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"My keenest interest is excited, not by what are called great questions and great cases but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution, or a telephone company, yet which have in them the germ of some wider theory, and therefore some profound interstitial change in the very tissue of the law."—Mr. Justice Holmes, Collected Legal Essays, p 269.

NOTES ON RECENT MISSOURI CASES

PLEADING—INCONSISTENT DEFENSES—RULE IN MISSOURI.

Caldwell v. City of New York Ins. Co.[1]

This was an action on a policy of insurance on an automobile. The answer contained a denial of each and every allegation of the petition except that the defendant is a corporation. It also alleged fraud in the procurement in that there was a chattel mortgage and a prior policy of insurance on the car. The Kansas City Court of Appeals held that these were inconsistent defenses, as it was an attempt to plead a general denial with a plea in confession and avoidance and refused to allow the defenses to stand together.

There seems to be a great deal of confusion both as to whether inconsistent defenses may be pleaded, and also as to when defenses are inconsistent. At early common law, inconsistent defenses were not permitted. The rule was that defendant could only plead one plea, as otherwise, the defense would be bad for duplicity.[2] This old idea of pleading but a single defense was objectionable, and the abuses and limitations of this common-law method caused the adoption of the Statute of 4 Anne, Chapter 16, Section 4 (1706).[3]

At first, under the Statute of Anne, there could not be pleaded anything that was inconsistent as a matter of law as well as a matter of fact.[4] Later the rule was relaxed so that there could be only the objection that the defenses were inconsistent in fact.[5] In the first half of the 19th century came the adop-

1. (1922) 245 S. W. 602.

2. Auburn & O. Canal Co. v. Leitch (1847) 4 Denio 65 (*dictum*).

3. "It shall be lawful for any defendant or tenant in any court or suit, or for any plaintiff in replevin in any court of record, with leave of the court, to plead as many several matters thereto as he shall think necessary for his defence."

4. Roe v. Rogers (1853) 8 How. Pr. 356; Arthur v. Brooks (1853) 14 Barb. 533; Williams v. Harris (1837) 2 How. (Miss.) 627, (*dictum*).

5. Wilson v. Ames (1814) 5 Taunt. 340, non tenure, infancy, nothing in arrear permitted, as not inconsistent. Merry v. Gay (1825) 3 Pick. 388, *non est factum*, and payment, not inconsistent.

tion of the Codes of the various states. We are interested only in the code of this state adopted in 1849.[6] Our code permits several defenses and in effect closely follows the Statute of Anne.[6a] It does not contain an express prohibition against pleading inconsistent defenses but provides that "different consistent defenses may be separately stated in the same answer."[7a] It always has been the rule that each defense must be separately stated and consistent within itself.[7] It is only with inconsistency between separate pleas that this note deals.

There is a division of authority on the question of inconsistency. Some states expressly permit them in their codes.[8] Where there are no such specific provisions, there is a lack of clarity in the various rules that have been adopted.[9] The first Missouri case found wherein there was an attempt to define inconsistency, and to lay down any definite rule, is *Nelson* v. *Brodhack* (1869).[10] There Bliss, J., said: "Some interpretation, then, of the term 'consistent defenses' should be adopted, if possible, that shall be consistent with the statute and secure the rights of full defense. That right will be secured if the consistency required be one of fact merely, and if two or more defenses are held to be inconsistent only when the proof of one necessarily disproves the other. Two statements are not inconsistent if both may be true." Many Missouri cases since then state the same rule; but there seems to be some inconsistency in the application of the rule.

Previous to the rule as stated in *Nelson v. Brodhack, supra*, the courts in Missouri had not made a very clear analysis of the problem.[11]

The first case decided after *Nelson v. Brodhack, supra*, is *Fulgate v. Pierce*.[12] There the court held that a denial of plaintiffs' ancestor's title under which they claim, and an allegation that defendant claims title from one of plaintiffs were inconsistent. This decision was based upon the ground that defendant could

6. Laws 1849, Art. VI. Sec. 7, Sec. 8; R. S. 1855, p. 1232, Sec. 12; Sec. 13; Sec. 12 to 13, 1865; Sec. 3522 to 3523, R. S. 1879; Sec. 2050 to 2051, R. S. 1889; Sec. 605 to 606, R. S. 1899; Sec. 1879 to 1808, R. S. 1909; Sec. 1232, 1233 and 1234, R. S. 1919.

6a. The first legislation in Missouri on the matter of inconsistent defenses appears in the R. S. of 1825, page 626, sec. 17, which reads: "The defendant in all actions may plead as many several matters, whether of law or fact, as he shall think proper." In the Revision of 1834, page 459, sec. 24 appears this statute: "The defendant may plead as many several pleas as he shall think necesary for his defense, subject to the power of the court to compel him to elect by which plea he will abide in case where he may plead inconsistent pleas." The same appears in the Revision of 1845, page 813, sec. 27.

The above statutes were dropped and Art. VI sec. 8 of Laws 1849 adopted, which reads, "The defendant may set forth in his answer as many grounds of defense as he shall have. They shall be separately stated, and may refer to the cause of action they are intended to answer, in any manner in which they may be intelligibly distinguished."

In the R. S. 1855, page 1233, sec. 14, appears this statute which appears also in the R. S. of 1919, sec. 1234: "Two or more defendants making the same defense shall answer jointly. Different consistent defenses may be separately stated in the same manner."

Apparently the rule should be as stated in the R. S. of 1834, that defendant should be able to plead as many several pleas as he shall think necessary for his defense, subject to the power of the court to compel him to elect by which plea he will abide, in cases where he may plead inconsistent defenses.

7a. R. S. of Missouri, 1919, sec. 1234.

7. Hensley v. Tartar (1860) 14 Cal. 508; Buddington v. Davis (1851) 6 How. Pr. 401.

8. Sec. 7261, Compiled Code of Iowa, 1919.

9. Seattle National Bank v. Jones (1895) 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177. *Contra:* Banta v. Siller (1898) 121 Cal. 414, 53 Pac. 935; Bell v. Brown (1863) 22 Cal. 671; Buhne v. Corbett (1872) 43 Cal. 264.

10. (1869) 44 Mo. 596.

11. Atterbury v. Powell (1860) 29 Mo. 429; Coble v. Daniel (1863) 33 Mo. 363; Kinman v. Carmefox (1863) 34 Mo. 147; Sheppard v. Starrett (1865) 35 Mo. 367; Darrett v. Donnelly (1866) 38 Mo. 492.

12. (1872) 49 Mo. 441.

not both wholly contest plaintiffs' title and also rely upon the same title to sustain joint possession. In *Rhine v. Montgomery*[13] the court held a general denial, self defense, and use of reasonable force in ejecting plaintiff from the premises of the defendant consistent. The only way these defenses could be consistent is to construe the general denial as a denial of the alleged unlawfulness of the assault.

In *Grady v. American Century Ins. Co.*,[14] an action on an insurance policy, the court suggests the defenses that the policy was forged and that there was a violation of the terms of the policy were inconsistent, when in fact both may have been true in fact. *Ledbetter v. Ledbetter*[15] shows a liberal viewpoint. There the court said that unless defendant expressly admits the plaintiff's title in an equitable defense to an ejectment suit plaintiff would have to prove title under the general denial.

In *Cohn v. Lehman*,[16] the court said, that "Defenses are inconsistent only when one fact contradicts the other, and has nothing to do with the seeming and logical inconsistency that arises merely from a denial and a plea in confession and avoidance." The same idea was expressed in *McCormick v. Mc Kaye*.[17] The court there held that a general denial, justification of trespass on land under orders of a road overseer, and the statute of limitations were not inconsistent, as proof of one, did not necessarily disprove the other. This result seems doubtful. Also a plea of *non est factum* and nonperformance of terms of an alleged contract were held not inconsistent in *Cox v. Bishop*.[18]

In *State ex inf. v. Fireman Fund Insurance Co.*,[19] the Supreme Court seems to have departed from the rule laid down in earlier cases, when in an extraordinary proceeding to oust the defendant for alleged violation of statute against pools, trusts, etc., the court held that a general denial, and plea that the statute was unconstitutional and void, admitted the guilty acts, or otherwise the proceeding would be in the nature of a moot proceeding.

State ex inf. v. Delmar Jockey Club[20] also seems to go *contra* to the general rule. The court, in an action in the nature of a *quo warranto* alleging violations of law and non user, said that "a general denial does not raise an issue if followed by a special plea of confession and avoidance." The case of *Atterbury v. Nichols*[21] follows the latter rule. The court held an answer alleging failure of consideration and damages for breach of warranty not inconsistent in *Broderick v. Andrews*[22] and *Plais de Costume Co. v. Beach*.[23] But a general denial and breach of warranty were held inconsistent in *Shoe Co. v. McDonald*.[24]

In *Bank v. Hoppe*,[25] an assignment was alleged in the answer. The reply contained a denial of any assignment, and if an assignment had been made it was fraudulent. These were held not inconsistent; *Blood v. Woodmen of World*[26] is to the same effect.

Lempee Land and Implement Co. v. Spellings[27] holds a plea of misjoindure of parties and a prayer for affirmative relief on a counterclaim inconsistent, and that the defense of misjoindure was waived. (This seems wrong under the

13. (1872) 50 Mo. 566.
14. (1875) 60 Mo. 116.
15. (1885) 88 Mo. 60.
16. (1887) 93 Mo. 574, 6 S. W. 267.
17. (1890) 41 Mo. App. 263.
18. (1894) 55 Mo. App. 135.
19. (1899) 152 Mo. 1, 52 S. W. 595.
20. (1906) 200 Mo. 34.
21. (1907) 127 Mo. App. 47, 106 S. W. 111.
22. (1908) 135 Mo. App. 57, 115 S. W. 519
23. (1910) 144 Mo. App. 456, 129 S. W. 270.
24. (1909) 138 Mo. App. 328, 122 S. W. 5.
25. (1908) 132 Mo. App. 449, 111 S. W. 1190.
26. (1909) 140 Mo. App. 526, 120 S. W. 700.
27. (1911) 236 Mo. 33, 139S. W. 345.

rule.) *Ewen v. Hart*[28] holds a denial and license in an action of trespass inconsistent.

In suit on a promissory note, *St. Louis Trust Co. v. Laughlin*,[29] defenses that the indorsement was for plantiff's accommodation, that it was procured by misrepresentation concerning securities in the payee's hands, and that the payee promised but failed to secure additional security, where held not technically inconsistent, as proof of one would not disprove the other. And in *Woodson v. Williams*,[30] an answer, in an action for slander, contained a general denial, and a plea of justification, and a plea in mitigation which were held not to be inconsistent.

It would seem that within certain limits inconsistent defenses ought to be permitted. This feeling on the part of the court is indicated by the fact that they refuse to hold as inconsistent defenses which clearly are so. It would seem unjust to deprive a defendant of every lawful defense. He may have some proof of two inconsistent defenses, and may not with safety alone rely on one defense; or he may not know which one is true; and hence be compelled to elect might work a hardship. He may not know which defense is true but if he has evidence tending to show that both defenses are true there seems no grave objection, assuming of course that he is in good faith, in making both defenses and in submitting the matter to the jury for its determination. This point of view is illustrated by a Minnesota case.[31] Suit was brought on an accident policy. Defendant pleaded, first, suicide of the insured; second, that plaintiff, the beneficiary, murdered the insured. It was held that these defenses might both be pleaded. Obviously, both cannot be true in fact, yet defendant in this situation might very well have very little ability to fully know the cause of death, yet have evidence tending to prove both defenses which he desired to have the jury consider.

Though considerations of policy might well prevent pleading defenses that are in fact inconsistent, there seems no justification for a hard and fast rule against pleading a general denial and a defense in confession and avoidance or discharge. No rule should be adopted which would prevent the pleading and proof of several defenses that may be true in fact.

LYNN ADAMS.*

EASEMENTS BY IMPLICATION—IMPLIED RESERVATION. *Bales v. Butts*.[1]

A owned a five-acre tract of land on which were two residences. On October 16, 1920, he contracted in writing to sell the plaintiff the south part of said tract, on which was one of the houses. An underground water pipe, passing over the other tract, connected this house with a city main. The contract, which made no reference to the water pipe, was not recorded, but plaintiff took possession under it. On April 2, 1921, A conveyed the north part of the tract to defendant without express mention of the water pipe. Defendant severed the pipe, and plaintiff, on October 7, 1922, brought suit asking for a mandatory injunction to compel defendant to restore said connection. A conveyed the

28. (1914) 183 Mo. App. 107, 166 S. W. 315.
29. (1923) 254 S. W. 844 (Mo. Sp. Ct.).
30. (1918) 204 S. W. 183 (Mo. Sp. Ct.).
31. McAlpine v. Fidelity & Casualty Co. (1916) 134 Minn. 192, 158 N. W. 967.

*Much material for this note was collected by George E. Woodruff, LL.B. 1925.

1. (1925) 274 S. W. 679.

south part to plaintiff on October 31, 1923, after the suit was brought. Since at the time the petition was filed, plaintiff was in possession under an agreement to purchase, the legal title was still in A, and if an easement existed it must be implied by reservation to A in the deed A made to defendant on April 2, 1921. The Supreme Court refused the relief on the ground that no easement was reserved by implication.

Had the plaintiff received his deed from A before A conveyed to the defendant, then he no doubt could have claimed an easement across defendant's land by implied grant, for it is usually held that a grant carries with it all those easements which are necessary to the reasonable enjoyment of the property granted.[2] Not only did the court in the principal case deny the plaintiff an easement by implied reservation, but by its opinion it indicated that such easements could be implied only in cases of strict necessity. The result of the decision seems correct, but on principle should easements by implied reservation be confined to cases of strict necessity?

It is a familiar rule that extrinsic evidence may not be adduced to vary or contradict the language of a deed, but an exception was early made in the case of ways of necessity, for it is *pro bono publico* that the land shall not be unoccupied[3]. The exception, originally restricted to ways of necessity, has been extended so as to include easements other than ways. Mutual or reciprocal easements such as cross easements of support, have been designated as another exception,[4] although one well known author plausibly insists that these so-called mutal easements are in fact only a form of an easement of necessity.[5] Aside from these exceptions, how far should the doctrine be carried? A familiar principle of construction is that a grantor shall not derogate from his grant. When a grantor conveys the fee to land, free and unencumbered, he presumably conveys the exclusive and absolute dominion over it. But if it is subject to an easement, it is not free and unencumbered, for the easement constitutes an encumbrance upon the land,[6] and is held to be a breach of the covenant against encumbrances.[7] An easement created by implied reservation, however, is not a breach of the covenant against encumbrances,[8] for if the easement were expressly reserved in the deed, the covenants must apply to the premises granted, that is, to an estate with an easement reserved or carved out of the fee, and in the case of an implied reservation, the law reserved the easement, and the covenants apply to the estate with the easement reserved.[9] It would seem that the grantor ought not be permitted to reserve an easement by implication and thus to impose an encumbrance upon the land granted, as such an encumbrance may be unsuspected by the grantee, and against it the covenants for title in the deed furnish no protection whatsoever. On the grantor should be imposed

2. Wheeldon v. Burrows (1879), L. R. 12 Ch. Div. 31; Bussmeyer v. Jablonsky (1912), 241 Mo. 681, 145 S. W. 772; Mullins v. Metropolitan St. Ry. Co. (1907), 126 Mo. App. 507, 104 S. W. 890; Hall v. Morton (1907), 125 Mo. App. 315, 102 S. W 570; Peters v. Worth (1901), 164 Mo. 431, 64 S. W. 490; Seidel v. Bloeser (1898), 77 Mo. App. 172; Fitzpatrick v. Mik (1887), 24 Mo. App. 435.

3. Clark v. Cogge (1607), Cro. Jac. 170; Dutton v. Taylor (1701), 2 Lutwyche 1487.

4. Richards v. Rose (1853), 9 Ex. 218; Wheeldon v. Burrows (1879), 12 Ch. Div. 31; Adams v. Marshall (1885), 138 Mass. 228.

5. Tiffany, Real Property, Vol. II, page 1294.

6. Kellogg v. Malin (1872), 50 Mo. 496.

7. Kunkle v. Beck (1913), 1 Ohio App. 70; Ensign v. Colt (1902), 75 Conn. 111, 52 Atl. 946; Weiss v. Binnian (1899), 178 Ill. 241, 52 N. E. 969; McGowen v. Myers (1882), 60 Ia. 256, 14 N. W. 788; Kellogg v. Malin (1872), 50 Mo. 496.

8. Reed v. Blum (1921), 215 Mich. 247, 183 N. W. 766.

9. Brigham v. Smith (1855) 4 Gray (70 Mass.) 297.

the duty of reserving such rights expressly in the grant.[10] Nevertheless on the question as to whether, on the severance of a tenement by the owner, he can claim an easement by implied reservation there is still a controversy. The affirmative is implied in the decision of *Pyer v. Carter*,[11] where no distinction is made between implied grants and implied reservations. Courts following *Pryer* v. *Carter* undoubtedly would permit plaintiff to recover in the principal case, for it holds that a purchaser buys the tenement "such as it is." But later English cases have overruled that part of *Pryer v. Carter*, and distinguish clearly between implied grants and implied reservations. Consequently, in England an easement will be implied in favor of the grantee when reasonably necessary, but not in favor of the grantor except in case of strict necessity.[12] In a few jurisdictions in this country the courts do not make any distincition between implied grants and implied reservations[13]. The weight of authority, however, recognizes a distinction, and there seems to be an increasingly marked tendency to hold that there can be no reservation of an easement by implication unless the easement is strictly necessary.[14]

It is submitted that the latter view is preferable. There seems no good reason for relaxing the ordinary rule of construction in favor of the grantor. It is so easy for him, in conveying.a piece of land, to express a limitation intended to be reserved over the land that the necessity of raising any such reservation by implication is hardly apparent.[15] If a reservation of an easement was intended but omitted from the deed by error, he could file a bill to correct the mistake. Furthermore, the recording acts do not furnish a purchaser any protection against these servitudes imposed by law. The stability and security of a registry system lies in the fact that a buyer may rely upon the public records as information of all the conveyances and upon the words of the instruments for all rights thereunder. But in a particular chain of title there appears nothing in reference to an easement implied by law. "If we adopt any other rule than that of strict necessity, we open a door to doubt and uncertainty, to the disturbance and questioning of titles, and to controversies as to matters of fact outside of the language or bundaries of the deed. If an estate, fully granted without exception or reservation, can be encumbered forever by an easement, or right of use by a third party by the finding of a jury that such use would be highly convenient, or that it was exercised by a former owner, or was notorious, or any other ground short of strict necessity, the sanctity and security of titles by deeds, exact and precise in their terms, would be seriously shaken and impaired. The record gives no notice of any such right or easement."[16]

Missouri cases involving easements by implication are not plentiful. A general note on the subject appears in a previous number of the Law Series.[17] Practically all the Missouri cases are cases of implied grant. Only two cases

10. Wheeldon v. Burrows (1879,) L. R. 12 Ch. Div. 31.

11. (1857) 1 Hurlstone & Norman 916.

12. Suffield v. Brown (1864), 4 De G., J. & S. 185; Crossley v. Lightowler (1867), L. R. 2 Ch. 478; Wheeldon v. Burrows (1879), 12 Ch. Div. 31.

13. 9 Ruling Case Law, Easements, page 765; Steinke v. Bentley (1892), 6 Ind. App. 663, 34 N. E. 97; Powers v. Heffernan (1908), 233 Ill. 597, 84 N. E. 661; Geible v. Smith (1891) 146 Pa. St. 276, 23 Atl. 437; Rightsell v. Hale (1891), 90 Tenn. 556, 18 S. W. 245.

14. Walker v. Clifford (1900), 128 Ala. 67, 29 So. 588; Cherry v. Brizzolara (1909), 89 Ark. 309; Mitchell v. Seipel (1879), 53 Md. 251; Buss. v. Dyer (1878), 125 Mass. 287; Brown v. Fuller (1911) 165 Mich. 162, 130 N. W. 621; Denman v. Mentz (1902), 63 N. J. Eq. 613, 52 Atl. 1117; Wells v. Garbott (1892), 132 N. Y. 430, 30 N. E. 978; Howley v. Chaffee (1915), 88 Vt. 468, 93 Atl. 120, L. R. A. 1915 D, 1010.

15. Miller v. Hoeschler (1905), 126 Wis. 263, 105 N. W. 790.

16. Warren v. Blake (1866), 54 Me. 276.

17. 7 Mo. Law Bull. 49.

have been found in which the principle of an implied reservation is applicable, and both are ways of necessity.[18] The conclusion of the principal case seems the proper one, and is consonant with the trend of the best considered modern authorities.

R. M. F.

ADVERSE POSSESSION—TITLE TO LAND BETWEEN FENCE AND TRUE BOUNDARY. *Ackerman et al.* v. *Ryder.*[1]

In an ejectment suit, defendant claimed title by adverse possession. Plaintiff was an adjoining landowner, and both parties derived title from a common source. A correct survey of the land conveyed showed that the boundary line between the two tracts had been drawn upon the land of plaintiff so as to include a few feet of his land within the defendant's enclosure. The strip in controversy had been occupied by defendant and his predecessors in title in ignorance of the true line for a period longer than was required by statute. The jury found for defendant, but the trial court arrested judgment, and, on appeal by defendant, this was affirmed by the Supreme Court. It clearly appeared that the occupation was not adverse for at least a portion of the statutory period. It was, therefore, not necessary for the Court to go further, but it stated that "the record title to the disputed land is in respondents... and the burden was therefore cast upon appellant to prove. .that she and her grantors have held adverse possession of the disputed land for ten years. . If appellant failed in this proof, then the trial court should have directed a verdict for respondents..."[2]

"There are two different and distinct situations which may arise in a boundary dispute, where the parties have held possession in ignorance of the true line. If the intention has been to hold only to the true line, wherever that may be, then the previously held line must yield to the correct line when ascertained. But where the defendants and those under whom they derive title have, for the statutory period, held possession up to a line claimed by them to be the true line, such possession is adverse. The condition of the mind of a person who claims a certain line as the true line is very different from that of one who claims only to the true line, wherever that may be. In the mind of one the boundary line is fixed. In the other it is subject to future ascertainment." In the more usual case in which the grantee enters upon his land where the boundary lines do not exactly coincide with those in his deed, he gives no thought to the possibility that the boundaries of his lot are not located correctly. Since evidence is lacking in many cases as to what the party setting up the statute of limitations actually claimed during the period required by the statute, and as to what his predecessor in title claimed, it is important to determine whether there is a presumption in favor of either party, and whether the burden of proving the hostility of the claim rests upon him who sets up the statute, or whether it devolves upon the record holder to prove that the claim was not hostile, but subject to a future ascertainment of the true line.

18. Auxier v. Horn (1919), 213 S. W. 100; Baumhoff v. Lochhass (1923), 253 S. W. 762.

1. (1925) 308 Mo. 9, 271 S. W. 743.

2. Mangold v. Phillips, et al., (1916) 186 S. W. 988, l. c. 989.

Upon this point the authorities are divided. A number of courts[3] have followed the decision of the Iowa court[4] and have required the adverse claimant to strictly prove, the adverse character of his possession. The weight of authority,[5] however, seems to be more nearly in accord with the view of the Indiana Court[6] that actual possession and occupation, even though under a mistake as to the true boundary, will raise a presumption that the holding was adverse.

The courts which deny the presumption in favor of the adverse holder say that it ought not be be presumed that a man intends to do a wrongful act, and, therefore, there is no presumption that one who occupies the land of another claims that land as his own. Courts which allow the presumption that the possession is adverse say that there should not be a premium placed on intentional wrongdoing (such that only the man who claims the land of another knowing of the other's ownership, can gain title adversely), but that he who innocently occupies the land of another should have the benefit of the presumption for practical reasons.

Not only are the authorities divided, but the cases in Missouri are not clear and the Missouri court has reversed itself several times. The earlier view[7] in Missouri was that the adverse claimant must prove that he claimed up to the boundary line against all the world without condition as to subsequent developments. A few of the later cases in Missouri, including the instant case, have adopted this position. Most of the cases,[8] however, are *contra*, and the growing tendency in Missouri until *Ackerman v. Ryder* was decided was that "where adverse possession has been held for the statutory period up to a certain line, the burden is on the opposite party to show that such possession was with the intention of claiming only to the true line." (186 S. W. 988). The effect of these decisions is to place the burden on the holder of record title to prove that the possession of the adverse claimant was not with an intent to claim to the existing boundary. Other cases[9] in Missouri, without purporting to place this burden on the record holder, have in fact reached this result. Where evidence of the intention of the adverse claimant and his predecessor to

3. Lecroix v. Malone, (1908) 157 Ala. 434, 47 So. 725; Williams v. Bernstein, (1899) 51 La. Ann. 115, 25 So. 411; Edwards v. Fleming, (1911) 83 Kans. 653, 112 Pac. 836; Preble v. Maine C. R. Co., (1893) 85 Me. 260, 27 Atl. 149; Kirkman v. Brown, (1894) 93 Tenn. 476, 27 S. W. 709.

4. Grube v. Wells (1871) 34 Ia. 148.

5. Searles v. DeLadson (1908) 81 Conn. 133, 70 Atl. 589; Krause v. Nolte, (1905) 217 Ill. 298, 75 N. E. 362; Diers v. Ward, (1902) 87 Minn. 475, 92 N. W. 402; Andrews v. Hastings, (1909) 85 Neb. 548, 123 N. W. 1035; Sommer v. Compton, (1908) 52 Ore. 173, 96 Pac. 1065; Bruce v. Washington, (1891) 80 Tex. 368, 15 S. W. 1104; Hesser v. Seipman, (1904) 35 Wash. 14, 76 Pac. 295; Lucas v. Provines, (1900) 130 Cal. 270, 62 Pac. 509; Johnson v. Thomas, (1904) 23 App. D. C. 141.

6. Dyer et al v. Eldridge et al, (1893). 136 Ind. 654, 36 N. E. 522.

7. Thomas et al. v. Babb et al (1870) 45 Mo. 384; Tamm v. Kellogg (1871) 49 Mo. 118; Brummell v. Harris (1898) 148 Mo. 430, 50 S. W. 93; Stevenson v. Black et al (1902) 168 Mo. 549, 68 S. W. 909; Himmelberger-Harrison Lumber Co. v. Craig (1913) 248 Mo. 319, 154 S. W. 73; Ware v. Cheek (1918) 201 S. W. 847; Ackerman v. Ryder (1925) (case under review) 308 Mo. 9, 271 S. W. 743.

8. Hedges v. Pollard (1899) 149 Mo. 216, 50 S. W. 889; Lemmons v. McKinney (1901) 162 Mo. 525, 63 S. W. 92; Milligan v. Fritts (1909) 226 Mo. 189, 125 S. W. 1101; Gloyd v. Franck (1913) 248 Mo. 468, 154 S. W. 744; Bartlett v. Boyd (1915) 175 S. W. 947; Corrigan v. Early et al (1916) 183 S. W. 574; Mangold v. Phillips et al (1916) 186 S. W. 988; Vogt v. Bergmann (1916) 189 S. W. 1166; Nichols v. Tallman (1916) 189 S. W. 1184; Diers v. Peterson (1921) 290 Mo. 249, 234 S. W. 792; Railsback v. Bowers, et al (1923) 257 S. W. 119.

9. Cole v. Parker (1879) 70 Mo. 372; Handlan v. McManus (1889) 100 Mo. 124, 13 S. W. 207.

claim up to the boundary would have been insufficient, the court has, in effect, taken the position that actual occupation to the extent of the adverse claim, especially when such occupation is by a permanent building, is sufficient evidence of claim of title to make the possession adverse.

The better view is that taken by the majority of Missouri cases, and seems to be the present tendency, although the case under review is *contra*. There are many boundary lines in Missouri today that are not the true lines, because the land was poorly surveyed many years ago. If the defense of adverse possession is difficult for the defendant to prove, this has a tendency to encourage those whose lands are held adversely to start suit. But if the burden is upon the holder of the paper title to prove that his neighbor did not intend to claim to the existing line, or if there is a presumption that one who occupies to a given line in ignorance of the true line intends to claim to such given line, then the holder of paper title is less likely to start suit, and this is, therefore, the most practical rule.

G. S. W.