#24.2

ANNOTATION

OWNER'S SURVEYING OF LAND AS ENTRY THEREON TOLLING RUNNING OF STATUTE OF LIMITATIONS FOR PURPOSES OF ADVERSE POSSESSION

by

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INDEX

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

3 AM JUR 2d, Adverse Possession §§ 89, 90

1 AM JUR PL & PR FORMS (Rev Ed), Adverse Possession, Forms 21 et seq.

ALR DIGESTS, Adverse Possession § 42

ALR QUICK INDEX, Adverse Possession

FEDERAL QUICK INDEX, Adverse Possession

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TABLE OF JURISDICTIONS REPRESENTED

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§ 1. Prefatory matters

[a] Scope

Since, in order that adverse possession may ripen into title, it is necessary to show that such possession has been continuous and uninterrupted for the full statutory period,[1] it has been held that the running of the statute of limitations will be tolled by the owner's entry upon the land where accompanied by an explicit declaration of his purpose to repossess himself thereof, or by such open and notorious acts of dominion as make that purpose manifest.[2]

It is the purpose of this annotation to collect cases discussing the question whether the owner's[3] surveying of the land was such an entry.[4]

[b] Related matters

Use of property by public as affecting acquisition of title by adverse possession. 56 ALR3d 1182.

Grazing of livestock or gathering of natural crop as fulfilling traditional elements of adverse possession. 48 ALR3d 818.

Adverse possession under parol gift of land. 43 ALR2d 6 (particularly § 11).

Adverse possession: sufficiency, as regards continuity, of seasonal possession other than for agricultural or logging purposes. 24 ALR2d 632.

Cutting of timber as adverse possession. 170 ALR 887.

Purchase of, or offer to purchase or to settle, outstanding title, interest, or claim as interrupting continuity of adverse possession as regards another title, interest, or claim. 125 ALR 825.

Adverse possession as affected by attempt during period thereof to change, or make more specific, the tract claimed. 115 ALR 1299.

Act of trespasser as interrupting adverse possession. 22 ALR 1458.

§ 2. Survey, without more, not sufficient entry

Generally, it has been held that the owner's surveying of land, without more, is not enough to interrupt the

1. See 3 Am Jur 2d, Adverse Possession § 54.

2. See 3 Am Jur 2d, Adverse Possession § 89.

3. The annotation is limited to the effect upon the continuity of adverse possession of an entry upon land by the record owner for the purpose of making a survey, and cases involving the question whether the surveying of land by the adverse possessor is an entry upon the land to support his claim of adverse possession are excluded herefrom, as are cases involving an intruder's surveying of land as an entry thereon tolling the running of the statute of limitations for purposes of adverse possession. For an annotation on the act of a trespasser as interrupting adverse possession, see 22 ALR 1458.

4. Cases involving the question whether a survey constitutes a disturbance of possession within the meaning of a possessory action statute are excluded herefrom.

continuity of possession so as to toll the running of the statute of limitations for the purposes of adverse possession.

Ark—Winter v Ragan (1936) 192 Ark 709, 94 SW2d 362.

Ky—Maysville & B. S. R. Co. v Holton (1897) 100 Ky 665, 39 SW 27.

La—New Orleans v Peterson (1962, La App) 142 So 2d 174.

Md—Rosencrantz v Shields, Inc. (1975) 28 Md App 379, 346 A2d 237, 76 ALR3d 1188 (recognizing rule).

NH—Alukonis v Kashulines (1952) 97 NH 298, 86 A2d 327.

Pa—Miller v Shaw (1821) 7 Serg & R 129 (recognizing rule); Hood v Hood (1855) 25 Pa 417; Hollinshead v Nauman (1863) 45 Pa 140; McCombs v Rowan (1869) 59 Pa 414.

RI—La Freniere v Sprague (1970) 108 RI 43, 271 A2d 819.

Wis—Illinois Steel Co. v Paczocha (1909) 139 Wis 23, 119 NW 550.

Holding that the making of surveys on behalf of a railroad which had obtained a right of way by deed failed to establish re-entry sufficient to interrupt the continued and actual adverse possession of the occupants, the court stated in Maysville & B. S. R. Co. v Holton (1897) 100 Ky 665, 39 SW 27, that the mere entry for the purpose of survey, or to drive down stakes, was not sufficient to divest the occupants of title who held the possession and claimed the property, or to give notice to the occupying claimants that the company was asserting a right of way over their farm.

And in New Orleans v Peterson (1962, La App) 142 So 2d 174, it was held that the mere fact that the owners' surveyor entered upon a strip of land for the purpose of establishing the corners thereof was not a disturbance of the actual possession of the railroad adverse possessor.

Again, in Rosencrantz v Shields, Inc. (1975) 28 Md App 379, 346 A2d 237, 76 ALR3d 1188, it was held that the entry upon the land by surveyors for the record owner did not, as a matter of law, interrupt the adverse possession, the court stating that in order to effect an interruption the entry must be made with a clear and unequivocal intent to challenge the adverse possessor and to retake possession. Although refusing to decide the question because the adverse possession was interrupted on another ground, namely, the successful defense of the subsequent trespass suit, the court pointed out that if entry by a record owner, in order to interrupt the continuity of adverse possession, must equal in dignity and character that which would be sufficient to initiate an adverse possession if the land were owned by another, it would be doubtful that the mere entry by surveyors for the owner upon the disputed land, standing alone, would be a sufficient entry under the statute to interrupt the adverse possession of the occupants.

Similarly, in Alukonis v Kashulines (1952) 97 NH 298, 86 A2d 327, it was held that evidence by the record holders' witness of a survey was not sufficient to establish, as a matter of law, such an exercise of dominion over the strip by its record owner as to interrupt the continuity of the adverse possession of the plaintiff and her predecessors in title.

In Miller v Shaw (1821, Pa) 7 Serg & R 129, it was held that although the entry on land to make a survey if made animo clamandi would toll the statute of limitations, nevertheless where it did not appear by what authority, or at whose request, a surveyor entered and made the survey,

and it did not appear whether there was an intent to enter in order to interrupt the possession of the defendant adverse possessor, the question was properly left to the jury, whose verdict in favor of the defendant was reversed on another ground. Rejecting the contention that the question was one of law for the court, the court pointed out that the facts were doubtful and that therefore the question was one for the jury.

In Hollinshead v Nauman (1863) 45 **Pa** 140, the court, in affirming a judgment in favor of the defendant adverse possessors, held that the trial court did not err in submitting, as a question of fact for the jury, the question whether the making of a survey by the plaintiff owner amounted to an entry sufficient to interrupt the running of the statute of limitations, and the court stated that a mere survey of land for the purpose of ascertaining its locality was not a sufficient entry to interrupt the statute; that there must be in addition something to show that the survey was made with the purpose of resuming possession, and the purpose must be unequivocally manifested; that since the evidence of an entry must rest in parol and since ejectment was the plain mode of recovering possession, there was reason for holding one who asserted an entry to full proof; that when the intent with which an act was done was doubtful, it must be left to a jury; and that it was so left in the present case and with instructions quite as favorable to the plaintiff as the case warranted.

Holding that the trial court erred in instructing the jury that if they believed from the evidence that the owner of the land entered for the purpose of making a survey, or for the exercise of any other act of ownership, such entry or entries would bar the running of the statute of limitations, because it would break the continuity of the possession, and destroy its peaceable character, the court stated in McCombs v Rowan (1869) 59 **Pa** 414, that the mere act of making a survey without it being animo clamandi, was not sufficient; that in the absence of any evidence of its object and purpose, a jury might well infer an intent to claim dominion; that the question must of necessity, however, as in all other questions involving intention, be left to the jury to determine, upon a consideration of all the circumstances; that the printed testimony did not distinctly state with what particular design the survey referred to in the present case was made, nor whether the plaintiff was present, or had notice of it; that, nevertheless, by affirming, without qualification, the instruction that an entry for the purpose of making a survey would bar the running of the statute, the question of the intent of the act, whether it was animo clamandi, was entirely withdrawn from the jury; and that it could not be doubted that the act might have been done diverso intuitu, simply to ascertain lines and corners of the adjoining tract, of which they were about to make partition.

In Douglas v Irvine (1863) 126 **Pa** 643, 17 A 802, the defendant, who claimed through one of the devisees of the owner of land, who died, proved an entry by the executors of the owner in 1869 for the purpose of making a survey as directed by the will of the deceased owner and the making of such survey, and claimed that if the statute had commenced to run in the lifetime of the owner, such entry would toll the statute. Rejecting this contention, the court stated that the survey made by the executors in 1869 was not such an entry as would

toll the statute; that it was not followed up by an ejectment within one year as required by an 1869 statute; that the verdict of the jury established the fact that the statute of limitations commenced to run in the lifetime of the owner; that when the statute commenced to run, no subsequent disability would stop it; and that it was clear, therefore, that the alleged entry, to have been of any avail, should have been followed up by an ejectment within one year thereafter, even though the parties in whose interest the entry was made were minors.

In La Freniere v Sprague (1970) 108 RI 43, 271 A2d 819, where the defendants caused a survey of their lot to be made, and notified the plaintiffs that the trees, bushes, and cesspool were on their land, it was held that the continuity of the required statutory period necessary to acquire title by adverse possession was not interrupted so as to toll the running of the statute of limitations, the court stating that the survey and the notice did not constitute a sufficiently substantial interruption to halt the running of the statute against the defendants. Pointing out that there was a paucity of cases on the precise issue of whether a survey and notice to the occupier constituted, as a matter of law, an interruption which would suffice to break the continuity sufficiently to toll the statute, the court stated that it found but one case bearing precisely on this issue, Alukonis v Kashulines (1952) 97 NH 298, 86 A2d 327 (supra), wherein the court held that the evidence was not sufficient to establish as a matter of law such an exercise of dominion as to interrupt the continuity of the adverse possession.

Rejecting the contention of the plaintiff owner that he disseised the defendant adverse occupant when the plaintiff, or some of its predecessors in title, had, on three occasions, gone on the land and made surveys locating houses and making plats, protracting such surveys over some months, the court stated in Illinois Steel Co. v Paczocha (1909) 139 Wis 23, 119 NW 550, that the first of the surveys, at least, was made by the city engineer and his assistant, although probably not in their official capacity; that the presence of surveyors locating points upon the property, although some of them were upon the property in question, was not so significant as to conclusively establish invasion of the defendant's possession sufficient to constitute a disseisin; that in a city such work was so frequent and was done so frequently under municipal sanction that the failure of an occupant of premises to protest against the entry on his premises for the purpose of measurement or running lines was not necessarily to be construed a submission to a title held by the employer of the surveyors, especially when, as in the present case, the acts of the surveyors were not clearly shown to have come to the knowledge of the occupant; and that the situation with reference to a lot fenced and occupied as residence and garden was very different from that discussed in Illinois Steel Co. v Budzisz (1902) 115 Wis 68, 90 NW 1019 (infra § 3), where the adverse possession was a rather vague assertion of sovereignty over a large area of wasteland with very inconsiderable and ambiguous acts of domination which might well be deemed contradicted by some months of surveying, driving stakes, etc., over the whole tract. The court also pointed out that any effect of such surveys as re-entry would seem to be denied by

a statute requiring re-entry to be followed by suit within one year.[5]

§ 3. Survey made with intent to recover possession is sufficient entry

Some cases have taken the position that where the surveying of the land by the owner was made with the intent of recovering possession, the entry is sufficient to interrupt the continuity of adverse possession so as to toll the statute of limitations.

Ky—Maysville & B. S. R. Co. v Holton (1897) 100 Ky 665, 39 SW 27 (recognizing rule).

Md—Rosencrantz v Shields, Inc. (1975) 28 Md App 379, 346 A2d 237, 76 ALR3d 1188 (apparently recognizing rule).

Pa—Miller v Shaw (1821) 7 Serg & R 129 (recognizing rule); Ingersoll v Lewis (1849) 11 Pa 212; Hoopes v Garver (1850) 15 Pa 517; Hood v Hood (1855) 25 Pa 417 (recognizing rule); Hollinshead v Nauman (1863) 45 Pa 140 (recognizing rule); McCombs v Rowan (1869) 59 Pa 414 (recognizing rule).

Wis—Illinois Steel Co. v Budzisz (1902) 115 Wis 68, 90 NW 1019.

Accordingly, in Ingersoll v Lewis (1849) 11 **Pa** 212, where there was an actual entry on the land by the agent of the owner with the avowed object of claiming the land, accompanied by an unequivocal act of dominion or ownership by making a survey with the knowledge and assent of the person in possession, it was held that the trial court erred in ruling peremptorily that the evidence was not sufficient to destroy the effect of the defendant's adverse possession. The court stated that if the jury believed these facts, the plaintiff was entitled to a binding direction that the statute of limitations was tolled; that an entry on land avoided the operation of the statute if accompanied by an explicit declaration, or an act of notorious dominion, by which the claimant challenged the right of the occupant; and that an entry to make a survey, animo clamandi, operated as a bar to the statute of limitations.

Similarly, in Hoopes v Garver (1850) 15 **Pa** 517, where there was evidence of an entry and survey of a whole tract of land, including the part in dispute, and the adverse possessor did not object to the survey or declare his claim to the part in dispute, but rather appealed to the owner that he knew that his father promised him that piece of land, it was held that the trial court erred in instructing the jury that the survey was not such an entry as suspended the operation of the statute of limitations, the court expressing the opinion that the act of entering on the land to make a survey with the intent of recovering possession would operate as a bar to the statute of limitations. The court stated that the trial court seemed to have considered that the question of adverse, continued, hostile, and visible possession had been submitted explicitly to the jury, but the court pointed out that the trial court, in assuming to instruct the jury, as a matter of law, that the entry on the land by the owner in the circumstances attending the survey, the interview with the adverse possessor, and the conversation and acts of the parties, did not suspend the operation of the statute, withdrew these material facts and circumstances from the jury, instead of submitting them

5. A Pennsylvania statute, similar to the Wisconsin statute mentioned, was also relied on in Douglas v Irvine (**Pa**), supra.

to the jury for their consideration with the instruction that if the proof of the entry, survey, declarations, and acts of the parties were satisfactory to the jury, it would operate to bar the running of the statute.

And in Hollinshead v Nauman (1863) 45 Pa 140, the court, after pointing out that a mere survey of land for the purpose of ascertaining its locality was not a sufficient entry to interrupt the statute of limitations, indicated that there would be such an interruption if in addition to the survey there was something to show that it was made with the purpose of resuming possession, and that the purpose was unequivocally manifested.

In Illinois Steel Co. v Budzisz (1902) 115 Wis 68, 90 NW 1019, the court held in its syllabus that an entry by the true owner upon premises not physically occupied adversely so as to permit physical disturbance thereof, the premises being marsh or overflowed land not enclosed and having no artifical objects thereon maintained by the adverse occupant, susceptible of physical visible interference, and a survey of the premises, stakes being located to indicate the boundaries thereof, and exploring and traversing the premises from day to day for a considerable period of time, animo clamandi, so as to reasonably charge the adverse occupant with knowledge that his possession was challenged and that an opportunity existed for him to vindicate it if he desired, were sufficient to break the continuity of the disseisin. The court stated that the entry upon the disputed territory was long continued and was characterized by acts that must have indicated to the adverse occupant the purpose thereof; that as to that part of the island not occupied by settlers, the circumstances of the agent exploring the entire region, calling upon all persons located thereon, proclaiming to them the true state of the title, going upon the territory upon many occasions as a matter of right and as an owner would naturally go, and for the notorious purpose of asserting title thereto, was sufficient as a matter of law to interrupt the adverse occupancy; that what acts would interrupt disseisin must necessarily vary with the character of the property involved, the same as the determination of what acts would constitute actual occupancy essential to adverse possession must so vary; that there were no fences on the particular property in controversy to be thrown down, no buildings to take possession of, no physical situations created by the adverse occupant that could well be disturbed, indicating an intent to reclaim possession, except by doing just what was done; that the premises were not occupied by settlers, being only open marsh or swampland, and largely covered by water; that all that the true owner could do to indicate that he challenged the right of any hostile claimant was to go upon the territory in the attitude of a true owner, demanding recognition by all wrongful occupants found thereon, continuing operations over such a length of time as to bring home to the attention of all hostile claimants that their claims were defied and that an opportunity existed for them to seek vindication if they supposed their claims to be legitimate; and that interference with adverse possession of property by going upon it habitually, ignoring such possession, if the nature of the property would not readily admit of any other way of asserting title, and continuing such way for such a length of time as to

clearly manifest a purpose to re-enter, would break the continuity of the adverse occupancy and turn to naught all such prior possession.

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