failure to reject an order for a meal within a reasonable time was acceptance. *Cole-McIntyre-Norfleet Co. v. Halloway* (1919) 141 Tenn. 679, 214 S. W. 817; *cf.* 1 Restatement of the Law of Contracts (1932) sec. 72.

The courts have apparently gone no further, although one authority has suggested that silence alone should be acceptance in the cases of an offer of forbearance and of a bilateral contract when a reasonable man would deem silence to show an intention to assent. 1 Williston, Law of Contracts (1931) secs. 91, 91a. It is submitted that silence alone is an exceedingly impractical basis for a conclusion in regard to the existence of any affirmative mental attitude in the offeree.

From the decisions it is possible to deduce a single guiding principle. Silence is acceptance only when there are other circumstances, exclusive of the silence, which tend to show that assent is the intention of the offeree. A positive act is something from which intention can be determined objectively. Silence alone is, at the most, merely ambiguous as far as showing the mental condition of an individual is concerned.

In the principal case the act of the defendant in requesting the plaintiff to discontinue the suit pending in New York is a circumstance in addition to silence. Both taken together signify acceptance, although neither would be sufficient by itself. The plaintiff had already stated his charge at the request of his client, who by his act of terminating suit whose prosecution was essential to the fulfilment of the previous agreement signified his acceptance of the only other arrangement before the parties. N. P., '34.

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DEED OF TRUST—EFFECT OF PROVISION GIVING TRUSTEE EXCLUSIVE POWER TO RENEW INSURANCE POLICIES.—A deed of trust provided for the assignment to the trustee of all insurance policies on the property covered. It further provided that the trustee was to have the exclusive right to renew or change the insurance carried on the property, subject to a duty to keep a certain stated amount of each kind of insurance in force. There was a further provision that the trustee might acquire for his own benefit, if he so desired, any of the serial notes to be issued under the deed of trust. The debtor notified the trustee not to take out new insurance and when the old policies expired tendered assignment of new policies in solvent companies. Nevertheless, the trustee took out new insurance. The trustee was a real estate broker and received commissions from the insurance companies on all policies written by him. The trustee was attempting to sell the land as was allowed by the deed of trust because the debtor refused to pay the premiums on the insurance policies taken out by the trustee. *Held*, the clause is valid and gives the trustee an irrevocable power to take out insurance and force the debtor to pay for it. *Hadley Bros.-Uhl Co. v. Scott* (Mo. App. 1932) 53 S. W. (2d) 1071.

Although such clauses have become common in recent deeds of trust, this is the first case which passes on the validity of such a provision. In an early Illinois case a similar provision was involved, but there the validity of

the clause was not considered, the attempt being to hold the trustee on the ground that he became a guarantor of the solvency of the insurance companies, which had failed to pay after the house was destroyed by fire. Liability was denied on the ground that the trustee was only bound to use ordinary care in selecting insurance companies which were solvent at the time he selected them. *Gettins v. Scudder* (1875) 71 Ill. 86. All parties assumed that the clause was valid.

The Missouri Court reaches its conclusion by a simple line of reasoning. The opinion admits the general rule that a trustee cannot personally profit from dealing with the subject of the trust, but says that this protection may be waived by the parties provided there is no undue influence. Thus far, the case is squarely in line with the great weight of authority. *Cohen v. Hutchins* (App. D. C. 1929) 32 F. (2d) 397; *Miller v. Dodge* (1899) 28 Misc. 640, 59 N. Y. S. 1070; *In Re Sykes* (1909) 2 Ch. 241. As the Court points out, such a clause is reasonable in that the purchasers of the notes, which were to be sold to the public by the firm of which the trustee was a member, would expect the firm to make certain that the property on which the notes were based was properly protected by insurance. The Court states that a power given for a consideration, or coupled with an interest, or given for security, may not be revoked. It concludes that the power to insure was given for security, since it was contemplated that the trustee might acquire some of the notes issued under the deed of trust. Some of this language is most unfortunate, although it enables the Court to reach a correct conclusion in the instant case. Missouri, like most other states, has long held that a power given for a consideration may be revoked at any time, although the principal will be liable for damages (such as here the amount of the commissions involved). *Staroske v. Pulitzer Publishing Co.* (1911) 235 Mo. 67, 138 S. W. 36. At least according to precedent, the power in the principal case is clearly not a power coupled with an interest, for the general American rule requires that the interest be in the subject-matter of the power. *State ex rel. Walker v. Walker* (1885) 88 Mo. 279; *aff'd* (1888) 125 U. S. 339; *Kilpatrick v. Wiley* (1906) 197 Mo. 123, 95 S. W. 213; cf. comprehensive note (1929) 64 A. L. R. 380. The Court might have rested its decision upon the statement that a power given for security cannot be revoked. *Hunt v. Rousmanier* (1823) 8 Wh. 174; *Gilbert v. Holmes* (1871) 64 Ill. 548; *Terwilliger v. Ontario C. & S. R. R. Co.* (1896) 149 N. Y. 86, 43 N. E. 432. Hence it was unnecessary to struggle to find an interest in the trustee for which the power might serve as a security. It is settled also that a power given as security for the claims of a third person cannot be revoked without first obtaining the consent of the beneficiary. *Stewart v. Hilton* (C. C. D. Vt. 1881) 7 F. 562; *Wood v. Kerkeslager* (1909) 225 Pa. 296, 74 Atl. 174; *American L. & T. Co. v. Billings* (1894) 58 Minn. 187, 59 N. W. 998. It may be hoped that Missouri courts will not be misled by the narrow ground for the decision in this case into refusing to apply the principle to cases in which the trustee has no similar power to acquire securities issued under the deed of trust.

Even with its limitations, the decision is to be welcomed as settling a point of law which has been moot. As a practical matter the existence of this power in the trustee is advisable, since it makes it more likely that the insurance will be placed with strong companies which pay losses promptly. The commissions which the trustee receives from the insurance companies do not increase the premiums which the borrower would have to pay if he took out the insurance himself, while they may serve as an inducement for trustees to act for lower fees, thus lessening the present heavy burden of fees which the prospective borrower must pay. G. W. S., '33.

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FRAUD—PROMISE WITH PRESENT INTENTION NOT TO PERFORM.—Plaintiff was an experienced banker, capable of managing a banking business. The defendants, a group of stockholders in a bank, pooled 250 shares of the capital stock, and appointed Cooke to sell it at a fixed price of $135 per share. The market value of the stock was $95, which fact was known to plaintiff. He was induced to purchase the stock, and pay this premium on it by a promise on the part of the defendants that inasmuch as they held the majority of the stock in the bank they would make him managing officer of the bank at a salary of about $300 per month. The defendants, at the time of making the promise did not intend to perform. The court sustained a demurrer to plaintiff's petition. This was affirmed by the Supreme Court *holding:* Fraud cannot be predicated upon a mere promise though accompanied by present intention not to perform. *Reed v. Cooke* (Mo. 1932) 55 S. W. (2d) 275.

It is a well known and accepted rule in the law of fraud and deceit that an actionable representation must relate to past or existing facts and cannot consist of mere broken promises, unfulfilled predictions, or erroneous conjectures as to future events. 26 C. J. 1087. However, to this rule there are several well recognized exceptions. State of mind can be just as much of an existing fact as the state of digestion. *Edgington v. Fitzmaurice.* ( Eng.) 29 Ch. D. 459; *Deyo v. Hudson* (1919) 225 N. Y. 602, 122 N. E. 635; *Swift v. Rounds* (1897) 19 R. I. 527, 35 Atl. 45. This rule has been extended to allow recovery on the basis of fraud and deceit where a promise has been made with a present intent of future breach. *Wright v. Barnard* (D. C. D. Del., 1917) 248 F. 756; *Birmingham Warehouse Co. v. Elyton Land Co.* (1891) 93 Ala. 549, 9 So. 235; *Olson v. Smith* (1912) 116 Minn. 430, 134 N. W. 117. As pointed out by the dissenting judge in the principal case, twenty-one American states, England, and the Federal courts, have adopted this view. Massachusetts, Pennsylvania, New York, Ohio, and Wisconsin originally held, to the contrary. But in each of these states more modern decisions have abandoned the former position so that now it is probable that recovery could likewise be had there upon such a state of facts. *Bowe v. Gage* (1906) 127 Wis. 245, 106 N. W. 1074.

Other authorities hold that a misrepresentation of intention is purely promissory and is therefore not remediable fraud. *Farris v. Strong* (1897)