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Constitutionality of Statute Delaying Commencement of Adverse Possession by Tenant against Landlord Is Questioned by Court

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form is not so clear. Two of the three members of the court speaking on this issue would apparently require that such contracts, to be enforceable, cannot be expressed in the form of corporate by-laws.

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CONSTITUTIONALITY OF STATUTE DELAYING COMMENCEMENT OF ADVERSE POSSESSION BY TENANT AGAINST LANDLORD IS QUESTIONED BY COURT—In 1931 property which defendant claimed to own was sold for delinquent taxes. In 1933 defendant leased the premises to plaintiff, the lease providing that it should terminate if the lessor were unable to pay the taxes or should lose possession. The lessor failed to pay the taxes and in 1936 plaintiff, who had continued in possession, entered into a contract to purchase the property from the county, subsequently receiving a deed which in 1941 was held invalid.[1] In 1955 plaintiff commenced an action to quiet title to the property in himself on the basis of adverse possession. The district court concluded that adverse possession had been established. On appeal to the Montana Supreme Court, *held,* affirmed. A lease stating that taxes are then delinquent and providing that if the landlord shall be unable to pay them the lease shall be automatically terminated constitutes a waiver of the benefit of the statute which requires that a tenant maintain adverse possession against his landlord for twice the ordinary period.[2] *Johnstone v. Sanborn,* 358 P.2d 399 (Mont. 1960) (Justice Adair dissenting).

At the time of this adverse possession Revised Codes of Montana, 1947, section 93-2512 provided:

> When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of ten years from the termination of the tenancy, or, where there has been no written lease, until the expiration of ten years from the time of the last payment of rent, notwithstanding such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions cannot be made after the periods prescribed in this section.

The following section required adverse possession for ten years for perfecting of title.[3] In 1953 both provisions were amended to make the periods five years. The effect of the two sections is to provide for a doubly long period of adverse possession where a landlord-tenant relationship has existed and the tenant has not relinquished possession between his tenancy and his adverse possession.

Since it held that the lessor had waived the benefit of the statute, the court was not obliged to apply it, but the majority opinion went out of its way to state[4]:

[1] Sanborn v. Lewis and Clark County, 113 Mont. 1, 120 P.2d 567 (1941).
[2] The court also held in the alternative that on the basis of prior proceedings the title should be quieted in the plaintiff.
[3] REVISED CODES OF MONTANA, 1947, § 93-2513.
[4] Instant case at 400.

> There is considerable doubt whether such a statute is valid in view of the holding in Lowery v. Garfield County, 122 Mont. 571, 208 P.2d 478. In the Lowery case, this court held that it was not competent for the Legislature to pass a special statute fixing a short statute of limitations applicable to only certain persons and individuals, leaving all others in the same circumstances subject to the general statute of limitations. It would seem that for the same reasons, the Legislature may not pass a special act fixing a long statute of limitations, applicable only to certain persons, leaving all others subject to the general statute of limitations.

The court suggests, therefore, that section 93-2512 may be violative of the constitutional provision that "where a general law can be made applicable, no special law shall be enacted."[5] This provision does not in any way prevent the enactment of differential legislation based upon reasonable classifications,[6] however, and a classification is not open to objection unless it precludes the assumption that the classification was made in the exercise of a real legislative judgment and discretion.[7] A law is said to be general and uniform in its operation when it applies equally to all persons embraced within the class to which it is addressed, provided such classification is made upon some natural, intrinsic, or constitutional distinction between the persons within the class and others not embraced within it. A law is special and improper if it confers particular privileges or imposes peculiar disabilities upon a class of persons arbitrarily selected from a larger number of persons all of whom stand in the same relation to the privileges conferred or the disabilities imposed.[8]

With these principles in mind we should compare the statute involved in the *Lowery* case with that cited in the instant case. The statute held unconstitutional in the *Lowery* case provided that no action could be maintained to assert a title hostile to the grantee of a tax deed unless such action were brought within eight years,[9] whereas the general statute of limitations allowed ten years.[10] The majority of the court held that the statute was clearly a special law[11]:

> It applies to certain persons and individuals and leaves all others in the same circumstances subject to the provisions of the general statute on adverse possession. The right of the legislature to shorten the Statute of Limitations for the period of adverse possession is not questioned but it must apply to all classes claiming adversely and the same requirements during the period of adverse possession must be required of all persons and classes.

Under the statute, holders of tax deeds were placed in a different class from all other owners of property. No reasonable basis for the special treatment of this class was apparent to the court. There was no such difference be-

[5]Mont. Const. art. V, § 26.
[6]Tonn v. City of Helena, 42 Mont. 127, 111 Pac. 715 (1910).
[7]Bank of Miles City v. Custer County, 93 Mont. 291, 19 P.2d 885 (1933).
[8]Leuthold v. Brandjord, 100 Mont. 96, 47 P.2d 41 (1935).
[9]Laws of Mont. 1943, ch. 100.
[10]Note 3, *supra*.
[11]Lowery v. Garfield County, 122 Mont. 571, 588, 208 P.2d 478, 487.

tween tax deed holders and other property owners to justify the shorter statute of limitations.

In the statute enacting a longer statute of limitations for those who have occupied the status of tenant there is much less reason to find the differential treatment arbitrary. The relation of landlord and tenant is a distinct, well-recognized one, neither new nor novel.[12] At common law a tenant could not set up a title against his landlord at all without first surrendering possession.[13] In the absence of a statute, the general rule today is that the possession of the tenant is not deemed adverse to the landlord, so as to enable the tenant to acquire title by adverse possession, unless there has been a clear repudiation of the holding under the landlord and notice of such repudiation is brought home to the landlord.[14] The Montana statute takes an intermediate position, dealing with the problem in the same way that California and New York have.[15] It would seem that the legislature intended to give recognition to the important character of the relation and to impede the claim of adverse possession by a tenant who has continued in possession. The relation of landlord and tenant is not a mere technical one, but implies a relation of trust and confidence which should not be abused.[16] The relation involves the relinquishment by the landlord of exclusive possession and control during the term, as distinguished from a mere privilege or license.[17]

The dictum in the instant case leaves the standing of the statute governing adverse possession by a tenant in serious question. The court will undoubtedly be called upon sometime to answer the question which it has posed. It is submitted that in view of the foregoing considerations the court should not conclude that section 93-2512 is unconstitutional. The classification it makes is based upon a sound traditional distinction.

ROBERT CORONTZOS

DECISION HOLDING CONTRACTION OF POLIO IS INJURY WITHIN MONTANA WORKMEN'S COMPENSATION ACT IS OVERTURNED BY LEGISLATURE—Decedent was employed as a foreman in the Helena city street department. He frequently worked and ate at the city shops, in close proximity to city garbage trucks and the hobo jungles. For three or four days prior to the onset of his illness he had been doing fatiguing work in the hot sun. Three days after he became ill, he died of bulbar polio. The Industrial Accident Board denied his widow compensation because she failed to show that de-

[12]Butler v. Maney, 146 Fla. 33, 200 So. 226 (1941).
[13]Tewksbury v. Magraff, 33 Cal. 237 (1867).
[14]51 C.J.S. *Landlord and Tenant* § 282 (1947).
[15]See CAL. CODE CIV. PROC. § 326; N.Y. CIV. PRAC. ACT § 41. Research has failed to disclose any cases questioning the constitutionality of the statute in these jurisdictions.
[16]Ballard v. Gilbert, 55 So. 2d 723 (Fla. 1951).
[17]Kaynar Corp. v. Fosterport Realty Corp., 1 Misc. 2d 469, 69 N.Y.S.2d 313 (1947), *aff'd.* 272 App. Div. 878, 72 N.Y.S.2d 465 (1947).