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Article 10

Insurance - Voluntary Transfer of Possession as a Bar to Recovery Under Policy Covering Theft and Larceny

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the defendant cannot be found in the state.[6] It is conceded that the state legislature may, within reason, fix the venue of actions[7] and, in case of necessity, provide for substituted service,[8] as long as there is no unreasonable discrimination between litigants or classes of litigants,[9] on the ground that the state may provide for the adjudication of all adversary rights of persons in property within its borders.[10]

Territorial limitation of jurisdiction of Justices of the Peace is based upon public policy requiring an action involving small amounts to be tried in the locality where the defendant resides to protect him from undue expense of litigation.[11] The presumption in most states is that courts of limited jurisdiction have no jurisdiction until it is affirmatively shown.[12] Other states strictly limit jurisdiction to the county in all cases except where the defendant has absconded[13] or cannot be found within the state.[14] The question is one for the legislature to decide, looking both to the requirements of justice and public demand for speedier and less cumbersome tribunals.[15]

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Insurance—Voluntary Transfer of Possession as a Bar to Recovery Under Policy Covering Theft and Larceny—Insured, an auto dealer, allowed a prospective purchaser to take a car out for inspection, whereupon the latter converted the car to his own use. There was an insurance policy in effect that covered theft, larceny, robbery or pilferage, but the policy excepted coverage where the insured voluntarily parted with title to or possession of the car, even if induced to do so by fraud, scheme, false pretense or some trick. *Held:* Insured so voluntarily gave up possession of the car that in view of the exception in the policy he is not entitled to the coverage benefits. *Boyd v. Travelers Fire Insurance Co.* 22 N.W. 2nd 700 (Nebraska, 1946).

The main conflict in determining cases of this nature seems to lie in the interpretation of the word possession in the policy. There

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[6] Section 262.12, Wisconsin Statutes.
[7] Clark v. Louisville & N. R. Co., 158 Miss. 287, 130 So. 302, at p. 307, (1930).
[8] 21 R.C.L. 1282, sec. 26.
[9] Fn. 7, *supra.*
[10] Fn. 8, *supra.*
[11] Thomas v. Hector Const. Co., 216 Minn. 207, 12 N.W. (2nd) 769, (1943).
[12] Gilbert v. York, 111 N.Y. 544, 19 N.E. 268, (1888). ACCORD: Collins-Dietz-Morris Co. v. Christ, 179 Okl. 422, 65 P. (2d.) 967, (1936); Schuler-Knox v. Smith, 62 Cal. App. 86, 144 P. (2d.) 47, (1943). CONTRA: Coffee v. Chippewa Falls, 36 Wis. 121, (1874); Baizer v. Lasch, 28 Wis. 268, (1871).
[13] Meyer v. Hibler, 52 Neb. 823, 73 N.W. 289, (1897).
[14] Empire Supply Co. v. McCann, 127 Okl. 195, 260 P. 44, (1927).
[15] For general discussion analyzing character, faults, and giving suggestions for Justice of the Peace Courts see: Wis. L.R. 1939: 414-22, May '39; Oreg. L. R. 21: 380-4, June '42.

has been no precise agreement on what constitutes possession in such a matter.[1] The word possession is capable of many interpretations and is subject to the application of the constructive possession doctrine. In a Kansas case, with similar facts, the court held that the insured did not voluntarily part with possession so as to preclude recovery under the theft policy. In this case the court applied the constructive possession doctrine in construing the policy and viewed the purchaser as merely having obtained custody of the car.[2] The general principle that the courts will construe the policies strictly against the insurer no doubt affects the result in such cases. However, in the instant case, the court does not deem it necessary to dwell on the construction of the word possession in the absence of any qualifying or restrictive clause extending the common understanding of the word. The more acceptable approach should be against giving any technical or fictional definition to the word possession, and the common popular construction of the word is applied in some cases.[3]

Such a popular construction was given in one case where an insured delivered his car to a service station for storage, and the manager used and damaged the car. The court held in this instance that the insured had no "constructive possession" left, and that in fact the service station manager had both temporary possession and custody of the car.[4] In another case involving a similar policy exception to that in the instant case, the insured rented the car to two boys who neglected to return it. In this case the court viewed the insured's voluntary parting with possession as preventing any recovery on the theory of theft under the policy.[5]

While no case in Wisconsin has been found dealing directly with this question, there is a case involving analogies which gives reason to conclude that Wisconsin would follow the instant case. This case concerned an insured dealer who delivered the car to a buyer under a conditional sales contract, and there followed a complete disappearance of both car and buyer. The court held here that the prospective

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[1] National Safe Deposit Co. v. Snead, 232 U. S. 58, 3Y S. Ct. 209 (1914): "* * * there is no word more ambiguous in its meaning than possession. It is interchangeably used to describe actual possession and constructive possession which often so shade into one another that it is difficult to say where one ends and the other begins."

[2] Tripp v. United States Fire Insurance Co. of New York, 141 Kansas 897, 44 P. 2nd. 236 (1935).

[3] Unkelsbee v. Homestead Fire Insurance Co. of Baltimore, 41 A. 2nd. 168 (1945), Municipal Court of Appeals, District of Columbia: "* * * words used in automobile insurance policy should be given their common, ordinary, or "popular" meaning, rather than meaning of lexicographers or those skilled in niceties of language."

[4] Royal Insurance Co. v. Wm. Cameron and Co., 184 S.W. 2nd. 936 (1945), Texas Civ. App.

[5] American Indemnity Co. v. Higgenbottom 52 S.W. 2nd. 653 (1923), Texas Civ. App.

buyer is presumed to have actual possession of the car.[6] This decision seems to exclude the idea of any constructive possession inhering in the dealer, and runs contrary to the reasoning in the Kansas case.

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[6] La Porte Motor Co. v. Fireman's Insurance Co. of Newark, New Jersey, 209 Wis. 397, 245 N.W. 105 (1932).
In this case the issue arose from the efforts of the assignee of the conditional sales contract to effect repossession of the car on which the purchaser owed several unpaid installments. The assignee saw the car on the street and drove it a short distance and parked it near his garage. From this latter point it was taken again by the defaulting buyer. The court held that this was not such a repossession on the part of the assignee as to make a retaking thereof by the defaulting buyer a theft from him which would entitle the assignee to recover on the policy.