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An Act to Amend the Civil Practice Act in Relation to Adverse Possession by Tenants in Common of Real Property

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amount of disability benefits paid. Any compromise of a cause of action by the injured employee in an amount less than the benefits provided for in the Act shall be made only with the written consent of either the Chairman of the Board or the carrier. If the injured employee who has received benefits fails to commence an action against the third person within six months prior to the expiration of the statute of limitations, the carrier or the Chairman of the Board may maintain an action against the third party.[24]

Waiver, Release and Exemption of Payments from Claims

Any agreement to waive rights under this Act shall be void. Disability benefits may not be assigned or released and shall be exempt from all claims of creditors and from levy, execution and attachment.[25] However, attorney's fees for services in connection with any contested claim under the Act shall become a lien upon the benefits, if these fees have been approved by the Board. The lien shall be paid from the proceeds only in the manner fixed by the Board.[26]

Conclusion

"What the New York Law provides is analogous to the concept of minimum wage. That is to say the statutory provision for disability benefits is a mandated standard, obligatory for employers and their employees who do not or cannot agree on something better; but where they can and do agree the widest latitude is allowed them to work out the solutions best suited to their own needs." [27] Some of the opposition to the Act in its present form was based on the contentions that the employer pay all the contributions, or that the state insurance fund constitute the sole insuring agent to the exclusion of private companies. Whatever the merit of these criticisms, the bill does offer to industry and labor an opportunity of proving that social betterment can be fostered by joint effort on their part with a minimum of state interference.

JAMES LYSAGHT.

AN ACT TO AMEND THE CIVIL PRACTICE ACT IN RELATION TO ADVERSE POSSESSION BY TENANTS IN COMMON OF REAL PROPERTY. —The one distinctive characteristic of every cotenancy is the right of each tenant in common, with his cotenants, to the possession of

[24] *Id.* § 227(1), (2), (3).
[25] *Id.* § 218(1), (2).
[26] *Id.* § 225.
[27] Miss M. Donlon's address before the House Ways and Means Committee on H. R. 2893, reported in the Insurance Advocate, April 30, 1949, p. 19, col. 2.

the premises so held in common. A necessary corollary to this rule is the principle that the possession of one cotenant is the possession of all and therefore not adverse to the interests of the others.[1] However, it is a well settled general legal principle that a tenant in common may, by ousting his cotenant and remaining in uninterrupted possession for fifteen years, acquire title by adverse possession; but this may only be done by a notice from one cotenant to another that the former claims adversely to the latter's title, by refusal to account for rents and profits, or by unequivocal acts, open and public, making the possession so visible, hostile, exclusive and notorious that notice may be presumed.[2]

The reason for the rule requiring an ouster is explained by Judge Blackmar in *Berger v. Horsfield*[3] wherein he states ". . . the rule is founded on the principle underlying the doctrine of adverse possession. As the title gained by adverse possession rests upon laches of the real owner, who fails to assert his title against the one claiming adversely, and as a tenant in common may be rightfully in possession by virtue of his own title, the tenant in common out of possession may rest quiescent without laches until charged with knowledge that his cotenant's possession is hostile to his title."[4] In other words, the degree of proof required in cases where privity of title exists is greater because there exists a quasi trust[5] or confidential relationship between cotenants; and this relationship creates an implied obligation on the part of each cotenant to sustain and protect the common title.[6]

While the sole possession of one cotenant is prima facie not adverse to the other, it may, as has been indicated, become adverse to him, and whether it has so become adverse is ordinarily a question of fact,[7] *e.g.*, do the acts relied upon constitute an ouster? Do they fulfill the requirement of notice? Was the possession hostile, exclusive and notorious?

Because the question of adverse possession is ordinarily one of fact for a jury, the uncertainties which accompany the determination

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[1] Clute v. Clute, 197 N. Y. 439, 90 N. E. 988 (1910); Sweetland v. Buell, 164 N. Y. 541, 58 N. E. 663 (1900).

[2] Kielbinski v. Sitko, — Misc. —, 87 N. Y. S. 2d 277 (Sup. Ct. 1949); Zapf v. Carter, 70 App. Div. 395, 75 N. Y. Supp. 197 (4th Dep't 1902); Sweetland v. Buell, 164 N. Y. 541, 58 N. E. 663 (1900); Hamershlag v. Duryea, 38 App. Div. 130, 56 N. Y. Supp. 615 (1st Dep't 1899); Culver v. Rhodes, 87 N. Y. 348 (1882).

[3] 188 App. Div. 649, 176 N. Y. Supp. 854 (2d Dep't 1919).

[4] *Id.* at 653, 176 N. Y. Supp. at 856.

[5] Markowitz v. Markowitz *et al.*, — Misc. —, 36 N. Y. S. 2d 261 (Sup. Ct. 1942), *aff'd*, 265 App. Div. 993, 39 N. Y. S. 2d 991 (1st Dep't 1943); Minion v. Warner, 238 N. Y. 413, 144 N. E. 665 (1924).

[6] Schenck v. Egbert, 56 Misc. 378, 107 N. Y. Supp. 787 (Sup. Ct. 1907); Carpenter v. Carpenter, 131 N. Y. 101, 29 N. E. 1013 (1892); Knolls v. Barnhart, 71 N. Y. 474 (1887).

[7] Berger v. Horsfield, 188 App. Div. 649, 176 N. Y. Supp. 854 (2d Dep't 1919); Clark v. Crego, 47 Barb. 599 (N. Y. 1867).

of such issues naturally attach themselves to any claim of title by adverse possession and not infrequently render the title in question unmarketable.

The title may be rendered unmarketable because an attorney in examining the title may find that in the chain of title there was a tenant in common who never conveyed. Assuming the statutory period has passed, the issues which arise are: has someone acquired title by adverse possession, or, did the non-conveying tenant have sufficient notice that possession was adverse to him? Then again, an attorney may run across facts which show that title to the premises passed by intestacy to the heirs of a deceased title holder some years previous but that there was no judicial determination of who the heirs were. Since heirs of real property take as tenants in common the question arises, was there a valid conveyance by *all* the heirs as cotenants? Since these vexatious problems have a habit of arising many years after the beginning of the cotenancy, not infrequently the actual proof of the original ouster has become lost by lapse of time and the cotenancy appears as an outstanding flaw in the title due to the presumption indulged in by the courts that possession of one cotenant is presumed to be for the benefit of all and not adverse.[8]

The risk consequent to a reliance upon a claim of title by adverse possession is clearly shown in the case of *Berger v. Horsfield* [9] wherein the plaintiff and his predecessors occupied the premises for a period of eighty-three years, collected all the rents and profits without accounting, without any assertion by the cotenants of any claim against the property; when the whole property was attempted to be sold, the Appellate Division held it was a question of fact whether title had been acquired by adverse possession, and resolved the question in the negative, sustaining the lower court determination.

In order to eliminate such difficulties and uncertainties in the conveyance of real property and to avoid expensive actions in equity to quiet title, the New York Legislature in its 172nd session, upon the recommendation of the Law Revision Commission,[10] amended the Civil Practice Act by inserting therein a new section to be known as Section forty-one-a.[11] The new section became law with the approval of the Governor on March 18, 1949 and took effect immediately. Its purpose is to limit to fifteen years the presumption that occupancy by one tenant in common is possession of the other.[12] It

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[8] Tarbox v. Hulett, 272 App. Div. 633, 75 N. Y. S. 2d 37 (3d Dep't 1947), wherein failure of two tenants in common to join in a conveyance though such tenants were unheard from for over twenty years rendered title of the property unmarketable when conveyed by a third cotenant.

[9] 188 App. Div. 649, 176 N. Y. Supp. 854 (2d Dep't 1919).

[10] 1949 LEG. DOC. No. 65(J), 1949 REPORT, LAW REVISION COMMISSION.

[11] Laws of N. Y. 1949, c. 184.

[12] 1949 LEG. DOC. No. 65(J), 1949 REPORT, LAW REVISION COMMISSION.

likewise provides that ouster of one tenant by the other destroys the presumption.

The text of the new section reads as follows:

> § 41-a. *Adverse possession by tenants in common. Where the relation of tenants in common has existed between any persons, the occupancy of one tenant, personally or by his servant or by his tenant, is deemed to have been the possession of the other, notwithstanding that the tenant so occupying the premises has acquired another title or has claimed to hold adversely to the other. But this presumption shall not be made after the expiration of fifteen years of continued occupancy by such tenant, personally or by his servant or by his tenant, or after an ouster by one tenant of the other.*
>
> § 2. Section forty-one-a of the civil practice act as added by this act shall apply to past as well as present and future occupancies by tenants in common; provided, however, that in the case of occupancies prior to the time this act shall take effect, the date upon which the presumption described in section forty-one-a of the civil practice act shall be deemed to have expired by lapse of time shall be (a) the date of the completion of fifteen years of continuous occupancy by such tenant, personally or by his servant or by his tenant, or (b) September first, nineteen hundred thirty-five, whichever date is later.
>
> § 3. This act shall take effect immediately.[13]

The new statute is not without justification. There is a strong analogy between the relations between tenants in common and those of landlord and tenant with respect to adverse possession, the rule relating to the latter being that possession of the tenant, even after the expiration of the lease, is presumed to be that of the landlord, however this presumption is limited to a period of fifteen years after the termination of the tenancy by Section 41 of the Civil Practice Act.[14]

It is evident that the legislature in enacting Section 41-a has sought to remove the prime source of uncertainty, *i.e.,* that adverse possession is a question of fact. Thus, by limiting the period of the presumption of the continuancy of the cotenancy, the statutory period necessary for the establishment of title by adverse possession can begin to run after fifteen years of continued undisturbed possession by one tenant the same as if an actual ouster had been shown. The presumption of ouster of one cotenant from continued undisturbed possession for fifteen years by the other is reasonable and justified because the average person does not ordinarily sleep on his rights

[13] Laws of N. Y. 1949, c. 184.
[14] Laws of N. Y. 1938, c. 97.

for so long a period. Furthermore, it is fair to infer that actual proof of the original ouster has become lost through the lapse of time.

It is to be noted that the new Section 41-a applies to past, present and future occupancies but the legislature in its endeavor to remove the source of grievance has not lost sight of the rights of the co-tenants out of possession. Their rights are adequately guarded by the safety clause as found in sub-section (2) which limits the retroactive application of the new statute so that a tenant in common who has been out of possession for more than fifteen years has a reasonable time to assert his rights and thereby prevent the tenant in possession from obtaining a title by adverse possession.

The statutory amendment is a recognition by the legislature of the need for freer and less complicated rules of law relating to transfers of real property and to that end it is submitted that the new amendment will facilitate the clearing of titles.

JOSEPH C. BRUEN.

UNIFORM SUPPORT OF DEPENDENTS LAW.—Every year over a hundred thousand men desert their wives and families. There are at least a million deserted dependents in the United States, three-quarters of whom are children under sixteen.[1] The direct cost of supporting these dependents is over fifty million dollars. Indirectly many more millions are spent fighting the resulting crime, juvenile delinquency, illness and allied ills.[2] Add to this what price you will for the human misery which always accompanies the disintegration of a home and some idea of the import of this social cancer will be realized.

Fortunately there are some restrictions on the impunity with which husbands may abandon their families. Applicable within New York State there are laws forming a tight network of protection for wives and children. Chiefly administered by the Children's Court and the Domestic Relations Court of New York City, their jurisdiction unfortunately ends at the state and city line.[3] When once the delinquent husband had fled the state, they were powerless. To be sure there was one weapon available to the authorities but so cum-

[1] According to figures obtained from the Abandonment Bureau of the Kings County District Attorney's office, in 1948 in Brooklyn alone 1,558 women and children were abandoned.

Number of children under 16	977
Number of pregnant wives	22
Number of non-pregnant wives	559

Not all cases were reported.

[2] Woodbury, *Runaway Husbands*, LADIES HOME JOURNAL, September 1949, p. 34.

[3] N. Y. CHILDREN'S CT. ACT §§ 30-34; N. Y. DOM. REL. CT. ACT §§ 91-159.