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Comments

AGENCY—ABANDONMENT AND RE-ENTRY

In the case of Pesot v. Yanda, the alleged servant, Yanda, habitually used an automobile in his duty of collecting insurance premiums for his employer. On the morning in question, prior to reporting for work at his employer's office, he first took his wife in the opposite direction to her place of employment.

1. 344 Mo. 338, 126 S. W. (2d) 240 (1939).
The court held that he had, in so doing, completely departed from his duty and had not resumed it when the accident occurred, although at that time the servant had left his wife and was proceeding directly toward the office. The court stated that a servant who had abandoned his employment did not re-enter that employment again until he had reached the point from which his departure took place, or a corresponding place, some place where in the performance of his duty he should be. In so deciding, the court necessarily decided that the servant's deviation of thirteen or fourteen blocks in order to take his wife to work was an abandonment of his employment.

For the legal historian there are few subjects more interesting and few more controversial than the liability of a master for the torts of his servant. The doctrine of respondeat superior has passed through many stages—from the time the master was liable for all of the acts of his servant, through the period when he was liable only for those he had commanded, to the present, when, according to current formula, he is liable only for those committed by the servant “within the scope of his employment.” Not all of his acts, even at the place and during the period of his employment, are within the “scope” of the employment. In other words, the word “scope” is a word expressive of the result of liability or non-liability. It is a conclusion, not a reason. If the servant takes a side trip of unusual proportions he may be said to be on a “frolic of his own” outside his “scope” of employment—whereas if he merely goes a roundabout way in order to stop by his mother’s home to deliver some sugar bought at a near-by sale, the conclusion reached may be that he is on a mere “detour” and within the scope of his employment.

Obviously the language fails to help us. Why is the one trip a frolic of his own and the other a mere detour? In order to establish this differentiation it is necessary to consider the reasons behind the so-called “rule” of respondeat superior.

Various reasons have been advanced for the development of the vicarious liability doctrine. Holmes contended that it was an outgrowth of the early family law, and that a fiction of identity (that within the scope of the agency master and servant are one) was built as a consequence of the early decisions, which fiction persists today. Other bases for the doctrine have been advanced, among which are the following: control, profit, revenge, carefulness and choice, identification, evidence, indulgence, danger, and satisfaction. A social and

3. The classic phrase is that of Parke, B., in Joel v. Morison, 6 C. & P. 501 (1834).
economic justification has also been suggested, namely, that it would seem to be socially expedient to spread among a large group of the community those losses which experience has taught are a necessary incident to every business. When such loss is thrown on the employer, he can, by means of insurance and increased prices, spread the loss through the community far better than can the employee. Or expressed in another way: “When (the master) bears the burden of (his servant’s) torts, even when he is himself without fault, it is because in a social distribution of profit and loss, the balance of least disturbance seems thereby best to be obtained.” Nor must it be overlooked that it is probably more than a mere coincidence that the master is usually better able to pay the injured plaintiff than the tort feasor himself, the servant.

Some analogy may be drawn between workmen's compensation and the doctrine of respondeat superior. Both, it has been said, were a modern reaction against mid-Victorian individualism. In both liability without “fault” is assessed against the employer. As a matter of fact, the doctrine of respondeat superior is occasionally attacked upon this latter ground that it does in fact impose liability without fault. Yet the force of this argument is greatly weakened by the many instances in which liability without fault is assessed in modern law, to say nothing of the inherent vagueness in the term “fault” as so used. The analogy, if such there is, lies in the fact that the various workmen's compensation acts and the modern doctrine of the master's liability for the uncommanded acts of his servant both recognize the fact that the conduct of business today imposes risks upon the public and the workmen themselves which the industry itself should assume as an incident of the business.

The current formula is, then, that the master is liable for the tortious acts of his servant who is acting in the scope of his employment. Being within such scope, what acts take the servant without the scope of his employment? What further acts are necessary to effectuate a re-entry into that employment? It is the purpose of this note to make a suggestion as to a possible answer to these questions.

The tests used to define the line of demarcation between acts within the scope of employment and those without have been varied. One much-used test deals with the motive of the servant. It is said that though he may be engaged on an errand of his own, constituting some slight departure from the ordered route at the time of the accident, if his motive is to carry out his master's business, the master will be liable for his negligent conduct. But thus phrased, the test leaves open the question as to the degree of motive necessary, for the

7. Smith, Frolic and Detour (1923) 23 Col. L. Rev. 444.
9. Ibid.
10. Isaacs, Fault and Liability (1918) 31 Harv. L. Rev. 954, 960 (mistakes as to title are no excuse; in accident cases the doctrine res ipso loquitur is significant. Statutes creating presumptions of negligence may be indicative of the public feeling as to the necessity of fault. Thus note the statutes relating to railroad fires.)
mixed motives which activate human conduct are seldom susceptible of complete isolation or exact measurement. On the one hand it is apparent the master is not liable in all cases where the servant is engaged to do certain designated work and voluntarily performs a different type. The servant must be doing a kind of act he was employed to perform. Yet, on the other, it is not essential that the servant be solely motivated to further his master's interests. He may be effectuating his own desires as well as those of his master and still be within the scope of his employment.

We might tentatively take the position that a predominant motive to serve the master is sufficient for the master's liability. However, even this view must be somewhat modified. Assume that a servant, in the capacity of a chauffeur, is proceeding along the exact route his master ordered him to follow. Desiring to determine the maximum speed the car will attain, he opens the throttle. Without a doubt his primary motive is to ascertain this speed, but it cannot be doubted that in such case a master would be responsible should such servant negligently injure the plaintiff in the course of his experiment. It matters not that the chauffeur disobeyed his employer's instructions by speeding.

Or suppose the servant's duties require him to proceed along Broadway from $A$ to $B$. He picks up a lady friend and offers to take her to her home. This new journey would necessitate some deviation from his direct route. But prior to reaching the point at which deviation would commence, an accident occurs. The master has been held liable. A predominant intention to serve his own purpose in preference to his master's is clearly not enough to free the master. The same is true where a chauffeur is on some frolic of his own, but later turns back with the intention of returning to the fold of his master's employ. His employer is not immediately liable for accidents at that time simply because of the subjective determination to return, which primarily motivates the servant at that time.

Similarly if the chauffeur is ordered to make a specified trip for his master from $A$ to $B$ and he detours slightly, for some purpose of his own, at right angles to the most direct route, numerous courts have considered him still within the scope of his employment. But if he starts off in the opposite direction from the ordered route, one court at least has held such journey not to be within the scope of his employment, although his motivation in this case would seem to include as much of an ultimate desire to serve his master as in the right-angled

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detour case. Apparently there is no well-defined test of liability based on motivation. It is inherently subject to such variation and change that it seems of little utility as a peg upon which to hang the cap of a master's responsibility. True, the motivation of the servant to serve his employer is of some value, for without a certain element of such motivation the master is not normally held liable for his employee's acts. But the cases cited amply show that motivation alone cannot solve the problem of the scope of the servant's employ.

We have up to this point confined our attention solely to the servant's motive. It is of interest to note that upon a partial motivation test the master in the principal case might well have been held liable. In taking his wife to work on his way to entering upon his official duties, it seems clear that the servant was motivated in part, at least, by a desire to serve his master. Other considerations may, however, be involved. The area within which the servant was supposed to act is doubtless of significance. In fact, another test for grounding liability on a master for an act of his deviating servant has been termed "the area of probable deviation" test. This attempt recognizes that there exists an area beyond and around the place within which the strict terms of the employment require the servant to move, in which area common experience shows he will probably deviate. Wandering within this area, it is said, constitutes a risk properly belonging to the business, and injury to a member of the public by the servant within this area should be borne as a cost of the business. Somewhat analogous is the suggested "motivation-deviation" test, in which two essential factors are considered: (1) satisfactory evidence that the employee in doing the act, in the doing of which the tort was committed, was motivated in part at least by a desire to serve his employer, and (2) satisfactory evidence that the act, in the doing of which the tort was committed, was not an extreme deviation from the normal conduct of such employees.

The difference between the two is sharply focused in the case where the servant has begun a lengthy unforeseeable trip for his own purposes, a "frolic of his own," the accident occurring, however, before he leaves the so-called area of probable deviation. Under the motivation-deviation test, no liability would presumably be assessed against the master, in view of the extremity of the deviation begun, but under the zone-of-risk test the employee is still within the zone of probable deviation, and it would seem that the employer should be held responsible. Had the employee gotten without this zone, liability would have been denied under either test.

20. It has been suggested that liability should be founded on the probability of the servant so deviating, regardless of the direction that the detour might take, and the servant's motive would be instrumental in determining whether it was probable that he would do what he did. (Smith, Frolic and Detour (1923) 23 COR. L. REV. 716, 726.) This would be applicable, even though the employee had driven past point B, the authorized destination, and was proceeding on some mission of his own (Duffy v. Hickey, 151 La. 274, 91 So. 733 (1922)).


22. Tiffany, Agency (Powell's ed. 1924) 106.

Some influence that finds but vague recognition in the "tests" employed is evidently here at work. Possibly it may be isolated through an analysis based on the social factors involved. When society grants an individual the right to engage in business, it seems reasonable to say that it makes certain demands upon him in return. Among them may be the responsibility for the injuries resulting from his servant's negligence in the conduct of this business. In assessing this liability, the courts should not restrict themselves to acts commanded by the master. Nor should they merely be guided by the probability of the servant doing the act. Rather they should look at the normal risks one should expect as a result of entering such a business. This risk load naturally includes both authorized and certain unauthorized acts. Those of the latter category are determined by what has gone on in the past in similar business enterprises, as well as other acts which can be reasonably anticipated. The field of the employer's liability for the servant's unauthorized deviation should not be bounded by mechanical fences of time, space, or distance. These tests entirely disregard the crux of the whole matter—that injuries of the type in question are the inevitable result of carrying on the business enterprise in the manner employed. The fact that most employees are financially unable to furnish adequate recompense for their own torts is generally accepted today. Thus the issue boils down to whether the party hiring the negligent servant or the injured third party must bear this loss. If the negligent act is of a class of risks that can be said to be within the normal scope of the employer's business, then that employer, it is submitted, should pay. One entering upon a business venture must accept burdens as well as benefits. Against his possible profits, the master should offset the normal and reasonable risks of such a type of business. These risks are varying, each business presents its own distinct problem, and only by such an analysis for the particular business involved can the correct limits of the master's liability be ascertained.

Assuming the servant has gotten beyond the bounds of his employment, he may later decide and attempt to re-enter that employ. This presents the problem of return. When is he again within the scope of his employment? Certain English cases have adopted the view that the employee does not re-enter his master's employ until he has returned to the place from whence he departed.24 American courts are at variance as to the point at which re-entry takes place. One line of cases is in accord with the English decisions. Under this view it is imperative that the servant return to his place of departure before a re-entry occurs.25 The theory behind this view is based on the idea the journey back is

25. Colwell v. Aetna Bottle & Stopper Co., 33 R. I. 531, 82 Atl. 388 (1912), dissenting opinion in Barmore v. Vicksburg S. & P. Ry., 85 Miss. 426, 38 So. 210, 216 (1905). The rule was expressed in Humphrey v. Hogan, 104 S. W. (2d) 767, 769 (Mo. 1937). Quoting from 5 BLASHFIELD, CYC. OF AUTOMOBILE LAW & PRACTICE (Permanent ed. 1934) 212: "The majority rule, and probably the better view, is that the relation of master and servant is not restored until he has returned to the place where the deviation occurred or to a corresponding place, some place where, in the performance of his duty, he should be."
as much of an independent mission as the journey out. His duty to return results from the out-bound trip. Consequently no termination of this frolic occurs until the point of departure is re-attained. Yet it is clear that this test will not fit all cases, for the servant may return to his commanded business by some other route.

At the opposite extreme, other cases hold the servant has re-entered the scope of his employment when he begins his return trip. Underlying this determinant of liability seems to be the idea of motive. On his return trip the servant is predominantly motivated by his master’s business—by a desire to return the vehicle to such business and to once more take up his duties as a servant. Regardless of his motive, however, he may still be far from his post of duty and the English and the first mentioned American views apparently subordinate this element of motive to the still-existing element of remoteness to the normal area of duty.

There is another possible view which may be taken. While not contending that the exact point of departure must be returned to, some courts have held that the master’s liability re-attaches when the servant reaches some point where, in the performance of his duties, he should be. This view was well expressed in the words of the court in Dockweiler v. American Piano Co., as follows: “Where there has been a temporary abandonment, I think the servant cannot ordinarily be said to have returned to his master’s service until he has, compatible with his regular or lawful duties, or (sic), at least, reached a point in a zone within which his labors would have been consistent with an act of deviation merely had the original act been such in its other circumstances to have been one of deviation and not one of temporary abandonment.” There is much to be said for this view. It recognizes that both motivation and geographical location are involved in a servant’s “scope” of employment, and, it would seem, the element of time also.

None of the aforementioned tests appear to satisfactorily answer the question of re-entry, involving, as it does, the whole complex question of the scope of a servant’s employment. It is clear that mere motivation to return should not bind the master and it is equally clear that he should not be relieved of responsibility.

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26. See authorities cited in (1922) 22 Col. L. Rev. 573, 574.
27. Heelan v. Guggenheim, 210 Ill. App. 1 (1918); Frisch v. Lorber, 95 Misc. 574, 159 N. Y. Supp. 722 (1916) (even if servant deviates slightly on route back to rejoin his master’s employ, the master is still liable from the time he starts back to rejoin his employ.) McKiernan v. Lehmaier, 85 Conn. 111, 81 Atl. 969 (1911).
30. For a case in which time was construed to be the distinguishing feature between frolic and detour, see Canon v. Goodyear Tire & Rubber Co., 208 Pac. 519 (Utah, 1922). Although the servant was spatially within the scope of his employment, the fact that he had spent some few hours for a purpose of his own constituted a frolic, and the court held he had not at the time of the accident re-entered his master’s employment.
until he returns to the exact point of departure. The compromise view presents obvious advantages, but any test so broad as to include within the determining factors such elements as motive, location, and time, comes close to merely stating the proposition that all of the attendant facts and circumstances must be considered. While this is undoubtedly true in this situation, it is true in any situation. It is no "test."

The fact is, it is submitted, that no formula, be it of time, space, or motive, is of substantial value in determining scope of employment or re-entry thereinto. The problem is one of normal business burdens, and should be frankly recognized as such. The court, in the instant case of Pesot v. Yanda has, it is felt, mechanically followed a spatial test in holding the servant to be without the scope of his employment principally because he was "thirteen or fourteen blocks away from the place where his duty to his master called him." The decision might well be compared with that of Kohlman v. Hyland, a case in which an added private jaunt of the servant's took him about thirty-five miles out of his way on a trip approximately one hundred miles in extent. In reversing a dismissal of the plaintiff's case by the trial court, the upper court said, in part: "There is an ever-present probability that third persons will suffer injury because somebody's servant is careless, disobedient, or unfaithful to his master. This is a real, not an imaginary risk, to which bear abundant witness the development of the doctrine of respondeat superior and the myriad cases where courts have been lost in the metaphysical refinement in definition between frolic and detour. This latter risk to the public is one which industry, or the analogy of the Compensation Acts, may well be required to carry, within reasonable bounds."

WILLIAM AULL, III

INSURANCE—THE MISSOURI MISREPRESENTATION STATUTE

Few statutes have received as much interpretation and construction by the Missouri courts as the "misrepresentation" section, providing:

"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 misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case shall be a question for the jury."

The Missouri court has not infrequently pointed out the purpose and nature of this enactment in these terms:

"... said section was enacted to prevent insurance companies from preparing a policy ... offering attractive features of indemnity, but,

31. 54 N. D. 710, 210 N. W. 643 (1926).
by questions to which answers were required having little or nothing to do with the liability involved, arranging it so that upon the slightest in-
correctness or deviation from the true facts by the insured in his answers thereto, a situation was created whereby indemnity could be successfully withheld regardless of whether the error or misrepresentation had anything to do with the event which matured the policy. That being the evil aimed at, of course, the courts have very properly set their faces like flint against any scheme or device to avoid coming within its purview, or to escape the effect of its provisions."

The court has not lost sight of this purpose, and seeks to upset any subterfuge or device designed to afford an escape from the provisions of the statute. Mis-
representation is not abrogated as a defense to an action on the policy, but its availability is immeasurably curtailed.

The statute is not specifically directed to matters of pleading, and thus has affected only incidentally the common law rules of pleading the defense of mis-
representation. Such defense is still affirmative in nature. The plaintiff estab-
lishes his prima facie case by evidence of the existence of the policy and the death of insured. The defendant insurer must plead that the matter misrepresented was material, and that it contributed to the contingency or event upon which the policy is payable. The insurer must allege that it would not have issued the policy had it known the true facts (although such allegation need not be shown by direct proof). The defendant has the burden of proof on each of the elements of the defense, and must show that the misrepresentation was of a type which would avoid the policy in view of the statute. Since the insurer chose the language used in the policy and application, therefore, any ambiguity found therein will be construed liberally in favor of the insured.


5. As a test of materiality—would it have affected the company's decision as to taking the risk, or the rate of the premium, or in estimating the degree or character of the risk? Chambers v. Metropolitan Life Ins. Co., 138 S. W. (2d) 29 (Mo. App. 1940).


9. Brown v. Railway Passenger Assur. Co., 45 Mo. 221, 226 (1870);
A preponderance of the cases construing the misrepresenting statute are found to be concerned with particular words or phrases used, thus furnishing a convenient segregation for purposes of discussion. The opening words “No misrepresentation” have provided a variety of questions for decision by the Missouri courts. The reports are replete with cases reiterating that the section applies with equal force and effect to warranties and misrepresentations, removing the availability of the doctrine of warranty as a device of the insurer to require literal and precise truth of statements expressly made warranties in the contract of insurance, no matter how immaterial they might be to the risk involved, and regardless of whether their breach resulted in prejudice or detriment to the insurer. The cases still contain the word “warranty,” but today the misrepresentation section has resulted in a change in its meaning. Today it designates a phrase incorporated in the insurance contract, appearing the same as the common law warranty, but, by virtue of the statute, resulting in different consequences—i.e., an imposition of the additional requirement that its breach result in or contribute to the contingency maturing the policy, before its common law consequences are available to the insurer.

Missouri courts have frequently said that the misrepresentation section is applicable “alike to warranties and misrepresentations, and draws no distinction between innocent and fraudulent misrepresentations.” Nevertheless, cases can be found which hold that “fraud” (which the court interprets to mean “known falsity”) must be shown to avoid the policy, in addition to the requirement that it contribute to the loss. As late as 1935, when Kirk v. Metropolitan Life Insurance Co. was decided, the Supreme Bench held that no distinction was to be drawn between innocent and fraudulent misrepresentations, a rule which was said to be true especially in cases involving “sound health” clauses, citing the


1. Jenkins v. Covenant Mut. Life Ins. Co., 171 Mo. 375, 71 S. W. 688 (1903): “This doctrine of warranties, in the extent to which it had grown and was applied, was something peculiar to insurance companies, and was therefore thought the subject of special legislation, in a law which properly undertook to affect insurance companies alone in that particular. By a long and hurtful practice of a given policy peculiarly their own, insurance companies had stamped themselves as a class, to which alone legislation might properly address itself, in that regard.”—Quoting from Schuermann v. Union Central Life Ins. Co., 165 Mo. 641, 65 S. W. 723 (1901); Keller v. Home Life Ins. Co., 198 Mo. 440, 95 S. W. 903 (1906); Doit v. Prudential Ins. Co., 186 Mo. App. 168, 171 S. W. 655 (1914); Bruck v. John Hancock Mut. Life Ins. Co., 194 Mo. App. 529, 186 S. W. 752 (1916); Yancey v. Central Mut. Ins. Ass’n, 77 S. W. (2d) 149 (Mo. App. 1934).


earlier case of Kern v. Supreme Council. The language used in the Kirk case seems to overrule any contrary cases, but in the next year, the St. Louis Court of Appeals, in Houston v. Metropolitan Life Insurance Co., imposed a definite qualification to the blanket statement of the supreme court, and drew a marked distinction between misrepresentations and warranties as regards innocence and fraud by saying:

"The rule in this State ... is that where material representations made ... are warranted to be true ... the representations, if in fact untrue, will avoid the policy, though the representations were innocently made. This is so because such is the contract. The insurer is entitled to stand on the contract as written, and the innocence of the insured in making the representations is a matter of no concern. But where there is no such warranty or provision in the policy a misrepresentation in order to avoid the policy must have been fraudulently made. This is the rule applicable to contracts generally, and we see no reason why an exception should be made with respect to insurance contracts." (Italics mine)

Thus, if the matter misrepresented is not expressly made a warranty or a defense to the policy, the insurer must prove; first, that it was fraudulently made; and, second, that it contributed to the loss, in order to avoid liability successfully. The Houston case distinguishes the Kirk case on the ground that the latter involved a sound health clause providing that the policy was not to become effective unless the policy was delivered while the insured was in sound health. This distinction between misrepresentations and warranties with its attendant result of requiring knowledge or not, as the case might be, has been accorded consistent recognition in a series of appeals cases. In Schriedel v. John Hancock Life Insurance Co., the company was released without showing fraud, where there was a sound health clause. There again, however, the denial of a distinction between an innocent and fraudulent misrepresentation is asserted. To the same effect is Woodson v. John Hancock Life Insurance Co., DeValpine v. New York Life Insurance Co., maintains in no uncertain terms that there exists a difference between misrepresentations and warranties in this respect, quoting with approval the Houston case, and holding that since the statements there involved were expressly made representations and not warranties, the insurer must prove known falsity. No sound health clause is to be found in that case, and the Kirk case was expressly distinguished. Other appeals cases have since made the same distinction, although some tenability could be given a contrary view, in line with the dictum of the Kirk case. The federal circuit court of appeals has held otherwise in construing this statute, requiring known falsity in any case,

16. 167 Mo. 471, 67 S. W. 252 (1902).
18. 133 S. W. (2d) 1103 (Mo. App. 1939).
19. 84 S. W. (2d) 390 (Mo. App. 1935).
though recognizing all the while that the matter is one of general concern so that Missouri's construction is not necessarily controlling in federal courts.\textsuperscript{22}

Life policies commonly provide that should the age of the insured be misstated, the amount payable under the policy shall be the amount of insurance the actual premium paid would have purchased at the rate for insured's correct age. Resolving the former conflict, and specifically overruling a series of cases from our appeals courts, the supreme court, in \textit{Langan v. United States Life Insurance Co.},\textsuperscript{23} held such age adjustment clauses not prohibited by the misrepresentation section, deeming the Missouri "non-discrimination" statute\textsuperscript{24} to compel the result, saying:

"If a person obtains insurance by stating a given age, nothing further being said on the subject in the policy, then, under the statute, it may be that the company can not question the correctness of the age stated. But is there anything in the statute which prevents a person from obtaining insurance at a stated age, qualified by a provision in the contract for adjustment according to correct age? We do not so read the statute. Nor do we know of any dictate of public policy to prevent such an age adjustment clause."

Nevertheless, misrepresentations of age are within the purview of the statute and will avoid the policy, if they are found to contribute to the maturing event.\textsuperscript{25}

The typical case in which the statute is held to apply, and in which it is frequently possible for a misstatement to contribute to the event of maturity, involves a misrepresentation as to the condition of insured's health. The "sound health" warranty clauses are held to be within the purview of the section, so that although the company can stipulate that the policy is not to become valid unless it is delivered while the insured is in sound health, the policy will not be avoided unless the unsound condition contributed to the maturing contingency.\textsuperscript{26}

\textsuperscript{22} Security Life Ins. Co. v. Brimmer, 36 F. (2d) 176 (C. C. A. 8th, 1929), cert. denied, 50 Sup. Ct. 350. Quaere: Has this been altered by \textit{Erie Railroad v. Tompkins}?

\textsuperscript{23} 130 S. W. (2d) 479, 483 (Mo. 1939).

\textsuperscript{24} Mo. Rev. Stat. (1939) § 5840, providing: "No life insurance company shall make or permit any distinction or discrimination in favor of individuals between insurants (the insured) of the same class and equal expectations of life in the amount or payment or premiums or rates charged for policies. . . . ."


\textsuperscript{26} Benson v. Metropolitan Life Ins. Co., 144 S. W. 122 (Mo. 1912); Cascarella v. Metropolitan Life Ins. Co., 175 Mo. App. 130, 157 S. W. 873 (1913); Hicks v. Metropolitan Life Ins. Co., 196 Mo. App. 162, 190 S. W. 661 (1916); Ryan v. Metropolitan Life Ins. Co., 30 S. W. (2d) 190 (Mo. App. 1930); Sappington v. Central Mut. Life Ins. Ass'n, 229 Mo. App. 222, 77 S. W. (2d) 140 (1934); Fields v. Metropolitan Life Ins. Co., 119 S. W. (2d) 463 (Mo. App. 1938). \textit{Contra}: Prince v. Metropolitan Life Ins. Co., 129 S. W. (2d) 5 (Mo. App. 1939), where the St. Louis Court of Appeals held that the sound health clause can be a basis for suit to cancel before death, and until then the insurer has the option to declare the policy void. But thereafter liability of the insurer is limited to a return of the premiums paid, if the insured was not in sound health but was instead suffering from a disease or condition contributing to death.
The statute does not operate to prevent the insurer from refusing to cover a designated class of persons, or a particular risk, termed an "exception." The insurance coverage is considered as never extending to the person of the class, or of the risk, excepted. Similarly, the section does not preclude the insurer from denying that the one signing the contract, or the one actually examined, was not the one insured, so that no contract in fact was ever made with the insured.

The statute speaks of misrepresentations made "in obtaining or securing a policy," and in interpreting this the courts have held that the misrepresentations must have been made before the issuance of the policy, and for the purpose of obtaining it. The matters misrepresented must be presently existing, as distinguished from those to transpire in the future, so that the section does not apply to the so-called "promissory warranty." The phrase "policy of insurance on the life or lives, etc." has been given just that construction, the courts holding that it has no application to other types of insurance such as burglary policies, or fidelity bonds. It obviously cannot apply to any type of property insurance. The section has been held to apply to accident and health clauses in life policies, since there is no rational explanation why it should be applicable where death results, and inapplicable where it does not. Not only does the section prevent denial of liability in the original policy, but should the policy lapse for nonpayment of premiums, and subsequently become reinstated, the same limitations are imposed on the insurer as to defenses of misrepresentations made in the application for reinstatement, even though the application contains a stipulation to the contrary.

27. Carter v. Metropolitan Life Ins. Co., 275 Mo. 84, 204 S. W. 399 (1918), holding that where the physical examination was not taken by the insured but by one impersonating him, no real agreement had ever been entered into by the parties, because the party contracting for insurance did not submit to an examination and, therefore, the statute was held inapplicable. In Johnson v. Central Mut. Ins. Ass'n, 143 S. W. (2d) 257 (Mo. 1940), the age limitation of an assessment company held an excepted risk. Reed v. Travelers Ins. Co., 227 Mo. App. 1155, 60 S. W. (2d) 59 (1933) (excepted all crippled persons from an accident policy).
30. Mathews v. Modern Woodmen of America, 236 Mo. 326, 139 S. W. 151 (1911).
35. No cases are to be found in which the policy has features of accident and health alone, without a sum to be paid upon death also.
While the misrepresentation section was formerly construed to apply only to "old line" policies, it is now held to apply to assessment policies as well. By virtue of Section 6108, Missouri Revised Statutes, 1939, a fraternal beneficiary association is exempt from the general insurance laws of this state, including the misrepresentation section, whether the company in question be a domestic or foreign corporation. Here, however, the form of the policy, and not the nature of the company, will be examined to resolve the question, so that if a fraternal beneficiary association be found to have issued an "old line" policy, the statute will be held applicable.

"No misrepresentation . . . shall be deemed material . . . unless the matter misrepresented shall have actually contributed to the contingency or event upon which the policy is to become due and payable." To all intents and purposes, materiality of misrepresentations in avoiding liability on life policies, since the enactment of the misrepresentation section, has been of little moment. Materiality has been found only where the matter misrepresented did contribute, and hence the two appear to have a synonymous connotation to the court. The meat of the section lies in this contributing requirement, and its enactment has removed as a source of avoiding liability many particular misrepresentations which by their very nature can seldom, if ever, contribute to the maturing event. Typical examples are found in cases of misrepresentations of age, of other insurance carried, that the beneficiary was the insured's wife, and of former accidents.
medical examination. Although in the ordinary case, misrepresentations of temperance would be difficult to prove to have contributed to the event, they are within the purview of the section.

In any case, the statute provides that whether the matter misrepresented did contribute to the event is a question for the jury, and the court has jealously enforced the requirement. It is said that:

". . . whether or not it is true that the matter misrepresented caused or contributed to the death of the insured, is a question of fact for the jury unless it be foreclosed by an admission of the plaintiff wholly unexplained or uncontradicted by other evidence."

A unique application of the jury provision is found in the cases where the insurer seeks cancellation of the policy. The section does not prevent the insurer's suit to cancel in every case. If the right of cancellation were available before the passage of the act, it is retained under the act, except where the suit is commenced by the beneficiary after the event which matures the policy. The courts have reasoned that after the event, the rights became fixed and absolute, and the statutory right of trial by jury prevents cancellation, so that the insurer may not pray for such relief in a cross-bill, attempting to convert the action into one essential equitable. It is only under exceptional circumstances that the insurer has the right to sue for cancellation after the insured's death, and such circumstances have been recognized only where an incontestable clause in the policy would remove a defense of misrepresentation, and where the beneficiary plaintiff delays in instituting suit upon the policy, with a view to the barring of the defense under the clause by the lapse of time. There if

suit to cancel is not allowed, the insurer's legitimate defense of misrepresentation is extinguished by the deliberate forbearance from suit by the plaintiff.

EDW. E. MANSUR

PRACTICE—DOMICILE AS A BASIS OF JURISDICTION—SERVICE REQUIRED IN ACTIONS IN PERSONAM

Under the full faith and credit clause of the Federal Constitution and under the statute passed by Congress in pursuance thereof, each state is required to give to state judgments "such faith and credit . . . as they have by law or usage in the courts of the State from which they are taken." But the rendition of a personal judgment by a court of a state, against a person over whom the state has no jurisdiction, is invalid even in the state in which it is rendered, as an infringement of the "due process of law" provision of the Fourteenth Amendment to the Federal Constitution. Such a judgment is not protected by the full faith and credit provision and will be treated as void in other states. Since the question of jurisdiction over the person is a federal question, the decisions of the Supreme Court of the United States are binding upon the states.

A state cannot render a valid personal judgment against a person unless, (1) he is subject to the jurisdiction of the state, and (2) a method of notification is employed which is reasonably calculated to give him knowledge of the action and an opportunity to defend. Both of these requirements must be met in order to comply with due process of law. For example, a non-resident, non-consenting absentee is not subject to the jurisdiction of a state. Hence, even actual service on such a non-resident outside of the jurisdiction is insufficient. If a person is not subject to the jurisdiction of a state, the service of notice outside the state will not give validity to the judgment, no matter how efficacious the notice is in giving knowledge of the action. A fortiori, service by publication on a non-resident is insufficient. On the other hand, a state cannot exercise judicial jurisdiction over a person, although he is subject to the jurisdiction of the state,

584 (1931). By virtue of Mo. Laws 1939, § 5771, p. 430, the statutory one year incontestable clause, under which the rights of the parties are held to "freeze," this question would seldom, if ever, arise.

5. Restatement, Conflict of Laws (1934) §§ 74-75.
unless a method of notification is employed which is reasonably calculated to give him notice of the suit and an opportunity to defend.\(^8\)

It has been said that an individual is subject to the jurisdiction of a state in at least five cases: (1) when he is personally present within the state; (2) when he has his domicile within the state; (3) when he is a citizen or subject owing allegiance to the state; (4) when he has consented to the exercise of jurisdiction; and (5) when he has, by his acts in the state, subjected himself to its jurisdiction. There are decisions supporting jurisdiction in all these situations, but in some of them there has been a difference of opinion.\(^9\)

This comment is not concerned with all of these possible bases of jurisdiction over the person of a defendant. The first problem presented by this paper may be stated in this question: Has a state in which a person is domiciled, jurisdiction to render a valid personal judgment against him, even though he is outside of the state at the time of service of process? It has been held by a few state courts that a state cannot acquire jurisdiction over a person domiciled within the state but not present there at the time of service of process.\(^10\) These cases seem to go on the ground that a state cannot give extra-territorial effect to the process of the state. But the weight of authority in the state courts seems to uphold jurisdiction in such a case, provided a method of notification is employed which is reasonably calculated to give him knowledge of the pendency of the action.\(^11\)

As indicated above, a distinction must be drawn between the question whether a person domiciled within a state but not present there is subject to the jurisdiction of the state, and the requirement that adequate notice be given. The distinction is brought out in *McDonald v. Mabee*,\(^12\) where an action was brought in Texas against a person domiciled there who had left the state, intending to establish a domicile elsewhere. But he was still technically domiciled in Texas and his family was there. Service was by publication. The Supreme Court of the United States held that the judgment rendered in the case was void. It has been said that this case holds that a state cannot exercise jurisdiction over a person

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10. See *Brande, Conflict of Laws* (1935) §§ 84.1-84.3; *Goodrich, Conflict of Laws* (1938) § 70.


domiciled within the state but not present there at the time of service of process. It is submitted, however, that the case does not support this proposition, for the Court said that "a summons left at his last and usual place of abode would have been enough." But "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done." Most writers agree that *McDonald v. Mahoo* merely decided that service by publication is not sufficient where there is a better method available, such as leaving the summons at the last and usual place of abode. The opinion indicates that domicile would be a sufficient basis for the exercise of jurisdiction if reasonable notice is given. In any event, a recent decision of the Federal Supreme Court definitely settles the question.

In *Milliken v. Meyer*, an action was brought in Wyoming against a defendant domiciled there. The defendant was personally served with process in Colorado pursuant to a Wyoming statute which authorized such service "in actions where the defendant, being a resident of this state, has departed from the county of his residence with the intent to delay or defraud his creditors, or to avoid service of summons, or keeps himself concealed with like intent." The Wyoming court entered an *in personam* judgment against the defendant who made no appearance in the case. The Supreme Court of the United States held that the Wyoming judgment was valid and that other states must give it faith and credit. The Court said: "The state which accords him (the defendant) privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties .... The attendant duties, like the rights and privileges incident to domicile, are not dependent on continuous presence in the state. One such incidence of domicile is amenability to suit within the state even during sojourns without the state, where the state has provided and employed a reasonable method for apprising such an absent party of the proceedings against him. Here such a reasonable method was so provided and so employed."

A contrary view has been expressed by the Supreme Court of Missouri. In *Moss v. Fitch*, decided in 1908, the plaintiff brought an action for divorce in Missouri against her husband who was at the time in Wyoming. He was served with process in Wyoming, but not in Missouri, and he did not appear in the action. The Supreme Court of Missouri held that the trial court had no jurisdiction to award a personal judgment for alimony. It would seem that the actual decision in this case is not contrary to *Milliken v. Meyer* because (1) the court apparently held that service outside the state was not authorized by the Missouri statutes in actions *in personam*; and (2) it is not clear whether the defendant was a resident or a non-resident of Missouri. As to the first point, the

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14. *Id.* at 92.
17. 61 Sup. Ct. 339 (1940).
18. *Id.* at 343.
19. 212 Mo. 484, 111 S. W. 475 (1908).
statute\textsuperscript{20} expressly provides that in certain actions, including divorce actions, service outside the state "shall be as effectual within the limits of this state as personal service within this state." But the court said that "the legislature had no intention of giving the service in Section 582 a broader scope than that of publication,"\textsuperscript{21} and that service by either method only gives the court jurisdiction over the res in actions in rem.\textsuperscript{22} If service outside the state is not authorized by statute, in actions in personam, the decision is not inconsistent with \textit{Milliken v. Meyer}. Because a state can exercise jurisdiction over an individual domiciled within the state, by serving him outside the state, it does not follow that in a particular state that method of service is authorized by law. It would seem, therefore, that the decision in \textit{Milliken v. Meyer} is of importance in Missouri only where a court here is asked to give full faith and credit to a judgment of another state based upon such service. It will be noted, however, that in discussing the constitutionality of a statute authorizing such service, the court said: "In other words, no process issued by the courts of this State and served upon the party defendant in another State can be the basis of a personal judgment. \textit{And this is true whether the party is a citizen of this state or of another state.} To be more explicit, when our process crosses the State line it loses its vitality as an instrument upon which a personal judgment can be entered."\textsuperscript{23} This view was repudiated in \textit{Milliken v. Meyer}. It is believed that the Supreme Court of Missouri failed to draw the distinction mentioned above and brought out in \textit{McDonald v. Mabee} and \textit{Milliken v. Meyer}. As previously stated, actual service of process outside the state, while it cannot enlarge a state's jurisdiction, seems the best method of giving notice of a pending action to one who is subject to the jurisdiction of the state by virtue of his domicile.

Three methods of service upon an absent defendant have been attempted; namely, personal service outside the state, service at the defendant's last and usual place of abode, and service by publication. As stated above, the first method has been approved by the Supreme Court of the United States.\textsuperscript{24} If a person domiciled within a state is subject to its jurisdiction, even though he is outside the state, service at his usual place of abode within the state would seem to constitute due process. Many state courts,\textsuperscript{25} including the Missouri courts,\textsuperscript{26} have upheld this method of acquiring jurisdiction. Although the Federal Supreme Court has not rendered a definite decision on the point, it is believed that the

\textsuperscript{22} 212 Mo. 484, 497, 498, 111 S. W. 475, 477 (1908).
\textsuperscript{23} \textit{Id.} at 501, 111 S. W. at 477. (Italics mine)
\textsuperscript{24} \textit{Milliken v. Meyer}, 61 Sup. Ct. 339 (1940).
\textsuperscript{25} Buford v. Kirkpatrick, 13 Ark. 33 (1852); Hurlbut v. Thomas, 55 Conn. 181, 10 Atl. 556 (1887); Sturgis v. Fay, 16 Ind. 429 (1861); Harryman v. Roberts, 52 Md. 64 (1879); Huntley v. Baker, 33 Hun. 578 (N. Y. 1884). See Note (1940) 126 A. L. R. 1474.
\textsuperscript{26} Wagoner v. Wagoner, 287 Mo. 567, 229 S. W. 1064 (1921). See also Davis v. Carp, 258 Mo. 685, 167 S. W. 1042 (1914); Venuci v. Cademartori, 59 Mo. 352 (1875); Garbh v. Robards, 20 Mo. 523 (1855); Independent Breweries Co. v. Lavin, 207 S. W. 351 (Mo. App. 1919); Bensley v. Haeberle, 20 Mo. App. 648 (1886).
Court would take the same position in view of the language used in several opinions. At least one state court has held that service by publication confers jurisdiction over an absent defendant. There are, however, state decisions on the other side. It is difficult to determine the position of the Supreme Court of the United States with regard to the validity of service by publication, in actions in personam. Professor Beale says: "It seems probable that service by publication is insufficient in any case, whether a better mode of service is practicable or not, since the tendency to give the defendant notice is so slight; unless, indeed, the defendant left the state in order to avoid service of process upon him." It seems clear that service by publication is insufficient if another and obviously better method of notification is practicable.

The Missouri cases hold that under the local statutes, service by publication will not support a personal judgment. In most of these cases no point was

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27. In Milliken v. Meyer, 61 Sup. Ct. 339, 342 (1940), the Supreme Court said: "Substituted service in such cases has been quite uniformly upheld where the absent defendant was served at his usual place of abode in the state (Huntley v. Baker, 33 Hun. N. Y., 678; Hurlbut v. Thomas, 55 Conn. 181, 10 A. 566, 3 Am. St. Rep. 45; Harryman v. Roberts, 52 Md. 64) as well as where he was personally served without the state. In re Hendrickson, 40 S. D. 211, 167 N. W. 172. That such substituted service may be wholly adequate to meet the requirements of due process was recognized by the Court in McDonald v. Mabee, 243 U. S. 96, 37 S. Ct. 343, 61 L. Ed. 698, L. R. A. 1917F, 458, despite earlier intimations to the contrary. See Pennoyer v. Neff, 95 U. S. 714, 733, 24 L. Ed. 565; ... See also Earle v. McVeigh, 91 U. S. 503 (1875); Knowles v. Gaslight & Coke Co., 19 Wall. 58, 61 (U. S. 1873).

28. Fernandez v. Casey, 77 Tex. 452, 14 S. W. 149 (1890). See Henderson v. Staniford, 105 Mass. 504 (1870) (judgment obtained on such service is at most voidable by the defendant, and cannot be treated as void by the plaintiff).

29. De la Montanya v. De la Montanya, 112 Cal. 101, 44 Pac. 345 (1896). See Bickerdike v. Allen, 167 Ill. 95, 41 N. E. 740 (1895) (publication alone not sufficient, but publication and mailing valid). See Note (1940) 126 A. L. R. 1474; Baylies v. Baylies, 196 App. Div. 677, 188 N. Y. Supp. 147 (1921) (where it does not appear whether the defendant was a resident or non-resident at the time of service).

30. If the Supreme Court is, as seems to be the case, opposed to service by publication as against a resident defendant who is within the state, a fortiori would it be against such service when the defendant is absent from the state. This also is the fair deduction from McDonald v. Mabee. Burdick, Service As a Requirement of Due Process in Actions In Personam (1922) 20 MICH. L. REV. 422, 431. See also Webster v. Reid, 11 How. 437 (U. S. 1850); Pennoyer v. Neff, 95 U. S. 714 (1877) (defendant a non-resident).

31. 1 Beale, Conflict of Laws (1935) § 75.1, p. 336. As indicated by Professor Beale, perhaps such service is sufficient where the defendant, by concealing himself in order to evade service, makes other methods of service impossible or impracticable. See Roberts v. Roberts, 135 Minn. 397, 161 N. W. 148 (1917) (where the defendant was concealing himself within the state); Skala v. Brockman, 109 Neb. 259, 190 N. W. 860 (1922).

32. McDonald v. Mabee, 243 U. S. 90 (1917); Bardwell v. Collins, 44 Minn. 97, 46 N. W. 315 (1890) (service by publication; defendant could be found within the state).

made as to whether the defendant was domiciled in Missouri, but the opinions indicate that even if a statute authorizes service by publication, such service is not alone a sufficient method of notification under any circumstances. Since the Missouri statutes do not authorize service by publication in actions in personam, this method is of importance in Missouri only when a court here is asked to recognize a judgment of another state based upon such service.

The question of jurisdiction in personam over a domestic corporation raises problems analogous to those discussed above. It is said that a corporation is domiciled in the state from which it receives its charter. While a corporation cannot have a domicile in the same sense that an individual has one, it is subject to the jurisdiction of the state of its incorporation and a court of that state can render a valid personal judgment against the corporation if the method of service is one which satisfies the constitutional requirement of due process of law. At common law, the only proper method of service upon a domestic corporation was by service upon "such head officer of a corporation as secured knowledge of the process to the corporation." Provision has been made by statute, however, for service upon domestic corporations in other ways, and such methods are valid if they have a reasonable tendency to give notice and opportunity to defend. For example, service within the state upon an officer or responsible agent of the corporation, other than the principal officer, is commonly provided for by statute and is valid. Some statutes provide that if an officer or agent cannot be found within the state, service of process may be made by hand¬ing a summons to an officer or agent of the corporation outside the state. It has been held that the method of service of process is sufficient to confer upon a court jurisdiction over a domestic corporation. However, there is some authority to the contrary.

Section 887 of the Missouri statutes provides that if an officer or agent of the defendant corporation cannot be found within the state, service of process may be made by delivering a summons to an officer or agent outside the state. In McMenamy Investment & Real Estate Co. v. Stillwell Catering Co., an attachment suit, the defendant was a Missouri corporation but no officer or agent of the defendant could be found within the state. An alias summons was served upon the president in California. Judgment by default was entered against the defendant, after its motion to quash was overruled. The Missouri Court of Appeals affirmed the judgment, Allen, J., dissenting on several grounds. The

34. 1 BEALE, CONFLICT OF LAWS (1935) §§ 41.1, 87.1; RESTATEMENT, CONFLICT OF LAWS (1934) § 87.
40. 175 Mo. App. 688, 158 S. W. 427 (1918).
supreme court adopted the dissenting opinion and reversed the court of appeals.\textsuperscript{41} This decision is not convincing authority for the proposition that the Missouri statute is unconstitutional. It will be noted that this was an attachment suit; and that the court actually held that Section 887\textsuperscript{42} has no reference to service in attachment suits, and that Section 900,\textsuperscript{43} providing for service in attachment suits, does not authorize service upon a domestic corporation by serving its president or chief officer in another state. Moreover, the court said that the plaintiff did not comply with the provisions of Sections 887 and 900. However, the opinion of Allen, J., declared that Section 887 "was evidently intended to permit a judgment \textit{in personam} to be rendered against a domestic corporation upon service beyond the limits of this State; but in so far as it purports to authorize the rendition of a personal judgment upon extraterritorial service, it is utterly void. [See Moss v. Fitch, supra; Wilson v. Railroad, 108 Mo. 588, 18 S. W. 286]."\textsuperscript{44} It is submitted that this view is erroneous. It fails to recognize the distinction between the question whether a domestic corporation is subject to the jurisdiction of the state of its origin, and the requirement that adequate notice be given the corporation. Since a corporation is subject to the jurisdiction of the state of its incorporation, it would seem that that state may confer jurisdiction upon its courts by any method of service reasonably calculated to give the corporation notice of the action. Such a view is consistent with the reasoning of the Supreme Court of the United States in \textit{Milliken v. Meyer}. The handing of a summons to an officer or responsible agent of the domestic corporation, no matter where it takes place, gives the corporation actual notice of the action. It is submitted, therefore, that the Missouri statute under discussion meets the requirements of due process of law.

Some statutes provide that if an officer or agent of a domestic corporation cannot be found within the state or within the county in which suit is instituted, service of process may be made upon the corporation by publication in a newspaper. A statute authorizing such service, according to the weight of authority, is not contrary to due process of law.\textsuperscript{45} A Missouri statute authorizes this mode

\textsuperscript{41} 267 Mo. 340, 184 S. W. 467 (1916). In Baxter v. Continental Casualty Co., 48 F. (2d) 467 (C. C. A. 8th, 1931), it was held that the Missouri statute (Mo. Rev. Stat. (1939) § 887), authorizing service outside the state is void. The Federal Court said: "The Supreme Court of the state has squarely decided the statute invalid as applied to Missouri corporations. McMenamy Inv. & R. E. Co. v. Stillwell Catering Co., 267 Mo. 340, 184 S. W. 467."


\textsuperscript{44} 175 Mo. App. at 685, 158 S. W. at 433.

\textsuperscript{45} Clearwater Mercantile Co. v. Roberts Shoe Co., 51 Fla. 176, 40 So. 436 (1906) (the language of the opinion indicates that the decision is confined to domestic corporations); State \textit{ex rel.} Woods-Young Co. v. Tedder, 103 Fla. 1083, 158 So. 643 (1932), \textit{cert. denied}, 285 U. S. 557 (1932); Ward Lumber Co. v. Henderson-White Mfg. Co., 107 Va. 626, 59 S. E. 476 (1907) (officers of corporation could not be found in county in which suit was instituted); White & Co. v. Jordan, 124 Va. 465, 98 S. E. 24 (1919) (following Ward Lumber Co. v. Henderson-White Mfg. Co., supra). See \textit{Restatement, Conflict of Laws (1934)} § 87, Comment b. But service by publication is insufficient if a better mode is practicable. McDonald v. Mabee, 243 U. S. 90 (1917); \textit{Restatement, Conflict of Laws (1934)} § 75, Comment d. In Piggly-Wiggly Georgia Co. v. May Investing
of service if an officer or agent of a domestic corporation cannot be found within the state. No Missouri case has been found involving this statute. In Baxter v. Continental Casualty Co., the plaintiff brought an action in a state court of Missouri against a domestic corporation. The defendant corporation was served by publication. The Eighth Circuit Court of Appeals refused to recognize the state judgment based upon such service because "the decisions of the state have confined service by publication to judgments and decrees affecting a res within the state and do not permit judgments in personam to be entered thereon," citing Priest v. Capitian and Moss v. Fitch. The two Missouri cases cited by the Federal Court are not in point because the defendant in those cases were individuals, not domestic corporations, and the statute under discussion was not involved. In one case, at least, the defendant was a non-resident individual. However, both opinions contain statements in accord with the decision of the Federal Court.

Statutes authorizing service upon a designated official, in an action in personam against a domestic corporation whose officer or agents cannot be found within the state, have been upheld. But the statute must make it the duty of the official to forward the summons to an officer of the corporation. The Missouri act regulating motor carriers applies to any corporation operating motor vehicles for hire within the state. It provides for service of process upon a state official but does not charge the official with the duty of forwarding the summons to the defendant corporation. This statute does not meet the requirements of due process of law.

CHARLES E. RUYLE

Corporation, 189 Ga. 477, 6 S. E. (2d) 579 (1939), the court declared unconstitutional a Georgia statute which made the plaintiff's knowledge or belief that the corporation had no place of business or officer in the state the only requirement for service by publication, instead of the actual fact of absence of such place of business and officers within the state. See also Meadows Independence Mines Co. v. Knight, 150 Ore. 395, 45 P. (2d) 909 (1935) (where the affidavit for service by publication did not show what diligence had been used to serve the defendant personally). Cf. Nelson v. Chicago, B. & Q. R. R., 225 Ill. 197, 80 N. E. 109 (1906) (service of process was upheld although the corporation was not found to be in the county in which suit was brought). See also Pinney v. Providence Loan & Inv. Co., 106 Wis. 396, 82 N. W. 308 (1900). See Wuchter v. Pizzuti, 276 U. S. 13 (1928); Consolidated Flour Mills v. Mueggge, 278 U. S. 559 (1928); Restatement, Conflict of Laws (1934) § 87, Comment b. Laws 1931, pp. 304-316; Mo. Rev. Stat. (1939) §§ 5720-5728.
In the recent case of *Mays v. Jackson*, the evidence showed plaintiff, desiring to purchase real estate owned by one Pierce, orally agreed with defendant for the latter to purchase same with money furnished by the plaintiff. Title was to be taken and held in the defendant’s name “until such time that plaintiff should demand said lands to be conveyed by defendant to plaintiff.” Defendant refused to convey to the plaintiff upon demand. Despite defendant’s contentions that plaintiff’s suit was based on an express oral trust which was void due to the Statute of Frauds; and that there could be no resulting trust since it can never be the result of an agreement, the supreme court in affirming the lower court’s decision held that plaintiff made out a case of resulting trust and even if there had been an express oral trust, which was invalid and unenforceable by reason of Section 3104, Missouri Revised Statutes, 1929, this alone would not prevent a trust from resulting by operation of law from the acts of the parties.

The establishment of trusts and the enforcement of trust relationships is one of the ancient grounds of equity jurisprudence. A trust is defined as an obligation upon a person arising out of a confidence reposed in him to apply property faithfully and according to such confidence. It is said that a trust in real estate exists whenever the legal title is in a person or class, called the trustee or trustees, and the equitable title is in another person or class, called the cestui que trust or cestuis quo trust. There are two main groups of trusts, express trusts and implied trusts. The latter is subdivided into two headings, resulting and constructive trusts. Trusts are called active if the trustee, apart from holding title, has duties to perform, and passive if the trustee’s only duty is to hold title to the property.

The distinction between a resulting trust and a constructive trust is that the former arises where the transferee was not intended by the person causing the transfer to be made to take the beneficial interest in the property, while the latter is imposed when a person holds title who is under a duty to convey it to another on the ground that if he were allowed to retain it he would be unjustly enriched. Constructive trusts do not arise out of intent, as do resulting trusts, but exist where the defendant is guilty of wrongful conduct as a result of

1. 145 S. W. (2d) 392 (Mo. 1940).
2. Mo. Rev. Stat. (1929) § 3104, which provides that all declarations or creations of trust of any lands shall be manifested and proved in writing and signed by the party to be charged or else they shall be void.
3. *Id.*
7. 1 BOGERT, TRUSTS AND TRUSTEES (1935) § 1, pp. 7 and 8. But Costigan, *The Classification of Trusts* (1914) 27 HARV. L. REV. 437, 456, says resulting trusts are the only implied trusts and some of them can only be called implied in fact by a resort to artificial reasoning.
8. 3 SCOTT, TRUSTS (1939) § 440.1. But Costigan, *supra* note 7, at 452, says the fundamental reason for enforcing all trusts (express, resulting, and constructive) is to prevent unjust enrichment.
which the court adjudges him a trustee. A resulting trust may arise in three cases; where an express trust fails in whole or in part; where an express trust is fully performed without exhausting the trust estate; and where one person pays the purchase price of the land and takes the deed therefor in the name of another.

This last mentioned case is essentially the same as the principal case and is universally called a purchase-money resulting trust. When one person pays for property and takes the title in the name of another, the parties being strangers to each other, the party who pays the consideration is said to be a cestui que trust, while the party receiving legal title is the trustee. This doctrine is founded on the natural presumption that the person who supplies the purchase money intends the purchase to be for his own benefit. It has been pointed out that the acquisition of value in return for money paid out is the normal expectation of mankind. But where the one to whom title is transferred is a wife, child or other natural object of bounty of the payor, the presumption is not only rebutted, but a contrary presumption that a gift was intended is raised. However, strangely enough, where the wife pays for a conveyance to her husband, the majority of the courts, including those of Missouri, presume a trust.

The Missouri Statute of Frauds expressly exempts trusts, which "may arise or result by implication of law," from its operation. Logically a pur-

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9. 2 Bogert, op. cit. supra note 7, § 454.
10. 3 Scott, Trusts (1939) § 404.1.
11. 2 Bogert, op. cit. supra note 7, § 454.
13. 2 Bogert, op. cit. supra note 7, § 454. See note 17, infra.
14. Harvey v. Ledbetter, 48 Miss. 95, 100 (1873); Stevens v. Fitzpatrick, 218 Mo. 708, 118 S. W. 946 (1909).
15. Thierry v. Thierry, 298 Mo. 25, 249 S. W. 946 (1923).
17. 2 Bogert, op. cit. supra note 7, § 454; Ames, Constructive Trusts Based Upon the Breach of an Express Oral Trust of Land (1907) 20 Harv. L. Rev. 549, 555: There it is contended that before the Statute of Uses (1536), title to most of the land in England was in fee-simple to the use of the owners, and not the owners, thus it was natural to presume, as the courts did, that one who received a conveyance in the direction of the buyer from the grantor-seller was to hold in trust for the buyer. But when uses were abolished by the Statute of Uses there was no longer any reason for the presumption that the grantee of the seller was a trustee for the one who paid the purchase money, as the custom of the country had changed. However, the courts still raise the presumption, confesses Professor Ames. Costigan, supra note 7: There it is said where the buyer has the property conveyed to a legal stranger who orally agrees to hold for the buyer, there is no more room for the indulgence of the presumption of a trust than there would be if the express trust were manifested in writing; that a constructive trust should be imposed. The author’s observations have not been given impetus by the courts.
18. Mo. Rev. Stat. (1929) § 3105, which provides that when any conveyance is made of lands, by which a trust may arise by implication of law, such trust will be valid and effective as the same would have been if Section 3104, which requires a writing, had not been enacted. The effect of Section 3105 is, in a word, not to require resulting and constructive trusts to be proved in
chase-money resulting trust would not come within this exception as this type of trust arises because of the presumed intention of the parties to create a trust, hence more closely resembling an express trust than one arising by operation of law.19 But historically it is excepted from the operation of the Statute of Frauds as held in an anonymous case,20 decided six years after the enactment of the original Statute of Frauds;21 and practically it is properly excepted from the operation of the statute, because, although such trusts arise from the intention of the parties, the circumstances of the transaction evidence that intention in place of the language of the parties, hence there is not the danger of perjured testimony as in the case where the only evidence of intention is the oral language of the parties.22 Even if Missouri had no provision excepting such trusts from the operation of the statute, it probably would be interpreted as excepting such trusts,23 as to require that such interests must be in writing would effect their abolition due to their peculiar nature.

Where one person pays the consideration to the grantor and instructs him to convey to the grantee, the fact that the payor and the grantee make an oral agreement unenforceable under the Statute of Frauds, that the property to be conveyed is to be held on an express trust for the payor, does not prevent a resulting trust from arising in favor of the payor.24 A majority of the American courts, including those of Missouri, hold the inference that the payor did not intend that the transferee should have the beneficial interest in the property is supported rather than rebutted by the unenforceable oral agreement.25

Where the grantee orally agrees to hold the land in trust for the payor of the purchase price, the express agreement is unenforceable due to the Statute of Frauds.26 Able counsel, representing the grantee, have argued, upon the grantee's refusal to convey to the payor, that only when there is no express agreement can a legitimate presumption that the grantee was intended to hold for the payor be made; that the express agreement amounts to an attempted express trust and takes the case out of the category of resulting trusts, and that the grantee should be granted the right to keep the land, since the express trust is unenforceable.27 This reasoning is illogical. Its unsoundness lies in writing. See Scholle v. Laumann, 139 S. W. (2d) 1067 (Mo. 1940), which interprets Section 3105.

20. 2 Vent. 361 (K. B. 1683), holding where a man buys land in another's name, and pays money, it will be held in trust for the payor, although no deed declaring the trust, for the Statute of 29 Chas. II called the Statute of Frauds, doesn't extend to trusts raised by operation of law.
21. 29 Chas. II, c. 3, §§ 7, 8 (1677).
22. 2 BOGERT, op. cit. supra note 7, § 462, p. 1417.
23. 2 SCOTT, TRUSTS (1939) § 406.
24. 2 RESTATEMENT, TRUSTS (1935) § 441(j); 2 BOGERT, op. cit. supra note 7, § 461.
25. 2 BOGERT, op. cit. supra note 7, § 462, p. 1417.
27. Bryan v. McCaskill, 284 Mo. 583, 225 S. W. 682, 688 (1920).
the fact that the agreement of the grantee to convey does not create the trust, but simply goes to the method by which it is to be executed. The payor’s equity still remains upon the grantee’s refusal to execute it. The grantee’s contention is also unsound for the reason that it would lead to the absurd result that he could keep the land because he expressly agreed to give it to the payor, whereas he would be compelled to give the land to the payor if he had made no such agreement.

However, in the case where the grantee verbally agrees to hold in trust for the payor who directed the land be conveyed to the grantee, and in the case where the payor directs that the conveyance be made to the grantee without an oral agreement as to the desired result, there is a slight difference in that the trust in the former case may be more active than the trust in the latter case, which exemplifies the usual resulting trust. But this difference is so slight that it has not justified a difference in result in the two types of cases.

The agreement by the grantee to hold in trust for the payor is regarded by the courts as identical with the trust which the law would have implied had there been no agreement. But, where, as in the case of Heil v. Heil, the grantee orally agrees to the imposition of specific duties which are carefully prescribed, it amounts to the grantee undertaking active trust duties for the payor, thus the court held that it was not a resulting trust, which is passive, but an express trust which must fail since not proved in writing as required by the Statute of Frauds. The case of Ebert v. Myers is inconsistent with the general Missouri view that the existence of an express agreement on the part of the grantee to hold the land in trust for the payor of the consideration does not cause the transaction to be judged as an attempt to create an express trust. In that case the grantor conveyed to the grantee, who was to hold the title for the benefit of the payor, thus the court held that it was not a resulting trust, which is passive, but an express trust which must fail since not proved in writing as required by the Statute of Frauds.

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Doubtless, some might try to justify the decision in the *Ebert* case on the ground that the grantor conveyed to his daughter, the grantee, shortly before being sued by creditors, and the payors were his own children who allegedly canceled debts owed them by grantor as consideration for the conveyance. Although it is apparent from the facts that the grantor was trying to defraud his creditors, the Missouri court was not justified in overturning the well-established rules as to purchase-money resulting trusts in order to hold for the defrauded creditors. The court should have used some other ground for reaching its result.\(^{37}\)

An example of an unusual case dealing with the subject is that of *Feis v. Rector*.\(^{38}\) There the defendant agreed with the plaintiff to buy in lands to be sold at public sale, and upon resale by the defendant the profits were to be divided with the plaintiff who furnished the purchase price. The court held that if the written contract was not sufficient evidence of a trust, defendant's denial of the plaintiff's interest in the property supplemented the contract and was in law a resulting trust. The effect of the decision is to allow the payor to proceed on a theory of resulting trust if he is not sure his evidence will satisfy the Statute of Frauds. It would seem more desirable for the payor to rely on the agreement and the written manifestation of the trust, where the agreement is in writing, and to ignore the payment of the purchase price, the theory of his suit being the establishment of an express trust.\(^{39}\)

If the theory of the plaintiff's case is the establishment of a resulting trust, plaintiff should allege the ultimate facts from which the resulting trust sought to be established would arise.\(^{40}\) Such facts are that, in connection with a sale of real estate, the vendor transferred title to the defendant, plaintiff paying the purchase price; that defendant refused to transfer the legal title to plaintiff on demand; and that the deed to defendant is a cloud on the plaintiff's title.\(^{41}\) Even if the plaintiff, in addition to the above facts, alleged the oral agreement of the defendant to convey to plaintiff upon demand, the Missouri courts would not rule that plaintiff's petition is fatally defective.\(^{42}\) The allegation of the oral agreement might indicate a theory of express trust, which would be un-

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\(^{37}\) The court might have reasoned that there were competing equities, that of the creditors of grantor, and that of the children (the alleged *cœstui que trust*), and since the former arose first it prevails.

\(^{38}\) 239 S. W. 515 (Mo. 1922).

\(^{39}\) 2 BOGERT, *op. cit. supra* note 7, § 461. Also see Drosten v. Mueller, 103 Mo. 624, 15 S. W. 967 (1891), where written evidence of the agreement was destroyed by the defendant.

\(^{40}\) Johnson v. United Railways, 247 Mo. 326, 152 S. W. 362 (1912), held plaintiff need only set forth "ultimate facts," and in construing his pleading to determine its effect, the judicial function is to construe its allegations liberally. *Mo. Rev. Stat.* (1929) § 764 requires "a plain and concise statement of the facts constituting a cause of action."

\(^{41}\) Mays v. Jackson, 145 S. W. (2d) 392, 394 (Mo. 1940).

\(^{42}\) Way v. Raby, 49 S. W. (2d) 672 (Mo. 1932). There it was said the character of the action must be determined from the petition as a whole. Its substance is controlling, and plaintiff's theory of the pleadings are of little or no consequence.
tenable because of the orality, but plaintiff need not adhere to the theory of his petition if the facts alleged and proved sustain any valid theory.\footnote{43}

The resulting trust of the type under discussion has been referred to as “one of the mistakes of equity” and “a matter of regret,”\footnote{44} due to the possibilities of fraud and perjury.\footnote{45} In an early New York Chancery case the doctrine was vigorously criticized.\footnote{46} Professor Scott has pointed out that the allowance of such trusts has led to much litigation and perjury,\footnote{47} but, he has added, “the danger of perjured testimony is not sufficiently great to justify the unjust enrichment of the grantee which would follow from his retention of the property.” The Missouri courts have adopted as a safeguard against fraud and perjury the requirement that the evidence that is offered to establish a trust by operation of law must be “so clear, cogent, positive and convincing as to exclude every reasonable doubt from the Chancellor’s mind.”\footnote{48}

Other objections to the establishment of resulting trust in lands, of the purchase-money type, is that it usually results in overthrowing formal documents of record and tends to make the title to land uncertain.\footnote{49} Also the possibilities of working a fraud upon creditors are increased in that the enforcement of a resulting trust deceives the creditors of the grantee as to the extent of the grantee’s ownership of the property, and the holding of the record title in the name of the grantee deceives the payor’s creditors with reference to the amount of assets possessed by him.\footnote{50} An answer to the objection that the creditors of the grantee are deceived is found in the argument that there is no reason to give greater protection to the creditor in this case than in other cases of apparent ownership.\footnote{51} In addition, the requirement that the basic fact of payment of the purchase price be clearly established, as pointed out above, protects the creditors of the grantee, as do principles of estoppel.\footnote{52}

The modern trend has been repugnant to this purchase-money resulting trust doctrine, and statutes in several states have abolished such trusts. Under those statutes the grantee keeps the property.\footnote{53} At the same time statutes of one state has abolished it if the grantee will reimburse the payor,\footnote{54} while the

\footnote{43. (1937) 22 WASH. U. L. Q. 251, where the writer discusses Missouri’s conflicting tendencies in the past and points out the present tendency is to adopt the liberal doctrine of pleading, getting away from the old doctrine of strict adherence to the theory as originally stated in the petition. The present Missouri rule insists that facts be pleaded to support a cause of action. Then any theory supported by the facts will be sustained by the court.}

\footnote{44. Lee v. Browder, 51 Ala. 239, 290 (1874).}

\footnote{45. 2 BOGERT, op. cit. supra note 7, § 452. See note 44, supra.}

\footnote{46. Boyd v. McLean, 1 Johns. Ch. 582, 586 (N. Y. 1815).}

\footnote{47. Scott, supra note 19.}

\footnote{48. Parker v. Blakeley, 338 Mo. 1189, 93 S. W. (2d) 981 (1936); Purvis v. Hardin, 343 Mo. 655, 122 S. W. (2d) 936 (1939); Williams v. Keef, 241 Mo. 366, 145 S. W. 425 (1912).}

\footnote{49. Williams v. Keef, 241 Mo. 366, 145 S. W. 425 (1912).}

\footnote{50. (1940) 12 MISS. L. J. 380-384.}

\footnote{51. (1938) 23 CORN. L. Q. 476-479.}

\footnote{52. Ibid.}

\footnote{53. New York, Michigan, Minnesota, and Wisconsin. See Ames, supra note 17.}

\footnote{54. Kentucky. See Ames, supra note 17.}
statutes of two states abolish the presumption of a trust resulting, except in cases where the grantee actually agrees orally to hold in trust for the payor.\textsuperscript{55} This latter is most desirable as it prevents the unjust enrichment of the grantee, while at the same time it does not unduly favor the payor.

The Missouri Supreme Court in the principal case of \textit{Mays v. Jackson}, considers the point as to whether the oral agreement turns the trust into an express one, and holds that the existence of the express oral agreement confirms the existence of a resulting trust and does not amount to an attempt to enforce an invalid express trust. This is the orthodox view and is in accord with the majority of the courts.\textsuperscript{56} The doctrine of the purchase-money resulting trust, in general, is a wise one.\textsuperscript{57} So long as the courts recognize resulting trusts in land, a presumption of trust is justified whenever the payor pays the purchase price and the grantee takes the title upon an oral agreement to reconvey. To arrive at any other conclusion would "penalize the innocent buyer to the aggrandizement of the unconscionable grantee."\textsuperscript{58}

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\footnotesize{\textsuperscript{55} Indiana and Kansas. See Ames, \textit{supra} note 17.}\\\textsuperscript{56} Bogert, \textit{op. cit. supra} note 7, §§ 454, 461; 3 Scott, \textit{Trusts} (1939) § 404.1; 57. Scott, \textit{supra} note 19.}\\\textsuperscript{58} From Ames, \textit{supra} note 17.