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An Action for the Removal of Encroaching Structures

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continued to exercise corporate powers after their term of duration has expired. Under this statute a corporation which has so continued in business is deemed to have had a continuous legal existence as a corporation and all its acts are thereby validated. It would therefore seem that the so called revival provision is little more than an extension. There are authorities [23] which recognize a corporation as *de facto* if it continues in business after the expiration of its charter. There is no other legal basis on which to place the retroactive effect of Section 49 than on the theory of *de facto* existence after the expiration of the charter. In a New York case [24] where a corporation continued in business for three years after its alleged dissolution, it was estopped to set up its dissolution as a ground for dismissing an action against it for the performance of an executory contract to which it had become a party after its dissolution. The reason for the estoppel was based upon the ground that the other party, a private individual, was not chargeable with constructive notice of the expiration date of the corporate charter, and so was not in *pari delictu* with the corporation. It may be said that the better legal basis for the *nunc pro tunc* provision of the present revival statute seems to be the *de facto* doctrine. This doctrine should be employed as to permit flexibility in working out the real equities of contending parties, and, if possible, the rights of stockholders should be further protected by legislation.

There are already some sixteen other states [25] in which corporate revival statutes have proven successful without much litigation. This may be ascertained from the lack of reported decisions in this field.

JOHN E. PERRY.

AN ACTION FOR THE REMOVAL OF ENCROACHING STRUCTURES.—An action may be maintained by the owner of any legal estate in land for an injunction directing the removal of a structure encroaching on such land. Nothing herein contained shall be construed as limiting the power of the court in such action to award damages in an appropriate case in lieu of an injunction or to render such other judgment as the facts may justify.

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[23] Brady v. Delaware Mut. Life Ins. Co., 2 Penne. 415, 45 Atl. 345 (Del. 1899); Bushnell v. Consolidated Ice Machine Co., 138 Ill. 67, 27 N. E. 596 (1891); Campbell v. Perth Amboy Mut. Loan, Homestead & Bldg. Ass'n, 76 N. J. Eq. 347, 74 Atl. 144 (1909). However, there is contrary authority which holds that after a corporation is dissolved by judicial decree, or by the expiration of the period fixed for its existence in the law under which it was organized, it is not even a *de facto* corporation. Clark v. American Coal Co., 165 Ind. 213, 73 N. E. 1083 (1905); Knights of Pythias v. Weller, 93 Va. 605, 25 S. E. 891 (1896); Arlington Hotel Co. v. Rector, 124 Ark. 90, 186 S. W. 622 (1916); Venable Bros. v. Southern Granite Co., 135 Ga. 508, 69 S. E. 822 (1910).

[24] Wilkins v. Sirael Realty Corp., 174 Misc. 1002, 21 N. Y. S. (2d) 1017 (1940).

[25] *Report of the Law Revision Commission*, LEGIS. Doc. No. 65(I) (1943).

This section shall not be deemed to repeal or modify any existing statute or local law relating to encroaching structures.[1]

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever.[2]

In each of the following actions an issue of fact must be tried by a jury unless a jury trial is waived or a reference is directed . . .

2. An action in ejectment . . .[3]

The word "action" refers to a civil action; . . . the words "an action of ejectment" to an action to recover the immediate possession of real property.[4]

There is only one form of civil action. The distinction between actions at law and suits in equity and the forms of those actions and suits have been abolished.[5]

Quaere: If the defendant in an action for the removal of an encroaching structure disputes title, will he be entitled to a jury trial?

The enactment of Section 539 of the Real Property Law was proposed by the Law Revision Commission.[6] It appears from the report of the Commission that the purpose of the enactment is to give to an owner of a legal estate, in cases of encroachment, the right to bring an action for an injunction directing removal, thereby restoring the rule which long prevailed in New York until it was brought into question by the decision in *Syracuse v. Hogan.*[7]

The question whether a mandatory injunction is a proper remedy against encroaching structures appeared to have been settled in New York by the case of *Baron v. Korn,*[8] where thirty-two years before the decision in *Syracuse v. Hogan* the Court of Appeals, in granting the injunction, said:

> Again, it would be impracticable, if not impossible, for the plaintiffs in ejectment to regain actual possession of the alley-way occupied by the wall.
>
> The sheriff might not regard it as his duty to deliver possession by taking down the wall, which would burden him with the risk of injury to other portions of defendant's building, not included within the nine inches. But in equity, the obligation to remove can be placed directly on the party who caused the wall to be erected.

In *Syracuse v. Hogan,*[9] however (in which, unlike the above case, the defendant moved for a jury trial as a matter of right, to determine disputed title), the Court of Appeals, in reversing the order denying the defendant's motion (on the ground that it was in essence an action of ejectment) said:

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[1] N. Y. REAL PROP. LAW (1942) § 539, subd. 1.
[2] N. Y. CONST. Art. I, § 2.
[3] N. Y. CIV. PRAC. ACT § 425.
[4] *Id.* § 7, subd. 8.
[5] *Id.* § 8.
[6] *N. Y. Law Revision Commission Report,* LEGIS. DOC. No. 65(C) (1942).
[7] Syracuse v. Hogan, 234 N. Y. 457, 138 N. E. 406 (1923).
[8] Baron v. Korn, 127 N. Y. 224, 228, 27 N. E. 804, 805 (1891).
[9] See note 7 *supra.*

It is suggested that the plaintiff cannot recover in this action all the relief to which it is entitled if it be held that it is in ejectment. I do not think this follows . . . If there be involved in such action the expense of . . . the removal of incumbrances, then the expense of such . . . removal . . . may be recovered . . . and the judgment may be enforced by execution . . . If it cannot be enforced by execution, then the defendant may be punished for contempt in refusing to comply with the judgment. (. . . C. P. A., sec. 505.) [10]

One year later in *Johnson v. Purpora*,[11] the Appellate Division—two judges dissenting—held that in an action to recover possession of real property and damages for withholding same, it is error for the court to include in the judgment an order upon the defendant to remove the encroachment. Quoting the statement in *Syracuse v. Hogan* as to the adequacy of the remedy in ejectment, the court said that this equitable relief was improper and unnecessary for the protection of plaintiff's rights. Although the question of title had been settled in favor of the plaintiff by a jury, the mandatory injunction was denied. "Thus," the Law Revision Commission concludes in commenting on this case, "the decision of the Court of Appeals in *Syracuse v. Hogan* was interpreted as precluding the granting of a mandatory injunction for the removal of encroaching structures." [12]

Whether or not this conclusion on the part of the Commission is justified,[13] these opinions certainly raised doubts as to the availability of this practicable equitable remedy to landowners. There was a definite need for a remedy. And Section 539 of the Real Property Law effectively meets this need. There can be no question, now, as to the right of a land owner to bring an action for a mandatory injunction directing the defendant to remove an encroaching structure—*if* he is the undisputed "legal owner".

But if the defendant disputes the legal ownership? This has been the basic controversy, the root from which the twisted branch of

[10] *See N. Y. Law Revision Commission Report*, LEGIS. DOC. No. 65(C) (1942) 17–18, for criticism of this interpretation of N. Y. Civil Practice Act § 505.

[11] Johnson v. Purpora, 208 App. Div. 505, 203 N. Y. Supp. 581 (1924).

[12] *N. Y. Law Revision Commission Report*, LEGIS. DOC. No. 65(C) (1942) 16.

[13] Hinman, J., in his dissenting opinion in *Johnson v. Purpora*, 208 App. Div. 505, 509 (3d Dept. 1924), writes: "There was nothing in the mode of trial adopted expressly indicating that equitable relief was to be sought. . . . The question is whether . . . the pleading and procedure adopted by plaintiff have been such as to preclude the equitable relief which has been granted in the judgment. . . . The plaintiff demanded judgment (1) for possession of said portion of said premises, (2) for damages for withholding same." The dissenting opinion held that according to the spirit of the reformed practice there can be no objection to the granting of equitable relief in this case, that there is now but one form of action and provided the plaintiff alleges and proves some cause of action, whether at law or in equity, he is entitled to appropriate judgment. The majority opinion, of course, did say that the equitable relief was unnecessary. But was this why the order was reversed? Or was the reversal, rather, a result of a narrower construction of the pleadings? Under these facts, can this decision be said to "preclude the granting of a mandatory injunction"?

law in *Purpora v. Johnson* sprang. The branch has been removed. But does the statute go to the root of the matter?

In *Syracuse v. Hogan* the plaintiff, demanding that the defendant be perpetually enjoined from maintaining an encroaching building and that he be ordered to remove the same, had put the action on the Special Term Calendar for trial. The defendant, who disputed plaintiff's title, moved to have the action stricken therefrom on the ground that he was, as a matter of right, entitled to a jury trial. The Court of Appeals held in favor of the defendant, saying:

> . . . the main issue to be tried is the title to the twenty-nine foot strip. . . . The fact that plaintiff has, as an incident to the main question to be determined, asked for equitable relief, does not change the form of the action. The court looks to substance and not to form . . . The prayer for judgment is not decisive and does not control the nature of the action . . .

It is evident from the Commission's recommendation to the Legislature that Section 539 was proposed to nullify the effect of the decision in *Syracuse v. Hogan,* for the reasons stated by Cardozo, J., in his dissenting opinion in this case:

> This is not an action of ejectment. It is an action in equity to enjoin the obstruction of a highway. . . . Equitable remedies being necessary for the attainment of complete relief, there is no rule that a court of equity must wait until the suitor's title to the land has been first made out at law. Such a rule there may once have been. It may still prevail in other states. In this State it has long been abandoned. . . .[14]

But is the language of the enactment sufficiently clear and specific to effect its purpose? Does it settle the controversy that has been raging since the "union of law and equity", declared by the codes?[15] Is there still not room for the defendant to argue that he cannot be deprived of his constitutional right to a jury trial by legislative fiat?[16]

It is obvious that in every case brought under Section 539 the plaintiff will necessarily be out of possession and the defendant, in possession. That being so, the Court of Appeals argued in *Syracuse v. Hogan,* the action is brought within the statutory definition of an action in ejectment, which is, "An action to recover the immediate possession of real property." That being so, may not the defendant still argue, if he disputes title, that Section 539 was not intended to apply to a case where the plaintiff's legal ownership is in dispute, and if it does apply to such a case, it is unconstitutional? Is the language of the statute sufficiently specific to override the formidable array of judicial support of his position?

The inherent and fundamental difference between actions at law

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[14] *N. Y. Law Revision Commission Report,* LEGIS. DOC. No. 65(C) (1942) 6.

[15] See note 5 *supra.*

[16] See notes 2, 3 *supra.*

and suits in equity cannot be ignored.[17] The code enables settlement and granting of equitable relief in one action.[18] But a litigant cannot be deprived of a jury trial of those issues which were adjudicated at law before the adoption of the constitution unless that right has been waived.[19] When an action is brought to obtain a mandatory injunction for the removal of encroachments, and the determination of the case involves a question of title, the action may properly be sent to the law side of the court as an action of ejectment to be tried by a jury.[20]

That authority is not lacking for the position that the constitutional guaranty of trial by jury does not apply to a case for mandatory injunction because this was always a case for equity and in equity there was no right to a jury trial, is not to be denied. And this is the position supported by the Law Revision Commission.[21] But can it be that in phrasing this statute the Commission drafted it in this Delphic manner to insure against its being declared unconstitutional?

To date there have been no cases under this section, so we are free to speculate. Will the New York Court of Appeals follow the reasoning of the Supreme Court of California in *Angus v. Craven*[22] in its interpretation of a statute authorizing an equity action to quiet title? This court said:

> A case under this Section presents a case for equitable relief. It seeks to have something done which a court of law cannot do . . . Courts, however, in guarding the constitutional right to a jury trial, have repeatedly held that where the suit should have been, and in substance is, an action for the recovery of the possession of land, the right of a defendant to a jury cannot be defeated by the mere device of bringing the action in an equitable form. And so it has been held that the right to a jury trial is not defeated when at the commencement of the action the defendant and not the plaintiff was in acual possession of the premises involved . . . but that the action should be treated as substantially an

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[17] Jackson v. Strong, 222 N. Y. 149, 118 N. E. 512 (1917).

[18] Hahl v. Sugo, 169 N. Y. 109, 62 N. E. 135 (1901).

[19] Wheelock v. Lee, 74 N. Y. 495 (1878).

[20] Westergreen v. Everett, 218 App. Div. 172, 218 N. Y. Supp. 68 (1926).

[21] *See N. Y. Law Revision Commission Report*, LEGIS. DOC. No. 65(C) (1942) at 11-12, 22-25, in which the following authorities are cited in support of this proposition: POMEROY, EQUITY JURISPRUDENCE (2d ed. 1919); Gardner v. Village of Newburgh, 2 Johns. Ch. 162 (N. Y. 1816), and Smith v. Carll, 5 Johns. Ch. 118 (N. Y. 1821)—cited in support of the proposition that equity would have settled a disputed title to land at the time of the adoption of the Constitution, before the amalgamation of law and equity. *Cf.* Broisted v. South Side R. R. Co., 55 N. Y. 220 (1873); Corning v. Troy Iron & Nail Factory, 40 N. Y. 191 (1869); Williams v. New York Central Ry. Co., 16 N. Y. 97 (1857); Olmsted v. Loomis, 9 N. Y. 423 (1854). In *Wheelock v.* Noonan, 108 N. Y. 179, 187, 15 N. E. 67, 69 (1888), Judge Finch said: "I am inclined to deem it more a rule of discretion than of jurisdiction"—re the requirement of a separate law action. *Carroll v. Bullock*, 207 N. Y. 567, 101 N. E. 438 (1913), held that an action for a mandatory injunction requiring the defendant to remove an encroachment was one in equity and not an action at law.

[22] Angus v. Craven, 132 Cal. 691, 64 Pac. 1091 (1901).

action to recover possession . . . Of course it is true that a court of equity can hear and determine any issue of fact in a proceeding properly before the court. . . . But the circumstance that either kind of court may try a question of fact has no weight in determining whether, upon a particular state of facts, the remedy is legal or equitable. . . .

Or, as is more likely in view of the judicial history behind this statute, will the New York court follow its reasoning in the decision of *Jamaica Savings Bank v. M. S. Investing Co.?* [23] This was an action to foreclose a mortgage and to receive a deficiency judgment against the defendant guarantor.

The defendant's contention that since prior to 1830 only an action at law could have been brought against him, that to deprive him of his right to trial by jury would be in contravention of Article I, Section 2 of the New York Constitution was repudiated. Citing *Knickerbocker Life Insurance Co. v. Nelson,*[24] the court held that since this is an equitable action, even though as incidental to the main relief prayed for the complaint also asks for money damages, a separate trial by jury is not within the realm of the constitutional guaranty.

How the New York courts will construe Real Property Law, Section 539, remains to be seen. That it effectively removes any doubts there may have been created by the opinion in *Syracuse v. Hogan* as to a land owner's right to the equitable remedy of a mandatory injunction for the removal of encroaching structures is conceded. But has it changed the controlling rule of law in that case? It is submitted that judicial construction or further amendment will be necessary before a "legal owner", where the defendant disputes his title, will be assured of the availability of Section 539 of the Real Property Law to protect his rights.

WILHEMINA PAULUS.

[23] 274 N. Y. 215, 8 N. E. (2d) 493 (1937).
[24] Knickerbocker Life Insurance Co. v. Nelson, 8 Hun 21 (N. Y. 1876).