

Adverse Possession & Prescriptive Easements in Maryland

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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 – Early History.

Fraley v. Minger; 829 N.E.2d 476; 2005 Indiana.

- ▶ ...As early as 1720 B.C. the Code of Hammurabi discussed adverse possession and the misuse of land, including provisions that punished land waste, rewarded long-term development, and allowed one who worked the land of another for three years to take and keep the land...
- ▶ ...In England, the history of adverse possession can be traced back to the Norman Conquest in 1066. ...
- ▶ The common law doctrine of adverse possession was applied to resolve land disputes between colonists in Virginia as early as 1646, where it was used "in an effort to help resolve the proverbial conflicts between speculators and squatters." ...
- ▶ The first statutory recognition of adverse possession in the New World appeared in a 1715 statute of limitations in Ohio.

Adverse Possession – Early History Code of Hammurabi – circa 1720 B.C.

- ▶ If a chieftain or a man leave his house, garden, and field and hires it out, and someone else takes possession of his house, garden, and field and uses it for three years: if the first owner return and claims his house, garden, and field, it shall not be given to him, but he who has taken possession of it and used it shall continue to use it.

Adverse Possession – Early History 12 Tables – Imperial Rome

- ▶ Table VI, : *Usucapio of movable things requires one year's possession for its completion; but usucapio of an estate and buildings two years.*
- ▶ (note: *usucapione* remains the technical term for adverse possession in current Italian civil code.

Adverse Possession: Early English Statutes

- ▶ **Statute of Westminster I, 3 Edward I, c. 39** (1275)
- ▶ **Statute of 32 Henry VIII, c. 2–3** "fixed a statutory period of limitations for the issuance of writs of right, [and] sixty years' possession was considered sufficient evidence of enjoyment from the time of *Richard I* to raise a presumption of a grant..."
- ▶ **Statute 21 James I, c. 16** (1623). adopts the modern method of limiting the right of entry, and so the action of ejectment, to within twenty years next after the right of entry accrues. The right of entry does not accrue until someone initiates an adverse possession.

Not the same as agreement

- ▶ "there is a difference between the transfer of title (adverse possession) or ownership of land vs. fixing the location of a boundary (acquiescence, estoppel, parol agreement and practical location), which, as you know, requires its own certain elements, and does not serve to transfer title otherwise it would be contrary to the statute of frauds." – Don Wilson by email May 21, 2010

Adverse Possession (General)

- ▶ Remember "OCEANS"
- ▶ **O**ccupation,
- ▶ **C**ontinuous,
- ▶ **E**xclusive,
- ▶ **A**dverse (to the true owner)
- ▶ **N**otorious (open and),
- ▶ for the **S**tatutory Period.

Relevant Statutes: Maryland:

- ▶ § **5-103** – Statute of Limitations – 20-year prescriptive period
- ▶ § **8-107** – Landlord/tenant relationships and payment of rents
- ▶ § **14-108** – Quieting title
- ▶ § **14-852** – 7-year statute of limitations for certain tax deeds.

Recent Adverse Claim: Maryland: (1)

Senez v. Collins:

182 Md. App. 300; 957 A.2d 1057; 2008

- ▶ At the time the parties purchased their respective properties, the properties were separated by a concrete retaining wall (the "Wall"), which did not precisely track the property line.
- ▶ The Wall, approximately 115 feet long, extended almost the entire length of the boundary between the properties. The disputed area contains part of a concrete boat ramp that extends past the sea wall, providing access from the Senez Property to Norman Creek. The boat ramp is entirely on the Senez side of the Wall. But, because...
- ▶ ... the Wall does not follow the boundary, a portion of the boat ramp falls on the Collins side of the property line.

Background Information: Maryland: (2)

Senez v. Collins:

182 Md. App. 300; 957 A.2d 1057; 2008

- ▶ Shortly before Mr. Myers sold his property to appellant in 2000, he obtained a survey of the property, to ensure that a fence he intended to construct on the southern boundary of his property (i.e., the opposite side from the Collins Property) correctly followed the property line.
- ▶ The surveyor informed Mr. Myers that, on the northern side of his property, there was "about a foot difference" between the Wall and the actual property line,

Justifications for Prescription: Maryland: (3)

Senez v. Collins:

182 Md. App. 300; 957 A.2d 1057; 2008

- ▶ Adverse possession is a method whereby a person who was not the owner of property obtains a valid title to that property by the passage of time
- ▶ "A number of policy justifications for the doctrine of adverse possession have been advanced."
- ▶ Most commonly, "courts justify the existence and application of adverse possession" for one or more of the following reasons:

Justifications for Prescription: Maryland: (4)

Senez v. Collins:

182 Md. App. 300; 957 A.2d 1057; 2008

- › First, there is a societal interest in "quieting" title to property by cutting off old claims.
- › Second, there is a desire to punish true owners of land who neglect to assert their proprietary rights.
- › Third, there is a need to protect the reliance interests of either the adverse possessor or others dealing with the adverse possessor that are justifiably based on the status quo.
- › Last, an efficiency rationale, asserting a goal of promoting land development, seeks to reward those who will use land and cause it to be productive.

Why do the courts allow Adverse Possession?

Historical Justifications for Prescription

Cumulus Broadcasting Inc. v. Shim (Tennessee)

226 S.W.3d 366 (2007)

- › 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.

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**, and that therefore he who uses land is preferred in the law to he who does not, even though the latter is the rightful owner."

Adverse Possession: 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**."

Basic Requirements: Maryland: (5)

Senez v. Collins:

182 Md. App. 300; 957 A.2d 1057; 2008

- › "To establish title by adverse possession, the claimant must show possession of the claimed property for the statutory period of 20 years. . . .
- › Such possession must be **actual, open, notorious, exclusive, hostile, under claim of title or ownership, and continuous or uninterrupted.**"
- › Initially, "[t]he burden of proving title by adverse possession is on the claimant."

Basic Requirements: Maryland: (6)

Senez v. Collins:

182 Md. App. 300; 957 A.2d 1057; 2008

- › Broadly, the elements of adverse possession can be placed in three groups: possession must be
- › (1) actual, open and notorious, and exclusive;
- › (2) continuous or uninterrupted for the requisite period; and
- › (3) hostile, under claim of title or ownership.
- › In evaluating a claim, the pertinent inquiry is whether the claimant has proved the elements 'based on the claimant's "objective manifestation" of adverse use, rather than on the claimant's subjective intent.

Terms of Art: Maryland: (7)

Senez v. Collins:

182 Md. App. 300; 957 A.2d 1057; 2008

- › Notably, the classic formulation of the elements of adverse possession contains several words that are terms of art.
- › "The plethora of phrases ...may confuse rather than clarify." Ordinarily, "[a]cts that make possession 'actual' are . . . sufficient to make it visible and notorious." ...Moreover, "the terms 'claim of title,' 'color of title,' 'claim of ownership,' and 'claim of right,' all . . . are alternative methods of proving that the claimant's possession was sufficiently 'hostile' to be 'adverse.'"
- › In other words, "a 'claim of title or ownership' is not a separate and distinct element of an adverse possession claim, in addition to hostility."

Open and Notorious: Maryland: (8)

Senez v. Collins:

182 Md. App. 300; 957 A.2d 1057; 2008

- › The element of "open and notorious" pertains to the concept of constructive notice to the title owner. Possession "must be visible and notorious, so that the owner may be presumed to have notice of it."
- › However, actual notice to the owner is not required. "Possessory acts of dominion over land may be sufficient to charge the record owner with knowledge that the land is adversely possessed."

Exclusive isn't really...: Maryland: (9)

Senez v. Collins:

182 Md. App. 300; 957 A.2d 1057; 2008

- › "Exclusive possession means that the claimant must possess the land as his own and not for another."
- › "[E]xclusive possession simply means that the disseisor must show an exclusive dominion over the land and an appropriation of it to his own use and benefit. An adverse claimant's possession need not be absolutely exclusive, however; it need only be a type of possession which would characterize an owner's use."

Strip used as part of parcel: Maryland: (10)

Senez v. Collins:

182 Md. App. 300; 957 A.2d 1057; 2008

- › We find no support in any of our cases for the principle apparently adopted by the circuit court, i.e., that ...
- › ...an adverse claimant's possessory acts might lose their possessory character if the acts also benefit the adjacent lands that the adverse claimant holds by title. The circuit court cited no authority for this proposition, nor do appellees.
- › Indeed, the case law tends to support the opposite view:
- › When an adverse claimant has used the disputed land in the same manner as adjacent land she owns by title, such acts are, if anything, further evidence of actual possession.

Tacking and Prescription: Maryland: (11)

Senez v. Collins:

182 Md. App. 300; 957 A.2d 1057; 2008

- › When, as here, no single adverse possessor has held the property in question for the statutory twenty-year period, the court must consider whether successive periods of adverse possession may be tacked together to meet the requisite duration.
- › Tacking will only be permitted where there is privity of estate between the successive adverse possessors.
- › even where privity exists between successive possessors, it must be privity of estate in the adversely possessed land.
- › possession cannot be tacked to make out title by prescription where the deed by which the last occupant claims title does not include the land in dispute.

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.– Adverse Possession Theory: (1)

Johnson v. Thomas: 23 App. D.C. 141; 1904 U.S. App.

- ▶ Elizabeth Thomas, the appellee here, ... who received what may be designated as the eastern tract, with the dwelling thereon, in which she had resided with her grandmother, **continued to occupy this tract of 8 acres**, and has occupied it down to the present time, although it is understood to be **without fencing or inclosure of any kind**.

D.C.– Adverse Possession Theory: (2)

Johnson v. Thomas: 23 App. D.C. 141; 1904 U.S. App.

- ▶ Also **under the mistaken impression that about 3 acres**, constituting the eastern part of the middle tract, which had been allotted by the will and the executor's deed to the heirs of George Butler, **was part of her tract of 8 acres**, she **occupied this part also, has cultivated it**, or part of it, from year to year in a fashion, and has continued to hold it in that way from the year 1862 to the present time.

D.C.– Adverse Possession Theory: (3)

Johnson v. Thomas: 23 App. D.C. 141; 1904 U.S. App.

- ▶ The complainant is ...so ignorant, indeed, that **she does not seem to appreciate even now that she has taken possession of any more property than she was entitled to do under the will** of Elizabeth Butler. **Under that will she was entitled to 8 acres; she is in possession or claims to be in possession of 11 acres**; and yet she protests that she does not want more than she was entitled to have under the will, but she claims that she was entitled under the will to all the property which she claims now, **notwithstanding repeated surveys to the contrary**.

D.C.– Adverse Possession Theory: (4)

Johnson v. Thomas: 23 App. D.C. 141; 1904 U.S. App.

- ▶ But, as she specifically claims the property in controversy as her own,
- ▶ ...and as she has exercised unequivocal acts of ownership over it adverse to all the world for twenty years and upwards,
- ▶ ...her mistake cannot be held to operate against her acquisition of title by adverse possession.

Identification by the Senses: Maryland: (12)

Senez v. Collins:

182 Md. App. 300; 957 A.2d 1057; 2008

- ▶ For tacking to apply, the land in dispute need not be included in the deed by which the last occupant claims title, "provided the land in question [is] contiguous to that described in a deed, and that lands both titled and untitled [are] part of a close, apparent by reason of physical boundaries such as fences or hedges."
- ▶ "[T]wo possessions will be tacked if it appears that the adverse possessor actually turned over possession of that part as well as of that portion of the land expressly included in his deed."

Interrupting Adverse Claim: Maryland: (13)

Senez v. Collins:

182 Md. App. 300; 957 A.2d 1057; 2008

- ▶ "All the authorities agree that an entry, to have [the] effect [of interrupting the statutory period], 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."
- ▶ "[T]he 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."

Interrupting Adverse Claim: Maryland: (14)

Senez v. Collins:

182 Md. App. 300; 957 A.2d 1057; 2008

- ▶ A mere physical entry by the owner is not enough, for, in order to defeat another's adverse possession, the owner's entry must clearly indicate to the occupant that his possession is invalid and his right challenged. It must be open and notorious and bear on its face an unequivocal intention to take possession...
- ▶ "In all cases, however, the intent, as expressed, or evidenced by acts of ownership, is that which governs the effect of the entry."
- ▶ In order to retake possession, an owner must engage in "[p]ossessory acts of dominion over [the] land"

Hostile, Claim of Right: Maryland: (15)

Senez v. Collins:

182 Md. App. 300; 957 A.2d 1057; 2008

- ▶ Possession must be hostile, under claim of title or ownership.
- ▶ "Hostile" is a term of art in the law of adverse possession.
- ▶ Maryland courts have long recognized that the hostility necessary to make an occupancy or use adverse "does not necessarily import enmity or ill will."
- ▶ Rather, the term "hostile" signifies a possession that is adverse in the sense of it being "without license or permission," and "unaccompanied by any recognition of... the real owner's right to the land."

Hostility Requirement

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."

Hostile vs. Claim of Right: Maryland: (20)

Senez v. Collins:

182 Md. App. 300; 957 A.2d 1057; 2008

- ▶ the requirement of hostility may be proved by showing, ...that possession was either "under color of title" or "under claim of right."
- ▶ There is no "'hostile' circumstance that could not be adequately characterized by one of these two terms."

Conquest and "Flying the Flag: Ohio

Grace v. Koch: 81 Ohio St. 3d 577 (1998)
Ohio 607; 692 N.E.2d 1009

- ▶ "the tenant **must unfurl his flag on the land**, and keep it flying so that the owner may see, if he will, that an **enemy has invaded his dominions** and planted his **standard of conquest.**"

"Hostility" Required for Adverse Possession" (North Carolina)

- ▶ *PEGG v. JONES – NO. COA07–147 Filed: 4 December 2007 (N.C.)*
- ▶ Additionally, the trial court made a finding of fact that there was no adverse possession after the incident in which Cecil **pointed a loaded shotgun at Carl Pegg** in 1965. Specifically, the **trial court stated that it did "not infer that the act of pointing a gun and telling Carl Pegg to get out means that Cecil Jones considered that he owned any property in fee simple** or that that message was communicated to Dr. Pegg."

Presumption of Adverse use?: Maryland: (16)

Senez v. Collins:

182 Md. App. 300; 957 A.2d 1057; 2008

- ▶ a claimant has the burden to prove title by adverse possession.
- ▶ But, once a claimant has made a satisfactory showing as to open, continuous use for the statutory period, "[t]he burden then shifts to the landowner to show that the use was permissive
- ▶ "In establishing the hostility of a particular use, a showing that the use has been made "openly, continuously, and without explanation for twenty years," justifies a presumption that such use was adverse."

Fence less significant when...: Maryland: (17)

Senez v. Collins:

182 Md. App. 300; 957 A.2d 1057; 2008

- ▶ The existence of a visible line of demarcation ordinarily does not constitute evidence of adverse possession when:
 - ▶ a) it was created by a record owner, for the record owner's own purposes, within the record owner's land; or
 - ▶ b) it was created by a party claiming title by adverse possession for the purpose of claiming the visible line of demarcation as a boundary only if it is in fact coincident with the actual boundary.

Fence More Significant when... Maryland: (18)

Senez v. Collins:

182 Md. App. 300; 957 A.2d 1057; 2008

- ▶ 2) The existence of a visible line of demarcation ordinarily constitutes some evidence of adverse possession when:
 - ▶ a) it was created by a party claiming title by adverse possession for the purpose of claiming the visible line of demarcation as a visible boundary delineating the extent of the claimed adverse possession; or
 - ▶ b) there is no evidence to show by whom and for what purpose the line of demarcation was created.

When does Title Transfer?

When does title transfer? Maryland: (1)

Campbell v. Fletcher: 37 Md. 430; 1873

- ▶ the maternal grandfather of the plaintiffs, under whom they claim, was in 1808 in actual, adverse and notorious possession, by enclosure, of a parcel of ground, of which the lot in controversy is a part; and in 1818 died in possession as aforesaid, leaving a paper writing purporting to be his last will...
- ▶ daughter, "Philipina," continued to live in the house, and to possess the premises aforesaid, from the death of her father in 1818 till 1840, when the house was burned down...
- ▶ During that period she continued to claim the property, and exercised acts of ownership...

When does title transfer? Maryland: (2)

Campbell v. Fletcher: 37 Md. 430; 1873

- ▶ It appears further that when in 1840, by reason of the destruction of the dwelling, which rendered it impossible for her to reside upon the property, she ceased to occupy it, that she by no means abandoned her title and claim to it as owner; but continued to assert the same till her death in 1855.
- ▶ Having acquired a title by such possession as gives right, continuing for more than twenty years, her legal seisin continued after she had removed from the property, and her title descended, on her death, to the plaintiffs, her heirs at law.

When does title transfer? Maryland: (1)

Broadfording Church v. Western Maryland Railway:
262 Md. 84; 277 A.2d 276; 1971

- ▶ If Dorsey's pleas can be substantiated by competent testimony, he acquired title to the disputed right of way in 1957 by adverse possession, and if he did, from 1957 on, he held a title which he could have alienated by conveyance or devise.
- ▶ The circumstance that he specifically excluded the right of way in the deed to Beavers left title in him, ...which he did not lose by removing from the property, and could only have lost if the property were adversely possessed by another, *Doe v. Fletcher, 37 Md. 430 (1873)*.

When does title transfer? Maryland: (2)

Broadfording Church v. Western Maryland Railway:
262 Md. 84; 277 A.2d 276; 1971

- ▶ See also, 3 American Law of Property § 15.14 at 828-30 (1952), which says, in part:
- ▶ " * * * It has even been stated that after the statute has fully run the title should be treated as having vested at the date of inception of the adverse possession.
- ▶ Whatever the date, having once vested it acquires the attributes of other vested titles in that it cannot be divested by parol abandonment, by the re-entry of the former owner, or by a failure to continue in possession."

When does title transfer? Ohio: (1)

Jennywine v. Heinig: 1995 Ohio App.No. 95 CA 12

- ▶ An adverse claimants' possession need not be absolutely exclusive; it need only be the type of possession which would characterize an owner's use. In other words, the adverse possessor must exclude third parties to the extent that the true owner would do the same.
- ▶ Title to property by adverse possession **ripens into an absolute interest after the statutory period has expired.**
- ▶ **At the same time, the record owner is divested of his estate in the property.** Id. See, also, *McNeely v. Langan (1871), 22 Ohio St. 32, 37.*

When does title transfer? – Mass. (1)

Pilkons v. Mendonca: 19 LCR 337; 2011

- ▶ **For a use to be exclusive** it "must encompass a 'disseisin' of the record owner...this means **exclusion not only of that owner but of all third persons to the extent that the owner would have excluded them.**" *Peck v. Bigelow; 34 Mass. App. Ct. 551. 557, 613 N.E.2d 134 (1993).*
- ▶ Here, the **Driveway Area** is part of the driveway that services the Pilkons Property exclusively. It has been used exclusively by Plaintiff, and his predecessors-in-title, and their invitees. The driveway was not shared, nor was it used by any other party from **1969 until 2006**

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."

When does title pass? – Colorado: (1)

Welsch v. Smith: 113 P.3d 1284; 2005 Colo.

- ▶ **Removal of a fence after the land has been adversely possessed for more than the statutory period would not necessarily rebut such a presumption.**
- ▶ (if a fence encloses the property for the statutory period, title vests in the adverse possessor even if the fence is subsequently removed).
- ▶ Any act, other than abandonment, which is inconsistent with ownership and **occurs after title by adverse possession is vested** does not defeat that title.

D.C. When does title pass?

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

- ▶ Title to property acquired by adverse possession matures **into an absolute fee interest after the statutory prescriptive period has expired.**...
- ▶ The Supreme Court has held that **the lapse of time** provided by the statute of limitations not only bars the original owner's remedy, but also extinguishes his right, and **vests a perfect title in the adverse holder.**
- ▶ Title to land acquired by adverse possession is as **perfect as title acquired by deed** from the record owner.

Benchmark: When does title Pass? Del. (1)

Marvel v. Barley Mill Road Homes:
34 Del. Ch. 417; 104 A.2d 908 (1954)

- ▶ ...the fact remains that **at the time of these occurrences** the adverse possession of plaintiffs and their predecessors in title had ripened into a title by adverse possession. **Plaintiffs' possession occurred in 1916.**
- ▶ The **occasions referred to by the witnesses offered by defendant took place in 1937 and 1938,** more than twenty years after the entry by plaintiffs.
- ▶ The acquirement of title by right of adverse possession prior to the time referred to by the witnesses called on behalf of defendant, **creates a new legal title though not a record title and that title would not be lost by a cessation of possession** and continued exclusive possession is not necessary to maintain it.

Co-Tenants, Payment of Taxes

Tacking: Maryland: (1)

Bratton v. Hitchens:
43 Md. App. 348; 405 A.2d 333; 1979

- ▶ [W]here there is privity of estate between the successive parties in possession, the possession of such parties may be tacked so as to make the twenty years required by the Statute of Limitations.
- ▶ The law is clear that such privity may be created by a sale and conveyance and possession under it as well as by descent.

Claims between Co-tenants: Maryland: (2)

Bratton v. Hitchens:

43 Md. App. 348; 405 A.2d 333; 1979

- It is true that the law presumes that possession by one cotenant is possession by the other and, therefore, in order to establish adverse possession by one cotenant against another it is necessary to rebut this presumption by proving an actual ouster.
- "And while the ouster need not have been accompanied by positive force, it must have been actual, and be established by acts or declarations brought home to the knowledge of the cotenant."

Each case is unique: Maryland: (3)

Bratton v. Hitchens:

43 Md. App. 348; 405 A.2d 333; 1979

- Finally, the chancellor erred in failing to consider the character and locality and the ordinary uses and purposes of the particular property in question.
- "In determining the question, whether one has an actual possession of property, we must take into consideration its character and locality, and the uses and purposes for which it is naturally adapted, ...
- ...for the possessory acts over an outlying and uncultivated piece of land, may be proved by acts of ownership somewhat different from what will be required in regard to land under enclosure and in actual cultivation.

Cut Timber, Pay Taxes?: Maryland: (4)

Bratton v. Hitchens:

43 Md. App. 348; 405 A.2d 333; 1979

- In applying these principles we must be careful to note that cutting of timber and payment of taxes are not sufficient in themselves to prove adverse possession. *Goen v. Sansbury*, 219 Md. 289, 149 A.2d 17 (1959).
- Both cutting of timber and payment of taxes are nonetheless potent facts to support adverse possession.

Claims against the State

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."**

Governmental/Proprietary: New York (1)

Ammirati v. Wicklen:

16 Misc. 3d 952; 839 N.Y.S.2d 685; 2007

- Defendant County's contentions are without merit.
- While immunity will generally attach to property held in a "governmental" capacity, such as a highway, public stream, canal and public fairground, there is no immunity available for property held in a so-called "proprietary" capacity.
- That a municipality takes land for tax collection purposes does not defeat an adverse possession claim if the subsequent purpose is merely resale, which is proprietary in nature and not a true governmental use

Governmental/Proprietary: New York (2)

Ammirati v. Wicklen:

16 Misc. 3d 952; 839 N.Y.S.2d 685; 2007

- ▶ Thus, it has been observed that "[t]here is a well-recognized distinction between lands held by the State as sovereign in trust for the public and lands held as proprietor only, for the purpose of 'sale or other disposition' . . . such lands only as the State holds as a proprietor may be lost to the State;
- ▶ ... it cannot lose such lands as it holds for the public, in trust for a public purpose [such] as highways, public streams, canals, [and] public fairgrounds"

Adverse against State: Maryland (1)

Siejack v. Baltimore: 270 Md. 640; 313 A.2d 843; 1974

- ▶ It seems entirely clear to us, as it did to Judge Hamill, that Siejack (and his father) held parcel 4N adversely and continuously since 1949.
- ▶ Their successive possessions were actual, open, visible, notorious, exclusive, hostile, and under color of title.
- ▶ Indeed, one would be hard pressed to find a case in which all of the elements of adverse possession so clearly appear.

Adverse against State: Maryland (2)

Siejack v. Baltimore: 270 Md. 640; 313 A.2d 843; 1974

- ▶ The City advanced the notion of "dual possession" but we see no merit in it, especially in view of testimony that, although Siejack's possession and use of parcel 4N was reported to the City Engineer's office in 1954 and although soon thereafter an investigation of the City's title was made by an Assistant City Solicitor, no move was ever made to eject Siejack or to challenge his right to own, possess and use parcel 4N.
- ▶ The only question now to be resolved is whether Judge Hamill erred in concluding that title could not be acquired by adverse possession against the City.

Adverse against State: Maryland (3)

Siejack v. Baltimore: 270 Md. 640; 313 A.2d 843; 1974

- ▶ Quite likely nothing is more solidly established than the rule that title to property held by a municipal corporation in its governmental capacity, for a public use, cannot be acquired by adverse possession.
- ▶ Less frequently encountered, however, although apparently as well established, is the notion that municipal property not devoted to a public use can be so acquired.

Adverse against State: Maryland (4)

Siejack v. Baltimore: 270 Md. 640; 313 A.2d 843; 1974

- ▶ Until now we seem not to have been required to consider whether it should be acknowledged to be the law of Maryland. We think it is and we so hold, but it must not be supposed that our holding goes any further than the case at bar or any other or future case having a similar factual background.
- ▶ In *Montgomery County v. Maryland-Washington Metropolitan District*, 202 Md. 293, 96 A. 2d 353 (1953), Chief Judge Sobeloff, for the Court, said:

Adverse against State: Maryland (5)

Siejack v. Baltimore: 270 Md. 640; 313 A.2d 843; 1974

- ▶ ...Pursuing the inquiry further, we find that a county may hold property in either of two capacities, one being governmental and the other proprietary. A distinction is frequently drawn between property held by a county in its proprietary 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.
- ▶ But as to property held in a proprietary capacity and not dedicated to public use, or impressed with a trust, the rule is otherwise.

What is "State Agency": Maryland (1)

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

- ▶ it is apparent that (1) the State does not control appellant in any meaningful way; (2) the scope of appellant's concerns are entirely limited to the Subdivision; and (3) although State law may provide officials of HSIA with immunity from suit, that is the extent of State law treatment of the Association that appellant has alleged.
- ▶ It is no more extensive than the immunity granted to the officials of counties or municipalities. See C.J. § 5-507(b)(1) (immunity of officials of municipal corporations).
- ▶ Thus, we conclude that Hillsmere is not a State agency.

Adverse against State: Maryland (2)

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

- ▶ In Maryland, there has never been any doubt that adverse possession does not run against the State. However, the rule, as applied to political subdivisions, is ordinarily limited to land held in a governmental capacity or for public use.
- ▶ Because appellant is not a State agency, appellant's ability to claim immunity from adverse possession, if any, is limited to the immunity enjoyed by a municipality or other political subdivision.
- ▶ The Court of Appeals elucidated this limited immunity in *Sejack v. Mayor and City of Baltimore*

Benefit of Color of Title: Maryland (3)

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

- ▶ Where the claimant makes a claim to the land under color of title, the claim of adverse possession extends to the property within the outlines of the claimant's title.
- ▶ Where the claimant does not claim the land under color of title, adverse possession only extends to the land actually occupied by the claimant.
- ▶ Title will also vest in all the land within visible boundaries that have existed for the statutory period, whether actually occupied or not, where the claimant has engaged in unequivocal acts of ownership over the land.

Mistaken Belief: Maryland (4)

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

- ▶ To be adverse it is not essential that a use . . . be made either in the belief or under a claim that it is legally justified. It is, however, necessary that the one making it shall not recognize in those as against whom it is claimed to be adverse an authority either to prevent or to permit its continuance.
- ▶ It is the non-recognition of such authority at the time a use is made which determines whether it is adverse
- ▶ A use which is not made in recognition of and in submission to a present authority to prevent it or to permit its continuance is adverse though made in recognition of the wrongfulness of the use and, also, of the legal authority of another to prevent it."

Justifies Majority Rule: Maryland (5)

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

- ▶ there are sound policy justifications for recognizing that adverse possession may be established by one who acknowledges that another holds record title:
- ▶ "Requiring a claimant to assert that she holds legal or record title to the property . . . 'even though she knows [that] to be false, involves the placing of a premium upon dishonesty, in contravention of the ordinary judicial policy."

Tax Sale & Prescription: Maryland (6)

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

- ▶ The Court of Appeals determined that the tax sale judgment had terminated the period of adverse possession, thus affirming the circuit court's rejection of the Lipperts' claims.
- ▶ "'If the tax deed is valid, then from the time of its delivery it clothes the purchaser, not merely with the title of the person who had been assessed for the taxes and had neglected to pay them, ...
- ▶ ...but with a new and complete title . . . from the sovereign authority, which bars and extinguishes all prior titles and encumbrances of private persons, and all equities arising out of them.

Color of Title

Color of Title: Maryland: (21)

Senez v. Collins:

182 Md. App. 300; 957 A.2d 1057; 2008

- › [c]olor of title is that which in appearance is title, but which in reality is not good and sufficient title."
- › "Under color of title" describes a situation in which a claimant bases a claim to land on an instrument that appears to give title--an instrument that, while actually defective in some manner, is "prima facie good in appearance [so] as to be consistent with the idea of good faith on the party entering under it."

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.

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 (3)

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. 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.**

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.

Adverse: Incidental uses: Ohio (1)

Hardert v. Neumann: 2014-Ohio-1770; No. 13CA977

- ▶ We agree that by themselves incidental "activities conducted merely to maintain the land, such as mowing, are generally not sufficient to establish adverse possession."
- ▶ However, each claim of adverse possession must be decided upon its particular facts and contrary to Neumann's arguments, there is no "bright line" rule regarding such activities as cutting hay and mowing grass.
- ▶ This "allows the court to consider the unique nature of the real property in question,"

D.C. Adverse Possession: Case 1 (1)

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

- ▶ ...**a wall of modest dimensions which was constructed in 1935** or even earlier and which **stood in peace and tranquility** until its location became the subject of litigation in 1986.
- ▶ **A four-foot wide easement was created at the rear of Lots 40, 41 and 42**, for the benefit of the owners of those lots and of Lot 43, which abuts the easement area at its southern terminus.
- ▶ As initially constructed, the easement took the physical form of a concrete walkway which is **three feet wide, rather than four feet as reflected in the original plat.**

D.C. Adverse Possession: Case 1. (2)

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

- ▶ **The walkway is bounded on the west side by the eastern wall of a building** which is located on property known as Lot 39. **On the east side of Lot 40 (Ms. Tippet's property), the walkway is bounded by the brick wall which is the subject of this controversy,** and which occupies about twelve inches of the easement area. The walkway continues across Lot 41, which is owned by Charles and Elaine Dym, and Lot 42, which is Mr. Smith's property.

D.C. Adverse Possession: Berlin Wall

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

- ▶ Fortunately, the days of ejection by force (*vi et armis*) are largely behind us...
- ▶ It has been said that "adverse possession is the law of the landless, the have-nots..."
- ▶ and the doctrine provides means by which a persistent have-not may become a have.
- ▶ Appellant Lawrence S. Smith ...asks us to hold that **this wall, like its once more formidable counterparts in Jericho and Berlin, must now come tumbling down**, or must at least be removed from its present location.

Mistaken Belief

Mistaken Belief – early: Maryland: (1)

Tamburo v. Miller: 203 Md. 329; 100 A.2d 818 (1953)

- ▶ It has been said often in the earlier cases that where a land owner extends his fence, through inadvertence, ignorance or mistake, as to the location of the true boundary line, so as to embrace the land of a neighbor, but with no intention of claiming the area thus enclosed, adverse possession cannot be established because the holding of the extended area is neither adverse nor hostile to the true owner.

Mistaken Belief: Maryland: (2)

Tamburo v. Miller: 203 Md. 329; 100 A.2d 818 (1953)

- ▶ **The modern trend and the better rule** is that where the visible boundaries have existed for the period set forth in the Statute of Limitations, ...
- ▶ ...title will vest in the adverse possessor where there is evidence of unequivocal acts of ownership.
- ▶ In this view it is immaterial that the holder supposed the visible boundary to be correct or, in other words, ...
- ▶ ...the fact that the possession was due to inadvertence, ignorance, or mistake, is entirely immaterial.

D.C. Majority Rule:

Smith v. Tippet: 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. Tippet: 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

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.

Mistaken Belief: New York (1)

Brand v. Prince:
43 A.D.2d 638; 349 N.Y.S.2d 222; 1973

- ▶ The fact that plaintiffs claim more land than their deed specifies is not controlling, "since adverse possession, even when held by mistake or through inadvertence, may ripen into a prescriptive right." *Belotti v. Bickhardt*

Mistaken Belief: Objective Test: Md. (1)

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

- ▶ "The burden of proving title by adverse possession is on the claimant."
- ▶ The test is objective:
- ▶ "In evaluating a claim, the pertinent inquiry is whether the claimant has proved the elements 'based on the claimant's "objective manifestation" of adverse use, rather than on the claimant's subjective intent.'"

Adverse Claims And Party Walls

Party Wall Case: Maryland: (1)

Barry v. Edlavitch: 84 Md. 95; 35 A. 170; 1896

- ▶ parties are respectively the owners of adjacent houses on Centre Market Space, in Baltimore City. The entire wall, between the lots, has been used for the support of both houses, for fifty years.
- ▶ From Centre Market Space, eastwardly for thirty-six feet, it is built, one-half on each lot; but the remainder being nine inches in thickness, and extending eastwardly fifty-four feet to an alley in the rear stood entirely on the lot of the appellant.

Party Wall Case: Maryland: (2)

Barry v. Edlavitch: 84 Md. 95; 35 A. 170; 1896

- ▶ The term "party wall," is usually applied to such walls, as are built partly on the land of another, for the common benefit of both, in supporting timbers, used in the construction of contiguous buildings.
- ▶ And "a division wall may become a party wall by agreement, either actual or presumed, and although such wall may have been built exclusively upon the land of one,
- ▶ if it has been used and enjoyed in common by the owners of both houses for a period of twenty-years, the law will...
- ▶ presume in the absence of evidence showing that such use and enjoyment was permissive, that the wall is a party wall.

Party Wall & Presumed Grant: Maryland: (3)

Barry v. Edlavitch: 84 Md. 95; 35 A. 170; 1896

- ▶ ...in cases of prescription, the terms of the presumed grant are fixed and determined by the user in which it originated. Possession per se, can never afford the presumption of a grant, so as to conclude the real owner.
- ▶ It is only from the fact that such possession, amounting as it does to a continuous claim of title, has been acquiesced in for twenty years, that the presumption of a grant is afforded.
- ▶ So that, from the very statement of the nature of title by prescription it is obvious that the presumed grant can never extend farther than the user, in which the other party has acquiesced.

Party Wall & Presumed Grant: Maryland: (4)

Barry v. Edlavitch: 84 Md. 95; 35 A. 170; 1896

- ▶ The right of the appellee was to maintain the support of his house as it had been for twenty years or longer, and therefore, if in the rebuilding of the new wall his house was, without his consent, detrimentally affected by injuries occasioned either by careless construction; or by...
- ▶ cutting his joists and steps, so that now they are no longer as they were; or the rooms were narrowed, the appellant would be responsible although such cutting was rendered necessary by the straightening of the new wall. In a word,
- ▶ ...the appellee had a full right to maintain his easement to the extent of the ancient user; and any encroachment thereon by the appellant was an invasion of his rights.

D.C.-Adverse Possession & Party Walls: (1)

Kreuzer v. George Washington University:

896 A.2d 238; 2006 D.C. App.

- ▶ **alleging primarily** that GWU had (1) trespassed on his property by **building a ten-story residence hall that cantilevered -- or extended -- over a party wall** that has supported Dr. Kreuzer's house since it was built in the 1800's
- ▶ **This case focused primarily on Lot 7.** The only other property in Square 43, besides Dr. Kreuzer's lots and a large property known as the Remington Condominium, is current Lot 26 **owned by GWU; it includes the property formerly known as Lot 6** that abuts Dr. Kreuzer's Lot 7 on the north side.

D.C.-Adverse Possession & Party Walls: (2)

Kreuzer v. George Washington University:

896 A.2d 238; 2006 D.C. App.

- ▶ The **primary source of contention here** (or at least a key one among Dr. Kreuzer's multiple grievances) is that, although the **first three floors on the south wall of the dormitory are built straight up on GWU's Lot 6 about an inch from the north side of the party wall, ...**
- ▶ **when the south wall reaches the height of the party wall**, the concrete floor **slab cantilevers to the south over the top of the shared wall** up to GWU's property line and ascends upward from there. (The residence hall does not rest on or touch the party wall; separating them is a two inch gap between the concrete floor slab and the top of the party wall.)

D.C.-Adverse Possession & Party Walls: (3)

Kreuzer v. George Washington University:

896 A.2d 238; 2006 D.C. App.

- ▶ **...the party wall is situated wholly on GWU's property.** The respective rights of adjoining property owners concerning a wall that has this unusual feature -- lying entirely on one owner's property -- **have not been spelled out by a court decision in this jurisdiction.**
- ▶ Nevertheless, in *Fowler v. Koehler*, 43 App. D.C. 349 (1915), the Circuit Court long ago recognized that **"the erection of a party wall** by one of the two adjoining owners . . . amounts only to the establishment of a **mutual easement or servitude and benefit**" and **"does not change the boundaries** nor affect the title of the respective properties."

D.C.–Adverse Possession & Party Walls: (4)

Kreuzer v. George Washington University:
896 A.2d 238; 2006 D.C. App.

- ▶ "rights of way [and] **rights to use party walls ...are acquired by prescription**" rather than "adverse possession," the key difference being that while "successful adverse possession results in acquisition of a possessory estate," "**the owner of a servitude is only entitled to make the particular use authorized by the servitude.**"
- ▶ A party wall, as it is **generally defined** and understood, is a wall erected and standing on the line between two estates. . . owned by different persons for the use in common of both estates." *Moore v. Shoemaker*, 10 App. D.C. 6, 14 (1897)

Neighbory Accommodation

Neighbory Accommodation?: Maryland: (19)

Senez v. Collins:
182 Md. App. 300; 957 A.2d 1057; 2008

- ▶ Myers' testimony is clear that he and the Cooks were friendly throughout the years they were neighbors. There is no evidence in the record that there was any adversity or hostility between them. Although no ill-will is required, there must be some proof. Myers believed when the wall was built, and then rebuilt, that it was on his property. . . . The neighbors were friendly, and cooperative.
- ▶ The court's equation of "friendly," "cooperative" relations between the neighbors as evidence against hostility constitutes legal error as to the element of hostility.

NY "Neighbory Accommodation" (1)
Cole v. Rothe: 18 A.D.3d 1058; 795 N.Y.S.2d 373; 2005

- ▶ **Generally, proof that use of a property was open, notorious continuous and undisputed** will give rise to a **presumption that the use was** hostile and under a claim of right...
- ▶ The burden is then shifted to the party denying the existence of an easement to establish that the use of the subject land was, indeed, permissive...

NY "Neighbory Accommodation" (2)

Cole v. Rothe: 18 A.D.3d 1058; 795 N.Y.S.2d 373; 2005

- ▶ **Exceptions to the rule** that the presumption of hostility will arise exist
- ▶ (1) when the relationship between the parties is one of **neighbory accommodation** and cooperation...and
- ▶ (2) when the subject area is **used by the general public** ... It then becomes incumbent on the user to come forward with affirmative facts to establish that the use was, indeed, adverse to the interests of the landowner

Effect of a Survey

Effect of a Survey: Maryland (1)

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

Monteith v. Twin Falls:
68 Ohio App. 2d 219; 428 N.E.2d 870; 1980

- ▶ We are of the opinion that the statute was tolled at the time when the survey was conducted **for the purpose of grading the property**. We add that the plaintiffs were informed in 1970 by an agent of the defendants that the property in question in fact belonged to the defendants. **These acts, we believe, are a sufficient demonstration of an intent by the owners of title to recover possession.**

Adverse claim and the surveyor: Ohio (1)

Crown Credit Co., Ltd. v. Bushman:
170 Ohio App.3d 807 (2007)

- ▶ In *Rosencrantz*, the Maryland Court of Special Appeals expressed doubts that entry upon disputed land by a true owner's agents, **merely to conduct a survey, would sufficiently disrupt the continuity of adverse possession as a matter of law...**
- ▶ Instead, the *Rosencrantz* court stated that whether a survey, without more, is sufficient to disrupt continuity of adverse possession must be evaluated on a case-by-case basis to discern whether the entry to conduct a survey was "accompanied by a purpose to take possession."

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.

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 (1)

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 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's were 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.

Overlapping Deeds

Overlapping Claims: Maryland (1)

Goen v. Sansbury: 219 Md. 289; 149 A.2d 17 (1959)

- ▶ Generally, one who has color of title, like one who has actual title, has constructive possession of the land within the outlines of his title, although he actually occupies only a part of it.
- ▶ However, one who enters upon the land of another, though under color of title, gives no notice to that other of any claim, except to the extent of his actual occupancy.
- ▶ Thus, if a true owner be in actual possession of part of the whole land to which he has record title, he is in constructive possession of all of the land which is not actually possessed by another who claims through color of title, and this although the owner's actual possession is not within the limits of the land claimed by the other.

Overlapping Claims: Maryland (2)

Goen v. Sansbury: 219 Md. 289; 149 A.2d 17 (1959)

- ▶ This result has been reached by the cases because both parties cannot be seised at the same time of the same land under different titles and the law adjudges, therefore, the seisin of all that is not in the actual occupancy of the adverse party to him who has the better title.
- ▶ the possession of part of a tract of land by the rightful owner is constructive possession of the whole, as against one in possession of a part and claiming the whole under color of title, except as to the part actually occupied by the claimant."

Overlapping Claims: Maryland (3)

Goen v. Sansbury: 219 Md. 289; 149 A.2d 17 (1959)

- ▶ "In this kind of mixed constructive possession the legal seisin is according to the title. Title draws possession to the owner"...
- ▶ This is true even if the owner go into occupation of a part of his land after the disseisin has commenced. The running of the statute will thereby be stopped as to so much of the land as was constructively possessed and will be restricted to that in actual possession."

Intermittent Claims: Maryland (4)

Goen v. Sansbury: 219 Md. 289; 149 A.2d 17 (1959)

- ▶ And neither a record claim of title nor payment of taxes, without open, visible acts of possession, will suffice to support title by adverse possession
- ▶ The latter section says: "Since the statute runs against the rightful owner only if there is an actual possession of the land by another, it ceases to run upon a cessation of such actual possession, an interruption of the continuity of possession, as it is frequently termed.
- ▶ If such an interruption occurs, and possession is thereafter resumed, the limitation period commences to run only from the time of such resumption.

Overlapping Claims: U.S. Supreme Court (1)

Hunnicut v. Peyton 102. U.S. 333

- ▶ It is true that when a person enters upon unoccupied land, under a deed or title, and holds adversely, his possession is construed to be coextensive with his deed or title, and the true owner will be deemed to be dismissed to the extent of the boundaries described in that title.
- ▶ Still, his possession beyond the limits of his actual occupancy is only constructive. If the true owner be at the same time in actual possession of part of the land, claiming title to the whole, ...
- ▶ *[KK note: continued]*

Overlapping Claims: U.S. Supreme Court (2)

Hunnicut v. Peyton 102. U.S. 333 (1880)

- ▶ ...he has the constructive possession of all the land not in the actual possession of the intruder, and this, though the owner's actual possession is not within the limits of the defective title.
- ▶ "The reason is plain.
- ▶ Both parties cannot be seised at the same time of the same land under different titles.
- ▶ The law, therefore, adjudges the seisin of all that is not in the actual occupancy of the adverse party to him who has the better title."

Claims where overlap exists: W.Va.

Garrett v. Ramsey: 26 W. Va. 345; 1885

- ▶ Where two grants conflict and occasion what is called an **interlock**, **the elder grantee by the mere operation of his grant acquires at once constructive possession of all the land within his boundaries**, although he has taken no actual possession of any part thereof.
- ▶ Where two grants conflict and occasion what is called an interlock, **the junior grantee under his grant acquires a similar constructive possession of all the land embraced by his boundaries, except that portion within the interlock**, the constructive possession of which had already vested in the elder grantee.

Claims where overlap exists: W.Va.

Garrett v. Ramsey: 26 W. Va. 345; 1885

- ▶ **Where two grants conflict** and occasion what is called an **interlock**, **where the elder grantee is not in the actual possession of any portion of his land ...**
- ▶ **and the junior grantee enters and occupies a part of the interlock**, claiming the whole within his boundary, he thereby ousts the elder grantee of his constructive possession and becomes actually possessed to the extent of his grant.
- ▶ **If the elder grantee is in the actual possession of any part of the interlock** at the time of the entry thereon by the junior grantee, then the latter can gain no adversary possession beyond the limits of his mere enclosure without an actual ouster of the elder grantee from the whole of the land in the interlock.

1 constructive possession: Maryland: (4)

Wicke v. Wicke: 98 Md. 307; 56 A. 1017; 1904

- ▶ ...where two persons are in possession, the one by right and the other by wrong."
- ▶ In such cases the law imputes the possession to the one who has the title and for reasons that are sound and just. In the instances given there is a concurrence of possession but not a concurrent or joint seisin.

Other Issues

Adverse Claim against Minor: Maryland: (1) Wicke v. Wicke: 98 Md. 307; 56 A. 1017; 1904

- ▶ The Statute 21 James I., ch. 16, in force in this State, provides that "no person or persons shall at any time hereafter make any entry into any lands, tenements or hereditaments, but within twenty years next after his or their right or title, which shall hereafter first descend or accrue to the same; and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made."
- ▶ Then follows the proviso ...

Adverse Claim against Minor: Maryland: (2) Wicke v. Wicke: 98 Md. 307; 56 A. 1017; 1904

- ▶ "that if any person or persons * * * that hath or shall have such right or title of entry be or shall be, at the time of the said right or title first descended, accrued come or fallen within the age of twenty-one years * * * ...
- ▶ ...that then such person and persons and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry, as he might have done before this act; so as such person and persons, or his or their heir and heirs shall ...
- ▶ ...within ten years next after his and their full age * * * take benefit of and sue forth the same, and at no time after the said ten years."

Seasonal use & Prescription: Delaware (1) Lewes Trust v. Grindle: 53 Del. 396; 170 A.2d 280; 1961

- ▶ During all this period, plaintiffs' father and plaintiffs **occupied the premises every year, at least during the summer months.**
- ▶ We think that the trier of facts **could have found** from the evidence above referred to that **plaintiffs and their predecessors in title held adverse, continuous and uninterrupted possession** of the strip of land in question for a period in excess of twenty years in a manner **sufficiently to give to the record owner notice that an adverse claim was being made** to it by plaintiffs and their predecessors in title.

Seasonal use & Prescription: Delaware (2) Lewes Trust v. Grindle: 53 Del. 396; 170 A.2d 280; 1961

- ▶ Defendants question that the use of the area was **uninterrupted**, relying upon the alleged failure of plaintiff's evidence to **show explicitly that the ground was tilled every year.**
- ▶ Assuming defendants' contention to be correct, this is only one of several facts evidencing adverse possession on the part of plaintiffs.
- ▶ Stobs were driven by the seller and purchaser at the rear of the lots at the time of the purchase of plaintiffs' lots. **Cement blocks were placed on this line.**
- ▶ At different times **buildings were erected encroaching upon the disputed area.**

Seasonal use & Prescription: Delaware (3) Lewes Trust v. Grindle: 53 Del. 396; 170 A.2d 280; 1961

- ▶ The uninterrupted and continuous enjoyment of land to constitute adverse possession **does not require the constant use thereof.**
- ▶ It need be **continuous only in the sense** that the claimant exercised his claim of right without interference at such times as he had reasonable use for it.
- ▶ There must be an intention to relinquish the claim of ownership. *[Ark. Ill. Ky. References]*
- ▶ There is no evidence of any such intention in this case.

Adverse Possession – confusing?? A West Virginia Perspective

Somon v. Murphy Fabrication Co.: 160 W. Va. 84;
232 S.E.2d 524 (1977)

- ▶ To state that the doctrine of adverse possession is **firmly established in our law** is a mere truism and, yet, when one attempts an orderly assessment of the doctrine through the cases, **it is at best an arduous task.**

Doctrine of Presumed Grant

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.

Prescription & Presumed Grant (1)

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

- ▶ In England there is but **little difference between the doctrine of prescription, and the doctrine of presuming lost grants**, in regard to the objects embraced by the two principles.
- ▶ The doctrine of **prescription never extended to lands in fee, or corporeal hereditaments.**
- ▶ **nor** did it extend to such incorporeal rights as **could exist only by matter of record**; such as many species of royal franchise, deodands, traitors' or felons' goods, &c.

Prescription & Presumed Grant (2)

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

- ▶ **On the other hand**, the doctrine of **presuming grants never extended to corporeal hereditaments**; but, unlike the doctrine of prescription,
- ▶ it embraced **all incorporeal hereditaments**, whether evidenced by matters of record, or purely by grant.
- ▶ Patents from the crown, and acts of parliament even, were presumed to exist.

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.

Doctrine of Presumed Grant: U.S.

Fletcher v. Fuller: (2)

120 U.S. 534; 7 S. Ct. 667; 30 L. Ed. 759; 1887

- ▶ 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 of conveyance, to which the occupant of land is entitled, or may lead to its loss after being executed.

Doctrine of Presumed Grant: U.S.

Fletcher v. Fuller: (3)

120 U.S. 534; 7 S. Ct. 667; 30 L. Ed. 759; 1887

- ▶ **"the fiction of presuming a grant from twenty years' possession** or use was invented by the English courts in the eighteenth century **to avoid the absurdities of their rule of legal memory, and was derived by analogy from the limitation prescribed by the St. of 21 Jac. 1, c. 21, for actions of ejectment.**
- ▶ **It is not founded on a belief that the grant has actually been made** in the particular case, but on the general presumption that a man will naturally enjoy what belongs to him, the difficulty of proof after lapse of time, and the policy of not disturbing long continued possessions."

Doctrine of Presumed Grant: U.S.

Fletcher v. Fuller: (4)

120 U.S. 534; 7 S. Ct. 667; 30 L. Ed. 759; 1887

- ▶ It is necessary, therefore, in the cases mentioned, **for the jury, in order to presume a conveyance,** to believe that a conveyance was in point of fact executed.
- ▶ **It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed and that its existence would be a solution of the difficulties arising from its non-execution.**
- ▶ It is **not indispensable,** in order to lay a proper foundation for the legal presumption of a grant, **to establish the probability of the fact that in reality a grant ever issued.** It will be a sufficient ground for the presumption to show that, by legal possibility, a grant might have issued.

Doctrine of Presumed Grant: U.S.

Fletcher v. Fuller: (5)

120 U.S. 534; 7 S. Ct. 667; 30 L. Ed. 759; 1887

- ▶ **How long a period** must elapse after the date of the supposed conveyance before it may be presumed to have existed has not always been a matter of easy determination.
- ▶ **"In general," said this court, speaking by Mr. Justice Story, "It is the policy of courts of law to limit the presumption of grants to periods analogous to those of the statute of limitations** in cases where the statute does not apply.

Doctrine of Presumed Grant: U.S.

Fletcher v. Fuller: (6) 120 U.S. 534; 7 S. Ct. 667; 30 L. Ed. 759; 1887

- ▶ "Where one **uses an easement whenever he sees fit, without asking leave and without objection,**" says the **Supreme Court of Pennsylvania,** "it is adverse and an interrupted adverse enjoyment for twenty-one years is a title which cannot afterward be disputed.
- ▶ **The same presumption will arise 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...**

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.

Doctrine of Presumed Grant: Del. (1)

Walls v. M'gee: 4 Del. 108; 1844

- ▶ BOOTH, Chief Justice, charged the jury--that as a **general principle, acts of limitation will not run against the State; nor can there be an adverse possession, strictly speaking, against the State** such as can be against an individual;
- ▶ yet there are cases where from length of possession--rightful possession--a presumption will arise against the king, or against the State, to quiet the title.
- ▶ **The most solemn papers have been presumed after a great lapse of time: grants; charters; even acts of parliament, have been presumed.** So in this country grants and patents from the State are presumed after a great lapse of time in conformity with lawful possession.

Presumed Grant: Delaware (1)

State v. Phillips: 400 A.2d 299; 1979

- ▶ A shorter, more succinct statement of the rule appears in U. S. v. Fullard-Leo, 331 U.S. at 271, 67 S. Ct. at 1294:
- ▶ (B) 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 20 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.**

Presumed Grant: Delaware (2)

State v. Phillips: 400 A.2d 299; 1979

- ▶ The net result of these policies is that **it is not necessary to believe a conveyance was in fact made** in order for the trier of fact to presume a conveyance.
- ▶ If the evidence leads to the conclusion that the **conveyance might have been executed**, and ...
- ▶ ...that its existence would be a solution to the difficulties arising from its non-execution, then this is sufficient to presume a grant.

Claims against State: Delaware (3)

State v. Phillips: 400 A.2d 299; 1979

- ▶ Delaware has recognized the doctrine of presumed or lost grant for at least 130 years.
- ▶ In ...Walls' Lessee v. M'Gee, 4 Harr. 110 (1844)...
- ▶ ...yet there are cases where from length of possession rightful possession **a presumption will arise against the king, or against the State, to quiet the title.** The most solemn papers have been presumed after a great lapse of time: grants; charters; even acts of parliament, have been presumed. So in this country grants and patents from the State are presumed after a great lapse of time in conformity with lawful possession.

Conclusion: Delaware (4)

State v. Phillips; 400 A.2d 299; 1979

- › Furthermore, the defendants have set forth a sufficient basis for believing that they may have a valid claim of title by adverse possession because it appears that the land in dispute may have long been in the possession of the defendants and their predecessors...
- › The State's Motion For Summary Judgment is therefore denied. So ordered.
- › Hopefully, this matter is at long last now ready for trial.

Doctrine of Presumed Grant: Penn: (1)

Donegal Township v. Crosby:
178 Pa. Super. 30; 112 A.2d 645; 1955

- › Since the early days of the Commonwealth the doctrine of a presumptive grant has been recognized and sustained by our courts.
Application of this doctrine is not limited to an intruder without color of title.
- › Nor is possession by the claimant necessary.
- › This doctrine provides that after a great lapse of time and a series of circumstances disclosing the enjoyment of an unchallenged title during such period, the courts will presume whatever grant may be necessary to quiet the title.

Prescriptive Easements

Easements – General overview

(By Implication – Also by operation of Law)
Easement by Recorded Plat widely recognized

Easement by
Prior Use

Easement by
Necessity

Implied by
Recorded Plat

Easement by
Prescription

Easement by
Estoppel

Prescriptive Easements: Maryland: (1)

Forrester v. Kiler; 98 Md. App. 481; 633 A.2d 913; 1993

- › In order to establish an easement by prescription, the party claiming it must prove that the use was adverse, exclusive, and uninterrupted for a period of twenty years.
- › ...an exception to the presumption exists when property in controversy consists of unenclosed and unimproved wild lands or woodlands.
- › Thus, when unenclosed and unimproved wildlands or woodlands are involved, the presumption is that the use was permissive, and the burden of proving that the use was adverse or under a claim of right is upon the one asserting these rights.

Woodland Exception: Maryland: (2)

Forrester v. Kiler; 98 Md. App. 481; 633 A.2d 913; 1993

- › "it may be presumed that use of the land is permissive, because it is the custom of neighboring owners to travel over such land for pleasure or convenience, and the owners usually make no objection to their doing so."
- › We note that *Wilson and Leekley* both recognized that, in determining whether a prescriptive easement exists, permission will be presumed in the case of wooded, unenclosed land.
- › It is nonetheless clear to us that the woodlands exception is the law in Maryland.
- › The Court then suggested that the woodlands exception be applied only to "unimproved property."

D.C. Recent Prescriptive Easement Case (1) Martin v. Bicknell: No. 12-CV-1226 (2014 DC App.)

- ▶ A review of our prescriptive easement cases reveals that courts in the District of Columbia have **sometimes included exclusivity in the list of elements of a prescriptive easement, and sometimes not.**
- ▶ And even when this court has included exclusivity in our list, it has never garnered separate attention, much less been the reason why a claim to a prescriptive easement failed.
- ▶ **It seems exclusivity has been recited with the other elements of prescriptive easements that have been imported from adverse possession cases, but it is a layabout; it has never done any work.**

D.C. Recent Prescriptive Easement Case (2) Martin v. Bicknell: No. 12-CV-1226 (2014 DC App.)

- ▶ The rationale for a showing of exclusivity in the context of adverse possession simply does not intelligibly transfer to prescriptive easements and only causes confusion.
- ▶ **We now clarify that a plaintiff need not show exclusivity to make out a claim of a prescriptive easement.**
- ▶ For the foregoing reasons, we hold that the trial court erred in granting the motion to dismiss. The judgment of the trial court is reversed and we remand for proceedings consistent with this opinion.

Prescriptive Easements: New York (1) Mau v. Schusler: 124 A.D.3d 1292; 2015

- ▶ With respect to the fourth cause of action, for an easement by prescription, we conclude that there is a triable issue of fact whether plaintiffs had a claim of right to the use of the turnaround.
- ▶ To establish a prescriptive easement, plaintiffs must establish by **clear and convincing evidence** that the use of the turnaround was **"adverse, open and notorious, continuous and uninterrupted for the prescriptive period" of 10 years.**

Prescriptive Easements: New York (2) Mau v. Schusler: 124 A.D.3d 1292; 2015

- ▶ The elements of a claim for an easement by prescription are **similar to those of a claim for adverse possession, except that demonstration of exclusivity is not essential** to a claim for easement by prescription
- ▶ Thus, to establish an easement by prescription, plaintiffs must establish by clear and convincing evidence possession that was **hostile and under a claim of right; actual; open and notorious; and continuous for the required period.**

Prescription: Exclusive Use: Maryland: (1) Rupli v. South Mtn. Heritage Society: 202 Md. App. 673; 33 A.3d 1055; 2011

- ▶ A prescriptive easement arises when a party makes an **adverse, exclusive, and uninterrupted use** of another's real property for twenty years."
- ▶ By exclusive, the law does not mean that the right of way must be used by one person only, because two or more persons may be entitled to the use of the same way, but simply that the right should not depend for its enjoyment upon a similar right in others, and that the party claiming it exercises it under some claim existing in his favor, independent of all others. It must be exclusive as against the right of the community at large.

Prescription: Continuous Use: Maryland: (2) Rupli v. South Mtn. Heritage Society: 202 Md. App. 673; 33 A.3d 1055; 2011

- ▶ "[A]n uninterrupted and continuous enjoyment" does not mean "that a person shall use the way every day for twenty years, ...
- ▶ ...but simply that he exercises the right more or less frequently, according to the nature of the use to which its enjoyment may be applied, and without objection on the part of the owner of the land, ...
- ▶ ...and under such circumstances as excludes the presumption of a voluntary abandonment on the part of the person claiming it."

Prescription: Permissive Use: Maryland: (3) Rupli v. South Mtn. Heritage Society: 202 Md. App. 673; 33 A.3d 1055; 2011

- ▶ When a person has used a right of way openly, continuously, and without explanation for twenty years, it is presumed that the use has been adverse under a claim of right.
- ▶ The burden then shifts to the landowner to show that the use was [not adverse, but rather] permissive.").
- ▶ In a situation where "use begins adversely," the servient owner's "[m]ere failure to protest is not permission but acquiescence."

Prescription: Permissive Use: Maryland: (4) Rupli v. South Mtn. Heritage Society: 202 Md. App. 673; 33 A.3d 1055; 2011

- ▶ To establish permission, failure to protest must be combined "with other indications of permission." But a presumption of adversity "will not arise if the use . . . appears to have been by permission,"
- ▶ , i.e., where any "appearance of permission permeates the record."

Doctrine of Ancient Light

New Jersey: Doctrine of Ancient Light Hayden v. Dutcher: 31 N.J. Eq. 217; 1879

- ▶ "Where **one has a right to put up a building** on the spot where he erects it, and to continue it there, and the **adjoining owner can do nothing to prevent** its erection there, and can do nothing to prevent its remaining there, **it is absurd to say** that the **latter can, by lapse of time, lose his right to build up to his line.**
- ▶ A person, by making an erection on his own property, which he has a right to make and continue there, and which the adjoining owner has no means of preventing, can thereby acquire no right injurious to his neighbor." The same view, in a much more amplified form, will be found expressed in *Parker v. Foote*, 19 Wend. 309;

D.C. Prescription of Light & Air: Hefazi v. Stiglitz: 862 A.2d 901 (2004) D.C. App.

- ▶ Furthermore, "**the concept of adverse use includes . . . the ingredient that the conduct is either inherently wrongful or wrongful** at the election of such potential servient owner"—in this case, Stiglitz.
- ▶ **... As such, "American courts have refused to allow the acquisition by prescription of easements of light and air .**

D.C. Prescription of Light & Air: Hefazi v. Stiglitz: 862 A.2d 901 (2004) D.C. App.

- ▶ **... a negative easement cannot be created by prescription.**
- ▶ ...("An easement in the unobstructed passage of light and air cannot be acquired by prescription."). ...("American courts have wisely refused to allow the acquisition by prescription of easements of light and air . . ."). In fact, this "is the rule now established in all the American States, **with a single exception, [Delaware]**" ...[KK-????!]
- ▶ This rule flows from the basic principle that the "actual enjoyment of the air and light by the owner of the house is upon his own land only," and that "the owner of the adjoining lands has submitted to nothing which actually encroached upon his rights

D.C. Prescription of Light & Air: Hefazi v. Stiglitz: 862 A.2d 901 (2004) D.C. App.

- As a general principle, a property owner cannot hold an adverse interest against him or herself.
- ... ("**No easement by prescription can commence or exist while the dominant and servient estates are held by one and the same person.**");
- However, a use cannot be adverse where the user has full legal title to the underlying property, and consequently, the ability to use the land in whatever legal fashion he or she sees fit.
- To fall within the province of prescriptive easement law, the "dominant and servient tenements must, therefore, belong to different persons."

Ancient Light: Maryland: (1) Cherry v. Stein: 11 Md. 1; 1858

- "There is, I think, no principle upon which the modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in England.
- And I see it has recently been sanctioned with some qualification, by an act of parliament.
- But it cannot be applied in the growing cities and villages of this country, without working the most mischievous consequences.
- Nor do I find that it has been adopted in any of the States.

Actual Entry required: Maryland: (2) Cherry v. Stein: 11 Md. 1; 1858

- If A. erects a house immediately on the line which divides his land from that of B., and the eaves of the house are made to project over the land of the latter, this is a **manifest encroachment** upon his property, and an appropriation thereof to the use of another, to the extent of the projection, at least.
- And twenty years acquiescence by B. in the encroachment, without objection, or taking any steps to prevent its continuance, should be considered sufficient to lay the foundation for **presuming a grant**.

Amusing Prescriptive Claims

Prescription by Horseback: New Jersey: Kruvant v. 12-22 Woodland Ave. Corp: 138 N.J. Super. 1; 350 A.2d 102 (1975)

- The club has shown that it has used the bridle trail without permission since November 1, 1945.** The daily riding of individuals and groups mounted on horseback is an open use. **Plaintiffs admit knowledge of the activity.** Mayfair is chargeable with knowledge of the activity because of the knowledge of the Horns. There is no evidence that plaintiffs or their predecessors in title attempted to interrupt the use of the bridle trail after November 1, 1945, until the filing of the complaint in this action.
- The court concludes that the club has established a prescriptive easement for the bridle trail.**

Prescriptive Easement by beavers: Dawson V. Wade: 257 Ga. 552; 361 S.E.2d 181; 1987

- We must disagree with the trial court concerning the status of the beaver dams in the applicable segment of Reedy Creek. **The dams are not the handiwork of Wade, and he can enjoy no prescriptive right to their continued existence.** O.C.G.A. § 44-5-161 and 175.
- The case of *Brown v. Tomlinson*, 246 Ga. 513 (272 SE2d 258) (1980), is inapplicable to the circumstances of this case. There, the dam was erected through human agency and with common consent of riparian owners, including the complainant's predecessor in title.

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- ▶ Dissenting Opinion:
- ▶ It is true the dam in Brown's case was constructed by human effort but I do not believe that should alter the rights of the parties in this case. Here the dams were a natural occurrence allowed by the parties to continue for over 20 years. **The beavers were the agency.** I would analogize this to a mountain stream being dammed by a landslide to form a lake. **I suggest after sufficient time passes the riparian owners have a right in the continuing existence of the lake sufficient to prevent anyone from destroying it by removing the dam.**

