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## Municipal Corporations: Liability of Counties for Negligent Acts and Omissions of Their Employees and Officers

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“Certainly if the \$30.00 per day clause for delay does not apply, as such, it does fix a measure for the damages which would be suffered by the school district in the event the building was not completed in accordance with the terms of the contract. This measure of damages was agreed upon by the parties and on account of the uncertainty and the impossibility of applying the ordinary rules in measuring damages, I think that this clause in the contract affords the safest and most equitable rule to apply.”

If the provision is to be applied only to delays which the court thinks reasonable, why not forget all about binding provisions of contracts, and simply treat the provision as the best evidence available, under the circumstances, of the damages for loss of use to the employer?

—Bjarne Johnson.

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**MUNICIPAL CORPORATIONS: LIABILITY OF COUNTIES  
FOR NEGLIGENT ACTS AND OMISSIONS OF  
THEIR EMPLOYEES AND OFFICERS.**

In *Jacobey v. Chouteau County*,<sup>1</sup> the defendant county maintained a ferry for use of the general public crossing the Missouri river. In the winter time when a boat could not be used, the defendant provided a basket or aerial carrier operated upon a long cable. On the south side of the river there was constructed and maintained a tower near the embankment of the river to sustain the cable, and an elevated platform to provide means of getting into or on the basket. Plaintiff, desiring to cross the river, went up the tower to the platform and awaited the approach of the basket; and while he was on the platform the tower collapsed and fell, causing injury to him. Defendant was charged with negligence in the construction and maintenance of the tower. The court held that the county was liable for the injury sustained by the plaintiff; that the county was acting in a proprietary capacity in operation of the ferry; and that there was evidence from which the jury was warranted in finding active negligence on the part of the officers of defendant county, so that it was not necessary to determine whether a county's liability is limited to cases of active negligence. In thus holding counties liable for torts of its officers and employees when engaged in proprietary, but not governmental functions, the court followed *Johnson v. City of Billings*.<sup>2</sup>

<sup>1</sup>(1941) ..... Mont. ...., 112 P. (2d) 1068.

<sup>2</sup>(1936) 100 Mont. 462, 54 P. (2d) 579, 75 A. L. R. 1196.

At first the courts held counties immune from liability by extending the doctrine of immunity of the State to them.<sup>3</sup> However, the courts recognized that a city or town performs two types of functions, governmental on the one side and proprietary on the other, and is liable for the torts of its officers and employees while performing the latter but not the former;<sup>4</sup> and this rule of liability for injuries caused while performing proprietary functions was extended to counties at an early date.<sup>5</sup> Such is the rule today in all but one of the states where the question has been presented.<sup>6</sup>

The greatest difficulty is in deciding what is a governmental and what is a proprietary function. There have been a number of tests laid down, but the underlying one is whether the act is for the common benefit or pecuniary profit to the local community.<sup>7</sup> The courts have considered poor relief,<sup>8</sup> public health,<sup>9</sup> and maintenance and operation of police de-

<sup>3</sup>Russel v. The Men of Devon (1789) 2 T. R. 661, 100 Eng. Rep. 359; Doddridge, *Distinction Between Governmental and Proprietary Functions of Municipal Corporations*, 23 MICH. L. REV. 325, 333, 334 (1925); Potts, *Citizens Redress for Wrong Committed by the State*, 19 TEX. L. REV. 168-179 (1940).

<sup>4</sup>Campbell v. City of Helena (1932), 92 Mont. 366, 16 P. (2d) 1; Johnson v. City of Billings (1936) 101 Mont. 462, 52 P. (2d) 579, 75 A. L. R. 1196; Annotations: 9 L. R. A. 208; 19 L. R. A. 452; 1 L. R. A. (N. S.) 665; 6 McQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1936) §2792, p. 1038; 38 AM. JUR. *Municipal Corporations*, §572; 43 C. J. *Municipal Corporations*, §1701.

<sup>5</sup>Hannon v. St. Louis County (1876) 62 Mo. 313; Hughes v. Monroe County (1895), 147 N. Y. 49, 41 N. E. 407, 39 L. R. A. 33; Coburn v. San Mateo County (1896) (Cal.) 75 F. 520; Markey v. Queens County (1898) 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46; Kelley v. Cumberland County (1910) 229 Pa. 289, 78 A. 276.

<sup>6</sup>Annotations: 75 A. L. R. 1196; 101 A. L. R. 1106; 14 C. J. S., *Counties*, §51. In South Carolina the courts hold that a county cannot engage in anything but a governmental function: Looper v. City of Easley (1934) 172 S. C. 11, 172 S. E. 705; Reeves v. City of Easley (1932) 167 S. C. 231, 166 S. E. 120; Farrow v. Charleston (1933) 169 S. C. 373, 168 S. E. 852, 87 A. L. R. 981.

<sup>7</sup>Chardkoff Junk Co. v. Tampa (1931) 102 Fla. 501, 135 So. 457; Bolster v. Lawrence (1917) 225 Mass. 387, 114 N. E. 722; Wilcox v. Erie County (1937) 297 N. Y. Supp. 287, 290, 252 App. Div. 20; 6 McQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1936) §2795 p. 1057.

<sup>8</sup>Summers v. Davies County (1885) 103 Ind. 262, 2 N. E. 725, 53 Am. Rep. 512 Chaffee v. Oxford (1941) 308 Mass. 520, 33 N. E. (2d) 298, 134 A. L. R. 756; Neff v. Wellesley (1889) 148 Mass. 287, 20 N. E. 111, 2 L. R. A. 500; Orlando v. City of Brockton (1936) 295 Mass. 205, 3 N. E. (2d) 794; Davie v. Douglas County (1915) 98 Neb. 479, 153 N. W. 509, L. R. A. 1916B, 1261; Lefrois v. Monroe County (1900) 162 N. Y. 563, 57 N. E. 185, 50 L. R. A. 206.

<sup>9</sup>Scibilia v. Philadelphia (1924) 279 Pa. 549, 124 A. 273, 32 A. L. R. 981, 985; 6 McQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1936) §2795, p. 1057.

partments,<sup>10</sup> prisons,<sup>11</sup> fire departments,<sup>12</sup> schools,<sup>13</sup> and hospitals,<sup>14</sup> as governmental; while they have considered maintenance and operation of public playgrounds and parks,<sup>15</sup> water plants,<sup>16</sup> light plants,<sup>17</sup> street railways,<sup>18</sup> and airports,<sup>19</sup> and con-

<sup>10</sup>*United States v. City of New York* (1936) (C. C. A. 2d.) 82 F. (2d) 242; *McIntosh v. Denver* (1936) 98 Colo. 403, 55 P. (2d) 1337; *Rombos v. Chicago* (1928) 332 Ill. 70, 163 N. E. 361; *Easterly v. Town of Irwin* (1896) 99 Ia. 694, 68 N. W. 919; *Calwell v. City of Boone* (1879) 51 Ia. 687, 2 N. W. 614, 33 Am. Rep. 154; *Armstrong v. City of Brunswick* (1883) 70 Mo. 319; *Hull v. Roxboro* (1906) 142 N. C. 453, 55 S. E. 351; *Doty v. Port Jervis* (1898) 52 N. Y. Supp. 57, 23 Misc. Rep. 313.

<sup>11</sup>*Hammond v. Richmond County* (1882) 72 Ga. 188; *McConnell v. Floyd County* (1927) 164 Ga. 177, 137 S. E. 919; *Cousins v. Butler County* (1919) 73 Pa. Super. Ct. 86; *Hale v. Johnston* (1918) 140 Tenn. 182, 203 S. W. 949; Annotations: 46 A. L. R. 94; 61 A. L. R. 569.

<sup>12</sup>*Jewett v. New Haven* (1871) 38 Conn. 368, 9 Am. Rep. 382; *Wilcox v. Chicago* (1883) 107 Ill. 344, 47 Am. Rep. 434; *Brinkmeyer v. City of Evansville* (1867) 29 Ind. 187; *Fisher v. Boston* (1870) 104 Mass. 87, 6 Am. Rep. 196; *Burril v. Augusta* (1886) 78 Me. 118, 3 A. 177, 57 Am. Rep. 788; *Cunningham v. City of Seattle* (1905) 40 Wash. 59, 82 P. 143, 4 L. R. A. (N. S.) 629; *Lynch v. City of North Yakima* (1905) 37 Wash. 657, 80 P. 79.

<sup>13</sup>*Mokovich v. Independent School Dist.* (1929) 177 Minn. 446, 225 N. W. 292; *Herman v. Board of Education* (1922), 234 N. Y. 196, 137 N. E. 24, 24 A. L. R. 1065; *Antin v. Union High School Dist.* (1929) 130 Or. 461, 280 P. 664, 66 A. L. R. 1271.

<sup>14</sup>*Sherbourne v. Yuba County* (1862) 21 Cal. 113, 81 Am. Dec. 151; *Tollefson v. Ottawa* (1907) 228 Ill. 134, 81 N. E. 823, 11 L. R. A. (N. S.) 990; *McDonald v. Massachusetts General Hospital* (1876) 120 Mass. 432, 21 Am. Rep. 529; *Young v. City of Worcester* (1925) 253 Mass. 481, 149 N. E. 204.

<sup>15</sup>Authorities are in conflict as to parks. The older cases consider maintenance and operation of parks as a governmental function; *Autrey v. Augusta* (1925) 33 Ga. App. 757, 127 S. E. 796; *Miller v. Savannah* (1925) 33 Ga. App. 560, 126 S. E. 867; *Cornelisen v. Atlanta* (1917) 146 Ga. 416, 91 S. E. 415 (if not maintained primarily as a source of revenue); *Alder v. Salt Lake City* (1924) 64 Utah 568, 231 P. 1102. There is a slight weight of authority at present for holding maintenance and operation of playgrounds and parks as proprietary: *Harff v. Cincinnati* (1911) 11 Ohio N. P. N. S. 41; *Krause v. Springfield* (1914) 18 Ohio N. P. N. S. 129; *Byrnes v. Jackson* (1925) 140 Miss. 656, 105 So. 861, 42 A. L. R. 254; *Warden v. Grafton* (1925) 99 W. Va. 249, 128 S. E. 375, 42 A. L. R. 259; *Ramirez v. City of Cheyenne* (1925) 34 Wyo. 67, 241 P. 710, 42 A. L. R. 245; Annotation: 99 A. L. R. 687.

<sup>16</sup>*Campbell v. City of Helena* (1932) 92 Mont. 366, 16 P. (2d) 1; *Helena Consolidated Water Co. v. Steele* (1897) 20 Mont. 1, 49 P. 382, 37 L. R. A. 412; *Safransky v. City of Helena* (1935) 98 Mont. 456, 39 P. (2d) 644.

<sup>17</sup>*Bojko v. Minneapolis* (1923) 152 Minn. 167, 191 N. W. 399; *Bullmaster v. City of St. Joseph* (1897) 70 Mo. App. 60 (Aff. 155 Mo. 58, 55 S. W. 1015, 85 Am. St. Rep. 531.).

<sup>18</sup>*Davis v. New Orleans Public Belt R. Co.* (1924) 155 La. 504, 99 So. 419, 31 A. L. R. 1303; *Sinsheimer v. Underpinning & Foundation Co.* (1917) 165 N. Y. Supp. 645, 179 App. Div. 495 (Aff. 226 N. Y. 646, 123 N. E. 889); *Green v. Amarillo* (1922) (Tex. Civ. App.) 244 S. W. 241 (Aff. 267 S. W. 702); *Tobin v. Seattle* (1923) 127 Wash. 644, 221 P. 583.

<sup>19</sup>*Mobile v. Lartigue* (1930) 23 Ala. App. 479, 127 S. 257 (1930 U. S. Av.

struction and repair of sewers<sup>20</sup> as proprietary. There have been some very peculiar results reached in following this distinction.<sup>21</sup> According to one court, the liability of a city for injury due to a defective elevator, where a building maintained by it is used both for governmental and proprietary functions, depends on the purpose for which the person injured entered the building.<sup>22</sup>

Many commentators<sup>23</sup> and even some of the courts<sup>24</sup> have criticized this distinction. Some states have passed laws to make

R. 50); *Coleman v. City of Oakland* (1930) 110 Cal. App. 715, 295 P. 59 (1931 U. S. Av. R. 61); *Mollencop v. City of Salem* (1932) 139 Or. 137, 8 P. (2d) 783, 83 A. L. R. 315.

<sup>20</sup>*Ritterbusch v. City of Pittsburg* (1928) 205 Cal. 84, 269 P. 930, 61 A. L. R. 448; *Dixon v. Baker* (1872) 65 Ill. 518, 16 Am. Rep. 591; *Seifert v. Brooklyn* (1886) 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664; *Wiesner v. Albany* (1928) 229 N. Y. Supp. 622, 224 App. Div. 239 (Aff. 250 N. Y. 551, 166 N. E. 230).

<sup>21</sup>In the Montana case of *State ex rel Kern v. Arnold* (1935) 100 Mont. 346, 49 P. (2d) 976, 100 A. L. R. 1071, the court held that the city acted in a proprietary capacity in establishment and maintenance of a fire department except when engaged in extinguishing fires, going to and from fires or testing equipment for use on such occasions. This, however, was not a tort case, but a case involving the constitutionality of a statute requiring the city to set up a certain type of fire department and dictating the compensation to be paid firemen.

<sup>22</sup>*Pleasants v. Greensboro* (1926) 192 N. C. 820, 135 S. E. 321: There is some conflict in the cases as to liability where the building is used for both governmental and proprietary functions. Some courts hold the city liable where the building is used for any other use than performance of governmental functions (*Fox v. Philadelphia* (1904) 208 Pa. 127, 57 A. 356, 65 L. R. A. 214, 16 Am. Neg. Rep. 228; *Bell v. Pittsburgh* (1929) 297 Pa. 185, 146 A. 567, 64 A. L. R. 1542), while others hold the city liable regardless of the use made of the building (*Hilgers v. Woodbury County* (1925) 200 Ia. 1318, 206 N. W. 660; *Moest v. Buffalo* (1906) 116 App. Div. 657, 101 N. Y. Supp. 996, Aff. without opinion in (1908) 193 N. Y. 615, 86 N. E. 1128).

<sup>23</sup>*Albertsworth, New Interests in the Law of Torts*, 10 CALIF. L. REV. 461, 483 (1922); *Borchard, Governmental Liability in Tort*, 34 YALE L. J. 1, 129, 229 (1924); *Price, Governmental Liability for Tort in West Virginia*, 38 WEST. VA. L. Q. 101 (1932); *Seasongood, Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910, (1936); *Tooke, The Extension of Municipal Liability in Tort*, 19 VA. L. REV. 97, (1932); *Borchard, Governmental Responsibility in Tort VII*, 28 COLUM. L. REV. 577, (1928).

<sup>24</sup>*Kaufman v. Tallahassie*, (1922) 84 Fla. 634, 94 So. 697 (decided after *Fowler* case and follows it, and makes city liable regardless of the type of function); *Fowler v. City of Cleveland* (1919) 100 Ohio St. 158, 126 N. E. 72, 9 A. L. R. 131 (overruled in *Aldrich v. Youngstown* (1922) 106 Ohio St. 342, 140 N. E. 164, 27 A. L. R. 1497); *Workman v. New York City* (1900) 21 Sup. Ct. 212, 179 U. S. 522, 46 L. Ed. 312 (limited to maritime law).

cities and counties liable regardless of the type of function.<sup>25</sup> However, the courts are not willing to make the change themselves without legislation,<sup>26</sup> and therefore, it will probably be some time before it is generally accomplished.

In determining whether a distinction should be made between misfeasance and nonfeasance in regard to liability of counties when performing a proprietary function, it is well to consider the history of such a distinction in other fields. There are several phases of the law where this distinction is no longer made or the tendency is toward liability regardless whether there is misfeasance or mere omission.

The action of assumpsit grew out of the action of case and was originally limited to misfeasance. It was originally a tort action, the right to redress going upon the duty, collateral to the contract, which was imposed by law, and not upon the promise to do well the thing undertaken. A person had to undertake to do something and do it wrongly before he could be sued. But, it was difficult for the courts to maintain the line between misfeasance and nonfeasance. Thus, where a carpenter built a house and left a hole in the roof, while this might technically be nonfeasance, householders considered it misconduct, and the courts came to recognize it as such;<sup>27</sup> and once having made a person liable for incomplete performance it was hard for the courts to distinguish this from nonperformance.<sup>28</sup> The development of the action of deceit and the fact that equity courts gave relief for nonperformance helped to do away with this distinction.<sup>29</sup> So far as the action of assumpsit is concerned, the distinction between misfeasance and nonfeasance was entirely broken down by the middle of the fifteenth century.<sup>30</sup>

<sup>25</sup>Tooke, *The Extension of Municipal Liability in Tort*, 19 VA. L. REV. (1932). An act was before the New York legislature in 1929, but it has not been passed. Liability as to certain functions has been imposed by statutes in various states. Clear language must be put in the statute in order to modify immunity of municipal corporations (*Harding v. City of Hawthorne* (1932), 114 Cal. App. 580, 300 P. 42).

<sup>26</sup>*Ramirez v. City of Cheyenne* (1925) 34 Wyo. 67, 241 P. 710, 712; *Borchard, Governmental Responsibility in Tort VII*, 28 COLUM. L. REV. 577, 755 (1928).

<sup>27</sup>3 Henry VII (1488); 4 REEVES, HIST. ENG. LAW (Finlason ed.) p. 243; KEIGWIN, CASES IN COMMON LAW PLEADING, p. 177.

<sup>28</sup>HOLMES, COMMON LAW, p. 278; KEIGWIN, CASES IN COMMON LAW PLEADING, p. 177, 178.

<sup>29</sup>Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1 (1888); KEIGWIN, CASES IN COMMON LAW PLEADING, p. 179; Holdsworth *Debt Assumpsit, and Consideration*, 11 MICH. L. REV. 374, (1913).

<sup>30</sup>Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1 (1888); Holdsworth, *Debt Assumpsit and Consideration*, 11 MICH. L. REV. 347, (1913), KEIGWIN, CASES IN COMMON LAW PLEADING, p. 180.

Another place where the distinction between misfeasance and nonfeasance has entirely disappeared is in the action of trespass *ab initio*. The doctrine of trespass *ab initio* was first recognized in the *Six Carpenter's Case*.<sup>21</sup> In that case several men entered a tavern and ordered wine and food but later refused to pay for it. The theory behind this type of action is that a person who lawfully enters a place, authorized or licensed by law, and after entering does something wrong is a trespasser from the beginning. The *Six Carpenter's Case* did not apply the doctrine to an omission, but insisted that the act must be a misfeasance. This limitation of the doctrine to misfeasance was very soon criticized,<sup>22</sup> and it is well settled now that a person is liable as a trespasser under the doctrine of trespass *ab initio* for omission as well as misfeasance.<sup>23</sup>

The law of torts has made the distinction between misfeasance and nonfeasance where a person gratuitously undertakes to do something. But, there has been a trend away from the distinction and toward what may be termed a "reliance doctrine." The development is best shown by the New York cases.

In the early case of *Thorne v. Deas*,<sup>24</sup> defendant gratuitously promised to insure a certain vessel on a particular voyage. He failed to do so and the vessel was wrecked. In holding that the defendant was not liable, the court said: ". . . one who undertakes to do an act for another, without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it, and does it amiss."<sup>25</sup>

In 1925, in a case where furniture was gratuitously stored with the defendant and he gratuitously promised to insure it and failed to do so, the court held defendant liable for the loss.<sup>26</sup> The court distinguished *Thorne v. Deas*, on the ground that the furniture was sent to defendant's storehouse after the promise was

<sup>21</sup>(1610), 8 Coke 146a, 77 Eng. Rep. 695.

<sup>22</sup>*Waterbury v. Lockwood* (1810) 4 Day, (Conn.) 257, 4 Am. Dec. 215; *Boston & M. R. Co. v. Small* (1893) 85 Me. 462, 27 A. 349, 35 Am. St. Rep. 379; *Tubbs v. Tukey* (1893) 3 Cush. 438, 57 Mass. 438, 50 Am. Dec. 744; *Gardner v. Campbell* (1818) 15 Johns. N. Y. 401; *Fullam v. Stearns* (1857) 30 Vt. 443; *Gibson v. Holmes* (1905) 78 Vt. 110, 62 A. 11, 4 L. R. A. (N. S.) 451.

<sup>23</sup>*Anderson v. Cowles* (1899) 72 Conn. 335, 44 A. 477; *Dehm v. Hinmon* (1887) 56 Conn. 320, 15 A. 741; *Blanchard v. Dow* (1851) 32 Me. 557; *Carter v. Allen* (1871) 59 Me. 296, 298; *Wentworth v. Sawyer* (1884) 76 Me. 434; *Cuthbertson v. Ritchie* (1925) 99 Vt. 50, 130 A. 756, 758; *Wright v. Templeton* (1907) 80 Vt. 358, 67 A. 817; *Wright v. Marvin* (1887) 59 Vt. 437, 9 A. 601, 603.

<sup>24</sup>(1809) 4 Johns. (N. Y.) 84.

<sup>25</sup>4 Johns. (N. Y.) 84, 97.

<sup>26</sup>*Siegel v. Spear* (1935) 234 N. Y. 479, 138 N. E. 414, 26 A. L. R. 1205.

made, and the defendant had entered upon the execution of the trust.

The reliance doctrine was clearly recognized in the case of *Kirshenbaum v. General Outdoor Advertising Co.*,<sup>37</sup> decided in 1932. The court in this case held that if a person gratuitously promises to repair something, and assures the promisee that it has been properly repaired, and the promisee relying on this is injured, the gratuitous promisor is liable. The basis for liability was the assurance that the repairs had been properly done and the reliance thereon. Again, in the recent case of *Zoda v. National City Bank of New York*,<sup>38</sup> the defendant volunteered to repair a hall stairway, used exclusively by plaintiff and her family, but did not do so. Plaintiff relying on this promise did not make other arrangements to have the work done. Plaintiff fell down the stairs and was injured. The court held the defendant liable for the injury, the plaintiff having been "lulled into security and acceptance of the existing defective condition."<sup>39</sup> These cases clearly do away with the old distinction between misfeasance and nonfeasance.

Many of the other jurisdictions are beginning to fall in line with the decisions in New York,<sup>40</sup> and the reliance doctrine is adopted by the American Law Institute's *Restatement of the Law of Torts*.<sup>41</sup>

It is submitted that a distinction which has broken down in the actions of assumpsit and trespass *ab initio*, and which is breaking down in cases of gratuitous undertakings, should not be made in formulating the rules governing the liability of counties. There is no apparent reason for making such a distinction when dealing with the liability of counties while engaged in proprietary functions, while not doing so when dealing with the liability of private corporations. In fact, it would seem to be

<sup>37</sup>(1932) 258 N. Y. 489, 180 N. E. 245.

<sup>38</sup>(1939) 258 App. Div. 168, 15 N. Y. Supp. (2d) 875.

<sup>39</sup>15 N. Y. Supp. (2d) 875, 876.

<sup>40</sup>The *Blackgull* (1936) 82 F. (2d) 758, 761; *Erie R. C. v. Stewart* (1930) (C. C. A. 6th.) 50 F. (2d) 855; *Jadronja v. Bricker* (1934) 49 Ga. App. 37, 174 S. E. 251; *Rourke v. Clifton* (1941) 64 Ga. App. 474, 13 S. E. (2d) 587; *Mahon-Jellico Coal Co. v. Dulling* (1940) 282 Ky. 698, 139 S. W. (2d) 749; *Herbert v. Herlitz* (1933) (La. App.) 146 So. 65 (making of repairs constituted implied assurance that repairs were properly made.); *Rudomen v. Green* (1938) 299 Mass. 485, 13 N. E. (2d) 416, 417; *Hoger v. Massachusetts Mut. Life Ins. Co.* (1938) 204 Minn. 615, 282 N. W. 484; *Livingston v. Essex Inv. Co.* (1941) 219 N. C. 416, 14 S. E. (2d) 489; *Carr v. Maine Central R. R.* (1917) 78 N. H. 502, 102 A. 532, L. R. A. 1918 E, 389; *Kuchynski v. Ukryn* (1938) 89 N. H. 400, 200 A. 416; *Harris v. Lewistown Trust Co.* (1937) 326 Pa. 145, 191 A. 34.

<sup>41</sup>§325.



especially undesirable to adopt such a distinction in a field already confused by the distinction between governmental and proprietary functions.

—Elizabeth Kline.

### WATER RIGHTS: PRESCRIPTIVE RIGHT TO THE USE OF WATER IN MONTANA

A recent Montana decision, *Cook et. al. v. Hudson*,<sup>1</sup> involving litigation over water rights, raises again the question as to what is the nature of the adverse use of water necessary to gain a prescriptive right to it in this jurisdiction.

It is clear that a prescriptive right to the use of water may be acquired in Montana.<sup>2</sup> This was recognized at an early date.<sup>3</sup> But it is not so clear what facts must be shown in order to make the rule applicable, and the question remains whether a prescriptive right to the use of water may be perfected in actual practice as easily as it is in theory.

The general practice is for the plaintiff appropriator to allege his right of appropriation by himself or through his chain of title. The adverse claimant must plead his right as affirmative matter.<sup>4</sup> The burden of proof is on the latter,<sup>5</sup> and he must prove his prescriptive right by a preponderance of the evidence.<sup>6</sup>

Adverse user is initiated by taking water which by priority belongs to another at a time when it is so scarce that all the users cannot be supplied,<sup>7</sup> hence a use will not be adverse where there is water enough for all users.<sup>8</sup> Mere proof that the claimant used water and claimed the right to use it, is no proof whatsoever of adverse use.<sup>9</sup> An adverse right will never result from a permissive use,<sup>10</sup> nor may it be shown where the diversion is below that of the complainant.<sup>11</sup> But the adverse user will not

<sup>1</sup>(1940) 110 Mont. 263, 103 P. (2d) 137.

<sup>2</sup>State v. Quantic (1908) 37 Mont. 32, 94 P. 491.

<sup>3</sup>Smith v. Hope Min. Co. (1896) 18 Mont. 432, 45 P. 632.

<sup>4</sup>State v. Quantic (1908) 37 Mont. 32, 94 P. 491.

<sup>5</sup>Smith v. Duff (1909) 39 Mont. 374, 102 P. 981, 133 Am. St. Rep. 582;

Irion v. Hyde (1938) 107 Mont. 84, 81 P. (2d) 353.

<sup>6</sup>Boehler v. Boyer (1925) 72 Mont. 472, 234 P. 1086.

<sup>7</sup>Zosel v. Kohrs (1925) 72 Mont. 564, 234 P. 1089; Smith v. Duff (1909) 39 Mont. 374, 102 P. 981, 133 Am. St. Rep. 582; Talbott v. Butte City W. Co. (1903) 29 Mont. 17, 73 P. 1111.

<sup>8</sup>Smith v. Duff (1909) 39 Mont. 374, 102 P. 981, 133 Am. St. Rep. 582.

<sup>9</sup>Galiger v. McNulty (1927) 80 Mont. 339, 260 P. 401.

<sup>10</sup>Irion v. Hyde (1938) 107 Mont. 84, 81 P. (2d) 353.

<sup>11</sup>Norman v. Corbley (1905) 32 Mont. 195, 79 P. 1059; Talbott v. Butte City W. Co. (1903) 29 Mont. 17, 73 P. 1111.