

Continuous Trespass: Statute of Limitations Defense Disallowed

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treatment as may be of importance to him without having to wade through matter that does not particularly affect his practice.

ARTICLE 2 — LIMITATIONS OF TIME

Continuous trespass: Statute of limitations defense disallowed.

In *506 Sixth Ave. Corp. v. New York City Transit Authority*,¹ a trespass action to recover damages, the defendant pleaded the statute of limitations² as a defense. The court of appeals held that an underground encroachment built in 1939 was a continuing trespass, and although the right to bring an action accrued in 1939, the three-year statute of limitations did not bar institution of the suit in 1960.

The court distinguished a *permanent* trespass, which gives rise to a single cause of action, from a *continuous* trespass. "In New York, we have consistently characterized an unlawful encroachment as a *continuous* trespass giving rise to successive causes of action. . . ."³ The court reasoned that although the structure itself was permanent, the trespass was continuous. Apparently, the court considered that to allow defendant to successfully plead the statute of limitations would, in effect, allow adverse possession without notice thereof to the owner.

Periodic payments under an allegedly void lease do not constitute separate wrongs for statute of limitations purposes.

*Lowell Wiper Supply Co. v. Helen Shop, Inc.*⁴ was a stockholders' derivative suit based on an allegation that a lease entered into between the corporation and a principal stockholder was either void or voidable because of excessive rental charges. Defendants contended that since the lease was entered into nine years prior to the inception of the action, the statute of limitations⁵ was a bar. Plaintiffs countered that each payment under the lease was a separate, continuous wrong, and that they were thus entitled to damages which accrued during the most recent statutory period. The court rejected the theory "that each payment pursuant to a wrongful agreement gives rise to a separate and distinct claim. . . . The settled rule . . . is that the statute of limitations begins to run upon commission of the overt act causing damage."⁶

¹ 15 N.Y.2d 48, 203 N.E.2d 486, 255 N.Y.S.2d 89 (1964).

² CPA § 49(7).

³ *506 Sixth Ave. Corp. v. New York City Transit Authority*, 15 N.Y.2d 48, 52, 203 N.E.2d 486, 488, 255 N.Y.S.2d 89, 92 (1964).

⁴ 235 F. Supp. 640 (S.D.N.Y. 1964).

⁵ The court made no determination as to which statute of limitations was applicable, as it concluded that plaintiff would have been barred under the most favorable statute.

⁶ *Lowell Wiper Supply Co. v. Helen Shop, Inc.*, 235 F. Supp. 640, 644 (S.D.N.Y. 1964).