

FROM THE COURTS

BY PETER MANSFIELD

A RECENT case heard in the Supreme Court of Ontario underlines the requirements for claims by adverse possession. The case centred on an action by a finance company for possession of lands under a mortgage. The unusual aspect was the defendants claim that the mortgage was invalid since it had been placed by her estranged husband who had not occupied the lands in question since 1957. It was her contention that his claim to title had long since been extinguished as per the Statute of Limitations and title rested solely with her.

FACTS

The defendant and her husband were married in 1942. Five years later they bought a house in Napanee registering it in the husband's name only. This house served as the matrimonial home for the couple and their four children.

In 1952 the defendant executed a general power of attorney in favour of her husband. No reason was given.

Over time the husband returned home less and less and by 1957 only came home 3 nights a week.

In late 1957 the defendant became aware of the fact that her husband was having an affair with another woman and on Christmas Day 1957 she told her husband to leave the house and never come back.

The defendant had no further contact with her husband. He returned only once, in 1960, on the occasion of his daughter's wedding and was only in the house for 20 minutes.

From 1954 until 1977 the husband placed 7 mortgages on the property without the defendant's knowledge. One of these, registered on July 28, 1977 for \$25,000 is the one in question in this case. The last payment was made on July 30, 1981.

Further evidence showed that the defendant had the locks changed on the house soon after her husband's departure in 1957. She had looked after the house inside and out since then.

From 1957 until 1980 her husband paid the property taxes, heating costs and insurance premiums. In 1979 the defendant launched divorce proceedings asking for an order forcing her husband to transfer title to her.

At the November 16, 1980 hearing, the trial judge stated that the parties were equally entitled to ownership of the home. However at the appeal hearing on October 22, 1981, the court ordered title to be vested in the defendant only.

Shortly before this the husband stopped paying the mortgage and left the area. His whereabouts are not known.

ARGUMENTS

The case on the surface then is a simple action by a finance company for possession of lands on which they held a mortgage. But the real issue is one of adverse possession, for it is the defendant's contention that the mortgage was invalid in the first place for it was placed on the property by her husband whose claim to title had long since been extinguished by her possession of the lands.

The arguments presented:

FOR

1. The defendant told her husband to leave the house and never come back.
2. She changed the locks on the house.
3. She maintained the house from 1957 on.
4. She has remained in possession of the house since 1957.

Therefore, her husband's rights ran out 10 years or more after Christmas, 1957.

AGAINST

1. The husband paid the taxes, the heating bills and the insurance premiums from 1958 until 1981.
2. The power of attorney given to him in 1952 was not revoked until 1981.

3. In a Statement of Property sworn on June 21, 1979, the defendant claimed only 50% equity in the matrimonial home.
4. Throughout the entire divorce proceedings, the notion that her husband's claim to title had been extinguished was never raised.

JUDGEMENT

In making his decision Mr. Justice Labrosse cited a similar case "Strong and Colby et al (178) 20 O.R. (2d) 356". The law applicable to all cases of adverse possession was stated with the additional comment:

"To bar the title of a true owner it is not sufficient that possession during the statutory period be actual, constant, exclusive and visible - there must be an intention to exclude the owner from such uses as he or she wishes to make of the property or, to use the Latin phrase applicable to disputes of this nature, an 'animus possidendi' must be found on the part of the person claiming a possessory title to support his claim."

And further:

"In the instant case it is contended that adverse possession can be presumed from Colby's undisturbed occupation over many years and no doubt in most situations such lengthy occupation would warrant that conclusion. But where, as here, possession was acquired during a marital relationship it seems to me that the spouse claiming possessory title of the matrimonial home finds greater difficulty in discharging the onus of establishing the requisite 'animus possidendi' from the fact of possession alone than does a claimant in most other circumstances. A departing spouse may for a variety of readily imaginable reasons, and without any intention to abandon ownership in the matrimonial property, permit the other spouse to remain there for an indeterminate time and, by the same token, the remaining spouse's possession is not necessarily referable to an intention to deprive

the other of title. A divorce obviously raises different considerations, but where the statutory period relied upon is, in whole or in part, during the currency of the spousal relationship, it is my view that, generally speaking, the onus ought not to be treated as satisfied and the ownership of a spouse extinguished unless some **cogent evidence of intention** in addition to the fact of possession itself is adduced."

The judge thus decided in favour of the plaintiff, i.e. the finance company. In his opinion, the defendant had not satisfied the burden of establishing a possessory title.

"It is, in my opinion, a reasonable inference that it was only after the plaintiff took action and that (the husband) disappeared that the theory of adverse possession surfaced." It was an after-thought that offered a solution to these complications. There is not, in my view, 'cogent evidence of intention, in addition to the fact of possession itself', as referred to in *Re. Strong and Colby et al* and the defence fails." ●

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