Buffalo Law Review

Volume 4 | Number 1 Article 59

10-1-1954

Property—Real Property—Tax Lien Foreclosure—Adverse Possession

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Urging that the key provision for bringing the statute into operation is the payment of rent, the majority of the court maintained that since defendant had never paid any rent to plaintiff and the latter was not entitled to any, the defendant was not entitled to possession and therefore was not a tenant under the statute. Since the admittedly pro-tenant legislation gives occupants the privilege of remaining in possession and paying rent, the court felt it would be strange to allow the landlord to impose upon the occupant the status of a tenant against his will.

The dissenters were of the opinion that an occupant assumed the status of tenant by electing to remain in possession and that payment of rent was not essential to being a tenant under the statute.[28] Having exercised his privilege they felt the tenant must assume the accompanying burdens.[29]

The view of the majority is sound in the light of the act's underlying policy to allow tenants to remain in possession without exhorbitant increases in rent.

Tax Lien Foreclosure—Adverse Possession

Railroad Law, Section 8 (2) gives railroad corporations the right to acquire property by condemnation but such property must be used only for the purposes of the corporation during its existence. This section has been interpreted as giving railroads only an easement in property which ends when the railroad ceases operations and abandons the use of the property; the fee holder having the right to re-enter upon such happening.[30] It follows that the railroad can convey or mortgage no more than an easement.

In a condemnation proceeding instituted by the City of New York, two claims were made to the award. In 1919 the appellants' predecessor was the undisputed owner of the land in question when a railroad condemned it and went into possession. Subsequently the railroad attempted to mortgage the land in fee. In 1935 the railroad stopped using the land. At this point appellants' predecessor had a right to re-enter but did not do so. Appellants claim the award as her heirs. The respondent as liquidator of the mortgage company went into possession in 1936

28. See *Harlem Savings Bank v. Cooper,* 199 Misc. 1110, 101 N.Y.S. 2d 641 (Sup. Ct. 1951); *Pfalzgraf v. Voso,* 184 Misc. 575, 55 N. Y. S. 2d 171 (Sup. Ct. 1945); *DaCosta v. Hamilton Republican Club,* 187 Misc. 865, 65 N.Y.S. 2d 500 (Sup. Ct. 1946).

29. See *Wasservogel v. Meyerowitz,* 300 N.Y. 125, 89 N.E. 2d 712 (1949).

30. *Miner v. New York Central & H. R. R. Co.,* 123 N.Y. 242, 25 N.E. 339 (1890); *Roby v. New York Central & H. R. R. Co.,* 142 N.Y. 176, 36 N.E. 1053 (1894); *Hudson & Manhattan R. R. Co. v. Wendel,* 193 N.Y. 166, 85 N.E. 1020 (1908).

because the mortgage was in default, and purchased a tax lien on the property. In 1939 respondent foreclosed on the mortgage and the tax lien, making appellants' predecessor a party to the action. Respondent contends he has title by virtue of the foreclosure and by adverse possession.[31]

The case presents two paramount problems: (1) The possibility of a mortgagee in possession purchasing a tax lien, foreclosing on it and thereby acquiring the fee upon which his mortgagor's interest was dependent. (2) The degree of notice necessary to turn possession begun by permission into adverse possession.

In relation to the first problem, *Ten Eyck v. Craig*[32] points out that a mortgagee in possession may have a duty to pay taxes out of the rents and profits of the land. If he fails in this, allows the land to be sold for taxes, and purchases it himself, he holds the title in trust for the mortgagor. The majority of the court felt this had no bearing on the instant case because (a) there were no profits out of which to pay the taxes or purchase the tax lien when the city auctioned it off and (b) since the mortgage was on the easement only, the mortgagee's duty was solely to the mortgagor and the fee holders were strangers to the agreement. Furthermore the court concluded, since appellants' claim could have been raised by their predecessor in the foreclosure proceedings, it is now barred by ordinary rules of res judicata.[33]

Concerning the second problem, it appears that there are five essential elements to an effective adverse possession: (1) the possession must be hostile and under a claim of right, (2) it must be actual, (3) it must be open and notorious, (4) it must be exclusive and (5) it must be continuous for a period of fifteen years.[34]

Adverse possession cannot be based on possession or use under a license or permit from the fee owner, and possession begun by permission is presumed to so continue until the contrary appears.[35] Excessive use or violation of a right granted by the owner cannot create adverse possession until there has been a repudiation or renouncement of the owner's authority and the

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31. In re *Harlem River Drive, City of New York*, 307 N.Y. 447, 121 N.E. 2d 414 (1954).

32. 62 N.Y. 406 (1875).

33. See *Goebel v. Iffla*, 111 N.Y. 170, 18 N.E. 649 (1888); *Schuylkill Fuel Corp. v. B. & C. Nieberg Realty Corp.*, 250 N.Y. 304, 165 N.E. 456 (1929).

34. *Belotti v. Bickhardt*, 228 N.Y. 296, 127 N.E. 239 (1920); C.P.A. §§ 35, 37, 39.

35. *Lewis v. New York & Harlem R. R. Co.*, 162 N.Y. 202, 56 N.E. 540 (1900); *Hinkley v. State of New York*, 234 N.Y. 309, 137 N.E. 599 (1922).

possessor thereupon assumes a hostile attitude toward any rights of the owner.[36] The possessor's claim of right may be under a written instrument or judgment[37] or be unwritten.[38]

The majority of the court maintained that the railroad's easement ended in 1935[39] and that actual notice to the fee holders was unnecessary. Since the railroad and its successor the respondent possessed the land until 1952, the statutory requirement of fifteen years was met and title passed by adverse possession. It was further contended that the respondent himself having occupied the land from 1936 to 1952 under a mortgage purporting to be on the fee held adversely to the appellants under a written instrument.

The dissenters sought to resolve the issues in favor of the appellants. Judge Desmond conceded that there were no precise holdings regarding the mortgagee's right to cut off an interest other than that of his mortgagor but felt that the general rule of equity imposing a duty on one in possession to protect the interest of those upon whom his possession depends[40] was applicable to this situation, since the respondent owed a duty to the railroad which in turn owed a duty to the fee holders.[41]

The dissent also insisted that where possession is begun with permission, there can be no adverse possession without giving direct notice of the hostile claim to the owner, and that this rule is applied throughout the United States.[42]

B. Personal Property

Lost Trust Certificate

Plaintiffs represented a stock exchange firm which acquired five certificates of 100 shares each in a land trust in 1888. Four of the certificates were indorsed for transfer and had been presented for transfer on the books of the land trust, but the fifth one was never presented. Plaintiffs contended that it was lost

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36. *Ibid.*
37. C. P. A. § 37.
38. C. P. A. § 39.
39. See *Heard v. City of Brooklyn*, 60 N. Y. 242 (1875); see also *Miner v. New York Central & H. R. R. Co.; Roby v. New York Central & H. R. R. Co., supra* note 30.
40. *Cf. Burhans v. Van Zandt*, 7 N. Y. 523 (1852); *Ten Eyck v. Craig, supra* note 32; *Van Duzer v. Anderson*, 306 N. Y. 707, 117 N. E. 2d 805 (1954).
41. See *Becker v. McCrea*, 193 N. Y. 423, 86 N. E. 463 (1908).
42. See *City of New York v. Coney Island Fire Dep't.*, 259 App. Div. 286, 18 N. Y. S. 2d 923 (2d Dep't 1940), *aff'd*, 285 N. Y. 535, 32 N. E. 2d 827 (1941); *Branch v. Central Trust Co.*, 320 Ill. 432, 151 N. E. 284 (1926); *City of Grand Rapids v. Pere Marquette Ry. Co.*, 248 Mich. 686, 227 N. W. 797 (1929).