How to Fix a Boundary Line

…In Missouri

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Missouri: It's Complicated…

Tillman v. Hutcherson: 154 S.W.2d 104; 1941

- Actuality of possession, and the intent with which dominion over land is exercised, may be shown by an almost endless combination of circumstances.

Prescription: Lost Grant Theory & Adverse Possession

New York: What is a Presumption of Law? (1)

Post v. Pearsall: 22 Wend. 425; 1839

- **Every well grounded presumption**, then, is but an inference of the understanding from the common observation of life and the usual motives and conduct of mankind.
- It bears the same character in the law, being there nothing more than the same inference of the understanding thrown into the form of a legal rule and sanctioned by former judicial decision.

What is the Effect of the Passage of Time On Property Titles?

Praescriptio Temporis and Its Relation to Prescriptive Easements in the Anglo-American Law

Marian P. Opala (Tulsa Law Review, 1971) (1)

- Lapse of time, coupled with non-possession or inaction, may alter a man's legal position vis-a-vis his property, both corporeal and incorporeal, in several different ways.
- The law may **(1) bar the owner from asserting his rights** by a droitural action and thus leave these rights suspended in a state of unenforceability;
- **(2) extinguish his legal right as well as his remedy;**
- **(3) transfer his rights to another** who has exercised them by long-continued possession or use; and
- **(4) impose a presumption that long-continued possession or use by another had its beginning in a lawful devolution of right.**

Praescriptio Temporis and Its Relation to Prescriptive Easements in the Anglo-American Law Marian P. Opala (Tulsa Law Review, 1971) (2)

- The approach described in the fourth example, that of **imposing a presumption, differs somewhat from an acquisitive prescription**, though its effect is also investitive.
- A presumption **does not afford a mode of acquiring new rights but rather provides a means of protecting a presumably lawful acquisition** of presently existing rights, whose origin is lost in antiquity.
- It is a legal substitute for title supplied through an evidentiary device. **Its employment is found both in the common and Roman law systems.**

Praescriptio Temporis and Its Relation to Prescriptive Easements in the Anglo-American Law Marian P. Opala (Tulsa Law Review, 1971) (3)

- The English law since the time of Bracton (1200-1268), if not since a century earlier, has allowed easements to be acquired through immemorial user termed "prescription".
- This was the only form of acquisitive prescription known to the common law. Its application has been firmly restricted to easements and profits.

SCOTUS: Ravages of Time: (1)
Hammond v. Hopkins, 143 U.S. 224

- No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, …
- …but **will discourage stale demands, for the peace of society**, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred.

SCOTUS: Ravages of Time: (2)
Hammond v. Hopkins, 143 U.S. 224

- The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of,-or of the witness or witnesses, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible.

SCOTUS: Ravages of Time: (3)
Hammond v. Hopkins, 143 U.S. 224

- In all cases where actual fraud is not made out, but the imputation rests upon conjecture, where the seal of death has closed the lips of those whose character is involved, and lapse of time has impaired the recollection of transactions and obscured their details, the welfare of society demands the rigid enforcement of the rule of diligence.
- The hour-glass must supply the ravages of the scythe, and those who have slept upon their rights must be remitted to the repose from which they should not have been aroused.

Doctrine of Presumed Grant (Lost Grant Theory)

Doctrine of Presumed Grant: U.S. (1)

Ricard v. Williams: 20 U.S. 59; 5 L. Ed. 398; 1822

- For the **law will never construe a possession tortious unless from necessity**.
- On the other hand, it will consider every possession lawful, the commencement and continuance of which, is not proved to be wrongful. And this upon the plain principle, that **every man shall be presumed to act in obedience to his duty**, until the contrary appears.
- When, therefore, a naked possession is in proof, unaccompanied by evidence, as to its origin, it will be deemed lawful

Doctrine of Presumed Grant: U.S. (2)

Ricard v. Williams: 20 U.S. 59; 5 L. Ed. 398; 1822

- The **doctrine, as to presumptions of grants**, has been gone into largely, on the argument, and the general correctness of the **reasoning is not denied**.
- There is **no difference** in the doctrine, whether the grant relate to **corporeal or incorporeal** hereditaments.
- A grant of land may as well be presumed, as a grant of a fishery, or of common, or of a way.
- Presumptions of this nature are adopted from the **general infirmity of human nature**, the **difficulty of preserving muniments of title,** and the public policy of supporting long and uninterrupted possessions.

Doctrine of Presumed Grant: U.S.

Fletcher v. Fuller: (1)
120 U.S. 534; 7 S. Ct. 667; 30 L. Ed. 759; 1887

- **When, therefore, possession and use are long continued, they create a presumption of lawful origin, that is, that they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property.**
- It may be, in point of fact, that permission to occupy and use was **given orally**, or upon a **contract of sale**,
- with **promise of a future conveyance, which parties have subsequently neglected to obtain,** or the conveyance executed may not have been acknowledged, so as to be recorded, or **may have been mislaid or lost. Many circumstances may prevent the execution of a deed**

Doctrine of Presumed Grant: (1)

U.S.A. V. Fullard-Leo: 331 U.S. 256 (1947)

- Without going at length into the subject, it may be safely said that by the weight of authority, as well as the preponderance of opinion, it is the general rule of American law …
- …that a grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et de jure*, **wherever, by possibility, a right may be acquired in any manner known to the law."**

Doctrine of Presumed Grant: (2)

U.S.A. V. Fullard-Leo: 331 U.S. 256 (1947)

- In order for the doctrine of a lost grant to be applicable, the **possession must be under a claim of right, actual, open and exclusive.**
- A chain of conveyances is important. So is the payment of taxes.
- **A claim for government lands stands upon no different principle in theory** so long as authority exists in government officials to execute the patent, grant or conveyance.
- As a practical matter it requires a higher degree of proof because of the difficulty for a state to protect its lands from use by those without right.

Memory Fades over time: Missouri (1)

Hubbard v. K.C. Stained Glass:
188 Mo. 18; 86 S.W. 82; 1905

- Angew, J., in ***Richards v. Elwell, 12 Wright (48 Pa.) 361, 367,*** said:
- "If the rule which requires the proof to bring the parties face to face and to hear them make the bargain, or repeat it, and to state all its terms with precision and satisfaction, is not to be relaxed after the lapse of forty years, when shall it be? . . .
- There is a **time when the rules of evidence must be relaxed**. We cannot summon witnesses from the grave, rake memory from its ashes, or give freshness and vigor to the **dull and torpid brain**."

Presumed Grant Rebuttable?: Missouri (1)

Williams v. Mitchell: 112 Mo. 300; 20 S.W. 647; 1892

- Considering all circumstances aforesaid, it **may well be presumed that the executors of Williams executed a deed to Kimbrough in conformity to the order of the probate court.**
- Touching presumptions of this nature Greenleaf observes:
- "**Juries are also often instructed** or advised, in more or less forcible terms, to **presume conveyances between private individuals** in favor of the party who has proved a right to the beneficial enjoyment of the property, and **whose possession is consistent with the existence of such conveyance, as is to be presumed;**

Presumed Grant Rebuttable?: Missouri (2)

Williams v. Mitchell: 112 Mo. 300; 20 S.W. 647; 1892

- … especially if the possession, without such conveyance, would have been unlawful, or cannot be satisfactorily explained. This is done in order to **prevent an apparently just title from being defeated by matter of mere form.** * * *
- It is sufficient that the party, who asks for the aid of this presumption, has proved a title to the beneficial ownership, and a long possession not inconsistent therewith; and **has made it not unreasonable to believe that the deed of conveyance, or other act essential to the title, was duly executed."**

Missouri: Burnt Records?? (1)

Hartwell v. Parks, 240 Mo. 537 (1912)

- The common source of title, Alexander Barnes," died in 1869, a resident of Pemiscot, leaving Agnes his widow and no children, and seized in fee of many parcels of land situate here and there in that county—among them, that in dispute.
- The proof shows that it is fenced, partly cleared and cultivated, and has been in defendant's possession since the death of her husband in 1905.
- Prior to that it had been in possession of her husband since the date of his deed in 1902.

Missouri: Burnt Records?? (2)

Hartwell v. Parks, 240 Mo. 537 (1912)

- The proof tends to show that Agnes at the time of her husband's death and until she conveyed, claimed to own the land, …
- …that most of plaintiffs lived for a generation or so near the land, that plaintiffs knew of her claim of ownership and assertion of title under her husband's will from the outset …
- …and never asserted any title or claim until a few months before the 3d day of October, 1907,when they had an abstract of title made (which, they claim, dis- closed their ownership)

Missouri: Burnt Records?? (3)

Hartwell v. Parks, 240 Mo. 537 (1912)

- …and that at a certain unnamed time those records of Pemiscot county that did not go up in smoke and flame were reduced to ashes.
- It is agreed that a certain set of abstract books known as "Carleton's Abstracts" became by legislative enactment and orders of the circuit and county court evidence of land titles in that county.
- Is the absence of the entry showing the recording of a will, with a minute of its terms, opposite or in connection with the land in question, on Carleton's Abstracts, fatal to defendant's title?

Missouri: Burnt Records?? (4)

Hartwell v. Parks, 240 Mo. 537 (1912)

- We learn from the school of that mistress that when records of land titles are in ashes, witnesses to wills dead,…
- …scattered to the four winds of their memories are dull and dim with age and the transactions in judgment are ancient, …
- …the affairs of mankind would fall into an inextricable confusion leading to dismay and evil if the rules of evidence were not relaxed and if the law did not delight in applying certain kindly and convenient presumptions based on common experience and observation.

Missouri: Burnt Records?? (5)
Hartwell v. Parks, 240 Mo. 537 (1912)

- Under such circumstances as said by Chief Justice Fuller, in ***Hammond v.Hopkins,143 U.S. 1.c. 274***,…
- …"the hourglass must supply the ravages of the scythe." One of the precepts of the law is:
- What ought to be done is easily presumed.
- Another is:
- Presumptions arise from what generally happens'.
- *"Presumptio, ex eo quod plerumque fit."*

Doctrine of Presumed Grant: NM. (3)
El Paso v. PWG: 116 N.M. 583; 1993

- The doctrine . . . that the long[-]continued possession of land by one claiming as owner **gives rise to the presumption of a valid conveyance** to him or to the person under whom he claims,
- **though ordinarily similar in its practical results to the statutes of limitation [for adverse possession], is entirely independent thereof.**
- It involves a **presumption of the rightfulness** of one's possession, while the statutes of limitation are by their terms applicable only when the **possession is, apart from such statutes, wrongful.**

Doctrine of Presumed Grant: NM. (4)
El Paso v. PWG: 116 N.M. 583; 1993

- In New Mexico, adverse possession requires color of title supported by a writing or conveyance of some kind and payment of taxes during the period of possession, …, **neither of which are required to find presumption of a grant.**

Adverse Possession

Adverse possession creates new title

- Boundary lines never move after the moment of their creation; however, title to new lands can be acquired through other legal mechanisms including adverse possession and accretion.
- Driven by State Statute, this is a title doctrine which must be affirmed by the court in order to establish marketable title.

Adverse Possession is not always popular: W.Va.
O'Dell v. Stegall: 226 W. Va. 590; 703 S.E.2d 561; 2010

- **Hence, there have been some calls to abolish the doctrines of adverse possession and easement by prescription**…
- prescriptive easements "serve no legitimate independent function and should be abolished" because "**awarding a permanent property right to a willful trespasser hardly preserves the peace**, and the law of prescription actually **breeds litigation by forcing the landowner to sue a trespasser before the statutory period runs.**

Adverse Possession is not always popular: W.Va.
O'Dell v. Stegall: 226 W. Va. 590; 703 S.E.2d 561; 2010

- William G. Ackerman and Shane T. Johnson, "Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession…
- "[T]he public policy supporting [the usage of prescription and adverse possession] has long since **gone the way of the cattle drive and the chuckwagon**…
- [T]hey represent a significant imposition on landowner rights . . . [and] reward the theft of land.").

Adverse claims – pros & cons: W.Va.
O'Dell v. Stegall: 226 W. Va. 590; 703 S.E.2d 561; 2010

- Prescription doctrine **rewards the long-time user** of property and **penalizes the property owner who sleeps on his or her rights**. In its positive aspect, the rationale for prescription is that it **rewards the person who has made productive use of the land,** it fulfills expectations fostered by long use, and it conforms titles to actual use of the property. The doctrine protects the expectations of purchasers and creditors who act on the basis of the apparent ownerships suggested by the actual uses of the land.
- "[I]ts underlying philosophy is basically that **land use has historically been favored over disuse,**

Missouri: Adverse over Section Line (1)
Little v. Fox, 387 S.W.2d 532 (1965)

- The main dispute is over a matter which occurred about thirty years ago and memories do fail.

Missouri: Adverse over Section Line (2)
Little v. Fox, 387 S.W.2d 532 (1965)

- It may be described as beginning at the S.W. corner of the S.E. 1/4 of the S.W. 1/4 of Section 27, thence north 17 feet, thence easterly 590 feet to a road and to a point 6 feet north of the southern boundary line of Section 27, thence south to the section line, thence west 590 feet to point of beginning.
- In 1962, defend- ants had the land surveyed and it was learn- ed that the section line was south of the existing fence between the properties of plaintiffs and the defendants.

Cumulus Broadcasting Inc. v. Shim
226 S.W.3d 366 (2007) Tennessee

- Historically, there are several policy reasons used to justify adverse possession, such as:
- (1) the stabilization of uncertain boundaries through the passage of time;
- (2) a respect for the apparent ownership of the adverse possessor who transfers his interest; and
- (3) assurance of the long-term productivity of the land. Title by either possession or prescription are old subjects in the English Law, according to one treatise, with counterparts in the Roman Law.

Statutory Requirements

Missouri: Related Statutes (1)
Title XXXV Civil Procedure & Limitations

- 516.020. Right of possession not affected by descent.
- 516.030. Disabilities — twenty-one years.
- 516.050. Limitation where person under disability dies.
- 516.070. Limitation where equitable title to land emanates from government.

Missouri: Statute of Limitations (1)
Title XXXV Civil Procedure & Limitations: 516.010

- *Actions for recovery of lands commenced, when.*
- *— No action for the recovery of any **lands, tenements or hereditaments,** or for the recovery of the possession thereof, shall be commenced, had or maintained by any person, whether citizen, denizen, alien, resident or nonresident of this state, unless it appear that the plaintiff, his ancestor, predecessor, grantor or other person under whom he claims was seized or possessed of the premises in question, within **ten years** before the commencement of such action.*

Missouri: Color of Title (1)
Title XXXV Civil Procedure & Limitations: 516.040

- *Possession of land under color of title, effect.*
- *— The possession, under color of title, of a part of a track or lot of land, in the name of the whole tract claimed, and exercising, during the time of such possession, the usual acts of ownership over the whole tract so claimed, shall be deemed a possession of the whole of such tract.*

Missouri: Equitable Title from State (1)
Title XXXV Civil Procedure & Limitations: 516.070

- *Whenever any real estate, the equitable title to which shall have emanated from the government more than ten years, shall thereafter, on any date, be in the lawful possession of any person, and which shall or might be claimed by another, and which shall not at such date have been in possession of the said person claiming or who might claim the same, or of anyone under whom he claims or might claim, for thirty consecutive years, and on which neither the said person claiming or who might claim the same nor those under whom he claims or might claim has paid any taxes for all that period of time, …*

Missouri: Equitable Title from State (2)
Title XXXV Civil Procedure & Limitations: 516.070

- *…the said person claiming or who might claim such real estate shall, within one year from said date, bring his action to recover the same, and in default thereof he shall be forever barred, and his right and title shall, ipso facto, vest in such possessor; provided, however, that in all cases such action may be brought at any time within one year from the date at which this section takes effect and goes into force.*

Missouri: Equitable Title from US (1)
Title XXXV Civil Procedure & Limitations: 516.080

- ***When legal title has not emanated from the United States.** — In all cases in which the legal title has not yet emanated from the government of the United States, but in which there has been an equitable right or title for more than twenty years, under which a claimant has had a right of action by the statutes of this state, and in which the land has been in the possession of any person for twenty years, claiming the same in fee, any person claiming against the possessor shall bring his action under the legal title within one year after it issues from the government, and in default thereof, he shall be forever barred, and his right and title shall, ipso facto, vest in such possessor.*

Missouri: Statute of Limitations (Tax) (1)
Title X Taxation and Revenue: 140.590

- *Suits against purchaser of tax lands to be brought within three years. — Any suit or proceeding against the tax purchaser, his heirs or assigns, for the recovery of lands sold for taxes, or to defeat or avoid a sale or conveyance of lands for taxes, except in cases where the taxes have been paid or the land was not subject to taxation, or has been redeemed as provided by law, shall be commenced within three years from the time of recording the tax deed, and not thereafter; provided, that where the person claiming to own such land shall be an infant, or an incapacitated person, then such suit may be brought at any time within two years after the removal of such disability.*

Missouri: Sale of Contested Lands (1)
Title XXIX Ownership & Conveyance of Property: 442.070.

- *Person may convey, notwithstanding adverse possession. — Any person claiming title to real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest therein, in the same manner and with like effect as if he was in the actual possession thereof.*

Breakdown of Common Law Requirements

Missouri: Each Case Unique (1)
Flowers v. Roberts, 979 S.W.2d 465 (1998)

- In determining whether the facts in evidence warrant a finding that the elements of adverse possession have been satisfied, each case must be decided in light of its own unique circumstances, and much depends on the location, the character, and the use to which the land in question can reasonably be put.

Texas – A Harsh Doctrine (4)
Minh Thu Tran v. Macha, 213 S.W.3d 913 (2006)

- It may seem harsh that adverse possession rewards only those who believe "good fences make good neighbors," and not those who are happy to share.
- But the doctrine itself is a harsh one, taking real estate from a record owner without express consent or compensation.
- **Before taking such a severe step, the law reasonably requires that the parties' intentions be very clear.**

Adverse Possession (General)

- **Remember "OCEANS"**

- **Occupation,**
- **Continuous,**
- **Exclusive,**
- **Adverse (to the true owner)**
- **Notorious (open and),**
- **for the Statutory Period.**

Adverse Possession List: Missouri (1)
Nutting v. Reis: 326 S.W.3d 127; 2010

- Adverse possession occurs when a border, even though erroneous, is observed by all parties as the boundary for the statutory period, and it becomes the true boundary.
- For title to be acquired by adverse possession, possession must be:
- **(1) hostile, meaning under a claim of right,**
- **(2) actual, (3) open and notorious,**
- **(4) exclusive, and (5) continuous**
- for the necessary **period of years** prior to the commencement of action.

How to Define "Hostile" For Adverse Possession

TN: Hostile vs. "enmity" (1)
Dye v. Waldo: No. E2012-01433-COA-R3-CV (2013)

- **Adverse possession does not require proof of "ill will or actual enmity,** but merely means that the party claims to hold the possession as his, against the claims of any other."
- The "[o]ccasional use of land through cultivation, cutting grass or timber or the grazing of stock is not sufficient to establish adverse possession."

D.C. Hostile is a Term of Art
Smith v. Tippett: 569 A.2d 1186 (1990) D.C. App.

- **When used in the context of adverse possession, "hostile" is a term of art. It does not imply ill will.**
- In order to establish adverse possession, the possession must be openly hostile. "Hostile" possession has been defined as possession that is **opposed and antagonistic to all other claims,** and which conveys the clear message that the possessor intends to possess the land as his own. **It is not necessary that he intend to take away from the owner something which he knows to belong to another** or even that he be indifferent concerning the legal title.
- "It is the intent to possess, and not the intent to take irrespective of his right, which governs.

Missouri: Hostile Use – Claim of Right (1)
Frain v. Brda, 863 S.W.2d 17 (1993)

- To show use is hostile or open and notorious, it must have been calculated to give notice to the dominant tenant the user was exercising "exclusive dominion and control over this strip of land, under claim of title, adversely to any claim of [the dominant tenant] or anyone else."
- Adverse use and claim of right are similar elements. A use is not adverse if the user recognizes the authority of the dominant tenant to prevent or prohibit such use.

Missouri: Hostile Use (2)
Flowers v. Roberts, 979 S.W.2d 465 (1998)

- "Hostile and under claim of right" means that the possession must be opposed and antagonistic to the claims of all others, and the claimant must occupy the land with an intent to possess it as his or her own. *Brinner v. Huckaba, 957 S.W.2d at 494.*
- Whether possession is hostile and under claim of right is a question of intent, though such intent may often be inferred from the claimant's acts of dominion over the land.

Missouri: Actual Possession (3)
Flowers v. Roberts, 979 S.W.2d 465 (1998)

- "Actual" possession is manifested by acts of occupancy which indicate a present ability to control the land and an intent to exclude others from such control.
- Whether possession is "actual," and the kinds of acts which will constitute such possession, depends on the nature and location of the property and the possible uses to which it can be put.

Adverse: "Unfurl the Flag": Vermont
Wells v. Austin: 59 Vt. 157; 10 A. 405; 1886

- It is elementary that a possession that will work an ouster of the owner **must be open, notorious, hostile and continuous.**
- If stealthy, hidden, permissive or intermittent it will not avail.
- The tenant **must unfurl his flag on his land**, and keep it flying, so that the owner may see, if he will, that an **enemy has invaded his dominions and planted the standard of conquest.**

MISS. Flying the Flag (2)
Ellison v. Meek:
820 So. 2d 730; 2002

- In most cases, the underlying question is whether the possessory acts relied upon by the would-be adverse possessor are sufficient to put the record title holder upon notice that the lands are held under an adverse claim of ownership.
- "Mere possession is not sufficient to satisfy the requirements of open and notorious possession."
- The adverse possessor must **"fly the flag over the land** and **put the true owner upon notice** that his land [is] held under an adverse claim of ownership."

Open
Notorious
Exclusive

Missouri: Open & Notorious (4)
Flowers v. Roberts, 979 S.W.2d 465 (1998)

- The element of "open and notorious" possession is satisfied when there are "visible acts of ownership" exercised over the disputed property.
- The reason the law requires that possession be "open and notorious" is to afford the owner reasonable notice, either actual or constructive, that an adverse claim of ownership is being made by another.

Missouri: Exclusive Use (5)
Flowers v. Roberts, 979 S.W.2d 465 (1998)

- "Exclusive" possession means that the claimant must hold the land for himself or herself only, and not for another.
- To satisfy this element an adverse possession claimant must show that he or she "wholly excluded" the owner from possession for the required period;

Sporadic or Intermittent Use Mowing Grass

Missouri: Sporadic Use (6)

Flowers v. Roberts, 979 S.W.2d 465 (1998)

- "Exclusive" possession means that the claimant must hold the land for himself or herself only, and not for another.
- To satisfy this element an adverse possession claimant must show that he or she "wholly excluded" the owner from possession for the required period; but this does not mean that mere "sporadic use, temporary presence or permissive visits by others (including the title holder)" will negate this element and defeat a claim of adverse possession.

MISS. Intermittent uses (4)

Ellison v. Meek:
820 So. 2d 730; 2002

- While the Stewarts claimed that they used the contested area to enclose livestock, cut hay and garden, they did not meet the burden of proof that there was ever an enclosure.
- The chancellor aptly found that even if livestock were permitted to graze on this area, cut hay and garden,
- …occasional use of someone else's property without an enclosure does not pass the test of adverse possession.
- Sporadic use of another's property does not constitute open and notorious possession.

Adverse possession & Mowing: Ohio

Richardson v. Winegardner:
1999 Ohio 917; CASE NO. 1-99-56

- The law is **well established that merely mowing grass,** regardless of the intent of the claimant, is insufficient as a matter of law to amount to the required possession, and is therefore insufficient to commence the running of the statute of limitations upon which adverse possession can be founded.

Mowing Only: NC (4)

Wright v. Oakley: (Unpublished)
219 N.C. App. 402; 722 S.E.2d 212; 2012

- By contrast, here, the **Wrights rely solely on their mowing** of the disputed property rather than the more extensive evidence of hostility present in McManus.
- Given the evidence in this case, the trial court did not err in concluding that the Wrights did not establish their claim of adverse possession.

Tacking Adverse Use

Tacking or Succession?: NC (1)

Dickinson v. Pake: 201 S.E.2d 897 (1974)

- Tacking is the legal principle whereby successive adverse users in privity with prior adverse users can tack successive adverse possessions of land so as to aggregate the prescriptive period of twenty years.
- … that Sophia Lupton, mother of these plaintiffs, **used Lupton Drive without interruption, openly, notoriously and adversely, under claim of right, from 1938 until her death in 1967, a period of approximately twenty-nine years.**
- In this situation, her adverse use of the road for more than twenty years ripened into an easement by prescription, and the applicable legal principle is **not tacking but succession.**

Missouri: Tacking (7) (Headnotes)

Crispen v. Hannavan: 50 Mo. 536 (1872)

- Limitations — Land and land titles — Privity — Adverse possession.
- — Those who hold possession of lands independently of previous holders, their several possessions having no connection, cannot so tack their possession as to avail themselves of that which has gone before.

Missouri: Privity of Title (8) (Headnotes)

Crispen v. Hannavan: 50 Mo. 536 (1872)

- There must be privity of grant or descent, or some judicial or other proceedings which shall connect the possessions so that the latter shall apparently hold by right of the former.
- But not even a writing is necessary if it appear that the holding is continuous and under the first entry; and this doctrine applies not only to actual but constructive possession under color of title.
- Such possession tacks to that of previous holders, if there has been a colorable transfer.

Mistaken Belief

Identification by the Senses – Mass. (1)

Harrison v. Dolan: 172 Mass. 395; 52 N.E. 513 (1899)

- The tenant manifested her **intent** to maintain possession of the locus, even if she did it under a mistaken description.
- ***Proesentia corporis tollit errorem nominis***, **identification by the senses overrides description, as in many other cases in the law.** …
- We interpret the finding and ruling as meaning that the tenant in actual fact occupied the premises adversely during the whole twenty years,

D.C. Majority Rule:

Smith v. Tippett: 569 A.2d 1186 (1990) D.C. App.

- **The majority or Connecticut rule**, see ***French v. Pearce, 8 Conn. 439 (1831)***, which recognizes adverse possession even where the occupancy began as a result of a mistaken trespass rather than an intentional one, rests on sound reasoning…
- In any case in which title by adverse possession is claimed, **the initial possession must have come about either by mistake or by deliberate intrusion.**
- "To limit the doctrine of adverse possession to the latter type **places a premium on intentional wrongdoing,** contrary to fundamental justice and policy."

D.C. Minority Rule

Smith v. Tippett: 569 A.2d 1186 (1990) D.C. App.

- **The minority or Maine rule**, based on ***Preble v. Maine Central Railroad Co., 85 Me. 260, 27 A. 149 (1893)***, has received **extensive criticism** because it is historically unsound, practically inexpedient, and results in better treatment for intentional wrongdoers.
- Courts in the **District of Columbia have long subscribed to the majority rule** described above, and have held that adverse possession has been established in cases in which the claimant's occupancy resulted from a mistake

Missouri: Mistaken Belief (1)

Kitterman v. Simrall, 924 S.W.2d 872 (1996)

- Under the "hostile" element, even if the possessor mistakenly believed he had title and occupied the land as his own, the element is satisfied;
- …i.e., he must intend to occupy as his own and there is no requirement for adverse possession that he be holding title to take away from a true owner.

Missouri: Mistaken Belief (1)

DeVore v. Vaughn, 504 S.W.3d 176 (2016)

- Appellants argue that mere possession of property cannot ripen into adverse possession without some claimed legal right or a mistaken belief as to a legal right to the property.
- They interpret language in our cases saying the possession must be "hostile" and "under a claim of right" as requiring some good faith belief in legal ownership, perhaps manifested by colorable title to the property, before possession can ripen into adverse possession.

Missouri: Mistaken Belief (2)

DeVore v. Vaughn, 504 S.W.3d 176 (2016)

- Whether a claimant believes he does or does not have title to or other legal claim to the disputed property is, not the proper inquiry in Missouri as the intent that must be demonstrated is solely the intent to occupy the disputed property as one's own.
- Missouri cases have consistently held that to satisfy the "hostile,", i.e. under a "claim of right" element only re-quires that the adverse possessor show the intent to occupy the disputed property as his own, exclusive of the rights of all others.

Missouri: Mistaken Belief (2)

DeVore v. Vaughn, 504 S.W.3d 176 (2016)

- …we do not attempt to peer into the mind and make contingent the claimant's proof of hostility on why he is claiming ownership over the land.
- "To be hostile, it is not necessary to have actual malice, hostility, indifference or intent to take the property which belongs to another.
- The intent to possess, occupy, control, use and exercise dominion over the property is sufficient."

Mistaken Belief – NC Reverts: NC (1)

Walls v. Grohman: 315 N.C. 239; 337 S.E.2d 556; 1985

- We have concluded that a rule which requires the adverse possessor to be a thief in order for his possession of the property to be "adverse" is not reasonable, …
- …and we now join the overwhelming majority of states, return to the **law as it existed prior to *Price* and *Gibson***, and hold that …
- …**when a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own and claims title thereto, his possession and claim of title is adverse.**

NJ- Adverse by Mistaken Belief (1)

Mannillo v. Gorski: 54 N.J. 378; 255 A.2d 258; 1969

- **Whether or not the entry is caused by mistake** or intent, **the same result eventuates -- the true owner is ousted from possession.**
- Accordingly, **we discard the requirement that the entry and continued possession must be accompanied by a knowing intentional hostility** and hold that any entry and possession for the required time which is exclusive, continuous, uninterrupted, visible and notorious, even though under mistaken claim of title, is sufficient to support a claim of title by adverse possession.

Color of Title

TN: Color of Title – Typical Definition (6)

Cass Rye Assoc. v. Coleman:
No. M2011-01738-COA-R3-CV (2012)

- **Color of title is "'something in writing which at face value, professes to pass title but which does not do it, either for want of title in the person making it or from the defective mode of the conveyance that is used.'"**
- Further, constructive adverse possession requires the **land to be "wholly unoccupied" by the party with superior legal title.**

Missouri: Color of Title (1) (Headnotes)

Crispen v. Hannavan: 50 Mo. 536 (1872)

- Limitations — Adverse possession — Possession of part, with claim to the whole.—
- Ordinarily, the possession of one who does not hold the true title can extend only to the land in actual occupancy.
- The owner, who holds constructive possession of all lands not actually occupied by others, cannot be disseized by a mere claim; there must be something more.

Missouri: Color of Title (2) (Headnotes)

Crispen v. Hannavan: 50 Mo. 536 (1872)

- In addition to the actual occupancy of a part, the open, notorious and continuous possession as owner, there must be a claim to the whole by the same right under which the part actually occupied is held, …
- …and such claim must be Iona fide and evidenced by some paper or proceedings or relation that makes the claimant the apparent owner of the whole.

Missouri: Color of Title (3) (Headnotes)

Crispen v. Hannavan: 50 Mo. 536 (1872)

- Limitations — Adverse possession under claim of title — Paper giving color of title, owner must have actual or constructive notice of.
- —Where a paper is relied upon as giving color of title,- not only must the entry and occupation be open and notorious, etc., but the true owner must have actual or constructive notice of the paper under which claimant enters, and thus be advised not only of the actual possession, which is so open as to be known of all men, but also of its constructive extent and boundary, which can only be known by the paper.

Missouri: Color of Title (4) (Headnotes)

Crispen v. Hannavan: 50 Mo. 536 (1872)

- Limitations —Claim of whole, with possession of part, under color of title — Mixed possession.
- —In cases of mixed possession, where both claim- ants actually occupy parts, under adverse claims to the whole, the true title will prevail against the one merely colorable, and the adverse claimant will be confined to the portion actually occupied.

Missouri: Good Faith Requirement (5) (Headnotes)

Crispen v. Hannavan: 50 Mo. 536 (1872)

- Limitations — Color of title — Bona fides. —The element of good faith is essential to all papers, proceedings or relations under which color of title is claimed.
- While the law will refuse to protect mere tricksters or gamblers in lands, who institute sham proceedings or cause to be executed sham conveyances, in order to extend their possession by pretended color of title, …

Missouri: Good Faith Requirement (6) (Headnotes)

Crispen v. Hannavan: 50 Mo. 536 (1872)

- …it will, on the other hand, protect those who honestly purchase and enter into actual possession of the improvements like other bona fide purchasers, in the constructive possession of the premises so purchased, according to the boundaries contained in the instrument under which they enter—having by a proper registration given the world and the true owner notice of their claim.

Plat not Color of Title: Virginia

Sulphur Mines Co. of Va. v. Thompson:
93 Va. 293; 25 S.E. 232; 1896

- Color of title necessarily implies that the party relying upon it must claim under something that has the semblance of title. **A private survey and map, never recorded, not referred to or made a part of the deed under which the party relying on it claimed, cannot be considered color of title.**

Plat not Color of Title: Virginia

Baber v. Baber: 121 Va. 740; 94 S.E. 209; 1917

- **It is now well settled in this State that color of title must be by deed or will, or other *writing*, which purports or contracts to pass title**, legal or equitable, and which contains sufficient terms to designate the land in question with such certainty that the boundaries thereof can be ascertained therefrom by the application thereto of the general rules governing the location of land conveyed by a deed…It is inherent in color of title that the title claimed thereunder is invalid -- is in fact no title -- and **the writing may indeed be absolutely void;**

Color or "Shadow" of Title – N.C.

Johnston v. Case: 131 N.C. 491; 42 S.E. 957 (1902)

- **But the color of title is not title. It is only a shadow, and not a substance**; …
- …but for the purpose of quieting titles and to prevent litigation about State claims, the law has provided that **where one enters into the open, notorious possession of land, under color of title--this shadow**--and remains continuously in said adverse possession for seven years, claiming it as his own, the law will protect such possession; …
- …that such long possession under color of title, in the eyes of the law, ripens such color into title.

Color or "Shadow" of Title – N.C.
Johnston v. Case: 131 N.C. 491; 42 S.E. 957 (1902)

- **But that shadow, or color, only extends to the boundaries marked by the color--the deed**--and **can extend no further**; …
- …though they may be circumscribed, as they will not even cross another line, unless there is actual possession across that line, or lappage, as it is called.

When does Title Pass To Adverse Claimant?

Missouri: Any 10 Years Will Do…(7)
Flowers v. Roberts, 979 S.W.2d 465 (1998)

- "Continuous" means without lapse, uninterrupted, for the entire statutory period.
- Ten years means ten years.
- The years must be consecutive and need not be the ten years immediately prior to the filing of the law suit, but once the ten-year period has run, the possessor is vested with title and the record owner is divested.

Wash.: When does Title Vest (4)
Markovich v. Chambers:
122 Ore. App. 503; 857 P.2d 906; 1993

- The City's interpretation of the statute disregards traditional principles of adverse possession.
- **Title acquired by an adverse possessor, although not recorded, is valid and enforceable.**
- **Once an adverse possessor has fulfilled the conditions of the doctrine, title to the property vests in his favor.**
- The adverse possessor **need not record or sue to preserve his rights in the land.**
- **Rather, the law is clear that title is acquired upon passage of the 10-year period.**

Wash.: When does Title Vest (5)
Markovich v. Chambers:
122 Ore. App. 503; 857 P.2d 906; 1993

- To rule otherwise, the court said, would be to require an adverse possessor to "'keep his flag flying for ever [sic], and the statute [would] cease[ ] to be a statute of limitations.'
- **"The law is clear that title is acquired by adverse possession upon passage of the 10-year period.**
- **The quiet title action merely confirmed that title to the land had passed to Halverson by 1974."**

Missouri: When Does Title Vest? (1)
Humphreys v. Wooldridge, 408 S.W.3d 261 (2013)

- Case testified that the existing fence was in place for 11 or 12 years.
- Once the ten-year statutory period expired, Appellants' easement interest in the portion of Easement B within the existing fence was extinguished.

Texas – When Does Title Vest?? (2)
Republic v. Stetson: 390 S.W.2d 257 (1965)

- **Stetson had matured title to the two enclosed tracts before he executed either of the two acknowledgments of tenancy, and they did not divest him of that title.**
- *A limitation title once consummated, is as full and absolute as any other perfect title, and it is not lost by a subsequent oral statement by the limitation owner that he never intended to claim by limitations.*

U.S. Supreme Court: Oliver Wendell Holmes
Davis v. Mills: 194 U.S. 451 (1904) (1)

- "Again, as to land the distinction amounts to nothing, because **to deny all remedy, direct or indirect, within the State is practically to deny the right.**
- 'The lapse of time limited by such statutes **not only bars the remedy, but it extinguishes the right, and vests a perfect title in the adverse holder."**…
- "Property is protected because such protection answers a demand of human nature, and therefore takes the place of a fight…

U.S. Supreme Court: Oliver Wendell Holmes
Davis v. Mills: 194 U.S. 451 (1904) (2)

- **But that demand is not founded more certainly by creation or discovery than it is by the lapse of time,**
- **…**which gradually **shapes the mind to expect and demand the continuance** of what it actually and long has enjoyed, even if without right, …
- …and dissociates it from a like demand of even a right which long has been denied. …

U.S. Supreme Court: Oliver Wendell Holmes
Davis v. Mills: 194 U.S. 451 (1904) (3)

- Constitutions are intended to preserve practical and substantial rights, not to maintain theories.
- It is pretty safe to assume that **when the law may deprive a man of all the benefits of what once was his, it may deprive him of technical title as well.**
- That it may do so is shown sufficiently by the cases which we have cited and many others."

Missouri: When Does Title Vest? (1)
Hamilton Hauling v. Sleyster, 796 S.W.2d 936 (1990)

- Neither Sleyster by himself nor Avenue Auto Wrecking has ever had record legal title to the disputed tract. Record legal title has at all times been in plaintiff, Hamilton Hauling, and its predecessors in title, as a part of a 196-acre tract lying mostly east of Manchester Trafficway, but including a narrow strip west of Manchester Trafficway.

Missouri: When Does Title Vest? (2)
Hamilton Hauling v. Sleyster, 796 S.W.2d 936 (1990)

- James Lyddon, who from 1947 to 1968 was a stockholder and active in the business of Centropolis Crusher Co., testified he did not know the 196-acre tract, which during that period was owned by Centropolis Crusher Co., included any land west of Manchester Trafficway, except a small tract some distance south of the disputed tract.

Missouri: When Does Title Vest? (3)
Hamilton Hauling v. Sleyster, 796 S.W.2d 936 (1990)

- **By 1968, when Sleyster and the others got title to the 196-acre tract, it is to be noted that Avenue Auto Wrecking had already acquired title to the property by adverse possession.**
- **This title (subject, of course, to proof thereof) was as effective as a title acquired by deed.**
- Is there in the above recited history any act of Avenue Auto Wrecking that conveyed to Hamilton Hauling, or any of its predecessors in title, the right to possession of the property after 1968? Hamilton
- Hauling has suggested none, and we find none.

Cautionary Tale… – Mass. (1)
Pilkons v. Mendonca: 19 LCR 337; 2011

- Based on the testimony and the photographic evidence, this court finds that the Driveway Area was in place as early as 1969.
- Sometime in 2004, following a survey of their property, the Mendoncas learned that the Driveway Area encroached on their land.
- The Pilkons' paved driveway existed in the same location …until the 2006 excavation by the Mendoncas.
- While the Pilkons' driveway, including the Driveway Area, has been resurfaced several times since 1969, the location and dimensions of it did not change until the Mendoncas' 2006 excavation.

When does title transfer? – Mass. (2)
Pilkons v. Mendonca: 19 LCR 337; 2011

- **Since this court has found that Plaintiff established title to the Driveway Area,** it follows that…
- Defendants **trespassed on the Pilkons property** when they **excavated the Driveway Area, removed the wall, and erected a fence in 2006 without permission or right.**
- "When one without right attempts to appropriate the property of another…a court of equity will compel the trespasser to undo as far as possible what he has wrongfully done."

Who Decides?? Affidavit of Adverse Possession

Texas – Affidavit of Adverse Possession (4)
Bell v. Ott: 606 S.W.2d 942 (1980)

- The jury found (special issue 1) that **Bell "recorded or caused to be recorded a false affidavit concerning the 337 acre tract of land in question,"…**
- "1. That the cloud upon the title of Plaintiffs created by the several deeds and affidavits be removed and that the said deeds and affidavits, each of them, be declared null, void, cancelled and discharged of record.

Texas – Affidavits Used Repeatedly (1)
Chevalier v. Roberson: No. 01-15-00225-CV. (2016)

- Upon receiving the judgment in this cause in favor of the Plaintiff,
- I was informed by a colleague that Plaintiff has been allegedly **attempting to assert ownership of other real estate through an Affidavit of Adverse Possession.** After reviewing the case identified in Exhibit D of the Motion for New Trial, I determined that the facts of that case were similar to the claims made by Defendant in this case.
- **This evidence will go to prove that Plaintiff has a habit and pattern of asserting ownership over real estate without the right to do so.**

Texas – Not all Affidavits are Valid (1)

Collins v. D.R. Horton: No. 14-17-00764-CV. (2018)

- The trial court denied the Collinses' motions for directed verdict and judgment notwithstanding the verdict.
- In its final judgment, the trial court ordered that an **affidavit of adverse possession that the Collinses had filed** in the property records was …
- **…"invalid and of no force and effect and . . . null, void, canceled and discharged of record."**
- The court further permanently enjoined the Collinses from interfering with D.R. Horton's use and occupancy of the disputed property.

How to Interrupt an Adverse Possession Claim

MISS. Interruption of an Averse Claim (1)

Lambert v. State:
211 Miss. 129; 51 So. 2d 201; 1951

- The appellee claimed legal title and asserted that from time to time he had made **"verbal remonstrances"** with the persons using the alley, and that these protests interrupted the running of the limitation period.
- The Court said that **"there must be something more than a protest to interrupt the running of a claim of right** followed by actual users; there must be **at least an interruption of the use of the way claimed as a right by the opposing person** who opposes such claim …there must be a **physical interruption** or a court proceeding or some unequivocal act of ownership which interrupts the exercise of the right claimed …"

NM: Subsequent Written Statements (1)

Hoskins v. Talley:
29 N.M. 173; 1923-NMSC-085; 220 P. 1007; 1923

- **Where title has become perfect by adverse possession for the statutory period, it is not lost by an admission** by the holder that the possession was not adverse, although the admission is in writing; …
- …**or by confession that the disseizin was committed with fraudulent intent**, and fraudulently concealed until the expiration of the time limited by the statute; …
- …**or by an admission of defects or infirmities in the title under which the holder held adversely**; or by a subsequent recognition of a previous title which, originally rightful, has lost that character by a delay to enforce it;

Texas – Permission after the Fact…(1)

Yates v. Hogstrom: 444 S.W.2d 851 (1969)

- The trial court impliedly found that appellee, partly through Ybarra, **had matured title by limitation for the full period of ten years prior to October 31, 1963.**
- The **disclaimer by Ybarra in 1968**, long after his title by limitation was complete and after he had sold the property to Hogstrom in 1961, does not, as a matter of law, defeat appellee's limitation title.
- A limitation title once consummated, is as full and absolute as any other perfect title, and it is not lost by a subsequent oral statement or claim by a predecessor in title that he never intended to claim by limitation.

Missouri: Interrupting Adverse Claim (9) (Headnotes)

Crispen v. Hannavan: 50 Mo. 536 (1872)

- Limitations — Adverse possession must be continuous — How broken.
- — Living off from the premises, or a failure to cultivate them for a few years for any or every reason, will not necessarily constitute a break in the adverse possession; but an actual abandonment of the premises will so break the possession of him who has occupied, that the constructive possession of the true owner will again attach and save his right of entry.

Missouri: Interrupting Adverse Claim (1)
Brasher v. Craig, 483 S.W.3d 446 (2016)

- "[t]he true owner of land may interrupt an adverse possession by reentry under circumstances showing an intention to assert dominion against the adverse user."
- In order to interrupt the non-title holder's adverse possession, the true owner must take some action manifesting an intention to assert dominion against the adverse possessor.
- "The burden to establish a reentry is upon the person seeking to defeat the claim of adverse possession."

Regain Possession: Massachusetts (1)
Pugatch v. Stoloff:
41 Mass. App. Ct. 536; 671 N.E.2d 995 (1996)

- **Not every assertion of ownership by the record owner suffices to stop the running of the statute.**
- The running of the statute is interrupted by the owner's entry on the land, if, and only if, this is made openly and under claim of right, with a clearly indicated purpose of taking possession.
- **The usual elements of possession must be established, as in the case of the entry by the adverse possessor, except that it need not be exclusive.**

Regain Possession: Maryland (1)
Wickes v. Wickes:
98 Md. 307; 56 A. 1017; 1904

- It would seem to be clear from the facts stated that **no actual entry was made at any time upon the land in** question by Willie Wickes of a character to operate **to restore to her the possession thereof.**
- All the authorities agree that an entry to have such effect must be an actual entry upon some part of the land within the period of limitations, and must evince that it is made with the clear and unequivocal intent …
- …**to invade and challenge the right of the holder of the adverse possession and to retake possession.**

Regain Possession: Maryland (1)
Rosencrantz v. Shields:
28 Md. App. 379; 346 A.2d 237; 1975

- However, the reentry and consequent interruption of the possession **must rise in dignity and character to that required to initiate an adverse possession.** It is not every entry, however, by the owner that will destroy the adverse possession, but to effect this, he must assert his claim to the land by acts of ownership. * * *
- An entry on land by a person disseised, merely for the purpose of seeing if there is any evidence of an adverse occupation, is not, as a matter of law, conclusive evidence of an interruption of the disseisor's possession."

De Minimis Encroachments

Adverse – Narrow Strip–New York
NY: CLS RPAPL § 543 (2014)

- **(2008)**
- 1. Notwithstanding any other provision of this article, the existence of **de minimus [de minimis] non-structural encroachments** including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, **shall be deemed to be permissive and non-adverse.**
- 2. Notwithstanding any other provision of this article, the acts of **lawn mowing or similar maintenance** across the boundary line of an adjoining landowner's property **shall be deemed permissive and non-adverse.**

NJ- Adverse – Minor Encroachment (1)

Mannillo v. Gorski: 54 N.J. 378; 255 A.2d 258; 1969

- Therefore, to permit a presumption of notice to arise in the case of **minor border encroachments not exceeding several feet** would **fly in the face of reality and require the true owner to be on constant alert** for possible small encroachments.
- The only method of certain determination would be by obtaining **a survey each time the adjacent owner undertook any improvement** at or near the boundary, and this would place an undue and inequitable burden upon the true owner.

NJ- Adverse – Minor Encroachment (2)

Mannillo v. Gorski: 54 N.J. 378; 255 A.2d 258; 1969

- Accordingly **we hereby hold that no presumption of knowledge arises from a minor encroachment** along a common boundary.
- In such a case, **only where the true owner has actual knowledge thereof may it be said that the possession is open and notorious.**

Missouri: Adverse over Section Line (2)

Little v. Fox, 387 S.W.2d 532 (1965)

- It may be described as beginning at the S.W. corner of the S.E. 1/4 of the S.W. 1/4 of Section 27, thence north 17 feet, thence easterly 590 feet to a road and to a point 6 feet north of the southern boundary line of Section 27, thence south to the section line, thence west 590 feet to point of beginning.
- In 1962, defend- ants had the land surveyed and it was learn- ed that the section line was south of the existing fence between the properties of plaintiffs and the defendants.

Payment of Taxes and Narrow Strip rule

TN: Tax Maps and Adverse Claim (2)

Holtsclaw v. Johnson:
No. E2015-00081-COA-R3-CV (2015)

- In ***Cumulus***, the Court set forth an exception to section 28-2-110, stating in pertinent part as follows:
- Because **tax maps are for the purpose of showing the plats upon which parties have paid taxes rather than establishing boundaries**, …
- …a "slight overlap" would rarely have any effect on an evaluation for tax purposes. Tennessee Code Annotated section 28-2-110 was enacted in order to facilitate the collection of property taxes based upon property evaluations. . . .

Co-Tenants & Family

Adverse claims between family: Ohio (1)

Durham v. Fisher: No. 95CA768 1996 Ohio App.

- **However, the relationship of the parties must be taken into account in adverse possession cases**…
- Generally, family members are more likely to allow one another to make such use of each other's property that they might not otherwise allow of non-family members. **When a family relationship exists, the inference arises that such use is by permission**…

Claims against the State

Adverse Claims against the State: NM (1)

Stone v. Rhodes:
107 N.M. 96; 1988-NMCA-024; 752 P.2d 1112; 1988

- The **majority rule is that title to land held by the state, in any capacity, cannot be obtained by adverse possession** because the state cannot be bound by the defaults or negligence of her officers or agents. ***Sears v. Fair, 397 P.2d 134 (Okl.1964)***.
- Likewise, the **public cannot lose its right in government lands because the government's agents chose not to resist an encroachment** by one of its own members whose duty it was, as much as any other citizen, to protect the state. ***Trigg v. Allemand, 95 N.M. 128, 619 P.2d 573 (Ct.App.1980) (citing Kempner v. Aetna Hose, Hook & Ladder Co., 394 A.2d 238 (Del.Ch., 1978)).***

Maryland Adverse against state:

Messersmith v. Riverdale:
223 Md. 323; 164 A.2d 523 (1960)

- The general rule as to alienability of municipally held property was clearly stated in *Montgomery County v. Maryland-Washington Metropolitan District*, 202 Md. 293, 96 A. 2d 353 (1953), where it was said at p. 303:
- **"A distinction is frequently drawn between property held by a county in its proprietary [or business] capacity and that held by it in its governmental capacity. Property which is held in a governmental capacity or is impressed with a public trust, cannot be disposed of without special statutory authority."**

Missouri: Adverse Claim Public Lands(1)

Rice v. Huff: 22 S.W.3d 774; 2000

- The statute of limitations applicable to adverse possession claims does not apply to public lands, and, therefore, title to public property cannot be claimed on the basis of adverse possession. 516.090.
- Section 516.090 prevents a party from claiming adverse possession of land dedicated for a public street.
- Therefore, the statute of limitations on an adverse possession claim of a dedicated street only begins to run once a city vacates or discontinues the street.

Missouri: Adverse Claim Public Lands(1)

Przybylski, v. Barbosa: 289 S.W.3d 641; 2009

- The statute of limitations applicable to adverse possession does not run against public lands.
- Case law suggests that the statute of limitations on an adverse possession claim of a dedicated road only begins to run once it is vacated or abandoned.

Texas – Claim against Railroad (1)

G. C. & S. F. RY. CO. v. Candler, 61 S.W.2d 997 (1933)

- …plaintiff and his predecessors in title have had **physical possession of the tract of land in dispute, under fence, and have cultivated, used and enjoyed same, and paid the taxes thereon for more than the full period of ten years** prior to the filing of this suit,…
- … though the defendant insists that such possession has not been adverse as against the easement only which it asserts over and across the same under said judgment in condemnation.

Texas –Railroad claims Easement Only (2)

G. C. & S. F. RY. CO. v. CANDLER, 61 S.W.2d 997 (1933)

- It is the **contention of the company** that under the statutory law of this state, a railroad company in condemnation proceedings acquires only an easement in the land condemned, and as the fee to the land remains in the owner subject to such easement, the possession, use and cultivation by the owner until the railroad company may take it over, is not hostile or adverse and cannot ripen into title unless there be actual notice to the railroad of the hostile claim

Texas –Railroad claims Easement Only (3)

G. C. & S. F. RY. CO. v. CANDLER, 61 S.W.2d 997 (1933)

- If the possession by Young, after condemnation by the railway company, was peaceable and adverse, then, under the statute, **it operates as well against railroad corporations as against individuals,** and this rule applies as well to an easement as to a title in fee.
- The right to an easement may be lost by limitations the same as a title in fee.

Underground Trespass: Penn: (1)

Lewey v. Fricke: 166 Pa. 536; 31 A. 261; 1895

- **The legal question** on which this appeal depends is **beset with difficulty**.
- The interests to be affected by it must increase in magnitude as the value of the minerals, in which this state abounds, increases.
- It is not directly ruled by any of our own cases and we are at liberty to treat it as a question of first impression.

Underground Trespass: Penn: (2)

Lewey v. Fricke: 166 Pa. 536; 31 A. 261; 1895

- In 1884 in the progress of its mining operations the defendant company made an **opening or passageway through the plaintiff's coal under one corner of his lot,**
- The coal removed, amounting to more than four thousand bushels, was brought to the surface through the defendant's pits or openings on its own lands and used or disposed of as its own.
- **The plaintiff had no knowledge of the trespass upon him or the removal of his coal** and **no means of knowledge within his reach.**
- In 1891, some seven years after his coal was taken, as he alleges, he first became aware of his loss.

Underground Trespass: Penn: (3)

Lewey v. Fricke: 166 Pa. 536; 31 A. 261; 1895

- The statute makes certain exceptions.
- As to all persons who may be when the cause of action accrues "within the age of twenty-one years, femme covert, non compos mentis, imprisoned, or beyond sea," it is provided that the statute shall not begin to run until such disability ceases.

Underground Trespass: Penn: (4)
Lewey v. Fricke: 166 Pa. 536; 31 A. 261; 1895

- The **surface is visible and accessible. The owner may know of its condition without trespassing on others** and for that reason he is bound to know.
- **The interior of the earth is invisible and inaccessible to the owner** of the surface unless he is engaged in mining operations upon his own land; and then he can reach no part of his own coal stratum except that which he is actually removing.

Underground Trespass: Penn: (5)
Lewey v. Fricke: 166 Pa. 536; 31 A. 261; 1895

- If an adjoining landowner reaches the plaintiff's coal through subterranean ways that reach the surface on his own land and are under his actual control, …
- …**the vigilance the law requires of the plaintiff upon the surface is powerless to detect the invasion by his neighbor of the coal one hundred feet under the surface.**

Underground Trespass: Penn: (6)
Lewey v. Fricke: 166 Pa. 536; 31 A. 261; 1895

- We have felt constrained to recognize the **susceptibility of land to division into as many estates in fee simple as there are strata that make up the earth's crust,** and to protect the owners of these separate estates from each other.
- Thus the possession of one who has a title to the surface only does not extend to or affect any subjacent estate.
- The **occupancy of a coal stratum for more than twenty-one years will not give title to the surface above it**, or the oil or gas stratum below it.

Effect of a Survey

Maryland: Effect of a Survey
Rosencrantz v. Shields:
28 Md. App. 379; 346 A.2d 237; 1975

- **Whether the making of a survey will interrupt the continuity** of adverse possession sufficiently to toll the running of limitations must necessarily be decided in each case **according to the circumstances**.
- **A survey, unaccompanied by any other act of user and occupation, is not** such a distinct and notorious act of possession as will justify the reasonable presumption of an ouster or that the party went upon the land with a palpable intent to claim the possession as his own.

Adverse claim and the surveyor: Ohio (2)
Crown Credit Co., Ltd. v. Bushman:
170 Ohio App.3d 807 (2007)

- **Thus, we do not accept Crown's argument** that ***Montieth*** stands *for* the proposition that a record titleholder's entry, by an agent or otherwise, upon disputed land **to conduct a survey, by itself, disrupts the continuity of adverse possession as a matter of law.**
- Rather, we hold that the conducting of the survey must be accompanied by an intent to recover possession or exercise dominion over the property.

Survey & Adverse Claim: Missouri (1)

Ferguson v. Hoffman: 462 S.W.3d 776; 2015

- The **Fergusons argue** that notice of the boundary dispute is required before the clock begins to run to establish adverse possession and that, since they received no notice until 2012 when the survey was conducted, the ten year continuous period to establish adverse possession was not met.
- Instead, the Fergusons argue, in essence, that a person who has acquired title by adverse possession can be divested of that title if an owner subsequent to the individual who lost title can defeat any of the elements of adverse possession by his or her own actions. **This is not the law and the Fergusons cite no law to support this proposition.**

Survey & Adverse Claim: Missouri (2)

Ferguson v. Hoffman: 462 S.W.3d 776; 2015

- After title is vested, subsequent actions by subsequent owners are irrelevant to the trial court's analysis of whether adverse possession was previously established.
- Here, the court found that Peggy Hoffman established ownership of the disputed strip of land by adverse possession through maintaining hostile, actual, open and notorious, exclusive, and continuous possession for a period of ten years starting on April 30, 1991. We find the court's judgment to be supported by substantial evidence.

Survey & Adverse Claim: Missouri (3)

Ferguson v. Hoffman: 462 S.W.3d 776; 2015

- Nevertheless, **the Fergusons argue that the "relevant time period"** for assessing their adverse possession claim **began in 2012 after the survey was conducted** and they received notice of the boundary dispute.
- The Fergusons cite no case law to support this position.
- At the time the Fergusons had their survey conducted Peggy Hoffman had already owned the disputed 22 feet of property for approximately ten years.

Effect of A Survey – Georgia

Henson v. Tucker:
278 Ga. App. 859; 630 S.E.2d 64 (2006)

- However, the Supreme Court of Georgia has held that **entering a tract of land and surveying it is not an "open, notorious nor a continued possession."** The Court specifically determined, "Passing through a tract of land, or around it, and marking trees, is no such possession. It is no disseizin." (1) Accordingly, the 1973 surveying of the land and marking of drill rods and pins found thereon did not amount to an adverse possession.

Effect of A Survey – Pennsylvania

Hollinshead v. Nauman: 45 Pa. 140; 1863 Pa.

- **A mere survey of land** for the purpose of ascertaining its locality, **is not a sufficient entry to interrupt the statute.**
- There **must be in addition** something to show that the survey was made **with a purpose of resuming possession,** and the purpose must be **unequivocally manifested.**

Effect of A Survey – Illinois

White v. Harris:206 Ill. 584; 69 N.E. 519 (1903)

- We are of the opinion, however, **that the survey made by John Harris,** and the appointment of Bushnell as his agent and the acts of Bushnell in pursuance of the agency, **did not constitute such possession as the law requires.**
- **A mere survey of land is not sufficient to establish possession.** ..."Adverse possession of unenclosed, uncultivated, unimproved, and unoccupied land is not shown by evidence, **that one had it surveyed and its boundaries marked by monuments, paid taxes on it for a few years, and from time to time cut trees on it for use on other land."**

Effect of A Survey – Illinois

Davidson v. Perry: 898 N.E.2d 785 (2008)

- Defendants contend the 1977 survey and setting of markers shows their predecessors possessed the disputed tract. **However, the survey plat indicates survey pins were placed only on the southwest and southeast corner of the disputed tract.**
- …described the survey pins as located "right at the top of the ground." **Defendants cite no authority holding the placement by a surveyor of two survey pins at ground level alone shows possession by the true owner. We fail to see how two pins at ground level in a rural area is in itself indicative of possession**. We further note that, in asserting a claim of adverse possession, the claimant's mere survey of land is insufficient to establish possession.

Effect of A Survey – South Dakota

Titus v. Chapman:
2004 SD 106; 687 N.W.2d 918; 2004

- **We agree the iron rebar markers were insufficient to constitute an enclosure** within the meaning of SDCL 15-3-13. An enclosure need not be absolutely secure to satisfy the "substantial enclosure" statutory requirement.
- …While we have held a fence or natural barrier such as a tree line is sufficient, **we have never held something as meager as two 5/8th inch iron rebar denoting lot corners as sufficient to satisfy the enclosure requirement** under a claim of adverse possession.

Effect of an Ordinance

Effect of an Ordinance: Md. (1)

Hillsmere Shores Improvement v. Singleton:
182 Md. App. 667; 959 A.2d 130; 2008

- In its final two contentions, **appellant claims that certain provisions of the County Code effectively limit the doctrine of adverse possession** with respect to property such as the Community Beach. On this basis, appellant claims that neither appellees nor anyone else can ever claim title to a portion of such land by adverse possession.
- **Hillsmere cites no case law in support of its contentions.**
- In Maryland, the original source of the adverse possession doctrine was the Limitation Act of 1623, 21 James I, c.16, an English statute

Effect of an Ordinance: Md. (2)

Hillsmere Shores Improvement v. Singleton:
182 Md. App. 667; 959 A.2d 130; 2008

- Our research has disclosed **no Maryland cases, and only one decision of a foreign jurisdiction**, *Wanha v. Long, 255 Neb. 849, 587 N.W.2d 531 (Neb. 1998)*, in which arguments similar to appellant'swere addressed.
- In Wanha, the **Supreme Court of Nebraska considered whether "platted and subdivided land within a municipality cannot be adversely possessed,"** under a Nebraska statute which forbade certain owners of real estate "'to subdivide, plat, or lay out said real estate…
- The Nebraska court rejected the argument, determining that the statute had "no application to the doctrine of adverse possession and is not in conflict with it."

Effect of an Ordinance: Md. (3)

Hillsmere Shores Improvement v. Singleton:
182 Md. App. 667; 959 A.2d 130; 2008

- The court reasoned that the **source of an adverse possessor's title is "'[h]is own possession,'" rather than "'a transfer** or grant by operation of law from the former title holder,'"
- …and thus that, once the statutory period has run, **"there is nothing left for the adverse possessor to do to gain title,** i.e., no application to . . . any . . . authority need be made. . . ."
- … Moreover, the court observed that, "[b]y its own language, **[the state statute] applies only to the subdivision of property by its owner."**

Effect of an Ordinance: Md. (4)

Hillsmere Shores Improvement v. Singleton: 182 Md. App. 667; 959 A.2d 130; 2008

- In rejecting appellant's contention, the circuit court opined:
- "[A]dverse possession **does not meet the definition of subdivision** found in **Article 17 § 1-101(60) of the Anne Arundel County Code** because it does not divide land by deed as defined in Article 17 § 1-101(43)." We agree with the circuit court.
- Adverse possession of real property is achieved by occupying it for the statutory period, **not by the recordation of a deed or plat** in the County land records.

Effect of an Ordinance: Md. (5)

Hillsmere Shores Improvement v. Singleton: 182 Md. App. 667; 959 A.2d 130; 2008

- Accordingly, **adverse possession is not "subdivision" within the meaning of the County Code.** Moreover, subject to exceptions not applicable here, County Code § 17-2-106 provides: **"The owner of contiguous properties may consolidate the properties by deed without initiating subdivision..."** Thus, we do not perceive the present County Code to affect appellees' ability to adversely possess the disputed properties.
- **Even if** the ordinances that appellant cites applied by their terms to an adverse possession claim, **there would be a significant question whether a County ordinance could affect the operation of adverse possession.**

California: What is a "Subdivision"? (1)

Habibi v. Soofer: 2016 Cal. App. Unpub.

- "defined a subdivision as '. . . any real property, improved or unimproved, or portion thereof, shown on the latest equalized county assessment roll as a unit or as contiguous units, ...
- ...which is divided for the purpose of sale, lease, or financing, whether immediate or future, by any subdivider into five or more parcels . . . .'"

California: SMA vs. Prescriptive Easement (2)

Habibi v. Soofer: 2016 Cal. App. Unpub.

- Moreover, even if the creation of the easements did fall within the ambit of the SMA, there is **nothing in that statutory scheme that prevents a party from acquiring an easement within a subdivision by adverse possession or prescription.**

California: County Regs. vs. Prescription (3)

Habibi v. Soofer: 2016 Cal. App. Unpub.

- The Soofers argue that regardless of the applicability of the SMA, the Habibis had to comply with certain County regulations, particularly Santa Barbara (SB) County Code section 21-15.9,5 to change the easement boundaries depicted on the recorded parcel maps.
- As the Habibis point out, if claims of adverse possession or prescriptive easement necessarily required an administrative boundary change on a parcel map, then no such claim could ever be made without governmental approval. Governmental approval is not an element of either claim, and the Soofers cite no statutory or case authority for such a rule.

California: County Regs. vs. Prescription (4)

Habibi v. Soofer: 2016 Cal. App. Unpub.

- **Nor is there any authority supporting the Soofers' argument that a party claiming adverse possession or prescriptive easement must exhaust administrative remedies before pursuing the claim.**
- To exact such a requirement would entirely defeat the legitimate policies underlying the doctrines of adverse possession and prescription, which "express a preference for use, rather than disuse, of land.

California: Fire Codes vs. Title (5)
Habibi v. Soofer: 2016 Cal. App. Unpub.

- The trial court also determined that title by adverse possession or a prescriptive easement cannot occur if it would compromise public safety. The court took judicial notice under Evidence Code section 452, subdivision (h) "that Southern California and particularly Santa Barbara County are particularly vulnerable to wild fires."
- **Neither the Soofers nor the court cite any authority for the rule that no adverse possession or easement by prescription may occur if there is a possibility that it will create a public safety concern,** such as increasing the spread of wild fires. That is a novel theory unsupported by both the law and the record in this case.

California: Fire Codes vs. Title (6)
Habibi v. Soofer: 2016 Cal. App. Unpub.

- We conclude the trial court erred by determining that the Habibis' claims of adverse possession and prescriptive easement were preempted by the SMA or by public safety concerns.

Extinguishing an Easement By Adverse Possession

Colorado: Unused Easement (11)
Matoush v. Lovingood: 177 P.3d 1262; 2008

- [W]here an easement has been created but no occasion has arisen for its use, the owner of the servient tenement may fence his land and such use will not be deemed adverse to the existence of the easement until such time as
- (1) the need for the right of way arises,
- (2) a demand is made by the owner of the dominant tenement that the easement be opened and
- (3) the owner of the servient tenement refuses to do so.
- ***Castle Assocs. v. Schwartz, 407 N.Y.S.2d at 723.***
- ***See Halverson v. Turner, 268 Mont. 168, 885 P.2d 1285, 1290 (Mont. 1994)***
- ***Mueller v. Hoblyn, 887 P.2d 500, 507 (Wyo. 1994)***

Missouri: Easement Claims Confusing (2)
Frain v. Brda, 863 S.W.2d 17 (1993)

- Plaintiffs' use of a minor portion of the easement was not sufficiently adverse to extinguish the whole easement.
- Defendants did not hold title to the property affected by the easement.
- They merely had a right to make use of the land for a limited purpose, as an ingress and egress to their property.
- As a result, Plaintiffs had the right to use the fifteen-foot easement "in any manner not inconsistent with the easement granted."

Missouri: Acknowledge the Easement (3)
Frain v. Brda, 863 S.W.2d 17 (1993)

- Plaintiffs knowingly refrained from building their deck on the strip after a discussion with Defendants' son about the easement.
- Plaintiffs never obstructed traffic from passing through the easement. In 1984 or 1985, survey markers showed exactly where the easement was located.

Missouri: Acknowledge the Easement (4)
Frain v. Brda, 863 S.W.2d 17 (1993)

- Plaintiffs argue they were not required to show adverse possession of the entire easement to obtain title to the portion adversely held.
- They argue they met their burden of proof as to a disputed grassy area of approximately seven and one-half to eight feet of the fifteen-foot easement.
- Therefore, they contend judgment should have been entered for them as to that portion.

Missouri: Minor Use of Small Part (5)
Frain v. Brda, 863 S.W.2d 17 (1993)

- Here, Plaintiffs have merely used a minor portion of the easement as their yard.
- We have found no Missouri case where a minor portion of an easement was extinguished where permanent improvements were not erected on the easement area.

Missouri: Adverse Against Easement (1)
Creech v. Noyes, 87 S.W.3d 880 (2002)

- An easement can also be extinguished by adverse possession.
- "[W]hether an easement is extinguished by an adverse use is determined by applying principles that govern acquisition of title by adverse possession."
- To establish title to a tract of land by adverse possession must prove that his possession of the land was (1) actual; (2) hostile and under claim of right; (3) open and notorious; (4) exclusive; and (5) continuous for a period of ten years.

Part II
Acquiescence, Estoppel, Practical Location, and Part Performance:
Because Adverse Possession Isn't Weird Enough!

Those "Non-Standard Methods"

- Adverse Possession
- Presumed Grant (Lost Grant Theory)
- Parol Boundary Agreement
- Informal Written Agreement (which fails to fulfill requirements for a valid deed)
- Estoppel (also doctrine of Laches)
- Acquiescence
- Practical Location
- Consentable/Conditional Boundary Lines (Ky, Pa.)
- Doctrine of Merger

Record Lines are Critical – Pennsylvania . (1)
Perkins v. Gay: 3 Serg. & Rawle 327; 1817

- The certainty and **security of titles**, and **the safety of the community require** that this should be the governing principle; …
- …and the lines of the commissioners will control the lines run under the authority of the Susquehanna Company.
- For **if you change the lines** of the commissioners, you **introduce confusion** and uncertainty in the whole titles of the county.
- The land office will no longer contain the records of your titles, they will depend on the uncertainty of parol testimony, and you will have **all the evils incident** to a departure from legal and known land-marks.

Agreements
Parol and Written

Parol Agreement – General

Clark on Surveying and Boundaries: 7th Ed.
Lane J. Bouman and Walter Robillard

- There are, however, three legal obstacles to be overcome
- The first difficulty arises out of the English **Statute of Frauds;** adopted in 1660…This statute has been adopted by all of the states. *Except Louisiana…actually 1677*
- The second obstacle concerns the **rights of innocent third parties**, who would be dealing with either of the agreeing landowners, without knowledge of their secret agreement.
- The third problem is the legal doctrine of **"Constructive Notice".** All states have methods of recording or registering deeds or probating wills. Other parties are legally entitled to view the recorded documents to ascertain their rights and these records are binding upon everyone

Parol Agreement – General

Andrews v. Andrews 252 N.C. 97; 113 S.E.2d 47; 1960

- "…**A multitude of jurisdictions hold that an uncertain and disputed boundary line may, under certain circumstances, be fixed permanently by parol agreement,** if accompanied by sufficient acquiescence and possession,
- …but **where there is no uncertainty** as to the boundary line, a parol agreement fixing a boundary line in disregard of those fixed by the deeds is void under the Statute of Frauds, as it **amounts to a conveyance of land by parol…"**

Parol Agreement & Dispute: Missouri (1)

Dewitt v. Lutes: 581 S.W.2d 941 (1979)

- If the compromise itself does not fall within the scope of the statute, then the statute is inapplicable to the compromise.
- Since a **compromise which fixes a disputed or uncertain boundary line is not considered to involve a conveyance of land or passage of title**,…
- but is considered as an effort merely to **clarify and give effect to the title which the parties already have,**
- **such an agreement is neither within the scope of the Statute of Frauds nor within the scope of the statutes regarding conveyance of real estate.**

Parol Sale of Land: Missouri (1)

Kackley v. Burtrum: 947 S.W.2d 461; 1997

- An **oral agreement for the sale** of real property falls **squarely within the Statute of Frauds**, § 432.010, RSMo 1986, and will not be enforced at law.
- Equity will decree specific performance of such a contract, however, if a party has acted to such a degree upon the contract that denying the party the benefit of the agreement would be unjust.

Parol Agreement – General questions.

- Will subsequent purchasers for value have **constructive notice** of the agreement?
- Has there been a **violation of the Statute of Frauds**?
- Have the rights of **innocent third parties** been violated?
- Did the parties to the agreement **actually have the authority** to agree to anything?
- Has the agreement been accompanied by other evidence (possession and/or acquiescence to a visible line for 20 years or more)?

Washington: Doctrine of Parol Agreement: (8)

Kromm v. Literal:
2002 Wash. App: No. No. 19414-1-III

- (1) There must be either a **bona fide dispute** between two coterminous property owners as to where their common boundary lies upon the ground **or else both parties must be uncertain** as to the true location of such boundary;
- (2) the owners must arrive at an express meeting of the minds to permanently resolve the dispute or uncertainty by recognizing a definite and specific line as the true and unconditional location of the boundary;

Washington: Doctrine of Parol Agreement: (9)

Kromm v. Literal:
2002 Wash. App: No. No. 19414-1-III

- (3) they must in some fashion **physically designate that permanent boundary determination on the ground**; and
- (4) they must take possession of their property by such occupancy or improvements as would reasonably give constructive notice of the location of such boundary to their successors in interest;
- or (as an alternative to (4) above), (4a) bona fide purchasers for value must take with reference to such boundary.

Part Performance

Georgia: Part Performance (1)

Dobbs v. Dobbs:
270 Ga. 887; 515 S.E.2d 384; 1999

- Appellant Larry Dobbs and appellee Gary Dobbs are brothers who entered into an oral contract in 1973 for Larry to sell and Gary to purchase a house and one acre of land.
- The brothers agreed that Gary would assume the mortgage, and take possession of and maintain the property.
- They further agreed that title to the property would **remain in Larry's name until Gary satisfied the outstanding 30-year mortgage.**

Georgia: Part Performance (2)

Dobbs v. Dobbs:
270 Ga. 887; 515 S.E.2d 384; 1999

- Gary made mortgage payments directly to Larry, occasionally made payments directly to the mortgage company, and sometimes performed services for or made loans to Larry as a set-off against mortgage payments.
- **Gary occupied the premises continuously since 1973,** except for a brief period in 1991 during his divorce, and **made extensive improvements** to the house and land.
- In 1994, Gary sought to have Larry convey the land to him, but Larry refused…

Georgia: Part Performance (3)

Dobbs v. Dobbs:
270 Ga. 887; 515 S.E.2d 384; 1999

- The trial court ordered specific performance of the oral contract, citing the provisions in O.C.G.A. 23-2-131…
- That Code section reads:
- (a) The **specific performance of a parol contract** as to land shall be decreed if the defendant admits the contract or if the contract has been **so far executed by the party seeking relief and at the instance or by the inducements of the other party that if the contract were abandoned he could not be restored to his former position.**

Georgia: Part Performance (4)
Dobbs v. Dobbs:
270 Ga. 887; 515 S.E.2d 384; 1999

- (b) Full payment alone accepted by the vendor,…
- … or partial payment accompanied with possession, …
- …or possession alone with valuable improvements,…
- … **if clearly proved in each case** to have been done with reference to the parol contract, …
- …shall be sufficient part performance to justify a decree.

Georgia: Part Performance (5)
Dobbs v. Dobbs:
270 Ga. 887; 515 S.E.2d 384; 1999

- O.C.G.A. 23-1-10 states that "he who would have equity must do equity and must give effect to all equitable rights of the other party respecting the subject matter of the action."
- This equitable maxim embodies both the "unclean hands" doctrine and the concept that **"one will not be permitted to take advantage of his own wrong."**
- We have stated that this maxim refers to "'an inequity which infects the cause of action so that to entertain it would be violative of conscience.'

Georgia: Part Performance (6)
Dobbs v. Dobbs:
270 Ga. 887; 515 S.E.2d 384; 1999

- Although the trial court found that Gary had not completely discharged his indebtedness, the court…
- … also found that **Gary was unaware of the existence or amount of the arrearages until Larry testified about them at trial,** …
- …primarily because of the loose financial arrangement between the brothers, and because their relationship had deteriorated such that Larry would not tell Gary the amount.
- This is not the kind of conduct that would support a finding of unclean hands.

Parol Agreement & Dispute: Missouri (1)
Dewitt v. Lutes: 581 S.W.2d 941 (1979)

- If the compromise itself does not fall within the scope of the statute, then the statute is inapplicable to the compromise.
- Since a **compromise which fixes a disputed or uncertain boundary line is not considered to involve a conveyance of land or passage of title**,…
- but is considered as an effort merely to **clarify and give effect to the title which the parties already have,**
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Parol Sale of Land: Missouri (1)
Kackley v. Burtrum: 947 S.W.2d 461; 1997

- An **oral agreement for the sale** of real property falls **squarely within the Statute of Frauds**, § 432.010, RSMo 1986, and will not be enforced at law.
- Equity will decree specific performance of such a contract, however, if a party has acted to such a degree upon the contract that denying the party the benefit of the agreement would be unjust.

Exception to Statute of Frauds: Missouri (1)
Anderson v. Abernathy: 339 S.W.2d 817; 1960

- Plaintiff and defendants' evidence on the question **whether there was an oral contract to sell Lot 5** was diametrically opposed.
- **if believed,** clearly **established the existence of an oral agreement** between Grace Anderson and Charles Abernathy (sister and brother) and Erie Abernathy, …the Abernathys not only sold Grace Anderson **Lot 6** for $700, $25 down, balance later, …
- but also at the same time agreed to sell Grace Anderson Lot 5 for $700, payment to be made for Lot 5 … The Abernathys categorically denied the existence of any agreement to sell **Lot 5**

These facts undisputed: Missouri (2)
Anderson v. Abernathy: 339 S.W.2d 817; 1960

- They discussed the retail soft ice cream business, and Mrs. Anderson decided to establish and conduct such a business.
- Mrs. Anderson paid $25 that day, $275 on July 22, 1957 and $400 on August 17, 1957, following which she received a deed to Lot 6, duly executed by the Abernathys.
- After the building was completed, Mr. Abernathy planned and laid out a system of driveways and culverts connecting both Lots 5 and 6 with the highway by two 30-foot driveways, a driveway and culvert on each lot. Mrs. Anderson testified that she put a culvert on Lot 5 because she thought and understood she "was goin' to buy it."

These facts undisputed: Missouri (3)
Anderson v. Abernathy: 339 S.W.2d 817; 1960

- Mr. Abernathy was overseer of the grading. He ordered and had the gravel hauled and supervised the installation of the culverts and the construction of the driveways. They were built in such a manner that both lots could be used together and jointly as a unit for driving and parking customers' automobiles. Mr. Abernathy did some of this work personally.
- Mrs. Anderson paid the bills, for grading, graveling, culverts and concrete, in the total amount of $376.57.

These facts undisputed: Missouri (4)
Anderson v. Abernathy: 339 S.W.2d 817; 1960

- Disagreements occurred with respect to the use of the water, and on August 25, 1958
- Mr. Abernathy **cut the water line in two with a hack saw** and refused to supply any more water to his sister. She carried water in five-gallon cans for awhile.
- Thereafter she bought a large tank and pump, and eventually drilled a well.
- In August, 1958 Mr. Abernathy erected a woven wire fence all along the division line between the two lots, thereby preventing Mrs. Anderson's customers from approaching or leaving the building over any part of Lot 5

Justified the Situation How??: Missouri (5)
Anderson v. Abernathy: 339 S.W.2d 817; 1960

- Abernathys undertook to explain and justify Mrs. Anderson's possession and use of Lot 5 on the basis of an alleged permissive use. …that he told her then that if she wanted to make improvements on Lot 5 "she could use it until I deeded it or sold it or called for it"

Avoid the Statute of Frauds: Missouri (6)
Anderson v. Abernathy: 339 S.W.2d 817; 1960

- **"In the sale of land, possession by the vendee in pursuance of the contract of sale, without more, has been held to be sufficient part performance to take the case out of the operation of the statute of frauds.**
- If the **possession is accompanied by the erection of improvements** upon the land, the courts in this state have **always held the acts sufficient** to take the contract out of the statute.

Adverse, Estoppel?: Missouri (7)
Anderson v. Abernathy: 339 S.W.2d 817; 1960

- After making these improvements she used Lot 5 for the purposes for which she had caused it to be adapted. There **was no agreement for rent** and no rent paid on Lot 5.
- At all times she **claimed she had a contractual right to buy Lot 5**. All of her acts in connection with Lot 5 were **acts indicative of ownership and proprietorship. She treated it as her own.** She treated it like she treated Lot 6.
- None of her acts of ownership was consistent with any reasonable theory of proprietorship on the part of the **Abernathys, who, with full knowledge** of what she was doing not only **consented but actively assisted** her in the exercise of dominion over Lot 5.

Parol and Part Performance: Missouri (1)
Alonzo v. Laubert: 418 S.W.2d 94; 1967

- This brings us back to the doctrine of part performance
- …"Where one **party relying on an oral contract** has so far performed his part of it that it would be perpetrating a fraud on him to allow the other to repudiate the contract and to set up the statute of frauds in justification thereof, equity will regard the case as being removed from the operation of the statute."
- It is made clear that **this is purely an equitable doctrine** and no amount of part performance but **only complete and full performance by at least one party** will at law remove the case from the statute.

Parol and Part Performance: Missouri (2)
Alonzo v. Laubert: 418 S.W.2d 94; 1967

- The doctrine has particular applicability in cases of specific performance.
- Where partial performance is relied upon to take the case out of the statute, additional requirements are imposed.
- "An **act relied on as part performance** of an oral contract **must be unequivocally and exclusively referable to the contract** and must have been done in pursuance of the contract so as to result therefrom and not from some other relation."

Parol and Part Performance: Missouri (3)
Alonzo v. Laubert: 418 S.W.2d 94; 1967

- Although the statute of frauds was enacted too late in England to be accepted as part of the common law of Missouri, …
- …it was **adopted by statute in territorial days in our state** and has persisted with little change until the present. Nearly three centuries of interpretation have left a pattern which requires careful examination.

Parol and Part Performance: Missouri (4)
Alonzo v. Laubert: 418 S.W.2d 94; 1967

- As to unilateral performance, the following rules emerge for suits in equity to enforce land-sale contracts.
- There must have been sufficient part performance to convince the chancellor that fraud will result from a literal application of the statute.
- Mere payment of money is insufficient.
- "But if services are to be rendered instead of paying money and the services are fully performed, then the statute cannot be used to produce fraud."

Proof: Contract, Performance: Missouri (5)
Alonzo v. Laubert: 418 S.W.2d 94; 1967

- Judge Sturgis recognized the distinction between necessity of the proof **(1) of the contract** and (2) **of performance** of its terms where it is clear or even admitted that a contract existed.
- We conclude that the contract may be established by a combination of documents not themselves meeting the requirement of the statute of frauds and of oral testimony, followed by proof of performance by the party or parties seeking equitable relief.
- Such performance must point to the contract itself where there could otherwise be doubt as to its existence or its terms.

Part Performance -Early : North Carolina (1)
Albea v. Griffin: 22 N.C. 9; 1838

- GASTON, Judge, after stating the facts as above, proceeded:
- --It is objected on the part of the defendants that by our act of 1819 **all parol contracts to convey land are void, and that no part performance can, in this State, take a parol contract out of the operation of that statute.**
- We admit this objection to be well founded, and we hold as a consequence from it that the contract being void, not only its specific performance.

Part Performance : North Carolina (3)

Duckett v. Harrison:
235 N.C. 145; 69 S.E.2d 176; 1952

- Furthermore, if it be conceded, as contended by the defendant, R. L. Harrison, that there was a parol division of the lands in controversy in 1934 and that Dora Harrison entered into possession of the premises allotted to her, collected rents therefrom, paid the taxes thereon, …
- …this would not be sufficient to prevent the operation of the statute of frauds, **since we do not recognize the doctrine of part performance in this jurisdiction**, and twenty years have not elapsed since the defendant, R. L. Harrison, contends the property was divided.

Informal Written Agreement

Parol Agreement: Va.

McMurray v. Dixon: 105 Va. 605; 54 S.E. 481; 1906

- **The disclaimer of a freehold estate can only be made by deed, or in a court of record.**
- **In the case of disputed boundaries the parties may agree upon a line, by way of compromise, and if they take and hold possession up to that line the requisite statutory period, the mere possession will, in time, ripen into title.**
- **But no mere parol agreement to establish a boundary and thus exclude from the operation of a deed land embraced therein can divest, change or affect the legal rights of the parties growing out of the deed itself.**

Written agreement – U.S. Dist. Court

Williamson v. Williamson: 407 F. Supp. 370; 1976

- **It is clear in Virginia that an oral boundary line agreement unaccompanied by actual possession of the land acquired provides no foundation for a claim of title.** ***McMurray v. Dixon***, 105 Va. 605, 54 S.E. 481 (1906). The cases cited by the plaintiff buttress this legal principle but do not decide the precise issue before the Court. *See Wade v. Ford*, 193 Va. 279, 68 S.E. 2d 528 (1952); *Bradshaw v. Booth*, 129 Va. 19, 105 S.E. 555 (1921); *Reynolds v. Wallace*, 125 Va. 315, 99 S.E. 516 (1919); *Cox v. Heuseman*, 124 Va. 159, 97 S.E. 778 (1919). **The Virginia Supreme Court has yet to decide a case concerning an attempt to enforce a duly recorded written boundary line agreement.**

Written agreement – U.S. Dist. Court

Williamson v. Williamson: 407 F. Supp. 370; 1976

- In an attempt to settle the disagreement as to the Stokes tract, a boundary line agreement (Exhibit 2), dated April 9, 1970, between Evelyn Byrd Williamson, widow, and Carroll M. Williamson, Jr., was executed by Carroll Mac on or about June 24, 1971, and by Evelyn on or about June 30, 1971, **and was recorded in the Clerk's office of the Circuit Court of the City of Chesapeake, Virginia, on August 16, 1971**.
- **The boundary agreement incorporates a plat showing a survey of the property line agreed to by the parties to this document which was designed to establish boundary lines between their respective parcels of land on Battlefield Boulevard.**

Written agreement – U.S. Dist. Court

Williamson v. Williamson: 407 F. Supp. 370; 1976

- Thus, when presented with the opportunity, the Virginia Court expressly did not postulate a rule precluding all types of boundary line agreements, **thereby indicating the existence of a distinction between oral and written boundary line agreements.**

Written agreement – U.S. Dist. Court

Williamson v. Williamson: 407 F. Supp. 370; 1976

- Furthermore, the language quoted and the cases relying thereon have dealt with **oral boundary line agreements which, in some instances, were based upon land surveys.**
- If the Court had reached a contrary decision, oral statements which can neither be recorded nor proved save by parol evidence in later years, would have been permitted to establish title to realty.
- **The emphasis is on providing a reliable record of title; the same theory underscores the Statute of Frauds.** In the case before the Court, we have a writing, under seal, duly recorded in the Clerk's Office of the Court within whose jurisdiction the land is located.

Written agreement – U.S. Dist. Court

Williamson v. Williamson: 407 F. Supp. 370; 1976

- The factual circumstances which control the decision in *McMurray* and subsequent similar cases do not present themselves in this case. **It is consistent, therefore, with the law of Virginia and the facts of this case to hold that a written boundary line agreement may determine the location of a disputed boundary line between adjoining landowners, and this Court so holds.**

Written Agreement – Del. (1)

Sauers v. Bierman: C.A. No. 2014-S (2002)

- Adjoining property owners **entered into a written agreement** purporting to resolve what the agreement refers to as **"doubt and uncertainty about the true and correct location of the common boundary"** between their lands.
- The effect of the agreement was to move their common boundary from the bed of an old dirt road (that runs between the properties and provides access to them both) 50 feet south into a field lying in the southern property.
- Because the common boundary extends nearly 1,000 feet, 1.06 acre of land was cut off from the southern property …

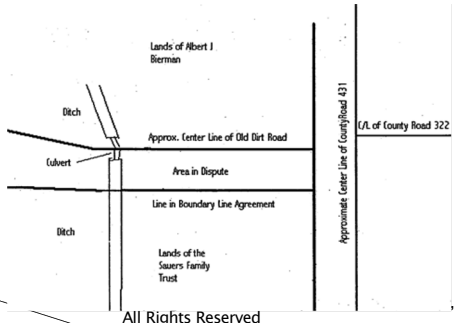
Source Descriptions: Agreement – Del. (2)

Sauers v. Bierman: C.A. No. 2014-S (2002)

- **The description in the 1994 deed is in all material respects the same as that found in the 1905 deed, although the 1905 deed further describes the parcel being conveyed as being "all the lands owned by the grantors on the south side of the 'New Public' road leading to Stockley Station."**
- *ALL THAT certain tract, piece and parcel of land lying … on the North corner of the County Roads leading from Georgetown to Piney Grove where County Roads cross leading to Stockley Station … and containing Eighteen (18) acres of land, be the same more or less with improvements thereon.*

Associated Map: Agreement – Del. (3)

Sauers v. Bierman: C.A. No. 2014-S (2002)



Background Info: Agreement – Del. (4)

Sauers v. Bierman: C.A. No. 2014-S (2002)

- For example, no party has found any old maps or surveys showing the existence of such a road.
- Nor has any party found a witness with a memory long enough to recall what the intersection in question looked like during the early years of the last century.
- Nevertheless, **it is clear from the record that, until the disputed agreement was signed, everyone concerned thought that the old dirt road marked the boundary** between the two properties.

Background Info: Agreement – Del. (5)
Sauers v. Bierman: C.A. No. 2014-S (2002)

- **The surveyor…also observed the ambiguity** caused by the 1905 deed's reference to the "New Public Road leading to Stockley Station" and **formed a professional judgment that "the deed descriptions in both the Bierman and Sauers Trust chains of title are vague and uncertain."** Notwithstanding this judgment, …
- Mr. ***(surveyor)***…**recognized that the dirt road and the old cedar tree appeared to mark the boundary between the two properties**. Kemp also ascertained that the Trust's property, measured using the old dirt road as the boundary, was closer in area to 14 acres than to the 12 acres called for on its deed.

Motivation for Written Agreement – Del. (6)
Sauers v. Bierman: C.A. No. 2014-S (2002)

- As Pivec testified: "The boundary line agreement only came about because **we were trying to … make the amount of property** that Mr. Bierman had and the amount of property adjacent to it **agreeable with those deeds."**
- She also testified that the "southern boundary line was **set to give Mr. Bierman 17 acres of property"** and for no other reason.
- The operative paragraph of the agreement reads as follows:

Motivation for Written Agreement – Del. (7)
Sauers v. Bierman: C.A. No. 2014-S (2002)

- *The doubt and uncertainty as to the true and correct location of the common boundary lines designated on this plot by the letters "A", "B" and "C" causes a hardship between the parties hereto. Whereas both parties desire to* ***fix the location*** *of the common boundary between their properties,* ***prevent further uncertainty*** *and improve their properties to the common boundary in any manner they so desire, they therefore agree that the common boundary between their properties is as shown on this plot prepared by Adams-Kemp Associates, Inc.*
- The agreement **nowhere refers to the discrepancies of acreage for the two properties.** Nor does it show the location of the dirt road or the old cedar tree.

Conclusion: Written Agreement – Del. (8)
Sauers v. Bierman: C.A. No. 2014-S (2002)

- While the record at this stage of the proceeding does **not support a conclusion** that Pivec or any other party **intentionally deceived** the Trustee, it is clear that, at the time she signed the Boundary Line Agreement, the…
- … Trustee was materially mistaken about the nature of the dispute and the effect of the proposed agreement.
- **The Trustee's mistake goes to the very purpose of the agreement and is sufficient reason to require that the agreement be rescinded and cancelled of record.**

Conclusion: Written Agreement – Del. (9)
Sauers v. Bierman: C.A. No. 2014-S (2002)

- The Boundary Line Agreement was **not intended to resolve a dispute between Bierman and the Trust**--not even the actual lack of clarity about the exact location of the common boundary between their lands.
- Instead, **Bierman pursued that agreement as a means to remedy** his discovery that he had **paid for 18 acres of land but gotten only 16 acres.**
- Rather than sue his seller, against whom he might have had a claim, Bierman decided to see if the Trust would convey an acre of land to him under the **guise of a "boundary line" dispute.**

Estoppel

Many types of Estoppel: Indiana (4)

Brown v. Branch: 758 N.E.2d 48; 2001

- There are a variety of estoppel doctrines including: estoppel **by record**, estoppel **by deed**,
- **collateral** estoppel, **equitable** estoppel
- **– also referred to as estoppel in pais,**
- **promissory** estoppel, and **judicial** estoppel.
- **All, however, are based on the same underlying principle:** one who by deed or conduct has induced another to act in a particular manner will not be permitted to adopt an inconsistent position, attitude, or course of conduct that causes injury to such other.

Estoppel – Michigan Law Review:

Olin L. Browder, Jr.: Vol. 56, No. 4 (Feb., 1958)

- Attempts have been made to define or to state the requirements for one major area of the doctrine, **estoppel in pais, of equitable origin**. There must be a **representation of fact**, by one who knows the true facts, to one who does not know, and a **substantial change of position** by the latter in reliance thereon. But to what extent have these requirements in application been redefined, distorted, or ignored?
- These are cases in which a landowner makes positive representations to his neighbor about the location of their common boundary.

Estoppel: New Mexico (1)

Cauble v. Beals: 96 N.M. 443; 1981

- The essential elements of equitable estoppel as related to the **party estopped** * * * are:
- **(1) conduct which amounts to a false representation or concealment** of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert;
- **(2) intention that such conduct shall be acted upon by the other party** * * *; and
- **(3) knowledge, actual or constructive, of the real facts…**

Estoppel: New Mexico (2)

Cauble v. Beals: 96 N.M. 443; 1981

- As related to **[the party] which claims estoppel**, the essentials are:
- (1) **lack of knowledge** and of means of knowledge of the truth as to the facts in question * * *;
- (2) **reliance** upon the conduct of the party estopped * * *; and
- (3) **action** based thereon of such a character as to **change its position prejudicially**.

Estoppel: New Mexico (3)

Cauble v. Beals: 96 N.M. 443; 1981

- …Under the facts of this case as set out above, the application of estoppel was inappropriate. During the period in which Beals constructed improvements along the fence line, **the record owners of Cauble's property were unaware of either the true boundary or the fence line, or both.**
- There is **not a shred of evidence** in the record that Cauble, or any of his predecessors, were guilty of the kind of wrongful conduct which would give rise to an estoppel.

Missouri: Early Estoppel & Survey (1)

Taylor v. Zepp, 14 Mo. 482 (1851)

- To constitute an estoppel in padis it is said in *Darrell vs. Odell (3 Hill 219)* that there must be,
- First, an admission inconsistent with the evidence proposed to be given, or the claim offered to be set up;
- Second, An action by the other party upon such admission;
- Third, An injury to him by allowing the admission to be disproved.
- Here we have a concurrence of all the circumstances thus said to be necessary to constitute an estoppel.

Missouri: Early Estoppel & Survey (2)
Taylor v. Zepp, 14 Mo. 482 (1851)

- 1. The act of the surveyor in establishing the division line, was the act of Papin; it was directed by him and sanctioned after completion.
- It was recognized and acquiesced in. This line is now sought to be removed by those claiming under him, and a new line established.

Missouri: Early Estoppel & Survey (3)
Taylor v. Zepp, 14 Mo. 482 (1851)

- 2. Upon the faith of this survey Walker took possession and has held possession ever since without question.
- But this is not all—he was induced to purchase two lots, not included in his part of the tract, with the view of giving his tract a rectangular shape, and getting a full front on the avenue or public street.

Missouri: Early Estoppel & Survey (4)
Taylor v. Zepp, 14 Mo. 482 (1851)

- 3. The injury resulting to Walker from an allowance of this claim is sufficiently obvious.
- A glance at the plat of survey will show that the lot purchased by Walker could only be valuable to him upon the stability of the division line already agreed on.
- If the provision now proposed be made, these lots would form an isolated wedge, disconnected with Walker's main tract, and if not wholly useless, certainly greatly diminished in value.

Missouri: Early Estoppel vs. Intent (5)
Taylor v. Zepp, 14 Mo. 482 (1851)

- It is upon this doctrine of estoppel that the cases have rested, which hold the verbal agreements and acts of parties conclusive of a disputed boundary, without regard to the inference which the law would draw from the deeds, in the absence of such acts and agreements.
- The object of rules of construction is to arrive at the intention of the parties, but no rules can be framed which will lead to so correct a conclusion as the interpretation pointed out by the acts of the parties themselves.

Missouri: Estoppel vs. Mistakes…(6)
Taylor v. Zepp, 14 Mo. 482 (1851)

- There might be some hesitation in applying this principle of estoppel to cases where parties had obviously acted under a mistaken impression of their rights.
- A careful examination of all the deeds and all the actions of the parties in this case will tend to the conclusion that there was in truth no mistake at all.
- Papin had all the facts fully before him when the line now disputed was assented to.

Missouri: Estoppel vs. Statute of Frauds (7)
Taylor v. Zepp, 14 Mo. 482 (1851)

- It is said that this doctrine conflicts with the statute of frauds —but it has not been so regarded in any of the numerous cases decided on this point.
- The truth is, the statute does not apply to such cases.
- The doctrine of estoppel is as old as the statute of frauds, and, as such, a part of the law of the land.
- It is no objection to either, that the one may be a modification or regulation of the other.

Estoppel and Real Property: Missouri (1)
Turner v. Baker: 64 Mo. 218; 1876

- …but even where a well defined boundary is given in the deed, we have seen that a different one may be established under circumstances which will conclude the parties from contesting it.
- This is only analogous to numerous other doctrines, as well settled as the construction of the statute itself.
- **Is not a title itself held to pass by estoppel?**
- Have not the courts refused to permit the contents of a deed to be proved, when the grantee has destroyed it with a view to reinvest the title?

Estoppel and Real Property: Missouri (2)
Turner v. Baker: 64 Mo. 218; 1876

- Have not the owners of land transferred their title by standing by and permitting adverse possession, and the adverse proprietors to build and improve?
- The statute was made to prevent fraud, and the courts have not felt themselves called upon to adhere so closely to its letter as to facilitate and encourage the very evil it was framed to prevent.
- **The truth is, the statute does not apply to such cases.**
- **The doctrine of estoppel is as old as the statute of frauds, and, as such, a part of the law of the land.**
- It is no objection to either, that the one may be a modification or regulation (?) of the other."

Estoppel and Boundary Line: Missouri (1)
Childress v. Flynn: 181 S.W. 584; 1916

- "In order to estop a party by conduct, admissions, or declarations, the following are essential requisites: It must appear:
- (1) That the **party making his admission** by his declaration or conduct **was apprised of the true state of his own title**;
- (2) that he **made the admission with the express intention to deceive, or with such careless or culpable negligence** as to amount to constructive fraud;

Estoppel and Boundary Line: Missouri (2)
Childress v. Flynn: 181 S.W. 584; 1916

- (3) that the other party was not only **destitute of all knowledge of the true state of the title, but of all means of acquiring such knowledge;**
- (4) that he **relied directly** on such admission and will be **injured** by allowing its truth to be disproved.
- ***Acton v. Dooley,*** …quotes this same doctrine from ***Bigelow*** on Estoppel, and **applies it to disputed boundary lines**, and holds that there is no estoppel where the party to be estopped by reason of false representations did not himself know the untruth thereof

The Duty to Speak: Missouri (1)
Randolph v. Moberly: 321 Mo. 995; 15 S.W.2d 834; 1929

- Estoppel in pais arises where one **by his acts, representations or admissions**, or …
- …**by his silence when he ought to speak out,** intentionally or through culpable negligence, …
- …**induces another to believe certain facts** to exist and…
- … such other relies and acts upon such belief and facts so that he will be prejudiced if the former is permitted to deny the existence of such facts.

Missouri: Estoppel By Deed (8)
Taylor v. Zepp, 14 Mo. 482 (1851)

- There is much reason for holding in this case that there was an estoppel by deed, as well as by acts in pais, …
- …but as the latter terminates the controversy, it is unnecessary to give any opinion an this point.

Estoppel against the State: S.C.
S.C.D.O.T. v. Horry County:
391 S.C. 76; 705 S.E.2d 21; 2011

- **As a general rule, estoppel does not lie against the government** to prevent the due exercise of its police power or to thwart the application of public policy. *Grant v. City of Folly Beach, 346 S.C. 74, 80–81, 551 S.E.2d 229, 232 (2001).* **To prove estoppel against the government,** the relying party must prove:
- (1) the **lack of knowledge** and of the means of knowledge of the truth of the facts in question;
- (2) **justifiable reliance upon the government's conduct;** and
- (3) a prejudicial **change in position.**

Estoppel against the State: S.C.
S.C.D.O.T. v. Horry County:
391 S.C. 76; 705 S.E.2d 21; 2011

- **Mere silence or acquiescence will not work an estoppel** when the party seeking estoppel has constructive notice of the public records that disclose the true facts. *Binkley, 348 S.C. at 74, 558 S.E.2d at 909.*
- Therefore, the special referee properly ruled that **SCDOT was not estopped from asserting its rights to the easement.**

Washington: Estoppel against Government: (1)
City of Bainbridge v. Brennan:
128 Wn. App. 1046, 2005

- **Equitable estoppel against the government is not favored.**
- Establishing equitable estoppel requires proof of
- (1) an **admission**, statement, or act inconsistent with a claim later asserted;
- (2) **reasonable reliance** on that admission, statement, or act by the other party; and
- (3) **injury to the relying party** if the court permits the first party to contradict or repudiate the admission, statement, or act.

Washington: Estoppel against Government: (2)
City of Bainbridge v. Brennan:
128 Wn. App. 1046, 2005

- **When the doctrine is asserted against the government acting in its governmental capacity**, the party asserting the defense **must also prove** that equitable estoppel
- (1) is **necessary to prevent a manifest injustice** and
- (2) that the **exercise of government functions will not be impaired** as a result of estoppel.
- Whether asserted against a government or a private party, each element of equitable estoppel must be proved by clear, cogent, and convincing evidence.

Acquiescence

Acquiescence has many definitions: (1)
Kline: "How to Fix a Boundary" 2016

- Deemed by one authority **(Michigan Law Review, Vol. 56, No. 4 pg. 504 (Feb., 1958) Olin L. Browder, Jr.)** to be an elusive concept at best, **...**
- **...**acquiescence may be considered mere **supporting evidence for other legal mechanisms**.
- Some jurisdictions apply the term interchangeably with **parol agreement**.
- Other courts consider it a doctrine of repose **similar to adverse possession.**
- Yet another variant is applied by the U.S. Supreme Court as a long-standing mechanism to determine **state and municipal boundary lines.**

Statutory Authority for Acquiescence: (2)
Kline: "How to Fix a Boundary" 2016

- Several states have gone so far as to create **statutory authority for acquiescence.**
- While the Iowa statute has been extensively chronicled, Colorado, Nebraska and Georgia also have similar statutes on record.

Acquiescence – Evidence of Original Line (3)
Kline: "How to Fix a Boundary" 2016

- Beyond the variants described above, many courts recognize that a line physically marked by an ancient fence and acquiesced to for a long period of time may constitute the best available evidence of the true line.
- The fence may control over subsequent surveys made long after the disappearance of the original boundary monuments.
- This approach can be considered a location doctrine (or re-survey principle) rather than a title doctrine.
- In this scenario, long acquiescence may be the most reliable evidence of a missing record monument.

Acquiescence – 5 Definitions: (4)
Kline: "How to Fix a Boundary" 2016

- At a minimum, this book documents at least five different definitions of acquiescence. It may be defined as:

1) **Evidence of another legal mechanism**, such as prescription
2) An evidentiary standard, i.e., **best available evidence** of the original survey
3) A substitute for **parol agreement**
4) A **title doctrine similar to adverse possession**
5) A mechanism to settle disputes of **state and municipal boundary** lines

Acquiescence – Olin Browder: (1)
Michigan Law Review, Vol. 56, No. 4 (Feb., 1958)

- II. ACQUIESCENCE
- There is a large body of authority to the effect that a **boundary may be given a binding practical location by what the courts call the acquiescence** of adjoining landowners.
- It is evident that the **precise meaning of this kind of practical location is as elusive** as practical location by parol agreement.
- In fact it may be noted at the outset that practical location by acquiescence and by parol agreement are not neatly separable.

Acquiescence – Olin Browder: (2)
Michigan Law Review, Vol. 56, No. 4 (Feb., 1958)

- One reason for this is obvious: the **acquiescence of the parties is often held to be a factor in the practical location of a boundary by parol agreement**
- It is the position of a large number of courts that a boundary can be established by the acquiescence of the parties for the period of the statute of limitations applicable to adverse possession cases

Cooley: 2 Definitions of Acquiescence: Michigan
Diehl v. Zanger: 39 Mich. 601; 1878

- **CONCUR BY: Cooley**
- As between old boundary fences, and any survey made after the monuments have disappeared, **the fences are by far the better evidence of what the lines of a lot actually are**, and it would have been surprising if the jury in this case, if left to their own judgment, had not so regarded them.
- But another view should have been equally conclusive in this case. **The long practical acquiescence of the parties** concerned, in supposed boundary lines, should be **regarded as such an agreement upon them as to be conclusive** even if originally located erroneously.

Acquiescence– Early History New York (1)
Jackson v. Sherwood: 2 Johns. Cas. 37; 1800

- The **plain and obvious mode to satisfy the terms of the grant, would be to give them the extent of two miles on each side of the Hoosick River**, conformable to all its windings, if that be practicable.
- Several other modes have been suggested and analogies between this and other cases attempted, which appear either arbitrary in themselves, or too loose and uncertain to furnish a rule for decision.
- **Boundaries of a similar description have, I believe, in many instances, either been settled by accommodation, or established by a length of possession and the acquiescence of all parties**

Acquiescence– Early History New York (2)
Jackson v. Sherwood: 2 Johns. Cas. 37; 1800

- This map is so far from concluding, that it cannot be admitted in evidence to the prejudice of strangers to the transaction.
- **But a uniform and long continued acquiescence,** as well on the part of the parties making it as on those intrusted in repelling encroachments on the adjoining tracts, **might have stamped it with a higher degree of verisimilitude.**

Acquiescence– Early History New York
Jackson v. Dysling: (NY) 2 Cai. R. 198; 1804

- The line run by Jacob G. Klock forty years ago, was run at the instance of the then proprietors of lots No. 12 and 18, by a person acting under their mutual employ. **This line was assented to at the time, and, independent of the subsequent acts** of the parties, **would, in my opinion, be conclusive upon them, after such a lapse of time,** and possessions of such antiquity.

Acquiescence–History New York (1)
Baldwin v. Brown: 16 N.Y. 359 (1857)

- **The acquiescence** in such cases affords ground **not merely for an inference of fact**, to go to the jury as evidence of an original parol agreement,
- …but for a **direct legal inference as to the true boundary line.** It is held to be proof of **so conclusive** a nature that the party is precluded from offering any evidence to the contrary. Unless the acquiescence has continued for a **sufficient length of time** to become thus conclusive, it is of no importance.
- **The rule seems to have been adopted as a rule of repose,** with a view to the quieting of titles; and **rests upon the same reason as our statute prohibiting the disturbance of an adverse possession** which has continued for twenty years.

Acquiescence–History New York (2)
Baldwin v. Brown: 16 N.Y. 359 (1857)

- These facts would seem to bring the case clearly within **the settled rule in this state, which forbids the disturbance of a practical location which has been acquiesced in for a long series of years.**
- **The counsel for the appellant takes the ground that the rule in question is based upon the idea of an agreement,** either express or implied, as to the location of the line, and he cites numerous cases to show that an agreement which is founded upon a mutual mistake of facts is not obligatory upon the parties. **But I apprehend the counsel is in error in assuming that a parol agreement, either actual or supposed, fixing the boundaries, lies at the foundation of the rule.**

Missouri: Acquiescence (1)
Blair v. Smith: 16 Mo. 273 (1852)

- Gay acquired by deed … on the 18th of April, 1828, a lot of ground at the corner of Chesnut and Front streets, bounded south by Chesnut street.
- Gay immediately entered into possession, and commenced building a warehouse in the fall of 1828, …built on what he claimed to be the north line of his lot, which said lot was bounded north by the lot of A. L. Magenis.
- Gay held possession of the same up to the great fire of 1849, …rebuilding on the same lines and covering the same ground occupied by the north wall of said warehouse.

Missouri: Acquiescence (2)
Blair v. Smith: 16 Mo. 273 (1852)

- In 1832, said Magenis, the ancestor of the plaintiffs, built a warehouse on his lot and used the north wall of Gay for the south wall of his warehouse, and paid Gay therefor the sum of one hundred dollars.
- Magenis resided in St. Louis during all these transactions, till his death, in 1848, and during all that time, Gay held the uninterrupted and peaceable possession of his said warehouse and lot, claiming the same; and such possession was continued till the commencement of the suit.

Missouri: French vs. English Foot (3)
Blair v. Smith: 16 Mo. 273 (1852)

- The land claimed is twenty-three inches, being the difference between thirty-one feet French, and thirty-one feet English measure.
- Magenis also occupied his building all that time.

Missouri: Acquiescence vs. Estoppel (4)
Blair v. Smith: 16 Mo. 273 (1852) (Headnotes)

- Where the owners of contiguous lots mutually establish a boundary line and build up to it, and use and occupy according to it, for a period long enough to show their **agreement and acquiescence**, although less than the period which would be a bar under the statute of limitations, they, and those claiming under them, will be **estopped** from afterwards claiming a different boundary.

Missouri: Misunderstood Doctrine (1)
Cope v. Beltram: 594 S.W.2d 319 (1980)

- Defendants misunderstand the doctrine they seek to apply.
- Tillman is an exhaustive review of the entire doctrine.
- Tillman recognizes that if there be an express agreement, the fence becomes the line, *supra at 107.*
- No such agreement existed in Tillman, and none exists here.

Missouri: Misunderstood Doctrine (2)
Cope v. Beltram: 594 S.W.2d 319 (1980)

- Tillman then traces the development of the doctrine and squarely holds that when a fence line is claimed as a property line by long acquiescence the fence must exist for the statutory period before the possession becomes adverse and thereafter another statutory period must elapse before the adverse use ripens into title,

Missouri: Acquiescence is "Murky" (1)
Conduff v. Stone, 968 S.W.2d 200 (1998)

- The doctrine of boundary by acquiescence is somewhat murky, and the parties disagree about the meaning of the applicable cases.

Acquiescence vs. Prescription: Missouri (1)
Weiss v. Alford: 267 S.W.3d 822; 2008

- The court's judgment **erroneously combines the theories of boundary by acquiescence with the theory of adverse possession.**
- These are **distinct theories with different elements.**
- As we shall explain, it is possible to establish a boundary by acquiescence and thereafter establish title by adverse possession to property bounded in part by such a boundary.

Acquiescence: Missouri (2)
Weiss v. Alford: 267 S.W.3d 822; 2008

- We begin our discussion with an explanation of the theory of boundary by acquiescence.
- **If a boundary line between properties is disputed or uncertain**, the parties may fix the boundary line by an **express written or oral agreement** …
- …or by an agreement that is presumed as a result of long acquiescence.
- If the agreement is presumed from long acquiescence, this legal theory is referred to as "boundary by acquiescence."

Acquiescence: Missouri (3)
Weiss v. Alford: 267 S.W.3d 822; 2008

- To prove a boundary by acquiescence, a party must show
- 1) an **uncertain or disputed boundary** between adjoining landowners and
- 2) acquiescence of the adjoining landowners in a definite and certain dividing line, marked by natural or artificial structures, as the boundary.

Acquiescence: Missouri (4)
Weiss v. Alford: 267 S.W.3d 822; 2008

- Acquiescence is shown by
- a) mutual conduct or acts of the adjoining landowners evidencing recognition of the dividing line as the boundary,
- b) occupation and use by the parties up to the dividing line, and
- c) continuation of the mutual acts and occupation and use for a sufficiently long period of years to show the parties' mutual acceptance of the dividing line as the boundary.

Fence & Acquiescence: Missouri (5)
Weiss v. Alford: 267 S.W.3d 822; 2008

- Although parties **may establish a fence line as a boundary under this theory**, …
- …the **mere existence of a fence at or near the boundary line between two properties is not enough**, standing alone, to establish a boundary agreement.
- "[T]he mere acquiescence in the existence of a fence as a barrier, **for convenience or for any reason other than a boundary** will not amount to an agreement as to a boundary or establish it as a true line."

Fence & Acquiescence: Missouri (6)
Weiss v. Alford: 267 S.W.3d 822; 2008

- **Acquiescence establishes a boundary; adverse possession, on the other hand, establishes title.**
- For a non-title holder to obtain title by adverse possession of land up to a boundary line established by acquiescence, …
- …the non-title holder must first demonstrate that a boundary by acquiescence has been established.

Fence & Acquiescence: Missouri (7)

Weiss v. Alford: 267 S.W.3d 822; 2008

- Possession does not become adverse and the ten year period does not begin to run until the agreement by acquiescence has been established.
  Thus, to show adverse possession of property bounded in part by a boundary by acquiescence, …
- …the ten year time period does not begin to run until after a sufficient time has elapsed to satisfy the requirements of acquiescence.

Missouri Acquiescence De-Emphasized (1)

Fischer v. First American Title:
388 S.W.3d 181 (2012)

- Conversely, a boundary by acquiescence exists if there is an uncertain boundary and the landowners fix the boundary by an "agreement that is presumed as a result of long acquiescence." *Weiss v. Alford, 267 S.W.3d 822, 827 (Mo. App. E.D.2008).*
- In a boundary by acquiescence claim, "[a]n agreement as to a boundary line, 'may be proved by an express agreement or by acquiescence in a fence as a boundary for a period of time sufficient to evidence a mutual acceptance of the dividing line as the common boundary by the adjoining owners.'"

Missouri Acquiescence De-Emphasized (2)

Fischer v. First American Title:
388 S.W.3d 181 (2012)

- Notably, acquiescence establishes a boundary, not title to land…
- Once there is an express agreement or acquiescence on the part of the landowners, possession becomes adverse for the purpose of running the statute of limitations period for adverse possession.

Missouri Acquiescence De-Emphasized (3)

Fischer v. First American Title:
388 S.W.3d 181 (2012)

- When adverse possession and boundary by acquiescence are discussed together, the importance of establishing acquiescence in the boundary as a boundary might be overlooked.
- But the distinction is critical in a case such as the present one. First, because a claim for boundary by acquiescence does not, in itself, impact title to land, such a claim — even if successful — cannot create a defect, lien, or encumbrance upon title;

Colorado: Acquiescence Statute

38-44-109. Corners and boundaries established

- The **corners and boundaries finally established** by the court in proceedings under this article, or an appeal therefrom, **shall be binding upon all the parties, their heirs and assigns,** as the **corners and boundaries that have been lost, destroyed, or in dispute;**
- **but if it is found** that the boundaries and corners alleged to **have been recognized and acquiesced in for twenty years have been so recognized and acquiesced** in, such recognized boundaries and corners shall be permanently established.
- The court order or decree shall be recorded in the grantor-grantee index of the real property records of the county or counties in which the land lies.

Colorado: Acquiescence (2)

Brehm v. Johnson: 531 P.2d 991; 1974 Colo. App.

- Whether a fence has been acquiesced in so that it becomes the permanently established boundary respecting real property is a question of fact.
- …**Where parties mistakenly locate a fence between their properties** and thereafter conduct themselves in a manner **indicating that they claim no property beyond that fence for a period exceeding 20 years**, the fence line becomes the accepted boundary between the properties. …
- Here, the court's finding of acquiescence is supported by the evidence and will not be disturbed on review.

Maryland almost accepts Acquiescence:

Millar v. Keating:
115 Md. App. 682; 694 A.2d 509; 1997

- Recognition by neighboring owners of a fence as the true boundary between their properties and not just as a barrier, is sufficient to establish the fence as the legal line. To prevail, the party claiming must **demonstrate agreement or acquiescence for the period required to establish adverse possession**. The acquiescence must be proved by evidence which is clear, cogent and convincing.
- *[KK note: the court failed to set a firm precedent in this opinion but left the door open]*

Acquiescence is powerful in Ohio

Simon v. Kreuz: Court of Appeals No. F-96-020 (1997)

- The doctrine of acquiescence is applied in cases where adjoining landowners occupy their respective properties up to a certain line and mutually recognize and treat that line as if it were the boundary separating their properties.
- Generally**, two conditions** must be present in order for the doctrine of acquiescence to apply:
- first, the adjoining landowners must **mutually respect and treat a specific line as the boundary to their property**, and...
- … second, that line must be treated as such for a period of years, **usually the statutory time period required for adverse possession. In Ohio, the time period required to establish adverse possession is twenty-one years**.

Acquiescence between Sovereign States

Acquiescence: State Boundaries (1)

Rhode Island v. Massachusetts:
45 U.S. 591; 11 L. Ed. 1116; 1846

- …we have now only to ascertain and determine the boundary in dispute. This, disconnected with the consequences which follow, **is a simple question, differing little, if any, in principle from a disputed line between individuals.** It involves neither a cession of territory, nor the exercise of a political jurisdiction.
- In settling the rights of the respective parties, **we do nothing more than ascertain the true boundary,** and the territory up to that line on either side necessarily falls within the proper jurisdiction.

Acquiescence: State Boundaries (2)

Rhode Island v. Massachusetts:
45 U.S. 591; 11 L. Ed. 1116; 1846

- …That Massachusetts **more than two hundred years ago construed the charter** as her counsel now construe it is clear, and the facts proved authorize the conclusion…
- I am of opinion, that, in settling the above-mentioned boundary, the crown will not disturb the settlement by the two provinces **so long ago as 1713.**
- I apprehend his Majesty will confirm their agreement, which of itself is not binding on the crown, but neither province should be suffered to litigate such an amicable compromise of **doubtful boundaries.**

Acquiescence: State Boundaries (3)

Rhode Island v. Massachusetts:
45 U.S. 591; 11 L. Ed. 1116; 1846

- **No human transactions are unaffected by time.** Its influence is seen on all things subject to change. And this is peculiarly the case in **regard to matters which rest in memory, and which consequently fade with the lapse of time,** and fall with the lives of individuals.
- **For the security of rights**, **whether of states or individuals,** long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary.

Acquiescence: State Boundaries (1)

City of Sherrill v. Oneida:
544 U.S. 197; 125 S. Ct. 1478; 161 L. Ed. 2d 386; 2005

- **As between States, long acquiescence may have controlling effect on the exercise of dominion and sovereignty over territory.**
- ***Ohio v. Kentucky, ... (1973)*** ("**The rule, long-settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority."** (quoting ***Michigan v. Wisconsin, ... (1926)));***

Acquiescence: State Boundaries (2)

City of Sherrill v. Oneida:
544 U.S. 197; 125 S. Ct. 1478; 161 L. Ed. 2d 386; 2005

- ***Massachusetts v. New York, ... (1926)*** ("Long acquiescence in the possession of territory and the exercise of dominion and sovereignty over it may have a controlling effect in the determination of a disputed boundary.").
- **The acquiescence doctrine does not depend on the original validity of a boundary line; rather, it attaches legal consequences to acquiescence in the observance of the boundary.**
- ***California v. Nevada, ... (1980)*** (No relationship need exist "between the origins of a boundary and the legal consequences of acquiescence in that boundary. . . . **Longstanding acquiescence by California and Nevada can give [the boundary lines] the force of law whether or not federal authorities had the power to draw them.").**

Practical Location

Practical Location – Michigan Law Review:

Olin L. Browder, Jr.: Vol. 56, No. 4 (Feb., 1958)

- **Vagueness of theory has led in turn to vagueness and disagreement** on the facts which will merit judicial recognition. **The result has been the growth of a gnarled and hoary knot upon this branch of the law of property.** One who seeks to work his way into the core is tempted simply to lay bare a cross-section of the mass for the exercise of students of legal method.

Practical Location – Michigan Law Review:

Olin L. Browder, Jr.: Vol. 56, No. 4 (Feb., 1958)

- This theory may rather reflect a realization of the **basic problem of practical location**:
- **the bridging of the gap between a description and a boundary on the ground, and ...**
- **a revulsion against the notion of a boundary which shifts with every new survey.**

Practical Location – General questions. (1)

- 1. Did the original surveyor of a state grant mark boundary lines **concurrently with the execution of the grant**, where the marked lines are clearly at variance with the description in the grant?
- 2. Did the parties, **in doubt as to the true location of the boundary line**, come to an agreement as to the location of the line in question, (possessing, acquiescing, and/or agreeing to the presumed line for some period of time, possibly that period required for a claim by prescriptive right).

Practical Location – General questions. (2)

- 3. Did two adjoining parties **mark upon the ground what they presume to be the actual monuments** or bounds called for in their respective deed descriptions some time after the deeds are executed.
- 4. Has **all evidence of original corner monumentation disappeared,** and are ancient fences or other lines of possession presumed to constitute the best available evidence of the original boundary line?

Practical Location: Missouri (1)

Turner v. Baker: 64 Mo. 218; 1876

- Now I apprehend that **it is not necessary**, **in order to make an actual practical location control the courses and distances in a deed,** that the party making such location, or subsequently recognizing it, should in all cases know that the effect of it would be to give him less land than he would otherwise be entitled to, nor that there should be an express agreement to abide by such line.
- An **acquiescence for a length of time** is evidence of such agreement. When the line has been acquiesced in for a **great number of years by all the parties interested**, it is conclusive evidence of an agreement to that line.

Practical Location: Missouri (1)

Bartlett v. Brown: 121 Mo. 353; 25 S.W. 1108; 1894

- So it has been held that **practical location and long continued recognition and acquiescence** in a boundary are conclusive, **not upon the theory that they are only evidence of a parol agreement** establishing the line, …
- …but because **they are of themselves proof that the location is correct,** and of so controlling a nature as to preclude the contrary. ***Baldwin v. Brown, 16 N.Y. 359; Reed v. Farr, 35 N.Y. 113; Blassingame v. Davis, 68 Tex. 595, 5 S.W. 402.***

Practical Location: Missouri (1)

Tillman v. Hutcherson:
348 Mo. 473; 154 S.W.2d 104; 1941

- **Actuality of possession, and the intent with which dominion over land** is exercised, may be shown by an **almost endless combination of circumstances.**
- An oft quoted expression from ***Blair v. Smith, supra, 16 Mo. l. c. 281,*** declares the occupancy is evidential if it be "not for twenty years, not for fifteen years, but for a **length of time sufficient to show the understanding and the intention** of themselves

Cooley Dictum:
A Rule of Evidence

Cooley Dictum: Michigan. (1)

Flynn v. Glenny: 51 Mich. 580; 17 N.W. 65; 1883

- It is probable that these stakes were not the stakes planted at the time of the original platting, …
- …but there is nothing in the evidence to raise any suspicion that they had been planted without authority, or for any other purpose than to indicate the lot boundaries;
- and it is reasonable to infer that they were either the original stakes or others which had been planted in the same places when the original stakes had gone to decay.
- It seems very plain on the evidence that they were recognized by the original proprietor

Cooley Dictum: Michigan. (2)
Flynn v. Glenny: 51 Mich. 580; 17 N.W. 65; 1883

- Recently, and after these parties had been in possession of their respective lots for nearly ten years, occupying with practical recognition of the fence they had jointly constructed as the dividing line, doubt has been thrown upon it by a survey which has been made of this part of the town…
- in his opinion make his conclusions correct to a mathematical certainty, that the **lot lines on this block are all wrongly located**…
- Defendant insists upon locating the dividing lines in accordance with this survey, and complainant contends for the correctness of the practical location.

Cooley Dictum: Michigan. (3)
Flynn v. Glenny: 51 Mich. 580; 17 N.W. 65; 1883

- Purchasers of town lots have a right to locate them according to the stakes which they find planted and recognized, and no subsequent survey can be allowed to unsettle their lines.
- The question afterwards is not whether the stakes were where they should have been in order to make them correspond with the lot lines as they should be if the platting were done with absolute accuracy, but it is…
- … whether they were planted by authority, and the lots were purchased and taken possession of in reliance upon them. **If such was the case they must govern, notwithstanding any errors in locating them.**

When the Deed is NOT the intent…(1)
Cherry v. Slade's Administrator. 7 N.C. 82; 1819

- **Whenever a natural boundary is called for in a patent or deed, the line is to terminate at it,** however wide of the course called for it may be, or however short or beyond the distance specified. The course and distance may be incorrect, from any one of the numerous causes likely to generate error on such a subject; but a natural boundary is fixed and permanent, and its being called for in the deed or patent, marks, beyond controversy, the intention of the party to select that land from the unappropriated mass.

When the Deed is NOT the intent…(2)
Cherry v. Slade's Administrator. 7 N.C. 82; 1819

- **Whenever it can be proved that there was a line actually run by the surveyor, was marked and a corner made, the party claiming under the patent or deed, shall hold accordingly, notwithstanding a mistaken description of the land in the patent or deed.**

Common Grantor Doctrine

NY: Origin of the Doctrine?? (1)
Herse v. Mazza: 100 A.D. 59 (1904) (Syllabus)

- Where the owner of two adjoining lots, laid out upon a map which rendered it difficult to ascertain the precise situation of the dividing lines between the lots, after procuring the dividing line to be located by a surveyor and **having the boundary as so located plainly marked upon the ground,** …
- …**conveys the respective lots to two different parties,** who acquiesce in such survey and whose possession for some ten years conforms thereto, the boundary line as thus located and marked is conclusive, even if erroneous, upon the grantees of the lots and their successors in title.

NY: Origin of the Doctrine?? (2)
Herse v. Mazza: 100 A.D. 59 (1904) (Syllabus)

- This does not rest upon any presumption of fact that the parties agreed upon any different boundary than the deed boundary, …
- …**but upon the conclusive presumption that they found and correctly located the deed boundary.**

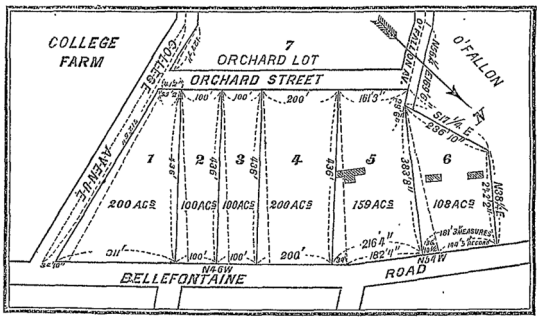
Wis.: Common Grantor Doctrine (1)
Kraus v. Mueller, 12 Wis. 2d 430 (1961)

- "However, we believe the legal principle, which is determinative of the controversy, to be that where adjoining owners take conveyances from a common grantor which describe the premises conveyed by lot numbers, but such grantees have purchased with reference to a boundary line then marked on the ground, such location of the boundary line so established by the common grantor is binding upon the original grantees and all persons claiming under them, irrespective of the length of time which has elapsed thereafter."

Mo.: Fence as Best Available Evidence (1)
Kronenberger v. Hoffner, 44 Mo. 185 (1869)

- *described as follows: beginning at a point in the western line of the Bellefontaine road, distant 860 feet 9 inches southwardly from the northern line of the tract; thence Westwardly at right angles to the said Bellefontaine road,*
- *[County Surveyor]* Considered himself bound by the stated distance; introduced his plat and said that it **included a portion of Mr. Hickman's house in lot 4;**

Mo.: Fence as Best Available Evidence (1)
Kronenberger v. Hoffner, 44 Mo. 185 (1869)



Mo.: The Actual Conveyance (2)
Kronenberger v. Hoffner, 44 Mo. 185 (1869)

- …who testified that he was agent for the university in the sale of the lots ;
- the first sale was on the 11th of May, 1853, when he sold lots 1, 5, and 6;
- that there were no improvements on lot 4, but were on lots 5 and 6;
- that there was a fence immediately south of the house on lot 5, running to Bellefontaine road,
- that was pointed out as the south boundary of lot 5 ; that " the line between lots numbered

Mo.: Common Grantor Doctrine?? (3)
Kronenberger v. Hoffner, 44 Mo. 185 (1869)

- Where there are no express calls that determine a line with certainty, evidence *aliunde* is admissible to show where the line was actually run to which the deed refers, or to which it must have reference; …
- …and its **location, so fixed by extrinsic evidence, will control the courses and distances** named in the deed or in the survey.

Mo.: Cooley Dictum?? (4)
Kronenberger v. Hoffner, 44 Mo. 185 (1869)

- The right to prove the true line of the survey to which the deed refers, and which it follows, **does not depend upon the rules applicable to ambiguities in written instruments,** though it has a strong analogy to latent ambiguities.
- It is not a question of construction, but a question of fact.
- There may be no ambiguity, and yet it may be impossible to locate the land with- out extrinsic information.

Mo.: The "Careless Surveyor" (5)
Kronenberger v. Hoffner, 44 Mo. 185 (1869)

- The carelessness of the surveyor, shown by his own map, in omitting half a chain in his first line, and in his false computations of quantity, only adds another illustration to the necessity of some more certain mode of finding the established boundaries of our possessions than reliance upon the description of careless surveyors, or upon the perfection of instruments, the best of which are imperfect.

Mo.: Common Grantor Doctrine (1)
Whitehead v. Ragan, 106 Mo. 231 (1891)

- …**when the subdivision was made, stones were planted to mark the four corners of lot 1**; that, …
- …after she conveyed her interest in lot 1 to Kritzer in 1870, the line between the stones planted for the southwest and southeast corners of lot 1 was adopted by them as the true division line between lots 1 and 4, and was so recognized and used until plaintiff purchased lot 1;
- … that the north and south lines of the subdivision on the west side were fifty-one feet shorter than was shown by the plat; **and that the division fence was on the line so marked, held and recognized.**

Mo.: Common Grantor Doctrine (2)
Whitehead v. Ragan, 106 Mo. 231 (1891)

- The plat is only intended to be a representation of the actual survey as made upon the land itself.
- It is in the nature of a certified copy of an instrument which will be controlled by the original.
- If the line between lots 1 and 4 was located, upon the land when surveyed and subdivided, and can now be ascertained and determined, that line will constitute the true division line between the lots though it con- flicts with the description given in the plat.

Neb.: Common Grantor Doctrine (1)
Huffman v. Peterson: 272 Neb. 62 (2006)

- The common grantor rule provides that where conveyances from a common grantor to adjoining landowners describe the premises conveyed by lot numbers, but adjoining owners purchase with reference to a boundary line then marked on the ground, the boundary line, as marked on the ground by the common grantor, is binding upon such adjoining landowners and all persons claiming under them irrespective of the length of time which has elapsed thereafter.

Neb.: Common Grantor Doctrine (2)
Huffman v. Peterson: 272 Neb. 62 (2006)

- This equitable rule is designed to ascertain the intention of the parties with respect to the location of premises described by lot number in a conveyance which is executed by a grantor who conveys only part of an area of land owned by him.

Doctrine of Merger & Unwritten Rights

Merger & Boundaries: Colorado (1)

Salazar v. Terry: Colo. 911 P.2d 1086 (1996)

- The fence, which runs in a north-south direction, is located at the western boundary of the Terry Tract and at the eastern boundary of that portion of the Salazar Tract. **The deeds transferring both tracts of land consistently have referred to the government subdivision lines and not the fence** as the boundary.
- survey revealed that the deviation between the government subdivision lines and the fence varies anywhere from 100 to 160 feet along her property's western boundary. By Terry's reckoning, the fence is east of the government subdivision lines and is located inside the Terry Tract.

Merger & Boundaries: Colorado (2)

Salazar v. Terry: Colo. 911 P.2d 1086 (1996)

- In response, Salazar claimed adverse possession and asserted a counterclaim that the fence line was acquiesced in and recognized by the parties or their predecessors in title for twenty years under the terms of section 38-44-109, 16A C.R.S. (1982).
- …between November 3, 1977, and November 18, 1977, **Mills Ranches owned both the Salazar and Terry Tracts simultaneously for fifteen days. During this fifteen-day period, Jerry Mills, as sole stockholder and principal of Mills Ranches, was the common owner of both tracts.** As mentioned above, all these conveyances refer to the government subdivision lines.

Merger & Boundaries: Colorado (3)

Salazar v. Terry: Colo. 911 P.2d 1086 (1996)

- When a common owner acquires title to adjoining tracts, **any agreement as to division that had previously been made while the ownership was in two different persons ceases to exist or be effective**. . . .
- Moreover, a **division fence between two properties loses its legal significance when separate ownership of the parcels is merged** in one owner. . . .
- Consequently, the **common ownership** acquired by Mills Ranches in 1977 **nullified any significance the fence had previously** been accorded as a boundary between separately held parcels. Mills Ranches as a subsequent grantor **could therefore freely describe its conveyance by boundaries making no reference to the fence.**

Merger & Boundaries: Colorado (4)

Salazar v. Terry: Colo. 911 P.2d 1086 (1996)

- The common ownership of the two tracts of land eradicated the significance of any acquiescence as to the legal boundary existing prior to the period of common ownership as a matter of law.
- In practical effect, **once the common ownership destroyed the prior acquiescence** of the fence as boundary, **the twenty-year clock,** for purposes of the acquiescence statute, started ticking anew. *See § 38-44-109, 16A C.R.S. (1982).* **Similarly, the eighteen-year clock**, for purposes of adverse possession, also began again. See § 38-41-101(1), 16A C.R.S. (1982).

Merger & Easements: Colorado (5)

Salazar v. Terry: Colo. 911 P.2d 1086 (1996)

- Our conclusion is reinforced by the **doctrine of merger as it applies to extinguishment of easements.**
- Easements, such as a "right of way," burden one estate to the benefit of the other estate. The burdened estate is servient to the dominant estate which benefits from the easement.
- **When the dominant and servient estates come under common ownership, the need for the easement is destroyed.**
- Specifically, "if the owner of an easement in gross comes into ownership of an estate in the servient tenement, the easement terminates to the extent that the ownership of that estate permits the uses authorized by the easement."

Merger & Easements: Colorado (6)

Salazar v. Terry: Colo. 911 P.2d 1086 (1996)

- see also *Breliant v. Preferred Equities Corp., 109 Nev. 842, 858 P.2d 1258, 1261 (Nev. 1993)*
- ("**When one party acquires present possessory fee simple title to both the servient and dominant tenements, the easement merges into the fee of the servient tenement and is terminated**.");
- *Witt v. Reavis, 284 Ore. 503, 587 P.2d 1005, 1008 (Or. 1978)*
- ("**if at any time the owner in fee of the dominant parcel acquires the fee in the servient parcel not subject to any other outstanding estate, the easement is then extinguished by merger**") (emphasis in original).

Merger & Easements: Colorado (7)

Salazar v. Terry: Colo. 911 P.2d 1086 (1996)

- **Furthermore, the easement will not revive if the estates are separated** once again **"without the same type of action required to bring an easement into existence in the first place."**
- … ("upon severance, a new easement authorizing a use corresponding to the use authorized by the extinguished easement may arise;" however, it arises only "because it was newly created at the time of the severance").

Merger & Boundaries: Illinois (1)

Conklin v. Newman: 278 Ill. 30; 115 N.E. 849; 1917

- **It is undisputed** that during the time Benjamin Newman owned the west forty and Rice owned the east forty, Benjamin Newman owned and maintained the south half of this fence as appurtenant to the west forty.
- **When he acquired title also to the east forty, and thus became the owner of the whole eighty-acre tract,** the two portions of this **fence ceased to be appurtenant to any particular parts of the tract,** and …
- …any **agreement and division** that had theretofore been made while the ownership of the two forties was in different persons **ceased to exist or to be effective**.

Merger & Boundaries: Utah (1)

Orton v. Carter: 970 P.2d 1254; 1998

- Our holding above essentially disposes of this claim. It is true that **common ownership of adjoining properties, even for a brief season, restarts the clock for determining boundary by acquiescence**.
- ***See Salazar v. Terry, 911 P.2d 1086, 1089 (Colo. 1992)*** (en banc) (holding that two weeks of joint ownership was sufficient to disrupt the acquiescence [**11] time period).

Merger & Boundaries: Missouri (1)

Patton v. Smith: 171 Mo. 231; 71 S.W. 187; 1902

- But in addition to all this, there is one fact in this case that completely **dispels all shadow of title by limitation** in the defendant, to-wit:
- In **1883 Remelius became the owner of both tracts,** and the evidence shows that when some question arose thereafter as to the location of the survey line, he said it made no difference, inasmuch as he owned all the land on both sides of the line, wherever it might be.
- *[KK-continued]*

Merger & Boundaries: Missouri (2)

Patton v. Smith: 171 Mo. 231; 71 S.W. 187; 1902

- So that **even if the possession of Kennedy had been hostile** to Remelius, and …
- …even if Kennedy had intended to claim to the line established as the survey line by Banister, without regard to whether that was the true line or not, and…
- …even if Kennedy and Remelius had agreed upon the line established by Banister, nevertheless…
- **when Remelius became the owner of both tracts of land, all such questions became immaterial;**

Merger & Boundaries: Missouri (3)

Patton v. Smith: 171 Mo. 231; 71 S.W. 187; 1902

- …there was **no adverse holding thereafter by Remelius as the owner of one tract against himself** as the owner of the other tract, and there was no longer any question of any agreed line dividing the two tracts. For as Remelius said **those matters had become immaterial by reason of his ownership of both tracts.**
- And so the matter remained for the five or six years that Remelius lived after he became the owner of both tracts, and so they remained during all the time his heirs owned the land.

Kentucky – Merger and Boundary Line

Caudill v. Bates: 286 S.W.2d 922; 1955

- Appellants urge that the fence has converted the Pigman tract and the tract in question into one connected body of land so that actual possession at any point within the fenced enclosure is actual possession of the entire enclosure. **They rely on** ***Elliott v. Hensley, 188 Ky. 444, 222 S.W. 507, 509,*** in which it was said:
- **when the owner of contiguous tract of land, that he has acquired by separate deeds or patents, converts them by fenced inclosure into one body, the interior lines will be obliterated,**

What is the responsibility of the Surveyor ?? Location:

- **Fence Lines**
  - Height, type, any indications of age
  - Any evidence of previous fencing
  - Bases of old posts
  - Determination of Age where wire fences are attached to trees

What is the responsibility of the Surveyor?? Location:

- **Other Barriers**
  - Hedgerows
  - Tree lines
  - Retaining Walls
  - "No Trespassing" Signs
  - Gates
  - Guardhouses

What is the responsibility of the Surveyor?? Location:

- **Evidence of Cultivation**
- Note herd animals within enclosures
- Look for evidence of balk lines at perimeter
- Cultivated ground or growing crops
- Differences in tree size and type (Woodlands)
- Orchards (old stumps??)
- Flower Beds
- Mowing

Evidence of land use

- Playground equipment or Lawn Furniture
- Parked cars or worn areas for parking
- Cutting of timber
- Worn wheel tracks or road beds
- No Trespassing signs
- Cattleguards

Collect Evidence of past land use

- U.S.D.A. aerial photographs
- Old photographs from family albums
- Newspaper photos
- Receipts for cattle sales, feed and seed purchase
- Documents pertaining to land planning
- Public office records (areas where public use is an issue)
- Affidavits from Neighbors???

Questions??