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Notes on Missouri Cases

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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 MISSOURI CASES

The Law School endeavors to place graduates who are looking for positions. Offices having vacancies to be filled and desiring to secure the services of a graduate of the School may communicate with the Dean.

NOTE ON RESTRAINTS ON ALIENATION IN MISSOURI

In an article on *Restraints on Alienation in Missouri* published in University of Missouri Bulletin Law Series 39 it was stated that there were no decisions on the question of whether provisions for forfeiture for or restraints on alienation of a legal life estate, were valid. It was further stated that in view of the language in some of the cases discussing "spendthrift trusts" that the validity of such provisions should be regarded as doubtful.

Since the publication of the article I have been referred (by Mr. R. C. Coburn, of the St. Louis Bar) to the case of Gilker, et al vs. Brown, 47 Mo. 105. This case quite clearly holds that a provision, for forfeiture of a legal life estate for breach of condition against alienation, is valid.

This case has never been cited on the point mentioned, and it does not seem to have ever been called to the attention of the Court in any of the cases involving the validity of "spendthrift trusts." The case is peculiarly digested (being only referred to under the head of "mortgage by life tenant") and was not found by me in a search of all of the digest titles that were thought to refer to the validity of provisions providing forfeiture for or restraints on alienation.

While the case squarely holds such a provision, relating to a legal life estate, to be valid, it should be considered at the present time, in view of the language of the Court in the "spendthrift trusts" decisions, doubtful whether it would be followed as authority. The safe way of restraining alienation of a life estate is by means of the "spendthrift trust."

Recent cases indicating the attitude of the Courts as suggested in Subdivision F have been called to my attention by Mr. John T. Matson of the Louisiana, Missouri, Bar, viz: Sorenson vs. Booram, 297 S. W. 70; Coleman vs. Haworth, 8 S. W. (2nd) 931.

Three typographical errors should be noted. (1) On page 24 line 14 the word "valid" should be "void"; (2) On page 24, line 21 the word "not" should be inserted between the words "should" and "be"; on page 28, line 25 the word "has" should be "had."*

EARL F. NELSON

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CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER—VALIDITY OF ORDINANCE DELEGATING FULL DISCRETIONARY POWER TO OFFICER TO ABATE A NUISANCE. *Lux v. Milwaukee Mechanics Insurance Company*.[1]

In the principal case the Missouri Supreme Court declared unconstitutional an ordinance of Kansas City which gave the Superintendent of Buildings full discretionary power to declare to be a public nuisance any structure or part thereof that was "unsafe as to fire or for the purpose used, or had become unsafe from fire, decay or other causes" and to institute such proceedings and take such steps as were necessary for the immediate abatement of the nuisance. Another ordinance made it a misdemeanor for any occupant of a building to fail to comply with a notice given him by the Superintendent of Buildings requiring him to tear down a building. No standards were provided in the ordinance for determining when a building was a nuisance, and the court decided for that reason that it was left to the discretion of the administrative officer to decide what constituted a nuisance, without any standard to guide him and this was regarded as a delegation of legislative discretion. The court recognized that a city may provide by ordinance the circumstances and conditions which would create an emergency justifying the summary destruction of property in order to protect the lives and property of the citizens from imminent and threatening danger. But the determination of what conditions and circumstances create such an emergency is a legislative function to be exercised by the council and not delegated to an administrative officer.

It is commonly asserted that legislative power is a trust placed in the legislative body and that it can not be delegated by that body to an administrative officer.[2] Exceptions to any rigid rule against delegation of powers legislative in character do, however, exist. It is well settled that purely ministerial acts may be delegated by the legislative body to an administrative officer.[3] Likewise a certain amount of discretion maybe conferred upon such officer. But difficulties arise in determining

1. 15 S. W. (2d) 343 (1929).

2. Ploner v. Standard Oil Co., 284 F. 34 (1922); In re Quong Woo, 13 F. 229, 7 Sawyer 526 (1882); Dillard v. Webb, 55 Ala. 468 (1876); Walsh v. City of Denver, 11 Colo. App. 523, 53 P. 458 (1898); Cannon v. City of Americus, 11 Ga. App. 95, 74 S. E. 701; City of Kimmuncy v. Mahon, 72 Ill. 463 (1874); City of East St. Louis v. Wehrung, 50 Ill. 29 (1869); City of Cairo v. Coleman, 53 Ill. App. 680 (1894); McGregor v. Village of Lovington, 48 Ill. App. 211 (1892); City of New Albany v. New Albany Street Ry. Co., 172 Ind. 487, 87 N. E. 1084 (1909); Bills v. Goshen, 117 Ind. 221, 20 N. E. 115 (1889); Tieford v. Balknap, 126 Ky. 244, 103 S. W. 289 (1907); Commonwealth v. Badger, 243 Mass. 137, 137 N. E. 261 (1922); Commonwealth v. Clay, 224 Mass. 271, 112 N. E. 867 (1916); Greene v. Cook et al, 219 Mass. 121, 106 N. E. 573 (1914); Commonwealth v. Maletsky, 203 Mass. 241, 89 N. E. 245 (1909); Day v. Green, 58 Mass. 433 (1849); State v. Redington, 119 Minn. 402, 138 N. W. 430 (1912); In re Wilson, 32 Minn. 145, 19 N. W. 723 (1884); State of Missouri v. Thompson, 160 Mo. 333, 345, 60 S. W. 1007; Stewart v. City of Clinton, 79 Mo. 603, l. c. 610 (1883); Matthews v. City of Alexandria, 68 Mo. 115, 119 (1878); Thompson v. City of Boonville, 61 Mo. 282 (1875); Town of Trenton v. Clayton, 50 Mo. App. 535 (1892); Ruggles v. Bixler, 43 Mo. 352 (1869); Helena Light & Ry. Co. v. City of Helena, 47 Mont. 18, 130 P. 446 (1913); Public Welfare Pictures Corp. v. Brennan, 134 A. 868 (1926); Levy et al v. Mravlag, Mayor of Elizabeth, 96 N. J. Law 367, 115 A. 350 (1921); City of Lambertville v. Applegate, 73 N. J. Law 110, 62 A. 270 (1905); State v. Mayor etc. of City of Salem, 67 N. J. Law 111, 50 A. 475 (1901); Thurlow Medical Co. v. City of Salem, 67 N. J. Law 111, 50 A. 475 (1901); State v. City of Cape May et al, 63 N. J. Law 429, 44 A. 209 (1899); Village of Silverton v. Davis, 30 Ohio Cir. Ct. R. 523 (1907); State v. Fiske, 9 R. I. 94 (1868); Noe et al v. Mayor and Aldermen of Morristown, 128 Tenn. 350, 161 S. W. 485 (1913); Lufkin v. City of Galveston, 56 Texas 522 (1882). Cooley, *Constitutional Limitations* (1st. Ed. 1868) 116, says, "So far as its functions are legislative they rest in the discretion and judgment of the municipal body intrusted with them, and that body can not refer the exercise of the power to the discretion and judgment of its subordinates or of any other authority."

3. So in Booth et al. v. City of Dallas, 179 S. W. 301 (1915), an ordinance required the operator of a motor bus to submit it at least once a week to the city automobile inspector, and if he found it safe, should issue a certificate permitting its operation for one

the conditions under which and the extent to which this discretionary power may be delegated. Where it is impracticable or impossible to fix in advance a definite rule or detailed standard a certain amount of discretionary power, legislative in its nature, may be delegated to an administrative officer.[4] Discretion may also be given to an officer where it relates to the enforcement of a police regulation requiring prompt exercise of judgment[5]. An administrative officer may be given authority to determine whether the facts upon which the operation of the ordinance is made by the ordinance to depend, do in fact exist. Thus, in Walker v. Towle, 156 Ind. 639, 59 N. E. 20 (1901) an ordinance was held valid as not delegating legislative power to the mayor, which provided that when the mayor apprehended the spread of hydrophobia he should issue a proclamation requiring all persons possessing dogs to confine or securely muzzle them for a period of not less than 30 nor more than 90 days, and providing a penalty for violation of the proclamation. The court said it was the mayor's imperative duty to issue this proclamation if he found such danger and when he did so it was in obedience of the ordinance. In carrying out the ordinance the mayor was the agent of the council and the ordinance was enforceable for the period fixed according to its own terms.[6] Small details in carrying out an ordinance may be

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week, and if unsafe he should refuse such certificate. In upholding the statute the court said it was a correct and long settled principle that police power entrusted in the council might not be delegated, since the trust is official and personal and may be exercised only by those to whom it is committed by the state. Accompanying that rule, however, is at all times the further rule, equally well defined and established, that the former will not be construed and applied so as to require the city commissioners, in the exercise of the city's police powers, to personally engage in every step necessary for the exercise of that function but they may fully discharge their official duty and exhaust the municipal discretion by enacting by-laws or ordinances to be executed by the proper board or officer. The municipality, after exercising its discretion as to the enactment of laws is not forbidden from delegating its ministerial or administrative functions. Every element of the ministerial act is found in the ordinance unless it can be said the method of examining the motor vehicle is not precisely prescribed. The city automobile inspector is required to be one skilled in the mechanism of automobiles and it is nearly the unanimous rule that in ministerial matters much may be left to the discretion and judgment of public officials in reference to matters resting peculiarly upon professional or expert knowledge or skill. It is common knowledge that the mechanism of automobiles, while not exceedingly intricate, is nevertheless of that character that requires the judgment of at least a skilled mechanic, and for whose guidance a set or fixed rule would be out of the question. See, also, Allman v. City of Mobile, 162 Ala. 226, 50 So. 238 (1909); Chicago v. Washingtonian Home of Chicago, 289 Ill. 206, 124 N. E. 416 (1919) Lane-Moore Lumber Co. v. City of Storm Lake, 151 Iowa 130, 130 N. W. 924 (1911); Poeggel v. Louisville Ry. Co., 225 Ky. 784, 10 S. W. (2d) 305 (1928); Treasy v. City of Louisville, 137 Ky. 289, 125 S. W. 706 (1910); City of New Orleans v. Charouleau, 121 La. 890, 46 So. 911 (1908); Hughes et al v. City of Detroit, 217 Mich. 567, 187 N. W. 530 (1922).

4. In Thorpe v. City of Savannah, 73 Ga. App. 767, 79 S. E. 949 (1913) an ordinance provided it should be unlawful to keep a cow in the city for dairy or personal use without a permit from the health officer. The court held it was not unlawful to vest such discretion in an administrative officer. Unless it is arbitrarily abused, the courts will not interfere with its exercise by such officer. Here an investigation was made and a permit for three cows refused on the ground it would be unsanitary. Permits for one would have been given by the health officer. The court said this was an exercise of the police power. "The ordinance itself could not in imperative and mandatory terms specify all the cases in which the health officer should be required to grant a permit, because each case necessarily presents its own special features and conditions, each of which requires special investigation and consideration. The health officer is the one qualified and fitted to do this." See, also, Taylor v. Roberts, 84 Fla. 654, 90 So. 874 (1922); Leontas v. Walker, 166 Ga. 266, 142 S. E. 891 (1928); City of Chicago v. Marriotto, 332 Ill. 44, 163 N. E. 369 (1928); People v. Flurnier, 175 Mich. 364, 141 N. W. 689 (1913); City of St. Louis v. Meyrose Lamp Mfg. Co., 139 Mo. 560, 41 S. W. 244; People ex rel Gould v. Rochester, 45 Hun 102; Milwaukee v. Rissling, 184 Wis. 517, 199 N. W. 61 (1926).

5. Chicago v. Mariotto, 332 Ill. 44, was the case of a traffic ordinance authorizing officers to direct all traffic in accordance with the provisions of the ordinance "or in emergencies as the public safety or convenience may require". It was held not an unconstitutional delegation of power and does not authorize officers to direct traffic arbitrarily, but it merely confers the necessary exercise of discretion and judgment and authorizes arrest for violation of an order given in exercise of such discretion for the purpose of clearing a congestion of traffic.

6. Gundling v. City of Chicago, 176 Ill. 340, 52 N. E. 44 (1900); Walker et al v. Towel, 156 Ind. 639,

left to the discretion of the officer.[7] After the council has passed the ordinance its execution may be properly delegated to an administrative officer.[8]

Some cases hold the authority to determine what ought to be done to protect the public welfare in particular cases, as necessity requires, may properly be reposed in public boards and officers. This is particularly true of cases in which matters of health or safety are involved.[9] These cases admit that to a certain extent power legislative in its nature has been delegated. They rest on the basis of necessity in properly protecting the public welfare and go on the presumption that such boards and officers will discharge their duties honestly and in accordance with the law. If there is no immediate and impending danger to the public, and the thing is of such a nature that fixed standards could be provided by the legislature, these cases are in conflict with any strict principle that legislative authority can not be delegated to an administrative officer.

Missouri courts have been fairly strict in regard to what constitutes delegation of legislative power to administrative officers.[10]

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59 N. E. 20 (1901); Hughes et al v. City of Detroit, 217 Mich. 567, 187 N. W. 530 (1922); State of Missouri v. Thompson, 160 Mo. 333, (1901); Karth v. City of Portland et al, 123 Ore. 180, 261 P. 895 (1927)

7. Thus, in Oakley v. Richards, 275 Mo. 279, 204 S. W. 505 (1910) an ordinance was upheld which forbade the employment of steps in theaters "except upon the written permission" of certain officers. The court said an ordinance conditionally restricting the exercise of a right, otherwise exercisable without question and making that exercise dependent on the arbitrary will of a city officer might well be held invalid. "On the other hand, matters of detail in enforcing an ordinance otherwise valid may be left to designated officials."

8. Sutherland, *Statutory Construction*, (sec. 68) says, "The true distinction is between a delegation of power to make the law, which involves a discretion as to what the law shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no objection can be made." Treasy v. City of Louisville, 137 Ky. 289, 125 S. W. 706 (1910); Komen v. St. Louis, 289 S. W. 838 (1926); In re Dawson et al, 277 P. 226 (1928); Booth et al v. City of Dallas, 179 S. W. 301 (1915); Batsel v. Blaine, 15 S. W. 283 (1891).

9. In People v. Kaye, 212 N. Y. 407, 106 N. E. 122 (1914) the charter provided owners of certain buildings should provide such means of communicating alarms of fire, accident, and danger to police and fire departments as the fire commissioner or Board of Police might direct and should provide fire hose, extinguishers, buckets, axes, hooks, doors, and "other means of preventing and extinguishing fires as said fire commissioner may direct." The court held that the commissioner was authorized to order the installation of a sprinkler system, where the circumstances made such a requirement a reasonable one. The court said, ". . . Case falls within the line of decisions which hold the authority to determine what ought to be done to protect the public welfare in particular cases, as necessity requires, may properly be reposed in public boards and officers. Boards of health and health officers are constituted on that theory and on the same theory licenses to carry on different kinds of business are granted by designated boards and officers. There are many statutes whereby the legislative power is thus delegated, and they have never been questioned. The presumption is such boards and officers will discharge their duties honestly and in accordance with the law. Where no general rules are enacted, but a subordinate officer is impowered to investigate and determine the fact whether in any particular instance further fire protection is required, the reasonableness of the determination of such officer is open to review by the courts and a person aggrieved is entitled to show the order made was unreasonable, unnecessary, and oppressive."

In Crayton v. Larabee, 220 N. Y. 493, 116 N. E. 356 (1917) an ordinance provided that in cases of certain contagious diseases the health officer should order isolation or absolute quarantine, or wherever he deemed necessary and take such other quarantine measures as he deemed necessary in cases not provided for. In a damage suit for quarantining a family not exposed, health officer was held not liable. The court said that among all the objects to be secured by governmental laws, none was more important than preservation of public health and that the powers in fact conferred on boards of health and health officers, in view of the great public interest entrusted in them, had always received from the courts a liberal construction. The ordinance was held to protect the officer because he had lawfully exercised a stated discretionary power.

10. In City of St. Louis v. Polar Wave Ice and Fuel Co., 317 Mo. 907, 296 S. W. 993 (1927) the court said, "In the extensive annotation of the subject at hand, found in 12 A. L. R. p. 1436, in its application to the regulation of an ordinary lawful business or activity, the rule is stated as follows: 'The generally accepted rule is to the effect that a statute or ordinance which vests arbitrary discretion with respect to an ordinarily lawful business, profession, appearance, etc. in public officials, without prescribing a uniform rule of action, or, in other words, which

It would seem that it is desirable to give as much discretion in the execution of an ordinance as is possible, as the legislative body can not possibly foresee all the situations which will be met in its enforcement. It should be reasonable to assume that the city administrative officers would exercise this discretion honestly, and if it could be shown that they had arbitrarily discriminated against an individual, the courts would give him relief. Government could hardly be carried on without a reasonable amount of discretion being given to the officers who are administering the laws. However, while discretion as to the execution of an ordinance is desirable, the power to make an ordinance should not be granted to an administrative officer, because it is a trust vested in the body elected to exercise it. The legislative body must not abdicate the function of legislation and delegate the whole power to an administrative officer or agency. The formation of the policy involved and the fixing of general standards to guide the action of the administrative officer are functions that must be performed by the legislative body, elected to perform them. Thus, the principal case was quite properly decided. If, however, the legislative body had determined as a matter of policy the type of things that are to constitute nuisances and had formulated more or less definite standards to guide the officer in his execution of the ordinance, the leaving of a considerable amount of discretion to the administrative officer would probably not have invalidated the ordinance.

The courts have been especially lenient in allowing the delegation of discretionary power to administrative officers or boards in cases where the public health is involved. Thus, in Liberman v. Van De Carr, 199 U. S. 552 (1905) the United States Supreme court upheld an ordinance of New York City which provided "No milk shall be received, held, kept, either for sale or delivered in the city of New York, without a permit in writing from the Board of Health, and subject to the conditions thereof". One of the grounds of objection to the ordinance was that it devolved upon the board of health absolute and despotic power to grant or withhold permits, and so was not due process of law. The court said it was presumed that public officials would discharge their duties honestly and in accordance with the laws, and that rightly construed the ordinance granted power to issue or withhold permits in the exercise of an honest discretion.[11] The discretion given was very broad.

These cases might indicate that if there were great danger to the public in allowing a building to remain standing, considerable discretion might be given to an administrative officer to declare any particular building a nuisance. However, these

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authorized the issuing or withholding of licenses' permits approvals, etc., according as the designated officials arbitrarily choose, without reference to all of the class to which the statute or ordinance under consideration was intended to apply, and without being controlled or guided by any definite rule or specified conditions to which all similarly situated might knowingly conform—is unconstitutional and void.'

"In a general way the decisions involving the questions of validity of a granted discretion recognize the differences in the nature of the subject of the regulation or the circumstances under which the discretion is to be exercised, as that sometimes on account of the nature of the subject it is impractical to lay down a definite or comprehensive rule, or that the discretion relates to the administration of a police regulation and is necessary to protect the public morals, health and safety and general welfare. The rulings of this court rendered under the facts peculiar to the given case, while not wholly in harmony, generally recognize the rule as heretofore set forth."

11. See, also, Zucht by Her Next Friend v. King et al, 260 U. S. 174 (1922) in which the court says, "And still others [cases] had settled that a municipality may vest in its officials broad discretion in matters affecting the application and enforcement of health law."

Crayton v. Larabee, 220 N. Y. 493, 116 N. E. 355 (1917) holds a health officer not liable for damages in quarantining a family not directly exposed to smallpox under an ordinance which provided health officer should order isolation or absolute quarantine of persons with certain diseases, or wherever he deems necessary and take such other quarantine measures as he deem necessary in cases not provided for. The court said the powers conferred upon health officers by the legislative authority, in view of the great public interest involved, have always received from the courts a liberal construction.

health cases are not necessarily determinative of the question, because the type of necessity involved in them is different. The nature and difficulty of the problem is different in those cases, and the need of the special knowledge of health experts and the lack of capacity in the legislative body in the field of public health may require a greater degree of delegation of discretionary power to administrative health officers than in the field of determining what shall constitute a nuisance in regard to buildings.

Had a standard for the guidance of the administrative officer been fixed in this ordinance, so that it was not invalid as delegating power legislative in its nature, the fact that the administrative officer could summarily abate the nuisance would not make the ordinance invalid.[12] At common law certain nuisances could be abated without judicial hearing, and if it was in fact a nuisance there would be no liability therefor.[13] The distinction is between the summary abatement of a nuisance dangerous to the public by an administrative officer, which is proper, and the power to determine what constitutes a nuisance, which is legislative in its nature, and which must be done by the legislative body.

J. H. C.

FOREIGN CORPORATIONS—RIGHT OF AN ASSIGNEE OF AN UNLICENSED FOREIGN CORPORATION DOING BUSINESS WITHIN THE STATE TO ENFORCE CONTRACT. *Flinn v. Gillen.*[1a]

A foreign corporation entered into a contract with the city of Excelsior Springs for the paving of certain streets of the city. Pursuant to the contract the work was properly done, and in payment therefor the city issued special tax bills, as provided by statute.[1] The corporation thereafter sold and assigned the tax bills to plaintiff. Plaintiff brought an action against the defendant, an owner of property abutting upon one of the streets paved under the contract, to enforce the tax bill as a lien upon such abutting property. The only defense made was that the contractor,

12. In Birch v. Ward, 200 Ala. 118, 75 So. 566 (1917) the court holds that authority to abate nuisances could be delegated to building inspector by general ordinance or authorization and need not be by special ordinance to do the specific thing. The act is regarded as ministerial.

Also in City of New Orleans v. Charouleau, 121 La. 890, 46 So. 910 (1908) an ordinance which provided that when by a test dairy cows should be found infected with certain incurable diseases they should be killed, was upheld. In dictum the court said there need be no judicial hearing before the property was condemned. It would not be practicable for a large city to institute judicial inquiry in every case of diseased dairy cows. Impure food, decayed meats, fish, and vegetables are subjected to the doom of the inspector without appeal. There is no reason why in a large city the same should not be done with dairy cows, which by a test recognized to be practically infallible are found to be a serious menace to public health.

In Sings v. Joliet, 207 Ill. 300, 86 N. E. 663, the court quotes from King v. Davenport, 98 Ill. 305 as follows, "In the exercise of the police power the legislature may not only provide that certain kinds of property may be seized and confiscated upon legal process after notice and hearing, but may also, when necessary to insure the public safety, authorize them to be summarily destroyed by the municipal authorities without previous notice to the owner . . . as in the familiar case of pulling down buildings to prevent the spreading of a conflagration or the impending fall of the buildings themselves, throwing overboard decayed or infected food, or abating other nuisances dangerous to health."

State v. French, 71 Ohio State 186 (1905) holds where a statute makes a fishing net a public nuisance if used in an unlawful way, and makes it the duty of the game warden to summarily abate it, he is not liable to damages for so doing. This has been held not to deprive a citizen of his property without due process of law. The court quoted Lawton v. Steele, 119 N. Y. 226, 237 to the effect that "These authorities sufficiently established the proposition that constitutional guaranty does not take away the common law right of abatement of nuisances by summary proceedings, without judicial trial or process."

13. Great Falls Co. v. Worster, 15 N. H. 412 (1844); Clement v. May, 136 App. Div. 199, 120 N. Y. Supp. 588 (1909).

1a. 320 Mo. 1047, 10 S. W. (2d) 923 (1928).

1. Laws Mo., 1921, extra session, pp. 112-118.

constructing said improvement, was a foreign corporation which had not complied with the laws of the State concerning foreign corporations doing business in this State, and was not licensed to do business in Missouri. It was conceeded that the plaintiff purchased the tax bills for value and without notice of his assignor's failure to comply with the statutes in question, and that his assignor was "doing business"[2] in the State, within the meaning of the law. The Supreme Court held that plaintiff could not enforce any lien under the tax bill. The court's position was that the enforceability of the lien depended upon the enforceability of the contract; that plaintiff's assignor, because not licensed to do business within the State did not acquire an enforceable right under the tax bill; and therefore plaintiff as assignee likewise acquired no such right. There is one other Missouri case to be found which seems to be to the same effect as this holding.

The case is interesting and merits consideration because the position of the plaintiff seems to be unfortunate and harsh. The city received the fruits of its bargain: the contractor, the foreign corporation, in substance received its compensation by the sale of the tax bills to plaintiff; and now the loss falls on the plaintiff who is really an innocent party to the transaction. Every one with the exception of the plaintiff had received what was expected from the transaction. Is the decision sound? An answer will depend upon a careful analysis of the statutes[3] and of the public policy embodied and expressed therein.

It has long since been well established that a corporation is not a "citizen" within the meaning of the federal constitutional provision[4] guaranteeing that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States" so as to give it a constitutional right to engage in business in States other than the State of its creation.[5] The corporate franchise is a privilege which can be exercised as of right only within the territorial limits of the incorporating sovereign. A corporation may through its agents engage in a purely intra-state business in other States only by virtue of comity.[6] And the power to exclude includes the lesser power to regulate and to prescribe conditions for admission.[7] The State of Missouri has by statute prescribed certain conditions which must be complied with before the corporation will be authorized to do business within the State. Such corporation must maintain a public office in the State where legal service may be obtained upon it, file with the Secretary of State a copy of its charter, pay an "incorporating tax" and license fee, and obtain from the Secretary of State a license to do business within the State.[8] The statutes further provide that for a failure to comply with these conditions the foreign corporation shall be subject to a fine of not less than $1,000, "in addition to which penalty . . . no foreign corporation . . . which shall fail to comply with said sections, can maintain any suit or action, either legal or equitable, in any of the courts of this State upon any demand, whether arising out of the con-

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2. As to what constitutes "doing business" within the meaning of the statutes, see scholarly "Analysis of Doing Business" by Elcanon Isaacs, 25 Col. L. Rev. 1018; 6 Thompson, Commentaries on the Law of Corporations, sec. 7936. The contract is not unenforceable where the company complies with the statutes before any attempt is made to perform the contract. Wolfing v. Armstrong Cork Co., 250 Mo. 723 (1913); Hogan v. City of St. Louis, 176 Mo. 149 (1903); Frazier v. City of Rockport, 199 Mo. App. 80 (1918). The "doing business" referred to by the statutes is a transaction of the business for which the company was incorporated and does not include the sale of its stock by a telephone and telegraph company. First Nat'l Bank v. Leeper, 97 S. W. 636 (1906).

3. 1919 R. S. Mo. 9790-9793.

4. Constitution, Art. 4, Sec. 2.

5. Insurance Co. v. Needles, 113 U. S. 574 (1885); Ducat v. Chicago, 10 Wall. 410 (1870); Paul v. Virginia, 8 Wall. 168 (1868).

6. 8 Thompson on Corporations, Sec. 6655.

7. Bank v. Earle, 13 Pet. 586 (1839); Lukans v. Insurance Co., 269 Mo. 574, 191 S. W. 418 (1917).

8. 1919 R. S. Mo. 9790-9793

tract or tort."[9] The object of these statutes is two-fold. First, to obtain revenue for the State—to prevent foreign corporations from enjoying equal advantages of trade with domestic corporations without bearing any of the burdens borne by the latter. Second, to bring foreign corporations doing business here into the jurisdiction of the State courts.

It is the construction of only the clause relating to suits in the State courts by foreign corporations that has occasioned difficulty. It is not free from ambiguity. Does the statute merely suspend the remedy until the law has been complied with, or does it relate to the right and make all demands growing out of the unauthorized business void? Is the disability personal to the corporation or does it attach to and follow the claim into the hands of an innocent assignee?

In the early case of *Carson-Rand Co. v. Stern*,[10] a corporation within the purview of the statute brought an action by attachment without having complied with the law. The defendant moved to dismiss for want of such compliance. After the action was begun, but before the motion to dismiss was filed, the corporation complied. The Supreme Court held that this was sufficient—that the statute did not effect a forfeiture of the right to begin an action, but merely of the right to maintain an action already begun. The opinion in the Carson-Rand Co. case said, "The object of the law was rather to induce observance of these conditions than to deprive any corporation of the right of action or other property." The judgment of the court and reasoning of the opinion were entirely incompatible with the theory that the contract was void. The court thus construed the statutes to merely suspend the remedy until the statutory conditions have been complied with, leaving the validity of the contract or claim unaffected. But this case was subsequently in effect overruled in the case of *Tri-State Amusement Co. v. Amusement Co.*,[11] and the court adopted the view that a compliance with the conditions after the business is done and before an action is begun will not entitle the corporation to sue in the State courts. It was stated that, "The statute which prohibits foreign corporations from doing business in this State without first complying with the law requiring the payment of incorporation taxes and obtaining of a license as effectively makes void a contract entered into by such foreign company as if the statute had in terms declared such contract to be void."[12]

Perhaps neither of the above views is exclusively reasonable. For the earlier view it may be said that the statute is highly penal, and should be strictly construed; that the pecuniary penalty if strictly enforced, and the power of the State to expel the offending corporation through ouster proceedings, would be sufficient sanction to enforce the State's policy. The reasoning of the St. Louis Court of Appeals in *Chicago Mill & Lumber Co. v. Sims*[13] (subsequently reversed by the Supreme Court)[14] seems sound. The court said, "The law nowhere said, nor as we think, intimates, that its contracts shall be void or that torts may be committed against it at pleasure.

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9. 1919 R.S. Mo. 9793.

10. Carson-Rand Co. v. Stein, 129 Mo. 381 (1895).

11. Tri-State Amusement Co. v. Amusement Co., 192 Mo. 404, 90 S. W. 1020 (1905). *Accord*, Heilman Brewery Co. v. Piemeisl, 85 Minn. 121, 88 N. W. 441 (1901).

12. Though in these cases the contracts are declared "void" it will be noted that the corporation is suing and the language is necessarily *obiter* as applied to an assignee. Parke Davis & Co. v. Mullett, 245 Mo. 168, 149 S. W. 461 (1912); Amalgamated Zinc & Lead Co. v. Bay State Zinc Mining Co., 221 Mo. 7, 120 S. W. 31 (1909); Chicago Mill & Lumber Co. v. Sims, 197 Mo. 507, 95 S. W. 344 (1906); Wilson-Moline Buggy Co. v. Priebe, 123 Mo. App. 521, 100 S. W. 558 (1907).

13. Chicago Mill & Lumber Co. v. Sims, 101 Mo. App. 569 (1906).

14. Ehrhardt v. Robertson Brothers, 78 Mo. App. 404 (1899).

We do not understand that if a wanton destruction of a company's property is committed while it is in default it will have no remedy for the tort if it thereafter complies with the law; for instance, if a foreign corporation owns timber land and a trespasser cuts off ten thousand dollars worth of timber, that the corporation cannot recover damages though it fully obeys the law before suing. The decided cases which we have read show that when foreign corporations have begun suits without compliance, it was due in every instance, we believe, to an oversight instead of a disposition to defy the authority of the State. The Legislature hardly intended to punish such an oversight or inadvertance by total forfeiture of contract obligations perhaps involving great interests, so that subsequent obedience could give the delinquent company no standing in the courts. Such an interpretation is harsh and unreasonable and ought not to be adopted when the words and object of the statute repel rather than invite it . . Outlawing companies in default and allowing persons who are parties to an agreement with them to violate their agreements at pleasure is likely to do the State more harm and produce more demoralization than will result from a moderate interpretation of the statutes, sufficient to attain the end desired without encouraging repudiation or destroying valuable rights."

For the later view, adopted by the Supreme Court of Missouri, it may be said that it will prevent the foreign corporation from deriving all the benefits from its business within the State and avoid the bearing of the burdens borne by domestic corporations unless they need the aid of the courts to enforce demands against citizens of this State; that it will make the statutes more effective to enforce the public policy of the State. Though this construction may in many cases place the foreign corporation in a harsh position, the corporation which has failed to comply with the law is perhaps not in a position to arouse sympathy. Similar statutes have been enacted in nearly all States and corporations entering the State to do business here will know or ought to know of the existence of such statutes. If it does business here in defiance of the law perhaps it should not be heard to complain if it is denied *all* access to our courts. In any event unless a foreign corporation has complied with the law before doing business here it can not enforce any rights arising therefrom in the Missouri courts.

The laws in force contemplated the making of a contract between the city and the contractor for the construction of the improvement.[15] And the usual holding has been that the validity of the tax bill depends upon the validity of the contract. The court in *Flinn v. Gillen* said, "The validity of the contract is essential to the validity of the assessment." In the only case cited by the court[16] there had been a failure to comply with one of the statutory conditions for the making of a valid assessment, and the case is no aid to the construction of the statutes relating to foreign corporations. The power to issue tax bills is wholly statutory and a strict compliance with the statutory conditions is essential to a valid issue.[17]

But is the court justified in holding that the contracts of a foreign corporation made before compliance with statutory requirements, are wholly void? The courts have uniformly permitted the other party to a contract with a delinquent corporation to enforce such contract—have uniformly refused to permit a defaulting corporation to plead its own non-compliance as a defense[18]. If the contract is wholly void it

15. Laws 1921, extra session, pp. 112-118.

16. Sanders v. Mayor of Gainesville, 141 Ga. 441, 81 S. E. 215 (1914).

17. Thrasher v. City of Kirksville, 204 S. W. 804 (1918); Curtice v. Schmidt, 202 Mo. 703, 101 S. W. 61 (1907); City of Webster Groves v. Reber, 212 S. W. 38 (1919); Galbrath v. Newton, 30 Mo. App. 380 (1887).

18. Central Coal & Coke Co. v. Otimo Lead & Zinc Co., 157 Mo. App. 720, 139 S.W. 525 (1911); Union Bank Note Co. v. Ajax Portland Cement Co., 155 Mo. App. 349, 137 S. W. 18 (1911); Young v. Goss, 134 Mo. App. 166, 113 S. W. 735 (1908).

would seem that neither party could declare any rights under it. Though the courts have said that the contract was "void", but that the corporation is "estopped" to plead its own wrong as against a citizen who has dealt with the corporation in ignorance of its default, it is perhaps more accurate to say that the disability is personal to the corporation, and that the other party, being unaffected by this disability, may enforce the contract in the courts of this State. If the foreign corporation should commit a tort in this State, there can be no doubt of its amenability in the courts of this State, and in such case there is no ground for the application of the doctrine of estoppel. It would be a perversion of the statute to extend the disability by construction to the other party to the contract. It would enable the statute, enacted for the protection of the people of the State, to be used as an instrument for the perpetration of fraud upon them.

Suppose A makes a contract with an unlicensed foreign corporation, A knowing of this fact when he entered into the agreement. Should A be permitted to sue in the event of a breach by the corporation? It is believed that A should have no right under the circumstances, not because no contract was made, but rather because A has participated and cooperated with the corporation in violating the law. It is illegal for the corporation to conduct business in Missouri without complying with the statute and it is subject to severe penalties and doubtless to ouster proceedings for so doing. Its action is quasi-criminal. Now A has participated in this illegal action. It is therefore quite proper to hold that A, being *particeps criminis* with the corporation, should be denied any rights which otherwise would have sprung from the transaction.

Now, what of the position of an innocent assignee of such corporation? This was the specific problem before the court in *Flinn v. Gillen*. It is believed that the harshness of the decision will be conceded by all, and it is believed that the result reached by the court is not, possibly, made necessary or desirable by the letter or the purpose of the statute. Note again that the statute expressly provides only that the foreign corporation may not sue. Though it is undoubtedly the general law of assignments that the assignee of a non-negotiable chose stands in the shoes of his assignor, and can have no greater right, the situation in the principal case may not be the usual case of assignment where such rule is applied.

The rule that an assignee stands in the shoes of his assignor was formed to prevent a contracting party being held to his bargain when to do so would work an injustice upon him. The rule should apply whenever, according to the substantive law of contracts, an obligor or promisor should be excused from the performance of his promise, either because of some inherent defect in the contract itself or because matters have occurred subsequent to the making of the agreement which, according to the law of contracts, should free him from his obligation to perform his original undertaking. To illustrate. A makes a contract with B; it is unenforceable because there was no consideration moving from B to A. A makes a contract with B; it is unenforceable because A procured B's promise by fraud. A makes a contract with B; it is unenforceable because A fails to perform a condition precedent to B's promise. A makes a contract with B; it is unenforceable because A substantially breaches his side of the bargain, which, according to the understanding of the parties was to be performed first. In all of the assumed cases if A were to assign his part of the agreement to C, C could no more hold B to his promise than could A have held B. This would be true in the first two assumed cases because of inherent defects in the agreement making it unjust to hold B, and in the last two assumed cases, because matters have occurred after the contract was entered into which would make it equally unjust to hold B. In other words the basis of the rule, that an assignee takes no

greater nor different rights than his assignor had, whenever it applies, is that if a promisor according to the substantive law of contracts cannot justly be held to his promise, his promisee can not nullify his legal defense and cause him to be held bound, contrary to such substantive law, by so simple a device as an assignment.

If the foregoing analysis and explanation of the rule is accurate, the question should be asked, has that rule any application to the situation presented in the principal case? Would the principle or spirit of the rule have been violated in any way if plaintiff had been permitted to enforce the tax bills? It would seem that the answer to this inquiry is, no, and that so far as plaintiff was denied a recovery because he was an assignee, the decision is unsound. The assigned contract as such was inherently good. It had all the elements that go to make a good contract and further than that it had been duly performed in all respects. From defendant's point of view value had been fully received and, according to all the rules of the substantive law of contracts defendant should have been bound. From the point of view of the law of contracts there would have been no injustice whatever in a judgment holding defendant liable, and for this reason the principle embraced in the rule that an assignee stands in the shoes of his assignor would not have been violated had the defendant been held liable. That rule in truth has no application to the situation and facts in the principal case.

The court in the principal case quoted with approval the following language,[19] ". . . to permit an assignee of such contracts or rights to sue and enforce them would in many instances enable the foreign corporation to escape the legal consequences of the violation of the statute, and would be offensive to the public policy of this State." But if it be said that the decision would destroy the company's market for such tax bills and thus tend to prevent circumvention of the law, the answer is that the plaintiff knew nothing of the default of the company and is no more likely to know after this decision than before. The court said, "The plaintiff in taking the assignment of tax bills from the corporation was obliged to take notice of the legal limits of the powers of that corporation." But is not this placing too great a burden upon the assignee? The assignee will usually be a layman—a business man. To assume that he will know of the existence of such statutes or that the corporation has failed to comply therewith is in many cases to make an assumption contrary to fact. To hold that the innocent assignee occupies no better position than the corporation is to visit the entire penalties of the statutes on innocent parties.

The case of *Handlin-Buck Mfg. Co. v. Wendelkin Construction Co.*[20] merits notice. A foreign construction company made and performed a sub-contract to do certain railroad construction work in Missouri, without complying with the statutes. It became indebted to one Anderson and to plaintiff. The construction company had a claim due it from the firm of Johnston Brothers, railroad contractors, for money earned under its sub-contract. The construction company executed to Anderson a bill of sale of certain personal property belonging to it, under which Anderson took possession, and also assigned to him the debt due from Johnston Brothers, in satisfaction *pro tanto* of its indebtedness to Anderson. Thereafter the plaintiff attached the personal property in the possession of Anderson and garnished the debt in the hands of Johnston Brothers as a debt due the construction company. The theory of the plaintiff was that the construction company, not having complied with the law, the bill of sale and the assignment of the debt were void. Anderson interpleaded,

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19. Fletcher, Cyclopedia Corporations, Vol. 9, sec. 5965.

20. Handlin-Buck Mfg. Co. v. Wendelkin Construction Co., 124 Mo. App. 349, 101 S. W 702 (1907).

alleging that the property was that of the interpleader and that the title to the debt passed to the interpleader under the assignment.

The court sustained the contention of the interpleader, holding that the validity of the bill of sale, when possession had been delivered, cannot be attacked by the attaching creditor, and that the title to the debt passed under the assignment. This decision seems to be sound. The statute does not prevent a delinquent corporation from passing valid title to property.[21] And though Johnston Brothers did not plead the non-compliance of the construction company as a defense, the position of the court seems to have been that the assignee Anderson got a valid claim under the assignment, and would not be precluded by the statute from enforcing it against Johnston Brothers in the courts. Thus the court seems to have taken the view, *contra* to the holding in *Flinn v. Gillen*, that the assignee may maintain suit, though the corporation be barred. The opinion said, "Whether the statutes were intended to invalidate contracts made by non-complying corporations or merely to suspend the remedy on those contracts, the legislation was directed against the corporations and not against third parties who might deal with them in ignorance of their disobedience . . . The most frenzied policy of strengthening the acts intended to compel certain steps to be taken by foreign companies before doing business in this State can find no motive for holding contracts void, when to do so will neither punish a delinquent company nor influence a foreign company generally to comply with the law . . . Courts and commentators have descanted on the injustice of holding contracts void even in the hands of a delinquent company, and the mischief would be intolerable if innocent parties were held to occupy no better position." The remedy of the assignee against his assignor for breach of implied warranty in the total failure of consideration may be wholly inadequate.

The Supreme Court of Minnesota has held,[22] under a statute almost identical with the Missouri statute, that the innocent assignee may sue. A foreign corporation, engaged in buying and selling real estate, sold certain real estate and took back a mortgage for part of the purchase price. The corporation assigned the mortgage to the plaintiff. Plaintiff brought a bill to foreclosure, and defendant pleaded the non-compliance of the mortgagee with the statutes. The court said, "The purpose of the statute is to subject all foreign corporations doing business in this State to the process of the courts thereof. If such corporations fail to comply therewith, they shall not be permitted to resort to such courts for relief, and shall also be subject to a penalty of $1,000 for each offense. There is no provision in the statute that contracts of unqualified corporations doing business in this State shall be void. If the Legislature had intended to render contracts entered into by such corporations under such conditions void, it undoubtedly would have so provided. The legal presumption is that it specified all the penalties that it intended to impose and it is not the province of the court to inflict more by construction.

"If contracts in violation of this statute are void, they are absolutely void and no part of them could be enforced. Under such circumstances, all of the parties to the transaction would be precluded from enforcing the contract in the courts of this State. Such was not the intention of the Legislature. The statute simply provides that, if such corporation will not subject itself to the processes of the courts of this

21. *Cf.* a *dictum* of Bland, P. J., in Young v. Gaus 134 Mo. App. l. c. 173 (1908) and of Woodson, J., in Roeder v. Robertson, 202 Mo., l. c. 533 (1907), implying that an unlicensed foreign corporation or its privy, might, by restoring the other party to its *status quo*, recover property transferred to such other party under an unauthorized contract of sale. These *dicta*, it would seem, are based on an erroneous interpretation of the statutes.

22. Craft v. Hoppe, 188 N. W. 162 (1922). General Statutes, Minn. 1913, Secs. 6206-6208.

State, it may not be permitted to resort to such courts for relief, and in addition thereto shall be subject to a fine of $1,000. . . If the assignee, be a bona fide assignee, and not in collusion with the corporation or a representative thereof in an effort to circumvent the statute, and having no knowledge when the assignment was taken that the assignor was unlawfully doing business in this State at the time the mortgage was received, he may enforce it in the courts of this State."

If the innocent assignee of an unlicensed foreign corporation should be permitted to enforce a right in the courts of this State, *a fortiori* a *bona fide* purchaser of a negotiable instrument should be able to sue. Indeed this result would seem to follow from the provision of the negotiable instrument law that "that the maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and of his then capacity to endorse."[23] Yet if the court's characterization of the contract as "void" is accurate, it is difficult to see how an endorsement could breathe into a negotiable instrument the breath of life. It is believed that to hold such negotiable paper unenforceable in the hands of a *bona fide* purchaser would most unfortunately restrict the salutary operation of the negotiable instruments law. It is doubtful whether the decision of the Kansas City Court of Appeals in *Ehrhardt v. Robertson Brothers*[24] goes so far. The plaintiff in that case seems to have been an assignee rather than an "endorsee" within the meaning of the negotiable instruments law.[25] In *Young v. Gaus*[26] officers and stockholders of a foreign corporation, unauthorized to do business in Missouri, executed to the corporation, for its accommodation, their negotiable promissory note. The makers, acting as officers and agents of the corporation, endorsed the note in the name of the corporation to plaintiff, an innocent holder for value. The court permitted the plaintiff to recover. Here however was the additional element in the case that the makers were estopped to set up in defense their own wrong and want of authority in the corporation to do business in the State; they could not shelter themselves behind the unlawful act of the corporation and thus indirectly set up their own wrong and fraud to escape liability. No other Missouri cases have been found bearing upon the rights of an endorsee of negotiable paper.

It would seem that the court might properly deny a recovery where the assignment appears to be merely colorable or where there is collusion to circumvent the law or where the assignee knew of the violation of the law. So, in *United Shoe Machinery Co. v. Ramlose*, an unlicensed foreign corporation assigned a demand arising out of its unauthorized contract to plaintiff. The assignee was a corporation of the same name, using the same offices, the same place of business, and the same local agent, as the assignor. The assignee had complied with the Missouri statutes. The court denied recovery. The case may perhaps be distinguished from the principal case on the ground that the plaintiff appears to have been, not an assignee without notice, but an attorney in fact to sue; the assignment appears not to have been *bona fide*, but a colorable scheme to evade the law of Missouri.[28]

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23. R. S. Mo. 1919, Sec. 846.

24. Ehrhardt v. Robertson Brothers, 78 Mo. App. 404 (1899).

25. R. S. Mo. 1919 Secs. 838-840.

26. Young v. Gaus, 134 Mo. App. 166, 113 S. W. 735 (1908).

27. United Shoe Machinery Co. v. Ramlose, 210 Mo. 631, 109 S. W. 567 (1908).

28. May the fact that the assignee knows his assignor is a foreign corporation, or that a note shows on its face that it is payable to a foreign corporation, impart constructive notice of the violation of the law? It is so suggested in Young v. Gaus, *supra*, note 26 in distinguishing the Ehrhardt case. But the courts indulge a presumption that the corporation has complied with the statutes; non-compliance is a defense which must be pleaded. United Shoe Machinery Co. v. Ramlose, 210 Mo. 631 (1908); Parlin etc. Co. v. Boatman, 84 Mo. App. 67 (1900). And it would seem that the courts should protect the

Though the tax bills are not contracts, the right of the holder to assert the lien against the property described in them would seem to be a "demand arising out of the contract" within the meaning of the statute. The statutes impose a heavy pecuniary penalty upon the corporation failing to secure the license. Such failure is made by law a quasi-criminal act. It is made the duty of the Secretary of State when advised that corporations are doing business in contravention of the statutes to report the fact to the prosecuting attorney of the county in which the business of such corporation is located, and it is made the duty of the prosecuting attorney to institute proceedings to recover the fine provided for.[29] And if the foreign corporation persists in violating the law undoubtedly the State would have the power through *quo warranto* proceedings to oust it from the State.[30] This would seem to be a sufficient sanction to vindicate the State's policy. And may not the innocent assignee justly feel aggrieved if the State by inaction permits the corporation to do the unauthorized business, and then leaves him to a doubtful and perhaps wholly inadequate remedy against his assignor? It is to be hoped that when the problem is again presented the court will reconsider, and that *Flinn v. Gillen* will not be followed.

O. H. McC.*

INSURABLE INTEREST—NECESSITY OF A PECUNIARY INTEREST IN LIFE INSURANCE. *Parish v. Missouri Mutual Association.*[1]

In this case the plaintiff brings an action to recover assessments on a life insurance policy which he took on the life of his mother. A Missouri statute makes the policy void *ab initio* on the life of a person who at his nearest birthday was sixty years old. The plaintiff finds this out, tenders policy, and demands the assessments. Defendant claims that the plaintiff has no insurable interest in the life of his mother and therefore cannot recover for assessments or premiums paid. Plaintiff here signed the application for the policy on the life of his mother. The record shows that the plaintiff was not dependent on his mother nor she on him. The Court holds that there was an insurable interest and based it on the mere fact of relationship alone.

This case represents a view that is strictly *contra* to that of the English courts and also to that of most American courts. The English courts, construing 14 Geo. III, C. 48,[2] have uniformly interpreted it to mean that the insured must have a pecuniary interest in the life of the assured. *Halford v. Kymer*[3], decided in 1830, seems to be the foundation on which the pecuniary interest theory rests. The Court there held that in order to render a policy valid within the meaning of the act the party for whose benefit it is effected must have a pecuniary interest in the life of the insured, and that therefore a policy effected by a father in his own name on the life of the son, the father not having a pecuniary interest therein, was void. This

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citizen in acting upon a like presumption. *Cf.* Central Coal & Coke Co. v. Optimo Lead & Zinc Co., 157 Mo. App. 720 (1911).

29. R. S. Mo. 1919, Sec. 9703.

30. Thompson, Commentaries on Law of Corporations, Vol. VI, Sec. 7944. Grover & Baker Sewing Machine Co. v. Butler, 53 Ind. 454 (1876).

*The writer has been assisted in finding the authorities by James Haw, Esq., LL.B. '30, and of the Charleston, Missouri, Bar.

1. 8 S. W. (2nd) 1018 (1928).

2. The Life Assurance Act of 1774, 14 Geo. III, C. 48 recites: "that the making of insurance on lives wherein the assured shall have no interest hath introduced a mischievous kind of gaming, and enacts that no insurance shall be made by anyone on the life or lives of any person or persons wherein the person or persons for whose use and benefits or on whose account such policy shall be made shall have no interest by way of gaming or wagering," and further . . . "and be it further enacted that in all cases where the insured hath interest in such life or lives, no greater sum shall be recovered or received from the insurer than the amount or value of assured in such life or lives."

3. 10 B. and C. 724; 8 L. J. (O.S.) K. B. 311 (1830).

country, even though we have no statutes similar to that of 14 Geo. III, seems to follow, for the most part, the rule of the English courts, and like the English courts, demands a pecuniary interest.[4] Many jurisdictions, as one court[5] very ably points out, says that it is unnecessary to have a pecuniary interest in the life of the assured, yet as a matter of fact, there is an actual pecuniary interest in those cases, although the interest may be contingent and not capable of estimation in dollars and cents.

The Missouri courts, until the present case of *Parish v. Missouri Mutual Association* have been definite in requiring a pecuniary interest.[6] They find it in the contract of insurance by one fiancee on the life of the other,[7] but not in the case of cousins,[8] or uncle and nephew,[9] and in finding as they do, seem to follow the majority of American cases.

There has been a tendency in this country, however, toward the view taken by the Missouri court in *Parish v. Missouri Mutual Association*, some courts seeking "a pecuniary advantage from the continued life of the assured, or some loss from his death."[10]

Some have taken a more liberal view. They say that in order to have an insurable interest in another, there must be a reasonable expectation of benefit. Certainly, if we proceed on the idea that in order to avoid the danger of homicide, there must be an insurable interest, the endangered assured is taken care of because the possible "murderer" has a reasonable expectation of benefit from the life of the assured. He now has an interest similar to that of a creditor—a creditor perhaps not in a pecuniary way, but nevertheless a creditor in the sense that he is expecting a benefit—not one legally owing him, but one morally due. If a mother may reasonably expect that her adult son would care for her in her old age, these courts would say that she has an insurable interest. She has a reasonable expectation of benefit, which is that her son will take care of her. And if we adopt the view of some courts that the vice in not having an insurable interest is not that there will be a greater number of homicides but that the insurance will be in the nature of a wager, they are satisfied by "the reasonable expectation of benefit" theory because an interest however small takes it out of that class.[11]

A few courts, whether they thought an insurable interest was necessary to protect the life of the assured or whether to take it out of the wagering class, have said a close degree of blood relationship alone is enough and some have based it on the idea that in such a case, a reasonable expectation of benefit is presumed to exist from the relationship while others take the view that it is against every moral law to expect that a close relative will kill the assured—that the relationship is enough protection.[12]

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4. Connecticut Mut. Life Ins. Co. v. Shaeffer, 94 U. S. 457 (1876); Life Ins. Clearing Co. v. O'Neill, 106 F. 800, 45 C. C. A. 641, 54 L. R. A. 225 (1901); Lewis v. Phoenix Mutual Life Ins. Co., 39 Conn. 100 (1872); Schwerdt v. Schwerdt, 235 Ill. 386, 85 N. E. 613 (1908); Guardian Mutual Life Ins. Co. of New York v. Hogan, 80 Ill. 35, 22 Am. Rep. 180 (1875); Peoples Mutual Benefit Society v. Templeton, 16 Ind. App. 126, 44 N. E. 809 (1896); Continental Life Ins. Co. v. Volger, 89 Ind. 572, 46 Am. Rep. 185 (1883); Mitchell v. Union Life Ins. Co., 45 Me. 104 (1858).

5. Life Ins. Clearing Co. v. O'Neill, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225 (1901).

6. In Charter Oak Life Ins. Co. v. Brant, 47 Mo. 419, 4 Am. Rep. 321 (1871), the court *obiter* seems to cite with approval the quotation in 3 Kent's Commentaries, 14th Ed. 564, which sets forth the English rule.

7. Chisholm v. Nat'l Capital Life Ins. Co., 52 Mo. 213, 14 Am. Rep. 414 (1873).

8. Ryan v. Metropolitan Life Ins. Co., 117 Mo. App. 688, 93 S. W. 347 (1906).

9. Singleton v. St. Louis Ins. Co., 66 Mo. 63, 27 Am. Rep. 321 (1877).

10. Rombach v. Insurance Co., 35 La. Ann. 233 (1833).

11. Loomis, Adm'r v. Eagle Life & Health Ins. Co., 72 Mass. 396, (1856); Cronin v. Vermont Life Ins. Co., 20 R. I. 575, 40 Atl. 497 (1898).

12. Such is the idea of the court in Warnock v. Davis, 104 U. S. 775, 26 L. Ed. 924 (1881), where as

Assume a case with similar facts to *Parish v. Missouri Assoc.*, a son, an adult, takes a policy on the life of his mother. Are we going to follow the decision in that case and say because of the relationship alone an insurable interest exists, or are we going to follow blindly, as many of our American courts do, the English courts, who say, and possibly necessarily so, because of the statute of 14 Geo. III, that there must be a showing of pecuniary interest. We certainly have no such statute in any of the states of this country. Our American courts avoid this danger by making the assured have an insurable interest in the life of his parent. Usually, those same courts follow the idea that a pecuniary interest is a necessary one. Lo and behold—when the creditor has owing to him by the debtor a debt of $50 or $100, the creditor may insure the life of his debtor, and if later he is paid by that debtor, the policy still exists and is good because he need only have an insurable interest at the time he takes out the policy. When the debt is paid—isn't the debtor in greater danger, far greater danger, from his previous creditor who now has no reason for the continued life of the debtor than he would be had his own son, lacking a pecuniary interest taken out the policy?

The real test in all these cases should be whether or not the contract is a wager contract. If it is, it is invalid by our gambling laws or as a matter of policy. If it isn't, it should be good and an insurable interest should be held to exist whenever the insured has a reasonable expectation of benefit from the continued life of the assured.[13] [14]

K. M. K.

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dicta it says, "it is not necessary that the expectation of advantage or benefit should be always of pecuniary estimation for a parent has an insurable interest in the life of his child and a child in the life of his parent—the natural affection in cases of this kind is considered as more powerful, as operating more efficaciously, to protect the life of the insured than any other consideration.

In Century Life Ins. Co. v. Custer, 10 S. W. (2nd) 882 (1928), one brother insured the life of another and the court says "Brothers are so closely related that they are naturally interested in the preservation of the life of each other—generally they will lay down their lives for each other. As a rule they care for each other in illness to the extent, if necessary, of furnishing all needed comforts and medical aid. It would be contrary to human nature for them to speculate on the death of each other so it may well be said that their contracts for an insurance on the life of each other should not be classed as wagering contracts. Trenton Mut. Life & Fire Ins. Co. v. Johnson, 24 N. J. L. 576 (1854); Home Benefit Assoc. v. Sabota, 295 S. W. 638 (1927); Maxey v. Franklin Life Ins. Co., 164 S. W. 438 (1914); Equitable Life Assurance Society v. Hazelwood, 75 Texas 338, 12 S. W. 621 (1889); Crismonds, Adm'x v. Jones, 117 Va. 34, 83 S. E. 1045 (1915); Valley Mut. Life Assurance v. Teewalt, 79 Va. 423 (1884).

13. Where there are statutes creating a liability on the insurer to take care of the assured, some courts say that that is enough to create an insurable interest, basing their idea on indemnity. Most courts, however, take an opposite view and say that even though there be burial expenses that the son will have to pay in the event of the death of his mother or father, he has no insurable interest. An English case, Harse v. Pearl Life Assurance Co., 2 K. B. 92 (1903), is to the effect that a moral necessity for burial expenses provides no insurable interest. In Life Ins. Clearing Co. v. O'Neill, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225 (1901), dealing with the Pennsylvania Poor Laws, the court says that an adult son has no insurable interest in the life of his father except for the purpose of reimbursing himself for payments actually made or to be made. Some courts do not go as far as Reserve Mutual Ins. Co. v. Kane, 81 Pa. St. 154, 22 Am. Rep. 741 (1876), which states the Pennsylvania rule. The plaintiff there was a creditor of his father's and the statute puts a legal liability on a child if the father or mother is unable to work. The court held that there was an insurable interest. Courts putting a limitation on this rule go only so far as to say that the son can take a policy to cover expenditures actually made in support of the assured or those necessarily to be made in the future. This differs from the Kane case, *supra*, the court holding there that the mere possibility of having to incur such expenditures under the statute constitutes a good insurable interest.

14. It seems that nearly all states find an insurable interest by the wife in the life of her husband, but this can easily be explained because of her common law right to support—the right to support dispensing with any danger of it being a wagering contract. In re Cohen, (D. C.) 230 F. 733 (1916); Millard v. Brayton, 177 Mass. 533, 59 N. E. 436, 52 L. R. A. 117, 83 Am. St. Rep. 294 (1901); Knights of the Modern Maccabees v. Sharp, 163 Mich. 449, 128 N. W. 786, 33 L. R. A. (N. S.) 780 (1910); De

COURTS—APPELLATE JURISDICTION IN MISSOURI IN CASES INVOLVING TITLE TO REAL ESTATE.

The question of the jurisdiction of the Supreme Court and the courts of appeal in Missouri has been before the courts since the adoption of the Constitution of 1875. Article VI, Section 12, of that constitution provides for the establishment of the old St. Louis Court of Appeals and further provides that appeals shall lie from that court to the Supreme Court in certain cases. Among these are cases "involving title to real estate." Provision for the present courts of appeal was made in the Amendment of 1884.[1] Under this, appeals and writs of error in those cases in which the decisions of the St. Louis Court of Appeals were formerly reviewable by the Supreme Court lie directly to that court, while all other suits are reviewed by the courts of appeal.

Two recent cases which present the problem of when title is involved under the above provisions are *Weil v. Richardson*[2] and *Flinn v. Richardson*.[3] In the Weil case, the plaintiffs sued to enjoin an execution sale of certain property, claiming title in themselves by virtue of a deed from the judgment debtor prior to the suit, and also alleging that the judgment was void as the charter of the judgment debtor, a corporation, was forfeited before action brought. The defendant judgment creditor answered, attacking the deed from the judgment debtor to the plaintiffs as being fraudulent and void as to him, and prayed that it be set aside and that the land be subjected to the execution. The court issued the injunction on the ground of the invalidity of the judgment due to the forfeiture of the charter of the judgment debtor. The suit was appealed to the Kansas City Court of Appeals which transferred it to the Supreme Court, which remanded it to the Kansas City court.

In the Flinn case, the plaintiff sued to enjoin the sale of certain property under execution on a judgment issued against one David W. Flinn, alleging that said David W. Flinn had no right, title or interest in the property and that the execution sale would cast a cloud upon the plaintiff's title. A temporary injunction was issued and later made permanent. Defendant moved to quash the temporary injunction on jurisdictional grounds and when it was overruled, refused to plead or appeal further, so judgment went for plaintiff by default. In the appellate courts, this case followed the same course as the Weil case.

The Court of Appeals held that these cases involved title to real estate and so properly came within the Supreme Court's jurisdiction. That court, however, decided that they did not. The problem thus raised of when suits do involve title in the constitutional sense is one that has been frequently before the courts. The matter of jurisdiction is an important one, as these are courts of but limited jurisdiction, and, once raised, must be decided, as no stipulation of the parties can confer jurisdiction on one court or another.[4] The cases cover a great many fields and are in considerable confusion. There is a general trend that holds through them, however, which is that there must be an actual contest as to the title,[5] and further, as expressed in *State ex rel v. Dearing*:[6]

Ronge v. Elliott, 23 N. J. Eq. 486 (1879); Holmes v. Gilman, 138 N. Y. 369, 20 L. R. A. 566 (1893) Brummer v. Cohen, 86 N. Y. 11, 40 Am. Rep. 503 (1881); Thompson v. American Tontine Life & Savings Ins. Co., 46 N. Y. 674 (1871); Marquet v. Aetna Life Ins. Co., 138 Tenn. 213, 159 S. W. 733, L. R. A. 1915B 749, nn Cas. 1915B, 677 (1913); Lewis v. Palmer, 106 Va. 522, 56 S. E. 349 (1907).

1. Const. Mo. 1875 Art. VI. Amendment 1884, Sec. 5.

2. 320 Mo. 310, 7 S. W. (2nd) 348 (1928).

3. 7 S. W. (2nd) 356 (Mo. Sup. 1928).

4. Dubowsky v. Binggeli, 258 Mo. 197, 167 S. W. 999 (1914). Vandeventer v. Savings Bank, 232 Mo. 618, 135 S. W. 23 (1911). May v. Trust Co., 138 Mo. 447, 40 S. W. 122 (1897).

5. See Nettleton Bank v. McGauhey's Estate, 318 Mo. 948, l. c. 952, 953, 2 S. W. (2nd) 771 (1928).

6. 180 Mo. 53, 79 S. W. 454 (1903).

> "The constitutional provision . . . applies only to cases in which title to land is the subject of controversy, and in which the judgment will operate directly upon the title, and not to those cases where the title to land may be merely a subject of collateral inquiry or in which the judgment will only affect the title incidentally or collaterally."

Exactly what is meant by a judgment which "operates directly upon the title" can only be discovered by going through the various situations in which the courts have passed upon the question. Before undertaking such an analysis, it is well to find out what the court looks to in determining whether or not title is in issue so as to be affected by the judgment. First of all, there is the judgment itself. If it is the kind of a judgment which "operates directly upon the title", the appeal is for the Supreme Court, even though such a judgment is not responsive to the pleadings or entirely void, as being beyond the power of the trial court to render in such an action.[7] However, though the judgment rendered is not of the sort referred to, "if the judgment *sought* by the appealing litigant would directly affect title, title is directly in issue and therefore involved . . ."[8] and the pleadings must be examined to settle the question. These must be regarded as a whole. Thus the matter involving title may be put in issue by the defendant, though it is essential that he do so by prayer for affirmative relief and not merely by way of defense.[9]

The first class of cases are those which essentially are suits for damages. In an early case, it was held that a trespass suit in which defendant justified on the ground of title was within the constitutional provision.[10] But this was soon overruled[11] and a definite rule laid down as to damage suits. This is well expressed by Judge MARSHALL in *Price v. Blankenship*,[12]

> "If the judgment rendered by the lower court could be satisfied by the payment of money without affecting the title to real estate, the case would not fall within our jurisdiction."

This rule is clearly consistent with the general rule given above. The early cases with regard to trespass were evidently influenced by the use of that action to try title to real estate. But in Missouri, trespass has been held to be strictly personal. It is regarded as transitory and has been held not to come within the provisions of Sec. 1179 R. S. Mo. 1919 which requires suits "affecting title to real estate" to be tried locally.[13] Under this concept, trespass actions do not so involve title as to be appealable to the Supreme Court, in spite of the historical associations.[14]

A suit for damages for land taken by a railroad for its purposes comes in this category.[15] So also do suits for the price of land[16] and suits in regard to the proceeds

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7. Watts v. Watts, 304 Mo. 361, 263 S. W. 421 (1924). See also Nettleton Bank v. McGauhey's Estate *supra*, note 5, l. c. 954.

8. Per Ellison C., in Nettleton Bank v. McGauhey's Estate, *supra*, note 5.

9. Wharton v. Bank, 15 S. W. (2nd) 860 (Mo. Sup. 1929). Conrey v. Pratt, 248 Mo. 576, 154 S. W. 749 (1913). Miller v. St. Louis, etc. Ry., 162 Mo. 424, 63 S. W. 85 (1900). See also Nettleton Bank v. McGauhey's Estate, *supra*, note 5.

10. Musick v. Ry., 114 Mo. 309, 21 S. W. 491 (1893).

11. Rothrock v. Lumber Co., 146 Mo. 57, 47 S. W. 907 (1898).

12. 144 Mo. 203, 45 S. W. 1123 (1898).

13. Hannibal, etc. Ry. Co. v. Mahoney, 42 Mo. 467 (1867).

14. Embraced in this rule are suits brought under Sec. 4242 R. S. Mo. 1919 for treble damages for taking of sand, gravel, etc. from plaintiff's land. Norman v. Const. Co., 319 Mo. 599, 4 S. W. (2nd) 1064 (1928).

15. Eighme v. Ry., 238 S. W. 479 (Mo. Sup. 1922). Edwards v. Ry., 148 Mo. 513, 50 S. W. 89 (1899). Pratt v. Ry., 130 Mo. App. 175, 108 S. W. 1099 (1908). Robertson v. Ry., 18 Mo. App. 185 (1885).

16. Park v. Park, 259 S. W. 417 (Mo. Sup. 1924). Turney v. Sparks, 158 Mo. 365, 59 S. W. 73 (1900). Sturdivant Bank v. Huck, 215 S. W. 758 (Mo. App. 1919).

of a condemnation action.[17] Though it may be necessary to inquire into the question of title to determine the right to damages, it is clear that the sole object of the suit is to determine whether plaintiff is entitled to such damages or not. Furthermore, by suing in this fashion, the title in the land is conceded in the defendant. Otherwise plaintiff could not sue for the value of the land. However, these suits should not be confused with condemnation suits proper, in which other considerations are present.

It has been held that an action under Sec. 1834 R. S. Mo. 1919 by an unsuccessful party in an ejectment suit to recover damages for improvements placed upon the land is independent of the ejectment action, and as the sole recovery is in money, that it does not involve title to real estate.[18] Another situation which comes under the rule as to money judgments is a suit against a trustee for a surplus in the proceeds of a trustee's sale over the mortgage debt. It was quite properly held that the plaintiffs ratified the sale and elected to stand thereunder and neither the title nor the validity of the sale is in issue.[19]

Involving similar considerations, though not strictly a damage suit, is a suit in replevin for crops, in which the title to the crops is dependent on the title to the real estate on which they were grown. Such a suit quite evidently does not involve more than the title to the chattels. Though the title to the real estate must be inquired into, that is purely incidental to the findings as to the title to the chattels.[20]

The next group of situations are those which rather obviously do involve title. First there is the action of ejectment. Here the judgment is to put the successful party in possession. Thus at the trial, the main issue is the right to possession. The basis of this right must be some interest in the land and an adjudication of this interest involves title in view of the judgment rendered. Strangely enough, the writer has been unable to find a direct authority in the Supreme Court to the effect that this action does involve title. But the courts of appeal have frequently so held[21] and the Supreme Court has invariably taken jurisdiction in such cases transferred to it.[22] Also, in *Turney v. Sparks*,[23] there is a well considered dictum to the effect that appellate jurisdiction in these suits is in the Supreme Court. It may safely be considered that the rule is to that effect.

In view of Sec. 1540 R. S. Mo. 1919, suits for specific performance of contracts for the sale of real estate, involve title. Prior to such statute, a decree for specific performance was, theoretically at least, *in personam* and affected only the person of the defendant and not the title to the real estate. But under the statute, the effect of the judgment may be to vest the title in plaintiff and divest it from defendant. Such a judgment clearly "operates upon the title" and the appeal is properly to the Supreme Court.[24]

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17. Murphy v. Barron, 286 Mo. 390 l. c. 410, 228 S. W. 492 (1921); Hilton v. St. Louis, 129 Mo. 389, 31 S. W. 771 (1895).

18. Bristol v. Thompson, 204 Mo. 366, 102 S. W. 780 (1907) disapproving *dictum* in Stump v. Hornback, 109 Mo. 272, l. c. 279, 18 S. W. 37 (1891) to the effect that such a suit is but a continuation of the ejectment proceeding.

19. Price v. Blankenship, *supra*, note 12.

20. Turner v. Morris, 222 Mo. 21, 121 S. W. 9 (1909). Fischer v. Johnson, 139 Mo. 433, 41 S. W. 203 (1897) over-ruling Gray v. Worst, 129 Mo. 122, 31 S. W. 585 (1895).

21. Norton v. Reed, 200 S. W. 667 (Mo. App. 1918). McKinney v. Hawkins, 192 S. W. 466 (Mo. App. 1917). Crouch v. Holterman, 185 Mo. App. 418, 170 S. W. 322 (1914). Mitchell v. Blatt, 76 Mo. App. 408 (1898). Bell v. Winkelman, 73 Mo. App. 451 (1898).

22. Norton v. Reed, 281 Mo. 482, 221 S. W. 6 (1920). McKinney v. Hawkins, 215 S. W. 250 (Mo. Sup. 1919). Crouch v. Holterman, 272 Mo. 432, 199 S. W. 193 (1917).

23. *Supra*, note 16. See also Dunn v. Miller, 96 Mo. 324, 334, 9 S. W. 640 (1888).

24. Barnes v. Stone, 198 Mo. 471, 95 S. W. 915 (1906).

In suits to declare a resulting trust in real estate, the rule of the equity courts was to require the defendant to convey to the plaintiff.[25] Consequently, under Sec. 1540, above mentioned, the title can now pass by the decree in such an action. Therefore the suit would involve title and this the courts have uniformly held.[26] However, this should be distinguished from the situation where plaintiff is really concerned only with a *lien* on the property. This follows the rules as to liens, even though the suit is denominated one to declare a trust.[27]

The proceedings in a partition suit are principally statutory. Under Sec. 2008 R. S. Mo. 1919, the court is required to "ascertain . . . and declare the rights, titles and interests of the parties to such proceedings, petitioners as well as defendants, and determine such rights . . ." This would indicate that a partition proceeding involves title within the constitutional sense, as the judgment must directly determine the titles of the parties. This is clearly so as regards partition in kind, or where the question on appeal is as to the kind of a partition to be had, etc.[28] But when there is a sale and a partition of the proceeds, the situation involves many aspects of a money judgment. The courts have recognized this in certain cases of a rather peculiar nature,[29] but have never, as far as can be determined, directly held that an appeal from a judgment ordering a partition sale, on the sole ground of a claim of a larger distributive share does or does not involve title. It is submitted that if that is the sole ground of appeal, title is not involved any more than in a trespass suit or an action for the price of land. True, the titles of the parties will have to be examined, but that is merely incidental to the rendition of the proper judgment of distribution. After the sale, the title is in the purchaser and will not be affected by this determination. Of course, in the case of partition in kind, very different considerations intervene and if the appeal involves such partition in any way, it should be to the Supreme Court.

Suits for the admeasurement of a widow's dower estate in her husband's realty present a confusing problem. It would seem almost self evident that a suit for the admeasurement of dower in kind involves the title to that piece of land set off to the widow for her life. Even though it be said that a wife obtains her dower right in the life of her husband, due to the marriage and his ownership of the property, that is but a general right and when a specific portion is set off, the actual title to that portion is determined by a judgment to that effect. Consequently it has been held that a suit of this character is within the constitutional provision.[30] But this should be distinguished from a case where the issues are the admeasurement of an equivalent amount of money in lieu of dower. There the title of the heir or devisee in the deceased's entire realty is affirmed and the sole consideration is the amount of money to be paid. Such suits are for the courts of appeal under general money judgment considerations.[31]

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25. Pomeroy, Equity Jurisprudence (4th ed.) Sec. 1030.

26. Park v. Park, *supra* note 16. Thorn v. Payne, 210 S. W. 850 (Mo. Sup. 1918). Morris v. Clare, 132 Mo. 232, 33 S. W. 1123 (1895). Baier v. Berberich, 77 Mo. 413 (1883).

27. Brannock v. Magoon, 216 Mo. 722, 116 S. W. 500 (1908).

28. Groes v. Brockman, 246 S. W. 608 (Mo. App. 1923) 307 Mo. 644, 271 S. W. 752 (1925). Hart v. Steedman, 98 Mo. 452, 11 S. W. 993 (1889). See: Case v. Mitzenburg, 109 Mo. 311, 314, 19 S. W. 40 (1891).

29. Lewellen v. Lewellen, 319 Mo. 854, 5 S. W. (2nd)4(1928) (allocation of $1500 to widow and minor children in lieu of homestead). Herchenroeder v. Herchenroeder, 75 Mo. App. 283 (1898) (one party claiming a right to have portion of another's share set off to him for alleged advances made).

30. Ecton v. Tomlinson, 278 Mo. 282, 212 S. W. 865 (1919) (assumed jurisdiction without comment). Gebbeken v. Growney, 205 S. W. 721 (Mo. Sup. 1918) (involving the analogous case of an estate by curtesy). Davison v. Davison, 207 Mo. 702, 106 S. W. 1 (1907) (assumed jurisdiction without comment). Pierce v. Georger, 30 Mo. App. 650 (1888), 103 Mo. 540, 15 S. W. 848 (1890). Lindell Glass Co. v. Hanneman 46 Mo. App. 614 (1891).

A suit to establish the estates of a widow and minor children in a deceased person's homestead involves quite similar considerations and the cases hold that matters affecting such right involve title.[32] But again when the sole question is the setting up of a money equivalent of that estate for the benefit of the widow and minor children, it has been held title is not involved.[33]

Condemnation proceedings present rather a difficult problem when regarded in this aspect. In the first place, the fact that it is an easement that is to be secured in the suit is immaterial. The easement affects the title to realty in that it clogs the title of the servient tenement.[34] The principal difficulty is that in a great many respects the suit seems to involve merely compensation for the land taken. On the other hand, however, the constitutional provisions for the taking of property for public use specifically set out that the proprietary rights of the defendant owner shall not be divested until the compensation is ascertained and paid into court, etc.[35] This would seem to indicate that a condemnation suit in all its aspects involves title, as the complete proceeding seems necessary to divest title from the defendant. This seems to have been the attitude of the Supreme Court in this situation. In several cases the court affirmatively held it had jurisdiction[36] and in a number of other cases, jurisdiction was taken without comment on a transfer by a court of appeals.[37] This has been the ruling even when the sole matter of appeal seems to have been the proper elements of damages, etc.[38] Recently, however, the St. Louis Court of Appeals has held in *State ex rel v. Wright*,[39] that as the appeal involved only the question of damages, that it had jurisdiction. At present this seems out of line with the cases, but perhaps it is the forerunner of a new current of decision. If the appealing party is complaining solely of the damages allowed and the public use and the authority of the agency of the state to condemn are admitted, it is hard to see how more than money damages are involved. If the rule is to be consistently followed, these cases should go to the courts of appeal. Of course, if the public use, or the authority to

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31. Jenkins v. Jenkins, 231 S. W. 581 (Mo. Sup. 1921). Kennedy v. Duncan, 224 Mo. 661, 123 S. W. 856 (1909). Carlin v. Mullery, 149 Mo. 255, 50 S. W. 813 (1899). CF. Brannock v. Magoon, *supra* note 27 (holding a judgment cutting off a wife's inchoate dower interest does not involve title to real estate).

32. Bennington v. Bennington, 211 Mo. 48, 109 S. W. 723 (1908). In re Street's Estate, 148 Mo. App. 700, 129 S. W. 253 (1910) (proceeding to sell deceased's real estate to pay debts wherein widow and minor children set up that the land is their homestead).

33. Lewellen v. Lewellen, *supra*, note 29 (Proceeds of a partition suit in lieu of homestead). However, it has been held that the right of exemption from levy of execution on property claimed as a homestead is but a personal right and that a motion to quash such a levy or to enjoin a sale on that ground does not involve title to real estate. Snodgrass v. Copple, 203 Mo. 480, 101 S. W. 1090 (1907). Lawson v. Hammond, 191 Mo. 522, 90 S. W. 431 (1905) (overruling Stinson v. Call, 163 Mo. 323, 63 S. W. 729 (1901) and McAnaw v. Matthis, 129 Mo. 142, 31 S. W. 344 (1895)). See also cases under note 86, *post*.

34. City of Moberly v. Lotter, 266 Mo. 457, 181 S. W. 991 (1915) State ex rel v. Rombauer, 124 Mo. 598, 28 S. W. 75 (1894) But see: Mining Co. v. Hodge, 185 Mo. App. 138, 170 S. W. 689 (1914). Hough v. Light and Fuel Co., 127 Mo. App. 570, 106 S. W. 547 (1908).

35. Const. Mo. 1875, Art II, Sec. 20-21.

36. City of Moberly v. Lotter, *supra*, note 34. Southern Missouri etc. Ry. v. Wyatt, 223 Mo. 347 (1909). Kansas City v. Ry., 187 Mo. 147, 86 S. W. 190 (1905). City of Tarkio v. Clark, 186 Mo. 285, 85 S. W. 329 (1905). State ex rel. v. Rombauer, *supra*, note 34.

37. Prairie Pipe Line Co. v. Shipp, 240 S. W. 473 (Mo. App. 1922). 305 Mo. 663, 267 S. W. 647 (1924). St. Louis, etc. Ry. v. Lewright, 49 Mo. App. 212 (1890) 113 Mo. 660, 21 S. W. 210 (1893).

38. Prairie Pipe Line Co. v. Shipp, *supra*, note 37. City of Moberly v. Lotter, *supra*, note 34. Southern Mo., etc. Ry. v. Wyatt, *supra*, note 36. Kansas City v. Ry., *supra*, note 36. CF. Springfield, etc. Ry. Co. v. Schweitzer, 246 Mo. 122, 151 S. W. 128 (1912) (holding when the defendant's sole interest is a leasehold and the sole issue is the value thereof, the case does not involve title).

39. 11 S. W. (2nd) 66 (Mo. App. 1929).

condemn, or some other essential factor to the right to condemn is involved, the appeal should go to the Supreme Court.[40]

Suits to cancel deeds on grounds of fraud, etc. have been uniformly held to involve title.[41] On the strictest equitable principles such a suit might be considered solely one to destroy the particular deed, which is but *evidence* of legal title. However, the chancery courts frequently required a reconveyance by the defendant in such cases to do equity between the parties, rather than a mere cancellation. This seems to have been the theory of the Missouri courts as to the proper decree, for it has been held that under the "*in rem*" statute (Sec. 1540 R. S. Mo. 1919) a decree in such a suit operates to vest the title directly in the complaining party.[42] In view of this theory as to the effect of such decree, cases involving cancellation have been properly held to involve title. This rule has been applied to suits for cancellation of deeds of trust[43] as well as absolute deeds,[44] whether brought by the grantor or by his creditors.[45]

Although similar on the face, a suit to cancel a deed of trust on the ground the note is paid involves some different considerations. The earlier cases do not seem to distinguish this situation from the last,[46] but the rule was soon established that this class of cases does not involve title.[47] The theory on which this is worked out is that the sole inquiry is as to whether the note has in fact been paid. If it is held to have been paid, the deed of trust has expired of its own limitation and "represents nothing to the defendant and the final decree ordering its cancellation becomes a matter to it of no concern and affects not an iota its interest in the land therein named; and if upon the other hand the court's final determination is that plaintiff's debt to defendant has not been fully paid, the proceeding herein is simply dismissed."[48] This would seem to be proper and certainly is consistent with the attitude of the courts as to liens and foreclosures to be considered hereafter.[49]

Considerations similar to those in the cases of cancellation proper are present in two other classes of cases. First: Suits to establish a lost or destroyed deed. The obvious decree prior to the "*in rem*" statute would be to require a new conveyance. The statute would operate on this to make the judgment pass title of record,

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40. A proceeding to declare a private road follows the same rules as public condemnation suits. Wells v. Harris, 60 Mo. App. 37 (1894) 137 Mo. 512, 38 S. W. 1101 (1896). In consequence, a proceeding under Secs. 10647 and 10648, R. S. Mo. 1919 to vacate a private road has been held to involve title. As the necessary inquiry is whether the servient estate is to remain subject to the easement, this would seem proper. Novinger v. Shoup, 185 Mo. App. 526, 172 S. W. 616 (1915), 201 S. W. 64 (1918). Reading v. Chandler, 175 Mo. App. 277, 157 S. W. 839 (1913), 269 Mo. 589, 192 S. W. 94 (1917).

41. Linneman v. Henry, 316 Mo. 674, 291 S. W. 109 (1927). Conrey v. Pratt, *supra*, note 9. Loewenstein v. Ins. Co., 227 Mo. 100, 127 S. W. 72 (1910). Balz v. Nelson, 171 Mo. 682, 72 S. W. 527 (1903). Overton v. Overton, 131 Mo. 559, 33 S. W. 1 (1895). Hanna v. Land Co., 126 Mo. 1., 28 S. W. 652 (1894). See also Dunn v. Miller, 96 Mo. 324, 9 S. W. 640 (1888) where the suit was to set aside a forged deed.

42. Balz v. Nelson, *supra*, note 4. Macklin v. Allenburg, 100 Mo. 337 l. c. 341, 13 S. W. 350 (1889).

43. Linneman v. Henry, *supra*, note 41. Conrey v. Pratt, *supra*, note 9. Overton v. Overton, *supra*, note 41. Hanna v. Land Co., *supra*, note 41.

44. Balz v. Nelson, *supra*, note 41. Dunn v. Miller, *supra*, note 41.

45. Creditors: Balz v. Nelson, *supra*, note 41. Bank v. Miller, 204 S. W. 817 (Mo. App. 1918), 223 S. W. 908 (1920). Jones v. Geery, 71 Mo. App. 200 (1896), 153 Mo. 476, 55 S. W. 73 (1899). McGregor, etc. Hardware Co. v. Horn, 65 Mo. App. 200 (1896), 146 Mo. 129, 47 S. W. 957 (1898). Grantor: See cases cited, notes 41-44.

46. May v. Trust Co., 138 Mo. 275, 39 S. W 782 (1897).

47. State ex rel. v. Huck, 240 S. W. 241 (Mo. Sup. 1922). Puthoff v. Walker, 239 S. W. 108 (Mo. Sup. 1922). Vandeventer v. Savings Bank, *supra*, note 4. Christopher v. Home and Sav. Assn., 180 Mo. 568, 79 S. W. 899 (1904). Vandergrif v. Brock, 158 Mo. 681, 59 S. W. 979 (1900). Bonner v. Lisenby, 157 Mo. 165, 57 S. W. 735 (1900).

48. Per Robinson J. in Christopher v. Home and Sav. Assn., *supra*, note 47, l. c. 573.

49. An analogous situation is presented in a suit to set aside a deed of trust and notes on the ground that the condition on which they were to be effective had not occurred. Schultz v. Tatum, 96 Mo. 185, 9 S. W. 133 (1888).

so that now it is the proper kind of judgment for appeal to the Supreme Court.[50] Second: Suits to reform an existing deed where the prayer is that the substantial character of the estate passed be changed. An example is where plaintiff sues to have an absolute deed reformed so as to make it a deed of trust. The "*in rem*" statute seemingly has been held to apply as title is held to be "operated upon" by the judgment.[51] Apparently the theory is that prior to the statute the judgment would be that defendant convey his interest to plaintiff and that plaintiff re-convey to defendant the estate of the quantum alleged to be proper. In such case the statute would operate to vest the plaintiff with the net title he is claiming and divest that much from defendant. On this basis the decision would seem to be correct. However, a suit to reform added by the insertion of covenants or provisions giving rise solely to a right to sue for damages for the breach must be distinguished. It has been held that such a suit does not come within the constitutional provision.[52]

A will contest suit in which real property has been sought to be devised by the testator has been held to involve title by the courts of appeal[53] and in those cases reaching it, the Supreme Court has taken jurisdiction without comment.[54] Though the latter court has never affirmatively held it had jurisdiction, as far as can be discovered, the rule would seem to be that it has in view of the above holdings. This differs from the class of cases as to muniments of title just considered in that it is an action at law and not in equity. Thus there is no problem of a judgment that is traditionally *in personam*. There would seem to be no good reason for saying a judgment in such a case would not involve title. The devisee's sole claim is under the will and an adjudication as to the will's validity would seem a direct adjudication as to the title between heir and devisee.[55]

Suits to redeem real estate from foreclosure have been held by the courts of appeal to involve title,[56] and in one such suit the Supreme Court took jurisdiction without comment.[57] The practice was followed in at least two such suits which were appealed directly to that court.[58] This would seem to indicate a concurrence in the rule of the courts of appeal. The Supreme Court has curtailed this somewhat, it would seem, in the case of *Casner v. Schwartz*,[59] where it was held that a suit to determine the amount necessary to have a redemption under the terms of Sections 2222 and 2223 R. S. Mo. 1919 does not involve title. It is held that the redemption is worked not by the judgment of the court, but by the payment of money in a specified time. To carry this out logically, a suit to determine whether the plaintiff has properly carried out the terms of the statute would not involve title. This would simply declare whether a redemption had occurred or not. The acts of the parties and not the judgment would constitute the redemption. But when the judgment itself orders the redemption on the ground of fraud, etc., then title is involved.

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50. Thomas v. Scott, 214 Mo. 430, 113 S. W. 1093 (1914). Sec. 1974 R. S. Mo. 1919 would also show that *in rem* effect is given to a decree in a suit of this character.

51. Scheer v. Scheer, 67 Mo. App. 370 (1896), 148 Mo. 447, 50 S. W. 111. (1899).

52. Heath v. Beck, 225 S. W. 993 (Mo. Sup. 1920). Nevins v. Coleman, 198 Mo. App. 252, 200 S. W. 445 (1918).

53. Bingaman v. Hannah, 171 Mo. App. 186, 156 S. W. 496 (1913). Moore v. McNulty, 76 Mo. App. 379 (1898). Karl v. Gabel, 48 Mo. App. 517 (1891).

54. Bingaman v. Hannah, 270 Mo. 611, 194 S. W. 276 (1917). Moore v. McNulty, 164 Mo. 111, 64 S. W. 159 (1901).

55. But when the testator directs that his real property be sold and the proceeds divided, it is held that an equitable conversion is worked and the will is treated as disposing of personal property only. Matthews v. Hughes, 232 S. W. 99 (Mo. Sup. 1921).

56. Casebolt v. Courtney, 177 Mo. App. 242, 162 S. W. 1045 (1914). House v. Clark, 171 Mo. App. 242, 156 S. W. 495 (1913).

57. Casebolt v. Courtney, 195 S. W. 746 (Mo. Sup. 1917).

58. Sturgeon v. Mudd, 190 Mo. 200, 88 S. W. 630 (1905). Keith v. Browning, 139 Mo. 190, 40 S. W. 764 (1897).

59. 276 S. W. 58 (Mo. Sup. 1925).

Suits to enforce restrictive covenants have not been considered from this angle to any great degree. Only three cases directly in point seem to have been decided. In two suits to enforce building restrictive covenants the St. Louis Court of Appeals held it had jurisdiction,[60] while more recently the Supreme Court has held a suit to enforce a covenant against negro ownership and occupation involves title in the constitutional sense and that appellate jurisdiction is in that court.[61] The former cases would seem to be more orthodox historically. Originally equity took jurisdiction of the enforcement of these covenants between the parties on the self evident ground of the inadequacy of the legal remedy. This was on grounds of specific performance of the contract and the judgment was essentially personal in character.[62] Later, beginning with *Tulk v. Moxhay*,[63] the obligations were enforced against takers with notice who were not parties to the contract. But the theory was still essentially that the thing enforced was a personal prohibition against such taker on a theory of unjust enrichment. But it was not long until some courts conceived the idea of the right to have these covenants enforced as rights in the land and in a sense running with it. This idea was formulated in *King v. Trust Co.*,[64] one of the leading American cases, where restrictions of this character were classed as equitable easements—rights in the land. In view of this holding, it is submitted that the decision in *Toothaker v. Pleasant*[65] is the proper one. If it is such a right in the land, it is a clog on the title of the servient owner and its determination involves his title.

Divorce suits in general are, of course, reviewed by the courts of appeal. But occasionally a trial court makes some disposition of real property is settling the divorce. Generally speaking, a court has no authority to compel a conveyance of land or make similar disposition of real property in a divorce suit. But a judgment which does so order is appealable to the Supreme Court, even though void.[66] If the judgment simply established a lien upon the real estate of the husband to insure the payment of alimony, however, the case would seem to go to the proper court of appeals on general lien principles.[67]

A suit to enjoin a trespass in which the defendant pleads title presents several aspects of a suit involving title. It would seem that a judgment for plaintiff would foreclose defendant of his right to come on the property and put in a claim to it in such fashion. But this judgment is essentially a judgment with regard to damage to plaintiff. In that respect it is analogous to trespass for damages. The thing decided in both cases is the past damage or the future threatened damage to plaintiff through invasion of his land. It is hard to see how such a judgment directly affects title any more than a judgment in trespass. As far as the usual situation goes, the courts have so decided.[68] But a peculiar phase of this action gave them trouble for some time. This is where the plaintiff sues county officials to enjoin the opening of a road through his land on the theory of a threatened trespass. In these cases the defense pleaded was the due establishment of a public road by the order of the county court. Until recently the courts have not ruled uniformly at all. In some cases it was held that

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60. Wearen v. Woodson, 268 S. W. 648 (Mo. App. 1924). State ex rel v. McElhinney, 190 Mo. App. 618, 176 S. W. 292 (1915).

61. Toothaker v. Pleasant, 315 Mo. 1239, 288 S. W. 38 (1927).

62. Maitland, Equity, 169.

63. 2 Phil. 774 (1848).

64. 226 Mo. 351, 126 S. W. 415 (1910). See also 31 Harv. L. Rev. 876. Clark, Covenants and Interests Running with Land, 148 *et seq.*

65. *Supra*, note 61.

66. Watts v. Watts, *supra*, note 7.

67. Chapman v. Chapman, 194 Mo. App. 483, 185 S. W. 221 (1916).

68. Sikes v. Turner, 242 S. W. 940 (Mo. Sup. 1922). Marshall v. Reddick, 177 S. W. 381 (Mo. Sup. 1915).

title was involved[69] and in others that it was not.[70] By the decision in *Dillard v. Anderson*, however, the cases adopting the former view were overruled and these cases aligned with the ordinary injunction against trespass. The proper judgment to have appealed from was the judgment ordering the road. To quote Judge GRAVES in *Dillard v. Anderson:*

> "Like all trespass cases, title to real estate may be incidentally involved but the judgment itself (unlike the judgment ordering the road) does not take title from one and lodge it in another. Mere injunction to restrain trespass (as is the case here) does not so involve title as to confer jurisdiction upon this court."

Another injunction situation in which title has been held not to be involved is where the plaintiff in an ejectment suit seeks to enjoin the commission of waste by the defendant in possession, pending suit.[72] Here the rights of the parties in the land are being threshed out in the ejectment suit and an adjudication either way in this suit will not affect the outcome of that action.

As has been heretofore noted, the courts have generally held that a judgment directly affecting an easement involves title to real estate as the easement is a clog on the title of the servient estate.[73] Further they have held that an injunction proceeding to enjoin the obstruction of an easement has the effect of establishing the easement and that title is involved in such a suit.[74] On the surface, the judgment in such a suit would not seem to be greatly different from one enjoining a trespass. In other words, all the court would order defendant to do, if it found against him, would be to remove the obstruction. That would hardly involve title in the constitutional sense and it was so held in the case of *Porter v. Ry.*[75] But the great weight of authority is *contra*. This can be explained on grounds that are principally historical. At law, the sole remedy for interference with an easement is an action on the case for damages.[76] In other words, there is no action at law in which a judgment directly affecting the title to the easement is rendered. This is in contrast to the situation as to corporeal rights in land where from earliest times there have been actions solely concerned with real property titles. In view of this fact it is not strange to find many courts of equity holding that the complainant need not present an adjudicated legal title before he may obtain relief, but that the legal title to the easement will be settled in the court of equity.[77] This is evidently the concept of the situation which the Missouri courts have adopted. This seems entirely reasonable and in view of this idea the holding of the courts as to jurisdiction seems justified.

It has been uniformly held from an early date that suits to establish liens upon real estate do not involve title thereto.[78] This applies to tax bill liens[79], mechanics'

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69. Ripkey v. Gresham, 279 Mo. 521, 214 S. W. 851 (1919). Monroe v. Crawford, 163 Mo. 178, 63 S. W. 393 (1901). Baubie v. Ossman, 142 Mo. 499, 44 S. W. 358 (1898).

70. Hill v. Hopson, 221 Mo. 103, 120 S. W. 29 (1909).

71. 282 Mo. 436, 222 S. W. 766 (1920).

72. Heman v. Wade, 141 Mo. 598, 43 S. W. 162 (1897).

73. *Supra*, note 34.

74. Davis v. Lea, 293 Mo. 660, 239 S. W. 823 (1922). State ex rel v. Muench, 225 Mo. 210 124, S. W. 1124 (1910). Peters v. Worth, 164 Mo. 431, 64 S. W. 490 (1901). Baker v. Squire, 143 Mo. 92, 44 S. W. 792 (1898).

75. 175 Mo. 96, 74 S. W. 992 (1903).

76. Tiffany, Real Property (2nd ed) 1358.

77. Jones, Easements, Sec. 889 and cases cited. See also Tiffany, Real Property (2nd ed) 1360.

78. Brannock v. Magoon, *supra*, note 27. Stark v. Martin, 204 Mo. 433, 102 S. W. 1089 (1907). Barber Paving Co. v. Hezel, 138 Mo. 228, 39 S. W. 781 (1897). McGregor v. Pollard, 130 Mo. 332, 32 S. W. 640 (1895). See: State ex rel. v. Court of Appeals, 67 Mo. 199 (1877).

79. Smith v. City of Westport, 174 Mo. 394, 74 S. W. 610 (1903). Barber Paving Co. v. Hezel, *supra* note 78. Corrigan v. Morris, 97 Mo. 174, 10 S. W. 880 (1888). Syenite Granite Co. v. Bobb, 97 Mo. 46, 11 S. W. 225 (1888).

liens[80] and liens based on advancements of money used in the purchase of the land.[81] This ruling goes on the theory that the suit establishing the lien does not of itself involve title. A subsequent sale is necessary to transfer the title and in the meantime, the lien can always be discharged by the payment of the amount due. Any judgment for money is in a sense a lien upon land, if the judgment debtor owns any, and it is not a far step from saying a lien suit involves title to saying any judgment which is a lien upon real estate involves title. This obviously is not the meaning of the constitutional provision. It is hard to see how the *judgment* in a suit to attach a lien involves title in view of the necessity for a subsequent sale. Similar considerations have led the courts to hold that suits to establish priorities between liens,[82] suits to foreclose liens and mortgages,[83] suits to enjoin such foreclosures,[84] and suits to have the real estate of a deceased person sold to pay debts,[85] do not involve title. The judgment in such cases may affect, but does not directly operate on the title.

These cases closely approach the situation of the principal cases. They are suits to enjoin execution sales. Such cases have been held not to come under the constitutional provisions since 1877.[86] The same reasoning is used as in the lien and foreclosure suits. If the injunction is denied the sale may take place, but that may be averted by the payment of the judgment. If the injunction is granted, the title is not affected. So the cases would seem to be properly disposed of on the injunction point. This is the sole question in the Flinn case, but other considerations intervene in the Weil case, which seem to have been overlooked in the decision. These are that the defendant attacked the deeds from the judgment debtor to the plaintiffs and asked that they be set aside as to him on the ground of fraud. As has been seen, when a judgment declaring a deed invalid is prayed, it has been held title to realty is involved.[87] Such a prayer may be appropriately introduced in the answer and when it is present it is just as if pleaded by plaintiff.[88] It is immaterial that the trial court gave judgment on a different basis. The validity of the deeds was directly in issue under the pleadings. In view of the rulings of the Supreme Court upon this latter point, it is submitted that the Weil case was erroneously decided.

R. S. EASTIN*

BANKS AND BANKING—LIABILITY OF A BANK EXAMINER FOR NEGLIGENCE. *State v. Turner.*[1]

This was an action to recover on the official bond of defendant, Turner, formerly a bank examiner of Missouri. It was alleged and found that Turner negligently failed

80. Press Brick Co. v. Lane, 205 S. W. 801 (Mo. Sup. 1918). Bruner Granitoid Co. v. Klein, 170 Mo. 225, 70 S. W. 687 (1902).

81. Jine v. Jine, 217 S. W. 93 (Mo. Sup. 1919). Brannock v. Magoon, *supra*, note 27. Russell v. Woerner, 207 Mo. 653, 106 S. W. 49 (1907). Lemmon v. Lincoln, 130 Mo. 335, 32 S. W. 662 (1895).

82. King v. Hayes, 319 Mo. 569, 4 S. W. (2nd) 1062 (1928). Clinton Co. Trust Co. v. Metzger, 266 S. W. 321 (Mo. Sup. 1921).

83. Dubowsky v. Binggeli, *supra*, note 4. Stark v. Martin, *supra*, note 78. Little v. Reid, 141 Mo. 242, 42 S. W. 674 (1897). Bailey v. Winn, 101 Mo. 649, 12 S. W. 1045 (1890).

84. Gay v. Sav. and Bldg. Assn., 149 Mo. 606, 51 S. W. 403 (1899). This is the situation where the injunction is sought on the ground of the payment or some other reason not directly affecting the validity of the mortgage. Apparently if the validity of the obligation and deed of trust is attacked it would be analogous to cancellation on grounds of fraud and involve title. See: Gardner v. Terry, 99 Mo. 523, 12 S. W. 888 (1889).

85. Nettleton Bank v. McGauhey's Estate, *supra*, note 5, overruling Dildine v. DeHart, 293 Mo. 393, 239 S. W. 112 (1922) and approving Swan v. Thompson, 36 Mo. App. 155 (1889).

86. State ex rel. v. Court of Appeals, *supra*, note 78. Also, Sibole v. McKinnies, 213 S. W. 795 (Mo. Sup. 1919). Payne v. Savings Assn., 198 Mo. 617, 96 S. W. 1016 (1906). Force v. Van Patton, 149 Mo. 446, 50 S. W. 906 (1899). See, also, Snodgrass v. Copple and cases cited note 33.

87. See note 41.

88. See note 9.

*The writer has been assisted in finding the authorities by Malcolm E. Grant, Esq., LL.B., 1929, of the St. Louis, Missouri, bar.

1. 17 S. W. (2d) 986 (1928).

to discover the insolvency of a certain bank, that the plaintiff subsequently became a depositor in the bank and was damaged because of its insolvency, which existed at the time the deposit was made. The Kansas City Court of Appeals held that defendant was a discretionary officer in the discharge of discretionary duties and was not liable for negligence, but only for willful or malicious acts. Arnold, J., dissented, basing his position on the grounds that defendant after learning of the insolvency, failed in the exercise of his duty. This position seems unwarranted in the case for the finding of facts showed, not that he knew of the insolvency, but that he would have known of it had he not been negligent.[2] This is the basis upon which the majority considered the case.

Sec. 9171 R. S. Mo. 1919, provides: "Persons injured by the neglect or misfeasance of any officer may proceed against such principal, or any one or more of his sureties, jointly or severally, in any proceeding authorized by law against such officer, for official neglect or injury." As explained by the majority in the principal case, this provision has been a part of the statutory law of Missouri for eighty-seven years and has never been used to create a liability that is not recognized at common law.

By the common law a discretionary officer is not liable for negligence[3] in the performance of his duties. On the other hand, a ministerial officer is liable for his negligence,[4] in cases in which a duty is owed to the individual as well as to the public.

The reason for different rules of liability between ministerial and discretionary officers rests on the nature of the duties. A discretionary officer must use discretion in that he must make selections and exercise a choice between alternatives. His duties are judicial in a sense, so that obviously to place liability upon him if he made negligent mistakes would hinder him in the performance of his duties and prevent a free exercise of discretion.[5] However, the duties of a ministerial officer are definite and do not demand the exercise of an independent discretion. To place liability on such an officer will not hinder him in the performance of those duties. The court in *State v. Turner*, well expresses the position as to discretionary officers.[6]

These general rules of liability are not controlled by the section of the Missouri statutes as to officers' liabilities. There are other statutes which must be considered. The Missouri statutes provide in general, for a bond by the examiner that he will faithfully discharge the duties of his office,[7] that he will be civilly liable for willful false reports,[8] and that he will be criminally responsible for misfeasance and malfeasance.[9] There is no section making him civilly liable for neglect and misfeasance. A later statute[10] provides that a bank commissioner taking possession of a bank shall be considered as exercising authority that is discretionary and not mandatory, and that neither he nor his deputies shall be liable as long as he acts in good faith. This

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2. State v. Turner, *supra*, note 1, at 987.

3. Bailey v. Berkay, 81 Fed. 737 (1897); Lee v. Huff, 61 Ark. 494, 33 S. W. 846 (1896); Wadsworth v. Middleton, 94 Conn. 435, 109 A. 246 (1920); Russell v. Considine, 101 Kan. 631, 168 P. 1095 (1917); Pike v. Megaun, 44 Mo. 491 (1869); Goltcheus v. Matheson, 61 N. Y. 420 (1875).

4. Amy v. Barkholder, 11 Wall. 136, 20 L. Ed. 101 (1871); Garber v. U. S. 46 Ct. Cl. 503 (1912); Grider v. Tally, 77 Ala. 422 (1884); Collins v. McDaniel, 66 Ga. 203 (1880); Sherry v. Rich, 228 Mass. 462 (1917); Fogarty v. Davis, 305 Mo. 288, 264 S. W. 879 (1924); Smith v. Berryman, 272 Mo. 365, 199 S. W. 165 (1917); Burton Mach. Co. v. Ruth, 194 Mo. App. 194, 186 S. W. 737 (1916).

5. Smith v. Berryman 272 Mo. l. c. 372, 199 S. W. 167 (1917).

6. State v. Turner, *supra*, note 1, at 991. "If such a Damoclean sword were hung over and permitted to menace an officer attempting to exercise discretionary authority it would constitute, to use a golf expression such a "mental hazard" as would endanger rather than help him to reach a just and fair decision."

7. Section 11675, Mo. Rev. Stat. (1919).

8. Section 11680, Mo. Rev. Stat. (1919).

9. Section 11682, Mo. Rev. Stat. (1919).

10. Section 11700 par. 4, page 212, Mo. Laws (1927).

section applies to a case where the commissioner has taken over the business. Thus the statutes do not contain a provision as to the liability of an examiner in the negligent discharge of his duties of examination.

There have been very few cases on this matter and those that can be found seem to agree with the principal case.

In *State v. American Surety Company*,[11] the action was brought by fifty-five depositors. It was alleged that the defendant bank commissioner had "wholly failed, neglected, omitted and refused to discharge his duties." It was further alleged that had he examined, he would have found that the bank "had been and was then guilty of violating each and every duty and requirement presented by our banking laws." The court held for the plaintiffs, on the grounds that while a bank examiner is a discretionary officer and not liable for negligence, he is liable for a willful abuse of discretion. In speaking of the petition the court said, "It is necessary to determine whether there are sufficient allegations to show, not only neglect or failure of the public officer to perform a discretionary duty and also that he clearly abused his discretion to the extent of acting unfaithfully and in bad faith, and with a willful design not to perform his duty as such officer."[12]

In *State v. Title Guaranty Company*[13] the bank examiner discovered the insolvency and was negligent in taking action in closing the bank. The court allowed the plaintiff to recover upon the grounds that upon discovering insolvency the examiner did not continue in his discretionary capacity but became in effect a ministerial officer and as such, liable for his negligence. The court said, "the law invests the bank commissioner with discretion while he is making his investigation and up to the point where he reaches the conclusion and becomes satisfied the bank is insolvent. At this point his discretion ends."[14] The same position was taken in an Arizona case.[15] The court held that the bank examiner in believing the bank to be solvent when it was not solvent, was exercising discretion and could not be held liable for not closing the bank unless he was satisfied of its insolvency.

In a word, the cases agree that a bank examiner is a discretionary officer, that until he discovers insolvency he is liable only as such an officer, for willful or malicious acts. Upon discovering insolvency he is considered a ministerial officer and is liable for negligence according to the rules as to ministerial officers.

As other situations arise similar to the principal case attempts will no doubt be made to escape the effect of these decisions. It seems that the result in *State v. Turner* is hardly desirable. Turner had evidently conducted the examination in a very negligent manner, failing to discover certain shortages which should have been readily discovered had the examiner performed his duty with reasonable care. Is it enough that a criminal prosecution should be the only remedy? Obviously this is no remedy to a depositor who is injured as a necessary result of the examiner's negligence. To attempt to overrule the uniform mass of law that a discretionary officer should not be liable for negligence would be futile as well as undesirable. Perhaps it would be better to say that the duties of an examiner are both ministerial and discretionary. After an examiner has ascertained the facts it would seem that the conclusions to be drawn from these facts as to whether certain securities are good or as to whether the bank is insolvent, etc., are matters of discretion. On the other hand, may it not be

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11. State v. American Surety Co., 26 Idaho 652, 145 Pac. 1097 (1914).
12. State v. American Surety Co., 145 Pac. 1097, 26 Idaho 652 (1914).
13. State v. Title Guaranty Co., 27 Idaho 752, (1104), 152 Pac. 189 (1915)
14. State v. Title Guaranty Co., *supra*, note 13' at 192, 27 Idaho 752 (1915).
15. Deatsch v. Fairfield, 233 Pac. 887, 38 A. L. R. 651 (1925).

said that in ascertaining certain facts and in gathering data the bank examiner acts as a ministerial officer. It should be remembered that the plaintiff in *State v. Turner* is not complaining because the examiner negligently came to certain conclusions but rather that the bank examiner failed to use reasonable care in ascertaining certain facts and in gathering data.

The duties of a bank examiner are quite well defined. The nature of the examination in Missouri is generally provided for by statute.[16] The examiner is required to make a written report to the bank commissioner. The fact that some discretion is to be exercised in the determination of certain facts does not necessarily mean that the official will be classed as a discretionary officer.[17] In the principal case the examiner reported—"cash items as $15,555; overdue paper as $10,467; states that the minutes are incomplete; states the capital stock to be $50,000; surplus fund $7,000; undivided profits $2,848"[18] etc. Can it not be said that the gathering of such facts constitutes more nearly a ministerial duty than a discretionary duty? As has been stated it may well be admitted that after the examiner has ascertained the facts that his determinations and conclusions may well be considered as discretionary. But the performance of well defined duties as to gathering facts would seem to be ministerial. A consideration of some of the cases should be helpful in dealing with the question. There are, of course, many cases where the act to be done is plainly a ministerial act. Clerks of courts are liable for negligent acts in filing papers[19] or carelessly giving a false certificate.[20] Notaries public fall in the same class.[21] School officers have been held liable for failure to take a bond when required to by law.[22] In a Missouri case members of a board of county commissioners were held liable for failure to levy a tax to meet the interest on the plaintiff's bonds.[23] An officer is liable for failure to grant a license, that being one of his duties.[24]

However, there are other cases which are much more helpful. One group of such cases are those dealing with the liability of inspectors of provisions.

In an early Louisiana case[25] the defendant was a meat inspector. The plaintiff, a purchaser of seven hundred barrels of pork, certified to be prime inspected pork, sued the inspector for negligence in the performance of his duties, the meat not being in good shape. The court held that the purpose of such inspection was to protect the public and that such objects could best be secured by holding inspectors liable for want of ordinary diligence in the discharge of their duties. The same position was

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16. Sec. 11689, R. S. Mo. 1919: "In every such examination inquiry shall be made as to the condition and resources of such corporation or banker, the mode of conducting and managing its affairs, the actions of its directors, the investments of its funds, the safety and prudence of its management" etc. "and as to such other matters as the commissioner may prescribe."

17. Patterson, Ministerial and Discretionary Official Acts (1922), 20 Mich. L. Rev. 848. Discretion as used legally "means something more than a mere mental operation; it involves intelligent choice between two causes of action."

Grider v. Tally 77 Ala. 422 (1884). Board v. Comm. of Jackson County v. State, 46 N. E. 908 (1904) "A duty to be performed is none the less ministerial because the person who is required to perform it may have to satisfy himself of the existence of a state of facts under which he is given the warrant to perform the duty required." People v. May, 251 Ill. 54 (1911); Flournoy v. City, 17 Ind. 169 (1861). State v. Kelly, 27 N. M. 412, 202 Pac. 524, (1921). Freund, Administrative Powers over Persons and Property (1928) Sec. 38. Mechem, Public Offices and Officers (1890), Sec. 658.

18. State v. Turner, *supra*, note 1 at 990.

19. Rosenthal v. Davenport, 38 Minn. 543, 38 N. W. 618 (1888).

20. Maxwell v. Pike, 2 Me. 8 (1822).

21. Bank of Mobile v. Marston, 7 Ala. 108 (1844). Hyde v. Planters Bank, 17 La. 560 (1841). Bowling v. Arthur, 34 Miss. 41 (1857).

22. Fogarty v. Davis, 305 Mo. 288, 264 S. W. 879 (1924).

23. St. Joseph F. and N. Ins. Co. v. Leland, 90 Mo. 177, 2 S. W. 431 (1886).

24. Smith v. Berryman, 272 Mo. 365, 199 S. W. 165 (1917).

25. Tardos v. Bogart, 1 La. Ann. 199 (1846).

taken in *Hayes v. Porter*.[26] The court placed the inspector in the same class as other ministerial officers, sheriffs, coroners, etc. At least one case takes a contrary position.[27] These cases seem to reach a desirable result, although it seems that these duties do involve some discretion.[28] It can hardly be denied that such inspections involve the exercise of a greater degree of discretion than does the determination of certain well defined facts by a bank examiner. The inspector is to pass judgment on certain products as to their soundness. The bank examiner must first gather data upon which the bank commissioner or probably himself may later act. These later acts may well be discretionary, but are not the former ministerial?

Another group of cases are those involving highway officers. Their duties are both discretionary and ministerial. Such an officer obviously acts judicially and as a discretionary officer when he determines the location, nature and extent of highways.[29] But on the other hand he is held liable as a ministerial officer when his duties involve the execution or direction of the work. In *McCord v. High*[30] an action was brought against a bridge commissioner. The court held that the determination where and whether a bridge was needed was discretionary, but that the building of it was ministerial. Plaintiff recovered for defendant's negligence in building the bridge. These cases seem quite sound and yet the matter of building or direction of the building seems to involve as much discretion as the determinations of amounts of capital, of surplus, of loans, etc.

Thus the cases do not seem to demand that a bank examiner be held to be a discretionary officer in the performance of all of his duties. The reason for placing liability upon a ministerial officer and not upon a discretionary officer, as has been explained, is that to place such liability upon a discretionary officer would hinder him in the performance of his duties which demand a free and unchecked exercise of discretion, at least so far as civil liability is concerned. It does not seem that placing liability upon a bank examiner for negligently failing to discover certain facts, would hinder him in the performance of his duties. Rather it might be said that the opposite result could be expected. It is true that one can insist that the duties of an examiner are in a way discretionary. But when that rule is carried to extremes the reason for the rule cannot be found and at that point there can be no justification for its application.

W. W.

BILLS AND NOTES—CAN A PAYEE BE A HOLDER IN DUE COURSE?

Tressler v. Whitsett.[1]

The Supreme Court of Missouri held in this case that plaintiff was entitled to have a deed of trust and note secured thereby cancelled. In the course of its opinion the court emphasized the fact that defendant could not claim protection as a holder in due course under the N. I. L. because his name appeared as payee in the instrument. In determining whether plaintiff was entitled to have the note cancelled, it

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26. Hayes v. Porter, 22 Maine 371 (1843). See, also, Nickerson v. Thompson, 33 Maine 433 (1851).

27. Fath v. Koeppel, 72 Wis. 289 (1888).

28. Mechem, Public Offices and Officers, Sec. 702.

29. Sage v. Laurain, 19 Mich. 137 (1867); Cook v. Hecht, 64 Mo. App. 273 (1896); St. Joseph v. McCabe, 58 Mo. App. 542 (1894).

30. McCord v. High, 24 Iowa 336 (1868). See, also, Ham v. Los Angeles County, 189 Pac. 462 (1920); Tearney v. Smith, 86 Ill. 391. (1877).

1. 12 S. W. (2d) 723 (1928). Plaintiff was an accommodation maker of the note in question. The principal maker delivered a deed to his farm to the payee (defendant) as security for the payment of the note. Thereafter, and without knowledge of the plaintiff, defendant returned this deed to the principal maker, thereby releasing the farm as security for the note.

was perhaps not necessary for the court to pass upon the question whether defendant was a holder in due course. Nevertheless the opinion again raises the question whether or not it is ever proper to treat the payee as a holder in due course of such an instrument.

On the general question whether the payee named in a note can be a holder in due course within the meaning of the N. I. L. there is a sharp split of authority. The Missouri Courts have taken the position that he is not to be treated as a holder in due course.[2]

The leading case holding that the payee named in a note cannot be a holder in due course under the N. I. L. is *Vander Ploeg v. Van Zuuk*,[3] decided in Iowa, in 1907. The courts there held that under the N. I. L. the payee in a note which was executed in blank and delivered to a third person who filled it out payable to the payee and delivered it to him is not a holder in due course and takes the instrument subject to a defense by the maker that it was not completed in accordance with the understanding of the maker with such third party. That case was the earliest one decided after the adoption of the N. I. L. which held that the payee named in a note cannot be a holder in due course under the N. I. L. even though he took it for value, before maturity, and without notice of any infirmity in the instrument or defect in the title of the person negotiating it. Since that time there have been a great number of decisions to the same effect.[4]

One of the leading cases holding that the payee named in a note can be a holder in due course if he takes it for value, before maturity, and without notice of any infirmity in the instrument or defect in the title of the person negotiating it is *Liberty Trust Co. v. Tilton*,[5] decided seven years after *Vander Ploeg v. Van Zuuk*. In that case the suit was by the payee named in the note. The accommodation indorser of the note defended on the ground that at the time he signed the note it was blank as to amount. He indorsed it upon the agreement of the maker that it should not be delivered to the payee until it was indorsed in like manner by another party and that the amount to be filled in should not exceed a certain sum. Both of these conditions were violated by the maker and the note was delivered to the payee in completed form. Nevertheless the court held that the payee was a holder in due course within the meaning of the N. I. L. and could recover on the note from the accommodation indorser. That decision has been followed in many jurisdictions.[6]

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2. Mutual Life of Illinois v. McKinnis, 15 S. W. (2d) 935 (1929); Gate City National Bank v. Bunton, 296 S. W. 375 (1927); Weller v. Meadows, 272 S. W. 85 (1925); Long v. Shafer, 185 Mo. App. 641, 171 S. W. 690 (1914); St. Charles Savings Bank v. Edwards, 243 Mo. 553, 147 S. W. 978 (1912).

3. 135 Iowa 350, 112 N. W. 807 (1907).

4. Marion Savings Bank v. Leahy, 200 Iowa 220, 204 N. W. 456 (1925); Builders Lime & Cement Co. v. Weimer, 170 Iowa 444, 151 N. W. 100 (1915); Consolidated Wagon & Machine Co. v. Housman, 38 Idaho 343, 221 Pac. 143 (1923); Southern Nat'l Life Realty Corp. v. People's Bank, 178 Ky. 80, 198 S. W. 543 (1917); Portland Morris Plan Bank v. Winckler, 143 Atl. 173 (1928); Farmers State Bank v. Mowry et al., 107 Okla. 275, 232 Pac. 26 (1924); Rice et al. v. Jones, 102 Okla. 30, 225 Pac. 958 (1924); Strother et al. v. Wilkinson, 90 Okla. 247, 216 Pac. 436 (1923); First Nat'l Bank v. Allen, 88 Okla. 162, 212 Pac. 597 (1923); Britton Milling Co. v. Williams 45 S. D. 274, 187 N. W. 159 (1922); Kincaid v. Lee County State Bank, 4 S. W. (2d) 310 (1928); Exum v. Mayfield et al., 297 S. W. 607 (1927); Security Bank & Trust Co. v. Foster, 288 S. W. 438 (1926); Howth v. J. I. Case Threshing Machine Co., 280 S. W. 238 (1925).

5. 217 Mass. 462, 105 N. E. 605 (1914).

6. Dinsmore v. Cooper, 212 Ala. 485, 103 So. 460 (1925); Ex parte Goldberg and Lewis, 191 Ala. 356, 67 So. 839 (1914); Drumm Construction Co. v. Forbes, 305 Ill. 303, 137 N. E. 225 (1922); Ladd v. Read, 114 Kan. 175, 217 Pac. 273 (1923); Bergstrom v. Ritz-Carlton Restaurant and Hotel Co., 171 App. Div. 776, 157 N. Y. Supp. 959,—appeal dismissed in 220 N. Y. 569 (1916); Brown v. Rowan, 91 Misc. 220, 154 N. Y. Supp. 1098 (1915); Bank of Commerce and Savings v. Randell, 107 Neb. 332 (1921); Maurer v. Hahn, 145 Atl. 316 (1928); American National Bank v. Kerley et al., 109 Ore 155, 220 Pac. 116 (1923); Johnston v. Knipe, 260 Pa. 504, 103 Atl. 957 (1918); State Bank v. Missia, 144 Minn. 410, 175 N. W. 614 (1920); Snyder et al v.

The pertinent provisions of the N. I. L. to be considered in this connection are as follows:

> Sec. 191: Holder means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof. Issue means the first delivery of the instrument, complete in form, to the person who takes it as a holder.
> Sec. 30: An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.
> Sec. 52: A holder in due course is a holder who has taken the instrument under the following conditions:
>
> 1. That it is complete and regular on its face.
> 2. That he became the holder of it before it was overdue, and without notice that it had previously been dishonored, if such was the fact.
> 3. That he took it in good faith and for value.
> 4. That at the time it was *negotiated* to him he had no notice of any infirmity in the instrument or defect in the title of the person *negotiating* it.
>
> Sec. 58: In the hands of any holder other than a holder in due course a negotiable instrument is subject to the same defenses as if it were non-negotiable.

It is true that in most cases the payee named in a note cannot possibly be considered a holder in due course, because he has full knowledge of the circumstances surrounding the execution and delivery of the note and knows of any infirmity in the instrument. But there are innumerable cases wherein the note is transferred to the payee under such conditions that he knows nothing of the circumstances surrounding its execution. In some cases the note is delivered to the payee by the principal maker in violation of his agreement with his co-makers or accommodation indorsers or makers. In others some third person makes the delivery of the completed instrument to the payee after surreptitiously gaining possession of it from the maker. In such cases the right of the payee to recover from the maker or indorser depends upon whether he is a holder in due course. Does his good faith purchase of the note cut off the defense of the maker or indorser? Unless he be considered a holder in due course he takes the instrument subject to every defense which the maker has.

The courts holding that the payee named in a note cannot be a holder in due course concede that he can be the holder of the note under Sec. 191 of the N. I. L., but insist that he cannot be a holder in due course under Sec. 52. They say that the term "holder in due course" seems to be used throughout the N. I. L. to indicate a person to whom, after completion and delivery, the instrument has been "negotiated".[7] "Negotiated", as used in the N. I. L., means transferred from one holder to another, and, as there can be no holder prior to the payee, the instrument cannot be *negotiated* to him. These decisions rely for support upon subdivision 4 of Sec. 52 which requires that a person taking the instrument must take it without notice of any defect in the title of the person *negotiating* it before he can become a holder in due course. And, since the payee is the first person who is capable of negotiating an instrument, the payee himself cannot be a holder in due course.[8]

McEwen, 148 Tenn. 423, 256 S. W. 434 (1923); Howard National Bank v. Wilson, 96 Vt. 438, 120 Atl. 889 (1923); State Bank v. Pacific Grain Co., 125 Wash. 149, 215 Pac. 350 (1923).

7. Vander Ploeg v. Van Zuuk, 135 Iowa 350, 112 N. W. 807 (1907).

8. Note, 15 A. L. R. 437.

Some courts which hold that the payee named in a note cannot be a holder in due course take the position that in the act of negotiation there must be a transferor and a transferee and there also must be an instrument. This instrument must be owned by the transferor and at the time of the transfer it must have been complete. Sec. 16 of the N. I. L. provides that "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto." Under that section it is argued that until there has been a delivery the instrument is no more than an offer of a contract for a negotiable instrument. Sec. 16 further provides that "As between immediate parties and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be, and in such case the delivery may be shown to have been conditional or for a special purpose only and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed." Under that provision it is argued that the N. I. L. refuses to conclude the question of delivery as between the immediate parties to the instrument, but does conclusively presume a valid delivery by each prior owner when the instrument is in the hands of a holder in due course, thus showing that the payee, as an immediate party to the instrument, cannot be a holder in due course.[9]

The courts which hold that the payee named in a note can be a holder in due course if he takes it for value, before maturity, and without notice, rely for support upon Sections 191 and 30 of the N. I. L. Under 191 a holder is the payee or indorsee of a note who is in possession of it. Under 30 an instrument is *negotiated* when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. They argue that under these two sections a note can be negotiated to the payee in such manner as to constitute him the holder in due course. They say that under Sec. 30 it is not necessary to have a transfer from one "holder" to another in order to have a negotiation. That section requires only a transfer from one "person" to another in such manner as to constitute the transferee the holder of the instrument. And as the payee can be the holder of the instrument under Sec. 191 the conclusion that these courts reach is that the note can be negotiated to the payee in such manner as to constitute him a holder in due course. They argue further that a payee who takes a note for value, before maturity, and without notice is not an "immediate party" to the instrument within the meaning of Sec. 16 which makes such parties chargeable with notice of the conditions or limitations attached to the delivery of the note. Those words are held to refer only to those who are immediate in the sense of knowing, or being held to know, of the conditions or limitations placed upon the delivery and not to those who appear upon the face of the instrument as immediate parties.[10]

Some courts which hold that the payee named in a note can become a holder in due course take the position that the term "holder in due course" is used in the N. I. L. as the equivalent of the common law expression "bona fide holder for value without notice." They say that inasmuch as the payee named in a note could be a bona fide holder for value without notice under the common law,[11] it follows that the

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9. Security Bank and Trust Co. v. Foster, 288 S. W. 438 (1926).

10. Liberty Trust Co. v. Tilton, 217 Mass. 462, 105 N. E. 605 (1914).

11. Watson v. Russell, 3 B. & S. 34 (Q. B. 1862); Poirier v. Morris, 2 El. & Bl. 89 (Q. B. 1853); Munroe v. Bordier, 8 C. B. 862 (1849).

payee can likewise become a holder in due course under the N. I. L. The argument is that Sec. 52 merely confirms and continues the rule of the common law. The framers of the N. I. L. had no intention to change the common law rule. Statutes must be construed as near to the rule and reason of the common law as is possible. The presumption is that preexisting laws are not changed by the statute further than is expressly declared.[12]

The cases holding pro and con on this question cannot be reconciled. The view one prefers depends upon his interpretation of the N. I. L. The controversy on this question has arisen since the adoption of that instrument by the several states. Before that time it was universally conceded that the payee named in a negotiable instrument could become a holder in due course if he took it for value, before maturity and without notice.

In holding that a negotiation can be made only by one who is already a holder, the courts holding that a payee cannot be a holder in due course overlook the wording of Sec. 30 which provides that "an instrument is negotiated when it is transferred from one *person* to another in such manner as to constitute the transferee the holder thereof." It is to be noted that the word "person" is used in that section and not the word "holder". Under that section it is obvious that the negotiator need not be a holder. Sec. 191 provides that "holder" means the payee or indorsee of a note who is in possession of it. When read in connection with Sec. 30 it cannot be denied that an instrument can be netogiated to the payee named therein. And if he can be a negotiatee it follows that he can be a holder in due course if he fulfills the other requirements of Sec. 52.

It is submitted that the proper decision on this question is that a payee named in a negotiable instrument can become a holder in due course under the N. I. L. However, if it can correctly be said that an instrument can be negotiated only by a holder, then the courts holding that a payee can never be a holder in due course under the N. I. L. are right, because there is no person prior to the payee who is a holder. But in the opinion of the writer it was not the intention of the framers of the N. I. L. to change the signification of the word "negotiate". As used in that instrument it was intended to have the same meaning and legal significance it always had at common law, viz., concluded by bargain and agreement.[13] The whole purpose of the N. I. L. was to codify the law merchant and provide a uniform system of law for the determination of the rights of parties on negotiable instruments. It was not intended to change the law merchant thereby. The provisions of Sec. 30, enumerating the ways of negotiation, were not intended to exclude by omission a negotiation to the payee.[14]

The National Conference of Commissioners on Uniform State Laws at its August, 1927, meeting proposed that Sec. 30 be amended by inserting in the last clause after the words "negotiated by" the words "delivery to the person to whose order it is payable, or by" so that the section would read: "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by *delivery to the person to whose order it is payable, or by* the indorsement of the holder completed by delivery." It was also proposed to amend Sec. 52 by inserting in the first sentence thereof before the words

12. Drumm Construction Co. v. Forbes, 305 Ill. 303, 137 N. E. 225 (1922); Brown v. Rowan, 91 Misc. 220, 154 N. Y. Supp. 1098 (1915); Snyder et al v. McEwen, 148 Tenn. 423, 256 S. W. 434 (1923); Howard National Bank v. Wilson, 96 Vt. 438, 120 Atl. 889 (1923).

13. Brannan, The Negotiable Instruments Law, 4th ed., p. 120.

14. 28 Yale L. J. 197, 710. Aigler, *Payees as Holders in Due Course* (1927) 36 Yale L. J. 608.

"holder who has taken," the words "payee or other" so that the sentence would read: "A holder in due course is a *payee or other* holder who has taken the instrument under the following conditions;" and by changing Subsection 4 so that it would read: "That at the time he *became a holder* he had no notice of any infirmity in the instrument or *that* the title of the person negotiating it *was defective or that the delivery to himself was wrongful.*"[15] The purpose of these amendments is to make clear that a payee may be a holder in due course under the N. I. L. They would remove all doubt on the question and restore the law to the state in which it was before the adoption of the N. I. L. which it is submitted, is the proper law on the question.

R. S. ERDAHL

MORTGAGES AND DEEDS OF TRUST. RIGHTS OF MORTGAGEE TO RENTS UPON FORECLOSURE. MISSOURI STATUTE PROTECTING TENANTS' INTEREST IN CROPS UPON FORECLOSURE. *Allen v. Pullam.*[1]

One McLemore, owning land subject to a deed of trust, leased the premises for one year to the plaintiff. The plaintiff gave his promissory note to McLemore for the amount of the rent, the note maturing at the end of the year. McLemore sold the note, before maturity, to Merriweather, who knew that the note was for rent and that the land was subject to a deed of trust. He also knew that default had been made in payment of one of the notes secured by the deed of trust. Before the end of the year there was a foreclosure under the deed of trust, and the defendant Pullam purchased the premises. Both Pullam and Merriweather claimed the rent and the plaintiff brought interpleader, bringing the money into court. Apparently, in spite of the foreclosure, the plaintiff had not been disturbed in his possession of the premises and he had suffered no material injury by the foreclosure.

The Springfield Court of Appeals held that the full amount of the note should be paid to the defendant Merriweather. The decision could be clearer, but the court seemed to think that Merriweather should recover because the purchase of the note by him amounted to a payment of the rent and that the tenant became liable to him on the note.[2] It was also said that to hold otherwise would be in derogation of the plaintiff's rights under Sec. 2234, R. S. Mo. 1919, which, in effect, provides that a tenant in possession of lands which are foreclosed under a deed of trust should be entitled to unharvested and growing crops on the premises at the time of foreclosure.[3]

It is stated in the opinion that the purchaser at the foreclosure sale would have become entitled to the rents had there not been an assignment of the rent note before the foreclosure.[4] Under the settled law this would not have been true unless there had been a new contract made between the purchaser at the sale and the

15. Report Nat'l Conference of Commissioners on Uniform State Laws (1927), pp. 625, 626, 632.

1. 10 S. W. (2nd) 64 (1928).

2. 10 S. W. (2nd) 64, 67 (1928). It is conceded that taking the note by the lessor is not payment of the rent. Freeman v. Ruth, 215 Mo. App. 398, 257 S. W. 500 (1924); Big Four Implement Co. v. Chesney, 204 Mo. App. 285, 223 S. W. 944 (1920); Plaut v. Gorham Mfg. Co. (D. C.) 174 Fed. 852 (1909).

3. R. S. Mo. 1919, Sec. 2234, provides as follows: "All mortgages of real or personal property, or both, with powers of sale in the mortgagee, and all sales made by such mortgagee or his personal representatives, in pursuance of the provisions of such mortgages, shall be valid and binding by the laws of this state upon the mortgagors, and all persons claiming under them, and shall forever foreclose all right and equity of redemption of the property so sold: Provided, that nothing herein shall be construed to affect in any way the rights of a tenant to the growing and unharvested crops on lands foreclosed as aforesaid, to the extent of the interest of such tenant under the terms of contract or lease between such tenant and the said mortgagor or his personal representatives."

4. 10 S. W. (2nd) 66 (1928).

mortgagor's tenant.[5] The purchaser, in her interplea, states this to be a fact, but it is not mentioned by the Court and apparently its statement is not made in reliance thereon. Rents can only be due by virtue of a lease and the covenants therein contained, and an obligation to pay rents can spring from no other source.[6] In other words, if the purchaser is to have a valid claim to rents here it must be by virtue of the lease made between McLemore and the tenant, or by one made by himself with the mortgagor's tenant.

Assuming, as apparently did the Court, that no new contract was made between the purchaser and the tenant, can it be said that the purchaser acquired a right to rents by virtue of the McLemore lease? According to common law principles, a tenant is not liable to a mortgagee for rent on a lease made subsequent to a mortgage, as is the case here.[7] This is because the mortgagee is regarded as the owner of the premises from the time of the mortgage. In this case the mortgagor held the reversionary interest under the lease, and it is to the owner of this interest that the rent is due. The mortgagee never became the owner of this reversionary interest and hence could never claim the rent by virtue of it.[8] However, if the lease had antedated the mortgage then the mortgagor's interest could only have been of a reversion, and this interest would have passed to the mortgagee upon the taking of the mortgage, and he would be entitled to collect the rents by virtue of it (*i. e.* he would be in privity of estate with the tenant).[9]

The proposition above stated may be illustrated as follows: Suppose that A, owning Blackacre, leases the same and then mortgages it to B. B, as mortgagee, owns the reversion and, as such, he is entitled to the rents from A's tenant, and since the Statute of 4 and 5 Anne, it is not necessary that the tenant attorn.[10] However, if it be supposed that A mortgages the premises to B, and then leases them, then, in the absence of statute,[11] B could not claim the rent since he did not own the reversion and was not in privity with A on this lease.[12]

Missouri, like many other states, has not strictly followed common law principles in regard to the effect of a mortgage upon title. The view here prevails that upon execution of the mortgage, the mortgagee does not take title to the land by virtue of the mortgage, but merely takes a lien for purposes of security; while the title remains in the mortgagor until foreclosure of entry for conditions broken.[13] Upon foreclosure, however, the purchaser at the sale takes such title as the mortgagor had at the time the mortgage was given.[14] Until foreclosure or entry for condition

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5. 14 A. L. R. 648, 41 C. J. 633; Kennett v. Plumer, 28 Mo. 142 (1859); St. Louis Nat'l Bk. v. Field, 156 Mo. 306, 56 S. W. 1095 (1900).

6. 36 C. J. 289; Whetstone v. McCartney, 32 Mo. App. 430 (1888); Taylor, Landlord and Tenant, Sec. 438.

7. Evans v. Elliot, 9 Ad. & E. 342 (1838). The law is well stated in Russell v. Allen, 2 Allen (Mass.) 42 (1861), where it is said that where a lease is made subject to a mortgage there is no privity of contract or estate between the mortgagee and the lessee, and until actual entry or some equivalent action by the mortgagee, he has no action for rent, except on an express promise to pay.

8. 14 A. L. R. 648, 41 C. J. 627; In re Life Ins. Assn. of America, 96 Mo. 632, 10 S. W. 69 (1888). So long as the mortgagee refrains from taking possession he has no right to rents. 2 Jones on Mortgages Sec. 1120.

9. 14 A. L. R. 640, Sec. II. In St. Louis Nat'l Bank v. Field, 156 Mo. 306, 56 S. W. 1095 (1900) it was held that a mortgage does not include rents unless so expressed, but after the debt is due if property is insufficient the rents may be collected by a receiver.

10. 4 and 5 Anne, c. 16; 35 C. J. 1214; Biddle v. Hussman, 23 Mo. 597 (1856).

11. See Jones v. Clark, 20 Johns. 50 (N.Y.) (1822).

12. Medicus v. Altman, 199 Mo. App. 466, 203 S. W. 637 (1918), 14 A. L. R. 640, 664, L. R. A. 1915C 209.

13. Grafeman Dairy Co. v. Club (Mo. Sup.), 241 S. W. 923 (1922); Hunter v. Henry, 181 S. W. 597 (1916); Pence v. Gabberts Admr., 70 Mo. App. 201 (1897); Dickerson v. Bridges, 147 Mo. 235 (1898).

14. Springfield v. Ransdell, 305 Mo. 43, 264 S. W. 771 (1924); Burke v. Murphy, 275 Mo. 397, 205 S. W. 32 (1918); Siemers v. Schrader, 88 Mo. 20 (1885); Barnett v. Timberlake, 57 Mo. 499 (1874) See also, 41 C. J. 277 (note i) (1885).

broken the mortgagor is the owner as to all the world, and may lease or rent as he sees fit, and is entitled to the rents.[15] But upon foreclosure or entry the absolute title passes to the purchaser and a lease made by the mortgagor (with anyone) is terminated thereby.[16]

From the foregoing it can be seen that, in no event, would the mortgagee in this case have been entitled to the rent, unless he had made a separate agreement with the tenant. McLemore's right to the rent would have terminated upon the foreclosure, but this fact would not, *ipso facto*, give a claim thereto to the new owner of the premises. The new owner, Pullam, was entitled to possession and could have ousted or maintained ejectment against the tenant,[17] but it is impossible to find any lease which gave her any right to the rents unless it is by one that she had made with McLemore's tenant.

Merriweather's claim to rent, if any, arose solely out of his ownership of the rent note. If he took the note under such conditions as to become a holder in due course then it has been held that the rent is separated from the reversion and that the purchase of the note amounted to a payment of the rent.[18] This would amount to a payment by the tenant, and the tenant would become absolutely liable on the note to the holder thereof. If, however, the holder is not a holder in due course, then he is subject to the same defences that the lessee had against the lessor.[19]

Until foreclosure, the tenant had no defense to the note when it became due; but if there had been a foreclosure before the note became due and the purchaser had taken possession the tenant would have the defense of failure of consideration in that his lease had been terminated. When Merriweather took the note in question there had been no foreclosure and hence the tenant could not set that defense up against him. It is true that Merriweather knew that the note was given for rent and that the mortgagee had a *right to foreclose* at the time he took the note, but this would not have been a defense even as against the mortgagor because the lease is not terminated until foreclosure or entry.[20] A knowledge of the consideration of a note is not a knowledge of a subsequent failure thereof.[21] Thus, it would appear that Merriweather's knowledge was not the knowledge of a valid defense and therefore he was a holder in due course and was properly allowed to recover on the note.[22] This was expressly held in the case of *Johnson v. Murray*[23] where the Kansas City Court of Appeals said that the fact that the assignee of a note knew that it was given for rent, and that there was an indebtedness secured by a deed of trust which was then due, would not affect his right to recover.

Conceding that the tenant is liable on the note, would it be in derogation of his rights under Sec. 2234[24], R. S. Mo. 1919, to require him to pay again? Suppose the

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15. Kennett v. Plumer, 28 Mo. 142 (1859); St. Louis Nat'l Bank v. Field, 156 Mo. 306 (1900).

16. McGill v. Brown, 215 Mo. App. 402, 256 S. W. 510. This case also holds that where the mortgagor (lessor) did not covenant against foreclosure, he is not liable to tenant for any damages caused by foreclosure: Oaks v. Aldridge, 46 Mo. App. 11 (1891).

17. Bailey v. Winn, 101 Mo. 649 (1890); Sutton v. Mason, 38 Mo. 120 (1866); 2 Taylor, Landlord and Tenant, Sec. 537.

18. Hunter v. Henry, 181 S. W. 597 (1916), 21 R. C. L. 74, L. R. A. 1915 C 230; Alabama Gold Life Ins. Co. v. Oliver, 78 Ala. 158 (1884).

19. R. S. Mo. 1919, Sec. 844.

20. Oakes v. Aldridge, 46 Mo. App. 11 (1891); McGill v. Brown, 215 Mo. App. 402, 256 S. W. 510 (1923).

21. 8 C. J. 509; Polk Bank v. Wood, 189 Mo. App. 62 (1915); Hahn v. Bradley, 92 Mo. App. 403 (1901).

22. R. S. Mo. 1919, Secs. 838 and 843; see, also, 46 L. R. A. (N. S.) 869, Sec. IIIc and continued in L. R. A. 1918 F. 1018. In Saddler v. White, 14 La. Ann. 173, the answer stated that the plaintiff knew that there might be defenses to the note when he bought it. The court held that this knowledge did not defeat his recovery, saying, "The case would present a different aspect if the allegations of the answer had been not that the plaintiff knew there might be, but that there *were* equities between the original parties."

23. 289 S. W. 977 (Mo. App.) (1927).

24. *Supra*, footnote 3.

tenant had not only given the note in question, but had also promised to pay rent to the purchaser by a separate agreement. According to the decision of this case he would be liable on the note. He would also be liable to the purchaser by virtue of his contract with him. The principal case apparently construes the statute to mean that the tenant need pay but once. It is said that the tenant was not liable to the purchaser, however, because he was liable to the holder of the note.[25]

From reading the statute and the cases decided thereunder it is not clear just what is meant. It is clear, however, that prior to the passage of the provision, in 1893, the purchaser took the growing crops of the tenant upon foreclosure.[26] It is also clear that since the passage of the provision the tenant does not lose his interest in the crops.[27] But this is as far as the cases go in their interpretation of the meaning of the statute. It is not apparent that the statute means that the tenant shall be absolutely liable to pay rent to anyone, or if he is liable, that he shall not pay twice.

In the case of *Johnson v. Murray*, *supra*, it is said that "it was not the intention of the Legislature to permit the tenant to have the crops growing at the time of the foreclosure and yet not be liable for any rent for the land on which they were grown." This seems to be a reasonable construction of the statute, yet in *Nichols v. Lappin*[28] it is held that the provision is to protect tenants who happen to have growing crops when foreclosure occurs "against losing the proceeds of their labor." If the purpose is to insure them against losing the proceeds of their labor, then it would seem to follow only that the provision should be given effect even though there had been no payment of rent to anyone.

It is submitted that, as far as the statute is concerned, the tenant may have a right to his crops without paying rent to anyone. Yet if he makes any binding contracts to pay rent he should be bound thereunder, and if he, by his own agreements, becomes bound to two different parties, it would not be in derogation of his rights under the statute to hold him liable to both. Thus in our hypothetical case, the tenant would have bound himself on his negotiable note, and also by his agreement with the purchaser. On the other hand, if he had not given a negotiable note and had not made any agreement with the purchaser at foreclosure, he would be liable for rent to no one, and would still take his crops by virtue of the statute.[29]

MARION S. FRANCIS*

WILLS—VALIDITY OF A CONDITION IN A WILL PROVIDING FOR A FORFEITURE IN CASE OF CONTEST. *In re Chambers' Estate*[1]

This case is the determination of the Supreme Court on the final distribution of the estate of James Chambers. The will provided for the division of the estate into

25. 10 S. W. (2nd) 64, 67 (1928).

26. Walton v. Fudge, 63 Mo. App. 52 (1895); Salmon v. Fewell, 17 Mo. App. 118 (1885); Vogt v. Cunningham, 50 Mo. App. 136 (1892). These early Missouri cases hold, in effect, the same as the following quotation taken from 2 Taylor, Landlord & Tenant, Sec. 537: "A lessee of a mortgagor, under a lease made subsequent to the mortgage with notice of the terms thereof, without the concurrence of the mortgagee, has no greater rights to the crops, growing and unsevered, than the mortgagor himself would have after condition broken."

27. Wells v. Bente, 86 Mo. App. 264 (1900) says "This statute [referring to Sec. 2234] changes the rule and secures to the tenant the title of his interest in the crops."

28. 105 Mo. 401, 34 S. W. 483 (1891).

29. The most recent case dealing with this statute is Bartlett Trust Co. v. Bishop, 14 S. W. (2nd) 5 (1929). It is here held that the statute gives the tenant the right to the crops but not the right to possession until they are gathered. It appears that prior to this statute the purchaser had the right to the crops and possession also by virtue of his purchase and it was contended that when the tenant was given the right to the crops he was also given the right to possession.

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1. 18 S. W. (2nd) 30 (1929).

five equal parts after the payment of the testator's debts. The widow and three children were given their shares absolutely. The remaining one fifth was to be held by a trustee with the provision that the income should be given to the son John during his life; and at his death, that one-fifth should go to the other beneficiaries. The will contained the following clause: "If any devisee, legatee or beneficiary under the will shall contest the validity or object to the probate of this instrument, such person shall be thereby deprived of all beneficial interest there under and of any share of my estate, and the share of such person shall become a part of my residuary estate and such person shall be excluded from taking any part of my residuary estate, the same shall be divided among the other persons entitled to take such residuary estate." John contested the will on the ground of undue influence but he was unsuccessful and was excluded from sharing as a beneficiary pursuant to the clause above quoted. It was contended that the clause was invalid and John should be entitled to take under the will because it was against public policy. It was further insisted that although in general such a provision may be valid an exception should be made upon the grounds of public policy where there is a reasonable basis to contest the validity of the will.

The court upheld the validity of the clause and denied relief to the appellant. In deciding that the clause was not invalid as against public policy the court relied on the following statement in *Brandenburger v. Poller*:[2] "We know of no rule of public policy which requires a person to contest his ancestor's sanity, or to continue a costly suit in depletion of his own funds and those of the estate after his own right has been conceded and secured." It is not clear from the opinion of the Court whether or not it sustained the "no contest" clause because it believed that there was no justification for John's contest. It is pointed out that the provision made by the testator for John was, in view of John's habits and methods of living, a reasonable one, although there is no positive statement by the Court one way or the other upon the question as to the reasonableness or good faith of the contestant in his efforts to break the will. The question as to whether all "no contest" clauses will be sustained or only such clauses when a contest is brought in good faith is not settled by the opinion.

The case is one of first impression in the appellate courts of this state. However, the validity of a provision of this character has been before the courts of many of the other states, and not infrequently has been considered by the courts of England. Decisions are numerous not only on the question of whether such provision is valid, but also whether an exception to the provision for forfeiture should be made, upon the ground that the contest was one instituted upon the probable cause and in good faith. In this country the cases are in more or less confusion. The generally prevailing rule seems to be that the clause will be sustained in all cases save those where the contest has been instituted upon probable cause and in good faith.[3] In such cases the clause is disregarded as being against public policy. There is, however, a line of decisions holding that the clause is valid under all circumstances.[4]

The courts that sustain the clause under all circumstances have adopted the theory that the testator was at liberty to dispose of his property as he saw fit and upon whatever conditions he desired to impose, and the courts must carry out that

2. 266 Mo. 534, 181 S. W. 1141 (1919).

3. Dutter v. Logan, 137 S. E. 1 (W. Va. 1927); Tate v. Camp, 147 Tenn. 137, 245 S. W. 839 (1922); In re Keenan's Will, 188 Wis. 163, 205 N. W. 1001 (1925); South Norwalk Trust Co. v. St. Johns, 92 Conn. 168, 101 Atl. 961 (1917); Rouse v. Branch, 91 S. C. 101 (1912); In re Friends Estate, 209 Pa. 442, 58 Atl. 853 (1904).

4. Rudd v. Searles, 160 N. E. 882 (Mass. 1928); In re Hites Estate, 155 Cal. 436, 101 Pac. 443 (1909); In re Miller Estate, 156 Cal. 119, 103 Pac. 42 (1909); Moran v. Moran, 144 Iowa 451, 123 N. W. 202 (1909); Bradford v. Bradford, 190 Ohio St. 546 (1869).

intention as expressed, unless the intention be contrary to law or established principles of sound public policy. To show that these conditions are not against public policy, they rely on the following passage in the leading English case of *Cooke v. Turner*:[5] "No considerations of public policy require that an heir should contest the doubtful questions of fact or of law upon which the validity of a devise or bequest may depend. It matters not to the state whether the land is enjoyed by the heir or by the devisee; and we conceive, therefore, that the law leaves the parties to make just what contracts and engagements that they may think expedient as to the raising or not raising questions of law or fact among themselves, the sole result of which is to give the enjoyment of the property to one claimant rather than another."

The Alabama court in *Renagan v. Wade*[6] in holding a "no contest" provision valid and not against public policy apparently adopts the theory that the object in view in attaching such a condition to a legacy or devise is meritorious, because it prevents the inauguration or prosecution of a will contest suit with the end in view of defeating the will of the testator as he saw fit to make it, and also because such contests often breed family feuds and lead to disgraceful family exposures and will waste away the estate by litigation.

A majority of the courts follow the rule that the validity of such a condition depends on whether or not the contest was instituted with probable cause and in good faith. It is said that the policy of the law will not allow one who has every reason to believe that a will offered for probate is a forgery, or the result of fraud, or undue influence, or the work of an insane man be penalized for calling his evidence to the attention of the court by suffering the loss of any rights under the contested instrument, and that the courts should be open to all for the settlement of *bona fide* disputes.[7] If this clause is sustained where there is such a dispute, parties guilty of serious misconduct may unjustly profit at the expense of innocent persons, who as a matter of law should be entitled to take from their ancestor by the route of inheritance and intestate succession.

The rule last stated seems to reach a desirable result. It has the advantages of the rule that holds the condition valid under all circumstances, yet it does not have the disadvantages. The only justification for the minority rule is the view taken by the Alabama Court in *Renagan v. Wade*, that such a condition prevents will contests which so often breed family antagonism, expose family secrets better left untold and results in a waste of the estate. The objection to the rule is that it gives those who would practice fraud or exercise undue influence a greater opportunity to commit such unlawful acts without being detected. It places a burden on the interested parties of not disclosing the facts they have knowledge of to the court, unless they run the risk of the loss of rights under the will. This is extremely undesirable, if for no other reason than that of providing a shield for those who procure execution of the will by undue influence or fraud. How are the courts going to determine whether the will is the will of the testator or the will of those exercising the undue influence if the interested parties may not bring the facts before them?

If such undue influence is exercised over the testator as to require him to make an unjust disposition of his property, it will also be exercised in such a manner as to require him to place in the will a clause providing for forfeiture in case of contest. The rule which allows an exception to be made in the case of contest on probable

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5. 14 Sim. 493 (1845).
6. 70 Ala. 501 (1881).
7. Dutter v. Logan, *supra* note 3; In re Keenan's Will, *supra* note 3; South Norwalk Trust Co. v. St. Johns, *supra*, note 3; Rouse v. Branch, *supra* note 3; In re Friends Estate, *supra* note 3.

cause has the advantage of the stricter rule in that it is a bar to needless and trivial litigation. Under that rule the devisee or legatee in all probability will not contest the will unless he has sufficient and probable cause for so doing. If a will be secured by forgery or undue influence it is to the interest of the public to show that the will is not the true will of the testator and any condition which forbids an interested party from showing that fact when his belief is based on probable cause seems contrary to public policy. The majority rule has not only the advantage of being a bar to trivial litigation but it has the advantage of allowing a contest when it is to the interest of the public that the will should be contested.

The Connecticut court in the case of *South Norwalk Trust Co. v. St. Johns*[8] makes the following statement in support of this rule: "The law prescribes who may make a will and how it shall be made; that it must be executed in a named mode, by a person having testamentary capacity and acting freely and not under undue influence. The law is vitally interested in having property transmitted by will under those conditions and none other. Courts cannot know whether a will good on its face was made in conformity to statutory requirements, whether the testator was of sound mind and whether the will was the product of undue influence, unless these matters are presented to the court. And those only who have an interest in the will have the disposition to lay the facts before the court. If they are forced to remain silent, upon the penalty of a forfeiture of legacy or devise given them by the will, the courts will be prevented by the command of the testator from ascertaining the truth and the devolution of the property will be in a manner against both statutory and common law. Courts exist to ascertain the truth and apply it to a given situation, and the right of devolution which enables the testator to shut the door to truth and prevent the observance of the law is a mistaken public policy. If, on contest, the will should have been invalid, the literal interpretation of the forfeiture provision has suppressed the truth and impeded the true course of justice. If the will should be held valid, no harm has been done through contest, except the delay and expense."[9]

In England a singular rule has developed with reference to "no contest" clauses. In wills of personalty the rule of the ecclesiastical courts, which had adopted the civil law, was followed. In such cases if there was a gift over or a specific direction for the legacy to fall into the residue, in the case of a contest, the clause was held valid.[10] On the other hand if there was not a gift over or a specific direction for the legacy to fall into the residue the clause was held inoperative as being *in terrorem*. [11] In the case of devises it has been expressly held that such a clause is not against public policy and is valid even though there is not a gift over.[12] Apparently from the civil law the rule was introduced that, unless there was a gift over of such a legacy, a forfeiture would not be decreed. The provision for forfeiture would be construed as a mere threat, held *in terrorem* over the legatee but not intended to deprive him of his interest. Only in the event that the will made provision for a gift over would the conclusion be adopted that the testator intended a forfeiture.[13] No explanation of this arbitrary distinction has been made.

There is no substantial ground for any distinction in this respect between real and personal property. If it rests, as it seems to have rested in England, upon the desire of the chancery courts to conform to the decisions of the ecclesiastical courts,

8. 92 Conn. 168, 101 Atl. 961 (1917).

9. See Smithsonian Institute v. Meech, 169 U. S. 398 (1898).

10. Warbrick v. Varley, 30 Beav. 347 (1861); Cleaver v. Sperling, 2 P. Will. 256 (1729).

11. Williams v. Williams, (1912); 1 Ch. 399; Morris v. Borrough, 1 Atk. 398 (1737); Loyd v. Spillett, 3 P. Will. 344 (1734); Powell v. Morgan, 2 Vern. 90 (1688).

12. Cooke v. Turner, 14 Sim. 493 (1845).

13. In re Hites Estate, *supra* note 4; 2 Jarman, Wills (5th Am. Ed. 1888) Sec. 582.

such a reason does not in this country obtain. Although this rule has been followed in a few American jurisdictions[14] it has been repudiated by a great majority of the courts.[15]

It is difficult to say just how far the principal case goes in sustaining the validity of "no contest" clauses. Certainly it is true that some such clauses will be sustained. The Court seems to be of the opinion that there was no probable cause in the case, but whether or not the decision turns on that point cannot be said. It may well be, so far as this case is concerned, that the law in Missouri will ultimately come to be that all "no contest" clauses will be held valid. It is to be hoped that this extreme position will not be taken.

R. K.

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14. In re Title Guarantee & Trust Co., 165 N. Y. S. 71 (1917); In re Arrowsmith, 162 App. Div. 623, 147 N. Y. S. 1016 (1914); In re Wall, 136 N. Y. S. 432 (1912); Fifield v. Van Wyck, 94 Va. 557, 27 S. E. 446 (1897).

15. Massie v. Massie, 54 Tex. Civ. App. 617, 118 S. W. 219 (1909); In re Hites Estate, *supra*, note 4; Moran v. Moran, *supra* note 4; Bradford v. Bradford, *supra* note 4.