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THE NEGLECTED HISTORY BEHIND *PREBLE V. MAINE CENTRAL RAILROAD COMPANY*: LESSONS FROM THE "MAINE RULE" FOR ADVERSE POSSESSION

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Under the "Maine Rule" for adverse possession, only possessors who have the requisite intent can perfect an adverse possession claim. The Maine Rule has been consistently criticized. The history behind the adoption of the Maine Rule, however, and the purpose it was to serve, have been ignored. This Article fills that void. This inquiry leads to some surprising revelations about the Maine Rule. The Maine Rule was originally adopted so as to distinguish prior Maine cases rejecting adverse possession in mistaken boundary situations. The purpose behind the Maine Rule, then, was to enable—rather than prohibit—adverse possession. The history surrounding the adoption of the Maine Rule has contemporary value; this history powerfully demonstrates the pitfalls of using a claimant's state of mind as part of an adverse possession analysis.

I. INTRODUCTION

In *Preble v. Maine Central Railroad Co.*,[1] the Supreme Judicial Court of Maine famously[2] described its approach for measuring a

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1. 27 A. 149, 149 (Me. 1893).

2. The *Preble* case, decided in 1893, has been cited in ten law journals since 2010. Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. 1241, 1283 n.182 (2015); Lynn Foster & J. Cliff McKinney, II, *Adverse Possession and Boundary by Acquiescence in Arkansas: Some Suggestions for Reform*, 33 U. ARK. LITTLE ROCK L. REV. 199, 208 n.76 (2011); Jake Linford, *Trademark Owner as Adverse Possessor: Productive Use and Property Acquisition*, 63 CASE W. RES. L. REV. 703, 766 n.300 (2013); Bruce A. McGlauflin, *Some Confusing Things Happened . . . On the Way to Modernizing Maine's Adverse Possession Law*, 25 ME. B.J. 38, 39 (2010); Luke Meier, *A Contextual Approach to Claim of Right in Adverse Possession Cases: On* Van Valkenburgh v. Lutz, *Bad Faith, and Mistaken Boundaries*, 19 LEWIS & CLARK L. REV. 47, 49 n.6 (2015); Scott Andrew Shepard, *Adverse Possession, Private-Zoning Waiver and Desuetude: Abandonment and Recapture of Property and Liberty Interests*, 44

claimant's state of mind for adverse possession.[3] This test would come to be known as the "Maine Rule."[4] Under the Maine Rule, a claimant can only establish adverse possession if he possessed with the correct state of mind, which was described in *Preble* as the intent "to claim the ownership of land not embraced in his title."[5]

The Maine Rule has been heavily criticized by both courts and commentators.[6] Despite this widespread criticism, almost no attention has been given to the origins of the doctrine.[7] Given the ubiquitous disdain for the Maine Rule, it is surprising that the following question remains unresolved: Why did the Supreme Judicial Court of Maine adopt this test in the first place? This Article answers that question.

This inquiry into the historical origins of the Maine Rule leads to some surprising revelations. The Maine Rule, it turns out, was actually the byproduct of a change of heart by the Maine Supreme Judicial Court as to whether possession based on a mistaken property boundary could lead to a successful adverse possession claim. The court had previously rejected adverse possession in this context.[8] The Maine Rule, however, was an analytical retreat (a complicated one, for sure) from the court's previous prohibition against adverse possession in mistaken boundary cases.[9] The Maine Rule was developed as a test that would enable mistaken boundary claimants to win their adverse possession claim.

U. MICH. J.L. REFORM 557, 562 n.7 (2011); Matthew Sipe, Comment, *Jagged Edges*, 124 YALE L.J. 853, 859 n.17 (2014); James Charles Smith, *Some Preliminary Thoughts on the Law of Neighbors*, 39 GA. J. INT'L & COMP. L. 757, 769 n.34 (2011); Caroleene Hardee, Note, *This Land Is Your Land:* Tran v. Macha *and the Hostile Intent Standard in Texas Adverse Possession Law*, 64 BAYLOR L. REV. 569, 571 n.19 (2012); Christopher H. Meredith, Note, *Imputed Abandonment: A Fresh Perspective on Adverse Possession and a Defense of the Objective Standard*, 29 MISS. C. L. REV. 257, 275 n.164 (2010).

3. *Preble*, 27 A. at 150 (describing the state of mind required for a successful adverse possession claim).

4. Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037, 1039 n.9 (2006) (using the term "Maine rule"); Linford, *supra* note 2, at 766 n.300 (same); Smith, *supra* note 2, at 769 n.34 (same); *see also* Kara L. Spencer, *Court Clarifies Applicability of Mistaken Belief Rule to Adverse Possession Suits*, 47 S.C. L. REV. 146, 150 (1995) (using the term "*Preble* rule"); Meredith, *supra* note 2, at 275 n.164 (using the term "Maine view").

5. *Preble*, 27 A. at 150.

6. *See, e.g.*, JERRY L. ANDERSON & DANIEL B. BOGART, PROPERTY LAW: PRACTICE, PROBLEMS, AND PERSPECTIVES 128 (2014) ("Because [the Maine Rule] seems to reward bad actors over those who make an honest mistake, a 'shrinking minority of jurisdictions' continues to use some version of this rule, and even Maine itself has reversed the rule by statute." (quoting Fennell, *supra* note 4, at 1039 n.10)).

7. Bruce A. McGlauflin has written an excellent discussion of Maine's shifting terminology in discussing adverse possession claims. *See* McGlauflin, *supra* note 2, at 40-43. The specific history behind the adoption of the Maine Rule, however, has been ignored to this point.

8. *Preble*, 27 A. at 150.

9. McGlauflin, *supra* note 2, at 41-42.

Rather than overruling its previous case law rejecting adverse possession in mistaken boundary cases, the Maine Supreme Judicial Court distinguished this case law by introducing a new inquiry into the intent of the mistaken boundary claimant.[10] Under this new inquiry, an adverse possessor—even one whose claim was based on a mistaken boundary—could win her adverse possession suit, provided she had the right intent.

Much of the modern criticism of the Maine Rule ignores the historical development of the rule. For instance, one frequent critique of the Maine Rule is that it rewards only those possessors who have "bad faith."[11] According to this critique, unless a possessor *knows* that the land he is possessing is owned by someone else, he can never form the *intent* needed under the Maine Rule.[12] Thus, the Maine Rule is said to reward those who know that they are possessing land owned by another, whereas it punishes, or at least prohibits the claims of, those possessors who had legitimately—but mistakenly—believed that they were possessing their own land. Courts and commentators have frequently noted the seeming injustice of this aspect of the Maine Rule.[13] But this critique ignores the history behind the test and thus completely misunderstands the Maine Rule. The Supreme Judicial Court of Maine did not presume that only those with "bad faith" could satisfy the intent analysis; rather, the intent analysis was specifically created as a

10. *See id.* at 42-43.

11. *See* Foster & McKinney, *supra* note 2, at 208, 210 ("As stated above, the 'Maine Doctrine' denies successful adverse possession to the claimant who possesses property with mistaken, or 'with good faith' intent.").

12. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 857 & n.28 (3d ed. 2000) (stating that the Maine Rule precludes claims by those who have made an honest mistake); Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1144 & n.69 (1985) (stating that the Maine Rule "requires a subjective belief that the occupied property belongs to someone else"); Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1875 n.120 (2007) (stating that the "Maine Doctrine" requires "bad faith for adverse possession"); Shepard, *supra* note 2, at 562 n.7 (stating that the Maine Rule, which "limit[s] adverse-possession claims to trespassers who always intended to possess adversely," is "essentially a 'bad faith' requirement"); Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2430 n.61 (2001) ("[T]he Maine doctrine may come close to requiring bad faith.").

13. HERBERT HOVENKAMP & SHELDON F. KURTZ, PRINCIPLES OF PROPERTY LAW 73 (6th ed. 2005) ("The Maine rule penalized the honest, yet mistaken possession, but rewards the possessor who knowingly claims what she knows is not hers."); Merle W. Loper, *Ed Godfrey: The Justice, the Person, and Some Cases on Property*, 47 ME. L. REV. 295, 303 n.25 (1995) (stating that the Maine Rule contributes to the perception that "the law is a ass" (quoting CHARLES DICKENS, OLIVER TWIST 569 (Macmillan Collector's Library 2016) (1838))); Judson T. Tucker, *Adverse Possession in Mistaken Boundary Cases*, 43 BAYLOR L. REV. 389, 401 (1991) ("Under the [Maine Rule], it appears that only those claimants who harbor illicit intent are rewarded, while those who possess the land innocently, as their own, are prejudiced.").

mechanism by which to *allow* a good-faith, mistaken boundary claimant to successfully establish adverse possession.

Similarly, the occasional critique of the Maine Rule as encouraging litigants to lie about their intent is also off-target,[14] once the Maine Rule is properly understood. At least as applied to mistaken boundary claims, the Maine Rule did not technically require a claimant to lie about his intent; instead, the Maine Rule required a claimant to speculate—during litigation—about a question which he had never actually considered before. This is fantasy, but it is not lying.

Understanding the historical development of the Maine Rule is important for the scholars, judges, and lawyers that deal with adverse possession law. Understanding this history does not immunize the Maine Rule from criticism. A doctrine that requires a litigant to speculate about a fantastical state of mind is ripe for criticism, and a few commentators have deftly lodged this particular attack against the Maine Rule.[15] I join in this criticism of the Maine Rule; as I explain later in this Article, an inquiry into a possessor's intent is both unnecessary and potentially problematic.[16]

Rather, understanding the historical development of the Maine Rule facilitates some fundamental insights into adverse possession law. The history of the Maine Rule vividly demonstrates the pitfalls of trying to use a possessor's state of mind as an analytical tool to distinguish wheat from chaff in adverse possession. Because adverse possession arises in various different factual settings, an analysis of a claimant's state of mind in one type of case—say, a mistaken boundary case—might produce undesirable (and unintended) results in a different type of case. In other words, permitting or denying an adverse possession claim based on the possessor's state of mind will likely lead to doctrinal confusion, particularly if courts are inclined to apply a uniform "rule" for all different types of adverse possession cases.

The story of the Maine Rule is a story of the doctrinal confusion (and confusion of tongues)[17] that can arise when courts inquire into a claimant's state of mind as part of an adverse possession analysis. Indeed, one might say that the Maine Rule represents a "doubling down" on the inquiry into the claimant's state of mind. While previous Maine

14. *See, e.g.*, BARLOW BURKE & JOSEPH SNOE, PROPERTY: EXAMPLES AND EXPLANATIONS 86 (3d ed. 2008) (stating that the Maine approach "tempts the possessor . . . to lie"); HOVENKAMP & KURTZ, *supra* note 13, at 73 ("[T]his so-called 'Maine' rule creates a heavy incentive to commit perjury . . . .").

15. *See infra* note 121 and accompanying text.

16. *See infra* Part IV.

17. *See infra* text accompanying notes 166-67.

cases had considered only the claimant's *knowledge*, the Maine Rule introduced an inquiry into the claimant's *intent*.

The end result was—as suggested above—a legal test that can only be characterized as ludicrous and illusory. Indeed, the Maine Rule is so convoluted that the Maine Legislature has twice enacted legislation to attempt to overrule the approach.[18] Even after two attempts, it is still unclear as to whether the Maine Legislature has achieved its objective.

The very conditions that led to the creation of the Maine Rule, however, still exist today. Without a clear understanding of how Maine got to here from there—that is, without an understanding of the historical development of the doctrine—history is likely to repeat itself. The objective of this Article is to avoid that result.

II. KNOWLEDGE AND INTENT

The Maine Rule is typical in requiring an analysis of an adverse possessor's state of mind; many jurisdictions require a claimant to have the "right" state of mind in order to perfect an adverse possession claim.[19] The Maine Rule is unique, however, in that the inquiry into the claimant's state of mind involves an analysis of the possessor's *intent*.[20] Outside of the Maine Rule, the analysis of a claimant's state of mind will focus on the *knowledge*[21] of the possessor regarding true ownership of the land being possessed.[22]

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18. *See infra* text accompanying notes 160-71.

19. JESSE DUKEMINIER ET AL., PROPERTY 159 (8th ed. 2014) ("The requirement that adverse possession be accompanied by [the right state of mind] is embodied in the statutes of various states, and even when it is not, a considerable number of courts have read it in, whether in terms of claim of title, claim of right, or hostility.").

20. Loper, *supra* note 13, at 302 (describing the "unique Maine doctrine" that requires a possessor to prove the "intent to claim the land even if he had known that it was not his").

21. *See* Fennell, *supra* note 4, at 1051-52 (describing the different "knowledge" states of mind, and noting that intent is "sometimes" also a part of the state of mind inquiry).

22. The state of mind required by a possessor—either knowledge or intent—is referred to under a variety of "terms" and associated with different "elements" of adverse possession law. *See, e.g.*, ROGER BERNHARDT & ANN M. BURKHART, REAL PROPERTY IN A NUTSHELL 40-41 (6th ed. 2010) (using the term "hostile" to refer to the possessor's belief as to who is the true owner of the land being possessed); DANIEL B. BOGART & JOHN MAKDISI, INSIDE PROPERTY LAW: WHAT MATTERS AND WHY 23 (2009) ("In most jurisdictions, an adverse possessor must have a requisite state of mind—often called a claim of right."); A. JAMES CASNER ET AL., CASES AND TEXT ON PROPERTY 126 (5th ed. 2004) (using the term "claim of right" to refer to the requirement that the possessor have the right state of mind regarding who is the true owner of the land being possessed); JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH 116 (2009) (explaining that the possessor's state of mind can be analyzed under the "hostile," "adverse," or "claim of right" element); Amie N. Broder, Note, *Comparing Apples to APPLs: Importing the Doctrine of Adverse Possession in Real Property to Patent Law*, 2 N.Y.U. J.L. & LIBERTY 557, 595 (2007) ("Hostile possession . . . speaks to the intent of the adverse possessor."). In some instances,

Indeed, *before* the Supreme Judicial Court of Maine adopted the intent-based Maine Rule, it had used the typical knowledge-based test as part of its analysis in determining whether a successful adverse-possession claim had been established.[23] Problems associated with the knowledge-based approach, however, compelled the Court to incorporate the intent-based approach years later. Thus, to fully understand the Maine Rule, it is necessary to understand the typical knowledge-based approach to resolving adverse-possession claims, including the problems that frequently arise in applying this test.[24]

The typical hornbook description of the knowledge-based approach is as follows: jurisdictions employ one of three approaches.[25] Under the "good faith" approach, only those possessors who believed (incorrectly) they were possessing their own land can establish an adverse possession claim.[26] Under the "bad faith" approach, only those possessors who believed (correctly) that they were possessing land owned by another party can establish an adverse possession claim.[27] And, finally, under the

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however, these very same terms will be used to refer to completely different concepts. PAULA A. FRANZESE, A SHORT AND HAPPY GUIDE TO PROPERTY 78 (2011) ("Hostile[] mean[s] that the possessor does not have the true owner's permission to be there."); ERIC T. FREYFOGLE & BRADLEY C. KARKKAINEN, PROPERTY LAW: POWER, GOVERNANCE, AND THE COMMON GOOD 653 (2012) (stating that the majority rule is that hostile simply means without permissions); JAMES CHARLES SMITH, THE GLANNON GUIDE TO PROPERTY: LEARNING PROPERTY THROUGH MULTIPLE-CHOICE QUESTIONS AND ANALYSIS 53 (3d ed. 2015) ("Possession is adverse only if it is without the authority or permission of the true owner of the land."); Merrill, *supra* note 12, at 1142 (associating the term "claim of right" with the question of whether the possessor had permission from the true owner of the land). To avoid this confusion of tongues, I have intentionally avoided the use of these terms and have resisted associating the concepts discussed in this Article to any particular element of adverse possession law. For an example of the problems that can arise due to terminology confusion, see *infra* note 163.

23. *See* Preble v. Me. Cent. R.R. Co., 27 A. 149, 150-51 (Me. 1893).

24. The problems associated with the knowledge-based approach have been more fully explained in a previous article. *See generally* Meier, *supra* note 2. Readers wishing a more extensive discussion of this topic should consult this paper.

25. *See, e.g.*, CALVIN MASSEY, PROPERTY LAW: PRINCIPLES, PROBLEMS, AND CASES 84 (2012) (stating that there are three approaches to determining whether a claimant has satisfied the claim of right requirement); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 198-99 (2007) (same); Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L.Q. 739, 746 (1986) (same).

26. *See* Will Saxe, *When "Comprehensive" Prescriptive Easements Overlap Adverse Possession: Shifting Theories of "Use" and "Possession,"* 33 B.C. ENVTL. AFF. L. REV. 175, 180-81 (2006) (listing states that take a good faith approach to the claim of right requirement, which requires the possessor to believe she owns the land being possessed). As Professor Fennell points out, the knowledge-based approach is more than just an inquiry into the claimant's knowledge, but instead "depends on the interaction between fact and belief." Fennell, *supra* note 4, at 1050. As such, Professor Fennell suggests that the "good faith" and "bad faith" labels be replaced with "knowing" and "inadvertent." *See id.* at 1057-59. I also prefer this terminology but have opted to retain the "good faith" and "bad faith" terms simply because of their ubiquitous use.

27. COLLEEN E. MEDILL, ACING PROPERTY: A CHECKLIST APPROACH TO SOLVING PROPERTY

"objective approach," a claimant's knowledge (or belief) regarding true ownership of the land being possessed is irrelevant;[28] "good faith" and "bad faith" possessors can both establish an adverse possession claim.[29]

This is all simple enough. But, things become more difficult when one considers that adverse possession claims arise in three different factual settings.[30] In the first, a "squatter" begins possessing someone else's land with the knowledge that the land being possessed is owned by someone else.[31] The other two types of typical adverse possession cases involve a claimant who honestly, but mistakenly, believes that the land being possessed is actually owned by her. In a "color of title" case, the claimant thought that she was the true owner because of a deed or other written document that purported to make her so.[32] The problem,

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PROBLEMS 358 (A. Benjamin Spencer ed., 2d ed. 2012) ("A few jurisdictions apply a 'bad faith' subjective standard where the adverse possessor must believe that the land belongs to someone else . . . ."); *see* Hardee, *supra* note 2, at 571-72 (suggesting that Texas might follow a "bad faith standard, . . . [which] requires a possessor to be aware of other claims of ownership"). For purposes of this Article, I have ignored the interesting point made by Professor Fennell, which is that a possessor might be uncertain as to true ownership of the land being possessed, thus complicating the application of either the good faith or bad faith approach. *See* Fennell, *supra* note 4, at 1049-51 (explaining that possessors might often be unsure regarding true ownership of the disputed land).

28. *See* Carol Necole Brown & Serena M. Williams, *Rethinking Adverse Possession: An Essay on Ownership and Possession*, 60 SYRACUSE L. REV. 583, 590 (2010) (stating that the objective approach to claim of right, known as the "Connecticut Rule," "has been adopted by a majority of states").

29. *See* JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES § 6.1, at 299 (5th ed. 2010) ("An objective test makes the adverse possessor's state of mind irrelevant . . . .").

30. The three different types of adverse possession cases have been recognized by other authors as well. R. H. Helmholz, *More on Subjective Intent: A Response to Professor Cunningham*, 64 WASH. U. L.Q. 65, 89 (1986) (distinguishing between squatter cases and mistaken boundary cases in support of the thesis that courts implicitly prefer possessors acting in good faith); Radin, *supra* note 25, at 746-47, 747 n.21 (discussing the distinction between "color of title," "boundaries," and "squatters" as a potentially relevant distinction that was ignored in Professor Epstein's temporal perspective on property law). It is possible that additional—or different—categories of adverse possession cases could be recognized, but this Article focuses on these three basic types of fact patterns.

31. On occasion, the term "squatter" is defined slightly differently than how it is used herein. *See, e.g.*, Per C. Olson, Comment, *Adverse Possession in Oregon: The Belief-in-Ownership Requirement*, 23 ENVTL. L. 1297, 1301-02 (1993) ("A squatter occupies property in recognition of another's title with no intention of claiming title to it . . . ."). Most frequently, however, the term is simply used to denote possession of land by one with knowledge that legal title is in another. Halpern v. Lacy Inv. Corp., 379 S.E.2d 519, 521 (Ga. 1989) (defining "squatter" as a person who "enter[s] upon the land without any honest claim of right to do so"); Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1107-08 (2007) (using the term to refer to a possessor who knows that he is not the title owner).

32. "Color of title" is sometimes defined slightly differently than how it is defined herein. Often, the existence of the document, rather than the subjective belief in the validity of that document, will be emphasized. *See, e.g.*, DUKEMINIER ET AL., *supra* note 19, at 162 ("*Color of title* . . . refers to a claim founded on a written instrument (a deed, a will) or a judgment or decree

though, is that the deed—for whatever reason—is legally ineffective to convey legal title.[33] In a mistaken boundary case, the claimant *is* the true owner of a piece of land, but is simply mistaken as to the precise location of the boundary between her land (to which she is the true owner) and that of her neighbors (to which she is not the true owner).

Understanding the three basic types of adverse possession cases is—in isolation—simple enough. The difficulty arises, however, when one considers how each of three different knowledge-based approaches applies to each of the three types of adverse possession cases. These results are depicted below:

TABLE 1

Type of Case	*Result Under Objective Approach*	*Result Under Good Faith Approach*	*Result Under Bad Faith Approach*
Color of Title	Win	Win	Lose
Squatter	Win	Lose	Win
Mistaken Boundary	Win	Win	Lose

Notice that a uniform objective approach results in an adverse possessor being able to win all three different types of cases. But, the good faith and bad faith approaches produce different results in the three different types of adverse possession cases. Under a good faith approach, the mistaken boundary claimant and the color of title claimant win while the squatter loses. Under the bad faith approach, the squatter wins while the mistaken boundary claimant and color of title claimant lose.

The results depicted in Table 1 reveal a major shortcoming of the knowledge-based approach: a court might not like the results that a "uniform" approach produces. For instance, a jurisdiction considering the objective approach might like the result this test produces in the

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that is for some reason defective and invalid (as when the grantor does not own the land conveyed by deed or is incompetent to convey, or the deed is improperly executed)."); MASSEY, *supra* note 25, at 87 ("Color of title describes a claim that is based on a written transfer of title—a deed, will, or court judgment—that happens to be defective and thus not valid."). Usually, however, the statements suggesting that the mere existence of the defective document is alone sufficient to qualify as color of title are made in situations in which the adverse-possession claimant did, in fact, believe the defective document to be legally effective. JAMES CHARLES SMITH ET AL., PROPERTY: CASES AND MATERIALS 185 (3d ed. 2013) ("Many courts, even in states that generally reject a good faith requirement for adverse possession law, require subjective belief that the colorable title is valid."); R. H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 337 (1983) ("'Color of title' is held to require a title the possessor honestly thinks to be a good title.").

33. *See* Price v. Tomrich Corp., 167 S.E.2d 766, 770 (N.C. 1969) ("Color of title is generally defined as a written instrument which purports to convey the land described therein but fails to do so because of a want of title in the grantor or some defect in the mode of conveyance.").

color of title and mistaken boundary situation but object to a squatter being able to perfect an adverse possession claim. Similarly, a jurisdiction might like that a good faith approach allows a color of title claimant to win while a squatter loses but object to the idea that a mistaken boundary claimant wins under the good faith approach. And, a jurisdiction might be inclined to employ the bad faith approach so as to preclude a mistaken boundary claimant from perfecting an adverse possession claim but object to the notion that a squatter wins under a bad faith approach while a color of title claimant loses.

Because a jurisdiction might not like the results that a uniform approach produces, there will be an inclination to "bend" or "tailor" the knowledge-based inquiry to achieve the result that a jurisdiction prefers for each type of adverse possession case. The failure to appreciate this fact, I believe, has been the source of much confusion regarding the knowledge-based approach. The infamous case of *Van Valkenburgh v. Lutz* nicely demonstrates this point.[34]

The *Van Valkenburgh* case was unique in that it involved both a squatter claim and mistaken boundary claim within the context of the same litigation. The claimants in *Van Valkenburgh* had knowingly squatted on the land of their neighbor by building structures on land to which they knew they did not have legal title.[35] In addition, the claimants had also unknowingly possessed their neighbor's parcel by building a garage, which mistakenly encroached across the boundary line between the parcels.[36] The claimants asserted adverse possession based on their squatting activities *and* their mistaken boundary encroachment; the New York court rejected both claims.[37]

With regard to the squatter claim in *Van Valkenburgh*, the court used a good faith approach: because the claimants knew that the land they were possessing was owned by someone else, they did not have the right state of mind.[38] With regard to the garage encroachment, however, the court employed a bad faith approach: because the claimants thought that the land being possessed was owned by them, they did not have the right state of mind.[39]

The result in *Van Valkenburgh*—in which the court employed both the good faith and bad faith approaches within the same case—can appear illogical or contradictory. Indeed, *Van Valkenburgh* has been a

34. 106 N.E.2d 28 (N.Y. 1952).
35. *Id.* at 29-30.
36. *Id.* at 30.
37. *Id.* at 29-30.
38. *Id.*
39. *Id.* at 30.

popular target of commentators.[40] But the result is perfectly sensible if one starts with the proposition that the court simply did not believe that adverse possession should be available in either the squatter or mistaken boundary situation.[41] This is definitely a defensible perspective on adverse possession.[42] If one assumes that this is the end game a court wants for each of these types of cases, however, notice that a uniform approach to the knowledge-based test will not produce the desired result for each of these two types of adverse possession cases. Under the good faith or objective approach, the mistaken boundary wins;[43] under the bad faith approach, the squatter wins.[44]

As *Van Valkenburgh* demonstrates, a uniform approach to measuring whether an adverse possession claimant has the required state of mind may produce undesirable results. Recognizing this limitation of the knowledge-based approach is important to understanding the development of the Maine Rule. It is my contention that the intent-based approach was introduced by the Supreme Judicial Court of Maine, in part, to avoid the very criticisms that have been launched against the *Van Valkenburgh* decision. The Maine Rule was thought to avoid the necessity of having to use a different "test" in order to reach the "correct" decision in each type of adverse possession case.[45]

Before proceeding to the development of the Maine Rule, it is worth noting one final point about the knowledge-based approach. Often, commentators, judges, and students will question why a

40. *See, e.g.*, CHRISTOPHER SERKIN, THE LAW OF PROPERTY 61 (2013) (describing the decision as relying upon "two internally contradictory holdings"); JAMES WINOKUR ET AL., PROPERTY AND LAWYERING 180 (2002) (citing *Van Valkenburgh* as an example of "the confusion to which some courts have fallen prey" in considering the claim of right analysis within adverse possession law); Todd Barnet, *The Uniform Registered State Land and Adverse Possession Reform Act, A Proposal for Reform of the United States Real Property Law*, 12 BUFF. ENVTL. L.J. 1, 46 n.143 (2004) (describing *Van Valkenburgh* as an "odd case"); Roger Bernhardt, Essay, *Teaching Real Property Law as Real Estate Lawyering*, 23 PEPP. L. REV. 1099, 1118 n.67 (1996) (stating that *Van Valkenburgh* is a "good case to avoid" in teaching adverse possession to students); Lila Perelson, Note, *New York Adverse Possession Law as a Conspiracy of Forgetting:* Van Valkenburgh v. Lutz *and the Examination of Intent*, 14 CARDOZO L. REV. 1089, 1089, 1109, 1117 (1993) (describing the *Van Valkenburgh* opinion as creating "a major contradiction in the requirement . . . as to the intent required of the possessor in taking possession," calling the result "absurd" and for the case to be overruled).

41. And that this result (denying both types of adverse possession claims) must be achieved by focusing on the claimant's state of mind.

42. Under this perspective, adverse possession would only be available in the color of title scenario.

43. *See supra* Table 1.

44. *See supra* Table 1.

45. *See* Foster & McKinney, *supra* note 2, at 210.

jurisdiction would ever employ the bad faith approach.[46] The results depicted in Table 1, however, resolve this mystery: the bad faith approach is the only knowledge-based test that results in a loss for the mistaken boundary claimant.[47] There are differences of opinion as to whether a mistaken boundary claimant should be able to perfect adverse possession. I take no position on this normative question, except to state that the argument against adverse possession in this context is definitely defensible.[48] For a court committed to denying adverse possession in a mistaken boundary context,[49] however, the bad faith approach is the *only* knowledge-based test that produces the desired result. Appreciating this point, I believe, resolves the question as to why a jurisdiction would ever employ the bad faith approach: it is the only knowledge-based test that permits a court to deny adverse possession in a mistaken boundary situation.

III. EXPLAINING THE DEVELOPMENT OF THE "MAINE RULE"

The analysis developed in Part II of this Article provides a necessary foundation to understanding the development of the "Maine Rule." The Maine Rule involved a warping of the knowledge-based bad faith approach. Under this mutation of the bad faith inquiry, the critical question is not the possessor's belief regarding true ownership of the land involved, but rather an inquiry into the intent of the possessor in possessing the land in question. As explained below, this shift in focus from belief to intent constituted an effort by Maine courts to develop an uniform analysis that permitted adverse possession in both a mistaken boundary case (despite early cases using a bad faith approach precluding this result) *and* a squatter case.

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46. *See supra* note 13 and accompanying text.

47. *See supra* Table 1.

48. The bad faith approach to claim of right in mistaken boundary cases, so as to deny the adverse possession claim, is definitely sensible and supportable. There are ample policy reasons as to why a court might want to prevent a mistaken boundary case from ripening into an adverse possession claim. Denying adverse possession in these cases provides an incentive on a landowner to ascertain the true, legal boundary separating his lot from his neighbor's. If a possessor is not allowed to profit from a mistake, there is less incentive to make this "mistake," particularly if the trespassing possessor must remove (and rebuild) any encroaching enclosures. Moreover, denying adverse possession in mistaken boundary cases facilitates the goal of cementing record, legal title; recognizing adverse possession ejects additional uncertainty into this process.

49. And, assuming that a court feels compelled to achieve this result by looking at the possessor's state of mind rather than another element, such as the notoriety element. *See, e.g.*, Mannillo v. Gorski, 255 A.2d 258, 262-64 (N.J. 1969) (rejecting an adverse possession claim based on a mistaken boundary by concluding that the possession was notorious).

A. Early Maine Case Law: Bad Faith Approach in Mistaken Boundary Cases

With regard to mistaken boundary disputes, the first Maine cases clearly took a straightforward bad faith approach so as to preclude adverse possession. The first Maine case to address the question is the 1824[50] case of *Brown v. Gay*.[51] *Brown* involves the typical mistaken boundary case in which a party has erected an enclosure, thinking that he was enclosing his lot, but instead enclosing some of his neighbor's lot.[52] In *Brown*, the party who had erected the enclosure claimed adverse possession of the land that he had enclosed and possessed.[53] The court denied the possessor's claim under the following reasoning: "[The possessor's] claim is plainly founded in mistake. If the owner of a parcel of land, through inadvertency or ignorance of the dividing line, includes a part of an adjoining tract within his enclosure, this does not operate a disseisin . . . ."[54]

It is clear in *Brown* that the court is denying the possessor's claim because of the possessor's state of mind. Nothing about the adequacy or nature of the actual possession is ever mentioned as a reason to deny the adverse possession claim. Rather, the possessor's mistaken belief that he owned the enclosed land is the problem identified by the court in denying the claim.

In denying the claim in *Brown*, the Maine court employed the bad faith version of the knowledge-based approach. The possessor thought that he owned the land in question. The possessor's good faith belief was not, however, the state of mind required by the court.[55] Recall that a bad faith approach is the *only* approach that results in a mistaken boundary

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50. Maine did not become a state until 1820, as part of the Missouri Compromise; Maine was carved out of the existing state of Massachusetts. *See* Jenny B. Wahl, *Stay East, Young Man? Market Repercussions of the* Dred Scott *Decision*, 82 CHI.-KENT L. REV. 361, 362 (2007) (explaining the history of Maine statehood). Although, some early Maine decisions relied upon Massachusetts case law as authority, see, for example, Stearns v. Burnham, 5 Me. 261, 263 (1828) (citing and relying upon Massachusetts cases), the Supreme Judicial Court of Maine clearly felt free to chart its own path on legal issues. This is what occurred in the mistaken boundary cases. These early Maine cases involving mistaken boundaries are decided with scant reference to existing case law. Indeed, the initial decision in *Brown v. Gay*, in which the bad faith approach to claim of right is adopted for mistaken boundary cases, is without citation to any precedent. 3 Me. 126, 130 (1824). For this reason, I have chosen to begin my analysis with the earliest Maine case law, rather than examining earlier Massachusetts case law.

51. 3 Me. 126.

52. *Id.* at 128-29.

53. *Id.* at 130-31.

54. *Id.*

55. *Id.*

claimant losing an adverse possession claim.[56] In *Brown*, the court obviously believed that adverse possession should not be available in this type of case; to reach this result, the court employed a bad faith approach to claim of right.

The bad faith approach employed in *Brown* was cited in subsequent mistaken boundary cases decided by the Maine Supreme Judicial Court in the decades following the *Brown* decision.[57] Soon after adopting a bad faith approach so as to deny adverse possession in mistaken boundary cases, however, it became apparent that Maine would *not* employ this same approach in color of title cases. Recall that a uniform bad faith approach produces the following results:

TABLE 2

Type of Case	*Result Under Bad Faith Approach*
Color of Title	Lose
Squatter	Win
Mistaken Boundary	Lose

A party with color of title cannot win under a bad faith approach because that party honestly believes, based on a faulty deed, that they are the true owner of the land in question. Thus, the approach employed by Maine in the mistaken boundary case of *Brown* would result in a rejection of the adverse possession claim of somebody with color of title. This has never been the law in Maine, however. As early as 1822, the Supreme Judicial Court of Maine stated:

> [W]here the person claiming title, by a deed *duly registered*, has entered into possession of the land under his deed, and continued *openly to occupy and improve it* . . . , though the deed may not convey the legal estate, still the possession of a *part* of the land described in it . . . *may* be considered as a *possession* of the *whole* and as a disseisin of the true owner . . . .[58]

That a color of title claimant can win an adverse possession case has been repeatedly affirmed under Maine law.[59] By definition, a color

56. *See supra* Table 1.

57. *See, e.g.*, Ross v. Gould, 5 Me. 204, 212 (1828) ("A disseisin cannot be committed by mistake . . . ." (citing *Brown*, 3 Me. at 130-31)).

58. Little v. Megquier, 2 Me. 176, 178 (1822).

59. *See, e.g.*, John Wallingford Fruit House Inc. v. MacPherson, 386 A.2d 332, 334 (Me. 1978) (acknowledging that a color of title claimant can win an adverse possession case); Hornblower v. Banton, 69 A. 568, 569 (Me. 1907) (same); Brackett v. Persons Unknown, 53 Me. 228, 231-32 (1861) (affirming lower court decision finding adverse possession by possessor with

of title claimant believes that he is the true owner of the land in question,[60] and thus, the result that a color of title claimant can win an adverse possession claim cannot be squared with the bad faith approach used in early mistaken boundary cases. The color of title claimant can win only under a good faith or objective approach.[61] Therefore, the bad faith approach was employed by the Maine Supreme Judicial Court to get the "right" result for Maine in its early mistaken boundary cases, but this same approach was obviously not employed in color of title cases.

What about Maine's approach in squatter cases? Although there are relatively few cases on point, Maine squatters have tended to fare pretty well in asserting adverse possession claims. A few *old* cases recognize the adverse possession claims of squatters.[62] This result is not necessarily surprising, given that squatters were generally treated favorably during the nineteenth century.[63] Moreover, absentee land ownership in Maine might have been enough of a concern to favor squatters, so as to get land into production.[64] More surprising, however, is that Maine has continued to recognize the adverse possession claims of squatters in more recent cases. For instance, in the recent case of *Northland Realty, LLC v. Crawford*,[65] the Supreme Judicial Court of Maine rejected the argument that an adverse possessor's claim was

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color of title). Indeed, by statute, color of title is required for adverse possession of "uncultivated lands." ME. REV. STAT. ANN. tit. 14, § 816 (1980).

60. As explained earlier, this Article uses the term "color of title" only to refer to those situations in which the possessor has a good faith belief that the document conveys valid title. In one decision, Maine deviated from this definition, holding that a party had color of title, as required under the statute governing adverse possession of uncultivated lands, even though that party knew the deed in question could not transfer legal title. *See* Estate of Stone v. Hanson, 621 A.2d 852, 853-54 (Me. 1993) (determining that the Maine legislature did not intend to incorporate a good faith requirement in limiting adverse possession of uncultivated lands to those with color of title, thus allowing possessor who had created and filed a deed to himself, to win an adverse possession claim.). Under the terminology employed in this Article, a possessor who knows that her deed is without effect is a squatter. That said, Maine does clearly adhere to the distinction employed in this Article between color of title claimants and mistaken boundary claimants. *See John Wallingford Fruit House Inc.*, 386 A.2d at 334 (stating that a mistake as to the land described in a deed does not constitute color of title).

61. *See supra* Table 1.

62. *See* Penobscot Dev. Co. v. Scott, 157 A. 311, 312, 314 (Me. 1931) (recognizing the adverse possession claim of a squatter); Bean v. Bachelder, 74 Me. 202, 205-06 (1882) (same).

63. Squatters played a big part of the westward settlement of America in the nineteenth century. *See* Larissa Katz, *The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law*, 55 MCGILL L.J. 47, 61 (2010) (Can.) ("There was a time, particularly when the West was being settled, when it was seen as socially beneficial to encourage land-hungry locals to take over from absentee paper title holders."). Squatting on federally owned land was encouraged by various policies. *See id.*

64. *See id.* at 61 & n.57.

65. 953 A.2d 359 (Me. 2008).

invalid because the possessor knew that record title was in another party.[66] Similarly, in *Estate of Stone v. Hanson*,[67] the court refused to require "an element of good faith" in the adverse possession claim of a party who knew record title was in somebody else.[68]

If it is assumed that squatters can win under Maine law (and applying the early Maine position that mistaken boundary claimants could not win), Maine's desired result for each of three types of adverse possession cases is depicted below:

TABLE 3

Type of Case	*Desired Result*
Color of Title	Win
Squatter	Win
Mistaken Boundary	Lose

This result cannot be achieved under a uniform approach to claim of right, however, as depicted in Table 4. In Table 4, the result in each type of adverse possession case is depicted for each of the three knowledge-based tests for a possessor's state of mind; when the result under a particular test matches the result seemingly desired under early Maine law, it is indicated with a checkmark:

TABLE 4

Type of Case	*Desired Result*	*Result Under Objective Approach*	*Result Under Good Faith Approach*	*Result Under Bad Faith Approach*
Color of Title	Win	Win√	Win√	Lose
Squatter	Win	Win√	Lose	Win√
Mistaken Boundary	Lose	Win	Win	Lose√

66. *Id.* at 365 ("The fact that Mr. Crawford knew that Babb held record title and, at one point, asked Babb for a right of first refusal, does not compel a finding that the Crawfords believed their possession was subordinate to Babb's.").

67. 621 A.2d 852 (Me. 1993).

68. *Id.* at 852 n.1, 853-54 (refusing to read a requirement of good faith under specific statute controlling adverse possession of uncultivated land "situated in any place incorporated for any purpose" (quoting ME. REV. STAT. ANN. tit. 14, § 816 (1980))). The relationship between Maine statutes addressing adverse possession, and the common law of adverse possession, has generated some confusion, but the Supreme Judicial Court of Maine recently stated that "there is only one [adverse possession] claim—the common law claim . . . ." Dombkowski v. Ferland, 893 A.2d 599, 604 (Me. 2006). That said, the *Dombkowski* Court acknowledged that the Maine legislature has attempted to amend Maine's common law claim for adverse possession. *See id.* at 604. This legislative effort is discussed later in this Article. *See infra* notes 165-71 and accompanying text.

Because Maine (at least initially) wanted a mistaken boundary claimant to lose, the bad faith approach was necessary in that type of case. Although the bad faith approach is not necessary to achieve the "right" result of a squatter winning an adverse possession claim (this result could also be achieved under an objective approach), the bad faith approach also produces the desired result in the squatter case. The importance of this observation is explained below.

B. Modern Maine Case Law: Permitting Mistaken Boundary Claimants to Win

To continue the study of Maine adverse possession law, and to fully understand the Maine Rule, it is necessary to consider how Maine's approach in mistaken boundary cases has changed over time. This is a complicated inquiry. As indicated above, a Maine statute now (arguably) allows mistaken boundary claimants to win an adverse possession case.[69] Before the statute attempted to achieve this result, however, Maine cases had already moved away from the early view that a mistaken boundary case could not ripen into an adverse possession claim. The manner in which this result was achieved, however, was the introduction of an intent-based approach to measuring a possessor's state of mind.

To appreciate what occurred in Maine, the discussion from the previous Subpart is important: because Maine was seemingly committed to the view that squatters should win, the court was reluctant to achieve the result of allowing mistaken boundary claimants to win by simply rejecting the previous case law adopting a bad faith approach.[70] Instead, the court attempted to introduce an additional, distinguishing inquiry that examined the possessor's state of mind not just with regard to the belief of the possessor as to who was the true owner, but the intent of the possessor with regard to the land in question.[71] Unfortunately, this additional inquiry made absolutely no sense in the context of a mistaken boundary case, because it required a fact finder to determine the possessor's hypothetical intent to a question that the mistaken boundary possessor had never considered: "If you had known that you did not own the land in question, what would have been your intent with regard to your possession?" This nonsensical inquiry—although it served the technical purpose of distinguishing the prior Maine case law in boundary disputes, while preserving Maine's desired result in squatter cases—produced widespread confusion.

69. *See infra* notes 160-71 and accompanying text.
70. *See supra* notes 63-66 and accompanying text.
71. *See infra* text accompanying notes 143-48.

1. The *Moody* and *Otis* Cases: A Sign of Things to Come

The move away from the early Maine position that mistaken boundary claimants cannot win first starts to appear in the 1839 case of *Moody v. Nichols*.[72] The *Moody* case involved a dispute regarding the location of the western boundary of a lot that had been carved out of a larger lot (owned by Chandler) and then sold to Moody.[73] The western boundary of Moody's lot (and the eastern boundary of Chandler's remaining land) had been marked by a surveyor and agreed to by both Chandler and Moody.[74] Thereafter, Moody erected a brush fence on the agreed-upon boundary.[75] Decades later, a dispute arose when Chandler conveyed his land to a third party, who in turn conveyed the land to Nichols.[76] It was discovered that the brush fence had erroneously been placed to the west of the true boundary, meaning that Moody had been in possession of a portion of the Chandler-Nichols tract.[77]

The case was litigated to the Supreme Judicial Court of Maine, with Moody asserting a claim of adverse possession.[78] Under the bad faith approach to mistaken boundary cases, which Maine had previously adopted in *Brown v. Gay*, Moody's claim was invalid. As previously stated in *Brown*, "[i]f the owner of a parcel of land, through inadvertency or ignorance of the dividing line, includes a part of an adjoining tract within his enclosure, this does not operate a disseisin."[79] Indeed, Nichols's attorney relied upon and cited the *Brown* decision in arguing against Moody's adverse possession claim.[80] Moreover, Moody himself had seemed to facilitate the easy application of the *Brown* approach by declaring that, if the brush fence did not constitute the true western boundary of his lot, it was because of a simple mistake.[81]

Despite the *Brown* precedent holding that a mistake about a boundary line cannot ripen into an adverse possession claim, and despite Moody's declaration that the location of the brush fence to the west of his true lot line was a mistake, the Maine Supreme Judicial Court nevertheless upheld the jury verdict in favor of Moody.[82] In an approach that would be repeated in later cases, however, the court did not

72. 16 Me. 23 (1839).
73. *Id.* at 25.
74. *Id.* at 25-26.
75. *Id.* at 25.
76. *Id.* at 26.
77. *Id.* at 25-26.
78. *Id.* at 25.
79. Brown v. Gay, 3 Me. 126, 130-31 (1824).
80. *Moody*, 16 Me. at 24.
81. *Id.* at 25-26.
82. *Id.* at 26-27.

explicitly overrule *Brown*. Instead, the court distinguished the previous decision by noting that Moody and Chandler had agreed upon the (mistaken) location of the boundary line:

> [T]he parties may agree upon a line of boundary, and when they have so agreed, and the possession is in accordance with it, such boundary after an acquiescence for so long a time, as to give title by disseizin, will not be disturbed, although found to have been erroneously established . . . .[83]

The acquiescence theory used in *Moody* can, technically speaking, be considered a distinct legal theory from adverse possession. An acquiescence theory focuses on the *true owner's* state of mind and conduct.[84] Under the acquiescence rule used in *Moody*, the true owner's mistaken agreement that a physical line represented the actual, legal line resulted in the title to that land being lost in favor of the party in actual possession.[85]

Even though the *Moody* case involved the distinct legal theory of acquiescence, the *Moody* Court's use of this theory to award title to the mistaken possessor can be seen as a partial retreat from the *Brown* holding. In *Brown*, the court clearly and emphatically rejected the notion that a possessor who was mistaken about the location of a boundary could ever acquire good title to that land based on that possession.[86] In *Moody*, the court qualified that result, holding that, if the true owner were *also* mistaken and had agreed to the boundary, the mistaken possessor could acquire good title.[87] This limitation on *Brown* could not have been anticipated from the *Brown* opinion itself: In *Brown*, the court's rejection of adverse possession (in mistaken boundary cases) had been unqualified.[88]

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83. *Id.* at 25.

84. James H. Backman, *The Law of Practical Location of Boundaries and the Need for an Adverse Possession Remedy*, 1986 BYU L. REV. 957, 965-67 (1986) (explaining that the acquiescence theory requires both parties to acquiesce in the line as a boundary).

85. Ironically, although Maine still recognizes the distinct legal concept of acquiescence, the contemporary version of the doctrine would not apply in a case such as *Moody*'s in which both the possessor and the true owner were mutually mistaken as to the true location of a boundary. Under modern Maine law, acquiescence is not applicable when both parties "were mutually mistaken as to the boundary line." Hamlin v. Niedner, 955 A.2d 251, 254 (Me. 2008).

86. Brown v. Gay, 3 Me. 126, 130-31 (1824).

87. *Moody*, 16 Me. at 25.

88. Indeed, the distinction between an owner's agreement or "acquiescence" in a mistaken boundary, as opposed to simply failing to bring suit to eject the possessor during the statutory time period for adverse possession, is a slippery one.

The Supreme Judicial Court of Maine's retreat from the bad faith approach in mistaken boundary cases continued in the 1841 case of *Otis v. Moulton*.[89] The *Otis* case involves a somewhat complicated fact pattern that has elements of both a mistaken boundary case and a color of title case. In *Otis*, both the true owner and the possessor had deeds that purported to convey the land in question.[90] The possessor's deed, however, descended from a party that had been mistaken about the boundaries of an original land grant from the state.[91] The possessor, having a deed that purported to make the possessor the true owner of the land in question, sought to use the doctrine of adverse possession against the true owner of the land.[92]

The *Otis* case represents a slight deviation from the typical mistaken boundary case, in that both parties in *Otis* had a deed that described the land being disputed. In this sense, *Otis* is like a color of title case: The possessor was relying upon a deed that purported to make him the true owner but was ineffective to do so.[93] That said, the case is also a mistaken boundary case: The reason that the possessor's deed was ineffective was because the possessor's remote grantor had been mistaken as to the boundary limits of his land grant.[94] In *Otis*, then, the boundary mistake had occurred all the way up the chain of title—in the initial land grant by the state—rather than in the actual deed of the possessing party asserting an adverse possession claim.[95]

Despite the somewhat unique facts in *Otis*, the broad rule announced previously in *Brown* could seemingly have precluded the ripening of an adverse possession claim. The possessor's claim in *Otis*, like the possessor's claim in *Brown*, was based upon a good-faith mistake as to the location of a boundary dispute. The true owner in *Otis* at least thought that *Brown* applied to preclude the possessor's claim, as *Brown* was cited by the true owner in arguing before the Maine high court.[96]

As in *Moody* two years previously, however, the Maine Supreme Judicial Court distinguished *Brown* in recognizing the adverse possession claim of the possessor. The court conceded that the *Brown* rule would have prevented an adverse possession claim of *the original*

89. 20 Me. 205 (1841).
90. *Id.* at 211-12.
91. *Id.* at 210-11.
92. *Id.* at 212.
93. *Id.*
94. *See id.* at 207-11.
95. *Id.* at 207-12.
96. *Id.* at 207.

party who had mistaken the boundaries of the state's land grant, but thought that it was unfair to apply this rule to a subsequent grantee who had acquired this defective deed down the chain of title:

> The deeds of conveyance, it is true, described the land as situated in the town of Bucksport and the proprietors of the township, and their representatives might be supposed to intend to keep within their own limits, and if they did not, the rule might justly be applied to them, while professing to do so, that mistake does not give right. But the grantee should not be expected to be familiar with the rights of the proprietors and the bounds of their township . . . .[97]

Concededly, the *Otis* fact pattern is a somewhat unique fact pattern that does not, strictly speaking, directly contradict the holding in *Brown*. The *spirit* of the *Otis* decision, however, particularly when coupled with the *Moody* decision, seems to run against *Brown*. The *Brown* opinion broadly pronounced that adverse possession was never available in cases of mistaken boundaries.[98] The court in *Moody* provided this qualifier: except when the true owner is also mistaken and has agreed to the boundary.[99] The *Otis* decision provided a further qualifier: except when the boundary mistake has occurred up the chain of title.[100]

2. *Abbott* and *Preble*: Permitting Mistaken Boundary Claimants to Win by Considering Intent

After the *Moody* and *Otis* decisions, the tactic of detracting from the *Brown* rule (that mistakes about the location of a boundary cannot ripen into adverse possession), while nevertheless refusing to officially overrule the *Brown* case, continued in a series of cases decided by the Supreme Judicial Court of Maine in the last half of the nineteenth century. This line of cases, however, represented a more pronounced and dramatic departure from *Brown*, even though the rule from *Brown* continued to be cited as good law.

The first hint of this more dramatic retreat from *Brown* comes in the short, and seemingly innocuous, opinion by the Supreme Judicial Court of Maine in the 1850 case of *Lincoln v. Edgecomb*.[101] In *Lincoln*, the Maine Supreme Judicial Court reviewed the jury instructions given by

97. *Id.* at 211-12.
98. Brown v. Gay, 3 Me. 126, 130-31 (1824).
99. Moody v. Nichols, 16 Me. 23, 25 (1839).
100. *Otis*, 20 Me. at 211-12.
101. 31 Me. 345 (1850).

a trial judge in a case in which a fence had been erected (and possession had occurred) across the true lot line.[102] The jury instructions delineated between an encroaching fence that had been located by a mistake and one that had not been located by mistake.[103] The fence located by mistake, the trial court instructed (consistent with *Brown*), could not ripen into adverse possession; if the fence had not been located by mistake, however, adverse possession could occur.[104]

The Maine Supreme Judicial Court affirmed the trial judge's instructions.[105] As described in the previous Subpart, the instructions were an accurate reflection of Maine law at that time. In a mistaken boundary case, under *Brown*, a possessor could not win because Maine employed a bad faith approach to claim of right.[106] On the other hand, a possessor that knowingly possesses across a boundary line is a squatter. And, as described in the previous Subpart, squatters could win under Maine law,[107] a result that is also consistent with a bad faith approach to claim of right.

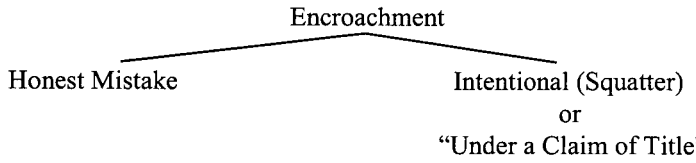
Despite the consistency of the trial court's instructions with existing Maine law, the seeds of the eventual transformation that was to follow were planted in *Lincoln*. In *Lincoln*, neither the trial court nor the Maine Supreme Judicial Court drew the distinction as simply one between mistake and non-mistake, as I have done in the previous two paragraphs. Instead, the distinction is drawn in language that is somewhat more amorphous. The trial court's instructions delineated between adverse possession cases involving a "mistake" and those in which "the tenant claimed title up to the fence."[108] In the Supreme Judicial Court of Maine, the distinction is between a fence erected "by mistake" and a fence erected "under a claim of title."[109]

Whether the *Lincoln* Court actually intended to make a distinction other than the distinction between an honest mistake and an intentional encroachment is not necessarily clear from the short opinion delivered by the court in that case. It is entirely possible that the *Lincoln* Court was attempting to delineate between mistaken encroachments and intentional encroachments and simply used the phrase "under a claim of title" as

102. *Id.* at 345.
103. *Id.*
104. *Id.*
105. *Id.*
106. *See supra* Table 1.
107. *See supra* text accompanying notes 62-68.
108. *Lincoln*, 31 Me. at 345.
109. *Id.*

part of this distinction. This interpretation of the *Lincoln* language is depicted directly below:

FIGURE 1



If this is the distinction intended by the *Lincoln* Court, it did not represent a departure from existing law.

The distinction drawn in *Lincoln*, however, eventually came to represent something drastically different. Just four years later, in the 1863 case of *Abbott v. Abbott*,[110] the language used in *Lincoln* was picked up by the Supreme Judicial Court of Maine. In *Abbott*, the court used the language from *Lincoln* to refer to something entirely different than simply the difference between mistaken and intentional encroachments.

The *Abbott* case involves a typical boundary dispute arising from a fence (and subsequent possession) encroaching over the true lot line.[111] In describing the Maine law applicable to such cases, however, the *Abbott* Court distinguished between mistaken boundary cases involving an "intention to claim title" and mistaken boundary cases in which there is no "intention to claim title":

> Mere occupation, by inadvertence, or mistake, without any *intention to claim title*, may not be a disseizin; as where a fence is erroneously erected not on the dividing line. But if, in such case, there is an *intention to claim title* to the land occupied, though the line is fixed by mistake, it is a disseizin.[112]

After making this distinction, the *Abbott* Court attempted to describe what it meant by an "intention to claim title."[113] A more thorough and helpful explanation of the distinction the *Abbott* Court was making, however, came decades later in the oft-cited case of *Preble v.*

110. 51 Me. 575 (1863).
111. *Id.* at 579.
112. *Id.* at 584 (citations omitted).
113. *Id.*

Maine Central Railroad Co.[114] In *Preble*, the court explained what it meant to have an "intention to claim title":

> It must be an intention to claim title to all land within a certain boundary on the face of the earth, whether it shall eventually be found to be the correct one or not. If, for instance, one in ignorance of his actual boundaries takes and holds possession by mistake up to a certain fence beyond his limits, upon the claim and in the belief that it is the true line, with the intention to claim title, and thus, if necessary, to acquire "title be possession" up to that fence, such possession, having the requisite duration and continuity, will ripen into title. . . .
>
> If, on the other hand, a party through ignorance, inadvertence, or mistake occupies up to a given fence beyond his actual boundary, because he believes it to be the true line, but has no intention to claim title to that extent if it should be ascertained that the fence was on his neighbor's land, an indispensable element of adverse possession is wanting. In such a case the intent to claim title exists only upon the condition that the fence is on the true line. The intention is not absolute, but provisional, and the possession is not adverse.[115]

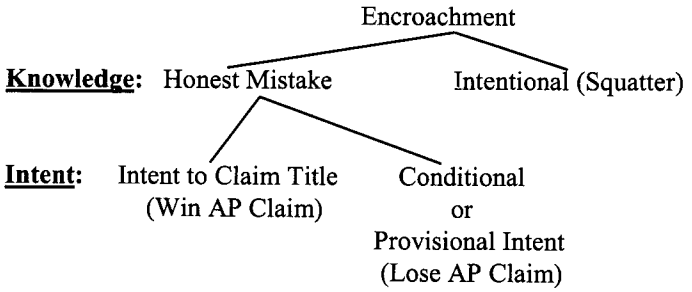
As made evident in *Preble*, the necessary "intent to claim title" first referenced by the court in *Lincoln* is an intent to use adverse possession against the true owner when, and if, the true owner were ever to attempt to remove the possessor from the owner's property.[116] This intent is to be distinguished from the "condition[al]" or "provisional" intent referenced in *Preble*.[117] Under this "provisional" intent, the possessor does not seek to use adverse possession against the true owner but rather has retained possession only until the time the true owner makes an appearance.

The *Preble* explanation assumes that the "intent to claim title" mindset can distinguish between different types of mistaken boundary claimants. In distinguishing a possessor who has the "intent to claim title" mindset from a possessor who does not, the court says that both possessions can be based on a "mistake."[118] In other words, according to *Abbott* and *Preble*, and contrary to what was suggested in *Brown*, a mistake about the location of a boundary *can* ripen into adverse

114. 27 A. 149 (Me. 1893).
115. *Id.* at 150.
116. *Id.*
117. *Id.*
118. *Id.*

possession, provided that the mistaken possessor has the right intent.[119] The distinction made in *Abbott* and *Preble* can be depicted as follows:

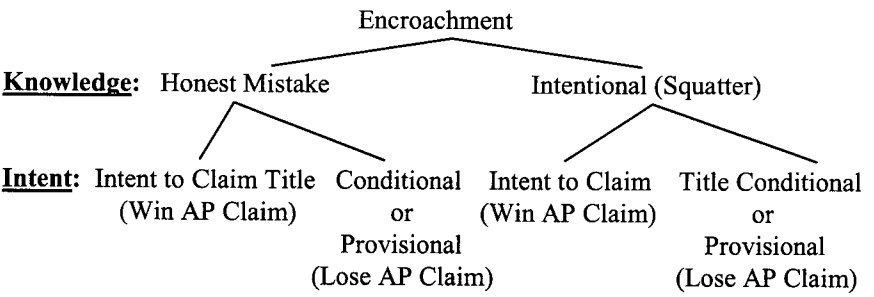
FIGURE 2



Intent, rather than knowledge, appeared to be the determining factor after *Abbott* and *Preble*.

If the determining factor after *Abbott* and *Preble* is the intent to use adverse possession to claim title, as opposed to a conditional intent in which the possessor only wishes to remain in possession until the true owner shows up, it is helpful to consider how this inquiry applies to a squatter case, as depicted below:

FIGURE 3



In most cases, presumably, a squatter will have taken possession of somebody else's land with the "intent to claim title." That is, the squatter, having begun possession of land that he or she knows belongs to somebody else, will hope to continue with the possession for a long

119. Other Maine Supreme Judicial Court cases make clear that, after *Abbott*, a mistake about the location of a boundary can ripen into adverse possession, provided that the right intent is present. *See, e.g.*, Richardson v. Watts, 48 A. 180, 184-85 (Me. 1901) ("[T]hough there may have been a mistake as to the true line, we think that the evidence shows that what they intended to claim, and did claim, was the title as far as to the shore. If that was what they intended to claim, the mistake in the line is unimportant."); Ricker v. Hibbard, 73 Me. 105, 107 (1881) ("The intention is the test and not the mistake. It is not unusual for an adverse possession to begin under a mistake as to the title . . . .").

enough time period so as to become the true owner via adverse possession. It is conceivable, of course, that some squatters will have the "conditional" or "provisional" intent to leave once the true owner appears (although the true owner would seem to face inherent obstacles in proving this in an actual case). The more likely result in a squatter case under the *Preble* intent test, though, would seem to be that the squatter wins.

Consider, however, the ridiculousness in applying this intent test in a mistaken boundary case. Recall that a mistaken boundary claimant is a claimant who has gone into possession of his neighbor's land based on a pure, and honest, mistake about the location of the lot boundary.[120] Under the *Preble* intent test, a court is supposed to inquire as to whether that mistaken possessor had the intent to use adverse possession to claim good title or whether the possessor's intent was "conditional" or "provisional." This is a nonsensical inquiry. The *Preble* test, as applied to a mistaken boundary case, requires an inquiry into the possessor's state of mind about a question that the possessor would never have considered. I am not the first to note the "Alice in Wonderland" nature of the *Preble* test:

> Indeed, it seems impossible to conceive the existence of an intention upon the part of a [possessor] to claim title by possession of land not covered by his deed when he has no knowledge or thought that his possession may embrace land not conveyed by his deed, and has no intention of encroaching on the rights of another; . . . [the] intent to hold in case it should be found that the holding is wrongful could not enter the mind unless or until some thought of possible error had occurred.[121]

C. *Understanding the Impetus for the* Abbott/Preble *Intent Test*

Why would the Supreme Judicial Court of Maine adopt the *Abbott/Preble* intent test, when that test seems to require a ludicrous inquiry? The prior decisions in *Moody* and *Otis*, I believe, are instructive

120. *See supra* p. 545.

121. Folkman v. Myers, 115 A. 615, 617 (N.J. 1921); *see also* Percy Bordwell, *Disseisin and Adverse Possession*, 33 YALE L.J. 141, 153 (1923) ("This is in effect to require a conditional intention to oust the true owner if a mistake shall appear. As such an intent is hardly likely to exist where no mistake is dreamed of, and is hypothetical where the fact of mistake has been raised but not settled, to make it material to the acquisition of title to property is merely to make a bad matter worse."); Recent Case, 7 HARV. L. REV. 237, 242 (1893) ("This distinction [drawn in cases like *Preble*] is too fine."); John Aycock McLendon, Jr., Note, Walls v. Grohman*: Adverse Possession in Mistaken Boundary Cases*, 64 N.C. L. REV. 1496, 1503 (1986) ("Indeed, one problem with the *Preble* rule is that it necessitates an inquiry into the possessor's intent under circumstances that probably were never considered before the mistake was discovered.").

as to what was motivating the court in *Abbott* and *Preble*: In short, the Maine court had come to the conclusion that *Brown* was incorrectly decided, and that a mistaken boundary should be able to ripen into a successful adverse possession claim. The *Preble* intent test provided an analytical route by which to achieve this desired result, even if this analytical route was nonsensical in its actual application.

First, it is worth mentioning that there are legitimate reasons as to why the Maine Supreme Judicial Court might have wanted to permit adverse possession in mistaken boundary disputes. As mentioned earlier in this Article, the normative argument against adverse possession in a mistaken boundary case is definitely defensible.[122] So too, however, is the argument in favor of adverse possession in a mistaken boundary case.[123] It is not preposterous, then, to suppose that the Maine high court had simply changed its mind as to whether adverse possession should apply in the mistaken boundary context.[124] Given the holdings in *Moody*, *Otis*, *Abbott*, and *Preble*, this conclusion seems justified.

If the Maine Supreme Judicial Court wanted to change direction and allow adverse possession in mistaken boundary cases, why, then, did the court not simply overrule the previous *Brown* decision? I believe two

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122. *See supra* note 48.

123. This approach encourages true owners to be diligent in recognizing encroachments onto their property. Allowing mistaken boundaries to ripen into adverse possession might have the effect of encouraging communication and agreement between neighboring landowners, thus decreasing litigation. Meier, *supra* note 2, at 62 n.26; Tucker, *supra* note 13, at 400-01. In short, believing that adverse possession should apply in mistaken boundary cases is a logical, supportable position. Of course, as briefly explained above in discussing the *Brown* case, believing that adverse possession should not apply in a mistaken boundary case is also a reasonable position. *See supra* text accompanying notes 50-57. Courts can legitimately come to different conclusions on this point.

124. Indeed, some of the factors that probably contributed to the court initially declining adverse possession in mistaken boundary cases had changed in the time period between the *Brown* decision and the *Preble* decision. For one, the art of surveying and thus determining the true boundary between legal lots had undoubtedly improved in the time period between *Brown* and *Preble*. In reading many of the early Maine cases, one is struck by the extreme difficulty in determining the true legal boundaries established by often rudimentary parcel descriptions. *See, e.g.*, Otis v. Moulton, 20 Me. 205, 207-09 (1841); Moody v. Nichols, 16 Me. 23, 25-26 (1839); Brown v. Gay, 3 Me. 126, 128-30 (1824). Recognizing adverse possession when there is so little clarity regarding true lot lines might have threatened the effort to create clearly defined legal parcels. As the exercise of describing and surveying land improved, however, and as this objective of clearly defined lot lines became more of a reality, the concept of adverse possession in mistaken boundary cases might have represented less of a threat. Moreover, as absentee ownership became less prevalent, and as land usage intensified, the calculus regarding who was in the best position to avoid these disputes might have changed. When the possessor is encroaching on an absentee landowner's land, the encroacher is in the best position to avoid the mistake, and thus, it makes sense to reject adverse possession so as not to reward the possessor from having made this mistake. On the other hand, when the true owner being encroached upon is present rather than absentee, he or she is in a better position to prevent the loss, thus justifying the application of adverse possession when the true owner does not take the affirmative step to ascertain, and remove, the encroacher.

factors pushed the court to adopt the *Preble* intent test rather than to directly overrule *Brown*.

First, the court was probably disinterested in directly overruling its prior precedent. Supreme courts tend to take stare decisis very seriously.[125] In the previous cases of *Moody* and *Otis*, the Maine high court had distinguished *Brown* so as to permit a mistaken boundary claimant to win.[126] The *Preble* intent test allowed the court to continue down this same road of delicately undermining *Brown* without having to expressly overrule the decision.

Second, the court was likely concerned as to what effect overruling *Brown* would have on other types of adverse possession cases. In particular, the court might have been concerned that recognizing the adverse possession claim of a mistaken boundary claimant would preclude the adverse possession claim of a squatter. As explained previously, Maine appeared to be firmly committed to allowing pure squatters to win an adverse possession claim.[127]

To demonstrate this point, recall the various results in the different types of adverse possession cases under the three different knowledge-based tests:

TABLE 5

Type of Case	*Result Under Objective Approach*	*Result Under Good Faith Approach*	*Result Under Bad Faith Approach*
Color of Title	Win	Win	Lose
Squatter	Win	Lose	Win
Mistaken Boundary	Win	Win	Lose

When Maine adhered to the position that mistaken boundary claimants should lose while squatters should win, the bad faith approach worked to get the "right" result in both of those cases.[128]

In moving to the view that mistaken boundary claimants should win, however, the Maine court was in an analytical dilemma with regard

125. Hohn v. United States, 524 U.S. 236, 251 (1998) ("[Adherence to] [*s*]*tare decisis* is 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991))).

126. *Otis*, 20 Me. at 211-12; *Moody*, 16 Me. at 25-26.

127. *See supra* text accompanying notes 62-68.

128. Of course, this bad faith approach got the "wrong" result in the color of title case, but Maine cases had long held that the color of title fact situation could give rise to an adverse possession claim. *See supra* note 59.

to the result it also desired in the squatter case. If the court were to overrule *Brown* and adopt a good faith approach to mistaken boundary cases, this same approach in a squatter case would mean that the squatter would lose.[129]

Of course, the Maine court could have determined that the mistaken boundary and squatter cases were governed by two different knowledge-based standards. Thus, the Maine court could have held that a good faith approach would be used in mistaken boundary cases while a bad faith approach would be used in squatter cases. Recall that this was the approach used by the New York court in *Van Valkenburgh*.[130] Recall also, however, the criticism that has been directed towards the court's analysis in *Van Valkenburgh*.[131]

The Maine court also could have reached its desired result in both the squatter and mistaken boundary cases by simply adopting an objective view, and thus completely eliminating the inquiry into the claimant's state of mind. Under an objective approach, of course, adverse possession is available in every type of case.[132] This approach, however, would have been a dramatic departure from previous case law. Maine case law had consistently used the state of mind of the possessor as part of its adverse possession analysis.[133] Similar to how the Supreme Judicial Court of Maine seemed reluctant to directly overrule *Brown*, I imagine the court was also very hesitant to abruptly turn its back on its traditional inquiry into the possessor's state of mind.

Instead of pursuing any of the above-described routes, the court in *Abbott* and *Preble* adopted an approach that continued the Maine tradition of analyzing the state of mind of the possessor.[134] Indeed, one can view *Abbott* and *Preble* as "doubling down" on the state of mind inquiry. Rather than adopting the objective approach thus eliminating the state of mind inquiry, the court added intent into the state of mind analysis. Adding the intent analysis allowed the court to continue to examine a possessor's state of mind while also permitting adverse

129. *See supra* Table 5.

130. In *Van Valkenburgh*, the court wanted both the squatter and mistaken boundary claimant to lose, so it employed a good faith approach in the squatter situation and a bad faith approach in the mistaken boundary situation. *See supra* notes 34-44 and accompanying text. The Maine court wanted the adverse possessor to win both of these types of cases, so it would have applied the good faith approach to the mistaken boundary case and the bad faith approach to the squatter case.

131. *See supra* note 40.

132. This approach would have had the additional benefit of allowing recovery in the color of title context.

133. *See supra* Part III.A–B.

134. Preble v. Me. Cent. R.R. Co., 27 A. 149, 150 (Me. 1893); Abbott v. Abbott, 51 Me. 575, 584 (1863).

possession in both the squatter and mistaken boundary contexts. The intent analysis of *Abbott* and *Preble* allowed the court to thread the proverbial needle: the court got the result it wanted for both squatter and mistaken boundary cases without having to (1) directly overrule *Brown*; (2) use two different tests for different types of cases (as the New York court later did in *Van Valkenburgh*); or (3) eliminate the inquiry into the possessor's state of mind that Maine had long employed.

The previous Maine case law gave the court just enough wiggle room to take the route it took in *Abbott* and *Preble*. The 1850 decision in *Lincoln*, discussed above, introduced the "claim of title" concept and suggested that intent, rather than mistake, was the determinative factor.[135] Even before *Lincoln*, however, the Maine Supreme Judicial Court had occasionally described the *Brown* rule precluding adverse possession in a mistaken boundary case in terms of the intent of the possessor rather than the mistake regarding true ownership. In the 1828 case of *Ross v. Gould*[136] the court stated that "[a] disseisin cannot be committed by mistake because the intention of the possessor to claim adversely is an essential ingredient."[137] Notice the manner in which the *Ross* Court describes the *Brown* rule. In *Brown*, the court stated that an adverse possession claim that is "plainly founded in mistake" cannot succeed.[138] This articulation of the rule suggests that it is the possessor's belief that he is the true owner that serves to preclude the claim; the owner has good faith, but bad faith is required. In *Ross*, however, the court suggests that the *intent* to assert an adverse possession claim is the *real* test. The mistake by the possessor in thinking that he is the true owner does not strictly preclude the possessor from winning as a legal matter, but the mistake has this practical effect because a possessor who is mistaken will not have the necessary intent required under the governing legal standard.[139]

This shift suggested in *Ross*, from a focus on the possessor's belief regarding true ownership to a focus on the possessor's intent to assert an adverse possession claim, is irrelevant *as long as it is recognized that these two states of mind go hand-in-hand.* A mistaken boundary claimant who believes that he is the true owner of the land in question will not have the intent to assert an adverse possession claim.[140]

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135. *See supra* text accompanying notes 101-09.

136. 5 Me. 204 (1828).

137. *Id.* at 212 (citing Brown v. Gay, 3 Me. 126, 130-31 (1824)).

138. *Brown*, 3 Me. at 130-31.

139. *Preble*, 27 A. at 150.

140. *See* William Sternberg, *The Element of Hostility in Adverse Possession*, 6 TEMP. L.Q. 207, 213-14 (1932) (describing the "Early Maine Rule" as resting on the presumption that "as long

Conversely, a squatter who knows that he is not the true owner of the land will almost always have the intent to assert an adverse possession claim.[141] Thus, as comprehended in prior cases such as *Ross*, whether the determinative test is based on belief about true ownership *or* intent to claim adverse possession, the result is the same and it makes no difference whether the claimant loses because of his good faith belief that he owned the land in question or his failure to intend to claim adverse possession. Under either the belief test or the intent test, the analysis will result in a mistaken boundary claimant losing and a squatter winning.[142] In order to reach the result that a mistaken boundary claimant could win, however, and to avoid overruling *Brown*, and to preserve the rule that a squatter could win an adverse possession claim, the courts in *Abbott* and *Preble* simply indulged in the fantasy that a mistaken boundary claimant *could* nevertheless have the intent to claim adverse possession.

By doing so, the court provided an analytical path such that a mistaken boundary claimant could win. Of course, a successful adverse possession claim was not necessarily *guaranteed* under the *Preble* intent test, as it would have been if the Maine court had simply adopted the objective or good faith versions of the knowledge-based approach. Instead, it was now up to the jury, instructed according to *Abbott* and *Preble* to apply this nonsensical standard. The failure to give these instructions constituted reversible error, as occurred in *Abbott*.[143] So long as these instructions were given to the fact finder, the Supreme Judicial Court of Maine would usually allow the verdict to stand, regardless of whether the verdict was in favor of the adverse possessor[144] or the true owner.[145] In a few early cases, claimants made the mistake of specifically admitting that they never intended to claim anything other than the true boundary line, and thus suffered an adverse judgment as a matter of law.[146] In later cases, though, the mistaken boundary claimants became savvier in describing their "intent" about a question that they

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as [the adverse claimant] believes himself to be the true owner, he will never have the intention to hold in hostility to the true owner").

141. *See Preble*, 27 A. 150-51; Abbott v. Abbott, 51 Me. 575, 584 (1863).

142. *See supra* Figure 2.

143. *Abbott*, 51 Me. at 585.

144. *See, e.g.*, Hitchings v. Morrison, 72 Me. 331, 333-34 (1881) (upholding jury verdict for adverse possessor in mistaken boundary case).

145. *See, e.g.*, Crosby v. Baizley, 642 A.2d 150, 154 (Me. 1994) (upholding jury verdict for true owner in adverse possession claim based on mistaken boundary).

146. *See, e.g.*, Landry v. Giguere, 143 A. 1, 2-3 (Me. 1928) (deciding admission from mistaken boundary claimant that he did not intend to claim anything other than the true lot required a judgment for true owner as a matter of law); Borneman v. Milliken, 100 A. 5, 7 (Me. 1917) (same).

had never actually considered during their possession.[147] Recall that one of the objections to the Maine Rule is that it encourages claimants to lie.[148] This criticism misses the mark. A lawyer did not really need his claimant to lie to win a mistaken boundary case under the Maine Rule; the lawyer just needed to convince his client that, *if* he had known this was not his property, he would have had the requisite intent to assert an adverse possession claim. It is difficult to truly lie about such an amorphous, fanciful question.

IV. LESSONS FROM THE MAINE RULE

There are important lessons—with contemporary value—to be learned from the history behind the Maine Rule.

First, it should now be obvious to the reader that an inquiry into a possessor's intent is unnecessary within adverse possession doctrine, even though some jurisdictions still engage in this analysis.[149]

The jurisdictions that still employ an intent-based approach seem to operate on a different assumption than that of the Supreme Judicial Court of Maine. Recall that the Maine Supreme Judicial Court introduced the intent-based approach as an analytical method by which mistaken boundary claimants could win an adverse possession claim.[150] In order for this to work, the Maine court assumed that even good faith possessors could have the required "intent to dispossess." For jurisdictions that still employ an intent-based inquiry, however, the assumption seems to be that a claimant will only have the necessary "intent to dispossess" if the claimant is aware that he is possessing land owned by someone else.[151] In other words, it is assumed that only bad-faith squatters will have the required intent. This assumption makes practical sense, and avoids the fantasy indulged in by Maine courts. But, if it is assumed that only bad faith squatters can have the requisite intent, the intent test is really just another way of articulating the knowledge-

147. In a reversal of the earlier cases in which the Supreme Judicial Court of Maine would occasionally enter judgment as a matter of law for the true owner, in some later cases the court would enter judgment as a matter of law for the possessor. McMullen v. Dowley, 483 A.2d 698, 701 (Me. 1984) (determining that the possessor's testimony that the true owner "would have to go to court [to] prove [ownership]" established the necessary intent to claim adverse possession, such that judgment was entered in favor of the possessor as a matter of law).

148. *See supra* notes 14-15 and accompanying text.

149. *See, e.g.*, Fulkerson v. Van Buren, 961 S.W.2d 780, 783 (Ark. Ct. App. 1998) ("[T]he church congregation did not possess the land with the requisite intent for seven years . . . .").

150. *See supra* text accompanying notes 8-10.

151. *See, e.g.*, *Fulkerson*, 961 S.W.2d at 782 (presuming that a good faith claimant cannot have the requisite intent); *see* Perry v. Heirs of Gadsden, 449 S.E.2d 250, 251 (S.C. 1994) (per curiam); Ellis v. Jansing, 620 S.W.2d 569, 571-72 (Tex. 1981).

based bad faith approach, at least in the mistaken boundary context.[152] As such, the intent test serves no analytical function that could not be achieved by the bad faith test. Thus, a jurisdiction can achieve the objective of preventing adverse possession in a mistaken boundary case by pointing to the claimant's lack of bad faith or lack of intent to possess. If it is assumed that the required intent can only arise in a bad faith possessor, the result is the same either way. For this reason, in those jurisdictions—like Texas—that purport to look at the intent of the possessor as a reason for denying adverse possession, this conclusion is often stated as an application of the bad faith knowledge-based approach.[153] This is a concession that the intent test is one-and-the-same as the bad faith approach. The intent test, then, has no analytical significance apart from the bad faith approach, and could be eliminated as a separate inquiry with no practical difference.

No jurisdiction appears to continue the fantasy upon which the Maine Rule was predicated—that a good faith claimant could nevertheless have the requisite intent to dispossess. In any event, there are easier ways to allow a good faith claimant (in a mistaken boundary or color of title situation) to win her claim. Namely, a jurisdiction could employ either the good faith or objective approach to reach this result. Here again, then, the intent inquiry is unnecessary to any result that a jurisdiction wishes to reach.

The history of the Maine Rule also reveals deeper insights about adverse possession law in general. The Maine Rule nicely demonstrates the challenges that can arise when courts focus on a claimant's state of mind as a reason for either denying—or allowing—an adverse possession claim. Recall that the Supreme Judicial Court of Maine adopted its intent-based approach because it felt boxed in by what it had previously held regarding a claimant's state of mind and the different types of adverse possession cases.[154] The result was the Maine Rule, which provided an analytical escape from this "trap." The analytical "escape" provided for under the Maine Rule, however, was based on the nonsensical idea that a party could have an "intent to dispossess" land they thought they already owned.[155] Stepping back, then, it is apparent that Maine's initial inquiry into a claimant's state of mind started the

152. It is conceivable that a jurisdiction might want to allow a squatter to win only if they have the intent to possess. In almost all instances, however, it would seem that a squatter would have this intent.

153. *See, e.g.*, Hardee, *supra* note 2, at 572, 581-82 (describing the Texas approach as a bad faith hostile intent standard).

154. *See supra* text accompanying note 45.

155. *See supra* text accompanying notes 71-72.

Maine court on a path that eventually led to the creation of an entirely ridiculous test.

Although the Maine Rule is a great example of what can occur when a court uses a claimant's state of mind as part of the adverse possession inquiry, it is not the only example. There is no shortage of instances in which commentators, judges, and litigators have struggled with the question of what the law requires regarding a possessor's state of mind.[156]

The underlying problem with any inquiry into a claimant's state of mind (either knowledge or intent) is, I believe, a failure to appreciate that a uniform approach to the state of mind question might not produce results that a court finds satisfactory for all different types of adverse possession cases. Thus, the "intent to dispossess" approach or bad faith approach might allow a court to reject adverse possession in a mistaken boundary case, but it would require the court to also reject adverse possession in a color of title case. A court that wanted to avoid this result in the color of title case could inject a more nuanced state of mind inquiry, as occurred under the Maine Rule. Or, the court could just use two different approaches to the required state of mind for each type of case; this is what occurred in *Van Valkenburgh*.[157] Either way, though, confusion is likely to ensue.

Completely eliminating the inquiry into a possessor's state of mind would solve this problem. But I am skeptical that courts will ever follow this path, for reasons that I have explained previously.[158] Assuming that courts are still going to use a claimant's state of mind as part of an adverse possession inquiry, then, it is imperative that this be done with precision and awareness. Namely, a court that wants to use a claimant's state of mind as a justification for a result in one type of case must accept that a different justification might be needed to reach the desired result in a different type of case. With the state of mind inquiry in adverse possession, one size simply does not fit all. Without this recognition, confusion and—as in the case of the Maine Rule—fantasy will frequently arise.

Maine's effort to statutorily overrule the Maine Rule is perhaps the best cautionary tale as to the need for precision and awareness when dealing with a state of mind inquiry within adverse possession law. In 1999, the Maine legislature undertook an effort to overrule the Maine

156. *See supra* note 13 and accompanying text.

157. *See supra* notes 34-45 and accompanying text.

158. *See generally* Meier, *supra* note 2 (explaining the inclination of courts to explain results by reference to rules).

Rule by statute.[159] The Maine legislature clearly approved of the result that the Maine courts had reached in permitting mistaken boundary claimants to win adverse possession. But, the legislature obviously disapproved of the manner in which this result had to occur under the Maine Rule; the Maine legislature wanted to end the fantasy that required a mistaken boundary claimant to testify as to whether they had the "intent to dispossess."

Towards this goal, the Maine legislature adopted the following statutory provision:

> If a person takes possession of land by mistake as to the location of the true boundary line and possession of the land in dispute is open and notorious, under claim of right, and continuous for the statutory period, the hostile nature of the claim is established and no further evidence of the knowledge or intention of the person in possession is required.[160]

The objective of the legislature in passing this statute seems clear enough: mistaken boundary claimants should be able to establish adverse possession in Maine without having to show the "intent to dispossess." A statement of fact accompanying the bill confirmed this legislative objective.[161] And the Supreme Judicial Court of Maine eventually confirmed this result, stating as follows: "[W]e hold that the intent requirement for adverse possession claims is eliminated."[162]

Before reaching this conclusion, however, the Maine court reprimanded the legislature in expressing this result in terms of the "hostile" requirement of adverse possession law rather than the "claim of right" requirement. According to the Maine court, the "hostile" element refers to the requirement that the possession be without the owner's permission,[163] while the intent analysis required under Maine law fell under the "claim of right" element.[164]

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159. Dombkowski v. Ferland, 893 A.2d 599, 605 (Me. 2006) ("[T]he statement of fact accompanying the bill explicitly states that the Legislature intended to eliminate the intent requirement for adverse possession claims.").

160. ME. REV. STAT. ANN. tit. 14, § 810-A (1993).

161. *Dombkowski*, 893 A.2d at 605.

162. *Id.* Curiously, although the Maine statute addresses only cases involving a "mistake as to the location of the true boundary line," the *Dombkowski* Court did not include this limitation in pronouncing that "the intent requirement for adverse possession claims is eliminated." *Id.*

163. In almost every other jurisdiction, the concept that the true owner's permission destroys a claim for adverse possession is associated with the "adverse" element. Thus, the Maine court, in reprimanding the Maine legislature, was using terminology that was inconsistent with the terminology employed in most other jurisdictions. Moreover, it is arguable that the Maine legislature had correctly used the terms as they had been previously defined by the Supreme Judicial Court of Maine.

164. *Dombkowski*, 893 A.2d at 602.

The inability of the Maine Supreme Judicial Court to resist the temptation to enter the minefield of adverse possession terminology[165] apparently raised the dander of the Maine legislature. Despite getting the exact result that the Maine legislature had desired—the Maine court had, after all, acknowledged that the effect of the statute was to eliminate the intent requirement in a mistaken boundary case[166]—the Maine legislature could not leave well enough alone. Thus, the Maine legislature amended the statute to respond to the public reprimand it had received by the Supreme Judicial Court of Maine regarding proper terminology. The amended statute now reads as follows: "If a person takes possession of land by mistake as to the location of the true boundary, the possessor's mistaken belief does not defeat a claim of adverse possession."[167]

This amended statute avoids any adverse possession terminology at all. Arguably, however, it undermines the very objective that motivated the legislature to act in the first place: this statute would not appear to overrule the Maine Rule.

Recall that the Maine Rule was adopted so as to provide an analytical route by which a mistaken boundary claimant could perfect an adverse possession claim.[168] This was accomplished by the introduction of the intent analysis. The (fantastical) assumption that formed the basis of the Maine Rule was that a mistaken boundary claimant could nevertheless have the required "intent to dispossess."

Notice, however, that the amended version of the Maine statute simply confirms that result. Under the Maine Rule, a "possessor's mistaken belief does not defeat a claim of adverse possession," which is exactly what the statute now says.[169] Rather than overrule the Maine Rule, the amended version of the Maine statute seems to reaffirm the Maine Rule![170] What a mess![171]

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165. I hope it is now apparent to the reader as to why I have avoided any mention of adverse possession elements or terms in this Article. *See supra* note 22. The concepts involved are difficult enough, without having to first resolve what "element" or "term" with which the concept should be associated. *Cf.* LUDWIG WITTGENSTEIN, PHILOSOPHICAL GRAMMAR 162 (Rush Rhees ed., Anthony Kenny trans., 1974) ("Like everything metaphysical the harmony between thought and reality is to be found in the grammar of the language.").

166. Actually, the court suggested that the intent requirement was eliminated for all cases. *Dombkowski*, 893 A.2d at 605 ("[W]e hold that the intent requirement for adverse possession claims is eliminated.").

167. ME. REV. STAT. ANN. tit. 14, § 810-A (2015).

168. *See supra* text accompanying note 69.

169. ME. REV. STAT. ANN. tit. 14, § 810-A.

170. Most commentators have assumed that the amended statute continues to abrogate the Maine Rule. *See, e.g.*, Sipe, *supra* note 2, at 859 n.17 ("The [Maine] rule has since been eliminated in Maine itself, via ME. REV. STAT. ANN. tit. 14, § 810-A (2009) . . . .").

The contemporary confusion still existing about the Maine Rule underscores that the Maine Rule is not a problem relegated to history. Indeed, the very conditions that led to the mess that is Maine law are present in every jurisdiction. Namely, courts react to different types of adverse possession cases with different instincts as to how that type of case should be resolved.[172] Courts should be extremely carefully in using a claimant's state of mind to reach these desired results. Havoc awaits for those jurisdictions that ignore the lessons from the history of the Maine Rule.

171. Although unrelated to the point being made in this Article, the Maine Supreme Judicial Court's decision in *Northland Realty, LLC v. Crawford*, 953 A.2d 359 (Me. 2008), adds an additional layer of intrigue to this saga. In *Northland Realty*, the court stated the following:

> Possessing land under a claim of right means the claimant is in possession as owner, with intent to claim the land as one's own, and not in recognition of or subordination to the record title holder. An individual possesses land under a "claim of right," even though the individual acknowledges that he or she does not have record title, as long as the possession is with the intent to claim the land as one's own.

Id. at 365 (citation omitted). This seems to directly contradict the court's statement in *Dombkowski* that "the intent requirement for adverse possession claims is eliminated." *Dombkowski*, 893 A.2d at 605. There is no reconciliation of these two statements in *Northland Realty*, despite the fact *Dombkowski* is cited previously in the *Northland Realty* opinion for the proposition that "[a]dverse possession presents a mixed question of law and fact." *Northland Realty*, 953 A.2d at 364 (quoting *Dombkowski*, 893 A.2d at 606). Moreover, the *Northland Realty* litigants cited *Dombkowski* in their brief to the Supreme Judicial Court of Maine. Brief of Appellees at 13-14, *Northland Realty, LLC*, 953 A.2d 359 (No. CUM-07-714). And, to top it off, the *Northland Realty* case was decided in 2008—before the amendments to the Maine legislation in 2015; thus, *Northland Realty* cannot be understood as a reaction to these confusing legislative amendments.

The *Northland Realty* Court's failure to reconcile its reaffirmation of the intent analysis, while failing to acknowledge the direct statement to the contrary in *Dombkowski*, can be reconciled by noting that the Maine legislation speaks only to mistaken boundary cases, while *Northland Realty* did not involve a mistaken boundary case. Even if this was the distinction that the court was making in *Northland Realty*, it is surprising that this was not explained in detail, given the unqualified language in *Dombkowski* that seems to completely eliminate the intent analysis for all adverse possession cases. There is some irony to this situation: the failure to clearly distinguish between different types of adverse possession cases is part of what got Maine into the mess it is currently in. The *Northland Realty* decision might indicate that this hard lesson has yet to have been learned.

172. *See, e.g.*, Horton v. McLerkin, 275 S.W.2d 10, 11-12 (Ark. 1955); Greathouse v. Linger, 127 S.E. 31, 32 (W. Va. 1925).