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Article 12

Highways-Mere public user for period of twenty years is insufficient to establish a public highway

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that the corporation, in the contemplation of the legislature, shall not discontinue its "ordinary and lawful" business. Surely the legislature would not require the allegation of an illegal act as a basis of return to the recognized corporate fold. The corporation, then, under the secretarial ban of forfeiture may continue its business. If it is yet a corporation *in being* (its franchise not having been judicially declared forfeited) what is the status of the directors, and stockholders prior to the recision of the forfeiture.

It would seem, that in order to give the statute some force and effect there must be some change in the corporate entity. The corporation having been validly organized, we may conclude it to be a true *de jure* corporation at the time of organization. Can it then be said, that the requirements of the statutes as to annual filing of reports is in the nature of a continuing duty, and compliance with that duty is necessary to continued existence as a *de jure* corporation? If we assume the above, we are faced with the difficulty of declaring that a failure to file, is a failure to fully comply with the law, and may render the corporation *de facto*. If we go further, we may arrive at the conclusion that failure to file the annual return is an absence of the essential of "attempted compliance" and thereby render the organization not even *de facto*. These considerations are of prime importance to the rights of creditors and of third parties, remembering the fact that the secretary of state, by statute, publishes the forfeitures third parties and creditors are *given notice,* and their rights are interwoven with the theories above expounded.

CHARLES L. GOLDBERG.

Highways—Mere public user for period of twenty years is insufficient to establish a public highway.[1]

The B Company, by deed, gave to the state, in 1907, the land in question. The state established on part of the land, a camp for tuberculosis patients and has since maintained and operated such camp. The B Company owned and used such lands prior to the sale to the state. The B Company had opened a tote road in connection with the operation of its saw mill. In 1890 one, W, built a homestead west of the land in question. He developed a summer resort and he and his guests used the tote road. There were two other approaches to his resort. The tote road continued in its original state until the state improved it and claimed it to be an institutional road leading to its tuberculosis camp. Town Board of Tomahawk in 1919 attempted to lay a highway through a part of the state camp, but at the request of the state camp superintendent, rescinded its motion so to do. In 1925, the Town Board authorized the clearing of the road. Some work was done, but without the knowledge of the state. State seeks a judgment determining that the road in question is not a public highway. From a judgment for plaintiff, defendant appeals. The supreme court affirmed the judgment of the Circuit Court.

It was *held* that the mere naked user of the road for twenty years was insufficient to establish a public highway in the absence of circum-

[1] *State* v. *Town Board of Tomahawk,* 212 N.W., Wis., Feb. 8, 1927.

stances giving rise to a presumption of intent on the part of the owner to dedicate the road as a public highway.

In order to have a public highway, it must come into existence either by user or lawful proceedings of the Town Board. Section 80.03 R.S. 1925 provides "that no public highway shall be laid out or through any . . . . yard or inclosure used for educational or charitable purposes." The undisputed facts show the camp was established and maintained by the state for charitable purposes, and the instant road would lead through the camp yard. The act, then, of the Town Board in 1925 to improve the road was wholly void under the statute.

To constitute a highway by prescription, there must be something more than mere use of the track for ten years or more; there must be an adverse user for that period. To make the user adverse, some act showing a claim of right must be done, such as repairing, recognizing the road as a highway, etc.[2]

Unless some such act is done, the ten year period required by statute (80.03) to make a highway of an unrecorded road does not run. It seems the statute is one of limitation designed to fix the period in which a user may be created and not to declare the nature of the user requisite to that end. Mere use does not raise a presumption of adverse hostile user.[3]

The intention to dedicate—*animus dedicandi*—on the part of the owner, either express or implied, constitutes the foundation of the right and there can be no title by prescription or adverse user without it. A right by prescription cannot be raised against the owner's wishes; but the use may be so long unobjected to as to authorize a finding of implied consent. But where the assent of the owner is not shown and it is neither shown that he objected to or opposed the travel over his land, the use is permissive. The facts show the user was such as is commonly made of similar roads in northern Wisconsin. The travel was permitted by the owner as a convenience for the public; a mere neighborly consideration, extended until such time as it would interfere with the owners' rights in or use of the land. "The mere use of a passway through uninclosed woodland will not constitute a right of way by prescription. Mere acquiescence in the use is regarded as permissive."[4]

The court distinguishes between the use of enclosed and unenclosed lands holding that it would be a harsh doctrine that would require an owner to place a guard over his unenclosed lands or be deprived of valuable rights therein. The weight of authority throughout the country holds that the mere use of a track or way through unenclosed lands for the statutory period does not raise the presumption that the use is hostile to the owner's rights.[5]

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[2] *State* v. *Joyce,* 19 Wis. 101.

[3] *Wiesner* v. *Jaeger,* 175 Wis. 281.

[4] *Bassett* v. *Soelle,* 186 Wis. 53.

[5] *Bales* v. *Rafferty,* 161 Ky. 511, 170 S.W. 1184; *Treemp* v. *McDonnell,* 120 Ala. 353, 24 S. 353; *Illinois Cent. R. Co.* v. *Stewart,* 265 Ill. 544, 78 N.E. 76; *Null* v. *Williamson,* 166 Ind. 537, 78 N.E. 76; *Hults* v. *Tendall,* 40 S.C.L. 396; *Schulenbarger* v. *Johnstone,* 64 Wash. 202, 116 P. 843.

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.