Litigating Boundary Disputes: Motions for Judgment to Establish Boundary Lines and Claims of Adverse Possession

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A. Motions for Judgment to Establish Boundary Lines

1. **A Motion for Judgment to Establish a Boundary Line is a statutory procedure.**

"[I]t was clearly within the contemplation of the legislature …to provide a summary method and a proceeding by which …[the boundary lines of real estate] might be settled and determined without having a great deal of technical formality about it..." *Wright v. Rabey,* 117 Va. 884, 890 (1915).

2. **The statute currently in effect.**

§ 8.01-179. *Motion for judgment*[1] *to establish boundary lines.*

> Any person having a subsisting interest in real estate and a right to its possession, or to the possession of some share, interest or portion thereof, may file a motion for judgment to ascertain and designate the true boundary line or lines to such real estate as to one or more of the coterminous landowners. Plaintiff in stating his interest shall conform to the requirements of § 8.01-137, and shall describe with reasonable certainty such real estate and the boundary line or lines thereof which he seeks to establish.

§ 8.01-137. *Plaintiff to state how he claims.*

> The plaintiff shall also state whether he claims in fee or for his life, or the life of another, or for years, specifying such lives or the duration of such term, and when he claims an undivided share or interest he shall state the same.

§ 8.01-180. *Parties defendant; pleadings.*

> The plaintiff shall make defendants to such motion for judgment all persons having a present interest in the boundary line or lines sought to be ascertained and designated.

§ 8.01-181. *Surveys.*

[1] The statute still describes the plaintiff's pleading as a "motion for judgment" notwithstanding Rule 3:2(a) which provides that "[a] civil action shall be commenced by filing a complaint…"

> The court may appoint a surveyor and direct such surveys to be made as it deems necessary, and the costs thereof shall be assessed as the court may direct.

§ 8.01-182. *Claims to rents, etc., not considered.*

> In a proceeding under this article, no claim of the plaintiff for rents, profits or damages shall be considered.

§ 8.01-183. *Recordation and effect of judgment.*

> The judgment of the court shall be recorded in the current deed book of the court. The judgment shall forever settle, determine, and designate the true boundary line or lines in question, between the parties, their heirs, devisees, and assigns. The judgment may be enforced in the same manner as a judgment in an action of ejectment.

3. **An Action filed pursuant to the Statute is at Law and not in Equity.**

A. "[E]jectment was a *common-law* action designed to try title to land, *Burks Pleading and Practice* § 112 at 219 (4th ed. 1952), and by statute it continues to be a law action. Code §§ 8.01-131, 134." *Seoane v. Drug Emporium*, 249 Va. 469, 476 (1995).

B. "The general rule is that in the absence of some peculiar equity arising out of the conduct, situation or relation of the parties, a court of equity is without jurisdiction to settle disputes as to title and boundaries of land." *Patterson* v. *Saunders,* 194 Va. 607, 610 (1953).

C. "The difficulty with Pennsylvania's position is that its bills in equity merely set forth, as the trial court found, a case for the establishment of boundary lines. Aside from the fact that the bills contain prayers for injunctions, there are no allegations which, if proven, would entitle Pennsylvania to equitable relief. The bills, bare-boned as they are, do not allege that the acts of the defendants were unlawful or that they constituted trespasses, continuing or otherwise. Nor do the bills claim that the defendants' acts resulted in damage, irreparable or otherwise, or that they amounted to anything more than non-wasteful assertions of ownership by rival claimants to the property involved." *Pennsylvania--Little Creek Corp. v. Cobb*, 215 Va. 44, 46-47 (1974).

Practice Point:

Although Virginia no longer has separate actions for law and chancery matters, substantive distinctions between the two remain. Two practical consequences of the distinction are entitlement to a jury[2] and standard of proof. With respect to equitable claims, litigants are not ordinarily entitled to jury trials and the "clear and convincing" evidentiary standard must be

[2] For use of juries in cases involving equitable claims see §8.01-336.D & E and §55-153 VA. CODE.

met.[3] With respect to legal claims, litigants are entitled to a jury trial and only a preponderance standard must be met.

4. **Proceedings to Establish Boundary Lines are Governed by the same Principles applicable to Ejectment actions.**

"Ejectment is an action at law to determine title and right of possession of real property. *See Providence* v. *United Va./Seaboard Nat.*, 219 Va. 735, 744 (1979); *Benoit* v. *Baxter*, 196 Va. 360, 365 (1954)." *Brown v. Haley*, 233 Va. 210, 216 (1987).

"A proceeding under Code § 8-836 *et seq.* [now §8.01-179 *et seq.*] to establish a boundary line is governed by the same principles of law that would be applicable in an action of ejectment." *Bull Run Development Corp.* v. *Jackson,* 201 Va. 95, 99, 109 S.E.2d 400, 403 (1959)." The principles of governing Ejectment which are applicable to proceedings to establish boundary lines are as follows:

A. "Generally, a plaintiff must prevail, if at all, on the strength of his own title." *Page* v. *Luhring,* 208 Va. 643, 650 (1968), *Bull Run Development Corp.* v. *Jackson,* 201 Va. 95, (1959).

B. "It is uncontroverted before us that in a proceeding such as this, equally as in an action of ejectment, a plaintiff, who cannot rely upon actual possession, must recover, if at all, upon the strength of his own title." *Griggs v. Brown*, 126 Va. 556, 564 (1920).

C. "As a general rule, in an action in ejectment as well as in a proceeding under Code § 8-836 [now §8.01-179] to establish a boundary line of coterminous lands, in order for a plaintiff to prevail he must do so on the strength of his own title, and when he relies on his own paper title he must trace an unbroken chain of title back to the Commonwealth or to a common grantor or prove such a state of facts as will warrant the presumption of a grant. *Brunswick Land Corp. v. Perkinson*, 146 Va. 695, 704 (1926); *Prettyman v. M. J. Duer & Co.,* 189 Va. 122, 136 (1949); *Development Corp. v. Jackson*, 201 Va. 95, 99 (1959)." *Page v. Luhring*, 208 Va. 643, 650 (1968).

D. "If the plaintiff is unable to trace his title from the Commonwealth or other common grantor, he has the burden of proving facts that will warrant a jury in presuming a grant." *Ferris* v. *Snellings,* 213 Va. 452, 453 (1972).

E. A grant may be presumed from a showing that the plaintiff "has taken prior peaceful possession under color of title, but this exception is limited to cases in which the defendant is a mere intruder or trespasser without color of title." *Page* v. *Luhring,* 208 Va. 643, 650-51 (1968); *Bull Run Development Corp.* v. *Jackson,* 201 Va. 95, 102-03 (1959).

[3] See Friend, *The Law of Evidence in Va.* (7th Ed.) §5-8. The "preponderance-of-the-evidence" standard applies to statutory boundary line claims. *Central Nat'l Bank v. Florence*, 215 Va. 463, 472 (1975), but the "clear and convincing evidence" standard applies to adverse possession claims.

F. An equitable estoppel cannot be pleaded or proven in ejectment. BURKS PLEADING AND PRACTICE, 3RD ED., § 118, page 224; *Haney* v. *Breeden,* 100 Va. 781, 782 (1902); *Wade* v. *Ford,* 193 Va. 279, 283 (1952)." *Allen v. Powers*, 194 Va. 662, 669 (1953).

G. "An action of ejectment lies to recover possession of property held by another. Since a judgment in favor of a plaintiff in an action of ejectment is not self-executing, *Aetna Casualty Co. v. Board of Supervisors of Warren County*, 160 Va. 11 (1933), a prevailing plaintiff needs a writ of possession to enforce his right to possession. But a prevailing defendant, being already in possession, needs no writ to enforce his right to possession. So the applicable statute provides for the issuance of a writ of possession only in favor of a plaintiff who has prevailed. VA. CODE ANN. § 8-402 [now §8.01-470]." *Page v. Luhring,* 211 Va. 503, 506 (1971).

H. "[A]dverse possession, whether with or without color of title, under a plea of the statute of limitations, is a defense which may be made under such act." *Christian v. Bulbeck,* 120 Va. 74, 82 (1916).

I. Motions for Judgment to Establish a Boundary Line are governed by the same 15-year statute of limitations which is applicable to Ejectment. § 8.01-236 VA. CODE.

5. Strength of Plaintiff's Title

"A party must recover on the strength of his own title and not on the weakness of his adversary's title. If it appear that the legal title is in another, whether that other be the defendant, the Commonwealth, or some third person, it is sufficient to defeat the plaintiff. 5 Encyc. U.S. S. Ct. Rep., pp. 699, 700." *Bradshaw v. Booth*, 129 Va. 19, 36 (1921).

When a plaintiff relies solely on his paper title, he must trace it either from the Commonwealth or from another grantor in his chain of title that he shares in common with the defendant. *Prettyman v. M. J. Duer & Co.,* 189 Va. 122, 137 (1949).

If a plaintiff claims title by virtue of a deed, their deed must specifically define the boundaries of their claim. *Ferris v. Snellings*, 213 Va. 452, 453 (1972) (citing *Bradshaw* v. *Booth,* 129 Va. 19, 38 (1921).

6. Construction of Title Deeds.

A. Construction of a deed is the province of the Court. "As a general rule the construction of all written documents in evidence belongs to the court exclusively, but it is equally as well settled that the location of a disputed boundary line is a question of fact for the jury. The line of demarcation between the two classes of cases is clearly pointed out by Burks, J., in *Collier* v. *Southern Ex. Co.*, 32 Gratt. 718, where the opinion says: 'The rule as laid down by Baron Park in *Nelson* v. *Hartford* is generally accepted. The construction of all written instruments, he says, belongs to the court alone, whose duty it is to construe all such instruments as soon as the words in which they are couched and the surrounding circumstances, if any, have been ascertained by the jury; and it is the duty of the jury to take

the construction from the court either absolutely, if there be no words of art or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, where those words or circumstances are necessarily referred to them.'" *Whealton & Wisherd v. Doughty*, 116 Va. 566, 574 (1914).

B. Use of Extrinsic Evidence

i. Generally.

a. "Generally, extrinsic evidence is not admissible to vary the terms of a written instrument. *Camp v. Camp*, 220 Va. 595, 598 (1979). '[W]here the description of premises conveyed in the deed is definite, certain and unambiguous, extrinsic evidence cannot be introduced to show it was the intention of the grantor to convey a different tract.' *Vanover v. Hollyfield,* 151 Va. 287, 292 (1928).

b. "In order to ascertain and fix upon the ground the lines of a grant, we look first to the grant itself, and follow those lines in the order in which they are there stated. If it is possible to do this on the ground with certainty, nothing more is to be said. A grantee takes what the State gives unless some senior right has already vested. If this is not possible, resort must be had to evidence *aliunde* [extrinsic]." *Richmond Cedar Works v. West,* 152 Va. 533, 537-538 (1929).

c. "Extrinsic evidence can be admitted to explain an ambiguity in a document. However, the ambiguity must be apparent on the face of the instrument [a patent ambiguity]. Parol evidence cannot be used to first create an ambiguity [latent ambiguity] and then remove it. *Stewart-Warner Corp. v. Smithey*, 163 Va. 476, 487, 175 S.E. 882, 886 (1934); *Coal Riv. Coll. v. Eureka Coal Co.,* 144 Va. 263, 280 (1926)." *Cohan v. Thurston*, 223 Va. 523, 524-525 (1982) (involving an ejectment action as to a disputed strip of land.)

Practice Point:

Cohan is difficult to square with the more recent case of *Galloway Corp. v. S.B. Ballard Constr. Co*., 250 Va. 493, 502 (1995) where it said: "parol evidence cannot be considered to explain a patent ambiguity, that is, to supply the understanding that the parties could have reasonably been expected to reach where the language of an instrument reflects no understanding." *Zehler v. E.L. Bruce Co., Inc.*, 208 Va. 796, 799 (1968); see also *City of Roanoke v. Blair*, 107 Va. 639, 641 (1908). Only where the ambiguity is not self-evident from the writing, that is, where there is a "latent ambiguity," is the use of parol and other extrinsic evidence permissible to aid the trier of fact in determining the intention of the parties." *Portsmouth Gas Co. v. Shebar*, 209 Va. 250, 253 (1968).

d. "It is in almost all cases necessary to resort to parol evidence in order to apply the descriptive terms of a deed or will to the subject to which they relate. Such evidence has always been admitted in this State and elsewhere, so far as we are informed." *Hurley v. Shortridge,* 118 Va. 136, 137-138 (1915).

e. "If a title to the land in controversy was vested in the plaintiff by the deeds and patents under which he claimed, then such title could not be divested out of him by any parol or verbal disclaimer by him of such title, but only by deed executed in the manner prescribed by law." *Whealton & Wisherd v. Doughty*, 116 Va. 566, 573 (1914). (Citation omitted.)

f. "'The extent of boundaries of land, and thus the title to land, cannot be established wholly by parol evidence, unsupported by written evidence of title, where title by adverse possession is not involved, and where the case is one in which the title claim is by deed and must have been derived by deed, if derived at all; for to hold otherwise would be to permit parol evidence to become an independent source of title, which by the weight of authority, and certainly in Virginia, is not permissible. *Bradshaw* v. *Booth,* 129 Va. 19, 38(1921).'" *Vanover v. Hollyfield*, 145 Va. 749, 755 (1926).

ii. Types of Extrinsic Evidence that have been held Admissable.

a. "Whenever deeds or grants conveying adjacent land tend to identify and fix a disputed boundary, the general rule is that they are admissible in evidence. *Hamman* v. *Miller*, 116 Va. 873 (1914)." *Wright v. Rabey*, 117 Va. 884, 893 (1915).

b. "**…**upon questions of boundary in Virginia, not only general reputation, but also hearsay evidence as to any particular facts may, under certain circumstances, be properly received as evidence. Thus the declaration of a deceased person as to a particular corner tree or boundary may be given in evidence, provided such person had peculiar means of knowing the facts. *Hurley v. Shortridge*, 118 Va. 136, 138 (1915) (Citation omitted.)

c. Surveys not found in the chain of title may be admissible "as evidence of a boundary line between those who are parties to it or who claim under it, but it is not admissible as independent evidence against others." *Robinson v. Peterson*, 200 Va. 186, 190 (1958).

d. "'It is settled law in this State that the disclaimer of a freehold estate can only be made by deed, or in a court of record. In the case of disputed boundaries the parties may agree upon a line, by way of compromise, and if they take and hold possession up to that line the requisite statutory period, the mere possession will, in time, ripen into title. But no mere parol agreement to establish a boundary and thus exclude from the operation of a deed land embraced therein can divest,

change or affect the legal rights of the parties growing out of the deed itself.' *McMurray* v. *Dixon,* 105 Va. 605, 610 (1906)." *Wade v. Ford*, 193 Va. 279, 282-283 (1952).

e. "In *Cox* v. *Heuseman,* 124 Va. 159, 166 (1919)… it was said: 'These instructions (which were not attempting to deal with adverse possession as a source of title) amounted to saying to the jury that acquiescence or verbal acknowledgment or agreement as to the location of a disputed boundary could, *proprio vigore,* pass title from one man and vest it in another. Such is not the law. Acquiescence and admissions as to boundaries may become very proper and very important evidence in determining where the true boundaries are, and such acquiescence and admissions may exist or be made under circumstances which will estop a landowner from denying them; but they are not in themselves independent sources of title." *Wade v. Ford*, 193 Va. 279, 282-283 (1952).

f. "'It is well settled by the weight of authority, and certainly in Virginia, although contrary holdings may be found elsewhere, that such mere acquiescence does not operate as an estoppel in such case, for the reason that, if this were so, such acquiescence would be given the effect of an independent source of title…' *Bradshaw v. Booth,* 129 Va. 19*,* 42 (1921)." *Wade v. Ford*, 193 Va. 279, 282-283 (1952).

C. Various rules of construction

1. "Whenever there is any room for construction, we follow that which favors the grantee. 11 C.J.S. 581." *Williams v. Miller*, 184 Va. 274, 279 (1945).

2. "In questions of boundary, natural land marks, marked lines, and reputed boundaries, especially if known to, and acquiesced in, by the parties interested, should be preferred when in opposition to mere magnetic lines, which may be described by mistake in deeds and surveys, (see *Dogan v. Seekright*, 14 Va. (4 Hen. & Munf. 125) (1809), and the cases there cited,) unless it shall appear clearly that the marked line was made by mistake--a mistake unknown to, and therefore not acquiesced in, by the parties in interest…" *Coles v. Wooding,* 2 Patt. & H. 189 (Va. 1856).

3. "The established rule that the location on the ground of courses and distances designated in the title papers must give way to known or reputed monuments, has reference only to monuments which are designated in the title papers. *Trimmer* v. *Martin,* 141 Va. 252, (1925)." *Richmond Cedar Works v. West,* 152 Va. 533, 541 (1929).

4. "Words indicating quantity in the descriptive part of the deed, when conflicting with words of a more accurate description, yield. Quantity is regarded as the least certain mode of describing land, and hence must yield to description by boundaries and distances. *Hunter v. Hume*, 88 Va. 24, 29 (1891).

5. "Erosive accretions attach to the land on which they fall. Accessions or abstractions, particle on particle, are so necessary and so general that title cannot be made to depend upon them. When this is all, a stream once a line continues to be the line. But where there is avulsion or sudden change from any cause, natural or artificial, by which a stream leaves its old bed and cuts for itself a new channel, the rule is otherwise, for title cannot be made to depend upon the meanderings of vagrant streams." *Woody v. Abrams*, 160 Va. 683, 692 (1933).

6. "'It is the established rule that a conveyance of land bounded on a street or highway carries with it the fee to the center thereof, subject to the easement of public way, provided the grantor at the time owned to the center and the language used in the conveyance, and the surrounding circumstances, do not indicate a contrary intent.'"(Citations omitted.) *Williams v. Miller*, 184 Va. 274, 278 (1945).

7. "'Where there has been long possession under claim of title, and long continued payment of taxes, a patent may sometimes be presumed. In *Archer* v. *Sadler,* 12 Va. (2 Hen. & Munf.) 370 (1808), there had been sixty years of peaceable and uninterrupted possession, together with payment of quit-rents before, and of taxes since, the Revolution, by the caveator and those under whom he claimed; and it was held that it was a case to be submitted to a jury to decide whether a patent should be presumed to have issued formerly, and whether the facts justified such presumption.' *Holloran* v. *Meisel,* 87 Va. 398, 403 (1891)." *Richmond Cedar Works v. West,* 152 Va. 533, 545 (1929).

D. Establishing the Presumption of a Grant

"Courts will presume a grant where one has for a long period of time held an uninterrupted possession of land while exercising proprietary rights. . . . The possession necessary to afford a presumption of a grant must be actual, open, adverse, exclusive and uninterrupted, as well as inconsistent with the existence of title in another. . . . The principle relied on by the plaintiff that possession under color of title constitutes a prima facie title is under the great weight of authority restricted to those factual situations where the defendant is a mere intruder or trespasser without color of title." *Ferris v. Snellings*, 213 Va. 452, 453-454 (1972).

B. Claims of Adverse Possession

An adverse possession claim is an action by the possessor of real property against the record title holder to establish that the possessor's actions would have given rise to an ejectment claim by the title holder against the adverse possessor, and that the title holder has allowed the applicable statute of limitations to run. If such a claim is successful, a court will then vest record title in the possessor.

The statute of limitations for an ejectment action is 15 years.

§ 8.01-236. *Limitation of entry on or action for land.*
No person shall make an entry on, or bring an action to recover, any land unless within fifteen years next after the time at which the right to make such entry or bring such action shall have first accrued to such person or to some other person through whom he claims…

1. **Elements of an Adverse Possession Claim.**

The court in ***Quatannens v. Tyrrell***, 268 Va. 360, 368-369 (2004) reviewed the case law applicable to adverse possession claims stating that "A concise restatement of the rule and an explanation of each element of adverse possession were provided in ***Grappo v. Blanks***, 241 Va. 58 (1991)." *Grappo* held that in order to establish title to real property by adverse possession, a claimant must prove certain elements with respect to their possession of real property. A claimant's possession of the claimed property must have been:

A. Actual - Use and occupation of property, evidenced by fencing the property, constitutes proof of *actual* possession.
B. Hostile - One is in *hostile* possession if his possession is adverse to the right of the true owner and *under a claim of right*.
C. Under a Claim of Right - "claim of right," "claim of title," and "claim of ownership" are synonyms meaning **a possessor's intention to appropriate and use the land as his own to the exclusion of all others.** That intention need not be expressed but may be implied by a claimant's conduct. Actual occupation, use, and improvement of the property by the claimant, as if he were in fact the owner, is conduct that can prove a claim of right.
D. Exclusive - One's possession is exclusive when it is not in common with others.
E. Visible - Possession is *visible* when it is so obvious that the true owner may be presumed to know about it.
F. Continuous - Possession is *continuous* only if it exists without interruption for the statutory period.
G. For the statutory period of 15 years - § 8.01-236 VA. CODE.

2. **Adverse Possession by different Owners may be Tacked on to each other**

In fixing the duration of adverse possession, a claimant may "tack" his possession on to the possessions of those under whom he claims. *Sims v. Capper*, 133 Va. 278 (1922).

3. **The Requirement of Hostile Possession and Mistake**

A. Boundary line disputes frequently rise where one or both of the adjoining property owners are mistaken as to the actual location of their record boundary line. The impact of

mistake on an adverse possession claim is discussed at II MINOR ON REAL PROPERTY (1st Ed. 1908), § 1036, as follows:

> "If one, either of set purpose or with entire indifference to the rights of his neighbor, builds upon, or otherwise occupies openly and notoriously his neighbor's land, there is no doubt but that this constitutes an adverse possession which will ripen after the lapse of the statutory period into a perfect legal title.
>
> But if he is acting through a *bona fide mistake* as to his boundaries, honestly believing that he is upon his own land, and without any intention of ousting his neighbor, the question is more difficult of solution, as where he builds a few inches over his neighbor's line by mistake, believing he is on his own lot.
>
> The solution depends upon the intention with which the possession is taken and held. If the intention be to take and hold the land at all events, whether it belong to the occupant or not, that is, to oust any adverse claimant, if necessary, the case comes under the first instance above described, and the possession would clearly be adverse. But if the occupant have no such intention in his mind, but only the intention to use and enjoy his own property in a proper and lawful way, the courts are divided as to whether this constitutes the possession adverse.
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> The Virginia doctrine seems to be that if the occupant's intention is not the ruthless purpose to claim title at all events, whether he is legally entitled to the land or not, but merely the intention to occupy what is legally his own, the possession is *not adverse.*[4]
>
> There are two important objections to this view, in that (1) it seems to place a premium on conscious evil doing; and (2) it introduces into the law of adverse possession an element of positive and conscious intention to take land not belonging to the occupant, which is unknown to the law of adverse possession under any other condition than that of mistake in locating a boundary line."

B. Subsequently, in ***Christian v. Bulbeck***, 120 Va. 74, 108-109 (1916), after exhaustively reviewing the case law involving mistake as to boundaries, the Supreme Court pointed out that there are distinctions between possessors whose intention is to hold only what is described in his deed, a possessor whose intention is to hold up to a specific boundary line on the ground, and one who has

[4] Citing *Haney v. Breeden*, 100 Va. 781 (1902); *Brock v. Bear*, 100 Va. 562 (1902); *Davis v Owen*, 107 Va. 283 (1907).

decided for himself, then and there, without waiting for any future more definite ascertainment thereof, that the lines called for in his chain of title have in fact a definite locus on the ground, which he then and there fixes upon definitely and claims title up thereto. It is true that in taking such definite action he may be mistaken in his location as compared with the true location of the lines called for in his chain or claim of title. It may be true that but for such mistake he would never have taken the further step of forming the definite intention to claim title up to the definite location of the line in question on the ground; but the fact exists that he did form such definite intention. In such case, if he has no other claim of title than his true title, he has no color of title to give him constructive possession beyond the true boundary line. But he may, nevertheless, take and hold possession by pedis position or actual possession beyond his true boundary line, and with such bona fide, though mistaken, claim of title to the extent of such pedis position or actual possession, he will have adverse possession, which if continued unbroken for the statutory period will ripen into a perfect title under the statute of limitations. (See *Creekmur v. Creekmur*, 75 Va. 430 (1881); *Kincheloe v. Tracewells*, 52 Va. (11 Gratt) 587, 685 (1857); *Reusens v. Lawson*, 91 Va. 226 (1895); *Shanks v. Lancaster*, 46 Va. (5 Gratt.) 110 (1848); *Drumright v. Hite*, 2 Va. Dec. 465 (1897) -- as to general subject of the character of claim of title which may support adverse possession in Virginia.) Otherwise the statute of limitations would not run in favor of possession under a bona fide claim of title when possession is taken beyond the bounds of the true title, and no honest man could acquire title under such statute. His very honesty and bona fides would rob him of the benefit of the statute.

C. The Supreme Court revisited a mistake as to boundary line in ***Hollander v. World Mission Church*****,** 255 Va. 440 (1998) where the church sought to recover possession of a strip of land to which it held record title. Hollander resisted the claim on the basis of adverse possession arising because she "had used the disputed land mistakenly believing that their property ran to a line of trees at the edge of woods on the church's property. After hearing both parties' evidence, the court concluded that all the elements necessary to establish title by adverse possession had been clearly established except for the requirement of an adverse or hostile possession. Because the claimants' possession of the land was based on a mistake as to the ownership of the land, the trial court determined that the possession was not adverse since 'there was no intent of the claimant in this case to oust the true owner of the title of the property.' Hence, the [circuit] court entered final judgment for the church. Hollander appealed. *Hollander* 255 Va. at 441.

In reversing, the Supreme Court cited *Christian* for the proposition that "[w]hether the positive and definite intention to claim as one's own the land up to a particular and definite line on the ground existed, is the practical test in such cases. The collateral question whether the possessor would have claimed title, claimed the land as

his own, had he believed the land involved did not belong to him, but to another, that is, had he not been mistaken as to the true boundary line called for in his chain of title, is not the proximate but an antecedent question, which is irrelevant and serves only to confuse ideas." 255 Va. at 443.

D. And in ***Quatannens v. Tyrrell***, 268 Va. 360 (2004), the Supreme addressed another appeal involving mistake as to the location of a boundary line. Upholding the claim of adverse possession, the Court, citing *Christian*, said at p. 372-73:

> when a claimant mistakenly believes that a particular "line on the ground" represents the extent of his or her own land and treats all the land within the line on the ground as his or her own in a manner that 15 satisfies the other requirements of adverse possession -- particularly actual, exclusive, and visible possession -- then the hostility requirement is generally satisfied. The Quatannens have provided clear and convincing proof that they possessed "the positive and definite intention to claim *as their own* the land up to a particular and definite line *on the ground*." *Christian*, 120 Va. at 111…
>
> The testimony of Eileen Quatannens that the Quatannens had not intended to possess any property that they did not own is irrelevant because, "the collateral question whether the possessor would have claimed title, claimed the land as his own, had he believed the land involved did not belong to him, but to another, that is, had he not been mistaken as to the true boundary line called for in his chain of title, is not the proximate but an antecedent question, which is irrelevant and serves only to confuse ideas." *Christian*, 120 Va. at 111

4. Trial of an Adverse Possession Claim

A. Clear and Convincing Evidentiary Standard

A claimant has the burden of proving all the elements of adverse possession by clear and convincing evidence. *Grappo v. Blanks*, 241 Va. 58, 62 (1991).

B. Trial by Jury

Ordinarily, a jury determines whether the elements of adverse possession have been proven. *Grappo v. Blanks*, 241 Va. 58, 62 (1991).

Practice Point:

Adverse possession and easements by prescription are similar and share several, but not all, of the same elements. The running of the 15-year statute of limitations (§8.01-326 VA. CODE) for Ejectment is the basis for establishing title by adverse possession, while the legal fiction of an implied grant after 20 years of prescriptive use is the basis for establishing a prescriptive easement. Care should be taken in using adverse possession

authorities in prescriptive easement cases, and *vice versa.* Note that the Supreme Court has been known to do so. *See, e.g., Quantannens v. Tyrrell*, 268 Va. 360, at 369 (2004).