THE BASICS...

- Ancient Doctrine: Dates back to at least 1623 England.

- Statute of Limitations: A limitation on the commencement of an action for the recovery of real property when the property has been adversely possessed by another for a certain period of time.

- Title vests when limitation period runs.
COMMON LAW ELEMENTS

- O.C.E.A.N (Open, Continuous, Exclusive, Actual, Notorious)

- Common Law Elements
  - Hostile/Under Claim of Title
  - Exclusive
  - Continuous
  - Open and Notorious
  - (For the Statutory Time Period)
  - (To the Extent Actually Occupied)

- Element overlap

ADVERSE POSSESSION STATUTES

s. 893.25, 20-years
- Uninterrupted
- Adverse Possession
  - Continuous
  - Under Claim of Title
  - Exclusive
  - Actual Occupancy
    - Protected by Substantial Enclosure
    - Usually Cultivated or Improved

s. 893.26, 10-years
- Uninterrupted
- Adverse Possession
  - Continuous
  - Entry under good faith claim of title
  - Exclusive
  - Written instrument
  - Recorded w/in 30 days
  - May extend to entire lot
  - Sufficient facts:
    - Protected by Substantial Enclosure
    - Usually Cultivated or Improved
    - Supply of fuel, fence, timber, husbandry, ordinary use

s. 893.27, 7-years
- Same as 10-year statute
- Plus, payment of real estate taxes for 7 years
THE MANY ROLES OF THE SURVEYOR

- Sets original boundary
- Locates an encroachment/Discovery of dispute
- Fact witness
  - From prior visits to the property
  - Description of possession
- Expert witness
- Researcher
  - Evidence of possession on the ground
  - Historical surveys
  - Aerial photos
- Dispute Resolution
- Interrupting adverse possession

THE BEGINNING OF POSSESSION

- Line fence ≠ record boundary
- Subdivision plat does not match flags on ground
- Assumed boundaries
  - Based on improvement
  - Based on utility locations
- Sale by common owner
- Use of neighboring vacant property
- Need for access / driveways
- Intentional possession
THE BEGINNING OF A DISPUTE

- Selling property
- New neighbors
- New fence
- Building or zoning permit
- SURVEY

HOSTILE/UNDER CLAIM OF TITLE

- “Hostility means... one in possession claims exclusive right thereto and actual possession prevents the assumption of possession in the true owner.” Burkhardt v. Smith, (Wis. 1962).

- Actual subjective intent required. Wilcox v. Estate of Hines, WI SC 2014

- Rebuttable presumption of hostility
  - Permissive use
  - Declarations of non-ownership
  - Other?
EXAMPLE

Hostile
Dave mistakenly builds a fence 4 ft. into neighbor Anne’s yard. Dave thought he was building the fence on the boundary and believes he owns up to the fence.

- Dave did not mean to fence in part of Anne’s yard, but the act is “hostile” because he intended to fence in the property as his own.
- It does not matter that it was a mistake.

Not Hostile
Dave and Anne agree that Dave will construct a fence 4 ft. into Anne’s yard to avoid an existing line of trees. Dave later sells the property to Eric without informing him of the boundary location. Eric believes the fence is the boundary, but the character of his use does not change.

- Dave’s use of the property was pursuant to Anne’s permission.
- Eric’s use is also permissive unless his actions clearly indicate that the use is now adverse.

OPEN AND NOTORIOUS

- “In order to constitute adverse possession..., an adverse claim must be sufficiently open and obvious both as to the fact of possession and its real adverse character to apprise the true owner of the fact and of an intention to usurp [his] possession”. Bettack v. Conachen, 235 Wis. 559 (1940).

- Flag of Hostility

- Reasonably diligent landowner standard

- Examples:
  - Fencing and gardening an area provides notice.
  - Hunting on property a few times per year is not enough [more consistent with sporadic trespass].
EXCLUSIVE

- The claimant must intend to and actually exclude the true owner in order to overcome the presumption that the true owner is in possession of the land. *Bettack v. Conachen*, (Wis. 1940).

- Sporadic acts do not show exclusivity.

- Dual use is not exclusive.

- Overlap with other elements.

- NOTE: Exclusivity not required for prescriptive easements.
CONTINUOUS

- Acts considered as a whole.
- Not sporadic.
- Depends on the nature of the property.

UNINTERRUPTED

- Interrupted possession is not exclusive or continuous.
- Stops SOL from running.
- Wis. Stat. s. 893.32 – entry interrupts if:
  - Action commenced within one year, or
  - The entry terminates the adverse possession in fact:
    - Notorious reentry/not casual reentry
    - Physical dispossession of the adverse claimant
- NEW Affidavit of Interruption
ACTS CONSTITUTING ADVERSE POSSESSION

Statutory list not exclusive:
- “Substantial enclosure”
  - Not just a fence
  - A natural area is not an substantial enclosure
- “Usually cultivated or improved”
  - Usual under the circumstances
  - “improvement” does not require value added

Mowing:
- Not sufficient alone
- Often among acts of possession

Wild property/property in a state of nature: More is needed to make a claim
TO THE EXTENT ACTUALLY OCCUPIED

• “Only the land actually occupied is considered to be held adversely”. *Burkhardt v. Smith*, 17 Wis.2d 132 (1962).

• “The boundaries of possession do not need to be marked. It is only required that the acts of dominion reasonably suggest the extent of the hostile invasion.” *Illinois Steel Co. v. Jeka*, (Wis. 1904).

• Easy to determine when there is a fence.
WIS. STAT S. 893.24(2)

- Occupation lines that the court declares to be property lines by adverse possession under s. 893.29, 1995 stats., or s. 893.25, 893.26 or 893.27 shall, by order of the court, be described by a retracelable description providing definite and unequivocal identification of the lines or boundaries. The description shall contain data of dimensions sufficient to enable the description to be mapped and retraced and shall describe the land by government lot, recorded private claim, quarter-quarter section, section, township, range and county, and by metes and bounds commencing with a corner marked and established by the United States public land survey or a corner of the private claim.

- In other words: HIRE A SURVEYOR

TIMING

- Tacking of possession of prior possessors.

- Claim does not have to be based on the 20-year period immediately preceding a court action.

- Which statute applies?
  - When possession commenced.
  - Claim against the state or other governmental entities.
    - Existed from 1931 to 3/3/2016
    - 2015 WI Act 219, banned adverse possession by or against public going forward.
DEALING WITH ADVERSE POSSESSION

- Evaluate the situation
  - Collect evidence
  - Consider defenses
    - Permission
    - Duration
- How to resolve?
  - Interrupt possession
  - Ignore
  - Property exchange
  - Quit claim deed
  - Easement
  - Court action

HISTORICAL EVIDENCE OF POSSESSION

- Testimony of prior occupants/neighbors
- Photos
  - Family photos
  - Old aerial photos – USDA, counties, other sources?
- Evidence on the ground
- Real estate transaction records
- Permit applications (zoning, building, etc.)
- Surveys, plat maps, and other documents (Sanborn maps)
NEW AFFIDAVIT OF INTERRUPTION


- Record owner can follow multiple steps including recording an “Affidavit of Interruption” to interrupt adverse possession before the statutory time period runs.

- Requires “a property survey that complies with ch. A-E 7, Wis. Admin. Code, and that contains a certification by a professional land surveyor that the survey shows all visible encroachments on the surveyed land.”

  - Must be certified within 5 years of recording.

  - All visible encroachments?
    - A-E 7.05 Maps (5) “Show observed evidence of possession or use by others in the parcel or across any perimeter line of the property.”
    - Include visible uses.
    - Talk to the client!

RESOLUTION

- Local ordinances:
  - Zoning requirements
  - Subdivision requirements

- Local requirements
  - Simple quit claim deed?
  - New parcel boundary descriptions?
  - CSM?

- Other approaches:
  - Easement agreements
  - Replat
CASE EXAMPLE