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ADVERSE POSSESSION:
KNOWING YOUR BOUNDARIES AND OTHER LIMITATIONS.

INTRODUCTION

Generally, cases involving claims of adverse possession or boundary by practical location will be tried to the Court sitting without a Jury. Many trial judges have not had significant experience in adverse possession cases. Trial judges come from a diverse background and arrive on the bench with a wealth and variety of education and experience which does not consistently include the niceties of esoteric real property law.

Adverse possession is a "common law" action; no statute creates the right to adverse possession. Instead, a statute of limitation terminates one's right to defend such claims after 15 years. A word about the common law; there is nothing common about it. The common law consists of judge created rights which are based on what judges before them ruled in various cases dating back to Old England.

For a quick summary of the elements of adverse possession written in a "user friendly" approach, also see my article: "(Not a) Learned Treatise on Adverse Possession", The Hennepin Lawyer, Vol. 68, No. 8, Aug. 1999, which follows these materials. My thanks to The Hennepin Lawyer for their permission to reprint.

1) ADVERSE POSSESSION

2) BOUNDARY BY PRACTICAL LOCATION

ADVERSE POSSESSION

STATUTE OF LIMITATION TO RECOVER TITLE & POSSESSION OF REAL PROPERTY

Minn. Stat. § 541.02 sets forth the statutory limitation of time for bringing an action to recover real estate. It states:

> "No action for the recovery of real estate or the possession thereof shall be maintained unless it appears that the plaintiff, the plaintiff's ancestor, predecessor, or grantor, was seized or possessed of the premises in question within 15 years before the beginning of the action.
>
> Such limitations shall not be a bar to an action for the recovery of real estate assessed as tracts or parcels separate from other real estate, unless it appears that the party claiming title by adverse possession or the party's ancestor, predecessor, or grantor, or all of them together, shall have paid taxes on the real estate in question at least five consecutive years of the time during which the party claims these lands to have been occupied adversely.
>
> The provisions of paragraph two shall not apply to actions relating to the boundary line of lands, which boundary lines are established by adverse possession, or to actions concerning lands included between the government or platted line and the line established by such adverse possession, or to lands not assessed for taxation."

BASIC ELEMENTS OF ADVERSE POSSESSION

There are five basic elements of possession which a claimant must establish in order to obtain legal confirmation of ownership of land. The claimant must show he had actual, exclusive, open, continuous and hostile possession of the real property in question for a period greater than 15 years. If he has, he has become the owner of the property involved and the court confirms that ownership.

The courts often also mention "notorious" possession which makes one presume that Jesse James is involved somewhere. In one recent case, the Court of Appeals again used the term apparently interchanging it with the requirement of "open" possession.

> Once it is established that the use is actual, notorious, exclusive, and continuous, a presumption is established that the use was hostile, and it is the burden of the party opposing the prescriptive right to show that the use was permissive.

642 N.W.2d 104, 112, Ebenhoh v. Hodgman, (Minn.App. 2002)

SURVEY VERSUS ADVERSE POSSESSION/PRACTICAL LOCATION

Boundaries established by adverse possession or by practical location of boundary will supercede the outcome of a an indisputably correct survey.

> It is clear that "(a) boundary clearly and convincingly established by practical location may still prevail over the contrary result of survey."

Phillips v. Blowers, 281 Minn. 267, 274, 161 N.W.2d 524, 529 (1968). 297 N.W.2d 298, 304, Wojahn v. Johnson, (Minn. 1980). It is routine that adverse possession cases and practical location cases start when someone decides to get a survey and discovers that the surveyed line is other than where everyone thought.

ACTUAL POSSESSION-POSSESSION IS 9/10'S OF THE LAW

The claimant must have been in possession of the property for the statutory period. Duh. Possession is 9/10 of the Law. You could look it up. Somewhere.

The claimant must have some domination and control over the property. The degree of possession will vary based on the type of property. If it's crop land and the claimant tills it for 15 years, and lets it lie fallow during the winter months, this is sufficient possession even though the claimant is not on the property for months at a time. See for example, 54 N.W.2d 15, 18, 237 Minn. 43, Voegele v. Mahoney, (Minn. 1952).

If the property is lakeshore recreational property, then summertime only possession is probably sufficient.

SPORADIC USE IS NOT ENOUGH

BUT: sporadic use of lake property to store play equipment, mowing the grass and allowing children to play on property has been held to be insufficient by itself. The construction of a utility shed was sufficient to start the running of the statutory period, but that wasn't done more than 15 years before the suit so adverse possession failed.

453 N.W.2d 733, 735, Stanard v. Urban, (Minn.App. 1990). The Court continued in a footnote to offer some explanation, as follows:

> (FN1.) This decision is not meant to state that, as a matter of law, adverse possession cannot start until one puts up a building or other permanent or semi-permanent structure. We only find that on these facts the irregular and minimal use by the Urbans of the land at issue was, with the exception of building the shed, nowhere near the level of hostile possession under a claim of right necessary to trigger the start of the required 15-year unbroken period.

In another decision, the court stated this:

> Occasional and sporadic trespasses for temporary purposes, because they do not indicate permanent occupation and appropriation of land, do not satisfy the requirements of hostility and continuity, and do not constitute adverse possession, even where they continue throughout the statutory period. Krueger v. Market, 124 Minn. 393, 145 N.W. 30; Bazille v. Murray, 40 Minn. 48, 41 N.W. 238; 2 C.J.S., Adverse Possession, §§ 24, 125b. This is especially true where, as here, there is nothing about each separate trespass to indicate that it is anything but a trespass, much less an assertion of adverse right likely to be persisted in.

14 N.W.2d 482, 485, 217 Minn. 174, Romans v. Nadler, (Minn. 1944)

In a case I tried which was affirmed by the Court of Appeals, my client claimed ownership by way of adverse possession up to a fence line. Ronning vs. Tungseth, Case No. C8-01-116 (Minn. Ct. App. 2001). The appellant Tungseth argued that the claimed area was wild, natural, not maintained, and therefore not possessed. We argued successfully that the claimant's possession was appropriate to the area. Owners had gone for walks in the wooded area, children had ridden BMX bikes, and horses had been ridden in this area. Photos depicted a fairly dense underbrush in areas. The property was bounded by a fence. The Trial Court and Court of Appeals held the possession was sufficient and appropriate to the area. The presence of the fence undoubtedly helped immeasurably in winning this lawsuit.

OPEN POSSESSION

This basic tenet may seem obvious. The purpose is logical. Where a statute of limitations is operating to bar his rights, the record "legal" owner should be on notice through the claimant's open possession that his property is being seized. It doesn't matter whether he sees it or not, just that the possession is visible. I've written that a moonshine still parked out in the woods may constitute open use if the use is appropriate to the site.

> The Hickersons argue that the improvements were not "open, notorious, and hostile" because the improvements may not have been visible to their predecessors in title from adjoining Green Gables Road. We construe "open," however, to mean visible from the surroundings, or visible to one seeking to exercise his rights.

Hickerson v. Bender, 500 N.W.2d 169, 171 (Minn.App. 1993).

EXCLUSIVE POSSESSION

I tried really hard to think of a good example dealing with exclusive possession; maybe this seems too obvious. I have written in the past that if I otherwise adversely possessed a public beach in the company of a thousand others, my claim would not succeed because not exclusive (oh, and because of the public property exception. However, see Magnuson v. City of White

Bear Lake, 203 N.W.2d 848, 851, 295 Minn. 193 (Minn. 1973): holding that adverse possession claimants may prevail enforcing a boundary determination agreed to by a city in a settlement discussed below.)

The Court of Appeals addressed the exclusive possession element in a recent unpublished opinion, Morris vs. Smith, C9-02-216 (November 26, 2002): "The possession was exclusive; no one except Morris used or cared for the Morris driveway and the rest of the and on the south side of the historic fence."

I could imagine one of a group of hunters claiming that he had acquired land by adverse possession (setting aside for a moment whether that use is sufficiently continuous); but if he used the land as one of a group of ten hunters, his use is probably not exclusive.

HOSTILE POSSESSION

There is plenty of hostility to go around once these cases get into suit; tempers flare, nothing seems more personal than a piece of ground in my backyard. But this is not what is meant by use of the term.

> ...the requirement of 'hostile' possession does not refer to personal animosity or physical overt acts against the record owner of the property but to the intention of the disseizor to claim exclusive ownership as against the world and to treat the property in dispute in a manner generally associated with the ownership of similar type property in the particular area involved.

Norgong v. Whitehead, 225 Minn. 379, 31 N.W.2d 267 (1948); Thomas v. Mrkonich, 247 Minn. 481, 78 N.W.2d 386 (1956); Ehle v. Prosser, 197 N.W.2d 458, 462, 293 Minn. 183, (Minn. 1972).

> Adverse possession sufficient to form the basis for title to land must be hostile as to the title of the owner. A claimant under such title must have intended to occupy the land under the exercise of exclusive ownership as against the world. See 1 Dunnell, Dig. & Supp. s 114, and cases cited.
>
> Under this doctrine, we have frequently held that where an occupant's original possession of land was permissive the statute of limitations did not commence to run against the owner until the occupant had subsequently declared or otherwise manifested an adverse holding and notice thereof had been brought to the attention of the owner.

> Beitz v. Buendiger, 144 Minn. 52, 174 N.W. 440; > Cameron v. Chicago, M. & St. P. Ry. Co., 60 Minn. 100, 61 N.W. 814; > Backus v. Burke, 63 Minn. 272, 65 N.W. 459; > Junes v. Junes, 158 Minn. 53, 196 N.W. 806.

31 N.W.2d 267, 225 Minn. 379, Norgong v. Whitehead, (Minn. 1948)
---------- Excerpt from page 31 N.W.2d 269

Good or bad faith on the part of the claimant is irrelevant although I've tried one such case to a jury with good success questioning the good faith of the claimant. Legally, it is irrelevant that Mr. Jones went out of his way to steal your land, or that he sat on it inadvertently with pure heart and a gentle soul thinking he was within his very own legal description.

In Cool v. Kelly, 78 Minn. 102, 104, 80 N.W. 861 (1899), this court said:

> '* * * An adverse intent to oust the owner and possess for [293 Minn. 190] himself may be generally evidenced by the character of the possession and the acts of ownership of the occupant. His good or bad faith in the premises is not material.'

197 N.W.2d 458, 293 Minn. 183, Ehle v. Prosser, (Minn. 1972)
---------- Excerpt from page 197 N.W.2d 462

ACKNOWLEDGMENT OF TITLE DEFEATS HOSTILE ELEMENT

The Supreme Court notes that a claimant defeats his own claim where he admits the ownership of his neighbor.

> An acknowledgment by the adverse claimant of the owner's title before the statute has run in his favor breaks the continuity of his adverse possession, and it cannot be tacked to any subsequent adverse possession.

103 N.W. 335, 94 Minn. 456, Olson v. Burk, (Minn. 1905). In another decision, the claimant defending against an ejectment action admitted he had contracted with the legal owner to purchase the property. This acknowledgment of ownership defeated his claim.

CONSENT

In order for possession to be adverse, it cannot be commenced or continued with the consent of the legal owner. His consent makes the possession non-hostile.

> Under this doctrine, we have frequently held that where an occupant's original possession of land was permissive the statute of limitations did not commence to run against the owner until the occupant had subsequently declared or otherwise manifested an adverse holding and notice thereof had been brought to the attention of the owner. > Beitz v.

> Buendiger, 144 Minn. 52, 174 N.W. 440; > Cameron v. Chicago, M. & St. P. Ry. Co., 60 Minn. 100, 61 N.W. 814; > Backus v. Burke, 63 Minn. 272, 65 N.W. 459; > Junes v. Junes, 158 Minn. 53, 196 N.W. 806.
>
> [

31 N.W.2d 267, 269, 225 Minn. 379, Norgong v. Whitehead, (Minn. 1948);

INFERRED CONSENT

The Court has inferred consent where there was a close family relationship:

> We have likewise held that the existence of a close family relationship between the claimant of land and the record owner, such as existed in the instant case, created the inference, if not the presumption, that the original possession by the claimant of the other's land was permissive and not adverse; > Lustmann v. Lustmann, 204 Minn. 228, 283 N.W. 387; > O'Boyle v. McHugh, 66 Minn. 390, 69 N.W. 37; > Collins v. Colleran, 86 Minn. 199, 90 N.W. 364; and that when such original use was thus permissive it would be presumed to continue as permissive, rather than hostile, until the contrary was affirmatively shown. > Omodt v. Chicago, M. & St. P. Ry. Co., 106 Minn. 205, 118 N.W. 798.

31 N.W.2d 267, 225 Minn. 379, Norgong v. Whitehead, (Minn. 1948)
---------- Excerpt from page 31 N.W.2d 269

This inference has been carried forward recently and remains the law:

> See Beitz v. Buendiger, 144 Minn. 52, 54, 174 N.W. 440, 441 (1919) (explaining the impact of a close familial relationship in an adverse possession case). In these situations, the presence of the close familial relationship gives rise to "the inference, if not the presumption" that the use is permissive.

618 N.W.2d 393, 397, Boldt v. Roth, (Minn. 2000).

CONTINUOUS POSSESSION

That possession must be continuous seems fairly obvious but there are a couple nuances. It must be uninterrupted in any way. Application of Stein, 99 N.W.2d 204, 256 Minn. 485, (Minn. 1959). 1904. He must “keep his flag flying”, Romans v. Nadler, 14 N.W.2d 482, 485, 217 Minn. 174,, (Minn. 1944). An interruption of possession is fatal to the adverse possessor’s claim, Simms v. William Simms Hardware, 12 N.W.2d 783, 785, 216 Minn. 283 (Minn. 1943). Further, though the possession is subsequently interrupted, if it had continued for 15 years before the period of interruption, title has ripened and should be established.

> To maintain a title, acquired by adverse possession, it is not necessary to continue the adverse possession beyond the time when title is acquired. The title once acquired is a new title; a legal title though not a record title is not lost by a cessation of possession, and continued possession is not necessary to maintain it.

Fredericksen v. Henke, 209 N.W.257, 259, 167 Minn. 356 (Minn. 1926).

However, the possession can be continuous even though it is interrupted for some period of time. A party was absent from the state for a four month period. This did not interrupt his otherwise "continuous" possession over a 15 year period.

179 N.W.2d 76, 288 Minn. 54, Nygren v. Patrin, (Minn. 1970)

CONTINUOUS POSSESSION-TACKING OF OWNERSHIPS

The claimant of adverse possession does not need to show that she or he held possession of the property for 15 years if their predecessors in title can be shown to have kept that possession.

> But since the record fails to disclose how long the quarry had been in operation prior to its acquisition by the Plachecki brothers in 1924, Delano must tack to this prior user the subsequent user by the brothers in order to establish the 15-year period required to raise this presumption of adverseness.

223 N.W.2d 133, 136, 301 Minn. 445, Burns v. Plachecki, (Minn. 1974).

> In order that adverse possession of land may ripen into title, there must be continuity of the adverse possession for the full statutory period.
>
> An acknowledgment by the adverse claimant of the owner's title before the statute has run in his favor breaks the continuity of his adverse possession, and it cannot be tacked to any subsequent adverse possession.

Syllabus by the Supreme Court, 103 N.W. 335, 94 Minn. 456, Olson v. Burk, (Minn. 1905)

INTENT; MISTAKEN BELIEF

A claimant under such title must have intended to occupy the land under the exercise of exclusive ownership as against the world.

31 N.W.2d 267, 269, 225 Minn. 379, Norgong v. Whitehead, (Minn. 1948).

Mistaken Possessor: That he thought his legal boundary was elsewhere and is mistaken about its "true" surveyed location is not a defense to a claim of adverse possession.

> In order to establish title by adverse possession, the disseizor must show, by clear and convincing evidence, an actual, open, hostile, continuous, and exclusive possession for the requisite period of time which, under our statute, is 15 years. Subjective intent to take land adversely is not essential in this state and title by adverse possession may be obtained even though the disseizor does not intend to take land not belonging to him so long as he does intend to exclude all others. Engquist v. Wirtjes, 243 Minn. 502, 504, 68 N.W.2d 412, 415 (1955). It is sufficient that the land is occupied by mistake.

Mellenthin v. Brantman, 211 Minn. 336, 341, 1 N.W.2d 141, 143; Skala v. Lindbeck, Supra. 197 N.W.2d 458, 462, 293 Minn. 183, Ehle v. Prosser, (Minn. 1972)

> So in Kelley v. Green, 142 Minn. 82, 86, 170 N.W. 922, 923, a case similar in its controlling facts to those here presented, in that there also the respondent and his predecessors in title had mistakenly occupied a greater area than that within the true line, the holding in the Carli case was reaffirmed and the applicable rule restated as follows: 'Where one of two adjoining owners takes and holds actual possession of land beyond the boundary of his own [lot or] tract, under a claim of title thereto as being a part of his own land, though under a mistake as to the location of the boundary line, such possession, for the purposes of the statute, is to be deemed adverse to the true owner and a disseizin.'
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1 N.W.2d 141, 143, 211 Minn. 336, Mellenthin v. Brantman, (Minn. 1941)

INTENT TO EXCLUDE OTHERS

Subjective intent to take land adversely is not essential in this state and title by adverse possession may be obtained even though the disseizor does not intend to take land not belonging to him so long as he does intend to exclude all others. > Engquist v. Wirtjes, 243 Minn. 502, 504, 68 N.W.2d 412, 415 (1955). It is sufficient that the land is occupied by mistake. > Mellenthin v. Brantman, 211 Minn. 336, 341, 1 N.W.2d 141, 143; Skala v. Lindbeck, Supra. 197 N.W.2d 458, 462, 293 Minn. 183, Ehle v. Prosser, (Minn. 1972).

APPROPRIATE USE

This topic probably belongs under the "actual possession" element. You don't actually have to live on the property which is the subject of the claim. Even though the claimant is not in constant possession of the property, if his "possession" is appropriate to the property, courts will consider this possession for the purpose of establishing ownership:

> To the same effect is Fredericksen v. Henke, 167 Minn. 356, 359, 209 N.W. 257, 258, 46 A.L.R. 785, where the court held: [211 Minn. 341] 'To constitute adverse possession, it is not essential that the adverse possessor actually live upon the land which he claims. It is enough that it is occupied and applied to the uses for which it is fit.'

1 N.W.2d 141, 143, 211 Minn. 336, Mellenthin v. Brantman, (Minn. 1941).

PUBLIC PROPERTY MAY NOT BE ADVERSELY POSSESSED

A private citizen may not adversely possess adjoining public lands even though he would otherwise meet all the tests:

> ...Such limitation shall apply to actions by or in behalf of the state and the several political subdivisions thereof; provided that no occupant of a public way, levee, square, or other ground dedicated or appropriated to public use shall acquire, by reason of occupancy, any title thereto.
>
> No occupant of the land of a public or private cemetery shall acquire any title to the cemetery land by reason of the occupancy.

MSA § 541.01, Application to state and other states; exceptions

YOU MAY NOT ADVERSELY POSSESS PUBLIC SWAMPLAND, SORRY

Sadly, this means a Minnesotan may not acquire a state swamp, Scofield v. Schaeffer, 1908, 104 Minn. 123, 116 N.W. 210.

AND, YOU MAY NOT ADVERSELY POSSESS YOUR KIDS' SCHOOL

It's also been held that a parent may not adversely possess school ground, Junes v. Junes, 1924, 158 Minn. 53, 196 N.W. 806; Scofield v. Schaeffer, 1908, 104 Minn. 123, 116 N.W. 210; Op.Atty.Gen., 50, July 25, 1946.

PUBLIC LAND EXCEPTIONS:

I have two neighbors whose gardens, yards, etc. encroach on park land. They are not ever going to be able to claim ownership of that land and can always be removed.

Though a private person generally cannot adversely possess public lands, there still are some

exceptions. A municipality can compromise a disputed boundary location and later be forced to honor it.

> A municipality can settle a dispute as to a boundary line as well as can an individual. > County of Houston v. Burns, 126 Minn. 206, 148 N.W. 115 (1914); > City of Rochester v. North Side Corp., 211 Minn. 276, 1 N.W.2d 361 (1941). In the latter case we held that where a municipality permits a landowner to build and make improvements on property once dedicated as a street, [295 Minn. 198] and makes no objection--in that case for 83 years--, the municipality is estopped to deny that the landowner owns the land.

203 N.W.2d 848, 851, 295 Minn. 193, Magnuson v. City of White Bear Lake, (Minn. 1973).

See also Denman vs. Gans, App.2000, 607 N.W.2d 788, where the Court recently held that waterfront property which was dedicated to the use of a small, defined group of property owners was not properly dedicated to a public use, and therefore not insulated against a claim of adverse possession by another.

But a public entity may adversely possess the property of a private citizen if other tests are met.

PAYMENT OF REAL ESTATE TAXES NOT PREREQUISITE (USUALLY)

The basic rule regarding payment of real estate taxes on claimed property is that the fact that the claimant did not pay the real estate taxes on the parcel is irrelevant. Specifically, it is not required in instances where the claim simply involves settlement of the location of a boundary; nor is it required in claims not involving an entire parcel which is taxed as a separate parcel with its own property identification number.

> It is next contended that, since plaintiff did not pay any taxes upon the disputed area, § 9187 bars his right of recovery. In making this claim appellants wholly ignore or overlook that part of the statute which reads: 'Providing, further, that the provisions of the foregoing proviso [relating to payment of taxes] shall not apply to actions relating to the boundary line of lands, which boundary lines are established by adverse possession, or to actions concerning lands included between the government or platted line and the line established by such adverse possession, or to lands not assessed for taxation.'

1 N.W.2d 141, 211 Minn. 336, Mellenthin v. Brantman, (Minn. 1941)
---------- Excerpt from page 1 N.W.2d 144.

> Claims relating to boundary lines of lands and claims to lands not assessed for taxation as separate tracts--both of which are presented in this case--are clearly exempt from the

statutory provisions requiring the payment of taxes. Mellenthin v. Brantman, 211 Minn. 336, 1 N.W.2d 141 (1941); > Skala v. Lindbeck, 171 Minn. 410, 214 N.W. 271 (1927); > Riley v. Kump, 170 Minn. 58, 212 N.W. 13 (1927); > Fredericksen v. Henke, 167 Minn. 356, 209 N.W. 257, 46 A.L.R. 785 (1926); > Kelley v. Green, 142 Minn. 82, 170 N.W. 922 (1919).

197 N.W.2d 458, 293 Minn. 183, Ehle v. Prosser, (Minn. 1972)
---------- Excerpt from page 197 N.W.2d 462

Where the owner of a lot claims title by adverse possession to an adjoining area held and claimed by him as being included under his title deed and where such disputed area is not separately assessed, it is not necessary that he should have paid taxes on such disputed area under the provisions of Mason St.1927, § 9187.

1 N.W.2d 141, 211 Minn. 336, Mellenthin v. Brantman, (Minn. 1941)

SHORT OF ENGAGING IN A SHOOTING WAR, WAYS TO TERMINATE AN ADVERSE POSSESSOR BEFORE IT'S TOO LATE:

TRESPASS, ACTIONS IN EJECTMENT, CONVERSION, DAMAGES CLAIMS

If a property owner learns of a conflicting claim to property, I would counsel that action must be taken but would leaven that advice with some common sense. Where a fence or structure has been put in place, I would not generally start by burning it to the ground or destroying the building. This allows the offended party at trial to comment on your destruction of the evidence, seldom a good thing. District Judges are unimpressed by combatants who must be separated by gendarmes.

However, after fair warning is given stating the claim must be resolved or action will taken, and if use continues, you have to act (and/or sue). You cannot stand by while another's possession ripens into title.

One can sue to eject the other from the property, chain off a driveway (though I would still counsel caution in taking this action), or otherwise interrupt the possession. Another approach is to announce your consent to the claimant's permissive use. The problem here is that he may fire back that it's his property to use as he sees fit, or worse he just ignores you leaving the consent in limbo.

Short of property owners getting into violent confrontations guaranteed to make settlement an impossibility, I submit a timely lawsuit for ejectment before the running of the statute of

limitations is an effective way to toll (stop the running of) the 15 year statute. A motion in the alternative to remove the offending fence or structure, or alternatively, for an Order that the fence may stay but that the operative date interrupting any claim is set by filing of the suit should suffice. But the lawsuit must then press ahead and not be forgotten.

ACTIONS FOR DAMAGES

You may bring an action for damages for trespass if you can show you have genuinely been hurt, or lost something. Often, there may be little proof of actual damages. The fact that another has occupied my property along a 10 foot wide strip for five years may not cause any concrete damages. A creative sort might come up with a rental or "unjust enrichment" theory. Here is what the Supreme Court has said about damages for trespass:

> The general rule is that damages in an action for trespass upon real property may be such as are appropriate to the tenure by which the plaintiff holds. Possession alone will entitle him to recover damages for any injury solely affecting it. If he seeks to recover for the future, he must show that his title gives him an interest in the damages claimed, and he can recover none except such as affect his own right, unless he holds in such relation to other parties interested that his recovery will bar their claim.

312 N.W.2d 110, 113, Williams v. Lynd Tp., (Minn. 1981)

Although the Court commented above regarding future trespass damages, often the remedy would be the removal of the trespass rather than the award of future damages. Damages may not be based on speculation or guess,

> Here, the district court first instructed the jury: "a party asking for damages must prove the nature, extent, duration, and consequences of his or her injury." See 4A Minnesota District Judges Association, Minnesota Practice, Jury Instruction Guides--Civil, JIG 90.15 (4th ed.1999). Next, the court told the jury that it "must not decide damages based on speculation or guess"

2002 WL 1980802, Morlock v. St. Paul Guardian Ins. Co., (Minn. 2002); Excerpt from page 2002 WL 1980802 *5 **;** 477 N.W.2d 757, 760, Peters v. Independent School Dist. No. 657, Morristown, (Minn.App. 1991)**.**

NOMINAL DAMAGES

Without actual provable damages, a claimant may be limited to nominal damages. 401 N.W.2d 387, 391, Lake Mille Lacs Inv., Inc. v. Payne, (Minn.App. 1987)**.** Lake Mille Lacs Investment holds that one who commits a trespass must pay at least nominal damages even though no actual damages are shown. However, no punitive damages can be awarded for a trespass if there were no actual damages. Meixner v. Buecksler, 216 Minn. 586, 591, 13 N.W.2d 754, 757 (1944).

IS A COURT RULING NECESSARY?

Technically, when 15 years have elapsed with the claimant having maintained actual, open, continuous, hostile, exclusive possession of a property, it is the claimant's property. His/her rights are established. A court is merely confirming those rights acquired by way of adverse possession. Hypothetically at least, one could take no court action for 50 years. If the possessor's rights are later challenged, there is no statute of limitations preventing the claimant from establishing that her Grandfather acquired the disputed property in 1940.

IS A COURT RULING HIGHLY RECOMMENDED?

Witnesses die, memories fade; I tried a case with photos and memos dating back into the 1930's and Deeds going back to the early 1900's. But it is obviously becoming heavy lifting for your attorney the longer it waits. Moreover, you hand the other side many opportunities by delay. A building permit application references the surveyed legal description only without any mention of a claim of ownership of the disputed parcel. A mortgage loan application, an appraisal and any other documents which the claimant might join in or obtain might be used to argue the claimant did not intend to claim the disputed property.

THE 40 YEAR RULE, FERTILE OCTOGENARIANS; RULE AGAINST PERPETUITIES AND OTHER ODDITIES

The so called "Forty Year rule" does not apply against adverse possession claims, end of story. Do not ask me to explain the 40 year rule; it is beyond the scope of this seminar, and beyond my limited capabilities of understanding, sort of like the Rule in Shelley's Case, the "Fertile Octogenarian" Rule and the Rule against Perpetuities.

Seriously, the 40 year rule, Minn. Stat. 541.023, roughly provides that no claim limiting a fee owner's rights or use may be made based on a recorded instrument over 40 years old where no one has recorded an instrument to preserve that claim. It's designed to prevent the effect of ancient conditions subsequent and limiting restrictions, for example. I brought a claim of adverse possession based on possession going back over 60 years to the construction of an ancient fence. A defendant raised the 40 year rule as a defense. The trial court ruled in our favor determining we had proven title by both adverse possession and by practical location of boundary; the Court of Appeals affirmed in an unpublished opinion, Ronning vs. Tungseth, Case No. C8-01-116 (Minn. Ct. App. 2001) and the Supreme Court declined to hear a Petition for Review. See also Wichelman v. Messner, 83 N.W.2d 800, 250 Minn. 88,, (Minn. 1957) where the Supreme Court stated:

> (1) the party desiring to invoke the act for his own benefit must have a requisite claim of title based on a source of title, which source has been of record at least 40 years; and that

(2) the person against whom the act is invoked is one who is conclusively presumed to have abandoned all right, claim, and interest in the property, and that there are three classes of persons against whom no one can invoke the act: (1) those persons who seek to enforce any right, claim, interest, encumbrance, or lien founded on any instrument, event, or transaction which was executed or which occurred within 40 years prior to commencement of the action; (2) those persons who seek to enforce a claim founded on any such instrument or event which was executed or which occurred over 40 years prior to commencement of the action, who have filed proper notice within 40 years of the execution or occurrence of the instrument, event, or transaction on which it is founded; and (3) those excepted by the sixth subdivision of the act, which includes persons in possession.

THE REVERSE ADVERSE POSSESSION CASE-
I DON'T WANT IT, YOU CAN HAVE IT...

Representing a Mortgage company, I recently saw a neighbor bring a reverse adverse possession lawsuit trying to clear his title. The bad guy's garage was one foot over on plaintiff's lot, and Plaintiff just wanted to give up the foot. A title insurer took it over from my hapless Mortgage lender so they did not have to pay me to "defend" the lawsuit. I know of no authority which would prevent a court decision under the Declaratory Judgment Act, Minn. Stat.555.01 et seq.

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

MSA § 555.01, Courts to construe rights
BURDEN OF PROOF: CLEAR & CONVINCING PROOF

You may be familiar with the term "burden of proof" from watching "The Practice" or "Law & Order". One side or the other has the burden of proof (and a heavy burden 'tis) on every question in civil and in criminal cases. (Criminal cases require the state to prove guilt beyond a reasonable doubt. Lower standards of proof are used in civil cases.

The short explanation is that in most civil cases, a claim is proven simply by a "preponderance of the evidence"; another way of putting it is that fact A is more probably true than not true. Adverse possession requires stronger proof; proof by something called "clear and convincing" evidence.

The clear and convincing standard is basically something less than the "beyond a reasonable doubt" standard and something greater than the "preponderance of the evidence"

standard..

> In order to establish title by adverse possession the disseizor (the disseizor is the person making the claim for title against the legal owner) must show by clear and convincing evidence an actual, open, hostile, continuous, and exclusive possession of the property for 15 years. > Ehle v. Prosser, 293 Minn. 183, 189, 197 N.W.2d 458, 462 (1972); > Minn.Stat. § 541.02 (1988). The burden rests upon the disseizor to come forward with the essential facts establishing the elements of adverse possession. > Simpson v. Sheridan, 231 Minn. 118, 120, 42 N.W.2d 402, 403 (1950). The evidence must be strictly construed and amount to clear and positive proof before title by adverse possession will be granted. > Id.

453 N.W.2d 733, 735, Stanard v. Urban, (Minn.App. 1990).

STRICT CONSTRUCTION OF EVIDENCE

But the courts are not done in making it hard for the claimant. The evidence they offer is also to "strictly construed", i.e., looked at more closely than ordinary evidence.

> Evidence tending to establish adverse possession must be strictly construed, "without resort to any inference or presumption in favor of the disseizor, but with the indulgence of every presumption against him."

642 N.W.2d 104, 108, Ebenhoh v. Hodgman, (Minn.App. 2002).

STANDARD OF REVIEW ON APPEAL (FOR LOSERS ONLY)

Of course, your lawyer will never lose a case so you can skip this material. Nor have I ever lost one. Ahem. For everyone else in the room, I note the following: Usually, the Trial Court sits as the finder of fact (juries in exceptional cases). The trial judge's decision on the facts is given wide berth but the appellate courts look at the legal rulings anew. They do not defer to the trial judge on her rulings on the law. The trial judge (or jury in rare cases) sitting as finder of fact is presumed to be the best one to judge credibility of witnesses. This is a truism. Having sat through many trials, depositions, etc., the printed page cannot ever reveal all that actually goes on in the court room, and just how believable a particular witness is, for example.

> In boundary-line cases, the findings of the district court will not be disturbed unless "the evidence taken as a whole furnishes no substantial support for them or where it is manifestly or palpably contrary to the findings." Engquist v. Wirtjes, 243 Minn. 502, 506, 68 N.W.2d 412, 416 (1955) (quotation omitted). But whether the findings of fact support a district court's conclusions of law and judgment is a question of law, which we review de novo. Donovan v. Dixon, 261 Minn. 455, 460, 113 N.W.2d 432, 435 (1962)

(noting that "it is for this court to determine whether the findings support the conclusions of law and the judgment").

642 N.W.2d 104, 108, Ebenhoh v. Hodgman, (Minn.App. 2002).

CONFLICTING SURVEYS: QUESTION OF FACT

The trial judge's decision as to the correctness of two surveyors whose opinions are in conflict is a question of fact: Erickson v. Turnquist, 247 Minn. 529, 531-32, 77 N.W.2d 740, 742 (1956); Wojahn v. Johnson, 297 N.W.2d 298, 303 (Minn. 1980).

> Thus, for instance, when two competent surveyors disagree as to where a boundary line should be, the trial court's determination as to which surveyor is correct depends mainly on each surveyor's credibility and will not be reversed if there is reasonable support in the evidence for such a determination.

Donaldson v. Kohner, 264 Minn. 230, 233, 118 N.W.2d 446, 448 (1962).

TREES EXTENDING OVER BOUNDARIES

Another favorite boundary topic is trees which are located "on" the boundary line, and the overhanging branches of trees on another's property. The general rule is that if a tree grows in my backyard, my next door neighbor can trim branches which overhang his home, outbuildings, and yard. CAVEAT: one cannot so trim a tree as to destroy or harm it and the neighbor can be liable for significant damages because of a triple damage provision in state statute:

> The legislature supplied a statutory remedy for the wrongful removal of trees in Minn.Stat. § 561.04, which provides:
>
> Whoever without lawful authority cuts down or carries off any wood, underwood, tree, or timber, or girdles or otherwise injures any tree, timber, or shrub, on the land of another person, or in the street or highway in front of any person's house, city lot, or cultivated grounds, or on the commons or public grounds of any city or town, or in the street or highway in front thereof, is liable in a civil action to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor * * *.

566 N.W.2d 94, 97, Miller-Lagro v. Northern States Power Co., (Minn.App. 1997).

II. BOUNDARY BY PRACTICAL LOCATION

Another means of establishment of a boundary is "practical location". These two separate theories are often confused because they are used somewhat interchangeably both by litigants and by the courts in boundary line cases. This theory looks to the neighbors' actions and understanding respecting a boundary which may be inferred often through circumstantial evidence.

According to the Supreme Court, there are three ways to establish a boundary by practical location:

> Ordinarily, in order to establish a practical location of a boundary line it must appear (1) the location relied on was acquiesced in [215 Minn. 166] for the full period of the statute of limitations; or (2) the line was expressly agreed upon by the parties and afterwards acquiesced in; or (3) the party barred acquiesced in the encroachment by the other, who subjected himself to expense which he would not have done if there had been a dispute as to the line.

9 N.W.2d 421, 427, 215 Minn. 156, Romanchuk v. Plotkin, (Minn. 1943).

The Courts say there are three separate ways to establish a boundary by practical location; they look a lot alike, and all three require that the defendant sits back on his porch not objecting to the claimant's use for the same 15 year period. Basically, the first theory requires that the defendant stands by silently while the other acts as though the boundary line is the actual line; the second theory requires that there is evidence of an agreement as to the boundary followed by the stand by, stand back period; the third theory injects that the claimant spends some money (like building a fence) that he otherwise would not had he not believed in the parties' mutual understanding of the line, sort of an "estoppel" theory for the lawyers.

PRACTICAL LOCATION DISTINCT FROM ADVERSE POSSESSION

While this theory looks similar to adverse possession (for instance, it carries the same statute of limitation period), the Courts state that the two theories are distinct:

> Engquist v. Wirtjes, 243 Minn. 502, 507, 68 N.W.2d 412, 417 (1955) (stating practical location is "independent of adverse possession").

636 N.W.2d 844, 848, Pratt Inv. Co. v. Kennedy, (Minn.App. 2001)

DOES PRACTICAL LOCATION REQUIRE SOMETHING AFFIRMATIVE?

It does get muddy: our Court has, on occasion, said that practical location requires some act like possession, building a fence or something:

> While case law does not say that "possession" is an element of establishing a boundary by practical location, "[a]cquiescence entails affirmative or tacit consent to an action by the alleged disseizor, such as construction of a physical boundary or other use * * *." > LeeJoice v. Harris, 404 N.W.2d 4, 7 (Minn.App.1987). Implicit in the case law is the notion that the disseizor has claimed, by way of some action, that a boundary has existed for the statutory period, and the disseized has acquiesced to that boundary.

636 N.W.2d 844, 849, Pratt Investment Company v. Kennedy, (Minn.App. 2001).

However, acquiescence by definition is inaction. Webster's defines acquiesce as to "grow quiet, to consent without protest". Pratt Investment Co. talks of affirmative or tacit consent. In other words, where consent can be inferred through inaction where action would be expected. The Pratt Investment court points to the "non-action" by the party losing title to the property. Sheep rearing may not be enough, LeeJoice v. Harris, 404 N.W.2d 4, 7 (Minn.App.1987). Where the land is vacant and heavily wooded, there is then no possession sufficient to establish a boundary by practical location, Pratt Investment . Some use is required, see the following:

> In addition, if appellant or his predecessor never substantially used or possessed the disputed territory, appellant can hardly claim that he has "relied" upon any supposed boundary for purposes of the practical location doctrine.

Fishman v. Nielsen, 237 Minn. 1, 6, 53 N.W.2d 553, 556 (1952) cited in Pratt Investment.

One of the more concrete easy to understand examples is found in Fishman:

> Acquiescence exists when adjoining landowners, for example, mutually construct a fence with the intention that the fence represents an adequate reflection of the property line. > Fishman, 237 Minn. at 7-8, 53 N.W.2d at 555-56 (finding practical location by acquiescence when parties and their predecessors in title built dividing fence as close as possible to actual boundary and remained satisfied with fence's location for statutory period);

as quoted in 636 N.W.2d 844, 850, Pratt Inv. Co. v. Kennedy, (Minn.App. 2001).

PRACTICAL LOCATION BY AGREEMENT

A principal method for establishing a boundary by practical location is for the neighbors to come to an agreement followed by acquiescence for the statutory period. Insufficient evidence was found in Wojahn v. Johnson, 297 N.W.2d 298, 305 (Minn. 1980) to support a finding of practical location.

LACK OF CONDUCT VERSUS PASSIVE CONSENT!

One of my favorite quotes on this topic comes from Engquist: 243 Minn. at 507-08, 68 N.W.2d at 417

> *It must be kept in mind that the acquiescence required is not [243 Minn. 508] merely passive consent to the existence of a fence or sod strip, but rather is conduct or lack thereof from which assent to the fence or sod strip as a boundary line may be reasonably inferred*.

68 N.W.2d 412, 417, 243 Minn. 502, Engquist v. Wirtjes, (Minn. 1955). You may be asking yourself what "lack of conduct" means, and how one could distinguish it from mere "passive consent". If you cannot tell the difference you must lack the advanced educational degrees which I possess!

The holding in Engquist has been reaffirmed recently in Pratt Investment Co. v. Kennedy, 636 N.W.2d 844, 849 (Minn.App. 2001) so remains good law. I have cited Engquist in support of my plaintiff's claim of practical location while my opponent has cited it just as earnestly in opposition to my claim.

It is action or inaction from which consent to a fence as a boundary line can be inferred, it is not merely silent consent to the fence. An illustration from a case I tried is in order. A fence existed within about 6 to 10 feet of the "true" boundary for over fifty years. What courts really look at in these situations are surrounding circumstances to try to figure out whether the fence was thought of as the boundary. In our case, some strong evidence was found in the testimony of a tree cutter. A survey done recently showed the legal line was off the fence by as much as ten feet at some points. While the neighbor tried to claim he had always thought of the additional ten feet as his, he was damned by his conversation with the tree cutter where he told him to send the bill for cutting a tree in the disputed area over to my client since it "is his tree".

In a truly rare instance, one neighbor just conceded honestly that he did recognize the fence as his boundary and even though liable to his buyer for breach of warranty of title continued to assert the truth he'd always believed the fence was the line. Such testimony clearly makes it easier for a trial court.

One major dispute I've litigated pertained to whether or not the claimant's predecessor built a fence intending that it represent the boundary line. Obviously, with an ancient fence, this is very hard to prove directly. We spent significant time in trial talking about whether the fence was constructed to keep marauding sheep away from pine trees, how big those boughs were, whether sheep like pine needles (or not). One witness claimed he recalled a fifty year old conversation indicating just that.

> When a fence is claimed to represent a boundary line under an acquiescence theory, one of the most important factors is whether the parties attempted and intended to place the

> fence as near the dividing line as possible. > Id. at 508, 68 N.W.2d at 417; see > Fishman v. Nielsen, 237 Minn. 1, 53 N.W.2d 553 (1952).

297 N.W.2d 298, 305, Wojahn v. Johnson, (Minn. 1980).

RESOLUTION OF AN OVERLAP VIA PRACTICAL LOCATION

Practical location may resolve an overlap problem. See Matter of Zahradka, 472 N.W.2d 153, 154 (Minn.App. 1991) where the court commented in the syllabus:

> Where certificates of title issued to adjoining landowners include legal descriptions which overlap, the doctrine of practical location of boundary may be applied to resolve disputed ownership.

The claiming owner had constructed a parking lot which then remained without objection

TORRENS TITLES PROTECTED AGAINST ADVERSE POSSESSION & BOUNDARY BY PRACTICAL LOCATION

I recently had a perfect adverse possession and/or practical location case in a western suburb but was chagrined to find that the claimed property was within a Torrens certificate. The applicable statute reads:

> Registered land shall be subject to the same burdens and incidents which attach by law to unregistered land. This chapter shall not operate to relieve registered land or the owners thereof from any rights, duties, or obligations incident to or growing out of the marriage relation, or from liability to attachment on mesne process, or levy on execution, or from liability to any lien or charge of any description, created or established by law upon the land or the buildings situated thereon, or the interest of the owner in such land or buildings. It shall not operate to change the laws of descent or the rights of partition between cotenants, or the right to take the land by eminent domain. It shall not operate to relieve such land from liability to be taken or recovered by any assignee or receiver under any provision of law relative thereto, and shall not operate to change or affect any other rights, burdens, liabilities, or obligations created by law and applicable to unregistered land except as otherwise expressly provided herein. No title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession.

MSA § 508.02, Registered land; same incidents as unregistered; no adverse possession
---------- Excerpt from page 80042

See also Minn. Stat. 508.025 specifying a certificate holder's rights against adverse claims.

A recent court case holds:

> By affording a method of acquiring a decree of registration and a certificate of title free from all adverse claims and encumbrances not noted on the certificate, the torrens law confers a conclusive title on the holder of a certificate. Moore, 282 Minn. at 519, 165 N.W.2d at 217; see also In re Petition of Alchemedes/Brookwood, Ltd. Partnership, 546 N.W.2d 41, 42 (Minn.App.1996) (concluding persons dealing with registered property need look no further than certificate of title for any transactions that might affect land), review denied (Minn. June 7, 1996).

576 N.W.2d 747, 749 Petition of Geis, (Minn.App. 1998).

JUDICIAL DETERMINATION OF TORRENS BOUNDARIES

The Torrens Act contemplates judicial determination of boundaries. A portion of the statute states:

> An owner of registered land may apply by a duly verified petition to the court to have all or some of the boundary lines judicially determined.

MSA § 508.671, Determination of boundaries
However, a Court may not rule in such a way as to alter the boundaries set out in a Torrens certificate:

> Moreover, a court may not, in a proceeding subsequent to initial registration of land, determine boundary lines, if that determination alters the legal description of the land as stated in the certificate of title, and thereby attacks the torrens certificate.

576 N.W.2d 747, 750, Petition of Geis, (Minn.App. 1998).

Why should torrens title property be treated differently? The Court of Appeals has answered the questions squarely:

> The purpose of the Torrens law is to establish an indefeasible title which is immune from adverse claims not registered with the registrar of titles and to assure that the property can become encumbered only with registered rights and claims.

536 N.W.2d 33, 35, Petition of McGinnis, (Minn.App. 1995).

PRESCRIPTIVE EASEMENTS

Although beyond today's topic, Prescriptive easements are established in the same manner as are claims of adverse possession.

("A prescriptive easement claim involves the same elements of proof as an adverse possession claim, subject to the inherent differences between such claims.");

642 N.W.2d 104, 112, Ebenhoh v. Hodgman, (Minn.App. 2002).

ADVERSE POSSESSION CURING DEFECTIVE MORTGAGE FORECLOSURE

While I would not count on this when you are doing a foreclosure, the Supreme Court held that Mortgagors could not attack the validity of a foreclosure where the mortgagee had gone into possession of the real property and held it for the requisite statutory period.

> Furthermore, the court's decision in this case is based on a finding that plaintiff has acquired title by adverse possession. It is clear, at least, that from the time plaintiff acquired possession in 1933 by her action in ejectment she was in possession under a claim of ownership hostile to that of the former owners.

54 N.W.2d 15, 18, 237 Minn. 43, Voegele v. Mahoney, (Minn. 1952).

EXPERT AND LAY WITNESS TESTIMONY

In boundary line litigation, there is often testimony from both experts and non-expert lay witnesses. The Rules of Evidence specify when opinion testimony may be used as opposed to direct observation of facts (e.g. I saw the car hit the boy; the fence started running east from the old sugar maple):

> If the witness is not testifying as an expert, the witness' testimony in the form of opinion or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

MSA REV Rule 701, OPINION TESTIMONY BY LAY WITNESS

The rule for admission of expert witness testimony is:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

MSA REV Rule 702, TESTIMONY BY EXPERTS

Rule 703 states what surveyors, engineers, etc. may base their opinions on.

> (a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
>
> (b) Underlying expert data must be independently admissible in order to be received upon direct examination; provided that when good cause is shown in civil cases and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the basis for the expert's opinion. Nothing in this rule restricts admissibility of underlying expert data when inquired into on cross-examination.

MSA REV Rule 703, BASES OF OPINION TESTIMONY BY EXPERTS

Sometimes persons other than surveyors may be permitted to testify to expert opinions concerning boundary line issues. An expert is basically anyone who by education, training or experience is qualified to render opinion evidence which may be helpful to the finder of fact. A mine engineer technician was allowed to testify although not a surveyor:

> James Rossi, an Eveleth Taconite Company employee for 20 years, was a mine engineering technician whose job included making maps and doing volumetric surveys. The maps are made daily. He testified that in drawing up the maps of Eveleth's property, he had to become familiar with the general boundaries of its property. Over objection, Rossi testified that a map he prepared was from an aerial photograph of the dock and general area where the bushings were stolen. He also testified that the "Spolarich Farm" was owned by Eveleth.
>
> Appellant contends that Rossi was not qualified to testify about whether the farm was on Eveleth's property because Rossi was neither an attorney nor a qualified land surveyor. The trial court ruled that he was a qualified witness based on his job responsibilities and lengthy experience in the mine engineering department. This ruling was proper.

393 N.W.2d 238, 242, State v. Larson, (Minn.App. 1986).

It is important to note that ultimately a judge (who presumably is not a surveyor) will rule on the correctness of disputed, competing surveys. Judges (and juries) often resolve hotly contested claims of a variety of experts when they have no previous background in the science or other field of study. This is simply a fact of life in our judicial system for parties to deal with.

There are some limitations on a surveyor's qualifications to testify. The following example relates more to the failure to establish a proper foundation for an opinion. A surveyor was called to testify in an accident case and did successfully identify a highway survey reflecting the contour of the highway and the elevation in 100 foot increments down the road. He showed the road rose by 4 ½ feet. Then the attorney tried to establish "sight distance":

> Objection was again sustained for lack of foundation. The question as asked clearly lacked foundation. Sight distance is meaningless unless the circumstances are explained showing at what height the sight is taken, from and to what point. The question as asked not only lacked foundation, but it is difficult to see how it could be answered at all.

119 N.W.2d 739, 744, 264 Minn. 369, Jallen v. Agre, (Minn. 1963).

Foundation simply looks at whether a witness has a reasonable basis to be qualified to state the opinion he is about to relate.

As stated earlier, a survey line may be overridden by proof of adverse possession or practical location of boundary. Nevertheless, survey testimony is often involved, to show the proper location, and to show where the line should be moved for two examples.

A good discussion of competing survey testimony is found in Wojahn v. Johnson involving attempts to relocate lost government corner lot markers, and claims of adverse possession and practical location. The county surveyor was held to have used proper survey techniques in first determining that he could not relocate the old monuments. The court stated:

> The plaintiffs attack the methodology of the Johnson survey on essentially three grounds, contending that the survey illegally deviated from the original government survey in angles and distances between corners, that the county surveyor did not adequately investigate before determining that certain corners were "lost," and that the surveyor inappropriately used proportionate measurement techniques.

The county surveyor located three of eight government corners but could not find the other five, though he did not speak to neighbors. The Plaintiff's surveyor criticized this failure. He did, however, follow the old field notes and drawings and relied on other old records of the government survey in establishing his opinion of the correct location of the missing corners. The surveyor admitted the boundary line established by the located corners did not jibe with certain existing and older fence lines.

Because the trial court accepted the county surveyor's testimony of his methodology, the Supreme Court deferred to its findings of fact. They also commented:

> When a resurvey is made of sections, quarter-sections, etc., originally established by United States Government Survey, the aim of the resurvey must be to retrace and relocate

> the lines and corners of the original survey. Even when an original section corner is erroneously placed by an original government surveyor, it cannot be corrected by the courts or a subsequent surveyor.

297 N.W.2d 298, 303, Wojahn v. Johnson, (Minn. 1980).

TITLE INSURANCE ISSUES

Title insurance may be available to cover possible boundary disputes. This topic will be covered in great detail by another speaker, Charles Hoyum of Old Republic National Title Insurance Company. Beware the standard exclusion from many standard form title insurance policies for "facts which would be disclosed by an accurate survey". Because a survey could reveal an encroachment of a fence or other structure, it may not be covered by the policy. Buyers may request and obtain survey coverage and waiver of this exclusion.

Claims should be reported to the insurer who may elect to pick up coverage because the so-called "duty to defend" is broader than the "duty to indemnify" meaning that the insurance company is supposed to defend its insured's title to the extent of their legal description against "colorable claims". These are claims that sound as though they may be covered, even if it's a close call.
Insurers have the burden of proof to establish they are entitled to the protection of an exclusion from coverage. Henning Nelson Const. Co. v. Fireman's Fund American Life Ins. Co., 383 N.W.2d 645, 652 (Minn. 1986):

> An insurer has the burden of proving that a policy exclusion applies. Caledonia Community Hosp. v. St. Paul Fire & Marine Ins. Co., 307 Minn. 352, 354, 239 N.W.2d 768, 770 (1976). In interpreting a policy exclusion, any ambiguity in the language of the policy must be construed in favor of the insured. Id.; Bobich v. Oja, 258 Minn. 287, 294, 104 N.W.2d 19, 24 (1960).

An insurer has a duty to defend if "any part of the claim is arguably within the scope of coverage afforded by the policy * * * ."; Brown v. State Auto. & Cas. Underwriters, 293 N.W.2d 822, 825 (Minn.1980).

I once represented a client whose insurer (not Old Republic) refused them a defense when a neighboring church's surveyed line turned out to be several feet into their backyard. Problem was that the fence and garden which made up part of their yard were actually outside their legal description. However, the policy stated that insurance was afforded for structures (excluding fences) located outside their legal description. We disputed whether a garden made up of rail road tie timbers constituted a structure.

I settled the dispute with the Church correcting my clients' legal description to take in the garden and fence; then sued the title insurer who refused coverage for damages and attorney's fees.

The court has specifically held that legal fees incurred by an insured after the insurer improperly refuses to undertake the defense are recoverable by the insured. "...if insurer refuses to defend, party may recover attorneys' fees from time defense was tendered" Franklin v. Western Nat. Mut. Ins. Co., 558 N.W.2d 277, 279, (Minn. App. 1997). See SCSC Corp. v. Allied Mut. Ins. Co., 536 N.W.2d 305, 316 (Minn. 1995) citing Jostens, Inc. v. Mission Ins. Co., 387 N.W.2d 161, 167 (Minn.1986), as amended on denial of reh'g (Minn., May 12, 1986):

> An insured may recover from its insurer attorney fees that the insured has incurred defending itself against claims by a third party when the insurer has a contractual duty to defend the insured, but has refused to do so.

The kicker in my case was that the trial court ruled the garden ties did not constitute a structure, but that the call was close enough that the insurer should have provided my clients a defense. As a result, my clients recovered their entire legal bill. (O'Donahue and Krienke vs. Universal Title, Hennepin County District Court, Case No. 98-017876).

ETHICAL CONSIDERATIONS

I believe there is a responsibility on the part of attorneys and other professionals working for land owners to counsel them concerning prosecution and defense of adverse possession and practical location claims. Reasonable efforts ought be made toward settlement. This does not mean that claimants should not pursue legitimate claims; just that thought needs to be given not only to survey and legal fees and other costs to be incurred which can be very substantial but also to the emotional cost of litigation, the distraction from the business of life, and the outcomes involved when neighbor is pitted against neighbor. Long after the lawyers and surveyors leave, the property owners will remain. Attorneys are required to be "zealous advocates" for their clients, but they also are obligated to employ candor in their dealings with the court and others, particularly with unrepresented parties.

An excerpt from the Lawyer's Code of Professional Responsibility follows:

> As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.
>
> MSA RPC Preamble, PREAMBLE: A LAWYER'S RESPONSIBILITIES

SUMMARY

> This is just a cursory summary of the variety of issues which can surface in cases

involving boundary line claims. As I have noted, disputed boundary lines may be resolved by way of claims of adverse possession and practical location lawsuits which may take precedence over the result of a survey. Because of the risk of expenditure of buckets of money, and accompanying acrimony, I generally recommend compromise. When that fails, and if litigation can be justified, then suit is appropriate.

REPRINT FROM THE HENNEPIN LAWYER with permission, Vol. 68, No. 8, August, 1999, Thomas B. Olson

(NOT A) LEARNED TREATISE ON ADVERSE POSSESSION

It was a dark and stormy night. A scream echoed down the corridors of the castle. Aaaiigh!!! The lord of the manor had just been served with a Complaint asserting adverse possession of beloved Blackacre. He hoped his lawyer knew adverse possession from a prescriptive easement.

Some of us who were awake during law school can tick off the five elements that must be proven in order to establish the claim of adverse possession. I, however, had to look them up again to be sure. One of the fundamental truisms of law: Possession is nine tenths of the law; but in a lawsuit claiming title by adverse possession, possession is ten tenths; but what kind of possession gets you over the moat and into the courtyard? The

possession must be actual, open, continuous, hostile and exclusive. However, if you try to explain what each element means, the audience may doze off in mid sentence.

We covered it in first year Real Property Law, but may not have thought deeply about it since. It's weigh too much heavy lifting. (Spell check doesn't even notice my pun in the last sentence).

I get the chance to litigate adverse possession and boundary disputes from time to time, and actually tried one case for over a week to a jury involving gentrified farm land; thus, we had the opportunity to work out jury instructions explaining the five elements to lay people. (They are not covered in JIG, so don't even bother).

> To prevail in an adverse possession claim, the disseizor must show by clear and convincing evidence hostile, actual, open, continuous and exclusive possession of the land for the 15-year period required by our statute of limitations, Minn.Stat. § 541.02. Ehle v. Prosser, 293 Minn. 183, 197 N.W.2d 458 (1972).

Grubb v. State, 433 N.W.2d 915, 917-918 (Minn.App. 1988).

The preceding quotation is an illustration of one of the things I most enjoy in the practice of law. When writing, judges and lawyers use the most arcane and obscure terms possible. A classic example is that of the "disseizor". However, the meaning is actually quite simple if you take the phonetic approach, i.e., the "disseizor" is da guy trying da seize da property. I consider it good planning on my part to have taken four years of Latin in high school. Not a day goes by when I don't have the

opportunity to make idle Latin chit chat-“Boyabus loveabus sweet girliorum, Papabus kickabus out of the doorum”; “Mea culpa, mea culpa, mea maxima culpa” and so forth.

Adverse possession conceptually can be seen as simply a statute of limitation. After fifteen years, the ousted fee owner may no longer recover possession of the land; and the possessor has seized the title. He can register his title in our Torrens system; but conversely, once registered, an owner cannot lose title to Torrens property by way of adverse possession (Minn. Stat. 508.02); Marsh v. Carlson, 390 N.W.2d 897, 900 (Minn.App. 1986); one of the many virtues of registering one’s property.

The applicable statute is Minn. Stat. 541.02. The central 15 year rule is recited in this excerpt:

541.02. Recovery of real estate, 15 years

> No action for the recovery of real estate or the possession thereof shall be maintained unless it appears that the plaintiff, the plaintiff's ancestor, predecessor, or grantor, was seized or possessed of the premises in question within 15 years before the beginning of the action.

What follows is an utterly dry description of each individual element of adverse possession intended to be devoid of any humor whatsoever.

OPEN

The possession must be open. Open means open but not necessarily visible, see? I swear. Even though the possession cannot be viewed from the road, it still may be Open (with a capital O). To illustrate, I cite the following passage from our

Court of Appeals:

> The Hickersons argue that the improvements were not "open, notorious, and hostile" because the improvements may not have been visible to their predecessors in title from adjoining Green Gables Road. We construe "open," however, to mean visible from the surroundings, or visible to one seeking to exercise his rights.

Hickerson v. Bender, 500 N.W.2d 169, 171 (Minn.App. 1993). Therefore, in seeking to establish title by adverse possession, it is entirely appropriate to lay in the weeds as long as you do it openly. You had better tell your clients to “beat the bushes” as part of their property inspection. Someone may “openly” have a still out in the woods adversely possessing part of their fiefdom.

EXCLUSIVE

I can have it; you can’t. Neither can anyone else. People, this is not complicated. However, if the lady lets everybody use her property along with me, I don’t have exclusive possession. If I plant my fanny on the public beach at Lake Harriet with my little picnic basket and park there for 15 years, I will burn in summer and freeze in winter but will be no closer to perfecting my claim due to all of the other pesky sun worshippers who use the beach in common with me. (Those of you thinking that I cannot adversely possess public property anyway are far too smart for this article and should skip to the personals).

HOSTILE

You have to be hostile, but you can still be civil. Let that be a lesson to all younger lawyers out there in TV land.

The court says that hostility does not mean you have to prove personal animosity but try telling that to any litigant. They'll have no trouble proving up the personal animosity, too.

> ...the requirement of 'hostile' possession does not refer to personal animosity or physical overt acts against the record owner of the property but to the intention of the disseizor to claim exclusive ownership as against the world and to treat the property in dispute in a manner generally associated with the ownership of similar type property in the particular area involved.

Norgong v. Whitehead, 225 Minn. 379, 31 N.W.2d 267 (1948); Thomas v. Mrkonich, 247 Minn. 481, 78 N.W.2d 386 (1956); Ehle v. Prosser, 197 N.W.2d 458, 462, 293 Minn. 183, (Minn. 1972). So does this mean you must prove intent, a sort of real property mens rea? Oh, there goes that Latin again. Read on.

If the original entry is with permission, there is no adverse possession unless the consensual (ooh la la) nature is somehow overtly changed. Junes v. Junes, 196 N.W. 806, 158 Minn. 53, (Minn. 1924). (The last sentence could be substituted in an article concerning developments in the law of criminal sexual conduct.)

CONTINUOUS

That possession must be continuous seems fairly obvious but there are a couple nuances. It must be uninterrupted in any way. Application of Stein, 99 N.W.2d 204, 256 Minn. 485, (Minn. 1959). 1904. He must "keep his flag flying", Romans v. Nadler, 14 N.W.2d 482, 485, 217 Minn. 174,, (Minn. 1944). An interruption of possession is fatal to the adverse possessor's claim, Simms v. William Simms Hardware, 12 N.W.2d 783, 785, 216 Minn. 283,,

(Minn. 1943). Further, though the possession is subsequently interrupted, if it had continued for 15 years before the period of interruption, title has ripened and should be established.

> To maintain a title, acquired by adverse possession, it is not necessary to continue the adverse possession beyond the time when title is acquired. The title once acquired is a new title; a legal title though not a record title is not lost by a cessation of possession, and continued possession is not necessary to maintain it.

Fredericksen v. Henke, 209 N.W.257, 259, 167 Minn. 356 (Minn. 1926).

ACTUAL

The claimant must be in actual possession of the real property for the 15 year period in order to claim it as his'n. The definition of actual possession may tend to blend over into the definition of continuous possession, but it has to do with the nature and character of the occupancy and use the property may be put to. The Supreme Court held that the fact that the owner of a property who was trying to defeat a recorded easement via adverse possession had padlocked a gate across the easement did not support a claim of adverse possession where there was no continuous locking, the purpose of locking the gate was to keep hunters off and use of a cartway by the owner as a turn-around for farm machinery also was not inconsistent with dominant estate owner's enjoyment of the easement; Gandy Co. v. Freuer, 313 N.W.2d 576 (Minn. 1981). Got that? His possession weren't actual enough.

Regular mowing and seeding of lakeshore property may

constitute actual possession but mowing only a few times per year was not sufficient in Nash v. Mahan, 377 N.W.2d 56,(Minn.App. 1985). I doubt I could establish adverse possession at my house based either on my mowing or my kids. Occasional and sporadic use is insufficient to establish adverse possession although appropriate use will depend on the character of the property. Stanard, supra.

SOME EXCEPTIONS

THE WILD AND NATURAL EXCEPTION

Not a new hair product or web site,e.g. (www.wildandnatural.com). If property is left in its wild and natural state, although you have otherwise adversely possessed it, you don't acquire title and can be excluded; Nash v. Mahan, 377 N.W.2d 56, 58 (Minn.App. 1985); LeeJoice v. Harris, 404 N.W.2d 4, 6 (Minn.App. 1987).

THE PUBLIC LAND EXCEPTION

One of my neighbors mows adjoining park land making it appear to be part of his back yard; another routinely plants her garden in the park. However, it is axiomatic that they may not adversely possess government land. It doesn't matter whether the land is federal, state or municipal.

> Statute precluding adverse possession against land dedicated or appropriated to public use does not distinguish between state and municipal lands, nor between lands held in proprietary or governmental capacity. M.S.A. Sec. 541.01.

Fischer v. City of Sauk Rapids 325 N.W.2d 816, (Minn. 1982). I

was really crushed to discover that you also may not adversely possess a drainage ditch. McCuen v. McCarvel, 263 N.W.2d 64 (Minn.1978). Further, one cannot adversely possess a school property though I know some parents who wouldn't care if you took their kids as part of the bargain. Murtaugh v. Chicago, M. & St. P. Ry. Co., 102 Minn. 52, 112 N.W. 860 (1907).

EXCEPTIONAL EXCEPTIONS

However, there are always some exceptions to the exceptions. Where there is a legitimate dispute over the location of a municipal boundary and a compromise is reached, the city may later be forced to honor that boundary. Magnuson v. City of White Bear Lake, 203 N.W.2d 848, 295 Minn. 193, (Minn. 1973). Further, if title ripened through adverse possession before a municipality's purported acquisition, I believe that title is good. Cf. Application of Stein, supra; I suggest you cite "Olson on Titles", Lawjokes Vol.I.

PAYMENT OF REAL ESTATE TAXES

The payment of real estate taxes is normally not dispositive for either party. The statute requires the party claiming adverse possession to have paid the real estate taxes on the land claimed but only in very limited circumstances. The parcel in question must be separately assessed. The rule still won't apply if the claim of adverse possession involves a boundary line dispute or involves property located between a government or platted line, and a new line created by the adverse possession

(which also sounds a lot like a boundary line dispute). See also, Mellenthin v. Brantman, 211 Minn. 336, 1 N.W.2d 141 (1941); Skala v. Lindbeck, 171 Minn. 410, 214 N.W. 271 (1927); Riley v. Kump, 170 Minn. 58, 212 N.W. 13 (1927); Fredericksen v. Henke, 167 Minn. 356, 209 N.W. 257, 46 A.L.R. 785 (1926); Kelley v. Green, 142 Minn. 82, 170 N.W. 922 (1919).

The example where non payment of the real estate taxes applies to defeat a claim is found in Grubb v. State, 433 N.W.2d 915, 919 (Minn.App. 1988):

> Where one landowner adversely possesses approximately 13 acres of his neighbor's 16-acre parcel, the parcel, not merely the boundary line, is at stake. Thus, the boundary-line exception to the statutory tax payment requirement is inapplicable to the facts of this case.

In the exceptional circumstance where the requirement of payment of the taxes does apply, the claimant must have paid them for at least five consecutive years, 541.02. In the instances where you defend in front of a jury, you still would want to put in evidence that the villain trying to take away your client's land without paying anything for it has also not paid the real estate taxes on the parcel while your virtuous (but stupid) client has. Plaintiffs may try to object on relevance grounds but it probably comes in.

BURDEN OF PROOF

Maybe it's important, maybe it's not; you be the judge (and jury). The burden of proof to establish adverse possession is by clear and convincing evidence; more than a mere preponderance and less than proof beyond a reasonable doubt. I've told a jury what

clear and convincing means and listened to my adversaries do the same. "It must be clear, and it must be convincing!" How's that?! I'm unconvinced that a jury cares much. In either case, they want to be convinced in order to find for you.

I think the burden of proof is of greater significance in a trial to the court since a Judge or Examiner of Titles will generally care more about the weight of the evidence than a jury may. In one jury trial I conducted, the three lawyers spent quite a bit of time emphasizing the meaning in closing arguments but I am utterly unconvinced the jury cared. Obviously as a defendant you will want to remind them early and often, however. The case law also states that the evidence must be strictly construed and amount to clear and positive proof before title by adverse possession will be granted. Stanard v. Urban, 453 N.W.2d 733, 735 (Minn.App. 1990).

ACKNOWLEDGEMENT OF RIGHT DEFEATS CLAIM

Even where someone purports to adversely possess property, if he acknowledges the fee owner's rights at some point during the 15 year period, his claim can be lost. In Stanard, the possessing party offered at one time to buy the property from the fee owner. This acknowledgment of the fee owner's rights was fatal to his claim of adverse possession.

You can get the impression that somehow the possessor's mental state is important but it is only action that matters (but cf. Hostile above). It is the act of admitting the other's ownership or seeking consent to use which defeats the adverse

possession.

A mistaken belief as to the true location of a boundary line makes no difference. Seymour, Sabin & Co. v. Carli, 31 Minn. 81, 16 N.W. 495 (1883). According to the court, lack of good faith makes no difference:

> and, if such possession is continued the sufficient length of time, it will ripen into title, regardless of the good faith or the bad faith of the disseisor, or whether he claimed the legal right to enter, or avowed himself a wrongdoer. The two essential elements are possession and adverse intent. The misapprehensive on the subject arises from the somewhat misleading, if not inaccurate, terms frequently used in the books to express this adverse intent, such as 'claim of right,' 'claim of title,' and 'claim of ownership.' These terms, when used in this connection, mean nothing more than the intention of the disseisor to appropriate and use the land as his own to the exclusion of all others.

Carpenter v. Coles, 77 N.W. 424, 75 Minn. 9 (Minn. 1898); Cool v. Kelly, 78 Minn. 102, 104, 80 N.W. 861 (1899)

But don’t tell a jury lack of good faith makes no difference; jurors think otherwise in my experience. Many lay people do not realize that you can lose title to land through adverse possession. Though they will be instructed to follow the law in a jury trial, they won’t see the proof of the five elements in quite the same way.

KNOW YOUR AUDIENCE: COURT OR JURY

My hat would be off (if I wore hats) to those of you still reading to this point, particularly if you say, but, even if I want a jury, how do I get one? Isn’t this some sort of equitable claim not entitling one to a jury?

The Rules of Civil Procedure, Rule 39.02 provides:

> In all actions not triable of right by a jury the court, upon its own initiative, may try an issue with an advisory jury, or the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

See also Noble v. C.E.D.O., Inc, 374 N.W.2d 734, 739 (Minn. App. 1985). Ask the court for a jury trial and it may be permitted; and you can stipulate that the verdict is binding instead of merely advisory.

Recite the mantra of the day: hostile, open, exclusive, actual, continuous; hostile, open, exclusive, actual, continuous; hostile, open, exclusive, actual, continuous; hostile, open, exclusive, actual, continuous; you get the point.