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Property—Real Property—Adverse Possession

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90 days after the claim arises. At the discretion of the court, leave may be granted to serve this notice late in certain cases,[37] if application for such leave is made within a year and explains the reason for the delay.[38] Claims brought by infants may be afforded this additional time.[39] In the instant case, the claimant was an infant; but sixteen months elapsed after the injury before such leave was applied for. Upon its denial, plaintiff appealed, asserting that the statute deprived him of the equal protection of the laws.[40] Upon the reasoning outlined above, the statute was held constitutional by a unanimous decision.[41]

VIII. Property

A. Real Property

Adverse Possession

In New York, claim of title has been defined to mean an entry upon another's land without right and in hostility to the owner's title.[1] Good faith as an element in the definition had long been rejected.[2] The intent to claim land as one's own can be founded on either knowledge that it belongs to another, or upon a mistaken belief that it is already the claimant's.[3] The intent can be proved by acts as well as words.[4] Where the intent is professed to be expressed by acts, those acts must be of such a character as to inform the owner unequivocally of the hostile claim of the usurper.[5] If

37. *Natoli v. Board of Education of City of Norwich,* 303 N. Y. 646, 101 N. E. 2d 761 (1951).

38. *Matter of McEwan v. City of New York,* 304 N. Y. 628, ___ N. E. 2d ___ (1952).

39. For a discussion of § 50-e as creating an exception to Civil Practice Act § 60, see Note, 1 Bflo. L. Rev. 64 (1951).

40. U. S. Const. Amend. XIV; New York Const. Art I, § 1.

41. See *Schmid v. Werner,* 303 N. Y. 754, 103 N. E. 2d 540 (1952) *affirming* 277 App. Div. 520, 100 N. Y. S. 2d 860 (1st Dep't 1950), for a discussion of the applicability of the notice requirement to an action against an individual *tortfeasor* in municipality's employ when the action is based upon a tort committed in the course of employment.

1. *Smith v. Burtes,* 9 John. 174 (N. Y. 1812).

2. *Humbert v. Trinity Church,* 24 Wend. 587 (N. Y. 1840). This case settled the issue with finality, and was necessitated by the decision in *La Frambois v. Jackson,* 8 Cow. 589 (N. Y. 1826), which impliedly asserted that good faith was indispensable to the establishment of a claim of title.

3. *Belotti v. Bickhardt,* 228 N. Y. 296, 127 N. E. 239 (1920); *Barnes v. Light,* 116 N. Y. 34, 22 N. E. 441 (1889).

4. *Barnes v. Light, supra* n. 3.

5. *Monnot v. Murphy,* 267 N. Y. 240, 100 N. E. 749 (1913).

the usurper had at a prior time actual or implied consent to use the land, the acts relied upon as conveying such information to the owner must be all the more clear in order to overcome the presumption of subordination to the title of the owner.[6] If the usurper is a stranger, the burden is lightened, but the acts relied upon must at least consist of either a substantial enclosure, or usual cultivation, or some improvement.[7] This rationale is in accord with the policy underlying the statute of repose, *i. e.*, to bar the delinquent owner from asserting any right to redress the adverse occupation of his land.[8]

With this background before it, the Court of Appeals in the last term rendered its decision in *Van Volkenburg v. Lutz*.[9] The facts of that case were as follows: the land in question was originally covered with a natural wild growth of brush and small trees. The defendant Lutz owned the adjoining property. He entered upon the land in question, cleared it, and from 1916 up until 1948 used nearly all of it as a truck farm. It was referred to by neighbors as "Mr. Lutz's garden." He also raised chickens on the premises, and constructed coops and sheds for that purpose. In 1920 he built a one room dwelling on the land which his brother inhabited. A garage he erected on his property also extended over onto the disputed land. The plaintiff purchased title to the land from the City of Yonkers in 1947. He then sued Lutz to recover possession, and to obtain removal of the encroachments. Lutz alleged as an affirmative defense, and as a counterclaim, title to the premises by right of adverse possession.

The Official Referee found that title to the property had vested in Lutz by virtue of adverse possession as of the year 1935. The Court of Appeals (4-3) reversed this finding. The majority opinion, written by Judge Dye, stated: (1) The essential elements of proof, *i. e.*, protection by a substantial enclosure, or usual cultivation, or improvement, were not met because there was no proof of a substantial enclosure, the cultivation did not embrace the whole of the premises by "clear and positive" proof, as he construed the Civil Practice Act §40 to require, and there was no evidence of any improvement; (2) Lutz did not have a claim of title to the *whole* of the premises because he knew the land was not his own; nor to the *part* on which his garage encroached, because

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6. *Hinkley v. State of N. Y.*, 234 N. Y. 309, 137 N. E. 325 (1922); *Doherty v. Matsell*, 119 N. Y. 646, 23 N. E. 994 (1890); and see §§ 41-41a N. Y. C. P. A.

7. *Belotti v. Bickhardt, supra* n. 3; *Barnes v. Light, supra* n. 3; and see § 40 N. Y. C. P. A.

8. *Humbert v. Trinity Church, supra* n. 2.

9. 304 N. Y. 95, 106 N. E. 2d 28 (1952).

Lutz mistakenly believed it was his own property, and hence, did not have a hostile intent.

The dissenting opinion, written by Judge Fuld, reasoned: (1) that the test of evidence should be formulated in light of the Practice Act's object, *i. e.*, an enclosure, or cultivation, or improvement sufficient to convey to the real owner knowledge of the usurper's claim, and that here the evidence met that test; (2) the fact that Lutz knew he did not have title to the premises is immaterial, for good faith is not necessary for a claim of title, it being sufficient that Lutz intended to acquire the property as his own.

The effect of the decision would seem to be to work a substantial alteration of the now traditional understanding of claim of title. Traditionally, claim of title meant the intent to claim the land as one's own; good faith and mistake as elements had been interred in the distant past. For the court to ressurect their forms today has the following results: *A.*, who occupies *B's* land, knowing it is *B's* land, does not have a claim of title, because he did not enter in good faith believing the land to be his own; *A.*, who occupies *B's* land, believing it to be his own land, does not have a claim of title, either, because by his mistake he did not enter in hostility to *B.* As a consequence, the concept of claim of title is now reduced to one rare and novel situation: *A.*, who occupies *B's* land, recognizes that title in the premise is in dispute, but he believes he has a claim to it (ergo, good faith), and that *B.* also has a claim to it (ergo, hostility), but that he, *A.*, intends to assert his superior right.

It is submitted that the Court's redefinition of claim of title, taken at face value, has greatly confined the doctrine of adverse possession in New York. Since this redefinition conflicts with the policy underlaying the doctrine of adverse possession, *i. e.*, to bar the delinqent owner's right to redress the adverse occupation of his land, it is submitted the decision is erroneous. Consequently, a doubt arises whether *Van Volkenburg v. Lutz* will be strictly followed.

Mortgages

In the case of *Shohfi v. Shohfi*[10] the Court of Appeals was presented with an interesting aspect of the legal problem involved in accepting a deed which states it is "subject to a mortgage." The defendant was the husband of the plaintiff. He had acquired title to a parcel of land in 1929 by a conveyance from his wife. In return, he gave her a bond and purchase money mort-

10. 303 N. Y. 370, 103 N. E. 2d 330 (1952).