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# IN DEFENSE OF THE INDIANA ADVERSE POSSESSION ACT OF 1927

ALBERT H. GAVIT*

At its 1927 session, the Indiana Legislature enacted:

> "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."[1]

Two commentators who, in their words, are "presently interested" in litigation involving this act challenge this legislation in an article in the November issue of the Indiana Law Journal.[2] The act in question adds to the elements of adverse possession of land a further attribute: that the adverse possessor must have paid the taxes and assessments thereon during the period of his adverse occupancy thereof. In so doing, it is far from the novel and revolutionary step indicated in the article in question, as similar legislative provisions exist in at least eleven of our states.[3]

The article in question discussed the subject under five divisions, to-wit: 1. Its constitutionality. 2. Its effect on the squatter, 3. Its effect on line encroachments, 4. Its effect on easements, and 5. Its adjectival effect in proceedings.

A like treatment will here be pursued:

## I.

## ITS CONSTITUTIONALITY.

The constitutionality of the act post-actively being conceded in the article, discussion to that effect will not be indulged.

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* See p. 336 for biographical note.

1 Chapter 42, Acts 1927 Indiana Legislature.

2 Indiana Law Journal, November, 1928, Vol. IV, p. 112 *et seq.*

3 Arizona, Arkansas, California, Colorado, Idaho, Illinois, South Dakota, Texas, Utah, Washington and West Virginia. See 2 C. J. 203 and note 9.

## II.

### ITS EFFECT ON THE SQUATTER.

It is argued in the article in question that the act applies only if the adverse possessor takes the offensive and seeks to assert title, and that it affords no aid to a record owner in his action to quiet title; that is, if the adverse possessor chooses to remain on the defensive and not himself assert title, the true owner is to find no assistance in the act.

To arrive at such a position, the authors read into the act the italicized portion of "Hereafter in any suit *by an adverse possessor of lands* to establish title," whereas the statute itself contains no such limitation but broadly provides: "Hereafter in any suit to establish . . ."

Such general language in the act was obviously intended to cover both offensive and defensive efforts by either the squatter or the record owner. The act affords the squatter neither a cause of action, nor a defense to one by the record owner, unless the adverse possessor has paid the taxes and assessments.

"Hereafter in any suit . . ." is too broad and general a statement to permit of the construction contended for. *Any* suit means a suit by *any* person, be he true owner or otherwise. The act purports to cover all litigation on the subject no matter by whom brought and contains no exceptions. It is therefore difficult to believe that, in the face of such ambiguous language the courts would hold it applicable only to those cases where the squatter sues.

Any such construction would be in clear disregard of the evident intent of the legislature as expressed in the most general terms at its command, and would necessitate judicial legislation of the most flagrant sort.

The further contention is made that since the act provides a rule for "suits to establish title . . ." that it will be limited to actions to quiet title alone and that ejectment actions will be excluded. In other words, it appears to be urged that although under this act a court decreed the record owner to be the true owner free from any claim of the adverse possessor that it would be powerless to mould a judgment awarding possession to the successful party, provided only the squatter had had twenty years adverse possession without the payment of taxes.

To say the least, any such construction of the act would be technical to the degree of absurdity. Such reasoning, if ever

it had a place in the law, passed with our abolishment of the common-law forms of actions and the enactment of our Code. It is unthinkable that any court would decree that a squatter was in possession of another's land without right and at the same time hold that it was powerless to afford possessory relief.

The legislature itself has spoken on this very subject and has provided that the same rules apply to ejectment and to quieting title cases.[4] Likewise, the courts have so held, as evidenced by *Trittip v. Morgan,* 99 Ind. 269, 270, where it said: "The provisions on the subject of quieting title and recovering possession are too closely interwoven to be separated."

Even on the reasoning of the commentators in the November article, the act would not be inoperative in possessory actions. The record owner would first quiet his title, and then, using that decree as an adjudication that the other's possession was without right, would bring an action in ejectment.

Certainly, the principle that in one and the same action the courts will afford a suitor all the relief to which he is entitled, is too firmly entrenched in our code and decisions, for any such contention as is urged against the act in question ever to find judicial support.

III.

The article in question urges that since (as asserted) many buildings in Indiana, through inaccurate surveys, encroach a few inches on adjoining lands, that any legislation is unwise that does not give the encroacher, as a premium for his mistake, a fee ownership of his neighbor's land.

To begin with, the statute is not retroactive, and the errors of the old surveyors and platters that have heretofore ripened into titles, are not affected.

Second, with the improvements in surveying methods and equipment, it is a rare case that encroachments innocently occur on large or important building projects.

Third, security of titles is admittedly to be desired, and such result is more likely to be achieved by a definite legislative rule that holds a man to his own platted and recorded boundaries than does a rule that encourages courts from time to time to change those boundaries upon conflicting oral proof as to the past line of occupancy. It is better that boundaries be fixed by

[4] Burns R. S. 1926, Section 1155.

plat—(a method permitting of definite and accurate calculation at *any* time)—than that an owner be forever subject to the risk of some court fixing a jagged, meandering line, now on one side of the true line, now on the other, changing as each adjoining owner inadvertently trespasses on the other's lands for the statutory period.

If relief is to be given for the class of encroachments complained of in the article, it might better be done under the occupying claimant's acts than by holding that the trespasser acquires title without any compensation whatever being paid therefor.

It is submitted that the law should be construed to prevent the very thing the authors contend for—the acquiring of titles through slight encroachments that arose through error and mistake of the very party now making claim to title. Normally the law puts the burdens of a man's mistakes on himself and to apply that rule to encroachments does no violence to the general principles of equity. If hardship is to result from mistakes of survey, they may well be placed on the party responsible for the error rather than upon the adjoining owner who is free from fault.

The middle paragraph on page 117 of the article in question states that the authors are "presently interested" in a case in which a cemetery association had occupied a part of another's lands for nearly twenty years before the passage of the act without the payment of any taxes thereon. Complaint is made that since the adjoining owner might have acquired the cemetery's lands without paying taxes (since they are tax exempt), that a rule is unjust which sets a different standard for lands that are not tax exempt.

Necessarily, any law relating to adverse possession may work inequalities between adjoining owners. For example, adverse possession runs in favor of the state but not against it, and if my lands adjoin those of the state, I can never gain any of its lands by adversely possessing them, but it may gain title to a part or all of mine by similar possession.

The proportion of tax exempt lands to those not exempt is so small as to be negligible, and, even were we to assume that in the one case in a thousand involving a state of facts similar to their cemetery case that this act is unfair, we should still be far short of a just indictment of the statute as applied generally.

If one is able to overlook the fact in the authors' cemetery case that it was the cemetery and not the adjoining owner who made the mistake as to boundary, it might be suggested that the solution to their problem may lie in the branch of law dealing with easements rather than with fee ownership by adverse possession.

## IV.

## ITS EFFECT ON EASEMENTS.

Under the above subdivision the article under discussion urges that, for all practical purposes an easement can never be acquired under the Adverse Possession Act, because of the fact that it is only in the rarest cases that the easement is assessed for tax purposes separate from the fee, and that therefore the claimant of a prescriptive right by adverse possession will but rarely be able to comply with the requirement that he pay all taxes on the interest he claims in the land.

Their reasoning is again superficial. If there are no taxes assessed against the easement, then a prescriptive right to the same may be acquired by the statutory period of user without the payment of taxes. That which is not assessed for taxation, either by reason of being exempt or otherwise (as in the case of their cemetery lands), may be acquired without the payment of taxes.

Investigation of the authorities under adverse possession legislation requiring the payment of taxes, affirms the above reasoning. Thus in *Johnson v. Knott*,[5] the defendant claimed a right to drive piling upon plaintiff's lands to aid in the operation of a ferry and proved the statutory period of user thereof. The plaintiff replied that defendant's failure to pay the taxes prevented a prescriptive right accruing. The court disposed of the above contention as follows:

"I do not understand that the occupation extended over the entire premises in dispute, but that it consisted in maintaining the piling before referred to, and was insisted upon more in the nature of right to exercise the privilege than a claim to title to the land. Under that view, the general ownership of the land might be in the appellant and the respondent entitled only to an easement, in which case, the payment of taxes by the former would not be inconsistent with the alleged right of the latter. One person may have a liberty, privilege or advantage in the land of another for a special purpose arising out of grant or prescription, and a grant would be

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[5] 13 Oregon 308, 10 Pacific 418.

presumed upon the adverse user of such right for a period equal to the statute of limitations. From the evidence shown by the bill of exceptions I would infer that it was the use by the respondent of the premises, in the particular way mentioned, for the period of time claimed, upon which their plea of the statute of limitations was founded. In that case, it would be immaterial whether the appellant paid the taxes or not, as the ownership of the premises subject to such right would be in him."

Likewise, in considering this problem, the Supreme Court of California in *Humphreys v. Blasingame*,[6] where a right of way was involved, held:

"Plaintiff's use of the way under a claim of right was necessarily hostile, but it need not amount to an ouster or exclusion of the defendant from a right to use the way. The use of the way, if without right, is a trespass, which would have given the defendant a right of action, and that is all that is necessary to set the statute running, so far as a right of action is concerned," (cases cited), "so the payment of taxes is necessary to the successful assertion of title by adverse possession as provided now by statute; but that requirement does not apply to a mere easement, which is not separately assessed for the purpose of taxation."

## V.

## ITS ADJECTIVAL EFFECT IN PROCEEDINGS.

The above captioned division of the subject is disclosed upon reading to be a caution that the act be narrowly construed and to urge that the courts limit the act, by judicial construction, to a defensive aid to the record owner in suits brought by the adverse possessor to quiet title.

Earlier in their article, the authors had contended that from its own words the act necessarily must be so construed, a position now tacitly abandoned for one of entreaty to the courts that they so construe it.

As heretofore shown the act is not susceptible of any such narrow construction. It was intended to, and does, by its very words, apply to any suit to establish title, and this, of course, means whether brought by the record owner or the adverse possessor.

The act is neither novel nor unworkable. It has been tried in nearly one-fourth of our states, was designed to meet a real need in Indiana generally, it affords security and certainty of titles and boundary lines and removes from the field of litigation what has heretofore been a fertile source of controversy.

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[6] 104 Cal. 40, 37 Pacific 804.