Buffalo Law Review

Volume 2 | Number 1 Article 39

12-1-1952

Property—Real Property—Mortgages

Robert Schaus

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).

gage. The husband never paid anything on the principal and stopped paying interest in 1933. In 1934 he reconveyed the premises to his wife to keep and manage for him, with a stipulation that the mortgage should not merge. In 1947, the husband sued to recover the property, and the trial court ordered the reconveyance "subject to the mortgage thereon", which reconveyance the wife executed and the husband accepted. The present action by the wife was on the bond and mortgage. The trial court sustained the husband's defense that the action was barred by the statute of limitations. The Appellate Division reversed,[11] arguing that by accepting the deed "subject to the mortgage" the husband had acknowledged the debt and set the statute running anew. The Court of Appeals reinstated the trial court's decision, thereby sustaining the defense of the statute of limitations. The cases cited by both opinions in the Court of Appeals involve basic principles of real property law.

Where a grantee accepts a deed which states that he *assumes* the mortgage of the grantor, he becomes personally liable to the mortgagee for the amount of the mortgage indebtedness.[12] While there is accord in the rule, there is departure in the reasoning sustaining it; some courts support it on a theory of equitable subrogation;[13] other courts support it on the theory of a third party beneficiary contract.[14] New York follows the later rationale.[15] But by either rationale, in a suit by the mortgagee against a grantee who has assumed to pay the mortgage, the grantee is barred from defending on the ground that the mortgagee is invalid,[16] or usurious,[17] or that the mortgage debt was barred by the statute of limitations at the time he accepted the deed.[18]

The problem grows more complex where the grantee accepts a deed *subject to a mortgage,* as distinguished from an assumption of the mortgage. As a first principle, it is quite clear that the

---

11. 277 App. Div. 390, 100 N. Y. S. 2d 497 (2d Dep't 1951).

12. *Trotter v. Hughes,* 12 N. Y. 74 (1854).

13. *Herd v. Twohy,* 133 Cal. 55, 65 Pac. 139 (1901); *Keller v. Ashford,* 133 U. S. 610 (1890).

14. *Cumberland Nat. Bank v. St. Clair,* 93 Me. 35, 44 Atl. 123 (1899); *Keddle v. Flack,* 27 Neb. 836, 44 N. W. 34 (1889).

15. *Burr v. Beers,* 24 N. Y. 178 (1861); *Thorp v. Keokuh Coal Co.,* 48 N. Y. 253 (1872).

16. *Parkinson v. Sherman,* 74 N. Y. 88 (1878).

17. *Hartley v. Harrison,* 24 N. Y. 170 (1861).

18. *Beddle v. Pugh,* 59 N. J. Eq. 480, 45 Atl. 626 (1900); *Hollister v. York,* 59 Vt. 1, 9 Atl. 2 (1886).

grantee is under no personal liability, and that the land alone is responsible for the mortgage debt.[19] If the mortgage is valid and enforceable, a default in payment leaves the land subject to foreclosure. However, if when the grantee accepts his deed subject to a mortgage, the mortgage is defective, or unenforceable under the statute of limitations, he may contest the foreclosure on those grounds.[20] But an exception to this right to contest a foreclosure exists where it can be shown that consideration, usually a reduction in purchase price, was given by the grantor to the grantee for the latter's undertaking to accept the deed subject to a mortgage.[21] Where such an undertaking can be shown, the grantee is barred on the principle of estoppel, or of a third party beneficiary contract, from contesting the foreclosure on the grounds that when he accepted the deed the mortgage was void or its enforcement barred.[22]

Applying these principles to the present case, the claim of the minority that the husband was a grantee who took subject to the mortgage and consequently was estopped from contesting the validity of the foreclosure, was properly refuted by the majority, which pointed out that there was no purchase of the mortgaged premises by the husband. The case does not fall within the exception, assuming the validity of the argument made by the minority that these principles apply, because there is no showing that the husband, because of a reduction in the purchase price, undertook to subject his land to the mortgage.

The majority attacked the dissent's assumption that the principles relating to a grantee taking subject to a mortgage are applicable here. It is submitted that the position of the majority was correct; the husband was not a grantee receiving land; he was the owner recovering it. Hence, the problem was purely one of acknowledgement by a debtor of his debt so as to start the statute of limitations running again. Acknowledgement is a matter of intent. The Court found that the acceptance of the deed was not sufficient to sustain the inference of an acknowledgement. By so doing, it avoided the obstacle of CIVIL PRACTICE ACT §59, which requires that an acknowledgement be in writing and signed

---

19. *Dingeldein v. Third Ave. R. R.*, 37 N. Y. 575 (1868).

20. *Fontana Land Co. v. Laughlin*, 199 Cal. 625, 250 Pac. 669 (1926); *Purdy v. Coar*, 109 N. Y. 448, 17 N. E. 352 (1888).

21. *Doran v. Doran*, 145 Ia. 122, 123 N. W. 996 (1908); *Central National Bank of Boston v. Hazard*, 30 F. 484 (1887); *Freeman v. Auld*, 44 N. Y. 50 (1876).

22. *Doran v. Doran, supra* n. 21; *Freeman v. Auld, supra* n. 21; *Bennett v. Bates*, 94 N. Y. 354 (1884); *Parkinson v. Sherman, supra* n. 16; *Hartley v. Harrison, supra* n. 17.

by the party to be charged, and the further problem of whether a court has the power to lift the statute of limitations by a conditional decree.

Future Interests

The institution of adoption is ancient. Yet, anomalous as it may be, the common law provided no method for the legal adoption of children. Consequently, an adopted child had no rights of inheritance where the foster parent died intestate; and where a will was left, the question as to whether the terms "children", "issue", etc., could be construed to include adopted children was precluded.[23] Fortunately, the common law was changed by statute in New York in 1887.[24] Since then the legislature[25] and the courts[26] have gradually but continuously enlarged and expanded the rights of adopted children to equal those of natural children. But one significant exception stands out: DOMESTIC RELATIONS LAW §115 states: "(A)s respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heir, the foster child is not deemed the child of the foster parent so as to defeat the rights of remaindermen . . . ."

The first adjudication by the Court of Appeals dealing with §115 arose in *Matter of Leask.*[27] There the testator died leaving a life estate in X., and upon X's death *leaving* children, then to such children; but if no children, then to the residuary estate. During X's life estate he adopted a son. The court declared that the testator, by using the word *leaving*, intended that only natural offspring should take. Consequently, the remainder estate passed to the residuary legatees. The significance of the decision lies in the Court's approach to the problem, an approach based on the intention of the testator.

The same method was followed by the court in *In Re Upjohn's Will*, decided this year.[28] Frederick Upjohn was the testator. His niece, Mrs. Childs, adopted a two month old daughter

23. RESTATEMENT, PROPERTY § 287, Comment on Subsection (1) a.

24. L. 1887, c. 703.

25. For the legislative development see N. Y. DOMESTIC RELATIONS LAW §§ 109-118a.

26. The more significant decisions are *Carpenter v. Buffalo General Elec. Co.*, 213 N. Y. 101, 106 N. E. 1026 (1914); *Matter of Walter's Estate*, 270 N. Y. 201, 200 N. E. 786 (1936); *Matter of Guilmartin's Will*, 277 N. Y. 689, 14 N. E. 2d 627 (1938); *Matter of Horn*, 256 N. Y. 294, 200 N. E. 786 (1931).

27. 197 N. Y. 193, 90 N. E. 652 (1910).

28. 304 N. Y. 366, 107 N. E. 2d 492 (1952).