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## Commentaries on the Public Acts of Indiana, 1927 (Part 2)

G. A. Farabaugh

*Hubbard, Farabaugh and Pettingill*

Walter R. Arnold

*Shively, Gilmer and Arnold*

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# COMMENTARIES ON THE PUBLIC ACTS OF INDIANA, 1927—II. THE ADVERSE POSSESSION ACT

G. A. FARABAUGH AND WALTER R. ARNOLD\*

Squatter rights and squatter tactics in the northwestern part of Indiana provoked a united endeavour on the part of assemblymen from that region, during the session of the Legislature of 1927, to halt the pernicious effect of one person holding color of title and consistently paying taxes and special assessments on land, while another enjoyed the usufruct and, eventually, became seized with title through adverse possession. The authors of the law which was conceived to combat this situation, however, reckoned little with the consequences of a general adverse possession statute and its effect on conditions and cases to which it was never intended to apply. Chapter 42 of the Acts (Acts of Indiana 1927, p. 119) again demonstrates the danger of legislation designed to meet some local or specific condition but not carefully scrutinized, before enactment, for possible application to the state at large and to circumstances wholly unrelated to the vice to be corrected, or the special remedy to be granted. It reads as follows:

"SECTION 1. Be it enacted by the general assembly of the State of Indiana, that hereafter in any suit to establish title to lands or real estate no possession thereof shall be deemed adverse to the owner in such manner as to establish title or rights in and to such land or real estate unless such adverse possessor or claimant shall have paid and discharged all taxes and special assessments of every nature falling due on such land or real estate during the period he claims to have possessed the same adversely: provided, however, That nothing in this act shall relieve any adverse possessor or claimant from proving all the elements of title by adverse possession now required by law."

We shall allocate, under five divisions, the questions patently arising on construction and application of the act: 1. Its constitutionality; 2. Its effect on the squatter; 3. Its effect on line encroachments and errors of survey; 4. Its effect on easements; and, 5. Its adjectival effect in proceedings.

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\* See biographical notes, p. 121. This is the second of a series of Commentaries on the Public Acts of Indiana, 1927 contributed to the Indiana Law Journal by Mr. Farabaugh and Mr. Arnold. The first appeared in III Ind. Law Jour. 351, 444.

## I

## ITS CONSTITUTIONALITY

In Indiana, as in practically all other states of the Union, the adverse possessor's rights are acquired under a statute of limitation.<sup>1</sup> After twenty years from the date of accrual thereof, no action shall be commenced for the recovery of real estate. But there is a marked distinction to be noted from the *effect* of the operation of the statute running as against actions for the recovery of the possession of real estate as differentiated from the usual bar of the statute in other actions: While in the latter instances the effect is merely to give the plaintiff no remedy when the statute is pleaded,<sup>2</sup> in the former case the bar operates to vest the defendant with title as against plaintiff.<sup>3</sup> When the bar of the statute has run, a *grant* to the adverse possessor is presumed,<sup>4</sup> and results in extinguishing the title of the true owner, as effectively as if there had been a grant.<sup>5</sup>

But statutes of limitations are creatures of the legislature. Without legislation they do not exist, and, in the absence of express constitutional inhibitions, the legislature is at liberty to amend or repeal statutes of limitations, *so long as no vested right is affected*.<sup>6</sup> This latter exception is important to bear in mind in construing the operation of the act, under review, for, whenever a statute can possibly be so construed as to render it constitutional, courts will resort to such construction even if it be a strained one.<sup>7</sup> That title to real estate which has been acquired by adverse possession for the statutory period cannot be constitutionally affected by a change in the statute after the period has run, is well settled.<sup>8</sup> Hence, we are warranted in assuming, without further analysis, that the Act does not and cannot affect rights which had fully ripened into title before the act was

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<sup>1</sup> Sec. 302 Burns Stat. 1926, Sub. Div. Sixth.

<sup>2</sup> *Cassell v. Lowry*, 164 Ind. 1; *Terry v. Davenport*, 185 Ind. 561.

<sup>3</sup> *Ridgway v. Ludlow*, 58 Ind. 248; *Roots v. Beck*, 109 Ind. 472; *Branson v. Studebaker*, 133 Ind. 147.

<sup>4</sup> *Brown v. Preston*, 48 Ind. 367; *Brown v. Anderson*, 90 Ind. 93.

<sup>5</sup> *Moore v. Hinkle*, 151 Ind. 343.

<sup>6</sup> *Hubble v. Berry*, 180 Ind. 513; *McKinney v. Springer*, 8 Blackf. 506; *Stapp v. Brown*, 2 Ind. 647.

<sup>7</sup> *Maize v. State*, 4 Ind. 342; *Clare v. State*, 68 Ind. 17; *Hovey v. State ex rel.*, 119 Ind. 395; *P. C. C. & St. L. R. Co. v. Hartford City*, 170 Ind. 674.

<sup>8</sup> *Union Pac. R. Co. v. Wooster et al.*, 177 N. W. 740. Certiorari denied 41 S. Ct. 323, 255 U. S. 569, 65 L. Ed. 790.

passed notwithstanding no legal proceedings were taken to establish it, because once title has ripened, nothing further by way of proceedings is necessary to fortify the vested right against aggression.<sup>9</sup> We are also brought to the conclusion that the act is constitutional because the statute is readily susceptible to a construction which excludes from its operation rights and interests vested before the statute became operative.

## II

### ITS EFFECT ON THE SQUATTER

The careless phraseology employed by the author of this bill, and the apparent disregard or ignorance of the principles of law stated above and constituting the genesis of title by adverse possession, engenders dubiety of the efficacy of the statute to accomplish the purposes intended by it. The usual mechanics of bringing the question into forensic play, seems to have been lost sight of. While many actions to quiet title are brought by the adverse possessor against the *former* title-holder, whose title has been extinguished in the manner above suggested, it has been observed that such action is not necessary to vest title in the possessor. Faced with this statute, it is not likely that any such squatter will ever attempt the aggressive—but will rest on the defensive side of the question. Assuming his continued actual or constructive possession at the time, an action in ejectment is brought by the record holder of the title, the defendant merely files an affirmative answer setting up that “the plaintiff’s cause of action did not accrue within twenty years next preceding the filing of his complaint herein,” (though not necessary to plead the statute specially).<sup>9a</sup> The plaintiff would either demur on account of defendant’s failure to set up compliance with this statute in his plea of the limitations, or would reply with a negative—that defendants did not pay the taxes and special assessments for the unexpired period of the limitations after enactment of the statute.

Let us speculate on the probable sequence of events after either plea: On plaintiff’s demurrer, or on defendant’s demurrer to plaintiff’s reply, plaintiff argues that a condition precedent to defendant’s standing in court, with his answer of limitation as

<sup>9</sup> *Rennert v Shirk et al.*, 163 Ind. 542.

<sup>9a</sup> Sec. 1131 Burns 1926; *Watson v. Lecklider*, 147 Ind. 395; *Craven v. Craven*, 181 Ind. 553.

a defense in bar to the action, is, that defendant have "paid and discharged all taxes and special assessments of every nature falling due on such land or real estate during the period he claims to have possessed the same adversely." Defendant counters, however, that the statute only requires such payment on his part if he *defendant*, seeks "to establish title or rights in and to such land or real estate"; that he is not in the action attempting to *establish* any right, but merely *resisting* an assault upon his *possession* of the premises which he, by his answer, admits he has held and holds, but that plaintiff cannot enforce his (plaintiff's) rights against defendant, because the former has too long slept on his, (plaintiff's) rights; that defendant's *right or title to the land* is not in controversy. In effect, defendant, by the special plea is admitting plaintiff's cause of action, but avoiding it *per force* the statute of limitation. Defendant is not asserting a *right*, but an affirmative *defense*, and it is axiomatic that one who seeks to prevail in an action in ejectment must prevail, if at all, on the strength of his own right or title, not on the weakness of the defendant's "right or title."<sup>10</sup>

Another difficulty looms in the offing against the plaintiff in the supposed case: the statute limits the operation of the act to suits "to establish *title* to lands or real estate" (sic). An action in ejectment is essentially not a suit "to establish title," though one of the consequences may be that, having judicially determined the right to possession, the nature of the case will effectually settle the title. An act of this character, which is derogatory of statutes of repose, will receive a strict construction.<sup>11</sup> *Ergo*, is it unreasonable to contend that the "suit" in which the statute shall have force, must be one to quiet title to real estate or an action of that nature?

However, resort to an action to quiet the title to real estate is barred *fifteen* years after the action accrues.<sup>12</sup> And not only may that constitute an insuperable impediment in some cases, but in those where the fifteen year statute has not run at the time of going into effect of the statute, can the plaintiff avail himself of the statute? The statute says that possession shall not be "deemed adverse to the *owner*," unless, etc. If the twenty year statute has run, even though through a part or the whole of it (after the going into effect of the act) the adverse pos-

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<sup>10</sup> *Welborn v. Kimmerling*, 46 Ind. App. 98.

<sup>11</sup> *Ellis v. Kenyon*, 25 Ind. 134.

<sup>12</sup> *Sinclair v. Gunzenhauser*, 179 Ind. 78; *Armstrong v. Hufty*, 156 Ind. 606; *Moore v. Ross*, 139 Ind. 200.

essor did not pay the taxes and special assessments, can it be said that the holder of the record title, as against the adverse possessor is "the owner?"

These and a multitude of other questions suggest themselves and will be pressed with vigor and persistency until our courts of review have settled what the legislature could have very simply settled by an amendment to Section 309 Burns R. S. 1926, so as to make the section read as follows:

"If any person, liable to an action, shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action; and in all actions for the possession of real estate or to quiet the title thereto, no period of adverse possession shall be reckoned in favor of either party who has not paid the taxes and special assessments falling due on such real estate, provided, this section shall not affect easements by prescription or encroachments over boundary lines or errors of survey acquiesced in or undisturbed for a period in excess of twenty years."

### III

#### ITS EFFECT ON LINE ENCROACHMENTS AND ERRORS OF SURVEY

We now enter upon a study of a phase of the statute that the legislature never took into consideration, although it affects millions of dollars worth of property in this State, particularly in the larger cities. Thousands of large and expensive buildings in Indiana are standing today some two-, some three-, some five-inches, some one-, two-, and, in rare cases, three feet over onto the property of the neighbor. In many cases they have not stood so for a full period of twenty years. The more valuable the land, the more likely the owner is to *get every inch* he owns. In this zeal to leave no part without the pale of the structure to be erected, an incompetent surveyor—or a competent surveyor obtaining an erroneous starting point—in 1908 extends Lot 35 two inches into lot 36. The owner of lot 35 has always been assessed for land of that description as shown on the recorded plat. When he completed his improvement of, say, a ten-story building, the entire building was valued as on lot 35, and no part of lot 36 was ever assessed against him; nor has any part of the value of the building been assessed against the owner of lot 36. The owner of lot 36, oblivious of the fact of the encroachment, in 1958 undertakes an improvement on *his* land. A careful survey discloses the building on lot 35 to encroach two inches on lot 36. Now, if the statute is free from

the objections we have urged under the last head, the owner of lot 35 may be obliged to move his building even though it has stood there openly, notoriously, and under claim of right for fifty years! In all likelihood, in such a case, the court would be strongly inclined to lay hold of the defects herein pointed out to defeat recovery by the plaintiff, but suppose the reviewing courts had already construed the statute (in a squatter case) as meaning that irrespective of whether the question of adverse possession comes into the case as a defense under the statute of limitations or to support a cause of action, the period of non-payment of taxes and special assessments by the adverse possessor on the *locus in quo* shall not be reckoned in computing the period of limitations? It would be difficult to escape the effect of such a decision.

Then there is another enigma to solve in practice, regardless of the scope judicial construction may give to the statute. Lands of some thirty different civic, public, and charitable organizations are exempt from taxation.<sup>13</sup> The authors of this article are presently interested in a case where lands were dedicated to a cemetery association in December 1907. Such lands, of course, are tax exempt. No improvements warranting special assessments have ever been made. At the time the cemetery association obtained the grant to the land, it immediately erected a fence on what it supposed to be the boundary line. As a matter of fact the fence extended fifteen feet over onto another's farm lands. Since then a few graves have been established which extend over onto the encroachment some few inches. The adjoining owner brought an action in ejectment in June, 1928. According to the tax records the acreage assessed against, and paid by the plaintiff, includes the strip on which the association encroaches.

If the statute of adverse possession is available to the plaintiff as replication to the statute of limitations, must it be construed as amending the statute exempting lands of cemeteries from taxation insofar as such lands have been acquired by adverse possession? Suppose the tables were turned: suppose the plaintiff held fifteen feet of land adversely as against the cemetery which, according to the tax records, is not assessed for taxation because shown as being cemetery ground? It is obvious that the defendant could not resist plaintiff's perfection of title thereto for failure to pay taxes, because there were

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<sup>13</sup> Sec's 14037-14046 Burns' R. S. 1926.

no "taxes and special assessments \* \* \* falling due on such land or real estate during the periods he claims to have possessed the same adversely." In that event, if the cemetery association is precluded, "What is sauce for the goose" is not always "gravy for the gander." The law would work unequally.

#### IV

#### ITS EFFECT ON EASEMENTS

The statute, *ex proprio vigore*, embraces easements by this language: "title or rights in and to such land." An easement, whether obtained by prescription or grant, is a right in land.<sup>14</sup> The most common easement, and, perhaps, considered in the aggregate, the most valuable, are easements of way, many of which are acquired by oral agreement (and often by writing which is never recorded) between adjoining owners, only years later to have a successor in title of one or the other seek their nullification. The statute of limitation, with its attendant presumption of a grant when applied to real estate, was designed to meet just such a situation—when the original owners are dead or beyond reach to establish the agreement. Now, when one acquires a right of way over another's land, whether by grant or oral agreement, it is the unique case for the dominant tenant to pay the taxes on the particular easement strip. Furthermore, such easements are often used in common by both servient—and dominant tenants. Therefore, if the scope accorded to this statute by construction is to cover both defensive—and offensive sides of a case, practically no easement can be established or enjoyed against the servient tenant unless either, (a), a grant in writing is made and of record; or, (b), a grant in writing is procurable as evidence; or, (c), the easement has, in some manner, been severed for tax purposes from the rest of the servient estate and taxed in the name of the dominant tenant; for how otherwise would the dominant tenant ever have an opportunity to pay the taxes, however willing he might be to do so?

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<sup>14</sup> *Indianapolis Southern Railway Co. v. Wycoff*, 51 Ind. App. 159 (161).

## V

## ITS ADJECTIVAL EFFECT IN PROCEEDINGS

We have intentionally avoided expressing an opinion on the questions of construction suggested in the several preceding divisions, to the end that before we utter our judgment, some possible operations of the statute might be envisaged. We are emboldened to suggest, after this brief survey, that the disinterested lawyer (a role we cannot fulfill now) and impartial jurist, working only for the greatest good to the greatest number, would conclude that a construction that limited the act to the very narrowest scope, would be the construction that should prevail. If such is the conclusion, then adjectivally considered, the statute is available only as a defense—where the adverse possessor (either by complaint or cross-action) takes the initiative—unless possibly in some proceedings which may be instituted under the new Declaratory Judgments Act.

If the statute is confined in its operation as last suggested, it may be administered without irreparable injury, to any party. While it will not accomplish against the squatter's unconscionable conduct what the interested legislators intended, it will hold them in *status quo* until a succeeding legislature can cure the defects by a proper amendment or by a new act.

Thus we again learn the wisdom of the watchword to the fellow who wants to squeeze through hurriedly a bill to cure this—or remedy that—or prevent such and such an evil: "analysis and cautious contemplation avoid paralysis by hasty legislation."

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