and assigns, their interest in the fixtures. Since the mortgagor and mortgagee may, as between themselves, treat the property as either real or personal in its nature, there appears to be no serious objection to recording the transaction as involving an interest in land, with a view to furnishing constructive notice to subsequent purchasers or encumbrancers of the premises. Recording the chattel mortgage at the same time is justified as a protection and notice to possible vendees of the chattel mortgagor who might wrongfully sever the fixtures and attempt to sell them.

It is interesting to note the Personal Property Laws of New York (Cahill, 1923) c. 4, art. 4, secs. 65, 66, 67, and their classification of chattels into three classes: first, chattels, which because of their character, remain personal property after annexation to the real estate, even without an agreement between the parties to that effect (and interpreted to include refrigerators or their units); second, chattels, which because of their character, inherently become a part of the realty (such as bricks, concrete piers, etc.); and third, chattels, which, after annexation, continue to be personal property or realty according to the agreement between the immediate parties. See *Chasnow v. Marlane Holding Co.* (1930) 137 Misc. 332, 244 N. Y. 455. L. S., '33.

INSURANCE—INCONTESTABLE CLAUSE—RIGHT IN EQUITY TO CANCELLATION FOR FRAUD AFTER INSURED'S DEATH WITHIN PERIOD.—After the death of the insured, the insurance company brought a bill in equity against the beneficiary to cancel the life insurance policy because of fraudulent misrepresentations made by the deceased. *Held,* such a suit is proper if the policy contains a clause making it incontestable after a certain period from date except for non-payment of premiums; but the bill must be filed within that period and must allege that no suit at law had been instituted by the beneficiary, so that the company had not been able to use this fraud as a defense at law. *Aetna Life Ins. Co. v. Daniel* (Mo. 1931) 42 S. W. (2d) 584. This case is in accord with an earlier case before the St. Louis Court of Appeals, *New York Life Ins. Co. v. Cobb* (1926) 219 Mo. App. 609, 282 S. W. 494; but the present case was certified to the Missouri Supreme Court because of the alleged conflict between the latter case and the sweeping dicta against suits in equity to cancel insurance policies after the death of the insured which were contained in many earlier Missouri cases, based upon a statute which seems mandatory in its demand that the issue whether the misrepresentation was material or not should be left to the jury. R. S. Mo. (1929) sec. 5732; *Schuerman v. Union Central Life Ins. Co.* (1901) 165 Mo. 641, 65 S. W. 723; *State ex rel. John Hancock Mutual Life Ins. Co. v. Allen et al.* (1926) 313 Mo. 384, 282 S. W. 46. The Supreme Court explained away this conflict by showing that in none of the previous cases had there been an incontestable clause and that if the insured could not bring such a suit in equity, the beneficiary might deprive the former of a valid defense by delaying suit until the period of contestability had passed. Thus, the present suit was likened to a bill *quia timet,* while the former attempts to sue in

equity were based upon the old, but now discarded, theory of concurrent jurisdiction over fraud cases. It is interesting to note that the present case has already been followed by the St. Louis Court of Appeals in a suit the decision of which was delayed until this ruling was made. *Mississippi Valley Life Ins. Co. v. Riddle* (Mo. App. 1931) 43 S. W. (2d) 1059.

The validity of such an incontestable clause is universally recognized, although the various states differ as to the theory upon which its sanction should rest and also as to the meaning of the clause. In an earlier case, the Missouri Supreme Court took the view that the insurance company by putting the clause in a policy which it sold was estopped from attacking its validity, for the insured paid the premiums so as to give the beneficiaries after a certain period an absolute contractual claim. *Harris v. Security Life Ins. Co.* (1913) 248 Mo. 304, 154 S. W. 68. The more prevalent view is that the clause creates a special short period of limitation upon certain defenses. *Powell v. Mutual Life Ins. Co.* (1925) 313 Ill. 161, 144 N. E. 825; *Mutual Life Ins. Co. v. Horni Packing Co.* (1923) 263 U. S. 167. The courts are willing to use this theory even though a statute makes void any agreement imposing a period of limitation shorter than that set by the Statute of Limitations, merely treating the former statute as inapplicable as directed only against agreements contrary to public policy, while the incontestable clause is considered to be in accord with public policy. *Priest v. Kansas City Life Ins. Co.* (1925) 119 Kan. 23, 237 Pac. 938. Other courts have upheld the clause on the basis that the insurer might have agreed to make the policy absolute from the beginning, while the clause as an exception to this gives him a limited right of contest. *Citizens Life Ins. Co. v. McClure* (1910) 138 Ky. 138, 127 S. W. 749; *Northwestern Mutual Life Ins. Co. v. Pickering* (C. C. A. 5, 1923) 293 F. 496, *certiorari* denied (1923) 263 U. S. 720. This argument can be met by the view advanced by other courts that such an absolute waiver of fraud would be void as contrary to public policy. *New York Life Ins. Co. v. Hardison* (1908) 199 Mass. 190, 85 N. E. 410; *Welch v. Union Central Life Ins. Co.* (1899) 108 Iowa 224, 78 N. W. 853. Although the usual clause makes the incontestability arise after a certain period from the date of the policy without any further stipulation, a few courts have held that the death of the insured automatically stops the running of this period, fixing the rights of the parties as they were at that time. *Jefferson Standard Life Ins. Co. v. Smith* (1923) 157 Ark. 499, 248 S. W. 897; *Mutual Life Ins. Co. v. Stevens* (1923) 157 Minn. 253, 195 N. W. 913. As is pointed out in the principal case this is contrary to the great weight of authority, with which Missouri is in accord. *Mutual Life Ins. Co. v. Hurni Packing Co., supra; Killian v. Metropolitan Life Ins. Co.* (1929) 251 N. Y. 44, 166 N. E. 798. Although the minority view is perhaps more convenient in that it obviates the need for a suit in equity, it does great violence to the language used in the policy.

It is well settled that it is not enough for the insurer to raise the question of fraud in letters to the beneficiary within the period. The beneficiary is entitled to have the question determined in a court. *Powell v. Mutual Life Ins. Co., supra; Missouri State Life Ins. Co. v. Cranford* (1923) 161 Ark.

602, 257 S. W. 66. The principal case and the *Cobb* case recognize this doctrine in its most absolute form, but in applying Illinois law to an Illinois policy, the St. Louis Court of Appeals held that it was enough if the insurance company had raised the point and taken a release from the beneficiaries, although the release was later held to be invalid. *Eichwedel v. Metropolitan Life Ins. Co.* (1925) 216 Mo. App. 452, 270 S. W. 415. Under this view, if the beneficiary does not file a suit so that an answer may raise the point within the period, the insurer must sue in equity for cancellation or the defense is lost. This seems bad public policy in that it encourages suits. The mere fact that suit on the policy is filed in the period is not enough; the answer raising the point must also be filed in that time. *Missouri State Life Ins. Co. v. Cranford, supra.* The principal case intimates that equity is barred if the lawsuit was withdrawn after the insurer had had a reasonable time in which to answer, even though the full period allowed by the statute for the filing of the answer had not passed. This is just.

In a suit in equity the beneficiary loses the advantage of a jury trial upon the issues of the fact and materiality of the fraud, a point of considerable importance because of the notorious prejudice of juries against insurance companies. However, it has been pointed out that this loss is caused by the beneficiary's own remissness in not filing suit sooner so that the point could be raised by answer. *Keystone Dairy Co. v. New York Life Ins. Co.* (C. C. A. 3, 1927) 19 F. (2d) 68. If in the bill for cancellation, the beneficiary counterclaims for the amount of the policy, it has been held under the Washington Code that this counterclaim must be tried by a jury. *Northern Life Ins. Co. v. Walker* (1923) 123 Wash. 203, 212 Pac. 277; *contra, Equitable Life Assur. Soc. v. Fillat* (1926) 127 Misc. 68, 215 N. Y. S. 277 (under the new New York Civil Practice Act). In the Federal courts a subsequent suit at law will be restrained unless the insurer actually defends the latter. *New York Life Ins. Co. v. McCarthy* (C. C. A. 5, 1927) 22 F. (2d) 241; *New York Life Ins. Co. v. Seymour* (C. C. A. 6, 1930) 45 F. (2d) 47. It would seem that the Missouri law would be in a better position to give the most ample protection to the rights of all parties, if it would add to the doctrines laid down in the principal case the view expressed by the Washington Court. Then, the beneficiary could always obtain a jury trial if he desired it.

G. W. S., '33.