University of Missouri Bulletin Law Series

Volume 15 *June 1917* Article 4

1917

Masthead

UNIVERSITY OF MISSOURI BULLETIN

LAW SERIES

Published Four Times a Year in February, April, June and December by the University of Missouri School of Law

APRIL, NINETEEN HUNDRED AND SEVENTEEN

NOTES ON RECENT MISSOURI CASES

EMINENT DOMAIN—CONDEMNATION BY MUNICIPALITY OF LAND ALREADY DEVOTED TO A PUBLIC USE. *City of St. Louis* v. *Moore*.[1]—The city of St. Louis desired to extend a certain street. Under its general power to appropriate land for the construction of streets, the city instituted proceedings to condemn a narrow strip of land along the edge of property used for school purposes and upon which a school building was located. The Supreme Court held, "that the power of a city to condemn property for street purposes is limited to private property, and does not extend to property of the state, or property held by a subordinate agency of the state, as distinguished from other corporations."

It seems to be unquestioned that the legislature may authorize the condemnation of property already devoted to a public use.[2] It is equally well established that a general delegation of the power of eminent domain to a municipal or private corporation, does not confer the power to take such property unless it can be implied from the general grant.[3] The authority to take property held by a private cor-

*Absent on leave 1916-17. During Professor Hudson's absence the Law Series will be in charge of Dean James.

1. (1917) 190 S. W. 867, BOND, J., dissenting.

2. Lewis, Eminent Domain, § 276; 15 Cyc. 612 and cases cited in note 82.

3. *City of Hannibal* v. *Hannibal and St. Joseph Ry. Co.* (1872) 49 Mo. 480; *In re City of Buffalo* (1877) 68 N. Y. 167; *Baltimore and Ohio and Chicago R. R. Co.* v. *North, et al.* (1885) 103 Ind. 486; *In re Milwaukee Southern Ry. Co.* (1905) 124 Wis. 490.

p. ation for public purposes may be inferred from a general delegatio t of the right of eminent domain.[4] In Missouri, prior to the decision in the principal case, there have been no cases deciding squarely whether or not property held by one instrumentality of the state could be condemned by another in the absence of express authorization to do so. Other jurisdictions, however, present a variety of decisions in which condemnation of property under such circumstances has been supported on the ground of an implied grant. In the case of *Inhabitants of Easthampton* v. *County Commissioners*,[5] which is apparently identical with the principal case, the plaintiff sought to take, for street purposes, a narrow strip of land which was part of the grounds of a public school. The court held that as the existing use, altho considerably impaired would not be wholly prevented, the authority to take the land could be inferred from the power of the city to take property for street purposes. *Rominger* v. *Simmons*[6] also, with practically the same facts as the principal case, held that the strip of land could be taken as the land was not absolutely necessary for the use of the school. The right to condemn state property set aside for a deaf and dumb asylum has been upheld under the doctrine of implied grant,[7] and likewise, the power of a city to place a highway across land held by another city in which the water pipes of the latter were laid, has been conceded.[8] These cases go on the principle that as the existing use was not seriously interfered with, and the contemplated use reasonably necessary, the power to condemn the land could be inferred from a grant of general power.

In most of the cases involving this question, in which it has been held that authority to take such property did not exist, the courts have apparently placed their decisions on the ground that the subsequent use would destroy or seriously cripple the prior use, and therefore they have refused to infer the legislative intent to grant such power.[9] In *In re City of Utica*,[10] it was held that a provision in a city charter that the city could appropriate for street purposes any real estate not belonging to the city did not authorize the city to condemn land used for a state hospital for the reason that such appropriation "would absolutely deprive the state of all benefit and use in the property taken and essentially interfere with the use of the

4. *St. Louis, Hannibal and Kansas City Ry. Co.* v. *Hannibal Union Depot Co.* (1894) 125 Mo. 82, 28 S. W. 483; *St. Louis and Suburban Ry. Co.* v. *Lindell Ry. Co., et al.* (1905) 190 Mo. 646, 88 S. W. 634; *Louisville and Nashville Ry. Co.* v. *City of Louisville* (1908) 131 Ky. 108.
5. (1891) 154 Mass. 424.
6. (1882) 88 Ind. 456.
7. *Indiana Central Ry. Co.* v. *State* (1852) 3 Ind. 421.
8. *City of Boston* v. *Inhabitants of Brookline* (1892) 156 Mass. 172.
9. *State* v. *Montclair Ry. Co.* (1872) 35 N. J. L. 328; *Tyronne School District's Appeal* (Pa. 1888) 15 Atl. 667; *In re Milwaukee Southern Ry. Co.* (1905) 124 Wis. 490.
10. (1893) 26 N. Y. Supp. 564.

remainder." The courts are reluctant to infer the power to take public property when the principal object for conferring the authority to condemn may be beneficially exercised without taking the particular land in question, as where the necessity for taking land for a street can be avoided by a slight curve in the street.[11]

The authority to take part of a public square for the purpose of erecting a school house thereon was denied in *McCullough* v. *Board of Education.*[12] In *Mayor of Atlanta* v. *Central Ry. Co.*,[13] it was held that the city under a general power to condemn property for streets could not take part of the land used for railway car shops. The language of these two cases indicates that property held by an instrumentality of the state cannot be taken in any case unless there has been an express delegation of the power. The case of *City of Edwardsville* v. *County of Madison*[14] appears to follow this minority view. However, another Illinois case, *City of Moline* v. *Green*,[15] in holding that the city could not take a strip from the library grounds to widen a street, recognized the fact that property may be so taken if it does not destroy the previous use.

It is submitted that on principle property held by a subordinate agency of the state is not exempt, as such, from condemnation proceedings under a general delegation of the power of eminent domain. Whether the implied power exists in a particular instance is a question of legislative intendment to be inferred from the express words of the statute and by the application of the statute to the subject matter.[16] There must be a reasonable necessity for the taking,[17] and the second use must not destroy or seriously impair the previous use.[18] The doctrine of implied power to condemn property devoted to a public use rests on the principle that grant of power to do a particular thing carries with it the implied authority to do all that is necessary to accomplish that purpose.[19] The legislature creates municipalities to further certain objects of general concern and gives them general powers to be used to that end. The power to take property in a city, even tho it is subject to an existing public use by an

11. *In re Pottsgrove Township Road* (1888) 5 Pa. Co. Ct. Rep. 361. In the case of *In re Milwaukee Southern Ry. Co.* (1905) 124 Wis. 490, 501, it was said, "it must appear that the rights granted when applied to the condition and circumstances covered by it can not be beneficially exercised without the taking of property already devoted to a public use."

12. (1878) 51 Cal. 418.

13. (1874) 53 Ga. 120.

14. (1911) 251 Ill. 265.

15. (1911) 252 Ill. 475.

16. Lewis, Eminent Domain, § 276.

17. *Cincinnati, Wabash and Michigan Ry. Co.* v. *City of Anderson* (1894) 139 Ind. 140; *Butte, A. & P. Ry. Co.* v. *Montana U. Ry. Co.* (1895) 16 Mont. 504.

18. *Boston* v. *City of Brookline* (1892) 156 Mass. 172; *Steele* v. *Empsom* (1895) 142 Ind. 397.

19. *Mobile and Girard Ry. v. Alabama Midland Ry. Co.* (1889) 87 Ala. 501.

agency of the state, for the purpose of establishing a street, the benefit of which inures to the public, might not unreasonably have been within the contemplation of the legislature, when such taking does not seriously interfere with the existing use.[20] As to what amounts to a material impairment of a use is a question as to which no general rule can be laid down. Two extreme cases may be noted. A highway placed across the track of a railroad is clearly not a serious infringement of the use by the railroad;[21] while a highway placed longitudinally on the track is a complete annihilation of the existing use.[22] Cases falling between these two cases present more difficult problems.

If the case of *City of St. Louis* v. *Moore* was decided on the ground that the proposed use would so injure the school property as to impair the object for which it was established, and in consideration of the relative importance of the two uses and the necessity for taking the land, the authority to condemn it could not be reasonably inferred, it seems to be in accord with the prevailing view. It is to be regretted, however, if the court intended to lay down the rule without qualification that express authority from the legislature is necessary to condemn "property of the state or property held by a subordinate agency of the state."

It is highly desirable that public property be protected, or else, as was said in the case of *City of Edwardsville* v. *City of Madison*,[23] "the school district might condemn the engine house for a school house, the county might condemn the school house for a court house, and an endless chain of condemnation by various municipalities be set in operation." But the principles by which such power is implied in certain cases, would not lead to such proceedings if properly applied to the circumstances of each particular case. A balancing and adjustment of conflicting public interests is demanded by public convenience and necessity whenever practicable, and may well be presumed to have been contemplated by the legislature in conferring the power upon a city to condemn property for the purpose of constructing streets.[24]

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20. FOLGER, J., in the case of *In re City of Buffalo* (1877) 68 N. Y., 167, 171, said, "Is there from the language in which these powers are given, or from any of the circumstances attending such gift, or from any of the necessities of the city, existing, or actually forseen when it was given, a necessary, that is, an unavoidable implication, that the legislature gave or meant to give such power?"

21. *City of Hannibal* v. *Hannibal and St. Joseph R. R. Co.* (1872) 49 Mo. 480.

22. *New Jersey Southern Ry. Co.* v. *Long Branch Commissioners* (1876) 39 N. J. L. 28.

23. (1911) 251 Ill. 265.

24. HOLMES, J., in the case of *Inhabitants of Easthampton* v. *County Commissioners* (1891) 154 Mass. 424, said, "when it is considered that very large tracts of land are often appropriated to school purposes, it is impossible to accept an unqualified rule that no part of such land can be taken, for a way under any circumstances without express enactment."

EQUITY—NOTICE OF BUILDING RESTRICTION.—*Zinn v. Sidler*.[1]—The defendant bought a lot in a residence subdivision, the plat of which had been filed and recorded in accordance with the statute.[2] Upon the plat, to which reference had been made in deeds in defendant's chain of title, a dotted or broken line marked "building line" had been drawn at a distance of twenty feet from the street, except in one instance, where the distance was only fifteen. The plaintiff was the owner of other lots in the subdivision and this suit was brought to obtain an injunction against the defendant restraining him from building nearer the street than the distance indicated by the "building line" on the plat. The defendant had no other notice of the existence of the restriction than that given by the plat and it does not appear that he had ever seen the plat. The Supreme Court denied the plaintiff the injunction sought.

This decision seems to be contrary both to the weight of authority and to what may be regarded as sound economic policy. A purchaser of land is chargeable with notice of all restrictions appearing in his chain of title or concerning which he is put upon inquiry,[3] and a plat of such land, or of a larger tract including it, is in the chain of title.[4] In addition, if the purchaser has knowledge of facts which would put a reasonable, prudent man upon inquiry as to the title, he is charged with notice of the existence of restrictions of which he could have learned had he inquired.[5]

In the case of *Tallmadge* v. *East River Bank*,[6] the defendant was held to be put upon inquiry and hence charged with notice of a building line restriction because of his knowledge that the house purchased as well as all the others in the block were built along a uniform front line. No reference to a building line appeared in his deed. In *Lawrence* v. *Woods*[7] the plat showed a tract marked "residence area," and it was held that an injunction would issue at the suit of the lot owner within this area against another restraining the latter from using his lot for other than residence purposes.

In *Simpson* v. *Mikkelsen*,[8] the facts of which are identical with those in the present case, the Supreme Court of Illinois held that a purchaser was bound by the restriction, the reference in the plat giving him notice of its existence. In *Smith* v. *Young*[9] an easement was held to have been created for the benefit of all of the abutting lots by a plat referred to in the deeds of such lots as a part of the de-

1. (1916) 187 S. W. 1172.
2. Revised Statutes 1909, § 10290.
3. *King* v. *Trust Co.* (1910) 226 Mo. 351, 126 S. W. 415.
4. *Kindsey* v. *Smith* (1914) 178 Mo. App. 189, 166 S. W. 820.
5. *Turner* v. *Edmonston* (1908) 210 Mo. 411, 109 S. W. 33.
6. (1862) 26 N. Y. 105.
7. (1909) 54 Tex. Civ. App. 233, 118 S. W. 551.
8. (1902) 196 Ill. 575.
9. (1896) 160 Ill. 163, 43 N. E. 486.

scription. A strip of land was indicated by dotted lines upon the plat with the words "reserved for private alley." This strip of land formed a connection between the street and an alley otherwise inaccessible, altho the solid lot lines passed unbroken thru the dotted lines. In *Henderson* v. *Hatterman*,[10] it was held that when a deed refers to a plat the particulars shown upon that plat are as much a part of the deed as tho they had been recited in it.

Some of the cases referred to by the Supreme Court of Missouri in support of its decision in *Zinn* v. *Sidler* seem to be cited for such general statements as that building restrictions in conveyances of the fee are regarded unfavorably and are strictly construed, and do not seem otherwise to be in point.[11] The other cases cited are *Hisey* v. *Church*,[12] in which the question of notice does not seem to be involved tho there is a *dictum* to the effect that a purchaser of land subject to a restriction is not bound thereby unless he has notice of it, and *Miller* v. *Klein*[13] which involves an entirely different question, one of laches or waiver of the right to enforce the restriction of which defendant had actual knowledge.

Authority, therefore, seems clearly against the decision in *Zinn* v. *Sidler*. It seems also contrary to public policy to refuse to enjoin a purchaser of a lot which is subject to an equitable restriction as to its use, from the violation of such restriction if he buys with knowledge or notice either of the restriction or of facts which would put a reasonable prudent person upon inquiry. That such a public policy exists and is recognized by the courts is apparent from a consideration of the case of *Miller* v. *Klein* which holds that an injunction will be issued without proof of damage to the plaintiff in case the defendant had notice of the existence of such restriction. As there is in this country no state regulation of residence districts and of building lines, it seems especially desirable to give full force and effect to such restrictions as have been created by owners of land for the benefit of purchasers from them, so far as this can be done without affecting the rights of bona fide purchasers for value and without knowledge or notice. The court in *Zinn* v. *Sidler*, however, in holding that one who refuses to follow up what notice he has lest he prejudice his own personal interests, seems to create a type of bona fide purchaser new to the law.

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10. (1893) 146 Ill. 555, 34 N. E. 1041.
11. *Scharer* v. *Panther* (1907) 127 Mo. App. 433, 105 S. W. 668; *Kitchen* v. *Hawley* (1910) 150 Mo. App. 497, 131 S. W. 142; *Bolin* v. *Tyrola Investment Co.* (1913) 178 Mo. App. 1, 160 S. W. 588.
12. (1908) 130 Mo. App. 566, 109 S. W. 60.
13. (1913) 177 Mo. App. 557, 160 S. W. 552.

EVIDENCE—ENTRIES IN THE REGULAR COURSE OF BUSINESS. *Schwall v. Higginsville Milling Co.*[1]—The plaintiff sued the defendant, a resident of Missouri, for damages arising from a breach of a contract to deliver flour in installments in New York. Each installment was to be paid for on delivery. The defendant refused to deliver subsequent installments claiming that the plaintiff had not paid until two weeks after the arrival of the last preceding installment in New York. To prove the time of the arrival of this shipment, copies from the books of original entry of the New York Central Railroad, over which the flour had been shipped, were admitted. These entries were made by various clerks in the usual course of business but seem to have been copied from memoranda made by others at the time of the happening of the events recorded. The witness who made the copy of these entries used at the trial had compared the entries with the original memoranda. He had not made the original entries himself and seems to have had no personal knowledge as to the facts stated, but he had charge of the railroad company's books and records at the station at which the flour was received. The Kansas City Court of Appeals held that the copies were admissible.

There would seem to be only two ways in which such copies might possibly be used: the first, under the principles governing the refreshing of a witness' recollection; the second, under the exception to the hearsay rule permitting the use of entries made in the usual course of business. To permit the use of a record or other writing to refresh a witness' recollection, it must appear that the writing was made at or about the time of the event recorded and the witness must guarantee that it refreshes his recollection so that he can now testify from his present revived recollection, or that it contains an accurate account of the fact as he knew it when it happened, and that he either made or saw the writing when the facts were fresh in his mind, tho he has no present recollection of them. It is not necessary that the record in either case should have been made by the witness himself or that it should have been made in the regular course of business. It is proper for him to revive his present recollection from a copy when the original cannot be produced.[2] The Missouri courts generally allow the admission of entries made in the regular course of business when the entrant is alive and testifies, on the theory that the witness is refreshing his recollection.[3] When they are used as evidence of his past recollection his testimony will consist principally in reading

1. (1917, Mo. App.) 190 S. W. 959.
2. Greenleaf, Evidence (16th ed.) vol. 1., § 439b.
3. *Mathias* v. *O'Neil* (1887) 94 Mo. 520, 6 S. W. 253; *Anchor-Milling Co.* v. *Walsh* (1891) 108 Mo. 277, 18 S. W. 904; *Gardner* v. *Gas & Elec. Co.* (1911) 154 Mo. App. 666, 135 S. W. 1023; *Lyons* v. *Corder* (1913) 253 Mo. 539, 162 S. W. 606.

these entries to the jury.[4] In *Schwall* v. *Higginsville Milling Co.*, *supra*, the witness was allowed to testify from the copies made by him on the theory that he was refreshing his recollection. It is submitted that this is incorrect because it does not appear that the witness had personal knowledge of the transaction, and it is difficult to see how such a witness has any recollection to be refreshed. The case of *Anchor Milling Co.* v. *Walsh* cited by the court in support of this conclusion does not sustain it, because in that case it appeared the witness had personal knowledge of the transaction. In *Anderson* v. *Volmer*[5] the plaintiff testified that the amount sued on was correct, because before the trial he had looked at the account book kept by his clerk and had found the account sued on corresponded with it. This evidence was rejected, but it would seem according to the language of the court in *Schwall* v. *Higginsville Milling Co.*, it should have been received as refreshing the witness' memory.

It remains to be determined whether these copies are admissible as copies of entries made in the usual course of business. Under an exception to the rule excluding hearsay, original entries made in the usual course of business or occupation by a person since deceased or otherwise unavailable are admissible in evidence. There are two general principles underlying all exceptions to the hearsay rule. There must be either an opportunity to cross-examine or some guarantee of trustworthiness to take the place of cross-examination and there must be a necessity for the use of such testimony.[6] The requirement of a guarantee of trustworthiness in the case of entries made in the regular course of business or occupation is met by showing that the entries were not mere casual memoranda but were part of a system of regular entries, and that they were made contemporaneously, or substantially so, with the transactions recorded, and, in most instances, it is necessary that the entrant should have had personal knowledge of the facts recorded. The necessity principle is satisfied by showing that the entrant is unavailable because of death, absence from the jurisdiction, illness, insanity, etc.[7] Whether the mere inconvenience of calling all the persons who cooperated in making the entries will permit the entries to be used will be discussed later.

The Missouri cases are not very clear as to whether there must be a necessity for the use of such entries before they are admissible. The cases may be divided into three classes: (a) those in which it appears that the entrant is dead or otherwise unavailable; (b) those in which the entries are introduced in evidence in connection with

4. *Anchor Milling Co.* v. *Walsh* (1891) 108 Mo. 277, 18 S. W. 904.
5. (1884) 83 Mo. 403.
6. Wigmore, Evidence §§ 1421, 1422.
7. Greenleaf, Evidence (16th ed.) vol. 1, § 120a; Wigmore, Evidence, §§ 1521-1526.

the testimony of the person who made the entry or knew of the transaction; (c) those in which the entries are offered without any accounting for the parties who participated in making them.

(a) Where the entrant is dead or otherwise unavailable, these entries made by him in the course of business are admissible on proof of his handwriting.[8] There is clearly a necessity for such entries in order to prevent a failure of justice.

(b) It also seems that these original entries are admissible in evidence in connection with the testimony of the clerk who made them, and the majority of the Missouri cases says that they are admissible as aids to the testimony of the entrant.[9] If this means that they are used to refresh the recollection of the witness, their admission does not constitute an exception to the rule excluding hearsay. Some of the cases last above cited also rest the admissibility of these entries on the ground that they are a part of the *res gestae*. This phrase is used very loosely by the courts. "It is ambiguous and unmanageable in all of its uses . . . It serves merely to aid in the case in hand the judicial disinclination to ascertain and state specifically the reason for admission."[10] In *Afflick* v. *Streeter*[11] the court does not discuss the ground on which it admits these entries, but holds merely that when identified by the clerk who made them, they are admissible in evidence. Nothing, however, is said about *res gestae* and it does not seem possible to sustain the ruling of the court upon the principle of refreshing recollection, as the witness apparently had no personal knowledge of the facts recorded.

Thus it is seen that while the courts are somewhat uncertain as to the principle on which these entries are admitted, they hold that the entries are nevertheless admissible, and apparently without regard to considerations of refreshing recollection or to those of necessity. Missouri is not alone in this regard. Courts in many other states have also held that such entries are admissible in connection with the testimony of the person who made them.[12] Such a result

8. *Fulkerson* v. *Long* (1895) 63 Mo. App. 270; *Milne* v. *Railroad* (1910) 155 Mo. App. 465, 135 S. W. 85.

9. *Mathias* v. *O'Neil* (1887) 94 Mo. 520, 6 S. W. 253; *Anchor Milling Co.* v. *Walsh* (1891) 108 Mo. 277, 18 S. W. 904; *Commission Co.* v. *Bank* (1904) 107 Mo. App. 426, 81 S. W. 503; *Ruth Tool Co.* v. *Spring Co.* (1909) 146 Mo. App. 1, 123 S. W. 253; *Gardner* v. *Gas & Electric Co.* (1911) 154 Mo. App. 666, 135 S. W. 1023; *Lyons* v. *Corder* (1913) 253 Mo. 539, 162 S. W. 606.

10. Wigmore, Evidence, §§ 1795, 1796.

11. (1909) 136 Mo. App. 712, 119 S. W. 28.

12. *Weeden* v. *Hawes* (1834) 10 Conn. 50; *State* v. *Shinborn* (1866) 46 N. H. 497; *Moots* v. *State* (1871) 21 Ohio St. 653; *Gilbert* v. *Sage* (1874) 57 N. Y. 639; *Newell* v. *Houlton* (1875) 22 Minn. 19; *Anderson* v. *Edwards* (1877) 123 Mass. 273; *Culver* v. *Marks* (1889) 122 Ind. 554; *Baldridge* v. *Penland* (1887) 68 Tex. 441; *Pauly* v. *Pauly* (1895) 107 Cal. 8; *Life Ins. Co.* v. *Smith* (1899) 119 Mich. 171; *Hopkins* v. *Stefan* (1890) 77 Wis. 45; *Almy* v. *Allen* (1901) 22 R. I. 595; *Chicago Ry. Co.* v. *Strawboard Co.* (1901) 190 Ill. 268.

seems to be unobjectionable. The business world relies on entries of this kind in its transactions without reference to necessity or refreshing recollection. So long as they appear trustworthy and are properly identified it would seem to be undesirable to limit their admissibility further, except, perhaps, to require the production of the original book of entries.

(c) Since it seems that the admissibility of these entries no longer depends, in Missouri at least, on any principle of necessity for the use of them, a question arises whether it is necessary for the clerk or clerks who cooperated in making the entries to identify them, provided these clerks can be produced. There is a great variety of decisions on this point. Where several persons have cooperated in making the entry, and the original observer is not called some courts hold the records are inadmissible even tho that person is out of the jurisdiction.[13] Other cases hold that the clerk who made the entry should be produced.[14] In several Missouri cases such entries were admitted without accounting for the clerk who made them.[15] In only one of these cases however was the point raised and in that case the court refused to discuss it.[16] While the weight of authority is probably against such a conclusion, there are decisions in accord with it.[17] Where a great many clerks have participated in making the entry, the practical inconvenience and cost of having them all present to identify the books and to swear to the correctness of the entries would outweigh the probable benefit of doing so. In such a case the testimony of the supervising officer, who knew them to be books of regular entry should be sufficient.[18] But the decision should be limited to those cases in which a showing is made that it would be materially inconvenient to produce the clerk or clerks who made the entry. However, it seems, undesirable to allow the use of copies of entries without the production of the original if such are called for and are available.[19]

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13. *Kent* v. *Garvin* (1854) 1 Gray 150; *Chicago Lumberine Co.* v. *Hewitt* (1894) 64 Fed. 314.
14. *Ford* v. *St. Louis Ry. Co.* (1880) 54 Ia. 723, 7 N. W. 126; *Kearns* v. *McKean* (1888) 76 Col. 87, 18 Pac. 122; *House* v. *Beak* (1892) 141 Ill. 290, 30 N. E. 1065; *Hoogenwerff* v. *Flack* (1905) 101 Md. 371, 61 Atl. 184.
15. *Robinson* v. *Smith* (1892) 111 Mo. 205, 20 S. W. 29; *Missouri E. L. & P. Co.* v. *Carmody* (1897) 72 Mo. App. 534; *Wright* v. *C. B. & Q. Ry. Co.* (1906) 118 Mo. App. 392, 94 S. W. 555; *Overy* v. *Tucker* (1909) 137 Mo. App. 428, 118 S. W. 672.
16. *Overy* v. *Tucker* (1909) 137 Mo. App. 428, 118 S. W. 672.
17. *Donovan* v. *Ry. Co.* (1893) 158 Mass. 650; *Northern Pac. Ry. Co.* v. *Keyes* (1898) 91 Fed. 47; *Continental Nat. Bank* v. *First Nat. Bank* (1902) 108 Tenn. 374; *U. S.* v. *Venable & Co.* (1903) 124 Fed. 267; *Lumber Co.* v. *Scenic Ry. Co.* (1916) 23 Cal. App. 716.
18. Wigmore, Evidence, § 1530.
19. Wigmore, Evidence, § 1532.

ESTATES—IMPLICATION OF REMAINDERS. *Lockney* v. *Campbell.*[1]—In 1860 a testator devised certain lands to his son, and provided that if the son should die "leaving no children" the testator's daughter should "inherit" the land. The testator's son is still alive, and his living children seek to have the title to the land ascertained, and have named their father's grantee as defendant. It was contended on behalf of the plaintiffs that the testator's son took only a life estate, with an implied contingent remainder to his surviving childen and an alternate contingent remainder to the testator's daughter. The Supreme Court held, however, that the testator had devised to his son a fee simple subject to an executory devise to the testator's daughter in the event of the son's dying without leaving children. The interest of the son was called a "defeasible fee."

This decision is particularly welcome because of the position recently taken by WOODSON and BLAIR, JJ., in *Faris* v. *Ewing*[2] where the facts were somewhat similar and where both of these judges favored the implication of remainders in the children of a devisee upon whose death without children the lands were given over. Both of these judges now concur in holding that there is no implication of a remainder and no consequent restriction of the first devise to a life estate in such a case. In commenting on *Faris* v. *Ewing*,[3] the writer criticised the view taken by these judges in that case, on the ground that such implication was not necessary in order to avoid an intestacy, and except in the implication of estates tail, it is not justified for any other reason.

In deciding the principal case, the court relied upon *Brown* v. *Tuschoff*[4] and *Collier* v. *Archer.*[5] In *Brown* v. *Tuschoff*, there was a devise to two of the testator's grand-children with the provision that "in case either one should die leaving no heirs, the other shall be entitled to it all." One of the grand-children died childless, and the court held that the executory devise to the other thereupon took effect. *Brown* v. *Tuschoff* is therefore no authority for the principal case. In *Collier* v. *Archer*, there was a conveyance by deed in 1836 to X and his heirs in trust for A for life, and at A's death the conveyance to X was to be "null and void," and the trust was to cease and the land was "to revert to and be the absolute property" of B and C, and if B and C died without issue, then the land was to "revert to and be the absolute property" of D and her heirs. In 1852 B gave a warranty deed to the land, and on his death in 1905 his issue claimed the land against one who possessed under the warranty deed.

1. (1916) 189 S. W. 1174.
2. (1916) 183 S. W. 280.
3. See 12 Law Series, Missouri Bulletin, p. 48.
4. (1911) 235 Mo. 449, 138 S. W. 497.
5. (1914) 258 Mo. 383, 167 S. W. 511.

A, the life tenant, had died in 1862. Relying on *Gannon* v. *Albright*,[6] which was after the statute on failures of issue and so not in point, the court held that B took a fee simple. The opinion is wholly inadequate. The contention on behalf of B's issue that they took an implied remainder was based on the gift over on an indefinite failure of issue. Since the deed took effect prior to the statute making failures definite, the ultimate gift was remote and void, tho it would not have been so if it could have taken effect as a remainder after a fee tail. The fact that the word heirs was nowhere used in the deed prevented any implication of a fee tail,[7] and the invalidity of the gift over which could only take effect as an executory limitation precluded any implication of a gift to B's issue. *Collier* v. *Archer* was not authority for the decision in *Lockney* v. *Campbell* because it involved a *deed*, with a *void* gift over on an *indefinite* failure of issue, and because the prior gift was to the donee *absolutely*.

The implication of fees tail in Missouri is established as to deeds and wills executed prior to the statute making all failures of issue definite.[8] This statute was enacted in 1845.[9] Altho in terms it applied only to remainders, it has been extended by construction to executory limitations.[10] The statute was overlooked in *Harbison* v. *Swan*.[11] In *Cross* v. *Hoch*,[12] a testator gave certain land to his daughter Sarah "and her heirs," and provided that it should be held in trust "for her use, and should the said Sarah die without children, then said property shall be divided among my other daughters." The court relied upon the words used in holding that Sarah took only a life estate with a remainder to her children who survived her. This result was reached partly by reading the words *and her heirs* to mean *and her children*, when taken in connection with the devise over when Sarah died without children; partly also the result was due to the fact that a trust had been created for Sarah's *use*. *Cross* v. *Hoch* was not cited by the court in *Lockney* v. *Campbell*. In *Yocum* v. *Siler*,[13] a testator devised lands to his son William, with a gift over in the event of William's death without issue. The court *en banc* refused to imply a fee tail, and said that after the birth of issue William had an absolute estate at least for the purpose of conveyance; the implication of fees

6 (1904) 183 Mo. 238, 81 S. W. 1162.
7. *Tygard* v. *Hartwell* (1907) 204 Mo. 200, 102 S. W. 989.
8. *Farrar* v. *Christy* (1857) 24 Mo. 453; *Chism* v. *Williams* (1860) 29 Mo. 288; *Rothwell* v. *Jamison* (1899) 147 Mo. 601, 49 S. W. 503.
9. Revised Statutes 1845, p. 116. Apart from such statutes the modern tendency is to find that a definite failure was intended where any expression may be seized on for this purpose. *Whitcomb* v. *Taylor* (1877) 122 Mass. 243; *Parkhurst* v. *Harrower* (1891) 142 Pa. St. 432; *Rudkin* v. *Rand* (Conn., 1914) 91 Atl. 198.
10. *Faust* v. *Birner* (1860) 30 Mo. 414; *Naylor* v. *Godman* (1891) 109 Mo. 543, 19 S. W. 56; *Yocum* v. *Siler* (1900) 160 Mo. 281, 61 S. W. 208.
11. (1874) 58 Mo. 147.
12. (1899) 149 Mo. 325, 50 S. W. 786.
13. (1900) 160 Mo. 281, 61 S. W. 208.

tail in conveyances since 1845 is a thing of the past since this decision. But *Cross* v. *Hoch* must still be reckoned with.

In *Lockney* v. *Campbell*, there is no basis for implying a fee tail for it could not possibly be contended that the gift over was on an indefinite failure of issue. No intention was expressed to restrict the first devisee to a life estate. The event introducing the gift over is not sufficient evidence of any intention on the part of the testator to confer an estate on the son's children. Conceivably an executory limitation to the children could be implied on the death of the son which would not have the effect of reducing the son's interest to a life estate, but such executory limitations are not implied except where the implication of a cross limitation would prevent intestacy. In this case there is no possibility of an intestacy, since the testator's son took a fee simple. The decision may not be in line with *Cross* v. *Hoch*, and it is entirely possible the same court would have decided the two cases in the same way. But since the implication of fees tail has been abandoned, it is believed that there is no further necessity for implying estates, except where the partial intestacy may be avoided by the implication of a cross limitation. The decision is a welcome one because in addition to clearing up any doubts which may have existed since *Faris* v. *Ewing*, it opens the way for a clearer delimitation of the whole doctrine of implication of estates.

The opinion of BLAIR, J., seems to bear down on the fact that the subsequent language was insufficient to reduce the testator's son's estate to a life estate. It must not be concluded, however, that it is essential that the first estate should be more than a life estate. Where a testator confers an express life estate on a devisee and makes a further devise on the devisee's death without children, no gift to the children of the first devisee would be implied. This result was reached by the House of Lords in *Scale* v. *Rawlins*,[14] and more recently by the Supreme Court of Illinois in *Bond* v. *Moore*.[15] Where there is so little dissatisfaction with the statutory course of descent, it seems unnecessary that courts should enlarge the ordinary meaning of a testator's expression, instead of requiring intended gifts to be clearly spelled out.

MANLEY O. HUDSON

INTERSTATE COMMERCE—BREAKING JOURNEY. *Reynolds* v. *St. Louis & Southwestern Ry. Co.*[1] The plaintiff in this action loaded certain goods into a car at Humphrey, Arkansas, and shipped them to St. Francis, Arkansas. Being desirous of proceeding from that point to Delta, Mo., he purchased a ticket to Bernie, Mo., checking the goods to that station as baggage. Upon getting off at Bernie he bought a ticket

14. (1892) Appeal Cases 342.
15. (1908) 236 Ill. 576.
1. (1916) 190 S. W. 423.

to Delta, rechecking the baggage. While standing on the track at Bernie the car and contents were destroyed. The plaintiff sued and recovered for the entire loss. At the trial he testified that the shipment had been divided up so that he could take advantage of lower rates. The Springfield Court of Appeals reversed and remanded the case on the ground that the trial court erred in holding the shipment intrastate and in excluding evidence of tariffs approved by the Interstate Commission affecting defendant's liability.

In determining whether or not commerce is interstate in character state courts look to and hold themselves bound by the decisions of the Supreme Court of the United States[2] and of the Federal courts. Any study of the question, therefore, involves a review of the decisions of those courts. The necessity and good policy of adhering to the Federal decisions upon these questions is manifest as this is the only means of avoiding a hopeless conflict, and the only means by which carriers and shippers may have assurance of any consistency in the law.

In the principal case the status of the plaintiff as a passenger was not discussed, the court treating the "baggage" as a shipment of freight. But since the court tests its decision on the intention of the plaintiff, admitted on the stand, it would seem to follow that the plaintiff, had he gone on the train from Bernie to Delta would have been deemed an interstate passenger. This precise point has not been much litigated. It arose squarely in an Arkansas case[3] where the plaintiff wishing to go from A in Arkansas to T in Texas applied for a ticket from A to C in Arkansas. On the defendant's refusal he was compelled to pay the interstate rate to T., and he brought an action under an action under an Arkansas statute providing a penalty for overcharges. It was held that the journey between A and C was intrastate and that the local state statute was applicable.[4] This decision disregards completely the doctrine of intention followed in *Reynolds* v. *St. Louis and Southwestern Ry. Co.* No valid distinction between passengers and freight, it seems, can be taken as the Interstate Commerce Act regulates passenger traffic as well as freight.

In view of recent decisions of the Supreme Court of the United States and of late reports of the Interstate Commerce Commission the Missouri decision seems preferable to that of the Arkansas court.[5] In *Kanotex Refining Co.* v. *Atchison, Topeka and Santa Fe Ry. Co.*, the complainants before the commission had an oil refinery at C., in Kan-

2. *Lusk* v. *Atkinson* (1916) 186 S. W. 703; *Deardorff* v. *Chicago, Burlington, R. R. Co.* (1914) 263 Mo. 65, 77, 172 S. W. 333.
3. *Kansas City So. Ry. Co.* v. *Brooks* (1907) 105 S. W. 93.
4. This decision is criticized in a short note, 21 Harvard Law Review 370, on the ground that it violates the test of ultimate destination.
5. *Kanotex Refining Co.* v. *Atchison, Topeka & Santa Fe Ry.* (1915) 34 Interstate Commerce Reports 271; *Railroad Comm. of Louisiana* v. *Texas & Pacific Ry. Co.* (1912) 229 U. S. 336.

sas and a distributing station at W., in Oklahoma. In order to get a lower rate it shipped the oil from C. to R., in Kansas, where it employed an agent solely for the purpose of rebilling to W., in Oklahoma. The defendant refused to carry from C., to R., unless at the interstate rate. The Interstate Commerce Commission held that the complainants were unlawfully attempting to evade the provisions of the Interstate Commerce Act because the shipment was really interstate in nature.

This decision finds ample support in the adjudicated cases even where it is not the intention of the shipper to get lower rates. In *Ohio Railroad Commission* v. *Worthington*[6] the state commission attempted to fix rates on shipments of coal from points in Ohio to be put on a vessel at Huron, Ohio, the coal being destined for points outside of Ohio. It was held that the shipments had taken on the character of interstate commerce and were not subject to state regulation. The billing in this case read from points in Ohio to Huron, Ohio. This decision was re-affirmed the following year by the Supreme Court of the United States in a case coming up on a writ of error to the Court of Civil Appeals of Texas.[7] Lumber intended for export was shipped from R. in Texas to S. in Texas on local bill of lading naming the plaintiff as consignee. The plaintiff had sold the lumber to P., who provided the ships in which lumber was carried from S. Again the Supreme Court disregarded the bill of lading and called the shipment interstate while *en route* from R. to S. In a previous case the court had gone a step farther and ruled that a shipment between two points in Texas, the subject matter of which was seed cake, intended for export was interstate altho it was sometimes necessary to manufacture the cake into meal at the point of destination in Texas.[8]

The Missouri Supreme Court was confronted with a similar problem in *Lusk* v. *Atkinson*.[9] J., a resident of Indiana bought railroad ties which were shipped from points in Missouri to Commerce in the same state. Here the ties were assorted and inspected and thereafter the largest part of them was shipped out of the state to complete sales made previously. The Public Service Commission ordered the railroads to charge state rates on the shipments to Commerce. This order was upheld in the circuit court but the Supreme Court sitting *en banc* reversed it in an opinion from which three of the judges dissented. The majority opinion was based on the intention of the shipper and on the fact that evasion of federal regulations would follow if by this means the shipment could be made subject to state superintendence. The minority agreed with the reasoning of the prevailing judges but

6. (1912) 225 U. S. 101.
7. *Texas & New Orleans Ry. Co.* v. *Sabine Tram Co.* (1913) 227 U. S. 14.
8. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission* (1911) 219 U. S. 498.
9. (1916) 186 S. W. 703.

thought that it did not apply because the shipments outside the state were not the identical cargoes shipped from a single point in the state. The three dissenting judges also took the view that Commerce was a distributing station and that the owner if he wished might have made shipments to points within the state as well as without. It is significant that the only shipment made from Commerce to a point in Missouri was made after the shipper had complained to the Public Service Commission.

The opinion of the minority may have been influenced by the holding of the United States Supreme Court in *Chicago, Milwaukee & St. Paul R. R.* v. *Iowa.*[10] Coal was shipped from Illinois to Davenport, Iowa. The coal remained on tracks there for different periods of time, and was then reconsigned in the same cars to points in Iowa. In sustaining the right of the Iowa commission to make regulations of this part of the transaction the court said that the continuity of transportations was destroyed after the cars reached Davenport, the distributing center. Stress was laid on the fact that the shipper did not know where the coal was ultimately going at the time of the contract of shipment. In *Lusk* v. *Atkinson* the shipper knew at least that the ties were going to points outside the state altho he did not know where the particular ties were going until they had been assorted. In a recent case before the St. Louis Court of Appeals[11] the plaintiff had sold ties to a railway company to be shipped from a point in Louisana to another point in the same state but at the request of the purchaser he billed them to a point on the purchaser's line outside the state. The court held that the billing did not control but that it was the intention of the parties that the shipment be continuous altho the last half of the transportation involved no costs to the shipper. It, therefore, came to the conclusion that the shipment was interstate.

Where the shipment from a point without the state to a point within is followed by a reshipment to a point within the problem has seemed to cause more difficulty in that it is not always clear when the continuity of the transportation has ended. This was the problem in *Reynolds* v. *St. Louis & Southwestern Ry. Co.*, and in support of the shipper's contention there was cited *Gulf, Colorado and Sante Fe R. R.* v. *Texas.*[12] While the actual decision in that case does not sustain the plaintiff's position the following *dictum* would seem to give it some weight: "If Hardin, for instance, had purchased a ticket from Hudson (North Dakota) to Texarkana (Texas), intending all the while to go on to Goldthwaite (Texas) he would not be entitled on his arrival at Texarkana to a new ticket from Texarkana to Goldthwaite

10. (1914) 233 U. S. 334.
11. *Werner Saw Mill Co.* v. *Kansas City So. Ry. Co.* (1916) 186 S. W. 1118.
12. (1907) 204 U. S. 403.

at the proportionate fraction of the rate prescribed by the Interstate Commerce Commission for carriage from Hudson to Goldthwaite. The one contract of the railroad companies having been finished he must make a new contract for his carriage to Goldthwaite and that would be subject to the law of the state within which that carriage was made."[13] It is submitted that this language disregards the rule of intention so much stressed in subsequent cases, and is to that extent out of line with other decisions of the Supreme Court of the United States.

While the Missouri courts have recognized the intention of the shipper as bearing on the inter- or intrastate character of the shipment the rule, it seems, is not always applied uniformly. Where the shipper desiring to send his mules from Glasgow, Missouri, to Horatio, Arkansas, shipped them from Glasgow to Kansas City, Missouri, over one railroad to be transferred there to another which was to take the mules to Horatio, it was held that the shipment between Glasgow and Kansas City was intrastate.[14] The latter railroad transported the shipment free because the plaintiff was to work for it. The court said the shipper had no intention to ship to Horatio and was concerned only with the shipment from Glasgow to Kansas City after which he was to have his transportation free. It would seem that the shipper's intention in this case is indistinguishable from that of the shipper in *Reynolds* v. *St. Louis & Southwestern Ry.*,[15] the principal case, where he was concerned in the first instance only with getting the transportation to Bernie after which he was to get it to another point at a lower rate.

The shipper's intention, however, does not conclusively determine the nature of the shipment. Under some circumstances a shipment is deemed interstate without regard to the intention of the shipper. It is now generally held that where the shipment is between two points in the same state, but the transporting agency in the course of the journey between the termini passes beyond the state the shipment is interstate. It has been held in Missouri that where coal was shipped from a point in Missouri to another point in the state by a carrier whose route between the two points carried it outside the state it remained intrastate commerce.[16] But in *Hanley* v. *Kansas City Southern Ry.*,[17] it was held by the United States Supreme Court that such shipments were interstate. The court's conception of the underlying reasons is indicated by the use of a quotation from the opinion of Mr. Justice Field in *Pacific Coast Stamping Co.* v. *Railroad Commission*:[18] "To bring transportation within control of the state as part

13. (1907) 204 U. S. 403, 413.
14. *Kolbmeyer* v. *Chicago & Alton R. R.* (1916) 192 Mo. App. 188, 182 S. W. 794.
15. (1916) 190 S. W. 423.
16. *Seawell et al.* v. *Railroad* (1893) 119 Mo. 222, 24 S. W. 1002.
17. (1902) 187 U. S. 617.
18. (1883) 18 Fed. 10.

of its domestic commerce, the subject transported must be within its entire voyage under the exclusive jurisdiction of the state." This view is now followed in Missouri.[19] It is desirable as avoiding clashes between the states as to which has jurisdiction. In this type of case the intention of the shipper is not inquired into, the question of the nature of the commerce being determined by the physical facts involved in the transportation.

An interesting question arises when the shipment is between points in the same state but is carried beyond into another state by the same carrier. In *Deardorff* v. *Chicago, Burlington & Quincy R. R. Co.*,[20] the plaintiff shipped stock from Hale, Missouri, to the Kansas City Stock Yards, some of the contracts reading to Kansas City, Missouri. The Stock Yards Company had yards in Missouri and in Kansas. Those alloted to defendant carrier were in Kansas. The cars were carried into that state and there unloaded. The court, citing the Federal decisions, held the shipment interstate, GRAVES and BROWN, JJ. dissenting. The court did not mention *Scammons* v. *Kansas City, St. Joseph & Council Bluffs R. R.*,[21] a Missouri case cited by plaintiff, which held such a shipment to be intrastate. This indicates, as has been pointed out, that the Federal decisions are paramount. Judge Graves in the dissent advanced a view that has met with little favor, viz: that the billing controlled as the parties were estopped by its terms from making the claim that the shipment was interstate. Such a rule would make evasions of the Interstate Commerce Act comparatively easy. If in this case the defendant carrier had allotted to it, yards both in Missouri and Kansas the solution, it seems, would be more difficult. This question has arisen very recently.[22] Shippers from various Missouri points shipped their grain to Kansas City, Missouri, grain dealers in Kansas City being the consignees. The cars on arrival were shunted off on "hold" tracks and samples sent from each car to the grain dealer who sold by sample. Some of the "hold" tracks were in Kansas. The Supreme Court in sustaining an order of the Public Service Commission held that the shipment was intrastate. Four opinions were handed down, GRAVES, J., again holding that the bill of lading was conclusive. The court decided that no intention to ship beyond Kansas City, Missouri, could be implied, and that the cars were sent to the "hold" tracks in Kansas solely for the convenience of the carrier as

19. *Bowles* v. *Quincy, Omaha, etc. R. R. Co.* (1916) 187 S. W. 131; *Howard* v. *Chicago, Rock Island & Pacific Ry. Co.* (1916) 184 S. W. 906; *Porter* v. *Kansas City Southern Ry.* (1915) 187 Mo. App. 56, 172 S. W. 1153; *Mires* v. *St. Louis & San Francisco Ry.* (1908) 134 Mo. App. 379, 114 S. W. 1052.

20. (1914) 263 Mo. 65, 172 S. W. 333.

21. (1890) 41 Mo. App. 194.

22. *State* v. *Public Service Commission* (1916) 189 S. W. 377.

it did not appear that the shipper knew of this. This case is distinguishable from *Deardorff* v. *Chicago, Burlington and Quincy R. R.*, on the ground that in the latter it was the duty of the carrier to unload on the Kansas side and hence the essential character of the shipment was interstate.

The tendency of the Missouri courts, if the decisions up to the present can be regarded as establishing a tendency, to hold a shipment interstate rather than intrastate is desirable, it seems, as a step in the process of placing all commerce involving carriage under the supervision of one body, the Interstate Commerce Commission. The courts have taken a step in that direction by adopting the tests used by the Supreme Court of the United States in determining the inter- or intra-state character of commerce. These tests, simple in themselves, but often difficult in their application to particular facts, were concisely stated by BOND, J., in his concurring opinion in *State* v. *Public Service Commission*:[23] "The essential character of commerce is determined first, by the intention of the shipper, second by the nature and object of the shipment." The decision in the principal case, it would seem, is a necessary result of the application of this rule.

S. H. LIBERMAN.

MUNICIPAL CORPORATIONS—LIABILITY FOR FAILURE TO REMOVE SNOW AND ICE FROM SIDEWALKS. *Albritton* v. *Kansas City*.[1]—The plaintiff was injured by falling on a sidewalk in Kansas City which was covered with snow and ice and brought this action against the city to recover the damages sustained. Six days before the accident ten inches of snow had fallen, which had not been removed from the sidewalk at the time of the plaintiff's fall. A path about eighteen inches wide had been beaten down thru the snow and this path had been converted by alternate freezing and thawing into ice with an extremely uneven and dangerous surface. The path, having remained in this condition for three or four days, was at the time plaintiff attempted to travel over it, covered by an inch of new snow then falling. The trial court overruled a demurrer to the evidence on the ground that the condition presented could reasonably be found by the jury to be far more dangerous that the general condition of snow covered sidewalks thruout the city. There was a judgment for the plaintiff which was reversed by the Kansas City Court of Appeals because of error in instructing the jury that the city was under a duty "to keep its sidewalks in a reasonably safe condition for travel." The Court of Appeals held that the duty of the city was to exercise reasonable care to keep its sidewalks in a reasonably safe condition.

23. (1916) 189 S. W. 377, 380.
1. (1916) 192 Mo. App. 574, 188 S. W. 239.

The court, after giving the above ground for the reversal, added: "a more serious error is that the hypothesis upon which a recovery by the plaintiff is authorized is so broad that it includes not only actionable but non-actionable defects. Snow allowed to remain on public sidewalks invariably, when subjected to alternate processes of thawing and freezing, becomes more or less rough, uneven, and slippery, and of course more or less dangerous. That we have pointed out is a natural and general condition for which the city can not be held responsible; and the instructions, in allowing recovery for such a condition, enlarged the scope of defendant's liability beyond its proper limits." Apparently the court is qualifying the general duty of the city to use due care to keep its sidewalks reasonably safe, by excepting snow and ice lying in the given conditions from the class of actionable defects. The question raised in this case is the extent to which the city is under a duty to remove snow and ice from its sidewalks.

The general duty of municipal corporations in Missouri is to use ordinary care to remove defects from streets and sidewalks.[2] In a few states this duty is created by statute;[3] but in Missouri, as in the majority of the states, the duty is imposed by the common law.[4] It is said to arise "by implication from the nature of the subject, and the vast power conferred upon such corporations, including the exclusive control of the streets."[5]

In the leading case of *Reedy* v. *St. Louis Brewing Association and City of St. Louis*,[6] the Supreme Court of Missouri applies the general test of due care under all the circumstances to defects caused by snow and ice. In that case the plaintiff fell while attempting to cross smooth ice which covered the sidewalk. Counsel for the city contended that smooth ice was a non-actionable defect. The court held the city liable on the ground that smooth ice was a dangerous defect and the exercise of due care required the removal of such dangerous defects within a reasonable time if the removal was practicable. The ice had been on the sidewalk twenty four hours and this was held to be a reasonable time within which the city should have discovered and removed it. The ice was caused by a local flooding of the sidewalk by water from a leaky pipe and the court was of the opinion it was practicable to remove it. If the ice had covered the whole city then the city would not be liable on the ground of the impracticability of removal. The sole test applied is that of due care, and reasonableness and practicableness are material elements of due care.

2. *Maus* v. *Springfield* (1890) 101 Mo. 613, 14 S. W. 630; *Carvin* v. *City of St. Louis* (1899) 151 Mo. 334, 52 S. W. 210; 7 Law Series, Mo. Bull. 21; McQuillin, Municipal Corporations, § 2720; Elliot, Roads and Streets (2d ed.) § 611.
3. *Stanton* v. *Springfield* (1866) 94 Mass. 566.
4. McQuillin, Municipal Corporations, § 2720; Elliot, Roads and Streets (2d ed.) § 611.
5. *Kiley* v. *City of Kansas* (1885) 87 Mo. 103, 106.
6. (1900) 161 Mo. 523, 61 S. W. 859, 53 L. R. A. 805.

Some cases seem to follow the mechanical test that the city is not liable for defects caused by smooth ice, or ice produced by natural causes. The "rough ice" rule was first stated in *Stanton* v. *Springfield*.[7] The court in that case laid down the rule that smooth ice was a non-actionable defect since mere smoothness had never been held to be a structural defect, and that snow or ice made the sidewalk defective only when it was so piled up as to form an obstruction. The authority of this decision was greatly weakened by a subsequent case, *Cromarty* v. *Boston*,[8] which held a glass and iron cover in a sidewalk to be a defect because of its slipperiness. *Stanton* v. *Springfield* has been severely criticised for the reason that smooth, slippery ice is often more dangerous than rough ice,[9] but, as the leading case in the United States its influence has been widespread.

The "natural cause" doctrine has no sound basis. In *Hausman* v. *Madison*,[10] the court gave among other reasons for holding a small strip of smooth ice a non-actionable defect the following: "These conditions are produced by natural causes, or the operation of the laws of gravitation and temperature. Such places may be defects but they are natural and common defects for which the municipality is not liable." Whether the defect is produced by artificial or natural causes, if indeed all causes may not be said to be natural the duty of the city is the same. The liability arises not in the creation of such defects, but in the failure to remove them. In the Missouri decisions following *Reedy* v. *St. Louis Brewing Association and City of St. Louis*,[11] the reasoning sometimes shows a confusion due to the influence of the "rough ice" rule and the "natural cause" doctrine. Smooth ice is an actionable defect if it is so localized as to be reasonably removable. If there is a general condition of snow and ice, but in a given place it is piled up so as to be more dangerous than the general condition, then due care will require its removal.[12] If the sidewalks of the entire city are rough from the sudden freezing of slush, the law does not place an absolute duty on the city to make sidewalks safe.[13] But after snow and ice have generally disappeared, the city is liable for failure to remove an isolated portion within a reasonable time.[14] In all cases the test is due care under the circumstances, and due care always has regard to the reasonableness of the burden imposed.

7. (1866) 94 Mass. 566.
8. (1879) 27 Mass. 329.
9. *Cloughhessey* v. *City of Waterbury* (1883) 51 Conn. 405; *Magha* v. *City of Hagerstown* (1902) 95 Md. 62; McQuillin, Municipal Corporations, § 2789. See 7 L. R. A. (N. S.) 933.
10. (1893) 85 Wis. 187. See note to this case, 21 L. R. A. 263.
11. *Reedy* v. *St. Louis Brewing Association and City of St. Louis* (1900) 161 Mo. 523, 61 S. W. 859, 53 L. R. A. 805.
12. *Reno* v. *City of St. Joseph* (1902) 169 Mo. App. 642, 70 S. W. 123.
13. *Vonkey* v. *St. Louis* (1909) 219 Mo. 37, 117 S. W. 733.
14. *Jackson* v. *Kansas City* (1914) 181 Mo. App. 178, 167 S. W. 1150.

In *Albritton* v. *Kansas City* while the Court of Appeals first lays down the correct principle of due care, its later statement that a more serious error was committed in including within the scope of the instructions non-actionable defects arising from rough, uneven and slippery snow and ice seems to indicate that the court was not entirely free from the influence of the mechanical tests mentioned above, the application of which in Missouri seems to have been abandoned for that of due care under the circumstances.

ROSCOE E. HARPER.

PARTITION—WHEN IS IT CONTRARY TO A TESTATOR'S INTENTION? *Shelton* v. *Bragg*.[1]—A testator devised his "home place" to his daughter "to use, occupy and enjoy during her natural life . . . and at her death it is my will and desire that said above described lots or the proceeds thereof be equally divided between all my (other) children or their heirs" and the heirs of the daughter to whom a life estate was given. In refusing to authorize a partition of the property during the lifetime of the testator's daughter, the court said that such partition "would be in utter disregard of the plain directions of the testator as expressed in said will, and in contravention of the clear provisions of" the statute.[2] The case may also be rested on the ground that at least a part of the remainder was contingent at the time the partition suit was instituted.[3] The decision is of interest, however, in that it indicates a disposition to apply liberally the statute forbidding partition contrary to a testator's intention.

The court has nowhere discussed the attitude with which it will approach the question of applying this statute, altho it has been applied in numerous cases.[4] A testator's injunction against partition might have been respected by courts of equity apart from the statute. In *Stevens* v. *De La Vaulx*[5] it was said "that a court of equity exercising its ancient jurisdiction uninfluenced by the statute above quoted, would not make partition at the suit of a devisee in express violation

1. (1916) 189 S. W. 1174.
2. Revised Statutes 1909, § 2596, first enacted in Revised Statutes 1825, p. 612.
3. This feature of the decision has been discussed in an article on "The Transfer and Partition of Remainders in Missouri," 14 Law Series, Missouri Bulletin, 3, 28.
4. *Lilly* v. *Menke* (1894) 126 Mo. 190, 211, 28 S. W. 643, 994; *Stevens* v. *De La Vaulx* (1901) 166 Mo. 20, 65 S. W. 1003; *Stewart* v. *Jones* (1909) 219 Mo. 614, 118 S. W. 1; *Barnard* v. *Keathley* (1910) 230 Mo. 209, 224, 130 S. W. 306. The court refused to apply the statute in *Sikemeier* v. *Galvin* (1894) 124 Mo. 376, 27 S. W. 551; and in *McQueen* v. *Lilly* (1895) 131 Mo. 17, 31 S. W. 1043. In *Cubbage* v. *Franklin* (1876) 62 Mo. 364, the validity of the partition was not in issue and the testator's words do not appear; but the court said *obiter* that "a partition cannot be made in contravention of a will. Indeed, if the contrary was held, there would be no use in our statutes allowing a testator to make a will." This extreme statement seems nothing short of absurd. In *Lilly* v. *Menke*, the court spoke of the statute as a "wise enactment."
5. (1901) 166 Mo. 20, 65 S. W. 1003. Cf. *Dee* v. *Dee* (1904) 212 Ill. 338; *Peterson* v. *Demonde* (Neb., 1915) 152 N. W. 786.

of the will." Since the statute did not divest the chancery courts of their jurisdiction,[6] it is conceivable that in the exercise of its equity jurisdiction a court might yet override a testator's restraint in order to do equity; the statute merely provides that there shall be no statutory partition contrary to the testator's direction.[7] Partition is a method of alienation.[8] But for the statute, restraints on partition would be subject to the inhibitions which the law has placed upon other restraints on alienation. Thus, in *Haeussler* v. *Missouri Iron Co.*,[9] where a deed contained an agreement that none of the parties, nor their heirs or assigns would institute a proceeding to partition the lands, an undivided interest in which was being conveyed, without the written consent of all persons interested in the property at the time, the court held the stipulation to be void as "an unreasonable restraint" on the enjoyment and use of the lands. Such a stipulation was said to be no restraint on alienation, inasmuch as "the several owners are left free to dispose of their interests in any manner they saw proper."[10] But it is submitted that any stipulation which precludes partition is truly a restraint on alienation by one of the recognized methods of alienation, and should be approached as other restraints are approached. If a stipulation in a deed precludes the conveyance of land by mortgage, it is void.[11] Public policy demands not only that lands should be alienable, but that they should be *freely* alienable. Restraints on alienation in Missouri have generally been held void on the ground that they are inconsistent with the estates to which they are attached.[12] But such reasoning begs the question, for the incidents of estates are themselves the subject of the inquiry. A stipulation forbidding partition may result in the inability of the owners to enjoin the land, for partition is the remedy which makes sure of possible enjoyment by co-tenants.

The statute forbidding partition contrary to the intention of a testator must have some limits. Suppose for instance a testator pro-

6. *Spitts* v. *Wells* (1833) 18 Mo. 468.

7. But in *Stevens* v. *De La Vaulx* (1901) 166 Mo. 20, 27, 65 S. W. 1003. the statute seems to have been regarded as a restraint on the chancellor in a non-statutory action. It is submitted that this was a misconception.

8. It was so spoken of in *Clamogan* v. *Lane* (1845) 9 Mo. 442, 462.

9. (1892) 110 Mo. 188, 19 S. W. 75, 16 L. R. A. 220. *Contra, Hunt* v. *Wright* (1867) 47 N. H. 396. *Cf. Buschmann* v. *McDermott* (1913) 139 N. Y. Supp. 314. An agreement that there shall be no partition for a certain time may be enforceable. See *Flournoy* v. *Kirkman* (1917) 192 S. W. 462. The civil law sets five years as the limit, for "he who has a companion in ownership has a master." Planiol, Traité élemétaire de droit civil, § 2502.

10. Professor Gray agrees that a prohibition against partition is not a restraint on alienation, "as the undivided share is always assignable." Gray, Restraints on Alienation (2d ed.) § 30. See also *Peterson* v. *Damonde* (Neb., 1915) 152 N. W. 786.

11. Gray, Restraints on Alienation (2d ed.) § 55.

12. *McDowell* v. *Brown* (1855) 21 Mo. 57; *Kessner* v. *Phillips* (1905) 189 Mo. 515, 528, 88 S. W. 66. In *Pratt* v. *Saline Valley Ry. Co.* (1908) 130 Mo. App. 175, 108 S. W. 1099, it was said to be because of "public policy."

vides that his land shall *never* be subject to partition, into whosever hands it may come. It may well be doubted whether the court would uphold such a restriction. The cases which have arisen involved restrictions limited as to time.[13]

One is lead to ask, what is the purpose of the statute which permits a testator to forbid future partition? Is any protection to the testator himself involved? What public policy underlies the perpetuation of men's control of their property beyond their lives? A stipulation forbidding partition has nothing to do with the determination of the persons who are to enjoy; as the statute cannot be based upon any legislative protection of the devisees themselves. It is conceivable that the object of the statute is to permit testators to protect their devisees against their own folly. In *Stewart* v. *Jones*,[14] this consideration seems to have been in the mind of the court. It is conceivable also that its object is to protect certain of the devisees against the folly of the others who would like to have partition; but such a purpose of the statute would be outweighed by the general policy of the law to enable any one to use and enjoy what belongs to him. In *Stevens* v. *De La Vaulx*, the court said that the property belonged to the testator and "he had a right to do with it as he pleased, and those who take of his bounty must take it on the terms he imposes." But there are some restrictions on what a testator may do, and the modern tendency toward curbing the individualism of the nineteenth centruy is gradually extending such restrictions; for instance, a testator cannot provide that land which is devised outright shall not be subject to the debts of the devisee. In other words, there is always an element of public policy involved in any attempt by a testator to control his property after his death, and it is submitted that in the application of the statute in question the court should always bear in mind that public policy demands free alienability of all property, and particularly of all land. Respect for the dead should not eclipse respect for the living.

The question is, therefore, whether the court will liberally construe this statute so as to extend its operation. Will any expression of a testator be seized upon in order to find that he has forbidden a partition of his land? If the foregoing argument be sound, it would seem that while a clear expression of a testator's intention is to be effectuated because of the statute, the court should not be over-zealous ot apply the statute, and should not in a doubtful case seize upon ambiguous phrases and expand them into an expression of a testator's intention that there should be no partition.

13. The time is usually restricted to the life of a devisee or party to a contract. See *Buschmann* v. *McDermott* (1913) 139 N. Y. Supp. 314. In *Flournoy* v. *Kirkman* (1916) 192 S. W. 462, ROY, C., seems to have thought such a limited restraint good.

14. (1908) 219 Mo. 614, 118 S. W. 1.

In *Stewart* v. *Jones*, the testator had provided for a public sale of certain lands upon the death of his widow, and the determination of the persons to whom the proceeds were to be distributed was left entirely contingent upon events which could not have been determined until the death of the widow and the directed sale; in such case the court had no choice, but was bound to find that the testator had forbidden an earlier partition of his land. In *Hill* v. *Hill*,[15] the testator created life estates in his son and son's wife, and directed that at the death of both, the land be divided equally among his grandchildren; he further provided that if the son should die before his wife, the land should be divided equally among his grandchildren and his daughter-in-law, the son's wife. It will thus be seen that the testator had provided for the division of his property on the death of his son, and if the son's wife survived the son, she was to share in the division, but otherwise not. Manifestly, it could not be determined until the death of the son how many beneficiaries of the division there would be. The quantum of each of the future interests remained contingent until an event which the testator himself had provided for, viz., a division upon the death of the son. On such facts it was easy to find that the testator had "expressed a desire that such real estate be not sold until one or the other of those contingencies arose."

In the principle case we are not told *why* the partition sought would be "in utter disregard of the plain direction of the testator as expressed in his will." The alternative provision for a division of "the proceeds thereof" would seem to have countenanced a partition.[16] But there was an element of contingency in the determination of the future estates, for the heirs of the daughter to whom a life estate was given could not be determined until her death; and the division was to be among the children "or their heirs," so that all the future interests may have been contingent. On this ground the case may be brought within the principle of the decisions in *Stewart* v. *Jones* and *Hill* v. *Hill;* but if no such element of contingency had existed, the court would apparently have inferred the same intention that there should be no partition. In the simple case where land is devised to A, to use, occupy and enjoy during his life, and after his death to be divided among B, C and D, it is certainly straining the language to hold that an intention is expressed to preclude partition during the continuance of the life estate; and if the view expressed above as to the public policy behind the statute is to be adopted, a court should hold that a much clearer expression is necessary for the application of the statute. In all three of the recent cases, *Stewart* v. *Jones*, *Hill* v. *Hill* and *Shelton* v. *Bragg*, the element of contingency was present. They may be

15. (1914) 216 Mo. 55, 168 S. W. 1165.
16. The direction for a *division* did not in itself preclude partition. *Chouteau* v. *Paul* (1833) 3 Mo. 260.

distinguished on that ground. *Shelton* v. *Bragg* may also be distinguished in that the testator was devising his *home place* to his daughter, apparently in order that she should make it her home during her lifetime; but since the daughter was one of the plaintiffs seeking partition, this reason was not controlling. Perhaps a supposed sentimental desire that the homestead should continue in the family was the cause of the court's willingness to find a direction that no partition should be made during the existence of the life estate. The validity of such a reason may well be questioned when it is weighed against the public interest in the free alienation of all lands.

It is to be hoped that when the question again arises the court will indicate a disposition to construe narrowly the provisions of a will which are relied upon as indicating an intention that no partition should be made. True, it is not for the court to question the policy behind the statute; but it is the proper function of the court to weigh the interests which are involved in its application. Where a statute clearly encroaches on public interest it is the part of the judiciary to confine its application within narrow limits. It is submitted that this statute should be applied only when a will contains a *clear* and *unequivocal* expression of the testator's intention that no partition should be made. It is to be regretted therefore that in *Hill* v. *Hill* and *Shelton* v. *Bragg* there is no weighing of these considerations. Since *Shelton* v. *Bragg* may be rested on the ground that the existence of the contingent remainder prevented any partition, its future influence as a precedent ought to be slight.

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