UNIVERSITY OF PENNSYLVANIA
LAW REVIEW
AND AMERICAN LAW REGISTER

FOUNDED 1852

Published Monthly (Except July, August and September) by The Department of Law of the University of Pennsylvania, 34th and Chestnut Streets, Philadelphia, Pa.

VOLUME 57 MAY NUMBER 8

SUBSCRIPTION PRICE, $3.00 PER ANNUM, SINGLE COPIES, 35 CENTS

NOTES.

THE LIABILITY OF A VENDOR TO ONE WITH WHOM HE HAS NO CONTRACTUAL RELATION.

The books, in dealing with this problem, state the rules somewhat dogmatically. First, they say that he who supplies an article for resale which is imminently dangerous to life or health, becomes liable in tort to the person injured by its use. Under this classification fall the drug cases in which noxious drugs are sold under harmless labels,[1] or the quantity of the dose is injurious and the manufacturer or the original vendor is the only one who knows its ingredients.[2] On the

[1] *George* v. *Skivington*, L. R. 5 Ex. 1 (1869); *Thomas* v. *Winchester*, 6 N. Y. 397 (1852).

[2] *Blood Balm Co.* v. *Cooper*, 83 Ga. 457 (1889).

other hand, a manufacturer who supplies a machine or appliance without knowledge of any defect is usually not held in tort by a stranger to the contract.[3] If, however, such machine or appliance is placed upon the market with knowledge on the part of the manufacturer of a latent defect which he conceals, or about which he remains reticent when it is his duty to speak, he becomes liable.[4]

To state the rules as given adds to clearness, only until it is attempted to apply them to a new situation.

The question under consideration came before the Supreme Court of the United States recently in the case of *Waters-Pierce Oil Co.* v. *Desclius*.[5] B, the oil company, sold to a retail dealer X, as coal oil, a mixture from a tank containing six thousand six hundred gallons of coal oil, into which by mistake three hundred gallons of gasoline had run. There was evidence to show that while B knew of the defect, it was not thought that sufficient gasoline had flowed into the coal oil tank to materially affect the quality of the latter. X resold to A, who used the fluid to kindle a fire. The mixture proved highly inflammable and an explosion resulted whereby A's wife and children were killed and his house destroyed. There was also proof that B knew of the custom in that locality of kindling fires by the aid of kerosene. In an action by A against B he was allowed to recover, aside from the question of contract, on the ground that B owed a duty to see that the oil supplied by him was not dangerous to the life or limb of the user.

Neither of the rules stated cover this case. Coal oil, unlike a drug, is not imminently dangerous to life or health, so as to invoke the application of the first rule. It yet awaits a decision declaring it inherently harmful. Petroleum lubricating oil has been held not to be imminently dangerous, and proof of negligence in its manufacture and knowledge of any defect has been required in order to impose liability.[6] Nor will the second rule cover this case, for there must be knowledge of the defect to make a manufacturer of an article liable.[7] It will be observed that while the manufacturer knew there had been a slight mixture, he thought, *bona fide*, that there

---

[3] *Bragdon* v. *Perkins-Campbell Co.*, 87 Fed. 109 (1898); *Lewis* v. *Terry*, 111 Cal. 45 (1896).

[4] *Schubert* v. *Clark*, 15 L. R. A. (N. S.) 818 (Minn.) (1892).

[5] 29 Supreme Ct. Rep. 270 (1909).

[6] *Standard Oil Co.* v. *Murry*, 119 Fed. 572 (1902).

[7] *Heizer* v. *Kingshand Co.*, 110 Nev. 605 (1892).

was no defect which made the oil highly inflammable. Assuming, however, that this would be sufficient knowledge, the language of the Court [8] goes further when it is said that they do not wish to be confined to the facts before them and to be understood as moulding their conclusions therefrom, but that "under the general principles of law sustained by the authorities already cited, a recovery against the oil company might be justified."

A better statement of the rule should therefore be deduced from the cases, with which, perhaps, the principal case may be consonant.

It would seem that wherever a vendor or manufacturer places upon the market an article which can only be used in a certain way, and if used for that particular purpose or in that peculiar manner, injury results, he should be liable.[9] This is true whether he actually knew of the defect or not. Furthermore, even if he inform the intermediate man, he will not escape liability.[10] If, however, the article is sold not for resale, but for the use of the vendee, and he informs the vendee of the defect, or, if ignorant of the defect, upon inspection it is accepted by the purchaser, the seller should not be answerable to a third party.[11]

A contractor who supplies an appliance to be used by another's servants becomes liable if when that machine is used in the only way it was intended, it proves unfit, to the injury of the servants.[12] And this should be true even though the master has been informed of the defect and gives no notice to his servants.[13]

There is mentioned in the principal case the knowledge by the defendant of the peculiar use, viz.: kindling fires, to which the coal oil was put in the community. If the case were decided solely on the ground that one is bound to see that an illuminating oil is not an improper mixture when put to an inordinate use, we should indeed have a startling proposition. True, when there is knowledge on the part of the original vendor that the article is to be used by certain persons, such as infants, but in the manner in which it was intended,

---

[8] P. 276.

[9] *Clement* v. *Crosby & Co.*, 111 N. W. (Mich.) 745 (1907).

[10] *Stowell* v. *Standard Oil Co.*, 139 Mich. 18 (1905); *Clement* v. *Crosby & Co.*, 111 N. W. (Mich.) 745 (1907).

[11] *Curtin* v. *Somerset*, 140 Pa. 70 (1891).

[12] *Heaven* v. *Pender*, L. R. 11 Queen's Bench Div. 503 (1883); *Cook* v. *Floating Dry Dock Co.*, 1 Hilt (N. Y.) 436.

[13] *Lechman* v. *Hooper*, 52 N. J. L. 253 (1890).

a false representation will entitle him who uses it to his injury to recover from the original seller.[14] The question of knowledge of its use, however, when the oil is used in a manner which everyone knows is dangerous even when pure, brings little order out of chaos. The question is simply, is the article fit for the particular purpose for which it is paraded on the market.[15]

We shall not dilate upon the problems of proximate cause, which is prolix in its ramifications. The question is briefly whether the interjection of a human agency, the intermediate, seller, is a break in the chain of concentration which will relieve the original vendor. There is a line of cases represented by *Fowles* v. *Briggs*,[16] which say that where there is the intervention of a human agency upon whom rests the obligation of inspection, the chain is broken. Those cases do not arise from a situation where there are a series of events resulting from the placing of an article on the market for resale. When an article or machine is sent out to be passed on by resale, or when it is furnished under contract to be used by another's servants, an injury, resulting from the only use for which it was intended, would seem to be the result of a chain of events so natural as to form one whole and to be the natural and probable consequence of the defendant's act.[17]

The principal case, while not so clear as one might desire on the question of knowledge of the defect in the article sold, at least in the dictum of the courts, places the law where it ought to be and removes much of the confusion which has resulted in making arbitrary distinctions between articles as to which are and which are not inherently dangerous.[18]

Undue Preference Under the English Railway Acts.

In *Holwell Iron Co.* v. *Midland Ry.*,[1] the plaintiff claimed that the defendant company had granted undue preference to three rival companies, each in different localities. As to the first, the defendant did all the terminal service and provided

[14] *Levy* v. *Langridge*, 4 M. & W. 337 (1838).

[15] *Watson* v. *Augusta Brewing Co.*, I L. R. A. 1178 (Ga. 1905).

[16] 116 Mich. 425 (1898).

[17] *Haverly* v. *State Line R. Co.*, 135 Pa. 50.

[18] *Huset* v. *Case Threshing Machine Co.*, 120 Fed. 865 (1903).

[1] L. R. 1 K. B. (1909) 486.

all terminal accommodations free of charge and granted lower rates for siding and main line work. This they justified as part consideration for the conveyance of certain private railways and sidings. As to the second, the defendant allowed certain rebates for hauling their traffic over their intervening sidings to and from the defendant's railway. These traders had better facilities with rival railways and secured the rebates because of competition. Such rebates were not in excess of reasonable remuneration for the services performed. As to the third, rebates were allowed in respect of services performed by them at their private sidings.

The Court held that such agreements, as in the first case, must be viewed with great suspicion, but it cannot be held as a matter of law that the payment for railway services or accommodation must take the form of coin of the realm. Since this agreement of purchase explains and accounts for the inequality of rates and is a fair and honest bargain, and since the consideration has been duly conveyed to and is enjoyed by the railway company, it is impossible to say that it is also an undue preference.

Where the reduced rate is due to competition and is not a pure and simple gift,[2] but a reasonable remuneration[3] for the services performed in hauling his traffic over his intervening private sidings to and from the railway, it is justified. As to the third, recovery was barred by the statute[4] which limits the bringing of action to one year after knowledge of the undue preference.

The English law, as relating to carriers, differs in several important respects from the American acts. The Act of 1854[5] enacts that no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person, company or traffic, or subject the same to any undue or unreasonable prejudice or disadvantage whatsoever.

Under the statute it is held the act complained of must be undue, unreasonable, or unfair in the company's treatment of the parties under investigation relatively to one another. A mere inequality in charge raises a presumption[6] that it is undue, unreasonable, or unfair, but it may be rebutted by a

---

[2] *Phipps* v. *L. & N. W.*, 8 Ry. & Ca. Tr. Cas. 83 (1892) 2 Q. B. 229.

[3] *Hickelton* v. *Dock Co.*, 12 Ry. & Ca. Tr. Cas. 63 (1903).

[4] Act 1888 (51 and 52 Vict. c. 25), sec. 12.

[5] 17 and 18 Vict. c. 31, sec. 2.

[6] *Denaby* v. *Manchester*, 3 Ry. & Ca. Tr. Cas. 426, 441 (1880).

bona fide effort to regulate[7] the traffic, a reasonable compensation[8] for services rendered, an increased length of haul,[9] or a reasonable[10] relation to the economy effected, as in the increase or decrease of the average cost of working. While the mere existence of competition is not any justification[11] for a difference in rates or rebates, it cannot be said as a matter of law[12] to be a consideration which may not be considered by the Commission or the courts, but it is one of the facts entering into the reasonableness of the rate.

Under the English Act of 1888,[13] the carrier must first submit its agreements or changes of rates to the Commission. Under the Act of 1873[14] this Commission was composed of three persons, one experienced in the law and another in railway business. By the Act of 1889[15] a Judge of the High Court was appointed to preside at the sittings of the Commission, which was then declared a Court of Record, not liable to be restrained by prohibition, injunction, *certiorari* or otherwise. The Commission is authorized[16] to take into consideration the interests of the public, but shall not sanction or allow any difference in the tolls, rates or charges made for, or any difference in the treatment of, home and foreign merchandise, in respect of the same or similar services.

The Equality Clause of 1845[17] required equality of rates for transportation "over the same portion of the line of railway under the same circumstances." While the McCullom Act[18] was modeled upon the prior English acts, the phraseology was so changed, the economic conditions are so different and the methods of railway management are so dissimilar to those in England that the English cases may be used only with great caution. However, the reasoning of the English cases has been

---

[7] *Oxlade* v. *N. E. R.* (1864), 1 Ry. & Ca. Tr. Cas. 162.
[8] *M. S. & L. R.* v. *Denaby*, 4 Ry. & Ca. Tr. Cas. 438 (1884).
[9] *Merry* v. *G. S. & W. R.* (1884), 4 Ry. & Ca. Tr. Cas. 383.
[10] *Bellsdyke Co.* v. *N. B. R.* (1875), 2 Ry. & Ca. Tr. Cas. 105.
[11] *Liverpool Assn.* v. *L. & N. W. R.* (1890), 7 Ry. & Ca. Tr. Cas. 126.
[12] *Phipps* v. *L. & N. W.*, *supra*.
[13] *Supra*.
[14] 36 and 37 Vict. c. 48.
[15] 52 and 53 Vict. c. 57.
[16] Act 1888 (51 and 52 Vict. c. 25), sec. 27, p. 2.
[17] Act 1845 (8 Vict. c. 20), sec. 90.
[18] 24 Stat. at L. 379; 34 Stat. at L. 584; 35 Stat. at L. 60.

adopted by our Federal Courts [19] and the same results have been reached in the decisions where the economic conditions are similar.

Thus it has been held by a number of State courts that concessions may [20] be made to secure competitive business, even if discrimination is involved, though the better and prevalent [21] rule is *contra*. Cartage may be accesorial service furnished free to some and denied to others.[22] Competition may lawfully be considered where it is not the only element of difference between the shippers.[23] So, as in the principal case, a rebate may lawfully be allowed as consideration for a contract,[24] or as remuneration for services,[25] or a difference in the method of shipment.[26] Some doubt is cast upon the ability of the carrier to purchase property in consideration of prospective freight rates [27] and the payment for transportation in anything other than currency.

Contracts Impossible of Performance.

The facts that make an agreement impossible of performance may have existed (1) at the time the contract was made, or (2) they may have arisen subsequent to the formation of the contract, but before its performance.

An example of the first class arises where a certain cargo of goods, supposed to be at sea, is bought, and at the time of

---

[19] *Interstate Com.* v. *Louisville R. R.*, 73 Fed. 409 (1896); *Tex. & Pac. R. R.* v. *Interestate C.*, 162 U. S. 197, 222 (1896); *Interstate Com.* v. *B. & O. R. R.*, 145 U. S. 263 (1892).

[20] *Johnson* v. *R. R.*, 16 Fla. 623; 26 Amer. Rep. 731 (1878); *Lough* v. *Outerbridge*, 143 N. Y. 271; 42 Amer. St. Rep. 712 (1894).

[21] *Wight* v. *U. S.*, 167 U. S. 512 (1897); *Messenger* v. *P. R. R.*, 36 N. J. L. 407; 37 N. J. L. 531 (1874).

[22] *I. C. C. v. Detroit R. R.*, 167 U. S. 633 (1897); 4 Elliot on Railroads, sec. 1678.

[23] *I. C. C.* v. *Ala. Midland*, 168 U. S. 144 (1897); *Louisville R. R.* v. *Behlmer*, 175 U. S. 648 (1900); *East. Tenn. R. R.* v. *I. C. C.*, 181 U. S. 1 (1901).

[24] *Root* v. *Long Island R. R.*, 4 L. R. A. 331 (1889).

[25] *Chicago & Alton R. R.* v. *U. S.*, 156 Fed. 558 (1907).

[26] *Penn. Ref. Co.* v. *R. R.*, 208 U. S. 208 (1908).

[27] *Weleetka Co.* v. *Fort Smith R. R.*, 12 I. C. C. Rep. 503 (1907). See Drinker's The Interstate Commerce Act, chap. x to xix.

the sale of the cargo is not in existence.[1] Or where an agreement is based on the existence of a certain judgment which does not exist.[2]

The general rule in such cases is that the contract is void on the ground of mistake, both parties having contracted on the assumption of the existence of the subject matter. So if the purchase price had been paid, it could be recovered.

An example of the second class arises where there is a contract to sell specified goods, and before completion of the contract the goods are destroyed without the fault of either party.[3] Or where an act of the Legislature passed subsequent to the agreement prevents performance.[4] Or where a contract for personal service is made and the promissor dies before performance.[5]

It is to cases of this class that the rules relating to impossibility apply.

In cases of this class the parties might have made either of two kinds of contracts. (1) That the promisor would absolutely assume the obligation. (2) That the parties intended the performance of the contract to depend, respectively, on the law remaining unchanged, and the subject-matter, or the promisor himself, continuing in existence.

If the first, then impossibility, clearly, would be no defense. If the second, it should be. Which kind of agreement was in fact entered into, is a question of construction.

In early times the agreement was construed very strictly against the promisor "because he might have provided against it by his contract."[6]

The modern tendency seems to be towards a more lenient construction. More regard is paid to what must have been the intention of the parties. Thus, in the recent case of the *Martin Emerich Outfitting Co.* v. *Siegel, Cooper Co.*,[7] the defendant, who operated a department store, agreed to allow the plaintiff to occupy the third floor to conduct his furniture department for the mutual benefit of both parties, the agreement to continue for five years. After the commencement of

---

[1] *Couturier* v. *Hastie*, 5 H. of L. C. 673 (1856).

[2] *Gibson* v. *Pelkie*, 37 Mich. 380 (1877).

[3] *Dexter* v. *Norton*, 47 N. Y. 62 (1871).

[4] *Baily* v. *De Crespigny*, L. R. 4 Q. B. 180 (1869).

[5] *Marvel* v. *Phillips*, 162 Mass. 399 (1894); *Dickinson* v. *Calahan*, 19 Pa. 227 (1852).

[6] *Paradine* v. *Jane*, Aleyn, 26.

[7] 86 N. E. 1104 (Illinois).

this period, the building was accidentally destroyed by fire. It was held that the agreement did not constitute a lease, but as it concerned the occupation of a certain space, the destruction of that space discharged the defendant from any further obligation.

Taylor v. *Caldwell*[8] seems to be the first case that departed from the strict rule.[9] In this case it was held that the destruction of a music hall between the date of a contract for its hire and the date fixed for its use, discharged the contract. The Court said that where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless some specified thing continued to exist, so that they must have contemplated such continuing existence as the foundation of what was to be done, the contract is to be construed as subject to an implied condition, that the parties shall be excused if performance is prevented by the destruction of the thing without the fault of either party.

The Court here, then, apparently read in an unexpressed condition in order to carry out the intention of the parties.

This view has been adopted in this country. Thus, where the performance of a contract was prevented by the action of the state, it was held that "this result was within the contemplation of the parties, and must be deemed an unexpressed condition of their agreement."[10] And in another case: "We think that as both parties had in view the contingency, * * * it was an implied part of their contract."[11]

Under this view on the performance becoming impossible, the contract should be regarded as rescinded *ab initio*. So if in a contract for the sale of goods, the purchase money has been paid and the goods are subsequently destroyed, but before the title has passed to the purchaser, the purchase money can be recovered.[12] Or if work has been done under a contract, but complete performance is prevented, the value of the work can be recovered.[13]

In England a different view is taken. Performance is excused, not because of any unexpressed condition which the

---

[8] 3 B. & S. 824 (1863).

[9] *Paradine* v. *Jane* was recognized as the law in England in *Hall* v. *Wright*, E., B. & E. 746, 789, 791 (1859).

[10] *People* v. *Insurance Co.*, 91 N. Y. 179.

[11] *Dolan* v. *Rogers*, 149 N. Y. 492 (1896).

[12] *Kelly* v. *Bliss*, 54 Wisc. 187 (1882).

[13] *Dolan* v. *Rogers*, 149 N. Y. 492.

parties had in mind, but because the event which renders the performance impossible was not in the minds of the parties when the contract was made, and therefore is not within the contract.[14]

So if the event rendering performance impossible is one which probably was in the contemplation of the parties, as contrary winds in a charter party, then impossibility is no excuse, for the parties must have intended to include it in the contract, and the Court will not read in a condition that is not there.[15]

The consequence resulting from this view is well illustrated by a series of cases that arose out of contracts made in view of the ceremonies contemplated at the time of the coronation of 1902, and frustrated by the King's illness. It was held, that a contract to hire a room to see a procession was discharged on the procession not taking place.[16] Both parties were relieved from any obligation. The price agreed upon could not be recovered, nor could the other party demand the use of the rooms for that day. But where money was actually paid over for a seat in a grandstand, the money could not be recovered on the procession being called off.[17] The contract is not rescinded *ab initio*, but the further performance merely excused. And, therefore, if the money was due before the procession was called off, but not paid, it can be recovered.[18]

There are, then, two views; first, that the defense of impossibility is based on a condition implied in fact, and, the condition failing, the contract is rendered void *ab initio* and the money can be recovered. Second, that the event which happened was not within the contract, so performance is excused on either side, but anything done under the contract is valid.

It is submitted that the second view is the better, since it conforms more nearly with the actual facts.

---

[14] "It is on this principle that the act of God is in some cases said to excuse the breach of a contract." *Baily* v. *De Crespigny*, L. R. 4 Q. B. at p. 185. Pollock defines an act of God as, "An event which, as between the parties and for the purpose of the matter in hand, cannot be definitely foreseen or controlled." Walds Pol. on Contracts, page 535 (3rd ed.)

[15] See *Blakely* v. *Muller*, 1903, 2 K. B. 760, per Wills, J.

[16] *Krell* v. *Henry*, 1903, 2 K. B. 740.

[17] *Blakely* v. *Muller*, 1903, 2 K. B. 760; *Clark* v. *Lindsay*, 88 L. T. 198.

[18] *Chandler* v. *Webster*, 1904, 1 K. B. 493.

Possession Alone as Sufficient to Uplift the Statute of Frauds.

The explanation of the doctrine of part performance that prevails to-day is that expressed by Lord Westbury—not in connection with the doctrine of part performance, however—to the effect that the Statute of Frauds shall not be used as an instrument of fraud.[1] One line of decisions has followed this strictly and wherever there was fraud, irreparable in damages, has uplifted the statute.[2] Another line has held that coupled with fraud the act done as part performance must point to a contract of some sort before the statute is raised,[3] thus putting the jurisdiction not merely on the ground of fraud, but of evidence. While this added requirement may make the exercise of the jurisdiction more certain to work justice and less likely to allow that against which the statute was aimed, nevertheless the statute required a certain kind of evidence in order to charge the defendant, to wit: a writing, and anything other than that would seem to be clearly insufficient. Consequently, part performance, which is merely evidentiary of a contract, but which does not cause a fraud to arise, would seem to be not enough to uplift the statute.

The question arises as to what constitutes sufficient part performance to take a case without the statute, which would otherwise be within it. In a recent case under an oral promise by B that if A, his son, would support B and B's wife during their lives, A should have the property B lived on, A went into possession with B and supported B and his wife during B's life. On a bill being filed for specific performance, it was held that the possession which "was as exclusive as the terms of the contract and the circumstances admitted" and the fact that he had performed the services, together constituted sufficient part performance to take the case without the statute. *Taylor, et al.*, v. *Taylor*, 99 Pac. Rep. 814 (Kansas).

For some time mere possession by the vendee has been looked upon as sufficient part performance. In an early case it was said that inasmuch as possession was delivered according to the agreement, he [Lord Chancellor Jefferies] took the bargain to be executed,[4] but no further explanation was given. It is suggested that an equitable title was regarded as vested in the vendee by the possession and with this the first sections

[1] *McCormick* v. *Grogan*, L. R. 4 E. & I. A. C. 82, 97 (1869).
[2] *Slingerland* v. *Slingerland*, 39 Minn. 197 (1888).
[3] *Maddison* v. *Alderson*, L. R. 8 A. C. 467 (1883).
[4] *Butcher* v. *Stapely*, 1 Vern. 363 (1685).

of the statute had nothing to do, they concerning only the creation and assignment of legal estates. But by the vesting of the equitable title a trust arose which is in terms excepted from the statute by the eighth section. Opposed to this view is that of Gibson, J., in an early Pennsylvania case, that an equitable title was vested in the vendee by the mere contract to sell without the delivery of possession, and that such an equitable estate came within the terms of the first three sections and prevented specific performance unless in writing.[5]

Under the fraud theory it has been held that mere possession is sufficient, because unless the contract could be shown by the vendee in possession, he would be a trespasser and this would be a fraud upon him. The contract being admitted for this purpose should be admissible throughout.[6] At least one jurisdiction has made mere possession sufficient by statute.[7] The contrary conclusion is reached in several jurisdictions, the reason being that while it is not contravening the statute to allow the contract to be offered in evidence as a defense against trespass, yet it would be in the very teeth of the statute to allow a defendant to be charged on a contract, even under the circumstance of the vendee in possession. There being no fraud, therefore, since the one in possession has an adequate defense to a trespass, there is no need of uplifting the statute.[8]

Those jurisdictions holding that possession is sufficient require the possession to be exclusive,[9] and it is generally held that the possession of a son with his father is insufficient, the reason being, of course, that the possession is explicable in many other ways than on the hypothesis of any contract existing between the parties.[10] The conclusion of the principal case that the possession was as exclusive as possible would seem to go farther than generally held. The mistake, it is submitted, is in starting with the thought that possession takes the case without the statute, whereas the rule is that to take the case without the statute there must be circumstances working a fraud and evidence pointing to a contract, and only where the possession is such as to satisfy these requirements is it sufficient.[11]

---

[5] *Wilson* v. *Clark*, 1 W. & S. 554 (Pa. 1841).

[6] *Clinan* v. *Cooke*, 1 S. & L. 22 (1802); *Ungley* v. *Ungley*, L. R. 5 Ch. D. 887 (1877); *Andrews* v. *Babcock*, 63 Conn. 109 (1893).

[7] Iowa State Code of 1897, secs. 4625-6.

[8] *Ann Lodge* v. *Leverton*, 42 Texas, 18 (1875); *Glass* v. *Hulbert*, 102 Mass. 24, 32 (1869).

[9] *Baldwin* v. *Baldwin*, 73 Kans. 39 (1906).

[10] *Crank* v. *Trumble*, 66 Ill. 428 (1872); *Johns* v. *Johns*, 67 Ind. 440 (1879).

[11] But see *McKay* v. *Calderwood*, 37 Wash. 194 (1905).