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APPLICABILITY TO ASSIGNEES OF DOCTRINE OF PRACTICAL CONSTRUCTION OF CONTRACTS

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When a contract is plain and unambiguous, or when such an instrument, although once ambiguous, has subsequently been made certain,[1] there is neither need of judicial interpretation nor room for it, the only office of judicial interpretation being to remove doubt and uncertainty.[2] An ambiguous contract, however, is always open to interpretation,[3] the risk of the interpretation that may be put upon it by the courts being one of the risks that the parties to it assume.[4]

The courts resort to established rules of interpretation for assistance in solving the doubts found in ambiguous contracts.[5] The cardinal rule of interpretation is that the court must endeavor to ascertain and give effect to the intention of the parties to the contract[6] *at the time of the making of the contract.*[7] Intention can not be proved by direct and positive evidence. It is a question of fact[8] to be proved "like any other fact, by acts, conduct and circumstances".[9] Thus the issue, the *inten-*

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[1] The parties to a contract can, of course, agree as to the meaning of any ambiguous provision. Furthermore, a contract, uncertain when made, may subsequently be made certain by practical construction. Gould v. Gunn, 161 Iowa 155, 140 N. W. 380 (1913). *See also* Fleming v. Buerkli, 159 Wash. 460, 293 Pac. 462 (1930), where the court said: "This contract is thought to be ambiguous, and it may be so in some particulars, but enough evidence was admitted at the trial to indicate clearly that the parties by their acts put a practical construction upon it which overcomes all ambiguity as to present issues." This is simply an extension of the maxim *certum est quod certum reddi potest.* Daily v. Minnick, 117 Iowa 567, 91 N. W. 913, 60 L. R. A. 840 (1902).

[2] 12 AM. JUR., Contracts, § 229; 17 C. J. S., Contracts, § 294.

[3] 12 AM. JUR., Contracts, § 229.

[4] "When a power is actually conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts," said Justice Holmes in Pennsylvania Fire Ins. Co. v. Gold Issue Min. & M. Co., 243 U. S. 93 (1917).

[5] 12 AM. JUR., Contracts, § 229; 17 C. J. S., Contracts, § 294.

[6] 12 AM. JUR., Contracts, § 227.

[7] 17 C. J. S., Contracts, § 295a. 4 PAGE, LAW OF CONTRACTS (2d ed. 1920) § 2021. Davison v. Von Lingen, 113 U. S. 40 (1884); Virginia v. West Virginia, 238 U. S. 202, 236 (1915); Montrose Contracting Co. v. Westchester County, 80 F. (2d) 841 (C. C. A. 2d, 1936), *cert. denied,* 298 U. S. 662 (1936); O'Boyle v. Home Life Ins. Co., 20 F. Supp. 33, 37 (M. D. Penn. 1937); Chicago Life Ins. Co. v. Tiernan, 263 Fed. 325 (C. C. A. 8th, 1920); Ferry & Co. v. Forquer, 61 Mont. 336, 202 Pac. 193, 29 A. L. R. 642 (1921).

[8] "The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else," said Bowen, L. J., in Edgington v. Fitzmaurice, L. R. 29, Ch. D. 459 (1882). For another statement to the same effect see Swift v. Rounds, 19 R. I. 527, 35 Atl. 45, 61 Am. St. Rep. 791, 33 L. R. A. 561 (1896).

[9] People v. Johnson, 131 Cal. 511, 514, 63 Pac. 842 (1901).

tion of the parties to the contract *at the time of the making of the contract,* is an issue of fact to be proved like any other fact. Relevant evidence is admissible—irrelevant evidence is not.

The generally accepted belief that acts indicate intention[10] has been recognized by the law in the maxim *acta exteriora indicant interiora,*[11] and so "the law, in some cases, judges a man's previous intentions by his subsequent acts".[12] Thus, when the parties to an ambiguous contract place an interpretation upon it by their subsequent acts (such an interpretation is usually referred to as a "practical construction"[13]) evidence of acts indicating such interpretation is admissible for the purpose of showing the intention of the parties at the time of the making of the contract.[14] Such evidence is admissible because it is relevant to the issue, and is entitled to great weight.[15] The courts,

[10] "I have always thought the actions of men the best interpreters of their thoughts," Locke, *Human Understanding,* Book 1, Ch. 3. "Action is eloquence," Shakespeare, *Coriolanus,* Act III, Sc. 2, line 76. "There is no secret of the heart which our actions do not disclose," Moliere, *Le Misanthrope,* Act. I, Sc. 1. "Actions, not words, are the true criterion of the attachment of friends," George Washington, *Social Maxims: Friendship.* "The deeds themselves, though mute, spoke loud the doer," Milton, *Samson Agonistes,* line 246. The old proverb, "Actions sometimes speak louder than words." has been used by the Supreme Court of the State of Washington, *See* Westerbeck v. Cannon, 105 Wash. Dec. 93, 106, 104 P. (2d) 918 (1940); and by the Supreme Court of Ohio, in a case involving practical construction, *see* City of Cincinnati v. Cincinnati Gaslight & Coke Co., 53 Ohio St. 278, 41 N. E. 239, 242 (1895).

[11] 1 C. J. 913. This maxim received its first notable application in the Six Carpenters' Case, 8 Coke 146a (1610), according to Guggenheim v. Long Branch, 80 N. J. L. 246, 76 Atl. 338 (1910). It was also applied in Beattie v. Gardner, 3 Fed. Cas. 1195, 4 Ben. 479 (1871).

[12] BROOM, LEGAL MAXIMS (8th Am. ed. and 5th London ed. 1882) 248.

[13] "The terms 'interpretation of a contract' and 'construction of a contract' are usually used interchangeably," 2 ELLIOT, CONTRACTS (1st ed. 1913) § 1505, (and are so used herein) although "they are not exact synonyms. The word 'interpretation' is narrower in its application. Properly speaking interpretation consists in ascertaining the meaning of the words used . . . 'Construction' takes into consideration the whole transaction, of which the words used are but a part. The purpose of all interpretation is to ascertain and give effect to the actual contract entered into by the parties,—the contract which they intended to make and upon which their minds met."

[14] 12 AM. JUR., Contracts, § 249; 17 C. J. S., Contracts, § 325.

[15] "Practical construction . . . is a matter of knowledge and intention," N. & M. Lumber Co. v. Chicago Ry. Co., 134 Wash. 291, 297, 235 Pac. 794, 796 (1925). "It is to be assumed that the parties to a contract know best what is meant by its terms and are the least likely to be mistaken as to its intention," 17 C. J. S., Contracts, § 325, footnote 21. Hence their acts in interpreting it afford the best evidence of how they understood it, 17 C. J. S., Contracts, § 325b and 2 ELLIOT, CONTRACTS (1st ed. 1913) § 1537. "The law will assume that an interpretation by the parties represents their true understanding," 17 C. J. S., Contracts, § 325, footnote 21. "It is to be assumed that . . . each party is alert to protect his own interests and to insist on his rights; and that whatever is done by the parties . . . is done under its terms as they understood and intended it should be," 12 AM. JUR., Contracts, § 249. Hence a practical construction "furnishes a reliable means of interpretation" and "usually furnishes a safe guide," 17 C. J. S., Contracts, § 235, footnote 21.

although not bound by it,[16] generally follow it.[17]

The rule of practical construction, being a subsidiary of the cardinal rule of interpretation, likewise has no application where the terms of a contract are plain and unambiguous. This is thoroughly settled—so well settled that when the parties to an unambiguous contract construe it erroneously the courts without hesitancy refuse to hold them bound by such mistaken construction, even though they may have acted upon it for years.[18] In *North Eastern Railway Co. v. Hastings*,[19] wherein the House of Lords held that erroneous construction of an unambiguous covenant by the defendant and his predecessor for more than forty years did not prevent insistence upon strict construction, the Earl of Halsbury said:

> "The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous. So far as I am aware no principle has ever been more universally or rigorously insisted upon than that written instruments, if they are plain and unambiguous, must be construed according to the plain and unambiguous language of the instrument itself."

One justice remarked that the long practice suggested a modification, as distinguished from a practical construction,[20] but agreed that since

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[16] 17 C. J. S., Contracts, § 325, p. 762, footnote 38, 40, citing Schneider v. Neubert, 308 Ill. 40, 139 N. E. 84 (1923).

[17] 12 AM. JUR., Contracts, § 249; 17 C. J. S., Contracts, § 325.

[18] 17 C. J. S., Contracts, § 325, footnote 29, citing *In re* Chicago & E. I. Ry. Co., 94 F. (2d) 296 (C. C. A. 7th, 1938), wherein the court said "If by mistake the parties have followed a practice in violation of the terms of the agreement, the court should not perpetuate the error"; Peoples Sav. Bank & Trust Co. v. Landstreet, 80 Fla. 853, 87 So. 227 (1920); Third & Lafayette Sts. Garage v. Globe Discount Corp., 133 Misc. Rep. 735, 234 N. Y. S. 166 (Sup. Ct. 1929).

[19] [1900] A. C. 260.

[20] The clear and important difference between a practical construction, to-wit, an *interpretation*, and a *modification*, is well explained in 4 PAGE, LAW OF CONTRACTS (2d ed. 1920) § 2035, as follows:

"In some cases in which the practical construction of the parties has been considered, the words and conduct of the parties suggest a new contract almost as much as they suggest a construction of an existing contract. The acceptance by one party of the interpretation which the adversary party places upon a contract, is treated as an agreement as to the meaning of the contract which will be binding upon both. The practical construction which is put upon a contract by the parties is to be regarded, however, as distinct from evidence tending to show the existence of a new contract. The difference between the practical construction of a contract by the acts and conduct of the parties and a new contract between the parties, either expressly or by fair implication, consists in the fact that if the question is one of construction, the construction thus placed upon the contract must be one of which its original form is fairly susceptible, while if the parties have entered into a new contract a modification of the terms of the original contract is the very purpose for which they enter into the new contract. Evidence of the practical construction which the parties have placed upon a contract is admissible only when the contract is ambiguous. Evidence of a new contract, on the other hand, is ad-

there was no evidence of a modification the court could not speculate concerning that possibility. The covenant continued to mean what it meant at the time it was made; and nothing occurring afterwards could change the original meaning, a modification not having been established.[21]

A contract has the same meaning in the hands of assignees and successors in interest of the original parties as it had in the hands of the original parties themselves. An assignee simply stands in the shoes of his predecessor and receives the contract subject to all equities and defenses which existed against his predecessor,[22] whether he know of them or not.[23]

Thus the assignee of an ambiguous contract takes it subject to the interpretation that may be put upon it by the courts, the risk of judicial interpretation being one of the risks that the parties who made it assumed.[24] In a suit between the original parties to an ambiguous contract the courts endeavor to ascertain and give effect to the intention of the parties at the time of the making of the contract and, with a view to discovering that intention, admit evidence of the acts of the parties, subsequent to the making of the contract, when such acts indicate how they interpreted the contract. Since a contract has the same meaning in the hands of an assignee as it had in the hands of

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missible without any reference to the ambiguity of the original contract. Such evidence is a mere aid in construction and it is not governed by the rules such as the Statute of Frauds, which would have applied to the formation of the new contract originally, or to the discharge of the contract by a new contract. Accordingly if the question is one of construction no particular form or means of proof is necessary, while if the transaction amounts to a new contract, the rules as to the form of the contract, method of proof, and the like, which would apply to the original contract, may apply to the new contract, or it may be necessary that such a new contract should be executed in some specified form in order to operate as a discharge of the original contract."

In the case of Indian Ter. Illuminat. Oil Co. v. Bartlesville Zinc Co., 288 Fed. 273, 281 (C. C. A. 3d, 1923), the court, after adopting the practical construction placed on a contract by the parties, said: "We have been careful not to change the contract by adding something to it or taking anything away from it, or by enlarging or diminishing the rights and duties which the parties had agreed upon."

[21] *See also* Clifton v. Walmesly, 5 T. R. 564, 101 Eng. Rep. 316 (1794), wherein the court disregarded the meaning put upon a contract by the parties to it for a period of ten years because it considered the language of the instrument to be unambiguous.

[22] 4 AM. JUR., Assignments, § 95, page 304.

[23] Doub v. Rawson, 142 Wash. 190, 252 Pac. 920 (1927); Apple v. Edwards, 92 Mont. 524, 16 P. (2d) 700, 87 A. L. R. 179 (1932); Stern v. Sunset Road Oil Co., 47 Cal. App. 334, 190 Pac. 651 (1920). A stipulation in a non-negotiable contract providing that it shall be treated as a negotiable instrument, so as to cut off defenses of one of the parties in case of an assignment, is of doubtful validity (Note [1932] 79 A. L. R. 33) and has been held to be void as contrary to public policy in so far as the defenses of fraud and usury are concerned. Motor Contract Co. v. Van Der Volgen, 162 Wash. 449, 298 Pac. 705, 79 A. L. R. 29 (1931).

[24] See note 4, *supra*.

the original party whom he has succeeded, there is no logical reason for a court to proceed differently when an assignee is concerned; and the fact that he (the assignee) may not have known of the existence of evidence relevant to the meaning of the contract, such as a practical construction by the original parties, is of no consequence since such evidence, being relevant to the issue, would have been admissible against his predecessor, in whose shoes he stands.

It is clear on principle, therefore, that the acts of the original parties to an ambiguous contract, amounting to a practical construction thereof by them, are relevant and admissible in evidence against an assignee or successor in interest when the issue is the true meaning of the contract.[25] The cases (all that have been found)[26] so hold.

In two Washington cases, *Town of Gold Bar v. Gold Bar Lumber Co.* [27] and *Dungeness Cemetery Association v. Lotzgesell,*[28] it has been

[25] Although almost all of the standard texts on Contracts and Evidence, and several textbooks on Real Property and Landlord and Tenant, were consulted, and although American Jurisprudence, Corpus Juris and Corpus Juris Secundum, were examined thoroughly, no discussion of the question under consideration was found, nor was any reference to it found, the two following references in Corpus Juris Secundum (one of which cites one case in point and the other of which is misleading) excepted: 17 C. J. S., Contracts, § 325, p. 763, footnote 50, contains the following statement:

"Where the mouths of the parties to a contract are closed by death, resort may be had to their acts and dealings with regard to the subject matter thereof to determine the contemporaneous construction and understanding by them of its terms. *In re* Chapin's Estate, 217 Ill. App. 442."

17 C. J. S., Contracts, § 325, page 764, states:

"So statements by the assignor of a contract have been held not to be binding as a practical construction of the contract as against the assignee, where it is not shown that the assignee ever had knowledge of them",

and cites, as authority for the statement quoted, only Miller v. Billington, 194 Pa. 452, 45 Atl. 372 (1900), which is not in point since the court found that the contract before it was not ambiguous.

[26] Neither the American Digest, nor any of the Decennial Digests, nor any other index which was used, made any distinction between cases involving the original parties to a contract and cases involving assignees. Most of the cases involving assignees were found by commencing reading cases dealing with practical construction and continuing to read until one involving assignees was found, the search being limited for the most part however, to the fields deemed likely to be fertile, to-wit, those dealing with contracts or other instruments of a type usually intended to remain in force for long periods of time (and therefore the most likely to pass into the hands of assignees or successors) such as deeds, long term leases, franchises granted to public utilities and joint use contracts between railways. As the search was by no means exhaustive it is thought that this explanation of the method employed may be of interest to counsel seeking like authority in a jurisdiction from which no case has been cited.

[27] 109 Wash. 391, 186 Pac. 896 (1920). In this case a lumber company, owning a water system which furnished water to its plant and to the inhabitants of Gold Bar, sold and conveyed the system to Gold Bar Light & Power Company, which operated the system for four years and then resold and conveyed to the Town of Gold Bar. Thereafter, the lumber company removed certain pipes and connections which were within its own yards. The Town of Gold Bar claimed the value thereof. The court found that the lumber company and the Gold Bar Light & Water Company had construed

held that evidence of the construction placed upon an ambiguous deed by the original grantee is relevant in interpreting the deed as against his successor in interest.[29] In *Warne v. Sorge*[30] the Missouri court held that the acts of a life tenant, indicating his interpretation of the meaning of ambiguous language in the deed under which he took his interest, could be considered in a dispute between the persons entitled to take in remainder. Since the life tenant lacked power to modify the deed, especially as to the remaindermen, this case admirably illustrates the difference referred to above,[31] between an interpretation and a modification.

Perhaps the most interesting case on the subject is *Cooke v. Booth*,[32] an English case in which the court admitted evidence of acts of the defendant's predecessor in interest. The question was whether a covenant by a lessor to renew a lease under the same rents and covenants should be considered a covenant for perpetual renewal. The plaintiff lessee contended that the covenant should be so construed and the

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the deed from the former to the latter as excluding the part of the water system within the lumber company's yards inasmuch as the water company had always refused to repair that part. This was held to be a practical construction by the original parties which should control the judicial construction of the deed, and the court held in favor of the lumber company.

[28] 173 Wash. 581, 24 P. (2d) 81 (1933). This case involved ambiguity in the description of a deed conveying land to Clallam County for cemetery purposes. The County took possession of the tract, improved it, constructed a fence enclosing it, and some twenty-five years later conveyed it to the plaintiff by a deed containing a description coinciding with that in the deed to the County. Plaintiff believed that both deeds included a small strip of land beyond a fence which had been constructed. Defendant, who owned the adjoining land, claimed the same strip. Plaintiff brought suit to quiet title and the court decided for defendant, holding that the construction put upon the deed by the County in fencing, occupying and improving the premises for a great number of years revealed that the land intended to be conveyed was that within the fence.

[29] Davies v. Wickstrom, 56 Wash. 154, 105 Pac. 454 (1909), is a similar case and the decision was the same, although there was also another ground for the result.

[30] 256 Mo. 162, 167 S. W. 967 (1914). The deed conveyed a life estate in a farm to the transferor's son, and the remainder either (1) to such of his children as survived him, or (2) to such of his children as survived him *and* to the children of his children who predeceased him. The son had, by certain acts, interpreted the deed as meaning that the remaindermen would be his surviving children *and* the children of such of his children as predeceased him. The court said that he could not place a construction upon the deed which would bind his remaindermen but that he was likely to understand the language of his mother better than others who did not know her and that for this reason his interpretation was entitled to some weight. The court then held that the deed meant what the son had previously interpreted it to mean. It should be noted that although the children and grandchildren of the life tenant acquired their interests under a deed to which the life tenant was a party, they were neither assignees nor successors in interest of the life tenant, having derived their interests from the transferor. Thus this case undoubtedly goes further than any other case considered herein.

[31] See note 20, *supra*.

[32] 2 Cowp. 819, 98 Eng. Rep. 138 (1778).

defendant, devisee of the lessor, contended otherwise. A lease granted by an ancestor of the lessor in 1688 had been renewed by the lessor at last three successive times during the ensuing sixty years, and each new lease contained the same covenant to renew. Evidence of the acts of the lessor in renewing the lease was admitted for the purpose of showing the intention of the contracting parties; and the covenant was held to be a covenant for perpetual renewal. Admitting that the construction imposed a hardship upon the lessor, Justice Ashurst said: "The lessor himself has put his own construction upon the covenant; and therefore is bound by it," meaning thereby that the evidence was relevant against the lessor's devisee, defendant in this action.

In addition to the foregoing, two Massachusetts cases, *Stone v. Clark*[33] and *New York Central R. Co. v. Stoneman*,[34] two federal cases, *Central Trust Co. v. Wabash, etc. Ry. Co.*[35] and *Chicago G. W. Ry Co. v. Northern Pacific Ry Co.*,[36] and several others[37] clearly demonstrate that the acts of the original parties to an ambiguous contract, amounting to a practical construction thereof, are relevant and admissi-

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[33] 1 Metc. (Mass.) 378, 35 Am. Dec. 370 (1840). Here the plaintiff, as assignee of certain mortgage deeds, claimed that the deeds embraced a lot known as Butler Lot. The court admitted evidence of acts of the original parties showing that they considered Butler Lot excluded. This interpretation was accepted by the court and plaintiff's claim was denied.

[34] 233 Mass. 258, 123 N. E. 679 (1919). In this case the defendants, mortgagees of a building when it was leased to plaintiff, assented to the lease and agreed to be bound by its terms if they foreclosed their mortgage. Thereafter both the lessors and the defendants construed an ambiguous covenant in the lease in a manner favorable to plaintiff. Later, however, defendant repudiated this construction, contending that the covenant had a different meaning. The court admitted evidence of the acts of the lessor and also evidence of the acts of defendants in construing the lease, and held in favor of plaintiff, the language of the opinion indicating that the decision would have been the same in the absence of the construction placed upon the ambiguous covenant by defendants.

[35] 34 Fed. 254 (E. D. Mo. 1888).

[36] 101 Fed. 792 (C. C. A. 8th, 1900). In this and the case cited in the preceding note the original parties to ambiguous contracts had indicated their interpretation by their acts, and in each case a successor in interest had indicated acceptance of such interpretation but, at a later time, had repudiated such interpretation and claimed a different meaning. In each case the court held that the practical construction of the original parties represented the correct meaning. It may be argued that the fact that a successor in interest, temporarily at least, placed a similar interpretation on the contract, weakens the authority of these cases, but in principle, and in view of the other authorities, particularly New York Central R. Co. v. Stoneman, 233 Mass. 258, 123 N. E. 679 (1919) it is believed that the result would have been the same in the absence of evidence of a construction by a successor in interest. This is indicated by the language used in the concluding paragraph of the opinion in *Chicago G. W. Ry. Co. v. Northern Pacific Ry. Co.*

[37] Fitzgerald v. First National Bank, 114 Fed. 474 (C. C. A. 8th, 1902); Mitau v. Roddan, 149 Cal. 1, 84 Pac. 145 (1906); *In re* Chapin's Estate, 217 Ill. App. 442 (1920); Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080 (1932), 85 A. L. R. 391 (1933); Caperton's Administrator v. Caperton's Heirs, 36 W. Va. 479, 15 S. E. 257 (1892).

ble in evidence against an assignee or successor in interest when the issue is the true meaning of the contract.

This conclusion suggests a further question: Are the acts of an assignee, or a successor in interest, of an ambiguous contract, amounting to a practical construction thereof by him, relevant and admissible in evidence against him or his successor in interest when the issue is the true meaning of the contract?

On principle it seems clear that an assignee's acts are not relevant, and therefore that evidence thereof is inadmissable. The issue is the intention of the parties who made the contract, at the time of the making of the contract, which is a question of fact. Evidence of the acts of someone else (an assignee) at a different time indicate only that person's (the assignee's) opinion of the meaning of the contract. His (the assignee's) thoughts are not the original parties' thoughts, nor are his ways necessarily their ways.[38] "After all, whether or not evidence is relevant, is wholly a matter of logic and reason."[39]

In a suit involving the meaning of an ambiguous contract, if an assignee not a party to the suit should be called as a witness, he could not testify as to his opinion[40] with respect to the fact in issue, to-wit, the intention of the original parties; and since he could not give his opinion by words he should not be allowed to do so by deeds. Furthermore, an assignee's acts, assuming they indicate his opinion, do not show that such opinion is based on knowledge derived from the personal observation of acts of the original parties, and hence, even in the eyes of those who believe the opinion rule should be relaxed in some cases, his acts alone fail to show that he is qualified to state an opinion.[41] Thus

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[38] See note 49, *infra*.

[39] Justice Robinson in State v. Marable, 104 Wash. Dec. 349, 358, 103 P. (2d) 1082 (1940).

[40] 2 C. J. 485, 494, footnote 88, citing, among many other cases, Rucker v. Bolles, 80 Fed. 504 (C. C. A. 8th, 1897), holding that *A* and *B* could not testify as to *C*'s intent, wherein the court said: "These witnesses had no knowledge of the plaintiff's intention . . . except as that intention was manifested by his acts, and they should have been required to state the facts within their observation on which their opinion . . . was founded." Holyoke Water Power Co. v. American Writing Paper Co., 68 F. (2d) 261 (C. C. A. 1st, 1933), involved the meaning of an ambiguous provision of a contract relating to the medium in which rental for perpetual water rights was to be paid, the language used being, "Two hundred and sixty ounces troy weight of silver of the present standard fineness of the silver coin of the United States, or an equivalent in gold at the option of the grantee of the time of payment." The plaintiff's offer in evidence of the testimony of an expert in economics as to the meaning of the language quoted was rejected, the court saying:

"Intent is not a subject for expert opinion, at least, when it is the ultimate issue in the case. Many times a judge would be glad if the intent of the parties to a written contract could be determined by experts in psychology, or economics or rhetoric. The evidence of the expert, therefore, as to the intent of the parties to these indentures from the language employed, was properly excluded."

[41] Wigmore's criticism of the opinion rule when applied so as to exclude

admitting evidence of the acts of an assignee would involve admitting opinion evidence without taking the precaution of requiring proof of a factual basis for the opinion expressed.

Cases involving the question under consideration are both fewer and better hidden than cases of practical construction affecting assignees. *Warne v. Sorge,*[42] contains a bare hint, in that it refers to "the construction which is placed upon such instruments by the immediate parties thereto", the word "immediate" implying that the rule might be different with respect to a construction by others, that is to say, assignees or successors in interest. The concluding paragraph of the opinion in *Chicago G. W. Ry. Co. v. Northern Pacific Ry. Co.*[43] mildly conveys the same thought.

City of Cincinnati v. Cincinnati Gaslight & Coke Co.[44] considered but did not decide the question. The issue involved the meaning of a portion of an ordinance, passed in 1841, by which the City of Cincinnati granted a franchise for the use of city streets for the purpose of supplying gaslight. The controversy related to the amount the city should pay for gas furnished to it by the gas company under the franchise in the year 1890.

The gas company contended that the applicable portion of the franchise was ambiguous, and claimed that a practical construction favorable to it had been placed thereon by the city in its dealings with the company over a period of years, and that the true meaning was in accordance with such practical construction.

The court held that the franchise was unambiguous, and therefore refused to follow the practical construction claimed by the gas company.[45] Concerning the applicability of the doctrine of practical con-

statements by observers involving sundry inferences as to another person's state of mind (4 WIGMORE, EVIDENCE (2d ed. 1923) § 1963) is not addressed to a ruling such as that made in the Holyoke Water Power Co. case, note 40, *supra.* Wigmore makes it clear that a witness must have knowledge derived from his own senses, knowledge founded on personal observations, in order to qualify (1 WIGMORE, EVIDENCE (2d ed. 1923) § 657). The "expert" whose testimony was offered in the Holyoke Water Power Co. case was expected to testify with respect to the intent of the parties as judged "from the language employed" and not from any acts of the parties which he had observed. Thus, he was not qualified. Had he been qualified, that is to say, had he observed indicative acts of the original parties, what need would there have been of his testimony "as an expert"? A witness having such knowledge can testify as to what he has observed and let the court or jury draw its own conclusions.

[42] 258 Mo. 162, 167 S. W. 967 (1914) cited *supra* note 30.

[43] 101 Fed. 792 (C. C. A. 8th, 1900) cited *supra* note 36.

[44] 53 Ohio St. 270, 41 N. E. 239 (1895).

[45] Justice Spear, dissenting, also thought the contract to be unambiguous, but said: "There seems to have been about as many interpretations as there have been minds applied to the problem. In such case it seems to me that the construction given by the dealings of the parties is as likely to be right as any." Chief Justice Minshall, who also dissented, thought that in view of the diversity of opinion the practical construction should be followed.

struction, the court said:

> "There is some looseness of expression in the reported cases as to what course of dealing will supply a practical construction. . . . The reason of the rule of practical construction has its origin in the presumption that the parties to the contract, at and after the making thereof, knew what they meant by the words used, and that their acts and conduct in the performance thereof are consistent with their knowledge and understanding, and that, therefore, their acts and conduct show the sense in which the words were used and understood by them. In such cases acts sometimes speak louder than words. But *the reason of the rule ceases when the acts or conduct are not those of the parties who made the contract,* and are not presumed to know in their own minds what was in fact meant by the words used. *The acts and conduct of the parties following after the parties who made the contract, must, in the nature of the case, be only their own construction of the words used,* and not an acting out of the understanding of the words by the parties who used them." (Italics supplied).

In referring to "parties following after the parties who made the contract" the court had in mind the fact that the officers representing the city in 1890 and for several years prior thereto were not the same persons as those who represented the city when the franchise was granted in 1841.

Bemis v. Bradley,[46] is the only other case in this country, considering the question under discussion, which has been found. It *decided* the question, squarely holding that the intention of the original parties to a deed was not shown by the acts of their successors in title. The case involved a boundary line dispute. In 1843, Ann Barrows, the owner of lot number 5, conveyed to Whitney "50 acres off the east end of lot number 5," and in 1854 she conveyed to Clay the portion of lot number 5 not already sold to Whitney. Through a series of other conveyances the property conveyed to Clay passed to Kneeland, who owned it in 1906, and then, later, to the plaintiff; the property conveyed to Whitney passed to the defendant.

The defendant introduced evidence showing that in 1906 he and Kneeland, the owner of the plaintiff's property at that time, established a boundary line by agreement; and he claimed that this was the true line. The court found otherwise, holding (1) that the defendant and Kneeland did not agree that such line *should be* the dividing line; (2) that all they did was to agree (erroneously) that it *had been* the dividing line ("They were not attempting to establish a line by agreement, but to reproduce an original line"); and (3) that such agreement was not binding and did not determine the boundary.

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[46] 126 Me. 462, 139 Atl. 593, 69 A. L. R. 1399 (1927).

Apparently the defendant then called attention to the fact that the deeds from Ann Barrows were ambiguous and argued that the agreement of 1906 constituted a practical construction of the Ann Barrows deeds by successors in interest and indicated the intention of Ann Barrows and her grantees with respect to the boundary. The court decided the case in favor of the plaintiff, and in so doing clearly stated that the acts of a successor in interest are not evidence of the intent of an original party, at least not if sixty-three years elapse between the making of the instrument and the acts of the successor in interest which are offered in evidence. It is submitted that the principle is the same irrespective of the time interval.

This brings us to the notable case of *Attorney General v. Drummond,*[47] decided by Sugden, who was Lord Chancellor of Ireland at the time of the decision and later Lord Chancellor of England. The question was whether the beneficiaries of a trust established for Protestant Dissenters should be limited to believers in the doctrine of the Trinity, or could include Unitarians.

The trust deed, executed in 1710, referred to Protestant Dissenters, a term which, taken literally, included both Trinitarians and Unitarians; but in 1710 there was no Unitarian minister, no church, and no chapel or other place for religious worship by Unitarians as such. The Protestant Dissenters of 1710 were believers in the doctrine of the Trinity, and in 1702 had had the Reverend Thomas Emlyn removed from the pastoral charge of his congregation, fined and imprisoned, for having avowed that he held Unitarian doctrines.

The Lord Chancellor attributed great weight to the evidence of the acts of the founders of the trust at the time of its creation, and particularly to the action taken with respect to the Reverend Thomas Emlyn, and held in favor of the Trinitarians on the ground that the acts of the founders removed the uncertainty in the trust deed and clearly showed that the founders intended the trust to benefit only Trinitarians.

At the time of the decision and for many years prior thereto, a number of the trustees, a majority it was charged, were Unitarians, and *for more than a century the trustees had used the trust's funds, without objection, for the benefit of Unitarians as well as Trinitarians.* The

[47] Decided tentatively in January 1842, 1 Drury & Warren's Reports 353 (principal opinion), because the case of Lady Hewley's Charities, possibly involving similar issues, was pending before the House of Lords; and decided finally in November, 1842, 3 Drury & Warren's Reports 162. In the principal opinion the Lord Chancellor said: "This case has been very elaborately argued, and it would be impossible to have had abler assistance than has been afforded by counsel on both sides"; and the publication of the report of the case was advanced out of its chronological order "in consequence of the importance and general interest of the decision." The House of Lords affirmed Sugden's decree when the case came before it on appeal in 1849. Drummond v. Attorney General, 2 H. L. C. 837, 9 Eng. Rep. 1312.

Lord Chancellor disregarded this construction placed upon the instrument by the trustees, some of whom were Trinitarians, and ordered that such of the trustees as were Unitarians, at least five of whom were ministers of the gospel, should be removed and be replaced by others.

Thus, although Sugden said, "Tell me what you have done under such a deed and I will tell you what that deed means", a statement excelling in wisdom and often quoted in cases involving practical construction,[48] it is clear that the learned Lord Chancellor's conclusions with respect to the meaning of the trust deed was based upon his belief as to the intention of the founders at the time of the making of the trust deed in 1710, as shown by the language of the instrument, evidence of contemporaneous usage, and surrounding facts and circumstances, and not upon the interpretation which the trustees placed upon it at a later time. If the founders of the trust had been alive, and had desired to inform the trustees of the fallacy in the argument of practical construction, they could have done so, very appropriately, in the words of an Authority[49] higher than the Lord Chancellor, saying:

> "For my thoughts are not your thoughts, neither are your ways my ways."

In view of *Attorney General v. Drummond,* and *Bemis v. Bradley,* it is believed that there is good reason for saying that on authority, as well as on principle, the acts of an assignee or successor in interest of an ambiguous contract, amounting to a practical construction thereof by him, are inadmissible in evidence on the ground that they are not relevant to the issue, to-wit, the intention of the original parties to the contract at the time of the making of the contract.

If this conclusion is correct, that is to say, if evidence of the acts of an assignee is inadmissible *because it is irrelevant,* it cannot be admitted on any other ground,[50] and hence an assignee who has acted so as to place a construction on an ambiguous contract can have evidence of his acts excluded even in a suit to which he is a party. This thought should give new hope to an assignee who, through ignorance or error, has misconstrued an ambiguous contract to his own detriment; he should remember that one Lord Chancellor disregarded forty years of misconstruction, and that another Lord Chancellor could not be convinced that a century of wrong interpretation made a right interpretation.

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[48] "This remark of the Lord Chancellor has come to be accepted as a maxim in the construction of contracts," Chicago G. W. Ry Co. v. Northern Pac. Ry Co., 101 Fed. 792, 795 (C. C. A. 8th, 1900); Otis v. Pittsburgh-Westmoreland Coal Co., 199 Fed. 86, 91 (C. C. A. 3d, 1912); Indian Ter. Illuminat. Oil Co. v. Bartlesville Zinc Co., 288 Fed. 273, 281 (C. C. A. 3d, 1923); Keith v. Electrical Engineering Co., 136 Cal. 178, 68 Pac. 598 (1902); Caperton's Administrator v. Caperton's Heirs, 36 W. Va. 479, 15 S. E. 257 (1892).

[49] Isaiah, Chap. 55, Verse 8.

[50] Nothing is admissible unless it is relevant—not even an admission. 12 AM. JUR., Evidence, § 545.