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Adverse Possession- Mistake in Boundary Disputes - Tamburo v. Miller - Ervin v. Brown - Hub Bel Air, Inc. v. Hirsch, Bishop v. Stackus, Ridgely v. Lewis

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Adverse Possession — Mistake In Boundary Disputes

Tamburo v. Miller[1]
Ervin v. Brown[2]
Hub Bel Air, Inc. v. Hirsch[3]
Bishop v. Stackus[4]
Ridgely v. Lewis[5]

The courts of this country have long been in conflict on the question of whether there can be an adverse possession where the adverse possessor has occupied beyond his boundary line as the result of a mistake in the location of that boundary. The five cases presently noted, which were decided recently by the Court of Appeals, have clarified Maryland's stand in this conflict.

In *Tamburo v. Miller,* the plaintiff had brought suit in trespass *q.c.f.* for that the defendant adjoining lot owner had occupied ground beyond the confines of his deed onto the property of the plaintiff. The defendant, when he originally purchased his lot, had erected a fence around his property connecting wooden pegs which he had erroneously thought to signify his boundaries; and he had later built a boat-house partially on the property of the defendant. The argument raised by the defendant, both as a defense and as the ground for a counter claim in trespass, was that he (defendant) had gained title by an adverse possession for the twenty year period of the statute of limitations. The plaintiff, in turn, contended that since the defendant had occupied beyond his boundary as the result of a mistake, there was not such an adverse possession to have ever started the statute running. The Court of Appeals held that the mistake was immaterial, and that the adverse occupation for the twenty year period had vested title in the defendant. In the words of the Court:

> "The modern trend and the better rule is that where the visible boundaries have existed for the period set forth in the statute of limitations, title will vest in the adverse possessor where there is evidence of unequivocal acts of ownership. In this view it is immaterial that the holder supposed the visible boundary to be correct or, in other words, the fact that the possession

[1] 203 Md. 329, 100 A. 2d 818 (1953).
[2] 204 Md. 136, 102 A. 2d 806 (1954).
[3] 203 Md. 637, 102 A. 2d 550 (1954).
[4] 206 Md. 493, 112 A. 2d 472 (1955).
[5] 204 Md. 563, 105 A. 2d 212 (1953).

was due to inadvertence, ignorance, or mistake, is entirely immaterial."[6]

In *Ervin v. Brown,* the doctrine was followed, the only substantial difference in the case being that there the disseisor occupied up to a hedge planted by the disseisee rather than himself. The Court held that there being evidence justifying a finding of adverse possession, it was immaterial that it arose from a mistake.[7]

The same question was raised as to a small strip of ground between two buildings in *Hub Bel Air, Inc. v. Hirsch, supra.* The Court, regarding the question as now being settled, disposed of it by saying that the argument was answered by the *Tamburo* case.[8] By holding the mistake to be immaterial in these cases, the Maryland Court has repudiated the view which considers the mistake a weighty factor in determining if there is a sufficient *intent* to constitute an adverse possession.

Though having been criticized for the commission of an historical error,[9] the courts in this country had long been uniform in holding that two of the essential elements of an adverse possession are that the occupation be with a *hostile*

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[6] Tamburo v. Miller, *supra,* n. 1, 336.

[7] Ervin v. Brown, *supra,* n. 2, 143, 144.

[8] Hub Bel Air, Inc. v. Hirsch, *supra,* n. 3, 645.

[9] Bordwell, *Mistake and Adverse Possession,* 7 Iowa L. Bull. 129 (1922). The author argues that the American conception of adverse possession has been from the affirmative approach of the party in possession being vested with a new title rather than the English negative approach of limitations running against the old title of the party out of possession. This, he says, is the result of confusing *adverse possession* with the common law conception of *disseisin,* which, when repudiated by Lord Mansfield in the case of Taylor v. Horde, 1 Burr. 60, 97 Eng. Rep. 190 (1757), gave rise to the modern concept of adverse possession. The American error resulted from the:

> ". . . identification of adverse possession with the old disseisin and a reading into adverse possession of Coke's old definition of a disseisin (Co. Lit. 153b) to the effect that 'a disseisin is when one enters, intending to usurp the possession, and to oust another of his freehold'."

This led to the unfortunate "impression that in order for title to be gained by adverse possession the land must be held with an intent consciously hostile to the true owner", Bordwell, *ibid,* 132, *circa,* fn. 21. See also articles by the same author in 34 Harv. L. Rev. 592 and 717 (1921) and 33 Yale L. J. 1 (1923); and City of Rock Springs v. Sturm, 39 Wyo. 494, 273 Pac. 908 (1929).

A possible manifestation of this may lie in the fact that as a matter of pleading, the statute of limitations for adverse possession may be raised under the general issue plea in Maryland, whereas it must otherwise be specially pleaded. 1 POE, PLEADING AND PRACTICE (5th ed., 1925), Sec. 275; Md. Code (1951), Art. 75, Sec. 76; Hub Bel Air, Inc. v. Hirsch, *supra,* n. 3, 641-642. The inference may be that the defendant's showing limitations and title in himself is denial of the plaintiff's allegation of title or possession, whereas a plea of limitations in other cases is merely an allegation that an otherwise valid cause of action is barred by lapse of time.

intent, and *under a claim of right or title.*[10] Thus, the general rule is that:

> ". . . to constitute an actual disseisin, there must not only be an unlawful entry . . . but it must be made with an *intention* to dispossess the owner, . . . Thus . . . the *quo animo,* in which the possession was taken, is a test of its adverse character; and before one's possession is pronounced adverse, it must be found that he *intended* to hold in hostility to the true owner."[11]

In applying this principle to the *mistake* cases, many courts reasoned that where one had occupied beyond his boundary through a mere inadvertence, there was lacking the necessary hostile intent to claim against the true owner. *Mistake* and *hostile intent* were said to be mutually exclusive of one another;[12] "the mere fact that the occupation is by pure mistake precluding any possibility of there being a possession hostile to . . . a consciously considered individual".[13]

However, this in itself did not entirely preclude the possibility of an adverse possession in the majority of courts following this view, for a further distinction was drawn from which could yet be found a hostile intent. This distinction was whether the mistaken possession was under a *conditional* intent to claim title to the boundary occupied, or under an *absolute* intent to do so; that is, whether the intent was to claim only if the mistakenly-chosen boundary *was* the *correct* line, or whether the intent was to claim *regardless* of its being the true line. If the latter, the possession was adverse; if the former, it was not.[14] Washburn described the distinction thusly:

> " '. . . if the limits of the occupation be fixed with the intention of claiming them as *the* boundaries, the statute runs; but if the occupation and delimitation of the boundaries appear to be merely provisional, with

[10] Bordwell, *supra,* n. 9, 130-1; Tamburo v. Miller, *supra,* n. 1, 335; Bishop v. Stackus, *supra,* n. 4, 498.

[11] 3 WASHBURN, REAL PROPERTY (5th ed., 1887) 139, and to the same effect at 149:

> ". . . this intent to claim and possess the land is one of the qualities essential to constitute a disseisin."

[12] The argument putting relevance on the mistake is:

> ". . . that to make the possession adverse and constitute an ouster there must be an intent to disseise the owner, and that the belief that they owned to the line to which they occupied negatives such an intent, and their occupation will therefore be presumed to be in subordination to the title of the true owner."
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> Searles v. De Ladson, 81 Conn. 133, 70 A. 589, 590 (1908).

[13] Comment, 31 Yale L. J. 195, 196 (1921).

[14] 4 TIFFANY, REAL PROPERTY (3rd ed., 1939), 471-2.

> the intent to claim them as boundaries if they are found to be the proper boundaries, then the statute does not run'."[15]

This view — repudiated first in the *Tamburo* case — was the view which had been followed by the early Maryland cases. In *Cresap v. Hutson*,[16] it was said that where two brothers had erroneously approximated the boundary between the portions of a tract devised to each by their father, the mistake prevented an adverse possession by the one who was occupying beyond his true line. And in *Davis v. Furlow*,[17] the Court of Appeals upheld a prayer granted by the lower court that if the defendant's predecessor had occupied the land, supposing it to be the land in the deed, and without the intent to occupy land outside the lines of the deed, then it did not constitute an adverse possession. The Court said:

> " 'A disseisin cannot be committed by mistake, because the intention of the possessor to claim adversely is an essential ingredient of a disseisin'."[18]

In *Sadtler v. Peabody Heights Co.*,[19] the defendant in ejectment was held to have acquired title to a closed roadbed between two of his lots, even though he occupied under the mere belief that it was his, because he had taken possession with the hostile intent to claim it whether it was really his or not. In *Jacobs v. Disharoon*,[20] the plaintiff had purchased a portion of a large tract and occupied the land according to the boundaries marked on the ground by a surveyor in the presence of the grantor and the plaintiff. In the deed, instead of describing the plot as so marked on the ground, the grantor erroneously described boundaries the parties had earlier discussed but discarded. The Court, after discussing the distinction between *conditional* and *absolute* intent in *mistake* cases,[21] held that this plaintiff had the necessary hostile intent to claim the land for which he had paid.[22]

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[15] As quoted in Jacobs v. Disharoon, 113 Md. 92, 98, 77 A. 258 (1910). See also Tamburo v. Miller, 203 Md. 329, 336, 100 A. 2d 818 (1953); Ervin v. Brown, 204 Md. 136, 143-4, 102 A. 2d 806 (1954).

[16] 9 Gill 269 (Md., 1850).

[17] 27 Md. 536 (1867).

[18] *Ibid*, 545.

[19] 66 Md. 1, 10 A. 599 (1886).

[20] *Supra*, n. 15.

[21] As appears in the quotation, *ibid*, 98.

[22] In the Tamburo case, *supra*, n. 15, at 336, the Court seemed to rely on Jacobs v. Disharoon as authority for the view that the mistake is immaterial, when it states the holding in that case to have been:

Criticism of the old view has been levelled at its practical result, in that it rewards only the evil intent. Though the law seldom allows a man to profit by his own mistake to the detriment of another, by excluding mistaken possession from the doctrine of adverse possession, that doctrine thereby limits its protection to the thief who would "steal" the land of his neighbor with a "felonious" intent.[23] It has also been said that the old view's emphasis on the mental attitude of the possessor is unwarranted, for it is the running of limitations against the true owner's action in ejectment which is the important factor.[24] But even assuming that the intent element is an important factor to be considered — for the courts uniformly require some hostile intent to claim against the true owner — the analysis of the courts following the old view is fraught with theoretical inconsistencies, and impracticalities of evidence and proof.

By searching the evidence to determine if the occupier's intent was *conditional* or *absolute*, the courts adhering to the old view disregard the rule that a man's intent should be determined by his *objective manifestations* rather than his *subjective thoughts*. Here the objective intent appears from the very act of possession and the degree and character thereof. As Justice Holmes, speaking for the Massachusetts Court, said:

> ". . . he will not be the less a disseisor . . . because his occupation . . . is under the belief that it is embraced in his deed. His claim is not limited by his

". . . that one who continuously asserts ownership within an enclosure for more than twenty years in exclusive, notorious and actual hostile possession, would not be required to surrender the title by adverse possession merely because of his possession by mistake."

This would appear to be an improper reliance. Not only did the Court in the Jacobs case rationalize the problem under the old view of materiality of mistake and "alternative intent", but also the case is not the traditional situation of the mistake case: it was not so much a mistake in possession as a *mistake in the deed*, for which equity may accord reformation. The Court in the Jacobs case, *supra*, n. 15, 98, evidently was influenced by such nature of the mistake, for it said:

". . . to hold that one who purchases . . . and continues for . . . twenty years, in . . . hostile . . . possession . . . asserting his claim to it . . ., must surrender it because of some *defect in his deed* would largely do away with title by adverse possession." (Italics supplied.)

[23] 80 A. L. R. 157; 97 A. L. R. 14, 20-21. The latter annotation contains a voluminous collection of cases of both the old and new views. See also City of Rock Springs v. Sturm, 39 Wyo. 494, 273 P. 908 (1929); and Bordwell, *Mistake and Adverse Possession*, 7 Iowa L. Bull. 129 (1922).

[24] 3 AMERICAN LAW OF PROPERTY (1952), 789. The author criticizes the authorities following the old view because:

"They are necessarily wrong as a matter of legal principle because they disregard the plain operation of the statute of limitations which alone gives title by adverse possession."

See also Bordwell, *ibid.*

> belief. Or, to put it in another way, the *direction of the claim to an object identified by the senses as the thing claimed overrides the inconsistent attempt to direct it also in conformity to the deed,* just as a similar identification, when a pistol shot is fired or a conveyance is made, overrides the inconsistent belief that the person aimed at or the grantee is some one else."[25]

Not only does such a rule depart from the tests applied in other fields of law,[26] but the question of whether there was a mere *conditional* intent to possess to the true boundary is difficult and often insusceptible of proof. In the early and well reasoned case of *French v. Pearce,*[27] the Connecticut Court criticized the adoption of this rule, pointing out:

> "The enquiry no longer is, whether *visible* possession, with the intent to possess, . . . is a disseisin; but from this plain and easy standard of proof we are to depart, and the *invisible* motives of the mind are to be explored."[28]

Perhaps it is too lenient to say that *conditional* or *unconditional* intent is "insusceptible of proof". For in actuality, one who possesses land beyond his boundary under the mistake that it is his own can have but one intent. He holds it as he holds the land contained in his deed, intending to claim it against all the world, for he is unaware of any difference in the two. Since he labors under mistake and ignorance, he does not conceive of the possibility that it may not be his. The thought never enters his mind of whether he claims the land only upon its being the true boundary. "He has no positive or conscious intention, one way or the other."[29] Hence, the attempt to prove which

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[25] Bond v. O'Gara, 177 Mass. 139, 58 N. E. 275, 276 (1900). (Italics supplied.)

[26] Tiffany points out that even in other phases of the law of adverse possession, the intent factor is not so applied. Why should more weight be given the mistake in boundary cases than where the mistake goes to the title to a whole tract? 4 TIFFANY, REAL PROPERTY (3rd ed., 1939) 475, fn. 56. The author cites the following from 2 DEMBITZ, LAND TITLES, 1937:

> "If possession through mistake were held not to be adverse, very little room would be left for the statute of limitations, for almost every man who buys land under a bad title labors under the mistaken idea that his deed is good and effectual."

[27] 8 Conn. 439 (1831).

[28] *Ibid,* 445. (Italics supplied.)

[29] 97 A. L. R. 14, 20. And in City of Rock Springs v. Sturm, *supra,* n. 23, 913, it was said:

> "Not knowing of the mistake, an intent to correct the line . . . when the true boundary is . . . discovered is hardly conceivable . . . So far as any mistake is concerned, that is not likely to enter his mind. What-

of the two intentions he had is merely a hypothetical question in retrospect: what would his intent have been had he known of his mitake?[30]

Such speculation raises a further objection in that it encourages fabricated testimony and puts the honest and uncoached party-witness at a disadvantage. Given the choice on the witness stand, between two intentions of which he had neither, he is likely to select the "morally better" one, that he merely intended to occupy to the boundary if it were the correct line, and thereby defeat his case.

A learned writer, in discussing these problems, has argued that the analytical error committed by the courts which follow the old view has been the failure to distinguish two different situations: (1) a *pure mistake* and (2) a *conscious doubt.*[31] In the latter, *conscious doubt,* the individual who oversteps his boundary has a conscious uncertainty of the exact line; therefore, he is aware that he may commit error. In such a situation, he will have either a *conditional* intention or an *absolute* one, and, hence, it is proper to determine which of the two he in fact had. But in the case of *pure mistake* — the situation in the majority of the cases — there is no possibility of such an alternative, because he is unaware that he has overstepped his line.

It is hoped that the Maryland Court, in repudiating the older view in the mistake cases, will nevertheless distinguish it from the *conscious doubt* situation. The quarrel with the old view of the *mistake* cases is that they sought to distinguish between two types of intent where there could be only one possible intention. But in the *conscious doubt* cases, where the intent could be conditional or absolute, a failure to so distinguish would be as unfair to the disseisee as the old mistake view was to the disseisor.

Thus it would seem that although the Maryland Court failed to utilize an opportunity to distinguish *conscious doubt* from *pure mistake* in *Bishop v. Stackus,*[32] there is

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ever affirmative psychological attitude he may be said to have is an intent to claim the land, though not from anyone else, since he already considers it his own."

[30] In Bayhouse v. Urquides, 17 Ida. 286, 105 P. 1066, 1068 (1909), the Court said:

"Neither the courts nor anyone else can tell or conjecture what the party might have intended to do in the event he discovered later that he had been mistaken as to the true line. If he acted in ignorance of the true line and in good faith, then of course he could have had no intention whatever with reference to a possible future discovery of any mistake. So far as he was then concerned, he was acting on a verity."

[31] Note, 7 Ore. L. Rev. 329, 331 *et seq.* (1928).

[32] 206 Md. 493, 112 A. 2d 472 (1955). In that case there was evidence from which it might have been found that the possession was under a *conscious doubt* accompanied by a *conditional intent.* Evidence inferring *conscious*

reason to believe that it may yet be done; the Court's language in several instances so indicates. In *Ervin v. Brown*, the Court said: "The occupation by the appellees' decedent could not be considered to be provisional."[33] And in *Ridgely v. Lewis*,[34] the Court said that, ". . . certainly, in the instant case, there is to be found that there was nothing provisional in the holding and use of Parcel A."[35]

In as much as these statements were contained in two of the very cases repudiating the distinction between conditional and absolute intent in mistake cases, it is submitted that the only logical reason for which the statements could have been made is that the Court visualized situations in which there *could* be one of two types of intent, such situations being those of *conscious doubt*.

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doubt included discussions by the disseisor's wife with the builder that the garage may have been over the boundary, and similar statements made to the disseisee. Evidence of *conditional intent* appeared from statements in regard to moving the garage off of the disseisee's property.

[33] 204 Md. 136, 144, 102 A. 2d 806 (1954).

[34] 204 Md. 563, 105 A. 2d 212 (1953) — another case reiterating the doctrine of the Tamburo case.

[35] *Ibid*, 567.

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