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Insurance: Construction of Contracts

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The court holds as sound law, the discussion of the elements necessary to constitute by prescription a highway over unenclosed lands, found in Chief Justice Dixon's dissenting opinion in *Hanson* v. *Taylor*.[6] Dixon there says, "Title acquired by prescription and title acquired by user, or adverse user as it is commonly called, mean the same thing. Prescription is defined to be a mode of acquiring title to an incorporeal hereditament by long and continued usage." He then declares that in addition to long and continuous user the intention on the part of the owner to dedicate the soil must positively concur when he says, "The intention to dedicate *animus dedecandi*, on the part of the owner of the soil, constitutes in every case, the foundation of the right; and there can be no title by prescription or adverse user without it."

The use may be regarded, rightly, as not hostile to the owner's rights, since it makes no conflict with any interest the owner has or does not interfere with any use he presently desires to make of it. The extent of the custom to travel over unenclosed woodland without asking the owners' permission repells the presumption of a grant of the right by the owner which might otherwise arise from a long, continuous user. A mere use of a passway does not prove anything detrimental to the rights of the owner and hence, will not amount to an adverse user. Evidence of the adverse character of such use must be shown by facts other than mere continuous user for the statutory period.

PATRICIA RYAN

Insurance: Construction of Contracts of.—The general rule of construction by the courts of all contracts of insurance is that while like other contracts, they are to be so construed as to give effect to the intention of the parties, yet where there exists any doubt as to that intention it is always to be strictly against the insurer and in favor of the insured.[1]

However, when we apply the rules of construction to the standard policy we find that in spite of the fact that in some states insurance contracts are required by law to be made in accordance with a statutory form, it is now a well settled rule, that the same rules of construction are to be applied to the terms of the statutory policy as to other forms of policies.

We must confess that many of the decisions, rendered by the courts of the highest jurisdictions, justify the assertion which is often made, that courts apply a different rule of construction to insurance contracts than to other contracts.[2] As a matter of law and justice, insurance contracts should be decided on the same basis as other contracts, so as to give the full effect to the intention of the parties. But consider the peculiar circumstances under which insurance contracts are made. The terms are chosen by the insurer without any consultation with the insured; the language used is ambiguous, doubtful and

[6] 23 Wis. 547.

[1] Definition of Wm. R. Vance, professor of George Washington University.

[2] *Welch* v. *Fire Association*, (Wisconsin 1904) 98 N.W. 227.

uncertain to the mind of the insured placing him in a position of amazement and bewilderment, knowing merely the bare facts, most of which are represented by an agent. When we consider these facts we readily know why the courts have a tendency to lean toward the insured and against the insurer.

This very tendency was brought about by the insurance companies at one time putting such lengthy conditions in the contract, and putting them in such small type that it was almost impossible for the insured to read or understand. This kind of work went to the extreme, causing the courts to be extremely harsh and many times the courts allowed dishonest claims that would scarcely have been considered if the contract had been fair upon its face.

While many of the unfair features have been eliminated by the standard policy, still the courts, who are slow to change, haven't swayed from their old practise of favoring the insured. It is the duty of the court in construing these contracts to look to the intent of the parties[3] and the language employed, that is, determine what the contract is, and in the absence of waiver, ambiguity, illegality, fraud or mistake to construe and enforce the contract as it was intended.

In a Wisconsin case[4] the court said "It is the duty of the court to adopt that construction of the policy which, in its judgment, shall best correspond with the intention of the parties." A southern court[5] follows this same idea and says, "Where the court can give a policy that construction which, while preserving the protection given the insured under its general terms, will also relieve the company from the increased hazard against which it undertook to provide, such construction must be adopted, for such was the evident intent of the parties."

The Pennsylvania Supreme Court states "that it is the policy of the Pennsylvania court to arrive at the intent of the parties, by their own interpretation of the policy, as shown by their actions."

While the courts almost universally are looking to the intent of the parties, still they seem also almost without exception, to favor the insured. An exception[6] has recently been shown in the case of *Hibbard* v. *North American Life Insurance Co.* Here the plaintiff took out a non-participating, whole life, monthly installment policy. Part of the policy was printed and part filled in on a typewriter. After a period of ten years it was noticed that several errors appeared in the policy. That is, they were errors because they were far too beneficial to the insured; so much so that no insurance company could do business and continue under these terms. Plaintiff sought recovery on the policy relying on the filled in parts of the contract, contending that the written in portions usually control over printed portions. The defense was the table of loan and cash surrender values. The court held that in construing a life policy, that if the court can determine on

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[3] *French* v. *Fidelity, etc. Co.*, 135 Wis. 259, 115 N.W. 869.

[4] *Cady* v. *Fidelity, etc. Co.*, 134 Wis. 322, 113 N.W. 967.

[5] *Royal Ins. Co.* v. *Texas, etc., Ry. Co.*, 115 S.W. 117.

[6] *Hibbard* v. *North American Life Insurance Co.*, (Wisconsin, March, 1927) 212 N.W. 779.

what terms the minds of the parties met with reasonable certainty from the nature and general contents of the contract itself, the rules of construction must yield to such determination.

From this case it appears that Wisconsin courts are striking a step forward and are allowing rules of construction to be prevailed over by the terms of the contract, upon which the minds of the contracting parties met, going almost entirely upon the intention of the parties. The marked distinction is the fact that, the minds of the parties, in the above case, did not correspond to the terms of the contract, and the court applied that construction which apparently was intended by the parties.

A. WATSON

Specific Performance: Mistake of Law.—In the case of *Rist* v. *Porter*,[1] both parties entered into oral agreements for conveyance of certain real estate. The plaintiff who is the father of the defendant agreed to convey certain lots to the defendant, and she agreed to convey property which she inherited as sole heir of the mother to the plaintiff. The deed to the defendant was defectively stated so as to omit 11½ feet which should have gone to the defendant under the oral agreement. The defendant subsequently refused to convey the land to the plaintiff which she inherited from her mother, the wife of the plaintiff.

Both parties at the time of making the oral agreement were of the opinion that the plaintiff had an estate by the courtesy in the premises owned by the daughter. The transaction was made with that understanding, although in the meantime and prior thereto, the plaintiff had remarried.

The action was begun to reform the deed given by the plaintiff to the defendant so as to correctly describe the premises to be conveyed thereby, and to require the defendant to convey to the plaintiff the property which she inherited from her mother.

Rosenberry, Justice, says in part regarding the aforesaid mistake of law:

> Here the controversy is between father and daughter, both of whom acted upon a mistaken notion as to the law governing their rights. While mistake of law does not of itself defeat the right of the opposite party to have a contract specifically performed, it may produce a situation which appeals very strongly to the conscience of the chancellor.

He then proceeded to change the deed so as to conform with the oral agreement and allowed the father only a life estate in the lands of the daughter, because of such mistake of law.

The general rule, of course, regarding mutual mistakes of law is that it does not give rise to any relief, as one is presumed to know the law. This presumption has been regarded, in modern decisions, as a violent one and the courts have, on one excuse or another given relief, placing such mistake wherever possible as one of mistake of fact. However, the court here has seen fit to depart from this principle and hold that a court of equity may grant relief for mutual mis-

[1] 212 N.W. 275 (Wis). Decided Feb. 8, 1927.