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ADVERSE POSSESSION-POSSESSION UNDER MISTAKE AS TO TRUE BOUNDARY

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ADVERSE POSSESSION—POSSESSION UNDER MISTAKE AS TO TRUE BOUNDARY—Land purchased by the plaintiff's husband in 1911 was surrounded by a fence which included the land in dispute. All of the enclosed area was of a different grading from the land to the west of it. The plaintiff's husband cultivated the area later disputed, tore down buildings on it and improved the entire property during the succeeding seventeen years. When the defendant purchased the adjacent land in 1935 the dividing fence was down but the difference in grading between the two parcels of land remained the same. The defendant, after a survey was made of the land in 1939, occupied the disputed area. In the ejectment suit brought by the plaintiff the lower court gave judgment for the plaintiff and denied the defendant a directed verdict and a motion for a new trial. Defendant appealed. *Held*, affirmed. Title may be gained by adverse possession even though there is mistake in marking out the boundaries. *Yatczak v. Cloon*, 313 Mich. 584, 22 N.W. (2d) 112 (1946).

Although the facts squarely presented the issue, the court did not discuss the question whether possession of adjoining land under a mistaken belief that it is part of the possessor's land is hostile and, therefore, adverse. The problem whether the intention of the possessor limits his claim has been the subject of a sharp split of authority[1] and confusion in Michigan cases. The majority of

[1] 4 TIFFANY, REAL PROPERTY, 3d ed., §1159 (1939).

American courts following the doctrine of *French v. Pearce*[2] hold that such possession is hostile and adverse even though the person possessed the property innocently believing it to be his own when in fact it was not. The minority view, typified by *Preble v. Maine Central Railway Co.*,[3] maintains that possession up to the true line with the intention to hold only to the true line is not hostile and will not ripen into ownership, no matter how long continued. This position has been severely criticized for its emphasis on the subjective intent of the possessor.[4] Early Michigan cases, while not discussing the element of mistake, held that possession up to the mistaken boundary for the statutory period under a claim of right amounted to adverse possession.[5] Also in early cases there developed the doctrine of acquiescence by which if one occupied the land of his neighbor for the statutory period up to the line supposed to be the true line, that line was taken to be the true line between adjoining land owners.[6] This acquiescence viewpoint was crystallized in *Hanlon v. Ten Hove*.[7] The lack of actual hostility common to both acquiescence and occupancy under mistake has tended to confuse the two doctrines.[8] However, in *Arduino v. City of Detroit*[9] where the plaintiff had by mistake fenced in a part of adjoining lots in the subdivision and a part of a subdivision adjacent to it with the intention to claim title to the portion of the adjoining lots only, the court decided that in order to claim title to the portion of the adjacent subdivision there must be an intention to claim that portion as of right, which intention did not here appear: as to the adjacent subdivision, then, there was no adverse possession. This decision was followed by *Gould v. Fiero*[10] in which the defendant had occupied the disputed area by planting trees and shrubbery along the presumed boundary line. There the court found that the defendant intended to claim the strip as his own and, therefore, acquired title by adverse possession. Two years later in *Gregory v. Thorrez*[11] the court stated that one may gain title to land by adverse possession even though there was a mistake in the establishment of the boundary. Other language in the

[2] 8 Conn. 439 (1831).

[3] 85 Me. 260, 27 A. 149 (1893).

[4] 11 ROCKY MT. L. REV. 214 (1939); Darling, "Adverse Possession in Boundary Cases," 19 ORE. L. REV. 117 (1940).

[5] Bunce v. Midwell, 43 Mich. 542, 5 N.W. 1023 (1880); Hockmoth v. Des Grand Champs, 71 Mich. 520, 39 N.W. 737 (1888); Greene v. Anglemire, 77 Mich. 168, 43 N.W. 772 (1889); Carpenter v. Monks, 81 Mich. 103, 45 N.W. 477 (1890); Pugh v. Schindler, 127 Mich. 191, 86 N.W. 515 (1901).

[6] Smith v. Hamilton, 20 Mich. 433 (1870); Joyce v. Williams, 26 Mich. 532 (1873); Gildea v. Warren, 173 Mich. 28, 138 N.W. 232 (1912). 39 MICH. L. REV. 614 (1941). This application of the doctrine of acquiescence should be distinguished from one in which the two adjoining owners are in dispute as to the boundary, fix the boundary and occupy up to it. This is taken to be the true line even though occupancy has not lasted for the statutory period.

[7] 235 Mich. 227, 209 N.W. 169 (1926), noted 25 MICH. L. REV. 67 (1926).

[8] Gregory v. Thorrez, 277 Mich. 197, 269 N.W. 142 (1936), noted 35 MICH. L. REV. 1164 (1937).

[9] 249 Mich. 382, 228 N.W. 694 (1930).

[10] 262 Mich. 467, 247 N.W. 719 (1933).

[11] 277 Mich. 197, 269 N.W. 142 (1936), noted 35 MICH. L. REV. 1164 (1937).

opinion indicates, however, that there had been acquiescence for longer than the statutory period and that may have been the true basis of the opinion. In 1938 the pendulum swung the other way when in *Warner v. Noble* [12] possession was not found to be hostile where there had been a mistake in locating the boundary of the parcel of land occupied for more than the statutory period and where extensive improvements had been made thereon by both parties. Two justices dissented, claiming that mistake was immaterial and that the character of the entry was determinative. Thus, in the principal case, without a definitive statement as to the character of the mistake doctrine, the court has swung away from this position taken by the minority and has indicated that possession under a claim of right up to a boundary which is incorrect but made under mistaken belief that it was the true line amounts to adverse possession. With fluctuations of attitude the Michigan court apparently has returned to the fundamental ground of the early decisions, one of which stated: "When possession is by actual occupation of the possessor, or by his tenants, under claim of title, his possession is visible, open, nortorious, distinct, and will be presumed to be hostile." [13] How strong the presumption of hostility is remains an open question in the light of decisions based on the subjective intent of the possessor.

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[12] 286 Mich. 654, 282 N.W. 855 (1938), noted 37 MICH. L. REV. 1124 (1939).

[13] Greene v. Anglemire, 77 Mich. 168 at 172, 43 N.W. 772 (1889).