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Property--Adverse Possession--Claim of Right (Van Valkenburgh v. Lutz, 304 N.Y. 95 (1952))

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lature and the courts, to the extent that a prompt attempt should be made to solve it before the law in this respect becomes merely a tool to be used by the unscrupulous, to the detriment, not only of those injured, but of the reputation of the medical profession itself.

PROPERTY—ADVERSE POSSESSION—CLAIM OF RIGHT.—In 1912, the defendants began to develop and cultivate part of the land adjoining their own, although aware that they had no rights there. Plaintiff purchased this adjoining property in 1947, and then initiated the present ejectment action. Defendants claimed that they had title by adverse possession. In reversing the appellate court decision, the Court of Appeals *held* that, under the statutes,[1] there must be a claim of right, or hostility, in addition to actual occupation, as evidenced by a sufficient cultivation of the land.[2] *Van Valkenburgh v. Lutz,* 304 N. Y. 95, 106 N. E. 2d 28 (1952).[3]

In England adverse possession commenced under the statute of Henry III,[4] as a means of getting land into productive use. To accomplish this end, the law provided that if a settler would occupy the premises for a stipulated period he would acquire, for all practical purposes, a fee simple in the land. The true owner was simultaneously penalized if he failed to pursue his remedy within that

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[1] N. Y. CIV. PRAC. ACT § 39 (1952). "Adverse possession under claim of title not written. Where there has been an actual continued occupation of premises under a claim of title, exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely."

N. Y. CIV. PRAC. ACT § 40 (1952). "Essentials of adverse possession under claim of title not written." For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases, and no others:

"1. Where it has been protected by a substantial inclosure.

"2. Where it has been usually cultivated and improved."

[2] By way of dicta, the court discussed adverse possession through mistaken entry. It was pointed out that "Lutz himself testified that when he built the garage he had no survey and thought he was getting it on his own property, which certainly falls short of establishing that he did it under a claim of title hostile to the true owner." Van Valkenburgh v. Lutz, 304 N. Y. 95, 99, 106 N. E. 2d 28, 30 (1952). On its face, this statement seems to contradict the present law. Roulston v. Stewart, 40 App. Div. 200, 57 N. Y. Supp. 1061 (2d Dep't 1899). It is submitted that what the Court meant was that title to all the land could not pass where the original entry was by mistake, but only to that part which was occupied.

[3] Loughran, Ch. J., Fuld and Desmond, JJ., dissenting.

[4] WALSH, REAL PROPERTY 783 (2d ed. 1937).

time.[5] No right at all was needed by the adverse possessor to justify his entry upon the unoccupied premises.[6] It seemed settled under early New York law that there must be possession under a claim of title[7] in order to acquire title by adverse possession. In *La Frambois v. Jackson*,[8] there appeared what seemed to be a new concept of claim of right, under which the elements of actual possession and improvement in the usual manner of the true owners would, standing alone, give rise to a presumption of a claim of right. Since, in any event, these elements were requisites for adverse possession, it would seem that claim of right under this concept was no more than a restatement of the requirements.[9] This is the prevailing view in the United States today.[10]

Claim of title and claim of right are synonymous, and are used interchangeably;[11] however, they should not be confused with color of title.[12] The former may exist wholly by parol, while the latter has reference to a paper title.[13] About 1864, New York passed a statute requiring a claim of right where there is no color of title.[14] Even after the enactment of this statute, however, some courts persisted in saying that mere "possession, accompanied by the usual acts of ownership, was presumed to be adverse until shown to be sub-

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[5] DIGBY, HISTORY OF LAW OF REAL PROPERTY 424-426 (4th ed. 1892).

[6] *Id.* at 424.

[7] Becker v. Van Valkenburgh, 29 Barb. 319 (N. Y. 1858); Smith v. Burtis, 9 Johns. 174 (N. Y. 1812).

[8] *See* La Frambois v. Jackson, 8 Cow. 589, 603 (N. Y. 1826). "The actual possession and improvement of the premises, as owners are accustomed to possess and improve their estate, without any payment of rent, or recognition of a title in another, or disavowal of a title in himself, will, in the absence of all other evidence, be sufficient to raise a presumption of his entry and holding as absolute owner; and unless rebutted by other evidence, will establish the fact of a claim of title."

[9] See 4 TIFFANY, REAL PROPERTY § 1147 (3d ed. 1939).

[10] City of Rock Springs v. Sturm, 39 Wyo. 494, 273 Pac. 908 (1929). ". . . [I]t is generally held that the actual occupation, use, and improvement of the premises of the claimant as if he were in fact the owner thereof will, in the absence of explanatory circumstances showing the contrary, be sufficient to raise a presumption of his entry and holding as absolute owner, and, unless rebutted, will establish the fact of a claim of right." *Id.*, 273 Pac. at 913; *accord*, Rennert v. Shirk, 163 Ind. 542, 72 N. E. 546 (1904); *cf.* Rowland v. Williams, 23 Ore. 515, 32 Pac. 402 (1893); Pioneer Investment & Trust Co. v. Bd. of Education, 35 Utah 1, 99 Pac. 150 (1909).

[11] *See* Evans v. Francis, 101 N. Y. S. 2d 716, 718 (Sup. Ct. 1951).

[12] *See* Hamilton v. Wright, 30 Iowa 480, *aff'd on rehearing*, 30 Iowa 484, 486 (1870).

[13] *Id.* at 486 (rehearing).

[14] N. Y. CODE PROC. § 84 (1864). "Premises actually occupied held adversely. Where it shall appear that there has been an actual continued occupation of premises, under a claim of title, exclusive of any other right, but not founded upon a written instrument, or a judgment or decree, the premises so actually occupied, and no other, shall be deemed to have been held adversely. This section was re-enacted in Code of Civil Procedure § 371 (1916) and is presently N. Y. Civil Practice Act § 39 (1952).

servient to the title of another," [15] thus adhering to the concept enunciated in *La Frambois v. Jackson.*

As a result of the decision in the present case, the party attempting to show adverse possession now has a more difficult task than previously. Evidently, mere possession and cultivation of the land will no longer suffice to establish the claim of right [16] now demanded; but exactly what additional facts are necessary is not clear. There is a strong dissent to this change,[17] based on the reasoning that "[t]he object of the statute is that the real owner may, by the unequivocal acts of the usurper, have notice of the hostile claim, and thereby be called upon to assert his legal title." [18] If this latter view is correct, then it seems improper to require more than the mere possession and cultivation that has hitherto sufficed to give this notice.

The majority of American jurisdictions recognize that the fundamental requisites for adverse possession are physical possession and proper cultivation, and that these will give rise to a claim of right. The present view in New York, however, is that these two elements do not spell out a claim of right.[19] The failure to define this claim of right, or the hostility with which it is equated, leaves the courts without a workable criterion of what constitutes adverse possession.

TORTS — LIBEL — REPORTS OF SEALED JUDICIAL PROCEEDINGS NOT PRIVILEGED.—This libel action was brought against defendant for its publication of material contained in pleadings filed by plaintiff's wife in a separation action and sealed by court rules. The privi-

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[15] Monnot v. Murphy, 207 N. Y. 240, 100 N. E. 742 (1913); Barnes v. Light, 116 N. Y. 34, 22 N. E. 441 (1889).

[16] *Accord,* De Forrest v. Bunnie, 107 N. Y. S. 2d 396, 401 (Sup. Ct. 1951) (Possession, to be adverse, need not be under color of title, but must be with a claim of right.); Evans v. Francis, 101 N. Y. S. 2d 716 (Sup. Ct. 1951).

[17] *See* Van Valkenburgh v. Lutz, 304 N. Y. 95, 102, 106 N. E. 2d 28, 31 (1952) (dissenting opinion, see note 3 *supra*).

[18] See St. William's Church v. New York, 296 N. Y. 861, 863, 864, 72 N. E. 2d 604, 605 (1947) (dissenting opinion by Fuld, J.).

[19] With respect to acts of improvement as an essential element, the court in deciding that the acts in the instant case did not suffice, laid some emphasis on the fact that the work was done by the defendant with knowledge that the land was not his. Van Valkenburgh v. Lutz, 304 N. Y. 95, 99, 106 N. E. 2d 28, 30 (1952). *Query:* Will the court now construe the fact of the settler's knowledge of no record title in his favor as militating against the establishment of adverse possession? See the dissenting opinion in the Van Valkenburgh case, *supra* at 102, 106 N. E. 2d at 31-32, wherein Judge Fuld contends that it should not.