risk never attached by reason of mistake, free from any evil practices, the insured is entitled to a return of the whole premium, for none of it was earned." *Per* J. Goode, in Vinning v. Franklin Insurance Co. (1901) 89 Mo. App. 323 (*dictum.*)

Stilwell v. Ins. Co. (1900) 83 Mo. App. 215; Miller v. Ins. Co (1906) 97 Minn. 98, 106 N. W. 485; McCann v. Ins. Co. (1901) 177 Mass. 280; 58 N. E. 1026; Seaback v. Ins. Co. (1916) 247 Ill. 516, 113 N. E. 862; Key v. Ins. Co. (1899) 107 Ia. 446, 78 N. W. 68.

DEEDS OF TRUST—DUTIES OF TRUSTEE. *Oakey v. Bond.*[1]

Plaintiff, the owner of land subject to a deed of trust, brought suit to set aside the trustee's deed on foreclosure because he had no notice of the sale until after the land was sold by the trustee. The court, in passing on this point, states that the "trustee proceeded to advertise the property in accordance with the terms of the deed of trust when he was requested to do so by the owner of the note. No further notice was required of him." The decision suggests a brief note on the duties of a trustee in respect to a sale under the power in a deed of trust.

A trustee is bound to act in good faith as, in exercising the power, he becomes the trustee of the debtor; he should adopt all reasonable means to render the sale beneficial to the debtor; he cannot shelter himself under a bare literal compliance with the conditions imposed by the terms of the power.[2] But the trustee is not required to give the owner personal notice of the intended sale,[3] unless so required by the terms of the deed.[4] A sale, however, will be set aside if procured by fraud in lulling the owner of the land into security by the promise of the creditor not to sell without first making demand.[5] Neither is a prior lien holder required to inform the holder of a junior lien of his intention to sell the property.[6] The notice required by statute to be published is intended to notify the community that a sale will take place in order that bidders may be present to purchase the property. It is not designed to give notice to the owner;[7] hence the law imposes no duty on the trustee to give personal notice to the former.

The Missouri statute[8] provides that all sales under a power of sale shall be made in the county where the land to be sold is situated, and not less than twenty days' notice shall be given. By statute "the time within which an act is to be done shall be computed by excluding the first day and including the last, if the last day be Sunday it shall be excluded."[9] This rule of computation applies to a notice of sale published by a trustee.[10] It is further provided[11] that "such notice shall set forth the date and book and page of the record of such mortgage or deed of trust, the grantors, the time, terms and place of sale, and a description of the property to be sold, and shall be given by advertisement" published as prescribed therein. Since a sale is made under a naked power given in a deed, the trustee must be held to a strict compliance with the terms and conditions prescribed; consequently, a corrected notice published

1. (1926) 286 S. W. 27. The evidence in the case showed that on April 30 an installment of interest matured on the note secured by the property; that early in May, plaintiff, the owner of the land, received a postal card from the holder of the note stating that the interest was past due and asking that payment be made; that without further notice the trustee advertised the property for sale, and sold the same on June 10; that plaintiff had no actual notice of this sale until July 4, when she attempted to collect rent from her tenant, who then informed her that the property had been old.

2. (1890) Cassady v. Wallace, 102 Mo. 575, 15 S. W. 138 (trustee did not give notice of his intention to sell to a junior lien holder, as he had agreed to do. (1876) Stoffel v. Schroeder, 62 Mo. 147 (sale at an earlier hour than usual).

3. (1894) Harlin v. Nation, 126 Mo. 97, 27 S. W. 330; (1874) DeJarnette v. DeGiverville, 56 Mo. 440; (1925) Moss v. Keary, 231 Mich. 295 204 N. W. 93; (1913) King v. Walker, 141 Ga. 63, 80 S. E. 312.

4. (1896) Jopling v. Walton, 138 Mo. 485, 40 S. W. 99.

5. (1867) Clarkson v. Creely, 40 Mo. 114.

6. (1894) Hardwicke v. Hamilton, 121 Mo. 465, 26 S. W. 342.

7. (1874) DeJarnette v. DeGiverville, 56 Mo. 440.

8. Sec. 2235, R. S. Mo. 1919.

9. Sec. 7058, R. S. Mo. 1919.

10. 1895) Gray v. Worst, 129 Mo. 122, 31 S. W. 585.

11. Sec. 2236, R. S. Mo. 1919, as amended by Laws of 1925, p. 140.

for nineteen days instead of twenty is not sufficient.[12] The notice given by the trustee should contain such facts as reasonably to apprise the public of the place, time and terms of sale, and of the property to be sold. But mere omissions and inaccuracies in these respects, not calculated to mislead and working no prejudice, will be disregarded.[13] Accordingly there are a number of cases in which the notice was held sufficient despite certain omissions and inaccuracies;[14] others have been held insufficient.[15]

A sale by the trustee passes the legal title notwithstanding the sale may be in violation of the provisions of the deed or the notice be defective.[16] The fact that a sale is irregular can be taken advantage of by the mortgagor, or one claiming under him, only by an action to redeem.[17] Since the trustee is a fiduciary, he must in person supervise the sale; he cannot delegate the trust or power to a third person.[18] A sale, therefore, made in the absence of the trustee by his agent is improper.[19] He should use all reasonable efforts and methods to make the sale bring as much as possible;[20] hence a sale at an unusual hour is not valid.[21] As the place of sale is usually at the county court house, there are a number of cases which attempt to define the "court house door."[22]

R. M. F.

12. (1891) Wolff v. Ward, 104 Mo. 127, 16 S. W. 161.

13. (1895) Noland v. Bank, 129 Mo. 57, 31 S. W. 341; (1872) Stephenson v. January, 49 Mo. 465; (1867) Powers v. Kueckhoff, 41 Mo. 425.

14. (1918) Swearengin v. Swearengin, 202 S. W. 556 (date of deed of trust incorrectly stated); (1917) Speer v. Graham, 199 S. W. 139 (page of record incorrectly stated in the first advertisement); (1914) Commerce Trust Co. v. Ellis, 258 Mo. 702, 167 S. W. 974 (failure to recite book and page of record); (1901) Baker v. Cunningham, 162 Mo. 134, 62 S. W. 445 (date of deed of trust incorrectly stated); (1895 Noland v. Bank, 129 Mo. 57, 31 S. W. 341 (error in description of the property, but description was sufficient to inform the public of the property to be sold); (1895) Gray v. Worst, 129 Mo. 122, 31 S. W. 585 (thirty days' notice); (1892) Wilkerson v. Eilers, 114 Mo. 245, 21 S. W. 514 (advertisement in two papers, where there was a consolidation); (1891) Meier v. Meier, 105 Mo. 411, 16 S. W. 223 (hour of sale not given); (1887) Munson v. Ensor, 94 Mo. 504, 7 S. W. 108 (notices signed in name of trustee by an attorney); (1880) The German Bank v. Stumpf, 73 Mo. 311 ("thirty days' notice in a daily paper" does not mean thirty days' daily notice in such paper); (1872) Stephenson v. January, 49 Mo. 465 (trustees' names correctly printed in body of the advertisement, but a mistake was made in one of them at the bottom); (1871) Sumrall v. Chaffin, 48 Mo. 402 (number of lot described correctly, but number of houses on the lot stated incorrectly); (1870) Kellogg v. Carrico, 47 Mo. 157 (sufficiency of newspaper); (1867) Powers v. Kueckhoff, 4 Mo. 425 (notice stated that sale would be at the court house door in the town of H., but omitted the name of the county); (1864) Miller v. Evans, 35 Mo. 45 (misdescription of note); (1855) Beatie v. Butler, 21 Mo. 313 ("town of St. Joseph" held not too vague for a description of the place of sale); (1851) Gray v. Shaw, 14 Mo. 341 (advertisement dated December 7th; sale to be "on the 28th day of December next."

15. (1891) Wolff v. Ward, 104 Mo. 127, 16 S. W. 161 (corrected notice published for nineteen days instead of twenty); (1883) Siemers v. Schrader, 14 Mo App. 346 (nineteen days' notice); (1880) Thacker v. Tracy, 8 Mo. App. 315 (Wednesday, February 19, 1874, was named as day of sale when in fact Thursday, February 19, 1874 was intended); (1846) Stein v. Wilkson, 10 Mo. 75 (one publication twenty days before day of sale is not twenty days' notice).

16. (1894) Springfield Engine & Thresher Co. v. Donovan, 120 Mo. 423, 25 S. W. 536 (insufficient period of publication); (1893) Kennedy v. Siemers, 120 Mo. 73, 25 S. W. 512 (nineteen days' notice instead of twenty); (1893) Schanewerk v. Hoberecht, 117 Mo. 22, 22 S. W. 949 (sale not made at place contemplated in the deed of trust).

17. (1905) Adams v. Carpenter, 187 Mo. 613, 86 S. W. 445 (twenty days' notice given instead of thirty).

18. (1872) Graham v. King, 50 Mo. 22.

19 (1876) Vail v. Jacobs, 62 Mo. 130; (1876) Landrum v. Union Bank of Missouri, 63 Mo. 48; (1910) Markel v. Peck, 144 Mo. App. 701, 129 S. W. 243.

20. (1900) Axman v. Smith, 156 Mo. 286, 57 S. W. 105.

21. (1908) Hanson v. Neal, 215 Mo. 256, 114 S. W. 1073; (1893) Holdsworth v. Shannon, 113 Mo. 508. 21 S. W. 85.

22. (1875) Hambright v. Brockman, 59 Mo. 52; (1879) Napton v. Hurt, 70 Mo. 497; (1890) Davis v. Hess, 103 Mo. 31, 15 S. W. 324; (1891) Stewart v. Brown, 16 S. W. 389; (1892) Stewart v. Brown, 112 Mo. 171, 20 S. W 451; (1892) Maloney v. Webb, 112 Mo. 575, 20 S. W. 683; (1894) Riggs v. Owen, 120 Mo. 176, 25 S. W. 356; (1895) Gray v. Worst, 129 Mo. 122, 31 S. W. 585; (1895) Snyder v. Chicago, S. F. & Co. Ry. Co., 131 Mo. 568, 33 S. W. 67.