ADVERSE POSSESSION AND PRACTICAL LOCATION

Origin of Common Law Claim of Adverse Possession ***T. Olson***

- Statute of limitations to reclaim land
- Role of surveys
- Elements to prove a claim
- Role of tax payment
- Defense of consent, license
- Burden of proof
- Trespass
- Boundary by practical location
- Pleading, proof
- Case law update attachment

I. ADVERSE POSSESSION

INTRODUCTION

These materials are intended for an overview with some citations to recent decisions which have developed the law in this area. For more detailed materials and appendices, visit www.olson-law.com. 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.

The two theories, adverse possession and boundary by practical location are distinct, not interchangeable, and at least one case hints that lawyers had better plead both theories and present proof under these legal doctrines if they wish to maintain both theories through trial. In one case, the Court of Appeals discussed the failure of one party to plead boundary by practical location and suggested that they could have waived their right to proceed under that theory.

Some cases will better fit adverse possession; and though they're similar, other cases will better meet the practical location rules.

("Although the doctrine of practical location, at least in effect, is similar to acquiring title by adverse possession, the two theories are distinct and require proof of different elements"). *Denman v. Gans*, 607 N.W.2d 788, 796 (Minn. Ct. App. 2000) *see also Engquist v. Wirtjes*, 68 N.W.2d 412, 417 (Minn. 1955) (stating practical location is "independent of 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.

> "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."

Another statute, Minn. Stat. § 559.23, anticipates courts establishing legal boundaries:

> An action may be brought by any person owning land or any interest therein against the owner, or persons interested in adjoining land, to have the boundary lines established; and when the boundary lines of two or more tracts depend upon any common point, line, or landmark, an action may be brought by the owner or any person interested in any of such tracts, against the owners or persons interested in the other tracts, to have all the boundary lines established. The court shall determine any adverse claims in respect to any portion of the land involved which it may be necessary to determine for a complete settlement of the boundary lines, and shall make such order respecting costs and disbursements as it shall deem just. …
>
> M.S.A. § 559.23

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 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.

Ehle v. Prosser, 197 N.W.2d 458, 462 (Minn. 1972); *Ganje v. Schuler*, 659 N.W.2d 261, 266 (Minn. Ct. App. 2003).

SURVEY VERSUS ADVERSE POSSESSION/PRACTICAL LOCATION

Boundaries established by adverse possession or by practical location of boundary will supersede the outcome of 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, 161 N.W.2d 524, 529 (Minn. 1968). *Wojahn v. Johnson*, 297 N.W.2d 298, 304 (Minn. 1980).

ACTUAL POSSESSION

The claimant must have been in possession of the property for the statutory period. It seems obvious but isn't always. The claimant must have some domination and control over the property. The degree of possession will vary based on the type of property. If its 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, *Voegele v. Mahoney*, 54 N.W.2d 15, 18 (Minn. 1952).

In one case, "substantive and frequent" agricultural and homestead-related uses of the land, including mowing the lawn, was sufficient. *Schauer v. Zellman*, 2001 WL 1530630, *3 (Minn. Ct. App. 2001).

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.

Stanard v. Urban, 453 N.W.2d 733, 735 (Minn. Ct. 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:

> 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.

Romans v. Nadler, 14 N.W.2d 482, 485 (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. Nikolai*, 2001 WL 799681 (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.

See also Blanchard v. Rasmussen, 2005 WL 2495991, 8 (Minn. Ct. App. 2005).

> The district court's findings in the present case demonstrate that respondents' activities on the disputed property went well beyond the occasional trespasses on a neighbor's land in cutting grass, trimming hedges, and the like that the supreme court referred to in *Romans.* The district court's findings indicate that respondents took open, undeveloped land and turned it into a yard around their cabin, and a portion of the yard that they created and used is on land that appellant owned. The respondents' activities were not the sporadic, occasional activities that this court relied upon in *Stanard.*

Brown v. Field, 2004 WL 2340095, 2 (Minn. Ct. App. 2004).

OPEN POSSESSION

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.

> 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. Ct. App. 1993).

NO TRESPASSING SIGNS?
Minnesota has never required the affirmative denial of the true owner's title by "no trespassing" signs. Although such signs might signal that the adverse-possession requirement of *openness* of possession was satisfied, there is no requirement under Minnesota law that mandates use of no trespassing signs.

Ganje v. Schuler, 659 N.W.2d 261, 269 (Minn. Ct. App. 2003); same effect, *Houdek v. Guyse* 2005 WL 406217, 2 (Minn. Ct. App. 2005).

EXCLUSIVE POSSESSION

The Court of Appeals addressed the exclusive possession element in an unpublished opinion, *Morris vs. Smith*, 2002 WL 31654983 (November 26, 2002): "The possession was exclusive; no one except Morris used or cared for the Morris driveway and the rest of the land on the south side of the historic fence."

You 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 sufficiently exclusive to maintain a claim.

HOSTILE POSSESSION

Hostile possession simply refers to an intention to claim the property; a use that goes on without permission by the true owner.

> ...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, 31 N.W.2d 267 (Minn. 1948); *Thomas v. Mrkonich*, 78 N.W.2d 386 (Minn. 1956); *Ehle v. Prosser*, 197 N.W.2d 458, 462 (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.

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

The disseizor's use of a gate and road after replacing a previously permitted lock with his own lock on the chain triggered the presumption of hostility. The burden of demonstrating that use was permissive therefore shifted to the owner. *Anderson v. Olson*, 2002 WL 1545642, *4 (Minn. Ct. App. 2002).

In *Cool v. Kelly*, 80 N.W. 861 (Minn. 1899), the 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.

Cited in *Ehle v. Prosser*, 197 N.W.2d 458, 462 (Minn. 1972).

ACKNOWLEDGMENT OF TITLE DEFEATS HOSTILE ELEMENT

Sometimes it is what you say. 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.

Olson v. Burk, 103 N.W. 335, 94 Minn. 456 (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. See also, *Lambert v. Bongard*, 648 N.W.2d 712, 714 (Minn.App. 2002), where the claimants acknowledged they held permissive possession under a valid contract for deed.

Admission of ownership in another may be fatal to claim of adverse possession:

> Siegel's attempt to purchase the land is but one fact among several that support the district court's finding that Siegel's possession was never hostile.
>
> *Siegel v. Nagel* WL 668131, 2 -3 (Minn.App.,2008)

An acknowledgment, by one holding title by adverse possession, of the former owner's title, by accepting a lease, is competent to prove his possession not adverse. *Sage v. Rudnick*, 1897, 67 Minn. 362, 69 N.W. 1096.

See also *Forbes v. Kociscak*, L 264576, 1 -2 (Minn.App., 2002) where an offer to purchase defeated an ongoing hostile possession, because it constituted admission of ownership.

BUT, opposite result: *Winfield v. Kasel*, 2009 WL 174211 (Minn. Ct. App. 2009) (unpublished): An adverse claimant first executed a lease for the disputed land, then prosecuted this suit successfully claiming he owned up to a fence by virtue of adverse possession. The Court relied on the fact the statute of limitations had already expired.

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.

> …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.

Norgong v. Whitehead, 31 N.W.2d 267, 269, 225 Minn. 379 (Minn. 1948); *Dozier v. Krmpotich*, 35 N.W.2d 696 (Minn. 1949)

In a case decided last year, the Court of Appeals agreed that no sufficient evidence established consent to mowing had been given. While the Court of Appeals agreed that consent given to use would defeat adverse possession, Andersen could not point to any specific conversation where he gave the consent.

Andersen v. Crowson, 2011 WL 206152 (Minn. Ct. App. 2011).

INFERRED CONSENT

The Court has implied consent where there was a close family relationship between original owners and the ownership was then separated:

> …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 … 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.

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

But when the property is sold outside the family, the permissive inference is generally lost. See

Boldt v. Roth, 618 N.W.2d 393, 397 (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 (Minn. 1959). An interruption of possession is fatal to the adverse possessor's claim, *Simms v. William Simms Hardware*, 12 N.W.2d 783 (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 (Minn. 1926). *See also Hector v. Hoffer*, 2011 WL 6141606 (Minn. Ct. App. Dec. 12, 2011) (district court erred to the extent it concluded "the requirements for adverse possession must be established by the current occupant of the property" since the court may find all elements in prior use of the disputed property).

A four month absence from the state was not a substantial interruption in the continuity of possession. *Nygren v. Patrin*, 179 N.W.2d 76 (Minn. 1970).

A bright-line test for how much activity constitutes continuous possession of a property for adverse-possession purposes does not exist. Instead, the rule of thumb used is that the disseizor must be using the property as his or her own, i.e., regularly and matched to the land's intended use. *Ganje v. Schuler*, 659 N.W.2d 261, 268 (Minn. Ct. App. 2003).

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 possessed the property. *Burns v. Plachecki*, 223 N.W.2d 133, 136 (Minn. 1974).

Tacking was confirmed in 2005 and somewhat limited in a 2009 case:

> The possession of successive occupants, if there is privity between them, may be [combined] to make adverse possession for the requisite period." *Fredericksen v. Henke*, 209 N.W. 257, 259 (Minn. 1926). *Houdek v. Guyse*, 2005 WL 406217, 2 (Minn. Ct. App. 2005).

The Joe Mauer case (not *that* Joe Mauer) confining tacking, requiring a showing that each former owner was in privity AND maintained hostile possession; *Mauer v. Otter Tail Power Company*, 2009 WL 2225820 (Minn. Ct. App. 2009).

Landowner could not establish adverse possession by tacking previous owners' adverse use because landowner did not present any evidence that predecessors in title used the land without permission. Further, landowner believed that neighbor permitted the use, so use was not hostile.

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, *Olson v. Burk*, 103 N.W. 335 (Minn. 1905).

Tacking by a Corporate Owner?

> But since appellant's predecessor in title was a corporation, and there was no showing that corporate officers or agents used the land, Kroiss and appellant are not in privity. Thus, Kroiss's ownership cannot be tacked to appellant's to satisfy the requirements for adverse possession. *Forbes v. Kociscak*, 2002 WL 264576 (Minn. Ct. App. 2002).

In another recent decision, though Red Cedar was using the southerly portion of a 4 acre tract to hunt, cut brush, to groom trails and to place a deer stand, it entered into a contract for deed with another, not the true survey owner. Thus, it could not be said as of the time of the Contract for Deed that they believed they were possessing adversely.

Grannes v. Red Cedar of Yellow Medicine, Inc., 2009 WL 234641, 3 (Minn. Ct. App. 2009).

The Court of Appeals also looked at privity in July of this year, and found that the deed from a predecessor in title need not specifically account for the disputed parcel for tacking to be appropriate; the voluntary transfer of possession was enough to establish privity. *LeBlanc Bros. v. Fish*, 2012 WL 3023488 (Minn. Ct. App. July 23, 2012). For a further discussion of privity, see *Rucker v. Schmidt*, 768 N.W.2d 408 (Minn. Ct. App. 2009).

TACKING; STANDING

A tenant, Moren, of the State of Minnesota in Itasca County intended to build a cabin on the leased land. Instead Moren built the cabin on land owned by a private party in 1968. In 1998, a county employee noted the cabin and part of an outbuilding were on the neighbor's property and informed both parties. The State conveyed ownership of the leased land to Jean Simat who continued to occupy the cabin off the conveyed property for several years.

The District Court decided the claimant did not have standing and therefore could NOT tack Moren's prior possession to hers to achieve 15 years.

The Court of Appeals reversed saying that Minn. Stat. 559.23 provides that any person having ownership or an interest in land may maintain an action; and that it is not barred to employ tacking to achieve sufficient duration.

> Appellants allege that they have standing under Minn.Stat. § 559.23 (2008), which provides that an action "may be brought *by any person owning land* or any interest therein *against the owner*, or persons interested *in adjoining land*, to have the boundary lines established...." Minn.Stat. § 559.23 (emphasis added). At the time they brought this action in 2008, appellants were "person [s] owning land" suing "the owners ... [of] adjoining land to have the boundary lines established." Thus, under Minn.Stat. § 559.23, appellants had standing to bring this action.

Simat v. Trytten, 2010 WL 2572621, 2 (Minn. Ct. App. 2010). *See also Soland v. Evert*, 2011 WL 6015170 (Minn. Ct. App. Dec. 5, 2011) (disseizor established elements of adverse possession through the use of the disputed parcel by disseizor's tenant).

TACKING; PREDECESSOR AS NECESSARY PARTY?

An owner sued his seller as a necessary party to a claim to tack the seller's possession. The Court of Appeals affirmed dismissal of the seller on this claim. (Seller would be a witness but not necessary party under Rule 19).

> Appellants assert that respondents adversely possessed the disputed land starting in 1973 when they purchased the homestead from the Millers. Appellants argue that respondents must remain in the lawsuit because without them appellants have no way to acquire the title they claim respondents have to the property. This argument misperceives the claim. Adverse possession does not depend on establishing an ownership interest by predecessors-in-interest, rather claimants must establish that the property has been adversely possessed by them and their predecessors-in-interest for at least 15-years.

Johnston v. Hjelmen, 2005 WL 14941, 4 (Minn. Ct. App. 2005).

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.

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

Mistaken Possessor: That the claimant is mistaken about its "true" surveyed location is not a defense to a claim of adverse possession.

> 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).
>
> *Owens v. Kelly*, 2002 WL 31247096, 2-3 (Minn.App. 2002).

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.

APPROPRIATE AND SUFFICIENT USE

Use must be "sufficient" to constitute actual use. An occasional trespass does not constitute actual, continual use.

However, the use required to be shown in a rural area may be less: In a 2009 unpublished Court of Appeals opinion the Court found adverse possession where the witnesses testified to use such as "[using] the property south of the fence line for pasturing cattle; for duck hunting and deer hunting; [playing] back there all the time [as] a child; maintain[ing] the fence and spray[ing] the area for weeds; pick[ing] plums from plum trees . . . [and] hunt[ing] deer" were sufficient. The Court held that the "use of the property by respondents' predecessors-in-interest was appropriate given the property's rural character and, therefore, sufficient to establish continuity. . . [T]he rule of thumb used is that the [adverse possessor] must be using the property as his or her own, i.e., regularly and matched to the land's intended use'" *Schwarz v. Finseth*, 2009 WL 4910552, 1- 4 (Minn. Ct. App. 2009), quoting *Application of Ganje v. Application of Schuler*, 659 N.W.2d 261, 268 (Minn. Ct. App. 2003).

The Court of Appeals addressed this issue again in 2009 holding that planting gardens, obviously a seasonal use, along with a large boulder and a canoe was enough possession in this instance. *Gelao v. Coss*, 2009 WL 2745833 (Minn. Ct. App. 2009). The neighbor was found to have created a private nuisance by erecting large steel poles at disputed boundary line which destroyed some of landowner's landscaping. Neighbor was also found liable for damages to a retaining wall.

PUBLIC PROPERTY MAY NOT BE ADVERSELY POSSESSED, BUT…

A private citizen may not adversely possess adjoining public lands even though he would otherwise meet all the tests, Minn. Stat. § 541.01:

> …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.

The statute prohibits establishment of a prescriptive easement over public property as well. *Heuer v. County of Aitkin*, 645 N.W.2d 753, 757-58 (Minn. Ct. App. 2002); *Claussen vs. City of Lauderdale*, 681 N.W. 2d 722 (Minn. Ct. App. 2004).

Rupley v. Fraser, 156 N.W. 350 (Minn. 1916) allows one to gain title to an entire tract which includes public streets; just not the streets themselves.

One may not acquire a state swamp, *Scofield v. Schaeffer*, 116 N.W. 210 (Minn. 1908); or a public school grounds. *Junes v. Junes*, 196 N.W. 806 (Minn. 1924); *Scofield v. Schaeffer*, 116 N.W. 210 (Minn. 1908); Op.Atty.Gen., 50, July 25, 1946.

PUBLIC LAND EXCEPTIONS:

A municipality can compromise a disputed boundary location and later be forced to honor it. The location of a platted street was disputed and settled in 1924 (proven through introduction of a newspaper clipping from 1924). Though it was public land, the settlement of a good faith boundary question by a governmental entity is enforceable.

Magnuson v. City of White Bear Lake, 203 N.W.2d 848, 851 (Minn. 1973), *see also Jennen v. County of Aitkin*, 2003 WL 21152491 (Minn. Ct. App. 2003).

Could public land ever be abandoned and therefore acquired by a possessor? Hypothetically, yes; practically not so far.

Nonuse and failure to remove improvements or obstructions placed by the private party (acquiescence) alone are not enough to constitute abandonment by the municipality. *Stadtherr v. City of Sauk Center*, 231 N.W. 210 (Minn. 1930). There must be some affirmative or unequivocal acts of the municipality representing intent to abandon the public property. *Rein v. Town of Spring Lake*, 145 N.W.2d 537, 540 (Minn. 1966).

See also *Denman vs. Gans*, 607 N.W.2d 788 (Minn. Ct. App 2000), where the Court 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.

PRACTICAL LOCATION EXCEPTION-BOUNDARY BY PRACTICAL LOCATION

Note that a boundary may be determined against a public entity via practical location due to an estoppel; see section pertaining to practical location of boundaries.

PAYMENT OF REAL ESTATE TAXES NOT PREREQUISITE (USUALLY)

Payment of the real estate taxes on the land 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.'

Mellenthin v. Brantman, 1 N.W.2d 141, 144 (Minn. 1941).

If the adverse possessor has paid taxes on the disputed property <u>as physically occupied</u>, even if the property's legal description on the assessment roll is inconsistent with the physical occupation, the requirement of M.S.A. 541.02 is satisfied. *LeGro v. Saterdalen*, 607 N.W.2d 173, 175-76 (Minn. 2000).

> 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.

Ehle v. Prosser, 197 N.W.2d 458, 462 (Minn. 1972).

One cannot acquire an entire parcel of land not having paid the real estate taxes on that parcel; but what is the entire parcel?

> In *Skelton*, this court ruled that when a landowner made a legally ineffective sale to neighbors of a 3.47-acre parcel of property encompassing a pond and certain land surrounding it, the doctrine of boundary by practical location was inapplicable because that "doctrine is intended to resolve boundary line disputes, *not* to establish ownership of substantial parcels of land. Expanding the doctrine as [one parcel claimant] urge[s] would undermine the statute of frauds and the recording act." *Id.* at 83 (emphasis in original). *Ampe v. Lutgen* 2007 WL 2034381, 2 (Minn.App.,2007)

Remember that the land must be a separate tax parcel for this rule to apply.

See also Wagner v. McPhaill, 2008 WL 4909420 (Minn. Ct. App. 2008) (failure to pay real estate taxes didn't bar adverse possession).

HOW TERMINATE AN ADVERSE POSSESSION BEFORE IT RIPENS INTO TITLE

It is necessary to act; it is normally not necessary to trash someone's shed which is over the line. 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, put up no trespassing signs, 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, 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.

ACTIONS FOR DAMAGES; NUISANCE

Lawyers and surveyors advising clients need to counsel the landowner to think before they act to remove someone else's property or improvements. An owner may bring an action for damages for trespass if he/she can show they have genuinely been hurt, or lost something. Often, there may be little proof of actual damages. The fact that another has occupied property along a 10 foot wide strip for five years may entitle the claimant to some nominal damages. 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.

Williams v. Lynd Tp., 312 N.W.2d 110, 113 (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"

Morlock v. St. Paul Guardian Ins. Co., 650 N.W.2d 154, 159 (Minn. 2002); *Peters v. Independent School Dist. No. 657, Morristown*, 477 N.W.2d 757, 760 (Minn. Ct. App. 1991).

Gelao v. Coss, 2009 WL 2745833 (Minn. Ct. App. 2009): Neighbor was found to have created a private nuisance by erecting large steel poles at disputed boundary line which destroyed some of landowner's landscaping. Neighbor was also found liable for damages to a retaining wall.

Note a statute which labels a fence that is "maliciously erected" is a private nuisance. This means it may be enjoined and damages could be available. There is little case law on its enforcement.

> Any fence, or any other structure, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property shall be deemed a private nuisance.

Minn. Stat. Ann. § 561.02 (West)

NOMINAL DAMAGES

Without actual provable damages, a claimant may be limited to nominal damages. *Lake Mille Lacs Inv., Inc. v. Payne*, 401 N.W.2d 387, 391 (Minn. Ct. 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*, 13 N.W.2d 754, 757 (Minn. 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.

In this unusual case, after losing an adverse possession case but ignoring the outcome and refusing to remove improvements, this party <u>almost</u> re-acquired the property by attempting to remain on the property for a new 15 year period:

Osgood v. Stanton, 2009 WL 1586943 (Minn. Ct. App. 2009).

The time during which action is pending might be included in the period of adverse possession. The only time not counted is that time during which a party is prevented from seeking recovery of disputed land. Ultimately decided on other grounds.

Osgood also makes it clear that commencing an action tolls running of the statute.

LIMITATION ON EQUITY

Though equity is said to be flexible, it has its limits as can be seen below. A trial court in fashioning a remedy may not ignore the facts proving a boundary has been established and give the possessor a more limited remedy, or compensate the "disseized" party for his loss.

Gabler v. Fedoruk, 756 N.W.2d 725 (Minn. Ct. App. 2008): Claimant proved a boundary was established by practical location but the trial court only granted a prescriptive easement and gave damages to the losing landowner. The Court of Appeals said a Court's equity powers are not so elastic; that if one is entitled to it, he deserves confirmation of his title, and there is no basis for damages.

See also Schnabel v. Rask, 2012 WL 3023423 (Minn. Ct. App. July 23, 2012) ("despite the generally equitable nature of the overall action," the court could not elect to grant a prescriptive easement once it found the elements of a title-divestment claim).

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.

NECESSITY OF PLEADING BOTH THEORIES

In one decision, the Court of Appeals inferred that it might bar a party from establishing practical location of a boundary if the party had proceeded solely on an adverse possession theory through the trial without ever mentioning the practical location theory. Though similar, the two theories are not identical and may require different proof. The Court goes on to state: Generally, "relief cannot be based on issues that are neither pleaded nor voluntarily litigated." *Roberge v. Cambridge Co-op. Creamery Co.*, 67 N.W.2d 400, 403 (Minn. 1954).

See also Quast v. Brose, 2001 WL 1035039, *2 (Minn. Ct. App. 2001).

Remember that though you may not adversely possess public land, practical location of the boundary may work an estoppel against a public entity defendant; reason alone to plead it.

THE 40 YEAR RULE

The so called 40 year rule, Minn. Stat. § 541.023, is not a defense to a claim of adverse possession. The 40 year rule 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.

See Wichelman v. Messner, 83 N.W.2d 800, (Minn. 1957) where the Supreme Court held possession was an exception to the 40 yr. rule.

THE REVERSE ADVERSE POSSESSION CASE: "I DON'T WANT IT, YOU CAN HAVE IT"

Representing a Mortgage company, I saw a neighbor bring a reverse adverse possession lawsuit trying to clear his title. The neighbor'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.

Minn. Stat. § 559.23 authorizes an action to determine boundaries; it doesn't appear to require that one be claiming land as opposed to offering to cede it to another.

TRIAL; SUMMARY JUDGMENT

Most often, adverse possession and practical location cases get tried; they are not decided based on summary judgment motions. The Courts say there are usually fact issues that need to be resolved, whether with the surveys themselves, or because neighbors have conflicting versions of what was said and done; and when it was said and done.

> As the district court's analysis suggests, much of this evidence invited concern about gaps in the picture of continuous, hostile use. The evidence was especially wanting for the period from 1989 to 1994, when appellant's Lot 18 was owned by Elaine Sager (prior to 1990) and Orville Sunde (1990 to 1994).
>
> Second, all of the alleged uses of the strip invite doubts as to whether these events were seasonal or otherwise episodic and whether they affected merely a lesser part of the 140-foot strip. *Cf. Engquist v. Wirtjes*, 243 Minn. 502, 505, 68 N.W.2d 412, 415 (1955) (requiring a disseizor to use and occupy the entire area claimed to be adversely possessed); *Stanard*, 453 N.W.2d at 736 (concluding that using land to store equipment during winter months and mowing land during the summer did not establish title by adverse possession because such acts were too sporadic and occasional). Appellants' evidence showed instances of mowing grass, movement and parking of vehicles, holding piled snow, and occasional swings of golf clubs. The evidence included no suggestion of fences (temporary or permanent), walls, hedges, or other lasting segregation of the strip from the rest of Lot 19. *Cf. Romans v. Nadler*, 217 Minn. 174, 180-81, 14 N.W.2d 482, 486 (1944) (examining the insufficiency of evidence on cutting grass and trimming hedges); *Ganje*, 659 N.W.2d at 267 (affirming conclusion that acts on a disputed area were sufficiently actual and open where respondents had planted trees, shrubs, and flower bulbs). Appellants' witnesses referred to an evergreen tree on the Lot 19 side of the strip, but there is no evidence that this single, front-yard tree, nearly in line with the closest side of the Lot 19 home, was planted to suggest a boundary line.
> *3 All of this being said, the district court dismissed the case without trial by disregarding sweeping evidence that, if accepted, would permit a finding of continuous and hostile use; the court evidently concluded that some of this evidence was not as "persuasive" as more particular observations by other affiants.

Toon v. Duluth Economic Development Authority, WL 4239178, 2 -3 (Minn. Ct. App. 2007).

BURDEN OF PROOF: CLEAR & CONVINCING PROOF

You may be familiar with the burden of proof in criminal cases: "beyond a reasonable doubt". One side or the other has the burden of proof on every question in civil and in criminal cases. Lower standards of

proof are used in most 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 if fact A is more probably true than not true, then a jury is entitled to find that A is a fact. Adverse possession requires proof by 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.

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

But this burden is considerable because "every presumption [is] against [the disseisor]." *Vill. of Newport v. Taylor*, 30 N.W.2d 588, 591 (Minn. 1948); s*ee also Houdek v. Guyse*, 2005 WL 406217, 1 (Minn. Ct. App. 2005).

CONSTRUCTION OF EVIDENCE

The Courts have also in the past ruled that evidence claimants offer is also "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."

Ebenhoh v. Hodgman, 642 N.W.2d 104, 108 (Minn. Ct. App. 2002). *But see LeBlanc Bros. v. Fish*, 2012 WL 3023488 (Minn. Ct. App. July 23, 2012); *Soland v. Evert*, 2011 WL 6015170 (Minn. Ct. App. Dec. 5, 2011), These cases apply the standard found in *Rogers v. Moore*, 603 N.W.2d 650 (Minn. 1999), which stated that a claimant must prove the elements by clear and convincing evidence, but need not strictly construe all evidence against the disseizor.

STANDARD OF REVIEW ON APPEAL

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/his 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 courtroom, 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").

Ebenhoh v. Hodgman, 642 N.W.2d 104, 108 (Minn. Ct. 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, 118 N.W.2d 446, 448 (Minn. 1962); *see also Ganje v. Schuler*, 659 N.W.2d 261, 266 (Minn. Ct. App. 2003).

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 the 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 * * *.

Miller-Lagro v. Northern States Power Co., 566 N.W.2d 94, 97 (Minn. Ct. App. 1997). Affirmed in part and reversed in part *Miller-Lagro v. Northern States Power, Co.*, 582 N.W.2d 550 (Minn. 1998). Municipalities and public utilities generally will not be liable under the statute. *Miller-Lagro v. Northern States Power, Co.*, 582 N.W.2d 550, 553-54 (Minn. 1998).

II. BOUNDARY BY PRACTICAL LOCATION

INTRODUCTION

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 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.

Romanchuk v. Plotkin, 9 N.W.2d 421, 427, (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 (except the estoppel basis in some cases). Basically, the first theory requires that the defendant stands by silently for the statutory period, 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, an "estoppel" theory.

A boundary line may be established by practical location in one of three ways:

(1) The location relied upon must have been acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations; (2) the line must have been expressly agreed upon between the parties claiming the land on both sides thereof and afterward acquiesced in; or (3) the parties whose rights are to be barred must have silently looked on, with knowledge of the true line, while the other party encroached upon it or subjected himself to expense in regard to the land which he would not have done had the line been in dispute.
Fishman v. Nielsen, 237 Minn. 1, 6, 53 N.W.2d 553, 556 (1952). The statute of limitations requires the boundary to be acquiesced in for 15 years. Minn.Stat. § 541.02 (2006).

Ampe v. Lutgen 2007 WL 2034381, 1 (Minn. Ct. App. 2007).

PRACTICAL LOCATION VERSUS PUBLIC BODY

Contrary to adverse possession, in the case of practical location it is possible to estop a city, township, parkboard, etc. from claiming ownership of property:

> The trial court found, as to Parcel B, that this case presents "a classic example of estoppel." We agree and do not reach the issue of adverse possession. A municipality, like a private owner, may be estopped. *Bice v. Town of Walcott*, 64 Minn. 459, 67 N.W. 360 (1896). Each case stands on its

> own sets of facts, *id.*, which must be proved by a fair preponderance of the evidence. The facts themselves must be clear, positive and unequivocal in their implications. *Eliason v. Production Credit Association of Aitkin*, 259 Minn. 134, 106 N.W.2d 210 (1960).
>
> We recognize that municipal corporations are afforded an added degree of protection as regards their property:

The doctrine of estoppel is not applicable to municipal corporations as freely and to the same extent that it is to individuals. When it is applied, the basis of application is usually not because of the nonaction of the officers of the municipality, but because they have taken some affirmative action influencing another, which renders it inequitable for the corporate body to assert a different set of facts. *Halverson v. Village of Deerwood*, 322 N.W.2d 761, 767 (Minn. 1982)

IS GOOD FAITH REQUIRED FOR PRACTICAL LOCATION CLAIM AGAINST BODY POLITIC?

The district court found that respondents believed in good faith that they had purchased the disputed tract. The county argues that the fact that respondents' predecessors in interest described the property in the 1994 permit application as about four acres in size demonstrates that respondents lack a good-faith basis for believing that they were purchasing more than seven acres of land. A survey completed just before respondents purchased the property indicates that the parcel contains about seven acres of land. A copy of the survey was appended to respondents' contract for deed. Because respondents' belief that they were purchasing the now-disputed tract was based on a certificate of survey completed shortly before they purchased

Pomphrey v. State ex rel. St. Louis County, 2008 WL 3288623, 2 (Minn. Ct. App. 2008).

PRACTICAL LOCATION DISTINCT FROM ADVERSE POSSESSION

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

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

See also Pratt Inv. Co. v. Kennedy, 636 N.W.2d 844, 848 (Minn. Ct. App. 2001); *Quast*, supra.

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.

Pratt Investment Company v. Kennedy, 636 N.W.2d 844, 849 (Minn. Ct. 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, 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. Ct. 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 *Pratt Inv. Co. v. Kennedy*, 636 N.W.2d 844, 850 (Minn. Ct. App. 2001).

And in a case with the same factual scenario as above, the court held "although the aid of a survey may often be useful in determining the location of a boundary, one is not required here" because of the existence of the fence which established the boundary. *Bickhardt v. Gerwerth*, 2002 WL 31109381, 2 (Minn. Ct. App. 2002).

> When adjoining landowners occupy their respective premises up to a certain line that they both recognize and acquiesce in for 15 years, generally they are precluded from contesting that boundary line. *Amato v. Haraden*, 280 Minn. 399, 403, 159 N.W.2d 907, 910 (1968); *see* Minn.Stat. § 541.02 (2004). Acquiescence requires actual or implied consent to some action by the disseizor, such as construction of a boundary or other use of the disputed property and acknowledgement of that boundary for an extended period of time. *Engquist*, 243 Minn. at 507-08, 68 N.W.2d at 417; *LeeJoice v. Harris*, 404 N.W.2d 4, 7 (Minn.App.1987); *see also Fishman v. Nielsen*, 237 Minn. 1, 7-8, 53 N.W.2d 553, 556-57 (1952) (finding practical boundary by acquiescence when two predecessors in title agreed on a line, built a fence on the line, and acquiesced in the line for at least 18 years); *In re Zahradka*, 472 N.W.2d 153, 156 (Minn.App.1991) (finding that boundary by practical location by acquiescence when disseizor built parking lot on disseized land and disseized made no claim to ownership of land for more than 15 years), *review denied* (Minn. Aug. 29, 1991).

Blanchard v. Rasmussen 2005 WL 2495991, 3 (Minn. C. App. 2005).

PRACTICAL LOCATION BY AGREEMENT

One 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.

Recently the Court made it clear that the express agreement theory requires clear proof of an agreement:

> We hold that an "express agreement" requires more than unilaterally assumed, unspoken and unwritten "mutual agreements" corroborated by neither word nor act.

Slindee v. Fritch Investments, LLC, 760 N.W.2d 903, 909 (Minn. Ct. App. 2009). *See e.g., Fredrickson v. Riepe*, 2011 WL 4008298 (Minn. Ct. App. Sept. 12, 2011) (express agreement found where disseizors built a fence that encroached onto their neighbor's property, but they asked her to approve of the fence after finishing it. She inspected it and then told them she approved).

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*.

Engquist v. Wirtjes, 68 N.W.2d 412, 417, 243 Minn. 502 (Minn. 1955). You may be asking yourself what "lack of conduct" means, and how one could distinguish it from mere "passive consent." Best to look to surrounding circumstances.

The holding in *Engquist* has been reaffirmed in *Pratt Investment Co. v. Kennedy*, 636 N.W.2d 844, 849 (Minn.App. 2001) so remains good law.

It is action or inaction from which consent to a fence as a boundary line can be inferred, it is not mere 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).

Wojahn v. Johnson, 297 N.W.2d 298, 305 (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. Ct. 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 & PRESCRIPTIVE EASEMENTS, BUT…

We had what looked like a strong case for adverse possession in a western suburb but we were chagrined to find that the claimed property was within a Torrens certificate. The applicable statute is M.S.A. § 508.02 which says that one may not adversely possess registered (torrens) land.

However, Minn. Stat. § 508.02 applies practical location to torrens property. And, § 508.02 is retroactive—it applies to actions filed before codification in 2008. *Ruikkie v. Nal*, 798 N.W.2d 806, 821 (Minn. Ct. App., May 09, 2011); *see also Hebert v. City of Fifty Lakes*, 744 N.W.2d 226 (Minn. 2008).

One decision states:

> 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).

Petition of Geis, 576 N.W.2d 747, 749 (Minn. Ct. 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.

Petition of Geis, 576 N.W.2d 747, 750 (Minn. Ct. App. 1998) which formerly held a torrens certificate legal description may not be altered was overruled by Minn.Stat. 508.02;

> This statement from *Geis* does not reflect the present state of the law. *Geis* was decided before the amendment of Minn.Stat. § 508.02, which overrules *Geis* by expressly allowing judicial proceedings to establish boundaries by practical location.

Ruikkie v. Nall, 798 N.W.2d 806, 821 (Minn. Ct. App. 2011)

The doctrine of practical location of boundaries does not apply to registered property absent an ambiguous certificate of title or a dispute as to the location of boundaries at the time the property was registered.

Petition of Building D, Inc., 502 N.W.2d 406 (Minn. Ct. App. 1993).

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.

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

ADVERSE POSSESSION CURING DEFECTIVE MORTGAGE FORECLOSURE

The Supreme Court has 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.

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

State v. Larson, 393 N.W.2d 238, 242 (Minn. Ct. 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.

Jallen v. Agre, 119 N.W.2d 739, 744 (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.

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

SUMMARY

Actions are available to settle boundaries. Owners and possessors should be counseled carefully to avoid damage claims; but also to avoid the impact of the statutes of limitation. Rights of re-entry must be timely asserted; an action can be filed to avoid expiration of a statute.

CASE LAW UPDATE

These cases were compiled to represent decisions handed down from 2009 to the present. Many are incorporated to the main materials. This supplement is included to give you an update and quick guide to recent decisions.

Singer v. Comm'r of Revenue, 817 N.W.2d 670 (Minn. 2012)
Tax court had subject matter jurisdiction to determine whether a son properly excluded his mother's home from the valuation of her estate when he alleged he had acquired the home through adverse possession. Whether the home was part of the estate was a question of fact affecting the gross value of the estate and, by extension, the amount of taxes properly assessed against it.

Jokela v. Jokela, 2012 WL 3553110 (Minn. Ct. App. Aug. 20, 2012)
To establish the element of hostility against co-tenants, a disseizor must rebut a presumption of permissive use: "there must be an express or implicit ouster of them [the co-tenants], such ouster consisting of acts or declarations of hostility sufficient to indicate a truly adverse possession." The disseizor must "'present clear and unequivocal proof of the inception of hostile possession.'"

LeBlanc Bros. v. Fish, 2012 WL 3023488 (Minn. Ct. App. July 23, 2012)
Tacking was proper and privity found between successive adverse possessors even though the contract for deed between them did not describe the disputed parcels and there was no evidence in the record of parol statements indicating an intent to specifically transfer the disputed parcels. The voluntary transfer of possession was enough to establish privity.

In reviewing whether the respondent established the elements of adverse possession, the Court applied the standard found in *Rogers v. Moore*, 603 N.W.2d 650 (Minn. 1999), which stated that a claimant must prove the elements by clear and convincing evidence, and did not strictly construe all evidence against the disseizor.

Schnabel v. Rask, 2012 WL 3023423 (Minn. Ct. App. July 23, 2012)
Adverse possessor met actual and open possession requirement for a wooded area with only acts like clearing out and trimming brush, and occasional entrances to hunt or clear trash because the area was small (a little over an acre) and well-defined, bordered by a road on one side and farmland on the other. The acts were consistent with normal use of the area and therefore sufficient.

Further, Court upheld district court's findings on where the new boundary lines should be because the location of a disputed boundary line is a question of fact. The lower court's reliance on one surveyor over another depends mainly on its determination of the credibility of each surveyor—such a determination will not be reversed if there is reasonable support for it.

Finally, once a court has found the elements of boundary by practical location (or a similar title-divestment claims), the remedy is nondiscretionary "despite the generally equitable nature of the overall action:" The court could not elect to grant a prescriptive easement instead of recognizing the boundary.

McDonald v. Christian, 2012 WL 34053 (Minn. Ct. App. Jan. 9, 2012)
The district court found in favor of a prescriptive easement after denying the now-servient estate owner a jury trial. On appeal, the Court found that the district court did not err in denying the request for a jury trial because "actions to quiet title and determine adverse claims…are equitable actions," and it is well-established that no right to a jury trial attaches to equitable actions.

Hector v. Hoffer, 2011 WL 6141606 (Minn. Ct. App. Dec. 12, 2011)
District court erred to the extent it concluded "the requirements for adverse possession must be established by the current occupant of the property" since the court may find all elements in prior use of the disputed property (it was a harmless error, however).

Soland v. Evert, 2011 WL 6015170 (Minn. Ct. App. Dec. 5, 2011)
District court held that respondents acquired title to land by adverse possession and boundary by practical location. In affirming that decision, the Court of Appeals described the level of proof for adverse possession as clear and convincing, and not strictly construing all evidence against the disseizor. The Court also found that disseizor was able to show the elements of adverse possession through the use made of the disputed property by disseizor's tenant.

Further, *Newport* rule requiring strict construing of evidence without giving any presumption or inference to the disseizor is not applicable to boundary by practical location cases.

Enbridge Energy, Ltd. P'ship v. Dyrdal, 2011 WL 5026348 (Minn. Ct. App. Oct. 24, 2011), review denied (Jan. 17, 2012)
Where an easement was granted only about two years before a claim was brought, servient estate owner did not establish the "acquiescence over a substantial period of time" needed for their theory of boundary by practical location, by which they were attempting to limit the easement.

Fredrickson v. Riepe, 2011 WL 4008298 (Minn. Ct. App. Sept. 12, 2011)
Court upheld decision that boundary by practical location was established by express agreement. Disseizor proved "that the agreement set an 'exact, precise line' between two parcels" even though the relied upon fence was crooked.

Ruikkie v. Nal, 798 N.W.2d 806, 2011 WL 1743859 (Minn. Ct. App., May 09, 2011) (scope)
Minn. Stat. § 508.02 applies practical location to torrens property. And, 508.02 is retroactive—it applies to actions filed before codification in 2008.

Britney v. Swan Lake Cabin Corp., 795 N.W.2d 867 (Minn. Ct. App. 2011)
Failure to follow procedural requirements of Minn. Stat. § 508.671 for boundary by practical location claim requires dismissal. Claim for ownership by adverse possession not precluded by failure to follow those requirements.

de Neui v. Slindee, 2011 WL 292156 (Minn. Ct. App., Feb. 1, 2011) (standing)
Seller that granted a parcel by warranty deed that did not identify a previously made agreement with other to shift boundary had standing to bring reformation action where seller may be liable under the warranty

deed that did not accurately describe the property they attempted to sell.

Andersen v. Crowson, 2011 WL 206152 (Minn. Ct. App., Jan. 25, 2011)
Determination of boundary by practical location by acquiescence is reviewed for clear error.

Stevenson v. Brodt, 2010 WL 4068727 (Minn. Ct. App., Oct. 19, 2010) (estoppel, acquiescence and express agreement)
Building fence without intent to establish boundary does not make out detrimental reliance (a requisite of practical location by estoppel).

Juntti v. Bedore, 2010 WL 3306932 (Minn. Ct. App., Aug. 24, 2010) (express agreement)
Nine years of acquiescence is sufficient to establish boundary by practical location.

Simat v. Trytten, 2010 WL 2572621 (Minn. Ct. App., June 29, 2010) (standing and construction of statute)
Landowners that leased prior to purchasing land had standing to bring action against adjoining owners to determine boundary by practical location under Minn. Stat. § 559.23. Tacking is relevant to adverse possession and boundary by practical location, it is not relevant to standing.

Roehrs v. Rasmussen, 2010 WL 1850796 (Minn. Ct. App., May 11, 2010) (by acquiescence)
Plowline with definite endpoints and made with intent to mark a boundary is sufficiently known and capable of ascertainment to be a "practical location" despite not being perfectly straight.

Schwarz v. Finseth, 2009 WL 4910552 (Minn. Ct. App., Dec. 22, 2009) (adverse possession and practical location)
Rural character of the land supported claim for boundary because pasturing cattle and storing machinery comports with character

Holz-Kinney v. Thaler, 2009 WL 4040789 (Minn. Ct. App., Nov. 24, 2009) (acquiescence)
Clearly identifiable tree line intended to mark boundary is sufficient for boundary by practical location

Gelao v. Coss, 2009 WL 2745833 (Minn. Ct. App., Sept. 1, 2009) (acquiescence and estoppel)
Estoppel requires knowing silence of the true line on the party charged and unknown detriment on the other.

Mauer v. Otter Tail Power Co., 2009 WL 2225820 (Minn. Ct. App., July 28, 2009) (acquiescence)
Disseizor need not know precisely where alleged boundary is, but needs to show acquiescence.

Kaukola v. Menelli, 2009 WL 1374172 (Minn. Ct. App., May 19, 2009) (acquiescence)
Boundary by practical location by acquiescence requires, at minimum, some type of physical demarcation. Blaze marks and ribbons set and subsequently obliterated is not sufficient physical demarcation.

Slindee v. Fritch Investments, LLC, 760 N.W.2d 903 (Minn. Ct. App. 2009) (by express agreement)
Boundary by practical location based on express agreement means more than "unilaterally assumed, unspoken and unwritten 'mutual agreements' corroborated by neither word nor act." Requires a specific discussion.

Britney v. Swan Lake Cabin Corp., 795 N.W.2d 867 (Minn. Ct. App. 2011)

Failure to follow procedural requirements of Minn. Stat. § 508.671 for boundary by practical location claim requires dismissal; but claim for ownership by adverse possession is not precluded by failure to follow the same statutory procedural requirements.

Brausen v. Petersen, 2011 WL 500050 (Minn. Ct. App., Feb 15, 2011)
Title to registered land is not acquired by prescription or adverse possession. Minn. Stat § 508.02. Registration runs with the land and all "dealings with the land, or any estate or interest therein, and all liens, encumbrances, and charges upon the same" are subject to the terms of the Torrens Act. Minn.Stat. § 508.24, subd. 1.

Andersen v. Crowson, 2011 WL 206152 (Minn. Ct. App., Jan. 25, 2011)
Claim of permissive use without recollection of a specific conversation granting permissions requires some corroborating evidence to defeat hostile element. Facts support findings of adverse possession.

Vokal v. Vokal, 2010 WL 4721576 (Minn. Ct. App., Nov. 23, 2010)
Use with permission negates adverse possession claim

Stevenson v. Brodt, 2010 WL 4068727 (Minn. Ct. App., Oct. 19, 2010) (acquiescence and express agreement)
Trimming brush 2 times a year was not sufficient use where the area was still so overgrown that it could not be seen from the front of the property. Installing a buried drainage pipe and the existence of a garage overhang does not show intent to exclude all others.

Juntti v. Bedore, 2010 WL 3306932 (Minn. Ct. App., Aug. 24, 2010)
Keeping a row of trees, dock, removing and planting trees, and mowing may constitute sufficient possession.

Hebert v. City of Fifty Lakes, 784 N.W.2d 848 (Minn. Ct. App. 2010)
Scott Lucas' case in the Minnesota Supreme Court. Complex with multiple trips through the appellate courts. It does hold that a Torrens title may protect against placement of a public road off its platted location and onto neighboring registered land.

Sampair v. City of Birchwood, 784 N.W.2d 65 (Minn. 2010)
The Marketable Title Act's (Minn. Stat. § 541.023) possession exception requires those seeking its protection to prove use of an easement sufficient to put a prudent person on notice, giving due regard to the nature of the easement at issue—the adverse possession exclusivity standard is not proper because use of an easement is not necessarily exclusive or hostile.

Pellman v. Erdman, 2010 WL 935033 (Minn. Ct. App., March 16, 2010)

Schwarz v. Finseth, 2009 WL 4910552 (Minn. Ct. App., Dec. 22, 2009)

Holz-Kinney v. Thaler, 2009 WL 4040789 (Minn. Ct. App., Nov. 24, 2009) (acquiescence)
Mowing up to alleged boundary may constitute actual and open possession; intentional and non-sporadic mowing is hostile; use as primary residence is continuous even if work requires to be away at times.

Gelao v. Coss, 2009 WL 2745833 (Minn. Ct. App., Sept. 1, 2009) (acquiescence and estoppel)

District court entitled to deference. Placing canoe, garden, and boulder may constitute sufficient possession; mowing grass and maintaining garden with intent to use exclusively and with hostility for 15 years.

Mauer v. Otter Tail Power Co., 2009 WL 2225820 (Minn. Ct. App., July 28, 2009) (acquiescence)
Continuity is broken when the adverse possessor acknowledges owner's title before the period has run. Permissive use is not hostile and remains permissive until use changes or becomes hostile.

Osgood v. Stanton, 2009 WL 1586943 (Minn. Ct. App., June 9, 2009)
Period in which a party is prevented from seeking recovery of a disputed parcel by a "paramount authority" does not count towards 15 year period; "pending action" only is not enough to toll period. Commencement of an action to quiet title and recover possession tolls period if it is prosecuted to final judgment. Period prior to commencement cannot be tacked to period after adjudication, not continuous.

Holiday House II, LLC v. State, 2009 WL 1587090 (Minn. Ct. App., June 9, 2009)
Initially permissive use of property continues to be permissive until conclusive evidence can be shown that the use changed to hostile. An area claimed by adverse possession must be identifiable so that the true owner is put on notice.

Barth v. Stenwick, 761 N.W.2d 502 (Minn. Ct. App. 2009)
Non-mutual offensive collateral estoppel did not apply to an action to register land by adverse possession because the particular land at issue was not identical to that adjudicated in prior action. Title examiner's report reasonably supports a conclusion that a common-law dedication of Sand Beach for public use occurred, raising a genuine issue of material fact regarding the existence of such a dedication and precluding summary judgment.

Grannes v. Red Cedar of Yellow Medecine, Inc., 2009 WL 234641 (Minn. Ct. App., Feb. 3, 2009)
Trial court must make specific finding of where a formerly operated sawmill and quarry were located and operated on property to support adverse possession by tacking onto said former uses.

Winfield v. Kasel, 2009 WL 174211 (Minn. Ct. App., Jan. 27, 2009)
"Lease" entered into after adverse possession period had fully run did not negate acquisition of disputed property, did not show lack of hostile element.