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NOTES ON RECENT MISSOURI  
CASES

BILLS OF LADING—LIABILITY OF BANK WHICH DISCOUNTS DRAFT WITH BILL OF LADING ATTACHED FOR DEFECT IN GOODS. *TAPEE V. VARLEY-WOLTER CO.*<sup>1</sup>—Transactions between sellers of goods and banks with reference to drafts drawn on buyers usually take one of three forms: the bank may discount the draft giving credit to the seller and taking an indorsement of the bill of lading to the seller's order; under the same circumstances it may pay cash to the seller; or it may buy the draft and attached bill of lading outright. In all three cases the bank becomes owner of the goods by reason of the transfer of the bill of lading which represents them;<sup>2</sup> it occupies a position analogous to that of a mortgagee, succeeding the seller in that position.<sup>3</sup> The buyer has a right to the goods upon paying the draft, the bank merely holding the goods as security for payment.<sup>4</sup> In the third case, the bank by buying the draft and bill of lading really becomes the assignee of the buyer's contract, and holds title to the goods as the seller held it after the shipment, simply to secure the

1. (1914) 171 S. W. 19.

2. *Cairo Bank v. Crocker* (1872) 111 Mass. 163; *National Bank v. Batley* (1875) 115 Mass. 228; *Forbes v. R. R.* (1882) 133 Mass. 154; *Farmers' Bank v. Logan* (1878) 73 N. Y. 568.

3. Williston, Sales, § 286.

4. *Mirabita v. Imperial Bank* (1878) 3 Ex. D. 164; *First National Bank of Birmingham v. Wilkesbarre Lace Co.* (1909) 162 Ala. 309, 50 So. 153; *Leonhardt v. Small* (1906) 117 Tenn. 153, 96 S. W. 1051.

payment of the price. If the buyer has accepted the bill drawn by the seller, the bank as *bona fide* purchaser of the bill may assert its rights free from defenses which might avail against the seller or drawer; until the draft has been accepted by the drawee, the bank's rights against him depend entirely on the contract between the seller and buyer.<sup>5</sup> As the owner of the goods, the bank may assert various rights incident to ownership. It may bring replevin or trover,<sup>6</sup> and if the buyer should get possession of the goods without paying the draft he gets no title and cannot transfer any, even to a *bona fide* purchaser without notice.<sup>7</sup>

The question then arises as to the liability of the bank to the buyer who has paid the draft, first if there are no goods, i. e., where the bill of lading is forged; second, where the seller has no title to the goods; and third, where the goods are defective. If the bill of lading is forged, the bank is no less a *bona fide* transferee of the draft for value and without notice. The drawee becomes absolutely liable on the acceptance of the draft and cannot recover, notwithstanding a failure of consideration between him and the seller, nor has the drawee who has paid the draft any remedy against the bank if the seller had no title to the goods.<sup>8</sup> Being a *bona fide* transferee of the bill of lading, all equities are cut off and the bank is not liable. The interest acquired by it does not make it a party to the conversion.<sup>9</sup>

The bank is not liable to the drawee of the draft when the goods represented by the bill of lading are defective in quality or quantity. The contrary has been held in some jurisdictions. Beginning with the case of *Landa v. Lattin*,<sup>10</sup> this rule for a time gained support in several states.<sup>11</sup> But it has now been overruled and repudiated until it is of little consequence.<sup>12</sup> The three cases<sup>13</sup> cited as establishing this proposition rest

5. *First National Bank of Detroit v. Burkham* (1875) 32 Mich. 328; *Young v. Lehman* (1879) 63 Ala. 519; *Mason v. Nelson* (1908) 148 N. C. 492, 62 S. E. 625; *Springs v. Bank* (1913) 209 N. Y. 224, 103 N. E. 156.

6. *Exchange Bank v. McGraw* (1896) 76 Fed. 930; *American National Bank v. Henderson* (1899) 123 Ala. 612, 26 So. 498; *Coker v. Memphis Bank* (1900) 112 Ga. 71, 37 S. E. 122; *Sabel v. Planters' Bank* (1901) 110 Ky. 299, 61 S. W. 367; *Schafers v. Rhynders* (1902) 116 Ia. 472, 89 N. W. 1099; *Mather v. Gordon* (1904) 77 Conn. 341, 59 Atl. 424; *Walsh v. Bank* (1907) 228 Ill. 446, 81 N. E. 1067; *Burgess v. R. R. Co.* (1913) 176 Mo. App. 257, 161 S. W. 858.

7. *Marine Bank v. Wright* (1871) 48 N. Y. 1; *Cairo National Bank v. Crocker* (1872) 111 Mass. 163; *Emery Sons v. Irving Nat. Bank* (1874) 25 Ohio St. 360; *Halsey v. Warden* (1881) 25 Kan. 128.

8. *Nat. Bank v. Burkham* (1875) 32 Mich. 328; *Young v. Lehman* (1879) 63 Ala. 519; *Hoffman v. Nat. City Bank* (1870) 12 Wallace 181; *Geotz v. Bank of Kansas City* (1887) 119 U. S. 551; *American Nat. Bank v. Grain Co.* (1896) 69 Ill. App. 268.

9. *Leuthold v. Fairchild* (1886) 35 Minn. 99, 27 N. W. 503.

10. (1898) 19 Tex. Civ. App. 246, 46 S. W. 48.

11. *Eufaula Grocery Co. v. Missouri Nat. Bank* (1898) 118 Ala. 408, 24 So. 389; *Searles v. Grain Co.* 80 Miss. 688, 32 So. 287; *Sloan v. Carolina R. R. Co.* (1900) 126 N. C. 487, 36 S. E. 21; *Mfg. Co. v. Tierney* (1903) 133 N. C. 636, 45 S. E. 1026.

12. *Mason v. Nelson* (1908) 148 N. C. 492, 62 S. E. 625, overruling *Finch v. Gregg* (1900) 126 N. C. 176, 35 S. E. 251; *Tolerton v. Anglo-California Bank* (1901) 112 Ia. 706, 84 N. W. 930, disapproving *Finch v. Gregg*; *Blaisdell v. Citizens' Bank* (1903) 96 Tex. 626, 75 S. W. 292, overruling *Landa v. Lattin* (1898) 19 Tex. Civ. App. 246, 46 S. W. 48; *Cosmos Cotton Co. v. Bank of Birmingham* (1911) Ala. 54 So. 621, disapproving *Landa v. Lattin*, and also distinguishing *Eufaula Grocery Co. v. Bank* (1898) 18 Ala. 408, 24 So. 389.

13. *Landa v. Lattin* (1898) 19 Tex. Civ. App. 246, 46 S. W. 48; *Finch v. Gregg* (1900) 126 N. C. 176, 35 S. E. 251; *Haas v. Citizens' Bank* (1905) 144 Ala. 562, 39 So. 129.

upon the theory that the bank in purchasing the draft with bill of lading attached steps into the shoes of the assignor, thus becoming owner of the goods and responsible for performance of the shipper's contract. These cases proceed on the ground that the bank took the draft subject to the same liabilities existing under the original contract, enjoying no greater rights and standing charged with the same demands that could be urged against the vendors. To consider the bank as owner of the goods and not responsible for delivery, would give effect to only part of the transaction; since the bank reaped the benefits of the contract it should be bound by it. These courts say that there is no rule of law or of public policy against a bank's becoming the absolute owner of a bill of lading and undertaking to perform an executory contract for the sale of goods. It is difficult they say, to see how a bank can be the unqualified owner of the debt, and only a qualified owner of the goods. These theories as shown above are not sound. One jurisdiction alone now follows this rule.<sup>14</sup> The Mississippi cases on this point rest squarely on *Landa v. Lattin*, the whole argument of that case being unqualifiedly accepted. The case of *Exchange Nat. Bank v. Russell*,<sup>15</sup> while accepting the rule, limits it by holding that the bank is not liable for the consignor's failure to deliver other grain, tho it may have been included in the one contract of sale.

This doctrine has been generally repudiated.<sup>16</sup> Taking a bill of lading to secure the draft is not a guarantee of the quantity or quality of the goods.<sup>17</sup> As before stated, the bank holds the goods as security, and without an express assumption of liability none can exist. It has been held that the payee of an accepted bill holds the same relation to the acceptor that the indorsee of a note holds to the maker.<sup>18</sup> If this is true, the acceptor cannot set up against the bank any claim for breach of warranty made by the shipper. There is no liability on the ground that the bank has received money which it cannot equitably retain. The seller could only have collected the price less damages for breach of warranty. If more is paid to the bank, the acceptor cannot recover the excess paid. The draft was negotiable, and it is well established that after the holder of a negotiable draft with bill of lading attached has

14. *Miller v. American Nat. Bank* (1898) 76 Miss. 84, 23 So. 439; *Searles v. Smith Grain Co.* (1902) 80 Miss. 688, 32 So. 287; *Exchange Bank v. Russel* (1902) 81 Miss. 169, 32 So. 314.

15. (1902) 81 Miss. 169, 32 So. 314.

16. *Detroit Bank v. Burkham* (1875) 32 Mich. 328; *Tolerton v. Anglo-Cal. Bank* (1901) 112 Ia. 706, 84 N. W. 930; *Blatsdell v. Citizens' Bank* (1903) 96 Tex. 626, 75 S. W. 292; *Bank v. Baltimore* (1904) 99 Md. 661, 59 Atl. 134; *Leonhardt v. Small* (1906) 117 Tenn. 153, 96 S. W. 1051; *Guntersville Bank v. Jones Cotton Co.* (1908) 156 Ala. 525, 46 So. 971; *Mason v. Nelson* (1908) 148 N. C. 492, 62 S. E. 625; *Bank v. Lace Co.* (1909) 162 Ala. 309, 50 So. 153; *Central Mer. Co. v. Okla. State Bank* (1910) 83 Kan. 504, 112 Pac. 114; *Hannay v. Trust Co.* (1911) 187 Fed. 686. But cf. *National Bank of Boston v. Merchants' Bank* (1875) 91 U. S. 92; *Trust Co. v. Grotlian* (1902) 114 Fed. 433.

17. *Robinson v. Reynolds* (1841) 2 Q. B. 196; *Hoffman v. Bank of Milwaukee* (1870) 12 Wallace 181; *Geotz v. Bank of Kansas City* (1887) 119 U. S. 551; *Varney v. Munroe County Bank* (La., 1907) 44 So. 753.

18. *Arpin v. Owens* (1885) 140 Mass. 144, 3 N. W. 25.

secured acceptance of it from the drawee, he is not affected by any equities originally existing between buyer and seller. The liability of the drawee to the payee<sup>19</sup> becomes fixed.

The minority rule if followed would cause great inconvenience and would impose great restriction upon business. If the banker had to examine the contract between seller and buyer to learn its terms and then examine the cargo to see if it complied with the original contract, there would be very little business of this kind carried on by banks. To fix liability on banks in these cases would violate the well settled rules applicable to commercial paper. It would practically prohibit the present method by which shippers needing all or part of the purchase money before the goods reach market, secure the money from the banks. It would restrict the freedom with which banks now advance money to the drawers of such drafts, and would as was said in *Hall v. Keller*<sup>20</sup> "bring about a revolution in commercial circles."

There are but three Missouri cases on this point.<sup>21</sup> The case of *Columbian National Bank v. White*<sup>22</sup> seems to be in accord with the minority rule and has been cited as so holding.<sup>23</sup> In that case the consignee of lumber discovered after paying the freight that the lumber was of inferior quality and refused to accept a draft for the purchase price attached to the bill of lading. The bank which had discounted the draft sued for the full amount of the draft and was refused relief on the ground that the consignor's rights had not been impaired or disturbed by the assignment, and that he had the same defenses against the bank that he would have had against the consignor. It must be noticed that the consignee had accepted the draft. Until such acceptance or acknowledgment of his obligation he was bound only by the terms of the original contract and not until acceptance of the draft does he come under a different liability. In *Burrton State Bank v. Milling Co.*,<sup>24</sup> a grain company on the order of a broker shipped corn to the defendant mill, issuing a draft with bill of lading which it assigned to the plaintiff bank. By mistake the defendant received the draft and bill of lading, surrendered the latter to the railroad and got possession of the grain. It remitted the amount of the draft to the broker. In a suit by the bank the court held the defendant still liable to the bank for the amount of the draft, neither payment to the broker nor defect in the goods being a defense. This case is in accord with the majority rule.

19. *Shaffer v. Bronenberg* (1873) 42 Ind. 89; *Nowak v. Excelstor Stone Co.* (1875) 78 Ill. 307; *Hayes v. Hathorn* (1878) 74 N. Y. 486; *Law v. Brinker* (1883) 6 Col. 555; *Arpin v. Owens* (1885) 140 Mass. 144, 3 N. E. 25; *Flourney v. Nat. Bank* (1887) 78 Ga. 222, 2 S. E. 547; *Tolerton v. Bank* (1901) 112 Ia. 706, 84 N. W. 930.

20. (1902) 64 Kan. 211, 67 Pac. 518.

21. *Columbian Nat. Bank v. White* (1896) 65 Mo. App. 677; *Burrton State Bank v. Milling Co.* (1912) 163 Mo. App. 135, 145 S. W. 508; *Tapee v. Varley-Woller Co.* (1914) 171 S. W. 19.

22. (1896) 65 Mo. App. 677.

23. *Finch v. Gregg* (1900) 126 N. C. 176, 35 S. W. 251; *Mason v. Nelson* (1904) 148 N. C. 492, 62 S. W. 625; 49 L. R. A. 679, note.

24. (1912) 163 Mo. App. 135, 145 S. W. 508.

The latest Missouri case, *Tappe v. Varley-Wolter Co.*,<sup>25</sup> is in line with the prevailing view. In this case the plaintiff bought a car load of potatoes from the defendant who drew a draft for the price. This draft with the bill of lading was discounted by the Market State Bank. The plaintiff paid the draft, and on finding the potatoes rotten brought suit against the Varley-Wolter Co., joining the bank as defendant. The Kansas City Court of Appeals held the bank not liable. From these three cases it is clear that Missouri is in accord with the majority rule.

G. L. D.

CONDITIONAL SALES—SELLER'S ELECTION OF REMEDY. TWENTIETH CENTURY MACHINERY CO. V. EXCELSIOR SPRINGS MINERAL WATER & BOTTLING CO.<sup>1</sup>—The term conditional sale is used to describe the transaction in which the buyer gets the right to possess and use the goods sold, but the seller retains title pending the payment of the purchase price. The buyer in such a transaction acquires a property right in the goods, subject to the bare legal title reserved in the seller for the purpose of security only. Upon the buyer's failure to comply with the terms of sale, the seller may either assert the title reserved by the contract and retake the property without refunding what he has been paid,<sup>2</sup> or sue the seller and recover the full amount of the purchase price.<sup>3</sup> Whether these remedies are alternative or cumulative is a question upon which opinion is divided.<sup>4</sup> A majority of courts of this country, holding that they are inconsistent, apply the general rule as to election of remedies that the choice of one remedial right is a bar to a subsequent prosecution of an inconsistent remedial right.<sup>5</sup> An excerpt from a leading Massachusetts case<sup>6</sup> well illustrates the reasoning adopted by these courts. "They [the vendors] could not treat the transaction as a valid sale and an invalid one at the same time. If they reclaimed their property, it must be on the ground that they elected to treat the transaction as no sale. If they brought an action for the price, they would thereby affirm it as a sale. Two inconsistent courses being open to them, they must elect which they

25. (1914) 171 S. W. 19.

1. (1915) 171 S. W. 944.

2. This is the prevailing view. *Duke v. Shackelford* (1879) 56 Miss. 552; *Fleck v. Warner* (1881) 25 Kan. 492; *Lorain Steel Co. v. Norfolk & Bristol Street Ry. Co.* (1905) 187 Mass. 500, 73 N. E. 646. But in Missouri, the vendor is required by Revised Statutes 1909, § 2890, to refund what he has been paid, less a reasonable compensation for the use.

3. Mechem, Sales, § 615.

4. See 23 L. R. A. (N. S.) 144, for an elaborate collection of cases upon this point.

5. *Batley v. Hervey* (1883) 135 Mass. 172; *Merchants & P. Bank v. Thomas* (1887) 69 Tex. 237, 6 S. W. 565; *Truax v. Parvis* (1886) 7 Houst. (Del.) 330, 32 Atl. 227; *Button v. Trader* (1889) 75 Mich. 295, 42 N. W. 834; *Crompton v. Beach* (1892) 62 Conn. 25, 25 Atl. 446; *Parke & L. Co. v. White River Lumber Co.* (1894) 101 Cal. 37, 35 Pac. 442; *Seanor v. McLaughlin* (1895) 165 Pa. 150, 30 Atl. 717; *Richards v. Schreiber* (1896) 98 Iowa 422, 67 N. W. 569; *D. M. Osborne & Co. v. Walther* (1902) 12 Okla. 20, 69 Pac. 953; *Alden v. Dyer & Bro.* (1904) 92 Minn. 134, 99 N. W. 784; *Dowagiac Mfg. Co. v. Mahon* (1904) 13 N. D. 516, 101 N. W. 903; *Butler v. Dodson* (1906) 78 Ark. 569, 94 S. W. 703; *Ellwood State Bank v. Mock* (1907) 40 Ind. App. 685, 82 N. E. 1003.

6. *Bailey v. Hervey* (1883) 135 Mass. 172.

would pursue, and, electing one, they are debarred from the other." On principle, the soundness of these views may be questioned. The seller, holding a title for the purpose of security only, is in substantially the same position as a mortgagee<sup>7</sup> and should have the same right that the mortgagee has to sue for the price and also foreclose upon the property, his recovery, of course, being limited to the satisfaction of his claim. The assertion of both rights does not involve both an affirmance and a disaffirmance of the sale. An action to reclaim the property is an assertion by the seller of his security title, and not a denial of the interest acquired by the buyer. These views have been adopted by a respectable number of courts, and are supported by Professor Williston.<sup>9</sup> Some courts, while not recognizing a suit and judgment for the price as an election, do give the suit such an effect when accompanied by some unequivocal act of the vendor, recognizing the property as belonging to the vendee, such as attaching<sup>10</sup> or attempting to establish a materialman's lien<sup>11</sup> upon the property.

In Missouri, there have been no cases deciding squarely whether or not a conditional vendor, by suing for the price, waives the right to recover the property. In *Kingsland Ferguson Mfg. Co. v. Culp*,<sup>12</sup> the seller had sued and obtained judgment upon notes representing the purchase price, it having been expressly stipulated that title should not pass till the property was fully paid for. The judgment remained unsatisfied and the seller was then allowed to retake the property. The court did not expressly decide whether an election had been made, though the point seems to have been raised by counsel. This case seems to be the nearest approach made by the Missouri courts to a direct adjudication upon the consistency of the rights of the conditional vendor. Other cases of an analogous character will be noticed later.

Assuming the inconsistency of the rights of the conditional vendor to sue for the price and to retake the property, the question arises as to how far the prosecution of the suit for the price must be carried in order to constitute a binding election. May the vendor after choosing one remedy, abandon it and resort to the other? In *Orcutt v. Rickenbrodt*,<sup>13</sup> it was held that the vendor made an election when the action for the price was commenced, and that though he discontinued that action, he was estopped to assert the right given by the contract to retake the property.

7. *Fairbanks, Morse & Co. v. Baskett* (1902) 98 Mo. App. 53, 63, 71 S. W.1113; *Chicago Railway Equipment Co. v. Merchants Bank* (1889) 136 U. S. 268, 283.

8. *Root v. Lord* (1851) 23 Vt. 568; *Vaughn v. Hopson* (1874) 10 Bush (Ky.) 337; *McPherson v. Acme Lumber Co.* (1893) 70 Miss. 649, 12 So. 857; *Campbell Printing Press & Mfg. Co. v. Rockaway Pub. Co.* (1894) 56 N. J. L. 676, 29 Atl. 681; *Forbes Piano Co. v. Wilson* (1905) 144 Ala. 586, 39 So. 645.

9. Williston, Sales, § 571.

10. *Heller v. Elliott* (1882) 44 N. J. L. 467; *Tanner Engine Co. v. Hall* (1890) 89 Ala. 628, 7 So. 187.

11. *Hickman v. Richburg* (1899) 122 Ala. 638, 26 So. 136.

12. (1885).85 Mo. 548. The questions chiefly considered in this case were the validity of the condition as against a subvendee and the waiver of the vendor's right by laches. The fact that the seller was tacitly allowed to resort to both remedies is probably little indication that this is or will become the Missouri rule.

13. (1899) 42 App. Div. 238, 59 N. Y. Supp. 1008.

The elements of an estoppel *in pais*, however, also appear here, for the party in whose favor the estoppel was asserted was a subvendee who had paid full value for the property after the commencement and before the discontinuance of the action for the price, and this circumstance clearly influenced, if it did not control, the decision of the court. In *Frisch v. Wells*,<sup>14</sup> the conditional vendor brought replevin for the property after he had brought suit for the price and had had the buyer arrested and his body held, but had not prosecuted the suit. The court held that "it is not the judgment which may be obtained, but the commencement of a suit to enforce a co-existing inconsistent remedy in a court having jurisdiction, which constitutes the decisive act and makes the election binding." Numerous cases may be found, the language of which seems to support the same rule, but in many of these either the exact point was not presented or there appeared additional facts which diminish their force as authority for the bare proposition that one remedy cannot, even before judgment, be abandoned for another. On the other hand, it was held in *Matthews v. Lucia*,<sup>15</sup> that the conditional vendor by suing for the price and attaching the property had not estopped himself to reclaim the property where a non-suit had been taken in the first action. The same result was reached in *Goldenberger Iron Co. v. Cincinnati Iron & Steel Co.*,<sup>16</sup> where it was held that a prosecution of the action to judgment was necessary to constitute an election.

In the recent case of *Twentieth Century Machinery Co. v. Excelsior Springs Mineral Water & Bottling Co.*, a sale of personal property was made under such circumstances as, in the opinion of the court, constituted a conditional sale. The vendor filed suit for the purchase price against the defendant, a subvendee, and then, being compelled to take a non-suit, dismissed the proceeding and commenced an action to recover the value of the goods. The court held that as the title was reserved in the vendor for the purpose of security, the mere assertion in court of a claim to the price, abandoned before prosecution to judgment, did not amount to a conclusive election to affirm the sale and pass title to the vendee, it appearing that the defendant suffered no impairment of any right by reason of the abandoned proceeding. Previous Missouri cases especially *Anchor Milling Co. v. Walsh*<sup>17</sup> and *Johnson-Brinkman Co. v. Central Bank*,<sup>18</sup> cited and quoted extensively in the principal case, seem to afford ample justification for the position of the court. While neither of the two cases just mentioned involved a conditional sale, the first is quite similar to the principal case in that the plaintiff, deriving his claim of title as the holder of a bill of sale in the nature of a mortgage and as the assignee of a mortgage, held a security title as does the conditional vendor.

14. (1909) 200 Mass. 429, 86 N. E. 775.

15. (1883) 55 Vt. 308.

16. (1913) 153 Ky. 20, 154 S. W. 374.

17. (1885) 20 Mo. App. 107.

18. (1893) 116 Mo. 559, 22 S. W. 813.



The court there held that the bringing of an attachment suit, which was abandoned before judgment, did not bar a subsequent recovery of the goods *in specie*; that to constitute a binding election in such a case there must arise either an estoppel by record, as by judgment, or an estoppel *in pais*, founded upon a detriment which the plaintiff would suffer from the plaintiff's change of remedy. The same doctrine was applied in *Johnson-Brinkman Co. v. Central Bank*, where the vendee in a cash sale paid with a worthless check.<sup>19</sup>

The result reached in the principal case seems desirable and proper. As the nature of the conditional seller's remedies, that is, whether alternative or cumulative, may be regarded as an open question in Missouri, the court might well have decided that even the prosecution to judgment of the action for the price would not have constituted an election. But if the majority view to the contrary be taken for granted, it seems proper to hold, as did the court, that the mere institution of proceedings did not constitute a conclusive election. This conclusion, it is believed, has the support of the best reasoned American cases. The question has often arisen in other than conditional sales cases, and the decisions have been so conflicting and so dependent upon the nature of the remedies between which the choice is exercised that it would be hazardous to state any one view as representing the weight of authority.<sup>20</sup> But there seems to be no good reason why a vendor, who retains title for the express purpose of securing the price, should be held to have irrevocably waived the security and affirmed the sale merely because he has attempted to enforce payment without resorting to the security, where a change of remedy would work no injustice.

D. H. L.

IMPLICATION OF EASEMENTS. *JABLONSKY v. WUSSLER*.<sup>1</sup>—The question of implying an easement usually arises upon the severance of a tenement into two or more parts. So long as the whole is owned by the same person there can be no easement over one part in favor of any other part.<sup>2</sup> Where the owner conveys to another a portion of his land to which the only way of ingress and egress is over the remaining land of the grantor

19. The following authorities also hold that the previous action, dismissed before judgment, does not constitute an election. *Johnson-Brinkman Co. v. Mo. Pac. Ry. Co.* (1894) 126 Mo. 344, 28 S. W. 870 (reversing decision of Kansas City Court of Appeals in 52 Mo. App. 407—vendor in cash sale paid with bad check; brought attachment suit against vendee, then replevied in hands of carrier); *Steinbach v. Murphy* (1910) 143 Mo. App. 537, 128 S. W. 207 (excluded partner sues at once for accounting; later brings another action); *Otto v. Young* (1910) 227 Mo. 193, 127 S. W. 9 (suit for damages brought and dismissed after suit for specific performance filed). But the remedies cannot be pursued concurrently. *Lapp v. Ryan* (1886) 23 Mo. App. 436 (vendor sued fraudulent vendee for price; also replevied goods); *Hargadine-McKiltrick D. G. Co. v. Warden* (1899) 151 Mo. 578, 52 S. W. 593 (during pendency of replevin suit, vendor presents claim to vendee's assignee in bankruptcy).

20. See 34 L. R. A. (N. S.) 309, for a classification and collection of decisions relating to election of remedies in other than conditional sale cases.

1. (1914) 171 S. W. 641.

2. *Oliver v. Hook* (1887) 47 Md. 301; *Wheeldon v. Burrows* (1879) 12 Ch. Div. 31; *Brown v. Alabaster* (1887) 37 Ch. Div. 490; *Howell v. Estes* (1888) 71 Tex. 690, 12 S. W. 62.

or land of a stranger, the law implies a grant of a way over the remaining land of the grantor.<sup>3</sup> It is a way of necessity. The courts equally imply a reservation of a similar way where the land retained by the grantor can only be reached over the land granted or over land of a stranger.<sup>4</sup> The way is given under an implied grant in favor of the grantee and under an implied reservation in favor of the grantor. It will not be implied where there is another way by which the owner may gain access even though an implied one over the land retained or granted would be more convenient.<sup>5</sup> The way must be necessary. Where there is no other way but one could be constructed, the expense of which would be entirely disproportionate to the value of the land, many courts say there is necessity sufficient for a way of necessity.<sup>6</sup> Other courts insist that there be strict necessity.<sup>7</sup> All courts agree that a way of necessity cannot arise from mere considerations of convenience.<sup>8</sup> A mode of access over navigable water will defeat a way over land of the grantor which encloses it on other sides.<sup>9</sup> The way being given on the theory of an implied grant or an implied reservation should be necessary to the use of the land in the condition it was in at the time of the severance. Such is the rule in England,<sup>10</sup> but the cases in this country seem to be divided.<sup>11</sup> A way of necessity is not a particular way,<sup>12</sup> but a reasonably convenient way to be selected by the owner of the servient tenement. If he fails or refuses to select it, the owner of the dominant tenement may select a way not unreasonably inconvenient to

3. *Cooper v. Maupin* (1840) 6 Mo. 624; *Snyder v. Warford & Thomas* (1848) 11 Mo. 513; *Vossen v. Dautel* (1893) 116 Mo. 379, 22 S. W. 734; *Rice v. Wade* (1908) 131 Mo. App. 338, 111 S. W. 594 (semble); *Clarke v. Cogge* (1607) Cro. Jac. 170; *Bass v. Edwards* (1879) 126 Mass. 445; *Kripp v. Curtis* (1886) 71 Cal. 62, 11 Pac. 879; *Mead v. Anderson* (1888) 40 Kan. 203, 19 Pac. 708; *Pleas v. Thomas* (1897) 75 Miss. 495, 22 So. 820; *Estep v. Hammons* (1898) 104 Ky. 144, 46 S. W. 715.

4. *Cooper v. Maupin* (1840) 6 Mo. 624; *Snyder v. Warford & Thomas* (1848) 11 Mo. 513; *Clark v. Cogge*, (1607) Cro. Jac. 170; *Collins v. Prentice*, (1843) 15 Conn. 38; *Fritz v. Tompkins* (1896) 41 N. Y. Supp. 985; *Meredith v. Frank* (1897) 56 Ohio St. 479, 47 N. E. 656; 8 L. R. A. 58, note; 17 L. R. A. N. S. 1019.

5. *Rice v. Wade* (1908) 131 Mo. App. 338, 111 S. W. 594; *Ogden v. Grose* (1861) 38 Pa. St. 487; *Charleston & W. C. Ry. Co. v. Fleming* (1903) 118 Ga. 699, 45 S. E. 664; *Garnis v. Lunsford* (1904) 120 Ga. 370, 47 S. E. 967; *O'Brien v. Murphy* (1905) 189 Mass. 353, 75 N. E. 700.

6. *Pettingill v. Porter* (1864) 8 Allen (Mass.) 1; *Schmidt v. Quinn* (1884) 136 Mass. 575; *Smith v. Griffin* (1890) 14 Colo. 429, 23 Pac. 905; *Trump v. McDonnell* (1898) 120 Ala. 200, 24 So. 353 (semble); *Gaines v. Lunsford* (1904) 120 Ga. 370, 47 S. E. 967 (semble).

7. *Ogden v. Grose* (1861) 38 Pa. 487; *Stevens v. Orr* (1879) 69 Me. 323; *Kripp v. Curtis* (1886) 71 Cal. 62, 11 Pac. 879; *Corea v. Higuera* (1908) 153 Cal. 451, 95 Pac. 882.

8. *Cooper v. Maupin* (1840) 6 Mo. 624; *Vossen v. Dautel* (1893) 116 Mo. 379, 22 S. W. 734; *Fieid v. Mark* (1894) 125 Mo. 502, 515, 28 S. W. 1004; *Peters v. Worth* (1901) 164 Mo. 431, 64 S. W. 490; *Nichols v. Luce* (1834) 24 Pick. (Mass.) 102; *Carey v. Rae* (1881) 58 Cal. 159; *Trump v. McDonnell* (1898) 120 Ala. 200, 34 So. 353.

9. *Lawton v. Rivers* (1823) 2 M'Cord (S. C.) 445; *Kingsley v. Goldsboro Land Imp. Co.* (1894) 86 Me. 279, 29 Atl. 1074; *Hildreth v. Goochins* (1898) 91 Me. 227, 39 Atl. 550; *Staples v. Cornuall* (1906) 114 App. Div. 596, 99 N. Y. Supp. 1009.

10. *Corporation of London v. Riggs* (1880) 13 Ch. Div. 798. Cf. *Camp v. Whitman* (1893) 51 N. J. Eq. 467, 26 Atl. 917, holding that the way of necessity is for the use of the premises contemplated by the parties at the time of the grant.

11. *Peofees of, etc., School of Ipswich v. Proprietors of, etc., Pasture* (1899) 174 Mass. 572, 54 N. E. 462; *Camp v. Whitman* (1893) 51 N. J. Eq. 467, 26 Atl. 917. *Contra: Meyers v. Dunn* (1881) 49 Conn. 71; *Whittier v. Winkley* (1882) 62 N. H. 338.

12. *Bass v. Edwards* (1879) 126 Mass. 445; *Brown v. Alabaster* (1887) 37 Ch. Div. 490.

the owner of the servient tenement.<sup>13</sup> The way being created because of necessity is held to cease when the necessity no longer exists.<sup>14</sup> Easements of necessity are not limited to ways but have been extended to include other easements.<sup>15</sup>

Another class of implied easements is represented by *Richards v. Rose*.<sup>16</sup> The easements there were reciprocal. Plaintiff's and defendant's houses adjoined each other and were dependent upon each other for support. Both were built by and had belonged to the same person, and it did not appear which was granted first by him. The court said "that where houses have been erected in common by the same owner upon a plot of ground, and therefore necessarily requiring mutual support, there is, either by a presumed grant or by a presumed reservation, a right to such mutual support; so that the owner who sells one of such houses, as against himself, grants such rights, and on his own part also reserves the right; and consequently the same mutual dependence of one house upon its neighbors still remains." The principle of this case was recognized and approved in *Wheeldon v. Burrows*<sup>17</sup> and represents the English rule. The question has frequently arisen in cases of easements of support but the court in *Wheeldon v. Burrows* in explaining *Pyer v. Carter*,<sup>18</sup> which was a case involving drains, suggested that the easements there were perhaps reciprocal. While recognizing that the case was not decided on that ground, Thesigler, L. J., in *Wheeldon v. Burrows* said, "I cannot see that there is anything unreasonable in supposing that in such a case, where the defendant under his grant is to take this easement, which had been enjoyed during the unity of ownership, of pouring his water upon the grantor's land, he should also be held to take it subject to the reciprocal and mutual easement by which that very same water was carried into the drain on that land and then back through the land of the person from whose land it came."<sup>19</sup> There seems no objection to this if both easements can be said to be drains. Reciprocity implies equality; the easements, then, should be of the same kind. Such was the case in *Richards v. Rose*, where the easements were both easements of support.

The question has arisen several times in American jurisdictions but it is seldom discussed as a matter of reciprocal easements.<sup>20</sup> In *Mitchell v. Seipel*,<sup>21</sup> the Court of Appeals of Maryland very correctly stated the

13. *Chase v. Hall* (1890) 41 Mo. App. 15; *Holmes v. Seely* (1838) 19 Wend. (N. Y.) 507; *Bass v. Edwards* (1879) 126 Mass. 445; *Kripp v. Curtis* (1886) 71 Cal. 62, 11 Pac. 879; *Ritchey v. Welch* (1898) 149 Ind. 214, 48 N. E. 1041.

14. *Collins v. Prentice* (1842) 15 Conn. 39; *Viall v. Carpenter* (1859) 14 Gray (Mass.) 136.

15. *Racky v. Sprague* (1840) 17 Me. 281; 1 Tiffany, Real Property, 713.

16. (1853) 9 Ex. 218.

17. (1879) 12 Ch. Div. 31.

18. (1857) 1 H. & N. 916.

19. (1879) 12 Ch. Div. 59.

20. *Eno v. De Vecchio* (1854) 4 Duer (N. Y.) 53, (1856) 6 Duer 17; *Jordan v. Otis* (1854) 38 Me. 429; *Webster v. Stearns* (1856) 5 Duer 553; *Morrison v. King* (1871) 62 Ill. 30.

21. (1879) 53 Md. 251.

doctrine of *Richards v. Rose*. In *Marshall v. Adams*,<sup>22</sup> land was conveyed and described by metes and bounds. The line passed through a barn. The grantee removed the portion of the barn on his own land. The Massachusetts court allowed the grantor to recover for the loss of support and shelter. The court recognized it to be a case of implied reciprocal easements of support, which are reserved in favor of the grantor as well as granted to the grantee. The court included the right of shelter as incidental to the right of support. In *Tunstall v. Christian*,<sup>23</sup> the Supreme Court of Virginia added a very proper qualification to the rule as already stated. An owner of two adjoining lots built light wooden buildings on each. He conveyed one and then the other. The second grantee erected a large brick building on his lot. The first grantee then began to excavate on his lot. The excavation would not have hurt the second grantee's property, but for his having increased the weight of the building on his land. The court recognized that reciprocal easements may be impliedly reserved in favor of the grantor but limited it to reciprocal easements in favor of the land in the condition it was in at the time of the grant. This is a reasonable qualification and would perhaps be recognized in any jurisdiction which recognizes reciprocal easements.<sup>24</sup> In order to have reciprocal easements in a wall, a portion of the wall must rest on the land of each party.<sup>25</sup> If it were otherwise, the entire burden would be on one tenement with no reciprocal benefit at the expense of the other tenement.

As to easements of necessity and reciprocal easements it is immaterial whether the dominant or the servient tenement is conveyed first. The courts will imply a reservation in favor of the grantor as well as a grant to the grantee. With regard to all other easements which are implied, the courts generally distinguish between cases of implied grants and implied reservations. An implied grant arises where the quasi-dominant tenement is conveyed before the quasi-servient tenement and where the quasi-dominant and quasi-servient tenements are conveyed simultaneously.<sup>26</sup> In such cases there is no question of the grantor's derogation from his own grant. The question is as to what passes to the grantee under the grant, and the grant will be construed in favor of the grantee. The courts uniformly hold that in favor of the grantee something more than easements of necessity and reciprocal easements will be implied. The English courts have held that in favor of the grantee there will be implied all those quasi-easements which are continuous, apparent, and necessary to a reasonable enjoyment of the premises.<sup>27</sup> While it is admitted that the

22. (1885) 138 Mass. 228.

23. (1885) 80 Va. 1.

24. See *Union Lighterage Co. v. London Graving Dock Co.* (1902) 2 Ch. Div. 557, 567.

25. *Cherry v. Brizzolara* (1909) 89 Ark. 309, 116 S. W. 668.

26. *Rogers v. Sinsheimer* (1873) 50 N. Y. 646; *Allen v. Taylor* (1880) 16 Ch. Div. 47; *Russel v. Watts* (1883) 25 Ch. Div. 559, 573; *Howell v. Estes* (1888) 71 Tex. 690, 12 S. W. 62 (devise); *Phillips v. Low* (1892) 1 Ch. Div. 47 (devise); *Greer v. Van Meter* (1896) 54 N. J. Eq. 270, 33 Atl. 794; *Baker v. Rice* (1897) 56 Ohio St. 463, 47 N. E. 653.

27. *Watts v. Kelson* (1870) L. R. 6 Ch. App. 166; *Wheeldon v. Burrows* (1879) 12 Ch. Div. 31; *Brown v. Alabaster* (1887) 37 Ch. Div. 490.

owner of two tenements cannot create an easement over one part in favor of any other part, it is considered that he may make such permanent alterations in one part as to adapt it to the use of another part. It is not unreasonable that the right to require the continuance of such alterations should be held to pass with a grant of the portion in favor of which the alteration operates. In *Polden v. Bastard*,<sup>28</sup> the court, in holding that a conveyance of a house did not carry with it the right to take water from a well on adjoining premises, considered a continuous easement to be one constantly in use. The case was decided several years before the English courts had clearly stated the doctrine of continuous and apparent quasi-easements and perhaps does not represent the views of the English courts as to continuous quasi-easements. A learned English text-writer considers a quasi-easement continuous when it involves a permanent alteration of the quasi-servient tenement.<sup>29</sup> Apparent quasi-easements, within the meaning of the English rule, are not only those which must necessarily be seen, but those which may be seen or known on a careful inspection of the premises by a person ordinarily conversant with the subject.<sup>30</sup>

The general views of the English courts have been adopted by most courts of this country with only slight modifications.<sup>31</sup> Pitney, V. C., in *Tooth v. Bryce*<sup>32</sup> said that a non-continuous quasi-easement was one the enjoyment of which depended "upon the actual interference of man at each time of enjoyment." The same learned Vice-Chancellor in *Larsen v. Peterson*<sup>33</sup> said "that the word 'continuous' in this connection means no more than this—that the structure which produces the change in the tenement shall be of a permanent character, and ready for use at the pleasure of the owner without making an entry on the servient tenement." That the structure should amount to a permanent alteration of the quasi-dominant tenement is perhaps all that is necessary.<sup>34</sup> Several American courts, however, have held that a quasi-easement is continuous when no act of man is necessary for its continuous enjoyment.<sup>35</sup> The New Jersey court in *Larsen v. Peterson* said that what was meant by apparent was "that the parties should have actual knowledge of the quasi-easement or knowledge of such facts as would put them on inquiry." It is doubtful whether actual knowledge by the purchaser of the quasi-dominant tenement should be considered in determining whether a quasi-easement is apparent within the meaning of the rule. For the benefit of an innocent

28. (1865) L. R. 1 Q. B. 156.

29. Gale, Easements (8th ed.) 115, 116.

30. *Pyer v. Carter* (1857) 1 H. & N. 916; Gale, Easements (8th ed.) 116.

31. *Carbrey v. Willis* (1863) 7 Allen (Mass.) 364; *Tooth v. Bryce* (1892) 50 N. J. Eq. 589, 25 Atl. 182; *Larsen v. Peterson* (1894) 53 N. J. Eq. 88, 30 Atl. 1094; cases cited in notes 36-41 *infra*; 8 L. R. A. N. S. 327, note; 26 L. R. A. N. S. 315, note.

32. (1892) 50 N. J. Eq. 589, 25 Atl. 182.

33. (1894) 53 N. J. Eq. 88, 30 Atl. 1094.

34. *Phillips v. Phillips* (1864) 48 Pa. St. 178; *John Hancock Mut. L. Ins. Co. v. Patterson* (1885) 103 Ind. 582, 2 N. E. 188; *Kelly v. Dunning* (1887) 43 N. J. Eq. 62, 10 Atl. 276.

35. *Providence Tool Co. v. Corliss Steam Engine Co.* (1870) 9 R. I. 564, 571; *Borelli Bros. v. Blakemore* (1888) 66 Miss. 136; 57 Am. Dec. 760, note; Jones, Easements, §143. Cf. *Lampman v. Milks* (1860) 21 N. Y. 505, 515.

purchaser without actual knowledge from the owner of the quasi-servient tenement it seems best to require that the quasi-easements to be apparent be such that they must necessarily be seen or that they may be seen or known on a careful inspection by a person ordinarily conversant with the subject.

The decisions are not uniform as to what is necessary in addition to the requirement that the quasi-easement be continuous and apparent. In *Tooth v. Bryce* the court required that it be such as is "beneficial to and adds to its use and will continue to do so in the future." Other cases have required that it be necessary "to a convenient enjoyment of the premises,"<sup>36</sup> "to a comfortable enjoyment of the premises,"<sup>37</sup> "to a reasonable use of the property granted,"<sup>38</sup> "to a proper use of the property granted,"<sup>39</sup> "to a beneficial enjoyment of the premises,"<sup>40</sup> or "reasonably necessary to a fair enjoyment of the premises."<sup>41</sup> It has been suggested that because of the uncertainty the whole doctrine of implied easements might well have been repudiated.<sup>42</sup> Professor Kales considers it based on the spirit of "officious kindness." A few jurisdictions have adopted a fixed test for the determination of the question of necessity, viz., whether a substitute can be secured by reasonable trouble and expense.<sup>43</sup> In stating the rule courts sometimes add that the quasi-easement must be *de facto* in existence.<sup>44</sup> This, it would seem, is added to emphasize the idea of permanency involved in the requirement that the quasi-easement be continuous.

*Pyer v. Carter* refused to make any distinction between implied reservations and implied grants. The court said the grantee took the premises such as they were. Several American jurisdictions have taken a similar view.<sup>45</sup> They are, however, in the minority. This portion of the decision in *Pyer v. Carter* has been repudiated in England, the later cases refusing to imply a reservation of any easements other than easements of necessity or reciprocal easements.<sup>46</sup> The grantor is not permitted to derogate from his own grant. This is perhaps the prevailing view in American jurisdictions.<sup>47</sup>

36. *Phillips v. Phillips* (1864) 48 Pa. St. 178.

37. *Fitzpatrick v. Mik* (1887) 24 Mo. App. 435.

38. *Israel v. Leith* (1890) 20 Ont. Rep. 361; *Paine v. Chandler* (1892) 134 N. Y. 385, 32 N. E. 18; *Baker v. Rice* (1897) 56 Ohio St. 463.

39. *Evans v. Dana* (1862) 7 R. I. 306.

40. *Kelly v. Dunning* (1887) 43 N. J. Eq. 62, 10 Atl. 276.

41. *John Hancock Mut. L. Ins. Co. v. Patterson* (1885) 103 Ind. 582, 2 N. E. 188.

42. 1 *Tiffany Real Property*, 710; Professor Kales in 3 *Illinois Law Review* 187.

43. *Johnson v. Jordan* (1841) 2 Met. (Mass.) 234; *Carbrey v. Willis* (1863) 7 Allen (Mass.) 364; *Randall v. McLaughlin* (1865) 10 Allen 366.

44. *Johnson v. Jordan* (1841) 2 Met. 234; *Carbrey v. Willis* (1863) 7 Allen 364.

45. *Seibert v. Levan* (1848) 8 Pa. St. 383; *Harwood v. Benton* (1860) 32 Vt. 724; *Galloway v. Bonesteel* (1886) 65 Wis. 79, 26 N. W. 262; *Znamancek v. Jellinek* (1903) 69 Neb. 110, 95 N. W. 28; *Powers v. Hefferman* (1908) 233 Ill. 597, 84 N. E. 661.

46. *Suffield v. Brown* (1863) 4 De G. J. & S. 185; *Wheeldon v. Burrows* (1879) 12 Ch. Div. 31.

47. *Preble v. Reed* (1840) 17 Me. 169; *Scott v. Bentel* (1873) 23 Grattan (Va.) 1; *Mitchell v. Seipel* (1879) 53 Md. 251; *Wells v. Garbutt* (1892) 132 N. Y. 430, 30 N. E. 178.

The question of implication of easements was presented to the Missouri Supreme Court in the recent case of *Jablonsky v. Wussler*.<sup>48</sup> The facts were the same as in *Bussmeyer v. Jablonsky*<sup>49</sup> and the court adopted the opinion in that case. A common owner of several lots, on some of which were buildings, sold five lots to plaintiff. Later the owner sold to defendant the remainder of the lots. Between buildings on plaintiff's and defendant's lots was a hallway, entirely on defendant's lot, which had been used by occupants of both houses as a means of access to the rear of the lots. Defendant obstructed the passage and plaintiff sought to compel him to remove the obstruction and to restrain him from further obstruction. Plaintiff could form a way over an adjoining lot owned by him. The court treated the question as an implication of a way of necessity. It did not discriminate between cases of implied grants of apparent and continuous quasi-easements and easements of necessity. Various cases of each class were discussed. The court said that for creation of an easement of necessity only reasonable necessity is requisite. *Barrett v. Bell*,<sup>50</sup> cited in the opinion, involved the question as to whether a kettle on an adjoining lot would pass under the word "appurtenances" in a lease. The case did not directly involve the implication of easements. *Field v. Mark*<sup>51</sup> was also quoted from. In that case at the time of the grant by the common owner the property was vacant and perhaps there was no way apparent at the time of the conveyance. The court did not discuss apparent and continuous quasi-easements but simply held that convenience was not sufficient for the implication of a way of necessity. The only case in Missouri deciding the question of apparent and continuous quasi-easements is *Fitzpatrick v. Mik*.<sup>52</sup> The court there said quasi-easements would be implied where apparent, continuous, "and reasonably necessary for enjoyment of the land granted" or "necessary for a comfortable enjoyment of the thing granted." The passage in the principal case was apparent and continuous, but the court said it was not reasonably necessary. With such as a finding of fact the result is perhaps sound; but it is to be regretted that the principle of the case was not worked out more clearly.

K. B.

#### OBLIGATIONS IMPOSED BY DEVISE. GALBRAITH V. PENNINGTON.<sup>1</sup>—

A testator devised land to his two foster children, the plaintiff and defendant, in "consideration of their looking after and caring for the wants of [the testator] and his wife during their life." After the death of the testator, the plaintiff alone cared for and supported the wife. This suit was brought after her death to recover half the cost of such support. It

- 48. (1914) 171 S. W. 641.
  - 49. (1911) 241 Mo. 681, 145 S. W. 772.
  - 50. (1884) 82 Mo. 110.
  - 51. (1894) 125 Mo. 502, 28 S. W. 1004.
  - 52. (1887) 24 Mo. App. 435.
1. (1914) 170 S. W. 668.

was held that the devise to the foster children was on a condition which they had a joint obligation to perform and which entitled the plaintiff, who wholly performed it, to contribution from the defendant. The decision presents two questions: whether the devisees of an estate on a condition are under a personal obligation to perform that condition, and whether one such devisee can compel contribution from the other.

Tho devises and gifts on condition that the devisee or donee support the grantor or some one else be expressed to be "in consideration of" such support, these provisions are not held to be conditions precedent to the passing of the title,<sup>2</sup> since the support may be more easily given if the land can be possessed. Such provisions are generally held to create charges on the land,<sup>3</sup> even tho apt words of conditions are used.<sup>4</sup> The disposition of the Missouri courts seems to be to construe these provisions as conditions subsequent. *Weinrich v. Weinrich*<sup>5</sup> suggests that a condition for the benefit of a third party may also operate as an enforceable trust in favor of the beneficiary.

Where a charge on the land is created, the person to be supported may enforce his claim against the land itself,<sup>6</sup> and the devisee or donee is personally responsible for the support.<sup>7</sup> The devise is construed to be on a condition precedent that the devisee agree to furnish the support, and the acceptance alone is sufficient evidence of that agreement.

The provision in question need not necessarily be construed to create a charge on the land. It may create a strict condition, especially where appropriate words are used. Such has been the rule of construction that the Missouri courts have adopted.<sup>8</sup> Tho in *Alexander v. Alexander*,<sup>9</sup> there were apt words of condition, in *Wood v. Ogden*<sup>10</sup> the court thought itself bound by that case to construe a devise "upon consideration" to be upon condition. No personal obligation should flow from a condition. A condition affects the land, not the person.<sup>11</sup> It acts on the estate granted as a limitation, and reserves to the grantor a future interest in the land.

2. *Wood v. Ogden* (1906) 121 Mo. App. 668, 97 S. W. 610.

3. *Sheldon v. Purple* (1834) 15 Pick. (Mass.) 528; *Jennings v. Jennings* (1862) 27 Ill. 517; *Meakin v. Duvall* (1875) 43 Md. 372; *Emery v. Swasey* (1902) 97 Me. 136, 53 Atl. 992; *Warner v. Bullen* (1905) 123 Ill. App. 138.

4. *Fox v. Phelps* (1837) 17 Wend. (N. Y.) 393; *Woodward v. Walling* (1871) 31 Iowa 533; *Isner v. Kelley* (1902) 51 W. Va. 82, 41 S. E. 158; *Spangler v. Newman* (1909) 239 Ill. 616, 88 N. E. 292. But a clear intent to create an estate on condition will be effectuated. *Hogeboom v. Hall* (1840) 24 Wend. (N. Y.) 145.

5. (1835) 18 Mo. App. 364.

6. *Donnelly v. Edelen* (1874) 40 Md. 117; *Borst v. Crommie* (1879) 19 Hun (N. Y.) 209. Cf. *Murphy v. Carlin* (1892) 113 Mo. 112, 20 S. W. 786.

7. *Loder v. Hatfield* (1877) 71 N. Y. 92; *Yearly v. Long* (1883) 40 Ohio St. 27; *Porter v. Jackson* (1884) 95 Ind. 210; *Evans v. Foster* (1891) 80 Wis. 509, 50 N. W. 410; *Sommers v. Sommers* (1901) 69 N. Y. S. 866, 59 App. Div. 340; *Wingett v. Bell* (1900) 14 Pa. Super. Ct. 558.

8. *Messersmith v. Messersmith* (1856) 22 Mo. 369; *Alexander v. Alexander* (1900) 156 Mo. 413, 57 S. W. 110; *Wood v. Ogden* (1906) 121 Mo. App. 668, 97 S. W. 610. But cf. *Anderson v. Gaines* (1900) 156 Mo. 664, 57 S. W. 726, where "under this express condition and agreement" was construed as a covenant.

9. (1900) 156 Mo. 413, 57 S. W. 110.

10. (1906) 121 Mo. App. 668, 97 S. W. 610.

11. *Clark v. Inhabitants of Brookfield* (1884) 81 Mo. 503; Conditions Subsequent in Conveyances in Missouri, 5 Law Series, Missouri Bulletin, pp. 16, 17, 18.



While there may be a duty on the part of the person to whose benefit the condition runs, to make a demand for the performance of the condition,<sup>12</sup> neither he nor the grantor should be permitted to enforce its performance, or recover damages for the failure to perform. *Dicta* in several Missouri decisions seem to point to a contrary rule. In *Baker v. C. R. I. & P. R. R.*<sup>13</sup> and *Hubbard v. K. C. etc. R. R.*,<sup>14</sup> there were grants of rights of way to railroads upon condition that they do some act on the land for the benefit of the grantor. The proper remedy for breach of the condition, it was indicated in each case, was a contractual one, either specific performance or a suit for damages. The *dicta*, if taken literally, are clearly opposed to decided cases in other jurisdictions.<sup>15</sup> In an early New York decision,<sup>16</sup> a condition in a deed that the grantee support the grantor was expressly held insufficient to show a promissory undertaking on the part of the grantee. The double operation of the conditional expression suggested in *Weinrich v. Weinrich*,<sup>17</sup> that it act both as a condition and a trust or charge, is not inconceivable. It has not been adopted, however, in any decision. On principle, then, it would seem that the provision for support in the principal case, construed solely as a condition should not have created any personal obligation.

Proceeding, however, upon the assumption of the court that a personal obligation did arise in the principal case, the inquiry is still open, whether that obligation attached jointly as to the whole of the support to both the devisees, or separately as to one-half of it to each of them. In the former case, the plaintiff who discharged the entire obligation and relieved the defendant from his liability, was clearly entitled to contribution.<sup>18</sup> This principle was stated in *Jacobsmeyer v. Jacobsmeyer*,<sup>19</sup> where the plaintiff and defendant jointly executed a contract to take care of their parents. But if the plaintiff and defendant were each separately liable for one-half the support, it is difficult to justify the plaintiff's recovery. One who voluntarily discharges another's obligation to furnish support without that other's prior request or subsequent approval, is generally regarded as an officious intermeddler.<sup>20</sup> It was stated in an

12. *Bradstreet v. Clark* (1838) 21 Pick (Mass.) 389; *Hogeboom v. Hall* (1840) 24 Wend. (N. Y.) 145.

13. (1874) 57 Mo. 265.

14. (1876) 63 Mo. 68.

15. *Palmer v. Fort Plain & Cooperstown Plank Road Co.* (1854) 11 N. Y. 376; *Woodruff v. Trenton Water Power Co.* (1856) 10 N. J. Eq. 489; *Blanchard v. Detroit, Lansing & Lake Mich. R. R. Co.* (1875) 31 Mich. 42; *Close v. Burlington, Cedar Rapids & Northern Ry. Co.* (1884) 64 Iowa 149. But cf. *Aiken v. Albany, etc., R. R. Co.* (1857) 26 Barb. (N. Y.) 289.

16. *Jackson v. Florence* (1819) 16 Johns (N. Y.) 46.

17. (1885) 18 Mo. App. 364. In *Hoyt v. Hoyt* (1905) 77 Vt. 244, 59 Atl. 845, the performance of the condition was expressly made a charge on the land.

18. Woodward, Quasi Contracts, § 254.

19. (1901) 88 Mo. App. 102.

20. See *Trippensee v. Brown* (1903) 104 Mo. App. 628, 78 S. W. 674, where the general principle is approved; Woodward, Quasi Contracts, § 209; *Moody v. Moody* (1837) 14 Me. 307; *Savage v. McCarkle* (1889) 17 Or. 42, 21 Pac. 444; *Matheny v. Chester* (1911) 141 Ky. 790, 133 S. W. 754. *Contra, Forsyth v. Ganson* (1830) 5 Wend. (N. Y.) 558, where the intermeddler who furnished the support was permitted to recover, on the analogy to the case of necessaries furnished to a wife or infant child for whom the husband or father neglects or refuses to provide.

Illinois case,<sup>21</sup> that a devise to two children "if they should take care of their mother" imposed a separate burden as to half the support on each of them. "If it were held," said the court, "that a failure of one of them to comply, should defeat the devise to them both, great and manifest injustice might result, such as never could have been designed by the testator."

It is submitted that when the court once determined in the principal case that the expression "in consideration of" created but an estate on condition, it was precluded from considering the question of recovery by the plaintiff. The condition may have attached as a whole to the devise. If it did and the defendant refused to contribute to the support, the plaintiff was compelled to furnish all of it, in order to protect his own interest in the land. If, on the other hand, it attached in equal parts to each half of the land, for the failure by the defendant to perform his part, the heirs of the testator might have entered upon his half of the land for breach of condition; it is conceivable that the defendant's obligation was personal in line with *Alexander v. Alexander*,<sup>22</sup> in which case only performance by him would save a forfeiture.

R. BURNETT

PUBLIC OFFICERS—APPOINTMENT OF MEMBER OF APPOINTING BODY. STATE EX REL. SMITH V. BOWMAN.<sup>1</sup>—The cases involving the validity of appointments to office made from the membership of the body having appointive power may be classified as follows: first, where the appointee's participation was necessary to the exercise of the appointive power; second, where such participation was unnecessary; third, where the appointee did not participate. Each of these classes will be considered apart from the statutory and constitutional provisions which in some jurisdictions make all such appointments void.<sup>2</sup>

The appointments in the first class of cases are void as against public policy.<sup>3</sup> Thus, where a statute empowered three justices of the peace to appoint a supervisor, and the appointee's participation was necessary to his appointment, the New York court held their action void on the ground that as the depositaries of a public trust the justices could not perform it for the benefit of one of their number.<sup>4</sup> In *Commonwealth v. Douglass*,<sup>5</sup> the power to appoint a prison inspector was vested by statute in a mayor,

21. *Jennings v. Jennings* (1862) 27 Ill. 517.

22. (1900) 156 Mo. 413, 57 S. W. 110.

1. (1914) 170 S. W. 700.

2. *Ellis v. Lennon* (1891) 86 Mich. 468, 49 N. W. 308; *Doyle v. Board of Education* (1892) 54 N. J. L. 313, 23 Atl. 670; *Gaw v. Ashley* (1907) 195 Mass. 173, 80 N. E. 790.

3. Throop, Public Officers, § 120; Mechem, Public Officers, § 112; *Commonwealth v. Douglass* (1803) 1 Binn. (Pa.) 77; *People ex rel. Davis v. Thomas* (1861) 33 Barb. (N. Y.) 287; *Ohio ex rel. Louthan v. Taylor* (1861) 12 Ohio St. 130; *State ex rel. Rosenheim v. Hoyt* (1867) 2 Oregon 247; *State ex rel. Oakey v. Fowler* (1895) 66 Conn. 294, 32 Atl. 162 (semble).

4. *People ex rel. Davis v. Thomas* (1861) 33 Barb. (N. Y.) 287.

5. (1803) 1 Binn. (Pa.) 77.

two aldermen, and two county justices. The court held that *quo warranto* would lie against the appointee whose participation was necessary to his appointment. This decision was approved in *Ohio ex rel. Louthan v. Taylor*,<sup>6</sup> where the appointment to the office of superintendent of a county infirmary of one of the members of the board of directors of such infirmary, was held void because the duties of the two offices were incompatible. The appointee's vote was necessary to his appointment. In *State ex rel. Rosenheim v. Hoyt*,<sup>7</sup> a city council was composed of nine members, and the charter required an appointee to receive at least five votes. The city ordinance prohibited a member of the council from voting on any question in which such member was immediately interested. The relator received five votes, one of which was cast by himself. In holding this appointment void the court said that "it is contrary to the policy of the law for an officer to prostitute his official position by using his official appointing power to place himself in office." The decision may, however, be placed upon the ground that the election was in violation of the city ordinance, but in view of the cases discussed above it would seem that a proper basis for the decision is the appointee's membership in the appointing body.

The appointments in the second class of cases are also void as against public policy.<sup>8</sup> In *Kinyon v. Duchene*,<sup>9</sup> where the board of supervisors was empowered to select drain commissioners, it was held improper to select such commissioners from its own membership. The court said, "whether they voted for their own appointment does not affirmatively appear, but they had as much right to do so as others had to vote for them." The court referred to the offices as incompatible, but treated the appointment as void. If it appears that the appointee was present and voted against his appointment, it might be urged that he had properly performed his duty to vote, and therefore is entitled to the office. But the fact that the selection is from the membership of the board having appointive power seems sufficient to invalidate the appointment. Two jurisdictions apparently recognize the validity of the appointments in the second class of cases.<sup>10</sup> In *State ex rel. Mueller v. Meyer*,<sup>11</sup> a board of trustees of an incorporated town selected one of its members to succeed the defendant as a member of the board of school trustees. The relator resigned the position of town trustee and qualified as school trustee. The court held this appointment valid. This case may, however, be distinguished from the cases representing the other view in that it does not appear that the office carried with it compensation and duties which were fixed by the appointing board. It is also characterized by the fact that

6. (1861) 12 Ohio St. 130.

7. (1867) 2 Oregon 247.

8. *Kinyon v. Duchene* (1870) 21 Mich. 498; *Meglemery v. Weissinger* (1910) 140 Ky. 353, 131 S. W. 40 (semble); Throop, Public Officers, §§ 120, 610-613; Mechem, Public Officers, § 112; 29 Cyc., 1381.

9. (1870) 21 Mich. 498.

10. *State ex rel. Mueller v. Meyer* (1878) 60 Ind. 288. See the *dictum* in *State ex rel. Oakey v. Fowler* (1895) 66 Conn. 294, 32 Atl. 162.

11. (1878) 60 Ind. 288.

the relator resigned as member of the city board before qualifying as school trustee. The court distinguished *Commonwealth v. Douglass*<sup>12</sup> and *State ex rel. Loukhan v. Taylor*,<sup>13</sup> as turning upon the question of the holding of two inconsistent offices by the same person at the same time.

*Meglemery v. Weissinger*<sup>14</sup> is the most recent case of the third class. A fiscal court appointed one of its own members whose term of office expired in three days to an office, the duties and salary of which were fixed by statute. In holding the appointment void the court said, "nor does the fact that he was not present with the court when his appointment was made, have the effect of changing this salutary rule." Clearly, under this rule the appointment would be held void if the appointee was present but did not participate in the appointment. It would seem that the basis of the doctrine of the cases is something more than the impropriety of the appointee's forfeiture of the first position by an acceptance of the office obtained through an exercise of his official appointing power.

The reasoning of the cases which treat the appointments void because of the incompatibility of the two offices would seem to be unsound on principle. The common law rule is well established that one who while occupying a public office accepts another which is incompatible with it, *ipso facto* forfeits the first without judicial proceeding or any further act of the incumbent.<sup>15</sup> It is the acceptance of, not the election or appointment to, an incompatible office which effects a forfeiture of the first office.<sup>16</sup> Where the holding of the two offices is forbidden by the constitution or the statutes an incompatibility is created similar in effect to that at common law.<sup>17</sup> An exception to this rule is made where the officer cannot vacate the first office by his own act, upon the principle that he will not be permitted to do indirectly that which he could not do directly.<sup>18</sup> This exception does not prevail in Missouri by virtue of a constitutional provision<sup>19</sup> which permits a public officer to resign at will.<sup>20</sup> Where the power which is authorized to accept his surrender of the first office appoints him to the second there is an implied concurrence in the new appointment.<sup>21</sup> The cases involving incompatibility created by common law, the constitution or the statutes, are to be distinguished from the cases where a person holding one office is declared ineligible to election to another office. In the former cases it is the holding of the two offices at the same time which is forbidden;<sup>22</sup> while in the latter cases the provisions incapacitate the

12. (1803) 1 Binn. (Pa.) 77.

13. (1861) 12 Ohio St. 130.

14. (1910) 140 Ky. 353, 131 S. W. 40.

15. *State v. Draper* (1870) 45 Mo. 355; *State ex rel. Walker v. Bus* (1896) 135 Mo. 325, 36 S. W. 636; *Rex v. Tizzard* (1829) 9 B. & C. 418; *People ex rel. Brown v. Dickson* (1855) 17 Ill. 191; *People ex rel. Kelley v. City of Brooklyn* (1879) 77 N. Y. 503; *Shell v. Cousins* (1883) 77 Va. 328.

16. *State v. Draper* (1870) 45 Mo. 355; *State ex rel. Walker v. Bus* (1896) 135 Mo. 325, 36 S. W. 636.

17. *State ex rel. Walker v. Bus* (1896) 135 Mo. 325, 36 S. W. 636.

18. *King v. Patten* (1832) 4 B. & Ad. 9.

19. Constitution of 1875, Art. XIV, § 5.

20. *State ex rel. Walker v. Bus* (1896) 135 Mo. 325, 36 S. W. 636.

21. *State ex rel. Kingsbury v. Brinkerhoff* (1886) 66 Tex. 45, 17 S. W. 109.

22. See cases cited under note 15.

incumbent of the first office for election to the second office. Any attempted election thereto is void, and does not effect a forfeiture of the first office.<sup>23</sup>

The officers of a municipal corporation like those of a private corporation are, to an extent, agents of the corporate body.<sup>24</sup> Wherever an agent is vested with authority to use any discretion in the exercise of a power conferred upon him, the law requires this discretion to be used in good faith for the benefit of the principal. The requirement is the same where the power is committed to members of a board to be exercised by them in joint action.<sup>25</sup> Upon this theory the cases hold that municipal officers can not be interested directly or indirectly in municipal contracts. In *Smith v. City of Albany*,<sup>26</sup> the council of the city of Albany of which the plaintiff was a member adopted a resolution, for which the plaintiff voted, appropriating a sum of money to defray the expense of a celebration. Under this resolution a committee from the membership of the council was appointed, under whose employment the plaintiff furnished horses and carriages to be used in the celebration. A statute made such contracts unlawful. The court in denying the plaintiff a recovery under a construction of the statute held that it was "simply declaratory of the law as it existed previous to its passage." It is immaterial that the transaction is fair on its face, or that the contractor did not participate in authorizing the contract.<sup>27</sup> The city is entitled to his services and judgment in letting the contract.<sup>28</sup> However, membership on the municipal board is not alone sufficient, the basis of the doctrine being the antagonism between the private interest of the officer and his public duty.<sup>29</sup> Statutes of Missouri applicable to cities of the first,<sup>30</sup> second<sup>31</sup> and third classes,<sup>32</sup> expressly prohibit municipal officers from being interested either directly or indirectly in municipal contracts.

A similar problem is encountered in answering the question how far directors may lawfully deal with their corporation. The principles upon which directors are restricted in dealing with their corporation are similar to those upon which the appointments and contracts discussed above are held void. Hence, if a contract is adopted at a meeting where it is necessary to count the interested director to make a quorum<sup>33</sup> or to pass the resolution authorizing the contract,<sup>34</sup> it may be avoided by the corpora-

23. *Crawford v. Dunbar* (1877) 52 Cal. 36; *In re Cortiss* (1878) 11 R. I. 638.

24. *Capital Gas Co. v. Young* (1895) 109 Cal. 140, 41 Pac. 859.

25. *Throop, Public Officers*, § 610.

26. (1875) 61 N. Y. 444.

27. *Berka v. Woodward* (1899) 125 Cal. 119, 57 Pac. 777 (semble).

28. 2 *Machen, Private Corporations*, § 1566.

29. *Boggs v. Caldwell Co.* (1859) 28 Mo. 586; *Niles v. Muzzy* (1875) 33 Mich. 61.

30. Revised Statutes, 1909, §§ 8570, 8871.

31. Laws of 1913, p. 460.

32. Laws of 1913, p. 525. This statute applies only to those cities of the third class which elect to organize under it. Revised Statutes 1909, § 9174.

33. *Hill v. Rich Hill Coal Mining Co.* (1893) 119 Mo. 9, 24 S. W. 223.

34. *Kankakee Woolen Mills Co. v. Kampe* (1889) 38 Mo. App. 229; *Davis Mill Co. v. Bennett* (1889) 39 Mo. App. 460; *Wardell v. Railroad Co.* (1880) 103 U. S. 651.

tion. This is because the director has a duty to act for the shareholders rather than for himself. So where the interested director has participated in the action of the board authorizing the contract but his vote was not necessary to constitute a sufficient majority, the prevalent doctrine treats such contracts as voidable even though the utmost good faith is used.<sup>35</sup> But the Missouri cases hold that "contracts thus entered into are presumptively valid, but when questioned by proceedings in equity, will be jealously scrutinized and set aside upon any reasonable appearance of unfairness or fraud."<sup>36</sup> The majority doctrine regards participation by the interested director sufficient to render the contract voidable whether or not his vote was necessary to its authorization.<sup>37</sup> His obligation is not discharged by a performance of the duty to vote; there is an additional duty to counsel and advise. However, where the interested director has not participated in the transaction on behalf of the company and the contract is fair and honest it is enforceable.<sup>38</sup> This is upon the theory that there is not a sufficient conflict of interests to invalidate the transaction.

In the recent case of *State ex rel. Smith v. Bowman*,<sup>39</sup> the council of a city of the third class having the power to select a city clerk, appointed one of its members to that office. The council consisted of sixteen members. The relator received nine votes one of which was cast by himself. In a proceeding to compel the mayor to approve his bond and issue a certificate of election, before he had resigned as councilman, the court denied relief on the ground that the appointment was void. This case might have been decided on the ground that the statutes vested in the city council the power and duty to select a city clerk, and that the ordinances of the city which determined the manner of election required a majority of the members elected to choose a clerk and prohibited an interested member from voting. Therefore, the relator's election necessitated nine votes and since his vote was necessary to constitute the required majority his election was void. The validity of these ordinances was questioned, and the court did not decide whether the appointee's vote could be counted, but held that the appointment was void in any event as against public policy.

Numerous reasons are assigned as the basis of this doctrine, such as, the possibility of forming a combination among the members of a board for the purpose of creating offices and appointing its members until all the

35. *Munson v. Syracuse etc. R. R. Co.* (1886) 103 N. Y. 58, 8 N. E. 355; *Ravenswood S. & G. Ry. Co. v. Woodyard* (1889) 46 W. Va. 558, 33 S. E. 285. Contra, *Tennison v. Patton* (1902) 95 Tex. 284, 67 S. W. 92.

36. *Chouteau Ins. Co. v. Floyd* (1881) 74 Mo. 291; *Patrick v. Boonville Gas Light Co.* (1885) 17 Mo. App. 462 (semble). *Williams v. Jackson Co. Patrons of Husbandry* (1886) 23 Mo. App. 132; *Foster v. Belcher's Sugar Refining Co.* (1893) 118 Mo. 238, 24 S. W. 63.

37. 2 Machen, *Private Corporations*, §§ 1566, 1572.

38. *Singer v. Salt Lake Copper Mfg. Co.* (1898) 17 Utah 143, 53 Pac. 1024; *Ft. Payne Rolling Mill v. Hill* (1899) 174 Mass. 224, 54 N. E. 532; *Union Trust Co. of Maryland v. Carter* (1905) 139 Fed. 717.

39. (1914) 170 S. W. 700.

appointive offices are filled by members of the appointing body; and the possibility of the appointee's affecting his compensation and duties, since they are usually regulated by the appointing body; and that since the office may be a lucrative one a member of the appointing body should not be permitted to become the beneficiary of the appointment. Aside from the impropriety of such appointments the most convincing reason seems to be that since public officers are public agents they should avoid the possibility of a conflict between their private interests and the interests of the public. The law will not permit one to assume a position which affords such opportunities for log-rolling.

R. BURNS

SALES OF PERSONAL PROPERTY—WARRANTY OF QUALITY. BOSTON v. ALEXANDER.<sup>1</sup>—The action upon a warranty was in its origin an action of tort, but the obligation of a warrantor is now conceived to be contractual.<sup>2</sup> Warranties of quality or condition are of two kinds—express and implied. "The sale of a chattel with any representation or positive affirmation of its quality and condition made with the intention of being relied upon, is an express warranty for the breach of which an action will lie."<sup>3</sup> The tendency of the early law to rely upon the exact form of a transaction resulted in the requirement of the use of "warrant" or words of similar import to render the seller liable.<sup>4</sup> However, it is now well settled that no special form of words is necessary to create an express warranty.<sup>5</sup>

The chief conflict in cases involving express warranties centers around the question as to whether the statement of the seller was a statement of fact or of opinion. It is held that a statement by the seller that his goods are equal in quality to other well known articles, similar in kind, is an express warranty.<sup>6</sup> Statements that a horse is "sound,"<sup>7</sup> or "all right except for a little bump on his ankle,"<sup>8</sup> have been held express warranties. But where a seller, in reply to inquiries concerning the soundness of an animal, said "I think so,"<sup>9</sup> or "if there is anything wrong with the mule I don't know it,"<sup>10</sup> it is held that he has not warranted. The basis for such decisions is that the statements are not such an express affirmation but that the buyer is left to judge for himself and that they are not intended and understood as being other than mere expressions

1. (1914) 171 S. W. 582.

2. Williston, Sales, § 197.

3. *Wertheimer-Swartz Shoe Co. v. McDonald* (1909) 138 Mo. App. 328, 122 S.W. 5.

4. *Chandeler v. Lopus* (1772) Cro. Jac. 4.

5. *Wertheimer-Swartz Shoe Co. v. McDonald* (1909) 138 Mo. App. 328, 122 S. W. 5; *Carter v. Black* (1870) 46 Mo. 384; *Childs v. Emerson* (1906) 117 Mo. App. 671, 93 S. W. 286; *Albin Fruit Assn. v. Hartman* (1909) 146 Mo. App. 155, 123 S. W. 957.

6. *Murphy v. Gay* (1865) 37 Mo. 535; *Strauss v. American Gum Co.* (1895) 134 Mo. 114, 114 S. W. 73; *Wertheimer-Swartz Shoe Co. v. McDonald* (1909) 138 Mo. App. 328, 122 S. W. 5.

7. *Samuels v. Guin's Estate* (1892) 49 Mo. App. 8; *Faust v. Koers* (1905) 111 Mo. App. 560, 86 S. W. 278; *Riddle v. Webb* (1895) 110 Ala. 599, 18 So. 323; *Joy v. Bitzer* (1889) 77 Iowa 73, 41 N. W. 575.

8. *Danforth v. Crookshanks* (1897) 68 Mo. App. 311.

9. *Lindsay v. Davis* (1860) 30 Mo. 406.

10. *Anthony v. Potts* (1895) 63 Mo. App. 517.

of opinion. In *Mallock v. Meyers*<sup>11</sup> the statement was, "she is a good mare." It was held that this was merely an expression of opinion and not a warranty of soundness. A statement regarding the breeding qualities of animals may<sup>12</sup> or may not<sup>13</sup> be express warranties according to whether it can be considered "puffing" or a representation of fact.

An express warranty does not cover obvious defects—those which the buyer *must* have observed—unless the seller successfully uses art to prevent their discovery.<sup>14</sup> This is based on the supposed intention of the parties.<sup>15</sup> The same may be said concerning a defect about which the buyer knows.<sup>16</sup> But a buyer may protect himself from the consequences of a known defect. In *Branson v. Turner*,<sup>17</sup> the vendor of oxen said concerning a sore upon the neck of one, "that don't hurt him, it is almost well." It was held that when a seller contracts in regard to an obvious defect or makes representations upon which the buyer relies he may be liable for a patent defect.<sup>18</sup> Inspection or opportunity to inspect does not in any way affect an express warranty unless the defect is obvious, as distinguished from patent, in which case it is held the parties did not intend the defect to be covered.<sup>19</sup>

In the early law, there was no implied warranty of quality<sup>20</sup> and the maxim *caveat emptor* was rigorously applied. But the modern tendency is to substitute *caveat venditor* for *caveat emptor*. A study of the law of implied warranty involves an answer to the question, "in what cases is a warranty implied and in what cases does the old maxim of *caveat emptor* still apply?"<sup>21</sup> In Missouri in the sale of goods specified in some other way than by description of their character, usually an actual sale as distinguished from an executory contract to sell,<sup>22</sup> there is no implied warranty against defects discoverable upon ordinary inspection if there has been an inspection or an opportunity to inspect—*caveat emptor* applies.<sup>23</sup> Thus it was said in *Moore v. Koger*,<sup>24</sup> "the maxim of the civil

11. (1877) 64 Mo. 531.

12. *Young v. Van Natta* (1905) 113 Mo. App. 550, 88 S. W. 123.

13. *Bates Co. Bank v. Anderson* (1900) 85 Mo. App. 351.

14. *Brown v. Weldon* (1889) 99 Mo. 564, 13 S. W. 342.

15. *Doyle v. Parish* (1904) 110 Mo. App. 470, 85 S. W. 646; *Branson v. Turner* (1882) 77 Mo. 489; *Samuels v. Guin's Estate* (1892) 49 Mo. App. 8.

16. *Knoepker v. Ahman* (1903) 99 Mo. App. 30, 72 S. W. 483.

17. (1882) 77 Mo. 439.

18. In *Ragsdale v. Shipp* (1899) 108 Ga. 817, 34 S. E. 167, the seller of a mule said concerning his condition that he had a shipping cold and would "be alright in a few days." Reasoning that since neither party could know the consequences of this condition and that since each knew as much as the other, the court held there was no express warranty. *Branson v. Turner* is distinguishable in that the evidence showed a reliance upon the seller's statement.

19. *Woods v. Thompson* (1905) 114 Mo. App. 38, 88 S. W. 1126.

20. *Stuart v. Wilkins* (1778) 1 Doug. 18, 20.

21. Williston, Sales, § 228. The leading case in the early law of implied warranty is *Jones v. Just* (1868) L. R. 3 Q. B. 197.

22. In *Lee v. Sickles Saddlery Co.* (1889) 38 Mo. App. 205, the court said that "the law governing executory contracts is quite different from that applicable to executed sales."

23. *Thompson v. Bolts* (1844) 8 Mo. 710; *McCurdy v. McFarland* (1847) 10 Mo. 377; *Lindsay v. Davis* (1860) 30 Mo. 406; *Mallock v. Meyers* (1877) 64 Mo. 531; *Muhr v. Eagle* (1879) 7 Mo. App. 590; *Anthony v. Potts* (1895) 63 Mo. App. 517; *Doyle v. Parish* (1904) 110 Mo. App. 470, 86 S. W. 646; *Moore v. Koger* (1905) 113 Mo. App. 423, 87 S. W. 602; *Colcord Co. v. Loy-Wilson Co.* (1908) 131 Mo. App. 540, 548; *DeJen v. Brewing Co.* (1911) 157 Mo. App. 615, 616, 138 S. W. 696.

24. (1905) 113 Mo. App. 423, 87 S. W. 602.



law that a sound price implies a sound commodity, though often employed to aid the implication of an agreement to warrant is not recognized as a rule of our law, for the reason that it is considered as being too restrictive of the right everyone has to make the best bargain possible." The general rule in this country precludes an implied warranty whenever inspection or opportunity to inspect is had at the time of the bargain whether the defect is latent or patent.<sup>25</sup> The English rule is otherwise as to patent defects.<sup>26</sup> In Missouri, there are *dicta* to the effect that the seller is not permitted to take unfair advantage from his superior knowledge,<sup>27</sup> i.e., that there is an implied warranty against latent defects known to the seller. In *Colcord Co. v. Loy-Wilson Co.*,<sup>28</sup> the court was inclined to "doubt if the law raises an implied warranty even against latent defects, when an article is sold on inspection, but refrain from ruling on this question." In *Doyle v. Parish*,<sup>29</sup> emphasis was put upon the fact that the defect in the goods sold was easily discoverable upon inspection. On principle it would seem that there should be an implied warranty against latent defects if the buyer reasonably relied upon the seller's judgment and especially if the defect was known to the seller.

"In all executory contracts for the sale of any commodity, when no opportunity for inspection is offered, there is always an implied warranty that the article sold will be of merchantable quality and condition; and if the article was purchased for a particular purpose, and this was known to the vendor, at the time of making the contract, then the law will annex to every such contract of sale, the implied condition that the article shall be reasonably fit for the purpose for which it was bought, unless this is controlled by express stipulation."<sup>30</sup> Thus as regards the implied warranty of merchantability it has been held that in a contract for the sale of ice,<sup>31</sup> flour,<sup>32</sup> corn,<sup>33</sup> or milk<sup>34</sup> there is an implied warranty that it shall be fit for general use. It should be noted that merchantability and fitness for a particular purpose may often be used interchangeably, but a mower may be merchantable if it will cut grass under ordinary conditions but fit for a particular purpose only if it will cut grass of a certain height. As for the second phase of the rule above quoted, it has been followed in numerous cases, including cases involving straw for horse collars,<sup>35</sup> seed

25. *Browning v. McNear* (1904) 145 Cal. 272, 78 Pac. 722; *Horwich v. Western Brewing Co.* (1900) 95 Ill. App. 162; *White v. Oakes* (1896) 88 Me. 367, 34 Atl. 175, 32 L. R. A. 592; *Barnard v. Kellogg* (1871) 10 Wall. 383.

26. *Jones v. Bright* (1839) 5 Bing. 233; *Mody v. Gregson* (1868) L. R. 4 Ex. 49.

27. *Moore v. Koger* (1905) 113 Mo. App. 423, 87 S. W. 602; *Samuels v. Guin's Estate* (1892) 49 Mo. App. 8; *Carter v. Black* (1870) 46 Mo. 384; *Matlock v. Meyers* (1877) 64 Mo. 532.

28. (1908) 131 Mo. App. 540, 547.

29. (1905) 110 Mo. App. 470, 85 S. W. 646.

30. *Lee v. Sickles Saddlery Co.* (1889) 38 Mo. App. 201, 205.

31. *St. Louis Union Packing Co. v. Mertens* (1910) 150 Mo. App. 583, 131 S. W. 354.

32. *Glasgow Milling Co. v. Burgher* (1906) 122 Mo. App. 14, 97 S. W. 950.

33. *Atkins Bros. Co. v. Southern Grain Co.* (1906) 119 Mo. App. 119, 95 S. W. 949.

34. *Eversole v. Hanna* (1914) 171 S. W. 25.

35. *Lee v. Sickles Saddlery Co.* (1889) 38 Mo. App. 201.

for sowing,<sup>36</sup> a fan for removing dust from a workroom,<sup>37</sup> cement for a certain kind of building,<sup>38</sup> and machines bought for particular uses.<sup>39</sup> But there is not such an implied warranty if the seller did not know the purpose for which the goods were bought,<sup>40</sup> or if an article of certain specifications or brand is ordered even though it is bought for a particular purpose known to the seller.<sup>41</sup> The reason underlying the rule just stated is that the buyer has exercised his own judgment instead of relying upon the seller's. Probably in the sale of second-hand goods there is no implied warranty of fitness for a particular purpose.<sup>42</sup> But in *Colcord Machine Co. v. Loy-Wilson Co.*,<sup>43</sup> the court attached "slight importance to the fact of the machine being second-hand." In a sale by description such as "No. 2 white corn,"<sup>44</sup> or "fancy apples,"<sup>45</sup> there is an implied warranty that the article delivered shall be of that particular description.<sup>46</sup> And in a sale by sample there is a warranty that the quality of the goods delivered shall equal the sample.<sup>47</sup>

A refusal to warrant<sup>48</sup> or an express warranty upon the same subject excludes an implied warranty, but the latter does not necessarily exclude an implied warranty as to matters disconnected with the express warranty.<sup>49</sup>

In the recent case of *Boston v. Alexander*,<sup>50</sup> the plaintiff brought suit for the purchase price of a cow which he had sold to the defendant who had a few days after the sale returned her. The defendant told the plaintiff at the opening of the negotiations between the parties that he was desirous of purchasing a good farm milch cow for the use of his family. Before buying the cow the buyer's agent asked the seller about "her milking qualities and if her bag was allright," and the seller said that "her bag was allright," and "this cow is as straight as a whip as far as I know." It appeared from the testimony of the plaintiff, who was the

36. *Johnson v. Sproull* (1892) 50 Mo. App. 121; *Cline v. Mock* (1910) 150 Mo. App. 434, 131 S. W. 710.

37. *Skinner v. Kerwin Glass Co.* (1903) 103 Mo. App. 650, 77 S. W. 1011.

38. *Hollwell Cement Co. v. Stewart* (1903) 103 Mo. App. 182, 77 S. W. 124.

39. *Comings v. Leedy* (1893) 114 Mo. 454, 21 S. W. 804; *Creasy v. Gray* (1901) 88 Mo. App. 454; *Ferguson Implement Co. v. Parmer* (1908) 128 Mo. App. 300, 107 S. W. 469.

40. *Mark v. Williams Cooperage Co.* (1907) 204 Mo. 242, 103 S. W. 20.

41. *Fairbanks, Morse & Co. v. Baskett* (1903) 98 Mo. App. 53, 71 S. W. 1113; *Seitz v. Brewers Refrigerating Co.* (1891) 141 U. S. 510.

42. *Morris v. Reinsieder* (1901) 90 Mo. App. 626; *Morley v. Consolidated Mfg. Co.* (1907) 196 Mass. 257, 81 N. E. 993; *Wilson v. Lawrence* (1885) 149 Mass. 318, 1 N. E. 278.

43. (1908) 131 Mo. App. 540, 546.

44. *Whitaker v. McCormick* (1878) 6 Mo. App. 114.

45. *Ashford v. Schoop* (1899) 81 Mo. App. 539.

46. *Catchings v. Hocke* (1884) 15 Mo. App. 51; *Long v. Armsby Co.* (1891) 43 Mo. App. 253; *Beck v. Holbeck* (1904) 109 Mo. App. 179, 82 S. W. 1128.

47. *Voss v. McGuire* (1885) 18 Mo. App. 477; *Schrieber v. Andrews* (1900) 101 Fed. 763; *Schoenberg v. Loker* (1901) 88 Mo. App. 387; *Beck v. Holbeck* (1904) 109 Mo. App. 179, 82 S. W. 1128.

48. *Grojean v. Darby* (1909) 135 Mo. App. 586, 116 S. W. 1032.

49. *International Pavement Co. v. Smith* (1885) 17 Mo. App. 264; *New Birdsall Co. v. Keys* (1903) 99 Mo. App. 158, 74 S. W. 12; *Brooks Tire Co. v. Wells* (1914) 182 Mo. App. 50.

50. (1914) 171 S. W. 582.

only witness in the case, that he had been informed by her former owner that the cow had upon several occasions given dark-colored milk after bruising her bag by jumping fences, and that he, the former owner, had put a yoke on her, the marks of which were on her at the time of the sale to the defendant. There was no evidence that the cow exhibited any breachy propensity or gave bad milk following the sale. It was held that the lower court erred in directing a verdict for the defendant in that there was no justification, as a conclusion of law, for holding that the representations of the plaintiff amounted to a warranty of soundness and suitability for the purposes for which he knew the cow was being purchased. The decision is undoubtedly correct because there was no evidence at all of any breach of warranty granting that there was a warranty. As a matter of law, it cannot be said that there was an express warranty because the testimony of the plaintiff did not show whether the statement was intended and understood by the parties as a warranty or as a mere matter of opinion. The court also held that there was no implied warranty of soundness or of suitability for defendant's purpose, or that the cow was not breachy. The reason assigned was, "It does not appear from the evidence before us that any of the defects claimed by defendant were not discoverable upon a reasonable inspection." The opportunity for inspection which was offered to the defendant at the time of the sale precluded an implied warranty covering patent defects because under such circumstances the vendee relies upon his own judgment. Following the above quotation the court said, "It is not shown that the defect, if any existed, was not discoverable to *an experienced farmer* making a reasonable examination." All sorts of people use milch cows and it is submitted that an opportunity for inspection should preclude an implied warranty covering defects discoverable to the ordinary buyer rather than to an "experienced farmer." The language used was probably caused by the fact that this particular buyer was a farmer and the point made does not affect this case. If the proper construction of the language is that this defect was discoverable to this particular farmer *because* discoverable to the ordinary buyer, it is proper. There is a *dictum* in the case to the effect that had there been defects not discoverable upon ordinary inspection and known to the seller, a warranty covering such defects would have been implied from the plaintiff's knowledge of the use for which the cow was bought.

L. W.



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