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RECENT DECISIONS

ADVERSE POSSESSION — TACKING POSSESSIONS OF LAND NOT INCLUDED IN DEED — MICHIGAN RULE — By agreement with plaintiffs' predecessor in title, defendants' grantor set out a hedge on what both parties believed to be the true dividing line between their respective lots but which was in fact seven feet south of the true line. Defendants' grantor occupied the strip up to the hedge for ten years and then sold the lot to defendants, at the time of sale pointing out to them the piece of property believed to be the lot he was selling. He delivered possession and a deed which did not include the seven-foot strip within its calls. Six years later plaintiffs had a survey made and, discovering the encroachment, brought ejectment. *Held*, that defendants were entitled to the disputed strip even though the deed did not include the strip and though it was given to defendants less than fifteen years before action was commenced. *Gregory v. Thorrez*, 277 Mich. 197, 269 N. W. 142 (1936).

The American courts, in dealing with the question of title by adverse possession, emphasize the merit of the adverse possessor rather than the demerit of the true owner, and almost uniformly insist upon privity between successive adverse occupants when it becomes necessary to tack several possessions to make up the statutory period.[1] They are not agreed, however, as to what constitutes sufficient privity to permit tacking. It is frequently said that a deed does not of itself create privity between the grantor and grantee as to land not described in the deed,[2] but this rule appears to be strictly limited to those cases where the deed alone is relied upon to create privity.[3] Hence the great majority of courts allow tacking when it is shown that there was an oral transfer of the possession of any property occupied adversely by the grantor and not included within the calls of the deed.[4] Michigan has long been reluctant to adopt this rule. In

[1] 2 TIFFANY, REAL PROPERTY, 2d ed., § 508 (1920). See 10 COL. L. REV. 761 (1910) for a comparison of the English and American theories of the statute of limitations and the corresponding requirements for acquisition of title by adverse possession. See also 9 HARV. L. REV. 279 (1895).

[2] Humes v. Bernstein, 72 Ala. 546 (1882); Messer v. Hibernia Sav. & L. Soc., 149 Cal. 122, 84 P. 835 (1906); Ely v. Brown, 183 Ill. 575, 56 N. E. 181 (1900); Sibley v. Pierson, 125 La. 478, 51 So. 502 (1910); Fleischmann v. Hearn, 141 Md. 463, 118 A. 847 (1922); Sheldon v. Michigan Central R. R., 161 Mich. 503, 126 N. W. 1056 (1910); Moore v. Helvy, 235 Mo. 443, 138 S. W. 481 (1911); Pohlman v. Evangelical Lutheran Trinity Church, 60 Neb. 364, 83 N. W. 201 (1900); Smith v. Reich, 30 N. Y. S. 167 (S. Ct. 1894), affd. 151 N. Y. 642, 45 N. E. 1134 (1896); Jennings v. White, 139 N. C. 23, 51 S. E. 799 (1905); Erck v. Church, 87 Tenn. 575, 11 S. W. 794 (1889); Cauble v. Halbert, (Tex. Civ. App. 1923) 254 S. W. 407; Vermont Marble Co. v. Eastman, 91 Vt. 425, 101 A. 151 (1917); Ryan v. Schwartz, 94 Wis. 403, 69 N. W. 178 (1896). See also Kramper v. St. John's Church, (Neb. 1936) 270 N. W. 478, where the deeds expressly excluded any of the claimed land.

[3] 46 A. L. R. 792 at 793 (1927).

[4] St. Louis S. W. R. R. v. Mulkey, 100 Ark. 71, 139 S. W. 643 (1911); Smith v. Chapin, 31 Conn. 530 (1863); Neale v. Lee, 8 Mackey (19 D. C.) 5 (1890); Rich v. Naffziger, 255 Ill. 98, 99 N. E. 341 (1912); Helmick v. Davenport, R. I.

Sheldon v. Michigan Central Ry.,[5] one of the early cases in which the question arose, the court stated the general rule to be that possessions cannot be tacked to make out title by prescription when the deed under which the last occupant claims does not include the land in dispute. It intimated that an oral transfer of possession might furnish the requisite privity for tacking, but refrained from deciding the point because there was no evidence of such a transfer. In *Gildea v. Warren*[6] the court reversed a ruling of the lower court which had directed a verdict for the record title-holder on the authority of the *Sheldon* case; it distinguished the facts by pointing out that here there was no exception of the disputed strip in the various conveyances and that there was evidence that the several grantees took possession of the strip, regarding it as conveyed; and it held that the case came within the reasoning of those decisions which had established the doctrine of long acquiescence in a boundary line. The *Sheldon* case was held to be controlling in *Lake Shore & M. S. Ry. v. Sterling*[7] and

& N. W. R. R., 174 Iowa 558, 156 N. W. 736 (1916); Wishart v. McKnight, 178 Mass. 356, 59 N. E. 1028 (1901); Fredericksen v. Henke, 167 Minn. 356, 209 N. W. 257 (1926); Davock v. Nealon, 58 N. J. L. 21, 32 A. 675 (1895); Belotti v. Bickhardt, 228 N. Y. 296, 127 N. E. 239 (1920); West v. Edwards, 41 Ore. 609, 69 P. 992 (1902); Rembert v. Edmondson, 99 Tenn. 15, 41 S. W. 935 (1897); Bateman v. Jackson, (Tex. Civ. App. 1898) 45 S. W. 224; Naher v. Farmer, 60 Wash. 600, 111 P. 768 (1910). Illinois Steel Co. v. Budzisz, 106 Wis. 499, 81 N. W. 1027, 48 L. R. A. 830 (1900). See also 2 WOOD, LIMITATIONS, 4th ed., § 271 (1916).

[5] Sheldon v. Michigan Cent. R. R., 161 Mich. 503, 126 N. W. 1056 (1910). The court stresses the fact that each deed from the original grantor through the intermediate grantees down to the defendant expressly excepted the strip in controversy, the record title to which had been conveyed to the railroad company. The court says at p. 510: "It is not necessary for us to decide whether any oral agreement to surrender a wrongful possession to the successor . . . would defeat an action to recover possession by the owner. . . . There was no transfer of any mere possessory right to the strip of land in litigation here, if any existed. No permission or authorization by Bell to Sheldon to take his place in possession of said litigated strip of land appears. The exception in the deed negatives such transfer, permission, or authorization. . . ." See 10 COL. L. REV. 761 (1910) for a criticism of this decision on the ground that privity, if necessary, was in fact present.

[6] 173 Mich. 28, 138 N. W. 232 (1912), noted in 11 MICH. L. REV. 245 (1913). "Acquiescence in a boundary line, standing alone, is not sufficient defense to an action of ejectment. . . . But where neighboring proprietors have composed their differences and in good faith agreed upon a line and have fixed their monuments, erected their fences and maintained them, the acquiescence need not continue for the statutory period in order to establish the line. . . . Where coupled with acquiescence is the further fact that it has continued for the statutory period, such acquiescence for such statutory period fixes the line." Hanlon v. Ten Hove, 235 Mich. 227 at 230, 209 N. W. 169 at 170 (1926). This doctrine was earlier announced in Smith v. Hamilton, 20 Mich. 433 (1870), and in Diehl v. Zanger, 39 Mich. 601 (1878).

[7] 189 Mich. 366, 155 N. W. 383 (1915), noted in 14 MICH. L. REV. 413 (1916) and 29 HARV. L. REV. 790 (1916).

was cited by way of dictum in *Wilhelm v. Herron* [8] and *Robertson v. Boylan.*[9] In *Bunde v. Finley* [10] five justices held that the lower court had charged the jury correctly on the question of establishing the boundary line by acquiescence, but sent the case back for a new trial because of the court's refusal to charge that defendant could not tack his possession to that of his grantor. The doctrine of acquiescence was again held to be the deciding factor in *Hanlon v. Ten Hove* [11] and *Jeffries v. Sheehan,*[12] although there was evidence, at least in the latter case, of an actual transfer of possession to the claimant. In only one case did the court squarely decide that privity exists between successive adverse occupants where there is a parol transfer.[13] The holding is supported only by the dictum of previous decisions, however,[14] and four of the justices merely concurred in the result. This decision is materially strengthened by the holding in the instant case, which places more emphasis upon the actual transfer of the disputed strip from grantor to grantee than upon the long acquiescence in the boundary line. In the light of these last two cases, it seems reasonably

[8] 211 Mich. 339, 178 N. W. 769 (1920). The facts indicate that claimant had been shown the boundaries which inclosed the disputed strip, and the contract under which he was in possession was in terms broad enough to include it. The court recognizes that these facts would constitute the requisite privity according to the majority rule, but states that even though claimant were allowed to tack his possession to that of his grantor, the period of occupancy would still fall short of the statutory period. Furthermore, there was some doubt as to whether he had actually held the land adversely.

[9] 214 Mich. 27, 181 N. W. 989 (1921). Claimant's grantor had obtained permission from the record title holder to use the disputed strip. Even though tacking were allowed, the possession would not have been adverse for the statutory period.

[10] 224 Mich. 634, 195 N. W. 425 (1923); noted in 22 MICH. L. REV. 601 (1924). Three justices dissented. Justice Moore, who dissented in the Sheldon case and approved the rule allowing oral transfer, points out that the disputed strip was not expressly excluded from the deeds to the claimant and his grantor, and also rests his dissent on the fact that the question was settled by acquiescence. In the latter the two other dissenting justices concurred, saying at pp. 638-639: "The case at bar is not one of tacking added land to the premises deeded defendants, but one of establishment, by long acquiescence, of the dividing line between lands owned by the parties. . . . I do not believe that the case should be sent back for a mere sifting of the blending elements of adverse possession and possession to a line by long acquiescence. The distinction is one of theory and not of substance."

[11] 235 Mich. 227, 209 N. W. 169 (1926), 46 A. L. R. 788 (1927); noted in 25 MICH. L. REV. 67 (1926).

[12] 242 Mich. 167, 218 N. W. 703 (1928). The court held that defendant's request for an instruction that plaintiff had no title by adverse possession should have been granted, and sent the case back for a new trial with the question of acquiescence as the sole issue. The land contract under which plaintiff held included the disputed strip, and the court suggested that plaintiff might therefore be allowed to tack to his vendor's possession. But since (p. 169) "there appears no conveyance of the strip in suit to plaintiff's vendor, so there can be no tacking of possession by others" prior to the date of sale to plaintiff.

[13] Arduino v. City of Detroit, 249 Mich. 382, 228 N. W. 694 (1930).

[14] Sheldon v. Michigan Cent. Ry., 161 Mich. 503, 126 N. W. 1056 (1910); Maes v. Olmsted, 247 Mich. 180, 225 N. W. 583 (1929).

certain that the Michigan court will henceforth permit tacking where there is clear evidence of an actual parol transfer of the possession of land adversely held but not described in the deed. The adoption of this rule will prove to be of great importance in those cases to which the doctrine of acquiescence cannot be applied.[15]

[15] See supra, note 6.