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ADVERSE POSSESSION — POSSESSION UNDER MISTAKE AS TO TRUE BOUNDARY — Plaintiff and defendant's predecessor in title made a mistake in locating the boundary line between their lots. Laboring under this misapprehension, the plaintiff constructed a cottage which in fact was partially on land of defendant's predecessor in title. Defendant, having purchased the adjoining lot, caused a survey to be made and discovered that the cottage of the plaintiff and the wall constructed by plaintiff and defendant's predecessor encroached upon defendant's land. However, plaintiff remained in possession without admitting defendant's title and in 1937 sued to establish title by adverse possession. The lower court found that having been in possession for the statutory period of fifteen years he acquired title by adverse possession. *Held*, reversed, possession under mistake with the intent to hold only to the true line is not adverse. Two

judges dissented. *Warner v. Noble,* 286 Mich. 654, 282 N. W. 855 (1938).

The decision of the Michigan court in the principal case is supported by a number of cases,[1] but the view has been much criticized.[2] The early view that adverse possession could not be commenced by mistake was based on the analogy to disseisin.[3] The result obtained by the view adopted by the principal case is subject to attack from several angles. It places a premium on bad faith, i.e., he who intends to hold property regardless of the ownership is rewarded while he who intends to hold only that to which he has paper title will lose.[4] Moreover, if it is a pure mistake case, the determination of the intent of the possessor had he known of the mistake must be on a hypothetical basis. Probing into hypothetical intents is uncertain at best and will generally result in acceptance of a presumption laid down by the court.[5] The position of the Michigan court as to the element of hostility in cases of possession under mistake is uncertain. Where the possession up to a fixed line is affirmatively shown to be provisional or conditional, title to land beyond the true line will not be acquired by adverse possession.[6] An early Michigan case stated that possession under a mistake as to the true line would be presumed to be hostile,[7] and this view seems to be supported by more recent cases.[8] The decision in the principal case seems to place the presumption to be drawn from possession against the hostility of possession. This result is neither dictated by precedent nor supported by the sounder reason-

[1] Edwards v. Fleming, 83 Kan. 653, 112 P. 836, 33 L. R. A. (N. S.) 923 (1911); 80 A. L. R. 155 (1932); 97 A. L. R. 14 at 53 (1935). At least one writer has called it the "Kansas rule." Sternberg, "The Element of Hostility in Adverse Possession," 6 TEMPLE L. Q. 207 (1932). What is frequently referred to as the "Maine rule" is similar.

[2] 2 TIFFANY, REAL PROPERTY, 2d ed., § 505 (1920); Bordwell, "Mistake and Adverse Possession," 7 IOWA L. BUL. 129 (1922).

[3] Brown v. Gay, 3 Greenl. (3 Me.) 126 (1824); 21 L. R. A. 831 (1893), annotation to Preble v. Maine Cent. Ry., 85 Me. 260, 27 A. 149 (1893).

[4] This is true only to the extent that the possessor must show an unconditional intent to hold the land in order to acquire title by adverse possession. The presumption of the Michigan court in the absence of evidence either way would seem to favor the paper title.

[5] Evidence as to what the intent of the possessor would have been had he known there was some doubt as to his title is generally lacking, so the presumption made by the court will be the controlling factor.

[6] Bird v. Stark, 66 Mich. 654, 33 N. W. 754 (1887); Arduino v. City of Detroit, 249 Mich. 382, 228 N. W. 694 (1930) (plaintiff's predecessor in title had taken possession of two parts of an adjoining strip with intent to acquire title by adverse possession, but took possession of another small piece by mistake and so testified).

[7] "When the possession is by actual occupation of the possessor, or by his tenants, under claim of title, his possession is visible, open, notorious, distinct and will be presumed to be hostile." Greene v. Anglemire, 77 Mich. 168 at 172, 43 N. W. 772 (1889).

[8] Gildea v. Warren, 173 Mich. 28, 138 N. W. 232 (1912); Corbishley v. Gribben, 234 Mich. 304, 208 N. W. 34 (1926); Gould v. Fiero, 262 Mich. 467, 247 N. W. 719 (1933); Gregory v. Thorrez, 277 Mich. 197, 269 N. W. 142 (1936), noted 35 MICH. L. REV. 1164 (1937).

ing.[9] By means of the doctrine of acquiescence,[10] those jurisdictions accepting the view that possession under mistake is not hostile or will not be presumed to be hostile may reach the same result as courts following the contrary rule.

S. R. Stroud

[9] As stated supra, such a result is reached by many courts, but in view of Michigan precedent the court had ample opportunity to follow the wiser course and make possession the basis of a rebuttable presumption of hostility.

[10] Call v. O'Harrow, 51 Mich. 98, 16 N. W. 249 (1883); Bunde v. Finley, 224 Mich. 634, 195 N. W. 425 (1923); Hanlon v. Ten Hove, 235 Mich. 227, 209 N. W. 169 (1926); Renwick v. Noggle, 247 Mich. 150, 225 N. W. 535 (1929); Foster v. Wagenaar, 251 Mich. 370, 232 N. W. 212 (1930). But see, Edmunds v. Sughrow, 233 Mich. 400, 206 N. W. 309 (1925). Bordwell, "Mistake and Adverse Possession," 7 IOWA L. BUL. 129 at 135 (1922), says in regard to the Iowa decisions: "Since *Miller v. Mills County*, [111 Iowa 654, 82 N. W. 1038 (1900)] therefore, where one claims a boundary strip which he has been occupying by mistake, what he may fail to gain on the ground of adverse possession, he is very likely to gain on the ground of acquiescence." For other cases on acquiescence, see the annotation in 69 A. L. R. 1430 at 1491 (1930).