STATE OF VERMONT
ESSEX COUNTY, SS

DAVID MACLEAN	)	
	)	
V.	)	ESSEX SUPERIOR COURT
	)	DOCKET NO. S34-90Ec
RONALD DEVOST and	)	
FRANCINE DEVOST	)	

FINDINGS AND CONCLUSIONS

This matter came before the undersigned for final hearing on April 7 and 8, and July 20, 1994. Plaintiff was present and represented by Robert R. Bent, Esq. Defendant Ronald Devost was present and both defendants were represented by Duncan Kilmartin, Esq.

Findings of Fact

Based on the credible evidence, the court finds as follows:

1. Plaintiff is the owner of a parcel of land south of Wallace Pond in the Town of Canaan. Vermont Route 114 passes between Wallace Pond and the subject property. Plaintiff's property is also south of a series of camp lots along Route 114. Access to Plaintiff's property is via a 20 foot right of way that passes between two of the camp lots.

2. Defendants own a parcel of land abutting Plaintiff's land and to the east of Plaintiff's land. Defendants' property has direct access onto Route 114.

3. The subject of this action is an area of approximately 9.5 acres in between the two parcels and a part of one or the other of them. Both parties claim it as a portion of their property. Plaintiff brought this action

requesting that the court enter judgment declaring ownership in the Plaintiff. Defendants responded with a counterclaim with four counts: treble damages for cutting trees, trespass, attorneys fees, and common law conversion. During the trial, Defendants' claims for damages for cutting trees and conversion were dismissed, leaving the claims for trespass and attorneys fees.

4. In 1956, Plaintiff's land was purchased by one Lurvey as part of a larger tract including additional land to the west of Plaintiff's and north to Route 114. He subsequently subdivided and sold off portions separately, including creating some of the camp lots to the north of Plaintiff's land. In 1956, Defendants' land was owned by Rose Marshall. She had acquired it from her husband's estate in 1954; he had owned it since 1928 and had been a major landowner and developer in the vicinity of Wallace Pond. The dividing line between the parcels was a straight line running north and south and is hereafter referred to as the "70 rod line". It is described in the 1956 deed from Atherton to Lurvey. A 1944 aerial photo of the area shows that existing lots as shown by physical evidence at that time conformed to the deed descriptions of the lots. The 70 rod line dividing the land Lurvey bought and the Marshall parcel is visible in the 1944 photo. Also visible further to the east on the Marshall property is a line hereafter referred to as the "wandering fence line" that separated open farmland on one side and wooded land on the other, indicating that it was a pasture fence. The area east of the 70 rod line and west of the wandering fence line is the subject of this lawsuit.

5. In 1959, Joseph MacLean, Plaintiff's father, owned an auto body repair shop in Colebrook, New Hampshire. Lurvey, who was then the superintendent of the county farm in Coos County, New Hampshire, brought a truck in for repair and told Joseph McLean that he had a woodlot for sale. Joseph MacLean was

interested and they made an appointment to meet at the property, which they did. Lurvey and Joseph MacLean walked the lines of the lot Lurvey was offering for sale, which was a parcel Lurvey created out of what he had acquired in 1956. They started at the northwest corner of the parcel, which was south of the camp lots along Route 114, and walked to the northeast corner where there was a post. They walked south along the eastern line along an old fence line that went part way up (the land rises steeply to the south). They followed "spotted" trees all the way, a line of trees with blazes marked on them. They got to the southern boundary, which was land belonging to Jackson, and turned west, following the Jackson line to a corner post. They turned and walked north along the western line back to the northwest corner. Along the western line there were spotted trees, and an old fence line on the lower portion. Joseph decided to buy the woodlot. The year before, in 1958, Rose Marshall had sold her abutting property to the east to James Mulvehill, William Eberle, and Millard Duff.

6. Property was conveyed to Joseph and Ruth MacLean by deed of Erwin S. Lurvey and Ileda R. Lurvey, dated April 9th, 1959, which deed was recorded at Book T, Page 18 of the Canaan Land Records on April 14, 1959. The land is described as follows:

> "Beginning at a point where the northwest corner of land owned by one Millard Duff intersects the southerly bound of land owned by Harry Ladd, thence in a southerly direction along the said Duff westerly bound to the line of land owned by Charles Jackson; thence at approximate right angles in a westerly direction along the said Jackson line to the easterly boundary of land owned by Neil Gray; thence at approximate right angles in a northerly direction to an iron pin and land owned by the within grantors; said iron pin being located approximately two hundred thirty-five (235) feet from the northerly side of Vermont Route No. 114; thence at approximate right angles in an easterly direction along the southern most boundary of parcels of land owned respectively by the grantors, the Daniels', the Pomerleau's and the above-noted Harry Ladd to the point of

beginning.

Meaning and intending herein to convey a portion of the same premises conveyed to Erwin S. Lurvey and Ileda R. Lurvey by administrator's deed of Sumner E. Atherton, Jr., Administrator of the estate of Sumner E. Atherton, Sr., under date of December 13, 1956, recorded in Canaan Land Records, Volume S. Page 124.

The grantees are given a right-of-way to the within deed premises said right-of-way being approximately twenty (20) feet in width and running in a north-south direction from Vermont Route No. 114 to the premises conveyed and located between the west side of the plot owned by Harry Ladd and the east side of property owned by the Pomerleau's.

This conveyance is made expressly subject to the right previously granted to Harry Ladd for the use of a certain spring located on the premises conveyed herein and a similar right granted to the Pomerleau's for use of another spring located on these same premises."

6. If a licensed surveyor had surveyed the MacLean property at the time of purchase in 1959 pursuant to the deed description, the boundaries would have been as established by Defendant's expert, surveyor Paul Hannon, and shown on his 1989 preliminary drawing of Plaintiff's property. The easterly boundary would have been along the 70 rod line, and the westerly boundary would have been 36 rods, or 594 feet, to the west. The lines of spotted trees that Lurvey and Joseph MacLean followed in walking the lines of the property Lurvey was offering for sale were not on these lines. The line of spotted trees on the supposed easterly boundary was actually along the wandering fence line. The line of spotted trees on the supposed westerly boundary, hereafter referred to as the westerly spotted line, was actually further to the east than the lot line according to the deed.

7. Two ages of blazes are currently visible on the trees on the wandering fence line and the westerly spotted line. Recent aging of those blazes shows that one set was made in 1958, plus or minus two years; the other set was made within the last ten years. There is no evidence to establish who put either of

these sets of blazes on the trees, or for what purpose. Defendant's surveyor Hannon located two blazed trees along the 70 rod line. These were on a ridge with a steep dropoff. Otherwise, no other trees with blazes were found along the 70 rod line. As described below, the area has been logged extensively twice since 1959.

8. At the southern end of the wandering fence line is a squared off wood post, hewn in the manner used by surveyors for marking corners, leaning against a tree. Surrounding it are three trees with blazes facing toward the post. These are consistent with the practice of making "witness trees", which means putting blazes on trees surrounding a corner and facing it so that the trees bear witness to the significance of a corner as a corner. The age of the blazes is contemporaneous with those found on the wandering fence line and westerly spotted line. If properly done as a corner, the post should have had three sides rather than four, and should have been subscribed with a date, lot numbers, and the owners. The post and witness trees could indicate the work of a lazy surveyor or other person attempting to mark a corner. It bears resemblance to the work of a surveyor named Stone who used to work in the region. It appears to mark someone's opinion of a corner. To the west on the southern boundary a distance of 608 feet, and at the southern end of the westerly spotted line, is a pile of stones that could also signify someone's opinion of a corner, although not clearly so. This is 14 feet further than the distance of 36 rods, which is the width of the parcel according to the Atherton-to-Lurvey deed.

9. Plaintiff's surveyor, Jonathan Cowan, located two springs within the disputed area. These are consistent with the two reservations of spring rights Lurvey had previously conveyed to Ladd and Pomerleau referenced in the deed

from Lurvey to Joseph MacLean. They could indicate that Lurvey thought he owned the land on which the springs were located. There is no evidence of other springs on the Plaintiff's record title land. The Marshall land had several springs, and Marshall occasionally conveyed water rights to springs on his land when he created camp lots on Wallace Pond.

10. Plaintiff's surveyor located an old logging dray in the disputed area of the type used to haul logs out of the woods.

11. After he bought the property in the spring of 1959, Joseph MacLean contracted with Clyde Gray to put in a culvert and road along the 20 foot wide access right of way and into a landing area south of the Ladd lot. He bought a John Deere tractor-bulldozer and prepared to log the woodlot. He laid out roads for getting the logs to the landing area. He believed that his land was bounded by the wandering fence line on the east, marked by a line of spotted trees, and the westerly spotted line, also marked by spotted trees. The landing area he created and many of the logging roads were partly within the disputed area. In June of 1959 when he was at his landing one day, Millard Duff (one of the owners of the former Marshall property) approached him, introduced himself, and asked if Joseph MacLean might be interested in cutting stumpage on Duff's land. Their conversation took place within view of the wandering fence line. Nothing ever happened as a result of the conversation. (Later in 1959, Millard Duff sold his interest in the property to coowners James Mulvehill and William Eberle.) Joseph spent a lot of time at the property in the summer of 1959 cutting timber. He bought a logging dray to use in pulling the logs down to the landing with his tractor. His son David, who was then 6 years old, also came to the property often, as did his wife. Ruth MacLean took a photograph of Joseph and David with a pile of logs Joseph had

cut, and another picture of Joseph on his bulldozer with the lake in the background. Whether or not the pictures were taken precisely within the disputed area is not firmly established, but they were taken on or near the disputed area, which Joseph considered to be within the parcel he owned.

11. In the fall of 1959, Joseph MacLean had back problems that prevented him from continuing to log himself. He left the dray on the property where he had used it. He hired Neil Champagne to finish logging the woodlot. Neil Champagne used horses to yard the logs out to the landing, and hauled them with trucks from there. He worked continuously from the fall of 1959 through the winter and spring of 1960. He cut throughout the disputed area pursuant to Joseph MacLean's instructions. Portions of the land are very steep and there were portions left uncut, but in many areas he cut up to the wandering fence line on the east.

12. After the logging was complete, Joseph intended to turn the property into a tree farm and raise Christmas trees. In 1962 and 1963, he and David planted 2400 6" seedlings all over his land, including throughout the disputed area. From 1963 through 1968, Joseph and David worked on the property trimming what was left after the logging operation. Starting in 1968, they began shaping and trimming the developing Christmas trees. Joseph continued this activity for approximately six years. At some point the trees grew too big to be harvested as Christmas trees, and the MacLeans took Christmas trees only for personal use.

13. In 1963 or 1964, Joseph MacLean purchased a D4 caterpillar bulldozer, which he used to level off the landing area with the idea of creating a site for building a camp. He put in a culvert by the landing area and made a new road from the right of way to the new level area. The family used the property

for walks and picnics on the landing area. In 1964 and 1965, David MacLean was a boy scout and used the property with his boy scout troup for scouting activities.

14. In 1970, Joseph and Ruth MacLean were divorced and David lived with his mother. As part of the property settlement, the parcel was deeded to David, who was seventeen years old. He considered it family property, and his father Joseph continued to work on the property cutting brush and undergrowth, shaping the Christmas trees, and cutting Christmas trees and firewood for personal use. At some point Joseph showed David where he understood the boundaries to be. Joseph kept a boat on the lake, and parked on the roadway. He used the property several times a year, including walking over it during hunting season. Once after 1970, Joseph MacLean came across some hippies camping on the land. They had a tent and a fire, and were planning to be there for a week. Joseph MacLean decided they were doing no harm and gave them permission to stay but asked them to be careful with their fire.

15. David used the property for parties with his high school friends from the time he got his driver's license in 1969 until he graduated from high school in 1972. He also used the property for snowmachines, and rode dirt bikes around it from 1972 to 1974. He used the disputed area together with the undisputed part of his property. From 1974, when David was married, to 1984, he went on the property three or four times a year to cut firewood from the property for personal use. He was always on the disputed area because he used the landing for loading the wood. He also took Christmas trees each year. From 1980 to 1984 or 1985, David had an auto dealership specializing in four wheel drive sport vehicles. He took used sport vehicles such as jeeps he acquired in trade onto the property to drive around. He did this between five

and ten times.

16. In 1986, Joseph MacLean, acting on behalf of David, contacted Raoul Riendeau about logging the property again. Raoul Riendeau had worked in the woods for twenty years, and been self-employed for five years. He met Joseph MacLean at the property, and they walked the boundaries to identify them for Mr. Riendeau. On the eastern boundary, they followed a fence line and spotted trees "all the way up", and similar spotted trees coming down on the western boundary. Joseph MacLean directed Mr. Riendeau to cut the same area that had been cut before, and he told him to cut all merchantable wood: "anything you can make a dollar on." Joseph MacLean showed Mr. Riendeau the landing and the place where Joseph himself had loaded trucks years before, and he showed him the logging roads throughout the property, including the disputed area.

17. In September 1986, Raoul Riendeau brought his skidder to the property. He widened a bridge in the area of the right of way, replaced a culvert at the landing and levelled it off, and added gravel to the road in the vicinity of the landing. Using the existing logging roads, he logged the entire property from mid-September 1986 to December 1987. He left his skidder on the property the whole time, and parked his truck on the landing daily. He worked alone and full-time, except for an additional job selling Electrolux vacuum cleaners. He hired a man named Amey to haul the logs to the mill. He logged the entire disputed area as well as other MacLean land, using the existing logging roads. The area he logged was defined by the wandering fence line on the east and the westerly spotted line on the west. He worked randomly with no particular pattern, as he knew he had the entire area to cut. The best timber was in the middle of the lot, which probably included portions of the disputed area. No one ever told him he should not be cutting where he was. He

was aware that the land to the east had uncut timber on it. He was aware of the difference in the timber east and west of the line of spotted trees on the eastern edge of where he cut, or the wandering fence line. The wood was so good that he considered buying the land (now Defendants' land) for the wood, as the property was for sale for $60,000. He completed his work in December of 1987.

18. Ronald Devost has 28 years of experience as a logger and contractor. He has owned a number of logging lots, and has cut for others. Over the years prior to 1987, he and his family had purchased 3,000-4,000 acres of land for harvesting timber. In 1987 he knew that the land he now owns east of David MacLean was for sale. He already owned other land on Wallace Pond. His brother also owns 150 acres in the vicinity, some of it bordering his land. His intent was to buy the land, harvest it, and then subdivide and sell off lots. Before completing the purchase, he walked through the land to view the timber. He did not walk the boundaries, and did not walk to the west line. On July 8, 1988, he and his wife purchased the property, which they understood consisted of 60 acres, more or less, for $40,000. After he had bought the property, he then walked the lines. On the west line, he saw spots on the trees and could tell the line was not straight. He hired surveyor Paul Hannon to survey the boundaries. Paul Hannon prepared a map showing the 70 rod line as the "true line" of the western boundary. If the 70 rod line is established as the boundary between the MacLean and Devost parcels, he and his wife would own 71 acres. Without the 9.5 acres of disputed land, their parcel is close to 60 acres in size. He contacted David MacLean about their common boundary line. This lawsuit followed.

19. Defendants' expert testified about the extent of logging activity

evident on Plaintiff's property based on stereoscope examination of aerial photos of the area from the early sixties. The thrust of the testimony was that analysis of the aerial photos indicates that the logging done by Plaintiff in the disputed area in 1959-60 was not as extensive as described in witnesses's oral testimony. The court finds that the expert testimony based on the aerial photos is inconclusive, and that the oral testimony of witnesses about the extent of logging activity in the disputed area is more credible.

Conclusions

Based on the foregoing findings and consideration of the relevant principles of law, the court concludes as follows:

1. When Joseph MacLean purchased property from Lurvey in 1959, he did not acquire record title to the disputed area. In 1959, the disputed area was owned by Mulvehill, Eberle, and Duff. Joseph MacLean's eastern boundary was the 70 rod line.

2. In 1959, when Lurvey walked the boundaries of the parcel he was offering for sale with Joseph MacLean, Lurvey represented that he owned a parcel of land bounded on the east by the wandering fence line and on the west by the westerly spotted line, both of which lines were marked by blazes on trees along those lines. By this act, Lurvey "unfurled his flag" over the territory encompassing the disputed area. This claim of ownership was hostile to the record title ownership of Mulvehill, Eberle and Duff. It was announced openly through blazes on trees on the wandering fence line, and it was notorious in that the spotted trees constituted a visible and public display of the claim.

3. From 1959 to 1987, Lurvey, Joseph MacLean, and David MacLean, in an

unbroken line, continued to fly the flag of ownership over the disputed area as defined on the east by the spotted trees along the wandering fence line. They consistently engaged in acts of ownership over the disputed area: extensive logging in 1959-60; planting Christmas trees; cutting and trimming vegetation; building, rebuilding, and levelling a landing area for loghauling and site improvement purposes; cutting firewood; walking in the woods; granting permission to campers to use the property; snowmobiling; teenage partying; riding dirt bikes; driving sport vehicles; cutting Christmas trees; and extensive logging in 1986-87. While each one of these activities did not take place on every square foot of the disputed area, most of them entailed a pervasive presence throughout the entire disputed area as defined by the line of blazes along the wandering fence line. The difference in logging activity and resulting timber growth on the west side of that line as opposed to the east side reflects the clear line of demarcation adopted by the claimants.

4. A person acquires title by adverse possession through open, notorious, hostile and continuous possession of another's property for a period of fifteen years. 12 V.S.A. § 501; Jarvis v. Gillespie, 155 Vt. 633, 638 (1991). "The ultimate fact to be proved in an adverse possession case is that the claimant has acted toward the land in question as would an average owner, taking properly into account the geophysical nature of the land." Id. at 638-39 (quoting 7 R. Powell, The Law of Real Property, § 1013[2][h], at 91-62 (1990)). While it is necessary for an adverse claimant to "unfurl his flag on the land" in order to apprise the owner of the claim upon the land, it is not necessary that the claimant verbally state to the owner that he has "planted his standard of conquest." Zuanich v. Quero, 135 Vt. 322, 324-5 (1977). Quite to the contrary, his use or acts may declare that they are done under a claim of

right, as effectively as the words of the claimant. Id. at 325. In the absence of permission, the use of an established claim of right firmly establishes the hostility of that use. Hilliker v. Husband, 132 Vt. 566, 568 (1974).

5. The court concludes that as of 1974, David MacLean had acquired ownership of the disputed area through adverse possession based on his own use and the use of his father Joseph, which was open, notorious, hostile, and continuous for a period of fifteen years.

6. Plaintiff is declared owner of all property within the disputed area as defined herein, extending eastward to the line referred to herein as the wandering fence line and marked by blazes on trees.

7. Defendants' claims for trespass and attorneys fees are denied.

8. Plaintiff's attorney shall prepare an Order with a description sufficient to properly identify Plaintiff's property. If no objection to the proposed Order is filed within ten days, the Order will issue.

Dated at Guildhall, Vermont, this 7th day of ~~November~~ December, 1994.

Mary Miles Teachout
Mary Miles Teachout
Presiding Judge

Virginia P. Carr
Virginia Carr
Assistant Judge

FILED
DEC - 9 1994
ESSEX SUPERIOR COURT
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