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Recent Cases

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FALSE IMPRISONMENT—LIABILITY OF PRIVATE CITIZEN FOR INSTIGATING ARREST

Winegar v. Chicago, Burlington and Quincy R. R. Co.[1]

Plaintiff was arrested for receiving stolen property (iron and materials) by a police officer of Kansas City, Missouri, without a warrant upon the instigation of the defendant company's agent. Plaintiff was tried and acquitted and then sued defendant company for false imprisonment resulting from the unlawful arrest instigated by the defendant's agent. In ruling on a demurrer to plaintiff's evidence the court held that although a police officer had a lawful right to arrest plaintiff when there was reasonable grounds to believe that he had committed a felony even though he was not convicted, and the officer would not be liable in damages, this immunity would not absolve a private citizen who furnishes information that an offense has been committed and encourages and requests the officer to make an arrest of an innocent party. If a party is arrested at the direction of a private citizen, the only ground of justification is that the party arrested is guilty as charged. This case, however, was reversed on error in the admission of evidence.

The power which citizens have to arrest without a warrant is an important supplement to our police agencies in the problem of law enforcement. At the common law every person, whether an officer or not, who was present when a felony was committed, was bound by the law to arrest the felon on pain of fine and imprisonment. This has come down to us somewhat modified; as to an officer it is a matter of duty and as to a citizen it is a matter of right. It is sometimes held if a citizen fails to arrest for a felony committed in his presence he is guilty as an accessory after the fact.[2]

The reason for the common law right to arrest, without a warrant, by citizens was due to the lack of a government police force. The police is a relatively new growth in our society. Until recent times police duties were the duties of every man. In medieval times it was very difficult to get men to collect taxes and tithes, so it was necessary to compel everyone to act as law enforcing officers. During the 17th and 18th centuries crime waves broke out in England and citizens were needed to arrest and prosecute criminals, so liberal rights of arrest were allowed. Then as the policeman came into being, less need was present for the liberal rights of citizens to arrest and these rights were slowly lessened until at the present time we have a modified and restricted right of a citizen to arrest without a warrant.[3] It has come from the duty to arrest down to the right to arrest under certain situations.

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1. 163 S. W. (2d) 357 (Mo. App. 1942).
2. Buchanan, *Arrest by Private Person Without a Warrant* (1938) 7 KAN. B. A. J. 283.
3. Hall, *Legal and Social Aspects of Arrest Without a Warrant* (1936) 49 HARV. L. REV. 566, at 578-590.

At common law a private citizen may arrest without a warrant when a felony has actually been committed and the person arrested is known to be the felon or is reasonably suspected of having committed the felony, and may arrest for a misdemeanor when the misdemeanor consists of a breach of the peace that has actually been committed within the presence of the arresting party.[4]

The Missouri cases fail to make a distinction as to the liability of the instigator between arrests for felonies and arrests for misdemeanors when the person arrested is innocent. In the principal case it is not certain whether the plaintiff was arrested for a misdemeanor or a felony. The plaintiff was arrested for buying stolen iron and materials, which was felonious only if the property bought were valued at over thirty dollars.[5] The value of iron is about twelve dollars a ton so this would mean plaintiff would have had to buy about two and one-half tons before it would have been a felony. The parties selling the iron had only a passenger car, so it is doubtful if they could have hauled a sufficient amount of iron to bring the offense in the felony class. It is possible they could have made several trips. The language as to an officer's privilege to arrest seemed to indicate that the case might be one of felony, but the facts are not clear. But there are cases in Missouri in which the plaintiff was arrested for a felony,[6] and also authority where plaintiff's arrest for a misdemeanor was instigated by defendant without a warrant, which are in accord with the principal case.[7] In the latter case the defendant also participated in the arrest by hauling the plaintiff to the police station in his car. Then there is a decision in which the courts make no mention whether plaintiff was arrested for a felony or a misdemeanor but still arrive at the same result as the principal case.[8] The court does not bother to mention the offense committed,

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4. HARPER, LAW OF TORTS (1933) § 55, pp. 123-124. See RESTATEMENT, TORTS (1934) § 119 (private citizen may arrest without a warrant if a felony has been committed and the citizen knows the felon or reasonably suspects the other as having committed the felony, and for a misdemeanor if actually committed in presence of the citizen).

5. MO. REV. STAT. (1939) § 4475: "Every person who shall buy, or in any way receive, any goods, money, right in action, personal property or any valuable security or effects whatsoever, that shall have been embezzled, converted, taken or secreted contrary to the provisions of the last four sections, or that shall have been stolen from another, knowing the same to have been so embezzled, taken or secreted, or stolen, shall, upon conviction, be punished in the same manner and to the same extent as for the stealing of money, property or other things so bought or received."

6. Pandjiris v. Hartman, 196 Mo. 539, 94 S. W. 270 (1906) (arrest for grand larceny but amount involved was $5 and also $38 collected by plaintiff previously, hence there is some question whether felony or not); Oliver v. Kessler, 95 S. W. (2d) 1226 (Mo. App. 1936); State *ex rel.* Fireman's Fund Ins. Co. v. Trimble, 294 Mo. 615, 242 S. W. 934 (1922). In the latter case the court found that the defendant had not instigated or participated in the arrest. But the court intimated that if the defendant had ordered or instigated the arrest, he would be liable for false imprisonment because the party arrested was innocent of the crime charged.

7. Martin v. Woodlea Inv. Co., 206 Mo. App. 33, 226 S. W. 650 (1920).

8. Peterson v. Fleming, 222 Mo. App. 296, 297 S. W. 163 (1927).

whether felony or misdemeanor, but just applies the same results as reached in the principal case. Of course where the plaintiff has been arrested for a felony which has not been committed at all, even the common law would not allow a private citizen to arrest.[9]

In the criminal law our court has reached different results from that in the principal case.[10] There the court held a private person is justified in arresting without a warrant when a felony has actually been committed and there is probable cause fairly to suspect the person guilty. But there would seem to be no reason why a different result should be reached in the civil and criminal cases. The same policy underlies both situations.

In any situation, before one can be held liable for the arrest and false imprisonment of the plaintiff, he must have directed, instigated, or in some way have been connected with the arrest of plaintiff.[11] One is not guilty just because he was present at the commission of the arrest of the plaintiff.[12] But words alone are sufficient to show that the defendant ordered, instigated or was in some way connected with plaintiff's unlawful arrest.[13] In the instant case there was abundant evidence to show instigation.

WILLIAM L. DODD

INSURANCE—NECESSITY OF FRAUD TO SUPPORT THE DEFENSE OF MISREPRESENTATION

Schuetzel v. Grand Aerie Fraternal Order of Eagles[1]

In order to re-instate a lapsed insurance policy the insured certified in writing: "I, ..., declare that I am in good health. I further declare and warrant that my present occupation is Taxi Driver." Two days earlier he had developed a cold and a sore on his nose and had been treated for them by a doctor who explained there was nothing serious. On the day of signing he was up and dressed, played rummy with a neighbor, and ate heartily of sauerkraut and knuckles in the evening. Later that evening, however, he began to feel worse, and two days later

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9. Wehmeyer v. Mulvihill, 130 S. W. 681 (Mo. App. 1910) (a citizen having knowledge that another has committed an offense may arrest the offender and direct an officer to do so without a warrant, but if no offense has been committed, the citizen must respond in damages sustained in the consequence of the arrest and imprisonment); Harris v. Terminal R. R. Ass'n. of St. Louis, 203 Mo. App. 324, 219 S. W. 686 (1920).

10. State v. Albright, 144 Mo. 638, 46 S. W. 620 (1898).

11. Richardson v. Empire Trust Co., 230 Mo. App. 580, 94 S. W. (2d) 966 (1936); Wright v. Hoover, 211 Mo. App. 185, 241 S. W. 89 (1922); Wright v. Automobile Gasoline Co., 250 S. W. 368 (Mo. 1923).

12. State *ex rel.* Fireman's Fund Ins. Co. v. Trimble, 294 Mo. 615, 242 S. W. 934 (1922).

13. Harris v. Terminal R. R. Ass'n. of St. Louis, 203 Mo. App. 324, 218 S. W. 686 (1920); McGill v. Walnut Realty Co., 148 S. W. (2d) 131 (Mo. App. 1941); Oliver v. Kessler, 95 S. W. (2d) 1226 (Mo. App. 1936); Wright v. Hoover, 211 Mo. App. 185, 241 S. W. 89 (1922); Peterson v. Fleming, 222 Mo. App. 296, 297 S. W. 163 (1927).

1. 164 S. W. (2d) 135 (Mo. App. 1942).

died of pneumonia. In an action on the policy the defense of the insurer was that there was a misrepresentation which avoided liability. The trial court overruled defendant's demurrer to the evidence and defendant appealed.

The Court of Appeals affirmed the ruling on two grounds: (1) they could not say as a matter of law that there actually was a misrepresentation and (2) it was also for the jury to say whether or not there was bad faith—a necessary element of defendant's defense.

With reference to the first ground, most courts agree that a representation of good health does not mean absolute perfection. Slight troubles and temporary illnesses do not disprove the representation of good health.[2] However, there is ground for concern over that portion of the opinion which holds that, even if there had been a misrepresentation, it was still for the jury to say if the insured had acted in bad faith, a necessary element of the defense. The court's statement is: ". . . if it was a warranty the defendant carried only the burden of showing the falsity of the statement, while if it was a mere representation the burden rested upon defendant to show, not only that the statement was false, but that it was material to the risk and made wilfully and in bad faith with intent to deceive the insurer."[3]

The Missouri statute[4] limits the defense of misrepresentation by providing in substance that no misrepresentation shall be deemed material unless the matter misrepresented shall actually have contributed to the death. Numerous problems have arisen in connection with this statute.[5] Does it put warranties and representations on the same basis?[6] Does it put innocent and fraudulent representations on the same basis? It is this latter question which the *Schuetzel* case again brings before the court. On the face of it the statute makes no distinction between warranties and representations, either as to the question of materiality or that of bad faith. It has been held that as to materiality, warranties and representations will be treated alike. Granting that the statute says nothing about the element of intent, it would not seem to follow that warranties and misrepresentations are

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2. 3 JOYCE, INSURANCE (2d ed. 1917) § 2004; Cushman v. United States Life Ins. Co., 70 N. Y. 72, 77 (1877); Sovereign Camp of Woodmen of the World v. Jackson, 57 Okla. 318, 157 Pac. 92, L. R. A. 1916 F, 166 (1916).

3. Schuetzel v. Grand Aerie Fraternal Order of Eagles, 164 S. W. (2d) 135, 139 (Mo. App. 1942).

4. MO. REV. STAT. (1939) § 5843: "No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this state, shall be deemed material, or render the policy void, unless the matter represented shall have actually contributed to the contingency or event on which the policy is to become due or payable, and whether it contributed in any case shall be a question for the jury."

5. Comment (1941) 6 MO. L. REV. 338.

6. The majority of cases say there should be no distinction between warranties and representations under the statute. Houston v. Metropolitan Life Ins. Co., 232 Mo. App. 195, 205; De Valpine v. New York Life Ins. Co., 105 S. W. (2d) 977 (Mo. App. 1937); Fields v. Metropolitan Life Ins. Co., 119 S. W. (2d) 463 (Mo. App. 1938); Clegg v. John Hancock Mutual Life Ins. Co., 141 S. W. (2d) 143 (Mo. App. 1940); Jenkins v. Covenant Mutual Life Ins. Co., 171 Mo. 375, 71 S. W. 688 (1903); Keller v. Home Life Ins. Co., 198 Mo. 440, 95 S. W. 903 (1906).

necessarily on different levels as to it. And the statute has been held to apply to both warranties and representations whether innocently or fraudulently made.[7]

One of the decisions which states this interpretation is *Kern v. Legion of Honor*,[8] where the contention had been made that the statute applied only to misrepresentations, not to warranties; also only to innocent misrepresentations, not to fraudulent. But the court replied that if that were true, "the statute is a dead letter." Under the construction there contended for, the company need only state in the contract that the insured warranted the truth of all statements and answers. The court also said that the statute draws no distinction between innocent and fraudulent misrepresentations and the courts have no right to draw any such distinctions. The test applied by the statute is whether or not the matter misrepresented actually contributed to the death—power to determine which is given to the jury. So in *Kirk v. Metropolitan Life Insurance Co.*[9] the court says:

> "We think that the Kern case construes the statute as making no distinction between innocent and fraudulent misrepresentations, especially when the statute is applied to a sound health condition in the policy itself. . . . To hold in such a case that the statute makes immaterial and ineffectual a misrepresentation relied on by the insurer, even though the matter misrepresented actually contributed to the event on which the policy is to become payable, unless the insured knew or in the opinion of the court or jury should be presumed to have known that the representation so made and relied upon and stipulated in the policy as a condition upon which the risk was assumed was false, would be to read into the statute by construction something which its language does not say and to impose on the insurer a risk it did not agree to assume and by the express terms of the contract declined to assume."[10]

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7. Kern v. Supreme Council, American Legion of Honor, 167 Mo. 471, 67 S. W. 252 (1902); Schriedel v. John Hancock Life Ins. Co., 133 S. W. (2d) 1103 (Mo. App. 1939); Woodson v. John Hancock Mutual Life Ins. Co., 84 S. W. (2d) 390 (Mo. App. 1935); Burgess v. Pan-American Life Ins. Co., 230 S. W. 315 (Mo. 1921; Boillot v. Income Guaranty Co., 231 Mo. App. 990, 83 S. W. (2d) 219 (1935); Bruck v. John Hancock Mutual Life Ins. Co., 194 Mo. App. 529, 185 S. W. 753 (1916); Hodges v. American National Ins. Co., 6 S. W. (2d) 72 (Mo. App. 1928).

8. Kern v. Supreme Council, American Legion of Honor, 167 Mo. 471, 67 S. W. 252 (1902).

9. Kirk v. Metropolitan Life Ins. Co., 336 Mo. 765, 81 S. W. (2d) 333 (1935).

10. Kirk v. Metropolitan Life Ins. Co., 336 Mo. 765, 783; 81 S. W. (2d) 333, 343 (1935). *Accord*: Schreidel v. John Hancock Life Ins. Co., 133 S. W. (2d) 1103 (Mo. App. 1939); Summers v. Metropolitan Life Ins. Co., 90 Mo. App. 691 (1901; Clegg v. John Hancock Mutual Life Ins. Co. of Boston, Mass., 141 S. W. (2d) 143 (Mo. App. 1940); Melville v. Business Men's Accident Assur. Co., 253 S. W. 68 (Mo. App. 1923); Lieberman v. American Bonding and Casualty Co., 244 S. W. 102 (Mo. App. 1922); Guaranty Life Ins. Co. v. Frumson, 236 S. W. 310 (1921); also Commercial Bank v. American Bonding Co., 194 Mo. App. 224, 187 S. W. 99 (1916).

However, there have been a few instances[11] of deviation from this concept of the statute—among which is this recent case from the St. Louis Court of Appeals, in which the language seems to mean that the court thinks fraud is necessary for a good defense in the case of misrepresentations. There is a certain line of authority behind this decision which rests primarily on *Houston v. Metropolitan Life Insurance Co.*[12] There the insured represented that she had never had and did not then have cancer. Upon trial conflicting testimony as to the truth or falsity of this representation was presented and the court concluded that it was a question for the jury. But they continue saying that *if* there is found to be a misrepresentation, it will not avoid the policy unless it was also fraudulently made, an assertion obviously not essential to the holding of the case, and one relying upon *Grand Lodge v. Massachusetts Bonding and Insurance Co.*[13] They distinguished the *Kirk* case on the ground that any liability was there conditioned on the good health of the party at the time of the issuance of the policy—a stipulation not made in the insurance contract before the court in the *Houston* case. They conclude that where there is no warranty or provision in the policy that a particular misrepresentation will avoid the policy a misrepresentation in order to avoid the policy must have been fraudulently made. The court said this is the rule applicable to contracts generally and saw no reason why an exception should be made with respect to insurance policies.[14] However, it is submitted the statement of that court as to the general rule as to contracts may have been too broad. Innocent misrepresentations may be made the basis of rescission.[15] Also, though the matter is in great conflict, there is some authority for saying an honest misrepresentation may be the basis of an action for damages.[16] In passing it may be noted also that the *Grand Lodge* case was not an action on a life insurance policy, but on a bond, to which the statute under examination has no application at all.[17]

Subsequent Missouri cases holding fraud essential without exception rely on the *Houston* case. One of these later decisions is *De Valpine v. New York Life Insurance Co.*[18] In the application for re-instatement, the insured stated that he was, to the best of his knowledge, in the same condition of health as when the policy was issued. Actually he had contracted and had been treated for cancer from which he later died. The instruction in the lower court was that if the repre-

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11. Houston v. Metropolitan Life Ins. Co., 232 Mo. App. 195, 97 S. W. (2d) 856 (1936); De Valpine v. New York Life Ins. Co., 105 S. W. (2d) 977 (Mo. App. 1937); Doran v. John Hancock Mutual Life Ins. Co., 116 S. W. (2d) 172 (Mo. App. 1938).
12. 232 Mo. App. 195, 97 S. W. (2d) 856 (1936).
13. 324 Mo. 938, 949, 25 S. W. (2d) 783, 787 (1930).
14. *Ibid.*
15. WILLISTON, CONTRACTS (rev. ed. 1936) § 1500.
16. WILLISTON, CONTRACTS (rev. ed. 1936) § 1501; WILLISTON, *Liability for Honest Misrepresentations* (1911) 24 HARV. L. REV. 415.
17. This statute sets up the only basis on which a misrepresentation could be used to avoid liability on the policy. Jenkins v. Cov. Mut. Life Ins. Co., 171 Mo. 375, 71 S. W. 688 (1903).
18. 105 S. W. (2d) 977 (Mo. App. 1937).

sentation was false and he actually did die of the disease as to which he misrepresented, the beneficiary could not recover regardless of whether or not he knew at the time that he had the disease. The St. Louis Court of Appeals held this instruction erroneous since "it failed to require the jury to find as a prerequisite to a verdict for the defendant—that in his application for re-instatement the insured made statements with regard to his health . . . which were false and were known by him at that time to be false, or concerned matters as to which the insured must be held to have knowledge."[19]

The later decisions holding fraud essential rely on these two cases, of which the former was not a square holding on the point and relied for its authority on a case not even in the insurance field.

Probably the result of the *Schuetzel* case is right, since in order to have any misrepresentation at all, it was necessary to have bad faith. That is true if the representation of good health means only that insofar as the applicant knows, he is in good health. In such a case, only if there is bad faith is there any misrepresentation at all. The difficulty with the case is that the language of the court is much broader than the facts warrant. There is danger that the language may be taken as authority where, according to the facts, intent does not enter into the question of whether or not there was a misrepresentation. Such a case might be one in which the applicant represented that he had not been treated by a doctor for five years when actually he had been treated for stomach ulcers but had honestly forgotten the incident. If the man died from ulcers it would seem under the better decisions that no recovery should be allowed on the policy. There is a misrepresentation even though in good faith, and it pertained to the very thing which later caused his death. Under the statute, that should be a good defense to the action on the policy. Unlike the sound health cases, the question of whether or not there was fraud has nothing to do with the question of whether or not there was a misrepresentation, and the two classes of cases should be kept separate in the mind of the court.[20]

The doctrine of misrepresentation in insurance cases should be distinguished from general principles of actions of deceit at law or rescission in equity. The representations are more than inducements to enter into the contract. They describe the risk the insurer assumes, and being concerned with matter peculiarly within the knowledge of the applicant, it is unfair to impose upon the insurer liability for loss from a pre-existing hazard it did not suppose it was carrying.

EDITH DAILEY

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19. *Id.* at 980.

20. It should be noted that the holdings which say there is no distinction between innocent and fraudulent representations do not conflict with the well-accepted rule that for a fraudulently procured life insurance policy the insurer can, before the death of the insured, bring a bill in equity to have the policy set aside for fraud. Pacific Mutual Life Ins. Co. v. Glaser, 245 Mo. 377, 150 S. W. 549, 45 L. R. A. (N. S.) 222 (1912); Kern v. Supreme Council, American Legion of Honor, 167 Mo. 471, 67 S. W. 252 (1902).

PROPERTY—EMBLEMENTS—REPLEVIN OF GROWING CROPS UPON CONVEYED LAND

Timothy v. Hicks[1]

The plaintiffs sued in replevin to recover corn from the defendant, who was a former co-tenant of the plaintiffs. At the time of the suit the corn in question was growing on land bought by the plaintiffs at a sheriff's partition sale. The defendant, who had planted and cultivated the corn, remained in possession of the land, was a party to the partition suit, received his share of the proceeds, and had not claimed any right to the corn until after the sale. The trial court granted the defendant's motion for a directed verdict and the plaintiffs appealed. *Held*: reversed and remanded. The court said, "The judgment in the partition suit and sale thereunder carried along with the land the crops growing thereon, and the plaintiffs as purchasers of the land became owners of the corn."

The question, as between vendor and vendee, of whether crops pass to a purchaser upon conveyance of the land upon which they are growing depends upon whether they are considered a part of the realty. The general rule is stated by a leading authority: "On the sale of land, or on its conveyance, either absolutely or by way of mortgage, vegetable growths thereon ordinarily pass with the land to the vendee or grantee, this being true of annual crops as well as of trees or shrubbery."[2] This rule is based upon the principle that a deed is to be construed most strongly against the grantor; and if the crop is not reserved the grantor is presumed to have intended it to pass with the land.[3] Some states draw a distinction between mature and immature crops, holding that only crops which have not ceased to draw sustenance from the soil pass.[4] The Missouri Supreme Court has held that in the absence of a manifested intent to the contrary such a conveyance carries with it all crops growing thereon without regard to their state of maturity.[5] The crops may of course be constructively severed by an express reservation in the deed, in which case they do not pass with the land upon its conveyance.[6]

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1. Timothy v. Hicks, 164 S. W. (2d) 99 (Mo. App. 1942).
2. 1 TIFFANY, REAL PROPERTY (2d ed. 1920) § 259.
3. *In re* Andersen's Estate, 83 Neb. 8, 118 N. W. 1108, 131 Am. St. Rep. 620 (1908).
4. Myers v. Steele, 98 Kan. 577, 158 Pac. 660 (1916); Tolland Co. v. First State Bank of Kennesburg, 95 Colo. 321, 35 P. (2d) 867 (1934); Hecht v. Dettman, 56 Iowa 679, 10 N. W. 241 (1881).
5. Garth v. Caldwell, 72 Mo. 622 (1880).
6. In Farris v. Hamilton, 144 Mo. App. 177, 129 S. W. 256 (1921), the court said that ordinarily crops will pass by a deed to the land but held in that particular case that the recital in the deed that it was subject to a lease, which did not expire until long after the crops then growing would have been matured, created between the parties some evidence that they in their dealings severed the crop from the land, making it personalty.

WILLISTON, SALES (2d ed. 1924) § 61: "*Fructus industriales*, being regarded as chattels for most purposes, are so treated in connection with the Statute of Frauds, and they do not constitute an interest in land, within the fourth section." See also UNIFORM SALES ACT § 72, definition of "goods," applying also to growing crops.

However, where third parties who planted and cultivated the crop are in possession of the land at the time of conveyance from vendor to purchaser, the cases are more troublesome. Even though the deed conveying the land is absolute on its face yet the growing crops thereon may or may not pass. Situations involving third parties may be divided into two major groups: (1) where at the time of the suit the intruder claims no interest in the land itself, but only in the crop growing thereon, and (2) where the intruder at the time of the suit claims an interest in the land as well as to the crops growing thereon. In the first situation, if the vendee either goes into possession of the land while the crop is still growing thereon or if he, although not in possession of the land, brings replevin for the growing crop, he is entitled to the crop. Conversely, if the vendee has not gone into possession of the land until after the crop is harvested by the third person, and also has failed to bring replevin before severance of the crop, he loses title to the crop and upon severance it vests in the intruder. Thus, in *Adams v. Leip*,[7] a suit to recover wheat claimed by the vendee, the evidence showed that the wheat was sown by the defendant on land owned by the vendor, and it was severed from the soil by the defendant. The evidence showed that between the time of the sowing and harvesting of the wheat the vendor conveyed the land to the vendee. The court said that without regard to the question of whether the third party in possession is a tenant, a licensee, or a mere trespasser, he is entitled to the crop provided he remain in possession of the land until it is harvested. The court was probably reasoning from the analogy to the accession cases, that one who cultivates the crops and by his work and labor adds most to their value should not be made to give them up.[8] The vendee can, however, recover damages from the intruder for the trespass.[9]

The case of *Stephens v. Steckdaub*[10] illustrates the situation in which the vendee obtains possession of the land before the crop is harvested. It was held that if the trespasser who planted it subsequently entered and harvested the crop, the purchaser might replevy it.[11] When the purchaser went into possession of the land while the crop was still growing, he completely divested the intruder of any interest which the latter might have possessed in the growing crop. In *Salmon v. Fewell*[12] replevin was brought by the vendee before the trespasser, who had planted and cultivated the crops growing on the land at the time of the sale, could harvest them. The court held that replevin would lie for the growing crops and that crops planted by an intruder so long as they remained on the land unsevered are the property of the owner of the land.

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7. Adams v. Leip, 71 Mo. 597 (1880). See also McAllister v. Lawler, 32 Mo. App. 91 (1888).
8. Carpenter v. Lingenfelter, 42 Neb. 728, 60 N. W. 1022, 32 L. R. A. 422 (1894).
9. Jenkins v. McCoy, 50 Mo. 348 (1872).
10. Stephens v. Steckdaub, 202 Mo. App. 392, 217 S. W. 871 (1920).
11. Accord: Oyster v. Oyster, 32 Mo. App. 270 (1888).
12. Salmon v. Fewell, 17 Mo. App. 118 (1885).

In the second major class of cases, where the third party claiming title to the crops is in possession of the land under an adverse claim to it, decision is complicated by the doctrine that replevin, being a transitory action, cannot be used to try title to realty, and it has been held that the right to possession of the crop depends upon proving ownership of the realty, replevin will not lie.[13] In *Bechler v. Bittick*[14] the plaintiff was the grantee of certain land, and the defendant, who claimed an adverse interest in the land, was the tenant of the grantor. The plaintiff obtained a writ of replevin for the growing crop planted by the defendant and harvested the crop. The court held that replevin would not lie where the tenant was in adverse possession under claim and color of title. In order for the grantee to obtain possession of the crop grown by another on land claimed adversely by him, the grantee must have first obtained the land in lawful manner, either through abandonment by the adverse claimant or by an action of ejectment, and he must have done so before title to the crop became perfected in the third party by reason of his severance of it.

In the reported case apparently title to the realty was not directly put in issue by the pleading and therefore replevin was held to lie.[15]

ALFRED J. HOFFMAN

USURY—DISTINCTION BETWEEN SALE AND LOAN

Powell v. Most Worshipful Grand Lodge Ancient Free and Accepted Masons[1]

The plaintiff and *X*, to secure a loan of $17,000 by defendant, Grand Lodge, both made separate trust deeds on their individually owned real estate. Defendant foreclosed on default and bought in the property at the foreclosure sale. Prior to foreclosure the City of St. Louis condemned plaintiff's property. On August 10, 1931, eleven days before the redemption period on plaintiff's property expired, all parties entered into a contract by the terms of which (1) all further redemption attempts were to be given up by plaintiff and *X*; (2) defendant was to get full title to the properties; (3) the condemnation proceeds were to be paid to defendant; (4) defendant was to sell *X*'s property to plaintiff for $3,125.14; (5) plaintiff was to execute a trust deed on the *X* property to secure the purchase price. The *X* property was deeded by defendant to plaintiff and plaintiff gave defendant a

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13. Gross v. Robinson, 36 Wyo. 392, 256 Pac. 80, 57 A. L. R. 578 (1927).
14. Bechler v. Bittick, 121 S. W. (2d) 188 (1938). See Yoakum v. Davis, 162 Mo. App. 253, 144 S. W. 877 (1912).
15. Timothy v. Hicks, 164 S. W. (2d) 99 (Mo. App. 1942).
SHIPMAN, COMMON LAW PLEADING (3d ed. 1923) 123: "Replevin will not lie to determine the title to land. But the fact that the question of title may incidentally arise will not necessarily defeat the action."
In Fischer v. Johnson, 139 Mo. 433, 41 S. W. 203 (1897) the court said that where in replevin for a crop, the title to it may depend on ownership of land, the title to real estate is not involved, within the meaning of Missouri Constitution Art. 6 § 12 as to deprive a court of appeals of jurisdiction.

1. 163 S. W. (2d) 1038 (Mo. 1942).

trust deed for $2600. Plaintiff later instituted an action to have the trust deed on the *X* property set aside and the property left to plaintiff without encumbrance. The plaintiff alleged duress in obtaining the trust deed and that defendant obtained usurious interest on its loan. The court held there was neither duress nor usury. The transaction of August 10 was a sale rather than a loan and therefore did not come within the purview of the Usury Statute.[2]

The Usury Statute is applicable only where the following factors are present: (1) a loan of money repayable absolutely; (2) a rate of interest upon the loan higher than the maximum allowed by the statute. Casual analysis of the case at bar might mislead one to conclude that usury was present, since at one time there had been a loan of money repayable absolutely, and furthermore, according to one set of figures, the total realized by the mortgages upon final settlement was greater than the amount of the original loan plus a legal rate of interest. Further analysis, however, proves that no usury was actually present. The key is to be found in the fact that there were really two transactions involved—(1) a loan at a proper rate of interest; (2) a separate and distinct transaction in the nature of a sale, to which usury statutes in general do not apply.

The courts hold that for a transaction to be usurious under the statute there must be a loan or forbearance.[3] The loan or forbearance must be of money.[4] A loan of chattels for a compensation measured in chattels of a similar kind is not usurious though the percentage of compensation is greater than the statutory rate of interest.[5] A loan of chattels per contract to return an amount of money greater than the value of the chattels when lent plus the statutory rate is held not usurious.[6] A loan of stocks or other securities under such a contract is held not usurious.[7] The courts hold the reason for these results to be the fluctuating value of the chattels or choses in action which may render them more or less valuable at time of repayment. The borrower may gain as well as lose on the bargain. It would seem that the policy in favor of compensating the lender for increased risks would outweigh any policy of giving the borrower whatever protection he needs. It is, of course, obvious that such transactions might easily be used to cover the intent of the parties to make a usurious loan of money. The cases therefore hold that where the property is given a fixed value by the parties and the return is to consist of property of greater value than the fixed value plus a percentage in excess of the

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2. Mo. REV. STAT. (1939) § 3226.
3. Stark v. Bauer Cooperage Co., 3 F. (2d) 214 (C. C. A. 6th, 1925); 6 WILLISTON, CONTRACTS (rev. ed. 1936) 4766-69; General Motors Acceptance Corp v. Weinrich, 218 Mo. App. 68, 262 S. W. 425 (1924); Coleman v. Cole, 158 Mo. 253, 59 S. W. 106 (1900).
4. 66 C. J. 179; Allen v. Newton, 219 Mo. App. 74, 266 S. W. 327, 329 (1924).
5. Morrison v. McKinnon, 12 Fla. 552 (1868); Allen v. Newton, 219 Mo. App. 74, 266 S. W. 327 (1924).
6. Bull v. Rice, 5 N. Y. App. 315 (1851).
7. Title Guaranty and Surety Co. v. Klein, 178 Fed. 689, 29 L. R. A. (N. S.) 620 (C. C. A. 3d, 1909); Dry Dock Bank v. American Life Insurance and Trust Co., 3 N. Y. 344 (1850).

statutory rate of interest or an equivalent monetary value, the transaction is usurious.[8] Protection of the lender, but in a slightly different way, would also seem to be the basis for holding that acceleration clauses providing for acceleration of payment date or increase of interest above the statutory rate after default are not usurious.[9]

Analogous reasoning applies where the loan is not absolutely repayable, since if the lender takes a risk of not being repaid by reason of a contingency not within his power to bring about, he is entitled to greater compensation than if he does not.[10]

On the other hand a refusal to grant an extension of a loan unless the borrower agrees to pay an amount above the legal rate is ruled usurious,[11] and upon like reasoning a mortgage or pledge securing a usurious loan is absolutely void.[12]

The clearest case of usury is, of course, the loan of money which the borrower agrees to repay later with greater than the legal rate of interest. Here one man exacts from a more needy one a price for the use of his money which the legislature deems unreasonable.[13] It therefore refuses to allow the one to utilize the other's necessity to receive a profit far out of proportion to the value of the use of the money. The hardship is unmistakable and the application of the statute clear. But the usual case is hardly so elemental. Devious techniques have been utilized to avoid the statute by attempting to conceal the true nature of the dealing. One of these occurring with much frequency is the lending of money with the deprivation of the use of a part of the principal sum upon which interest is calculated. This may be done in several ways: (1) by requiring a deposit of a certain amount of money with the lender during the period of the loan; (2) by keeping back a part of the loan during the loan; (3) by requiring the purchase of non-interest bearing certificates of deposit in a lending bank, *i.e.*, the certificates are purchased and used as security for the notes of the purchase price, the notes bearing interest but the certificates not; (4) by requiring the borrower to deposit a certain amount with the lender at stated intervals, each deposit being security

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8. Galveston and H. Inv. Co. v. Grymes, 50 S. W. 467 (Tex. Civ. App. 1899), *aff'd* 94 Tex. 609, 64 S. W. 778 (1901); Barnard v. Young, 17 Ves. 43 (Ch. 1810); Morrison v. McKinnon, *supra* note 5.

9. Taylor v. Buzard, 114 Mo. App. 622, 90 S. W. 126 (1905).

10. 6 WILLISTON, CONTRACTS (rev. ed. 1936) 4786; Hansen v. Duvall, 333 Mo. 59, 62 S. W. (2d) 732 (1933); 66 C. J. 194. Nor should it be held usurious when expenses of securing a loan or as incident to the giving of collateral security are paid by the borrower, bringing the amount paid over the principal above the statutory rate of interest. This is the rule where these expenses are *bona fide* and not a cover for part of the consideration of the loan. See Stewart v. Boone County Trust Co., 230 Mo. App. 120, 87 S. W. (2d) 223 (1935).

11. 82 A. L. R. 1189; 6 WILLISTON, CONTRACTS (rev. ed. 1936) 4779, 66 C. J. 193; Milholen v. Meyer, 161 Mo. App. 491, 143 S. W. 540 (1912); Mo. Real Estate Syndicate v. Sims, 78 S. W. 1006 (1904).

12. Leavel v. Johnson, 209 Mo. App. 197, 232 S. W. 1064 (1921); Kreibohm v. Yancey, 55 S. W. 260 (Mo. 1900); Osborn v. Payne, 111 Mo. App. 29, 85 S. W. 667 (1905).

13. MO. REV. STAT. (1939) § 3226.

for the payment of the loan but interest charged on the whole sum and not on the basis of the actual declining balance.[14] While the procedure in these cases is more complicated, that they are usurious is equally as clear. In all the lender receives for money which the borrower actually uses a profit beyond its reasonable value, if he receives as interest a per cent of the money actually lent which is above the legal rate. At this point a distinction should be made between these cases and the situation where part of the principal of the loan drawing maximum interest is required to be deposited with a third person, *e.g.*, where a trust deed provides that part of the principal shall be deposited with the trustee.[15] The distinguishing feature is that in the latter case the full amount is loaned since the lender gets no benefit from its use, it being beyond his reach, and the borrower actually has the use of the money though it is for security purposes. In the former cases the borrower never gets to use the sum held back for security purposes as it was never given to him or was taken by the lender and put to his own use. It must be kept in mind that the Usury Statutes do not deny the lender reasonable security. The policy of the statute is to protect the borrower, not handicap the lender.

Another situation frequently encountered in the cases is that in which the lender pays off indebtedness of another, as for instance a mortgage, in return for notes which equal an amount greater than the mortgage plus the legal rate of interest.[16] Upon examination it appears that this also is clearly usury since in substance the lender is making a loan at a prohibited rate.

On the other hand, there are transactions which are just as clearly not usurious —*e.g.*, the payment of a commission to a third person for procuring a loan;[17] expenses to the lender for obtaining his money for the loan for preparing security;[18] or charges for the aid to the borrower's business.[19] In these cases the borrower is paying for services rendered, the lender is giving value received for it and the sum is not part of the loan because not given in consideration therefor. As before mentioned, the statute does not aim at unduly burdening the lender. The sale of an article on credit for more than it would be sold for cash plus a rate greater than the statutory rate of interest is also not usurious.[20] Here the policy in favor of free alienation of property would seem to take precedence over the policy of giving buyers whatever protection would otherwise be thought necessary.

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14. 29 ILL. B. J. 409 (1941).
15. Jenkins v. Dugger, 95 F. (2d) 727, 119 A. L. R. 1484 (C. C. A. 6th, 1938).
16. Kreibohm v. Yancey, 55 S. W. 260 (Mo. 1900).
17. Sherwood v. Roundtree, 32 Fed. 113 (S. D. Ga. 1887); Whitworth v. Davey, 279 Mo. 672, 216 S. W. 736 (1919); lender is not entitled to charge commission, Johnson v. Grayson, 230 Mo. 380, 130 S. W. 673 (1910).
18. Hansen v. Duvall, *supra* note 10; Stewart v. Boone County Trust Co., *supra* note 10; Leavel v. Johnston, *supra* note 12; Wintergirst v. Collateral Loan Co., 60 Mo. App. 166 (1895).
19. Douglass v. Boulevard Co., 91 Conn. 601, 100 Atl. 1067 (1917).
20. Holland-O'Neal Milling Co. v. Rawlings, 217 Mo. App. 466, 268 S. W. 683 (1925); Florida Land Holding Corp. v. Burke, 238 N. Y. S. 1, 135 Misc. Rep. 341 (1929).

There are, of course, borderline cases in which it is difficult to determine whether the amount in excess of the legal rate was commission, expense or charge or really part of the consideration for the loan, concealed to avoid the statute. In such cases the jury must be called upon and rules of law are only helpful guides. The intent of the parties, the extent of the services, their value in proportion to the excess, the actual existence of such services, and whether, in case of commissions, the lender received any of them—all these considerations are important in deciding whether usury was present.

One of the harder problems in connection with usury, and the one presented by the instant case, is that of distinguishing a loan from a sale, the latter not being embraced by the statutes on usury.

Theoretically the difference between the two is clear enough. The sale requires consideration; when it occurs, title passes to another party; there is no interest payable; there are usually words of purchase. These are not characteristics of a loan. A sale is the absolute transfer of the property in a thing for a price in money. A loan has been defined as a contract by which one delivers money to another who agrees to repay it absolutely at a later date.[21] But such general distinctions are not always adequate guides in deciding close cases. Probably this is necessarily so because in close cases the difficulty may be as to a question of fact. Which of the two a given transaction is depends upon its provisions of agreement and the circumstances under which it took place.

In the case of *Quinn v. Van Raalte*,[22] the plaintiff had a contract for the purchase of land. While this contract was in force the Excelsior Realty Company, pursuant to an agreement between said company and plaintiff's husband, who was acting as her agent, paid the owner of the land $40,000 on the purchase-price of the land ($140,000 was the full purchase price). Title to the land was transferred to an agent of the Realty Company, who on the same day transferred it to plaintiff and received plaintiff's note for $60,000 with 6% interest. The agent then endorsed the note without recourse to the Realty Company, thus completing his duties as intermediary between the parties. Defendant then purchased the note from the Realty Company with knowledge of the aforesaid transactions. Plaintiff paid the $60,000 with interest and sued to recover usurious interest. The jury found for the plaintiff and the upper court found sufficient evidence to support that finding. The agent of the Realty Company was merely a conduit through which the purchase by plaintiff from the seller, partly with the use of the Realty Company's money, was affected. Since the defendant purchased the note knowing this, he was liable for the usurious interest paid.[23]

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21. Union Securities, Inc. v. Merchants' Trust and Savings Co., 205 Ind. 127, 183 N. E. 150, 95 A. L. R. 1189 (1933).

22. 276 Mo. 71, 205 S. W. 59 (1918).

23. In many jurisdictions only the amount above the usurious rate may be recovered and there can be no recovery until this is actually paid by the borrower. Lawler v. Vette, 166 Mo. App. 342, 149 S. W. 43 (1912); 66 C. J. 284, § 264.

In *White v. Anderson*,[24] the plaintiff sued to foreclose a chattel mortgage which secured two notes of the defendant, each for $10.50. The notes were given for the purchase by defendant from plaintiff of two coupon books, each worth $10 in trade at certain retail stores of the town in which plaintiff and defendant resided. The defendant had taken these coupons and purchased $20 worth of goods at a clothing store. The plaintiff at certain times took up the coupons from the merchants at a discount of 10% of their face value. It was contended that this was a sale of credit by the plaintiff and therefore the return which the lender received through the 5% obtained from the defendant plus the 10% obtained by discount when the coupons were taken from the merchants did not constitute usury. The lower court, sitting without a jury, held that this was a usurious loan and not a mere sale of credit where one person charges for becoming surety or indorsee on a note, because (1) the defendant did not owe the merchant any money as a maker of a note does, though he has a surety; (2) the plaintiff advanced money to the defendant, whereas a guarantor or indorser does not advance money to or for the party guaranteed or indorsed; (3) the plaintiff, in giving the coupons, was in fact giving defendant money to pay for the goods. The upper court affirmed the finding of the trial court. The court arrived at the conclusion that this was a loan by a process of ruling out other relationships which, it may be argued, the transaction on its face resembled.

The determination of the court that this transaction was a loan would seem to be sound. That it is a usurious loan is, however, questionable. It would not seem that a 5% loan falls within the purview of the Usury Statute unless the borrower is compelled in some way to pay an amount more than the statutory rate. Thus if, by agreement between the plaintiff and the merchant, the holders of the coupon books were not to get full face-value when they used the books, as for instance if the merchant gave $9.50 value for a $10 book or if the price of an article to a coupon purchaser was raised, usury might then be said to exist. But in this case the court expressly states that it was admitted that the price charged defendant by the merchant was the proper retail price.[25]

In *Union Securities, Inc. v. Merchants' Trust and Savings Co.*[26] the defendant assigned to Union Securities Company certain of defendant's accounts receivable. The assignment was made under an agreement whereby Union Securities should advance 88% of the face value of the accounts assigned, pay over an additional 10% when the accounts were paid, and keep 2% as its profit. The agreement further provided that the assignor, defendant, should collect the accounts, should after thirty days become surety for their payment, and should pay 2% a month to the

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24. 164 Mo. App. 132, 147 S. W. 1122 (1912).

25. The mere fact that a lender gets back more money than the amount he lent plus the statutory rate of interest should not necessarily render the loan usurious; *e.g.*, if the surplus is in the form of a gratuity, or the result of other non-enforceable obligation. See McArthur v. Schenck, 31 Wis. 673, 11 Am. Rep. 643 (1873).

26. 205 Ind. 127, 185 N. E. 150, 95 A. L. R. 1189 (1933).

assignee on accounts due but not remitted to assignee. Under this arrangement the total interest and discounts paid to Union Securities Company was $729.29. The total interest at the allowed rate was much less than this.

The case illustrates a class of cases which give great trouble. They are those in which the courts are called upon to determine whether the transaction is a sale of accounts receivable or other chose in action or merely a loan with an assignment of the choses in action as collateral security. The lower court in the *Union Securities* case found the evidence sufficient to establish that the transaction was a loan, since if it had been a *bona fide* sale the vendor's duty would be at an end when title passed and the seller would not, as in the *Union Securities* case, be obliged to make collections, guarantee payments or pay 2% a month in interest on all accounts due which were not paid over to the buyer. The upper court affirmed this finding. It is interesting to observe in this case that the parties purported to make a sale and used words conveying this meaning in their contract. The court said the transaction would be determined on the basis of reality without regard to the terms the parties applied to it.[27]

The three last mentioned cases reveal the difficulty of applying general rules to sale-loan questions. In the *Quinn* case the purpose of the proceedings are rather easily perceived, in *White v. Anderson* this is less true, and the last case is characteristic of a large group in which it often becomes virtually impossible to do so. They all, however, illustrate what is most important in every attempt at distinction; *viz.*, the outer screen must be looked through and the true character of the whole proceeding determined by the intent manifest, the circumstances surrounding, and a comparison of characteristics encountered with those of other legal concepts to which the situation seems to be akin.[28]

The case at bar seems to have been properly decided. It would seem to have involved a *bona fide* sale of an equity of redemption. It was incidental that the mortgagee ultimately received more value than the value of the money lent plus the statutory rate of interest.

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27. Compare Union Securities, Inc. v. Merchants' Trust and Savings Co., *supra* note 21, with Osborne v. Fridrich, 134 Mo. App. 449, 114 S. W. 1045 (1908).

28. Osborn v. Payne, *supra* note 12.