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# **Adverse Possession: An Advanced Course for Professional Land Surveyors**

*Instructor: Patrick C. Garner, PLS*

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5272 Meadow Estates Drive  
Fairfax, VA 22030-6658  
Phone & Fax: 703-988-0088  
[www.PDHonline.org](http://www.PDHonline.org)  
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## ADVERSE POSSESSION

### *An Advanced Course for Professional Land Surveyors*

*Patrick C. Garner, PLS*

## Course Content

### Advanced Course Introduction

Adverse possession is a legally recognized way, or method, of taking title to property by physical occupation. It is always a hostile act. Based on ancient principles of common law, adverse possession is defined by statute on a state-by-state basis. In all states, possession must run for a statutory period, and the adverse claimant is charged with the burden of proof.

Boundary surveyors *must* be familiar with this doctrine, as retracement surveys are frequently complicated by claims of adverse possession. A survey of original property lines cannot, by itself, revive the rights to land lost in adverse possession. Understanding the elements of adverse rights--with an awareness that variations exist between state laws--is critical. The appearance of surveyors in court is often triggered by issues of adverse possession, with attorneys relying heavily on surveyors as experts in what is often a difficult legal doctrine.

*Adverse Possession: An Advanced Course for Professional Land Surveyors*, is a three-hour course that reviews the historic concepts of adverse possession, the statutory character of these actions, and the burden of proof against the claimant. This course examines the effect of surveys on such claims, exemptions to claims of adverse possession, and the well established *elements* of adverse possession. The course also discusses the doctrine of *prescription* and its relationship to adverse possession. Using various examples both from classic texts and the author's experiences, the course examines statutes of limitations, color of title, and a surveyor's explicit duties to clients and courts.

### Legal Definitions

*Black's Law Dictionary* defines adverse possession as, "A method of acquisition of title to real property by possession for a statutory period under certain conditions." It goes on to note, "In order to establish title in this manner, there must be proof of nonpermissive use which is actual, open, notorious, exclusive and adverse for the statutorily prescribed period."

*Black's* further notes, "State statutes... differ with respect to the required length of possession from an upper limit of 20 years to a lower one of 5 years, with even more extreme time periods covering certain special cases. There may be different periods of time even within a single state, depending on whether or not the adverse possessor has color of title..." (Note that *color of title* occurs when there is the appearance of holding good title, when in reality, some defect prevents clear title.)

*Black's* concludes that, "There may also be different periods of time even within a single state,

whether or not taxes have been paid. In some cases a longer possession is required against public entities than against individuals.”

Curtis Brown et al, in *Boundary Control and Legal Principles*, states, “*Adverse Possession* is defined by possession of another’s land which when accompanied by certain acts and circumstances will vest title in the possessor... There must be actual possession. The possession must be open and notorious, hostile and continuous in the occupant or those claiming under him for the period prescribed by statute.”

Madson in *Rhode Island Property Boundary Law* states, “Although color of title is not essential, it is of great evidentiary value... Adverse possession depends on the intent of the occupant to claim and hold real property in opposition to all the world and also embodies the idea that the owner of, or persons interested in, property have knowledge of the assertion of ownership by the occupant. Payment of taxes alone is not sufficient to establish adverse possession. It is mandatory that the element of continuous possession be for the full statutory period.”

Davis, Foote and Kelly, in *Surveying: Theory & Practice*, define adverse possession as, “The enjoyment of land, under such circumstances as indicate that such enjoyment has been commenced and continued under an assertion of right on the part of the possessor...”

All of these definitions mirror each other in requiring the following elements:

- Occupation for the *full* statutory period.
- Actual physical occupation.
- Open--and notorious--occupation.
- *Exclusive and adverse* occupation for the statutorily prescribed period.

### **Prescription, and Prescriptive Easements**

Unlike adverse possession--which is a way of taking title to property by physical occupation--*prescription* is defined as a method of obtaining easement rights as a result of long use.

Prescription conveys only a right of usage, and is commonly confused with adverse possession. This separate doctrine will be examined in more detail later in the course.

### **Historic Concepts of Adverse Possession**

The American doctrine (a *doctrine* is a stated principle of government policy) of adverse possession evolved from Roman Common Law, from English Common Law, and later, from settlement of the North American continent. Greeks and Romans believed that a person’s spirit became a part of land that was settled, so in effect, the person who lived on a parcel became, in a real sense, part of the land. Thus, by logic, law and decree, that person became the owner.

Conflicting with this initial heritage, English Common Law favored the title holder of property, reflecting a historic bias in favor of titled land owners who, as the policy evolved, were predominately lords and barons. The bias between these different cultures may have also resulted from differences in available land mass. In Greek and Roman settlements, land seemed almost limitless, whereas in England, land was defined by the limits of the island itself.

Nevertheless, much of English Common Law is based on precepts and fundamental legal principles handed down from early Roman law. Thus, in the merger of these two concepts--Roman and English Common Law--arose a new doctrine that recognized the right of a person to “occupy a parcel of land under certain adverse conditions, and to obtain a new written title in accordance with the statutes of a given jurisdiction.” (Brown, *Boundary Control*)

English Common Law has in the last 200 years been further modified and defined by numerous statutes and court decisions in the United States. Regardless, the doctrine of adverse possession strongly reflects the basic principles crafted in England before America was settled.

Of note, in the United States, where title to property is held under a Torrens title (also called land registration or land court title), adverse rights cannot be advanced. Although not common, at this date, twenty states have passed land registration systems. Those states are California, Colorado, Georgia, Hawaii, Illinois, Massachusetts, Minnesota, Mississippi, Nebraska, New York, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia and Washington. In 1958 California repealed its act for lack of use. Even in states with Torrens titles, the majority of real property is not held under such title. When investigating claims of adverse possession, the surveyor must be aware of whether a given parcel is effected by such registration.



Barbed wire recently restrung on ancient fence posts. The fence exists ten feet into an adjoining property. Adverse possession or a permissive use?

### **Elements of Adverse Possession**

While examining the statutory character of adverse actions, we will review ten basic elements common to this doctrine. The legal presumption is that a claim will “ripen” into clear title (or fee) when all or most of the following elements are met. (Note that these elements vary from state to state, particularly in emphasis, and that all ten are not required in every state.)

Some legal scholars have noted that adverse possession is essentially a punishment against an owner for negligence. As harsh as this appears, the conclusion makes sense; for someone to adversely possess another’s land, the owner has, in effect, abandoned it. However, courts still view adverse possession as what it is--theft. An owner therefore does not have to be negligent for a short time, but, because laws aspire to fairness, must be negligent for years. An owner does not have to fear losing his land when he leases or rents it to another party, nor does he have to worry about loss when he shares it with others. The bar is high for adverse claims, and the statutory elements have been tested and refined from centuries of adjudication.

Understanding the following elements of adverse possession is critical.

1. Actual possession.
2. Open and notorious possession.
3. Claim of title.
4. Continuous possession.
5. Hostile possession.
6. Exclusive possession.
7. Possession for a statutorily defined period (also called a statute of limitations).
8. Color of title in some states.
9. Paid taxes in some states, and
10. Good faith in some states.

Of these ten elements, five are considered fundamental. The five, recognized by all states and jurisdictions, are: *Actual possession*; *Open and notorious possession*; *Continuous possession*; *Hostile possession*; and *Possession for a statutorily defined period*.

Of the elements, the time period for meeting the definition of continuous possession varies greatly (see expanded discussion below). Becoming familiar with the specific requirements for adverse possession in your own state is critical. As Brown notes in *Boundary Control*, "Since there is no merit in awarding the adverse claimant land flinched by legal means, the courts usually insist on strict adherence to the requirements of a given state." An examination of each of the ten elements follows.

### *Actual Possession*

*Actual possession* requires obvious, physical use of the claimed property. That use may include fencing, farming, construction of buildings, land clearing (followed by some other sign of further possession), and similar improvements or visible changes to the property.

An element of this requirement occurs when the claimant denies access to the rightful owner or his agents. Years ago when I was conducting a survey in Savannah, Georgia, a man suddenly appeared from behind a tree and pointed a shotgun at me. "You're on my land," he said. "Get off or you're dead." Without saying enough to get myself shot, I offered excuses, raised my hands, and backed away as quickly as I could. His statement clearly established his claim to the land, and denied me access. At the time I was not an expert in adverse possession, and immediately called my client. His attorney concluded rather too quickly--I realize in retrospect--that the man's declaration was insufficient to sustain a claim of adverse possession, and asked me to complete the work. I was young and foolish, and returned to finish the boundary a week later. Much to my relief, the man did not reappear. Regardless, if he had, and if he had attempted to establish other elements of an adverse claim, he may have been able to sustain his claim.

Note that a survey of the land by itself cannot establish actual possession. As Ray Skelton states in *Boundaries and Adjacent Properties*, “Actual possession is not established by entering land, surveying the same, and fixing the boundaries thereof, even when accompanied by the establishment of monuments...” Yet in an Iowa court decision, it was considered sufficient when the owner of a small parcel had a survey made to include adjacent property to his own and had monuments set. In addition, he had pointed out the land as his own, and maintained it regularly (*Whalen v Smith*, 183 Iowa 949, 167 N.W. 646). In this court decision, additional elements came into play, including the owner’s constant maintenance of the adjoining land, and his claim to other parties that he was the owner.

Surveying alone is not sufficient to put an owner on notice because monuments may not be obvious, and signs of a survey quickly disappear. In an Illinois case (*White v Harris*, 206 Ill. 584), the court ruled, “The survey of unenclosed land, and the placing of stones at the boundary corners, is not such a taking of possession as is contemplated by section 7 of the limitations act.”

Consequently, fencing is the most common form of recognized possession, and in fact, is required as an element in some jurisdictions. Fencing is also the most common form of “possession” that a professional land surveyor encounters. Substantial fences give what is called *constructive notice* to an owner of adverse possession, and meet the requirement for “open and notorious.” Note that fencing must be *substantial*, which in certain jurisdictions is legally defined. Typically, fences must be set as boundaries for the purpose of defining claimed land. Scattered posts set at random intervals along a line might not meet this requirement; a five-foot high wood fence clearly would.

An unusually strong-worded court decision states, “By actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation--by a substantial enclosure--by cultivation, or by appropriate use, accordingly to the particular locality and quality of the property.” (*Coryell v Cain*, 16 Calif. 567)

Intermittent farming of a property is not, by itself, sufficient to meet statutory requirements. Similarly, timbering a site not owned by the woodsman is considered theft, and not a claim of possession. On the other hand, continuous cultivation of a property within defined areas for a period sufficient to meet statutory periods might suffice.

### Open and Notorious Possession

A claimant, to meet this element, must act in such a manner *open and notorious* enough that an owner, during visits--however occasional--can observe the act of possession. Many jurisdictions also require that the possession be notorious in such a way that the public is aware of it. This element becomes coupled with the element of actual possession when possession entails fencing or other obvious physical improvements to land of others.

Yet Skelton, in *Boundaries and Adjacent Properties*, notes, “It is not necessary that the occupation be such as to inform a passing stranger that some one is adversely asserting title. If it be such as to notify and warn the owner should he visit the premises that a person is in possession under a hostile claim, it is sufficient...”



An example of adverse possession? Landscaping extends 9' beyond the property line. The use is relatively new. Does this "encroachment" constitute adverse possession?

The aspect of notoriety is paramount, and has been frequently described by courts. In *Towle v Quante* (246 Ill. 568, 92 N.E. 967), the court noted that "by notoriety is meant that the possession must from its nature appraise the world that the land is occupied and reveal the party claiming the ownership, and that it must be so conspicuous and talked about by the public that it is generally known." This definition may exceed that required in some states, but plainly states the need for the claimant to make obvious and unambiguous claims.

Another court decision found against a claimant, because the adversely possessed property itself was not easily viewed by the real owner. In a case where a city claimed adverse possession against a private party (*Carrere v New Orleans*, 162 La. 979), the court wrote, "The property was in such an obscure place that the city's manifestations of taking possession were not apt to be observed by the owner of the land or by the public." Note that in this case the court spoke of both "the owner of the land or by the public," requiring notoriety to be evident to both.

### Claim of Title

Based on English Common Law, as amended and incorporated into many statutes in the United States, title to property must at times be in writing. Brown notes in *Boundary Control*, "Title to land cannot be acquired by a squatter." Without written title, claim to title may be defective.

Furthermore, many states have affirmed that a *claim* of adverse possession is also necessary for the possession to have occurred. For instance, a mistake in boundaries where an abutter accidentally possesses another owner's land is not sufficient, by itself, to allow the use to ripen into adverse possession. In other states, the courts ignore intent, and observe only whether physical possession took place, discounting claims of title.

### Continuous Possession

*Continuous possession* (also referred to by courts as *continuity*) is the statutory period for possession as defined by individual states. Any interruption is presumed to return possession to the real owner. The courts have affirmed that, “No matter how short the period of interruption, if there is an interruption, the limitation period required by statute must start over.” Further, “Any admittance on the part of the adverse possessor that he does not have title to the land he is occupying ceases hostilities, causes an interruption, and stops the statutory period.” (Brown, *Boundary Control*)

The adverse possessor may return and reoccupy the property, thus making new claim to someone’s land. For instance, in *Shedd v Alexander* (270 Ill. 116), the court wrote, “The fact that adverse possession of land is interrupted after it is begun is not material if it is continued for twenty successive years after the interruption.” A court in Kentucky found, “No possession of land is sufficient to ripen into title unless the holding has been... [for] every day during the 15 year period.” (*Sackett v Jeffries*, 182 Ky. 696) In other words, the court found that any interruption of possession by a claimant, even for as short a period as a day, would extinguish a claim of continuity.

Continuity must also, in many jurisdictions, be peaceful. If a real owner discovers an adverse possessor and demands that the possessor vacate the property, the possessor’s claim is no longer peaceful. In Texas, peaceful has been defined as undisturbed, and “continuous and not interrupted by adverse suit to recover the property.” (*N. Fort Worth Townsite v Taylor*, 262 S.W. 505)

Last, the definition of continuous possession allows a succession of adverse possessors during the period of adverse possession. Practically all statutes call for “tacking” or a uniting of successive adverse possessors to make up the statutory period. This doctrine arose from disputes where one party built on another party’s land, then sold the adversely possessed land to a third party.

For instance, Farmer Smith owns 100 acres, and in 2000, fences in a 300-foot strip of Farmer Wesson’s back forty. Time goes by, and given that Farmer Wesson has said nothing, Farmer Smith then builds a two-story barn on the 300-foot strip. More time passes, and then Farmer Smith sells his original land, along with the newly “acquired” strip, including the barn. He mentions in passing to the buyer that he is “not sure” where the lines are, and suspects that the barn might be “over the line.” The new owner promptly rebuilds the fence that runs through Farmer Wesson’s land, replacing it with an even taller one. By this action, he has “tacked,” and become a successor in the on-going adverse possession against Farmer Wesson.

### Hostile Possession

Contrary to its implication, *hostile possession* does not imply violence, malevolence or ill will by a possessor. Its legal definition is that the adverse claimant must state that the possessed land is *exclusively his own*.

The precise definition of hostile varies from state to state. Yet as Brown notes, “Permissive entry is not hostile entry.” As an example, leasing a neighbor’s strip of land is not hostile

possession, and can never ripen into a claim. Family and business relationships where one party knowingly uses another's lands, with permission, rarely will ripen into hostile possession.

Further, a mistake in erecting a fence by one party on another's land is not hostile possession. Yet if the offending party later claims that the fence represents his boundary line, he may be making a claim of hostile possession.

### Exclusive Possession

Exclusive possession implies that lands being adversely claimed cannot be shared with the rightful owner. A foyer in a multi-family house that is the common access into three dwelling units can never be adversely claimed by one of the parties. Customers entering a store cannot claim possession of the entrance. One member of the public cannot claim adverse possession in a publicly used roadway. *Exclusive* possession is essential.

### Possession for a Statutorily Defined Period

This element is also referred to as a *statute of limitations*. To ripen into adverse possession, possession must run without interruption for the full statutory period. As Brown notes, "A person may oust another one day prior to fulfilling the statute of limitations." As stated earlier, jurisdictions have varying statutory periods, from as little as five years to as many as 20. California's statute runs 10 or 20 years, depending on who is paying taxes.

In some cases, entry based on a judgment or tax lien may also shorten the period of limitations. For instance, in some states, acquiring property through tax title does not automatically grant clear title to the property. Statutes dictate that once such a taking occurs, a statutory period of occupation must take place, although it is typically shorter than the statutory period for adverse possession. A house taken by tax title may require a seven year period of occupation for clear title to ripen, versus a period of fifteen years for adverse possession.

Color of title (as noted previously, *color of title* occurs when there is the appearance of holding good title, and when in reality, some defect prevents clear title) is required in some states to run simultaneously with the statutory time period. For instance, the Rhode Island General Laws note that, "Adverse possession must be actual, open, notorious, exclusive and continuous for ten years under color of title."

Illinois, one of the more lenient states in regard to time periods, nevertheless couples a short time period for adverse possession with other necessary elements, including color of title obtained in good faith, payment of taxes during the duration of possession, and continuous possession for an uninterrupted period of seven years (*Glos v Wheeler*, 229 Ill. 272). Notice here the emphasis on "color of title obtained in good faith," meaning that the adverse possessor must believe he has acquired good title through proper means (see further discussion below).

Clearly, a professional land surveyor must be aware of the statute of limitations before heeding claims of adverse possession. Because these statutory periods vary from state to state, and sometimes vary within the same state, a surveyor needs to be aware of the variances within jurisdictions where work is conducted.

### Color of Title (in some states)

Color of title might occur when a party holds written title that appears to be valid when it is not. Courts have held that any written instrument—including, at times, land surveys or plats—that rises to the level of appearing official meets this definition. If regular on its face, or if it meets legal criteria for such conveyances or descriptions in a given state, a written instrument also meets this definition. As Skelton states, “Color of title is merely that which in appearance is title but in reality is no title.”

Remember that some, although not all, states require color of title as an element of adverse possession. Further, as we observed in the discussion on *statute of limitations*, some states require color of title obtained in good faith.

### Paid Taxes (in some states)

In a requirement that greatly decreases adverse claims, some states require that taxes be paid on land adversely possessed. Some states require taxes be paid during the full duration of the claim, while others shorten the statutory period for possession if taxes have been paid. Brown emphasizes that, “Payment of taxes is not proof of possession; it is evidence of a claim of right... People do not pay taxes willingly; therefore, payment of taxes is evidence of a claim.”

### Good Faith (in some states)

As noted in several instances in this course, *good faith* merely means that a person believes that good title has been obtained properly, regardless of whether it has. Not all jurisdictions require good faith, and when they do, good faith is usually coupled with color of title.

A person obtaining a deed that is known to be defective does not obtain property in good faith. A deed falsified by the holder is similarly not a deed acquired in good faith. John Grimes in *A Treatise On the Law of Surveying and Boundaries* notes that, “an instrument purporting to be a conveyance” must be “accepted in good faith and in the honest belief that it invests the title in the claimant.” In other words, good faith in regards to adverse possession is devoid of schemes, dishonesty and manipulation.

As Davis, Foote and Kelly, conclude in *Surveying: Theory & Practice*, “... the application of the principle of adverse possession is entirely a matter of intention and belief.”

## **Exemptions to Claims of Adverse Possession**

Against whom does adverse possession *not* run? The largest land holder protected against adverse claims is the federal government. Further, unless stated to the contrary in statutes, adverse claims cannot be made against states or municipalities. When such possession occurs, it is usually defined as trespass, or an encroachment. Regardless, while individuals cannot adversely possess government lands, states and municipalities *can* adversely claim against individuals (see the reference to *Carrere v New Orleans* above). Such actions differ from

eminent domain, which is a taking under the guise of public good, versus the claim of ownership by mere possession.

Prohibitions against adversely acquiring land owned by the government or states dates back almost to the founding of the country. In 1796, basing their decision on Common Law, a Massachusetts court found, "Title to land cannot be acquired by adverse possession against the state." (*Commonwealth v Little*, 5 Dane Abr. 407)

Therefore, under principles reverting back to King's title, or what were known as sovereign lands, land owned by or for the benefit of the public can never be adversely claimed by a private party. Examples of publicly-owned lands are roads, parks, forests, cemeteries, and--although not publicly owned--parcels held in title by religious organizations. In addition, almost all western states, and many other states throughout the country, exempt railroads and many public utilities from adverse claims.

Of note, statutes commonly exempt individuals from claims of adverse possession in many common sense situations (although in some cases, the exemptions are clearly dated). Individuals are exempt in all, or some, of the following cases:

- When the owner is in military service, or in military service on foreign soils.
- When the owner is in jail for a period less than life.
- When the owner is found by a legal entity to be "legally insane."
- When the owner is disabled (although this exemption typically ceases if the owner's disability is removed)
- When the owner is not of legal age, and
- When the owner is entitled to a future estate.

In addition, some states exempt owners who live in other states. Interestingly, some states, in the same breath that they exempt infants and the insane from adverse claims, similarly exempt married women.

### **Adverse Possession versus Prescriptive Easements**

As emphasized in this course, adverse possession is a way of *taking title* to property by physical occupation. *Prescription* is a means of obtaining *easement rights* from long use. Prescription does not transfer ownership; it conveys only a right of usage.

Unlike adverse possession which requires continuity, prescription describes temporary, but long term, usage. For instance, a person traveling over another's land for a period of years may acquire a prescriptive easement if the use meets statutory requirements. Public use for a roadway of a portion of a privately-owned parcel may create a prescriptive easement by usage. Such public (and sometimes private) uses may, depending on their purpose, also be referred to as easements of necessity. Further, when the right is acquired by the public, it is called a *dedication*; when acquired by private individuals, it is always considered a *prescriptive* right.

Skelton notes, "... an easement will confer upon the public all the rights essential for the use of way as a street... an easement rather than a vesting of fee is acquired by prescription, [while] the

title in the roadway remains in the owner of the adjoining land.”

An example of prescription would be when an old public roadway that originated as a one-lane dirt road is slowly expanded to accommodate greater traffic. Over time it grows from one lane to two, then gradually, encroaches into a private property as the road is widened and maintained. Because the private property remains under the same ownership, no boundary survey occurs for 30 or 40 years. When the land is eventually under contract to be sold and the required survey shows an encroachment, the town may prevail with claims that a prescriptive easement has ripened on the land. Thus, the property owner still owns the “improved” land and pays taxes on it, but the public has the right to use it.

Therefore, prescription is not to be confused with adverse possession. The former always conveys an easement, with ownership remaining in the original title holder, while the latter--adverse possession--is a means of *taking title* by continuous physical occupation.

### **Practical Approaches to Adverse Possession**

Because adverse possession is usually an unwritten right or claim, a professional land surveyor is usually alerted to such a claim by encountering one of the following:

11. Fencing that clearly exceeds in length or width the recorded boundaries for a property.
12. Monuments that, while not matching surveys, appear to define, in excess, lands held by one party against another.
13. Buildings, whether residential, commercial or industrial, that overlap a boundary line, or encroach into an adjoining property.
14. Other physical uses by one owner of another owner’s known property.
15. Claims, almost always verbal, that an owner possesses land beyond that defined in his deed or on known surveys.
16. Evidence of cultivation, farming, ditching or other agricultural uses that, practically, extend one owner’s land use into that of another owner, and/or
17. A deed that contradicts a succession of reputable surveys or deeds for a given parcel, that in its description expands the previously described limits for a given parcel, and that is claimed by a party to represent his limits of ownership.

Clearly, one of the most difficult challenges for a professional land surveyor is accurately defining and acknowledging (or dismissing) adverse possession. Brown notes that, “It is much easier to prove recognition and acquiescence, practical location, or other means of unwritten transfers [than to prove adverse possession].”

A surveyor assumes immense liability for unrecognized adverse possession. Likewise he/she can assume similar liability for failing to correctly monument a property by deed, erring in giving undue weight to existing conditions that may, in fact, reflect a brief adverse possession that has not ripened under the law.



Wood slat fencing tied to old wooden posts that are reinforced with steel posts. About forty years old, this fence--if over a property line--meets the criteria of “open and notorious,” as well as “hostile.”

Given the most common adverse claim encounters (see the numbered items above), fencing is the most problematic. Because it constitutes the elements of “open and notorious,” as well as “hostile” and possibly “continuous,” fences must be judged by age, material, reference in older maps, reference by deed, and testimony to these same factors by abutting parties. New fences may be dismissed; ancient fences must be viewed with concern.

Monuments may be viewed similarly, although with less weight. There are many excellent books on boundary law and control that should be referenced on this subject, but clearly monuments may constitute an element of adverse possession, particularly when the monuments possess both age and specific reference by deed. Remember, monuments by themselves are usually dismissed by courts as insufficient evidence of adverse possession.

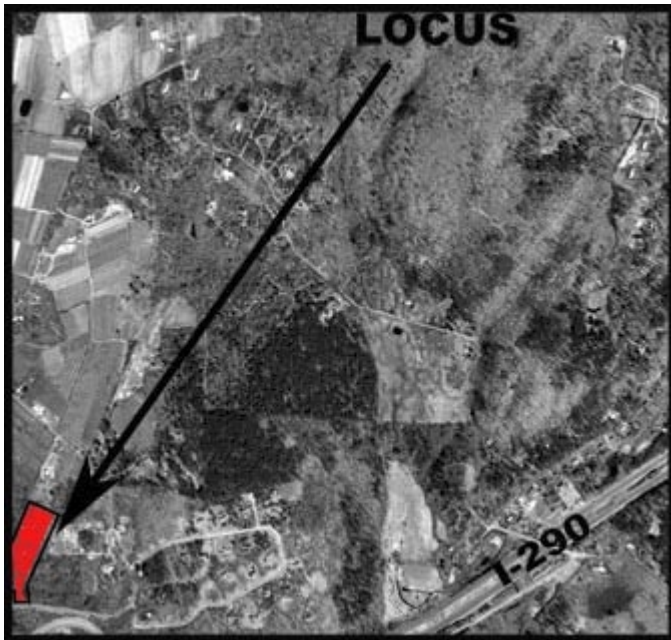
The existence of buildings and other large scale, permanent improvements is usually a clear sign of adverse possession, unless they exist by right under a lease or similar license. Again, age and intent play a major factor in determination. Further, does the adverse possessor make exclusive claim of ownership, even in the absence of written title? Usually such claims are necessary to sustain adverse possession.

An abutter’s statement of ownership beyond his deeded bounds, when those claims are not reinforced by actual, open, notorious, exclusive and continuous possession, may be a hollow claim. Mere statements of ownership hold no legal weight under this doctrine.

Evidence of cultivation, farming, ditching or other agricultural uses by one land owner into another’s property is clearly problematic. A professional land surveyor must determine, if possible, whether the use has been intermittent, or continuous, and for what period of time. An objective tool for such determinations may be aerial photographs, ideally ones predating whatever year is required to meet the state statutory period. If the period is 20 years and the surveyor discovers the use in 2006, he should search for photographs that predate 1986. If such are found and they indicate the use was in evidence even at that time, such photographs would

constitute strong evidence of adverse possession. Regardless, remember that further evidence would be required to meet a court test of *continuous*.

A deed that contradicts recorded or known documents and that is the basis for adverse claims by one party against another may meet the test of “good faith,” particularly if the holder honestly believes that such a deed is genuine. Yet the surveyor must, in addition, judge whether possession has been “open and notorious,” as well as “hostile” and “continuous.” A single element by itself rarely suffices to meet the test of adverse possession.



Aerial photos may be used to determine issues of adverse possession.

### **When to Involve an Attorney**

Because issues of adverse possession are complex, and often revolve around arcane court decisions that are subject to spirited legal interpretation, contacting an attorney when encountering suspected adverse possession is important. Developing an immediate “team approach” to solving disputed boundaries is prudent. Involving an attorney early in any analysis is the sign of an experienced land surveyor.

Because liability issues are always a possibility in these situations, having counsel conduct research and offer advice is critical. In addition, in any dispute, an attorney can act as an intermediary between the surveyor and claimant. An adverse possessor may say one thing to a surveyor, and be far more careful speaking to an attorney.

Many cases of adverse possession end up in litigation. Professional land surveyors frequently appear in court as expert witnesses. Unfortunately, far too many surveyors also end up in court as defendants, accused of negligence for failing to ascertain that possession is really trespass. The

temptation to survey existing fences as “lines of possession” (such surveyors are commonly, and disparagingly, called “fence surveyors”) is far too great--doing so rarely upsets land owners because the surveyor is simply acknowledging existing conditions. But a fence survey--unless it follows the footsteps of the original surveyor--may neglect the doctrines that define whether an adverse claim has ripened, and may violate ancient boundaries, exposing the surveyor to a lawsuit and even revocation of a professional license.



### **A Professional Land Surveyor's Duties**

Given the cautions in the preceding section, there are certain well established principles that should dictate a surveyor's duties to a court and to a client, when encountering adverse possession. These have been succinctly stated in Brown's *Boundary Control*, and are echoed in various texts by Madson, Skelton, Grimes, Donald Brown, and particularly, in *The Statute of Limitations and Adverse Possession* by Henry Foster Buswell.

A surveyor's legal duties may be summarized as follows:

- If possession does not agree with an owner's deed, an abutter's title must be searched to determine the status of senior rights and to determine if changes have occurred in the wording of titles at times of transfer.
- If possession is not in agreement with measurements and if an original survey were made, the contemporary surveyor must determine if the possession represents the footsteps of the original surveyor. If it does, then possession does not represent an unwritten conveyance right: it is instead where the original rights belong.
- If adjoining agree that lines of possession between them are, or should be, the boundary lines, and if possession is not in agreement with the deed, the surveyor should attempt to transform the agreements to writing. A plan would be prepared, and deeds revised to reflect actual conditions.
- The surveyor should differentiate between lands in agreement with a written title and lands claimed by some form of unwritten title.
- If there is possession that is not in agreement with a client's written deed, the surveyor

should inform the owner of its possible significance.

Many surveyors create maps that show both the “deed line” and “lines of possession,” not taking a position on issues of ownership. In reality, such a plan is not a boundary survey as much as an existing conditions plan that only serves to confuse all parties. A professional actively tries to ascertain lines of ownership, not dodge the very issues that may have caused his/her employment. If the surveyor cannot, after due analysis, properly reach conclusions about ownership when occupation differs from written instruments, his/her foremost duty is to then inform all parties of interest, noting that transfer of title by occupancy rights may have occurred.

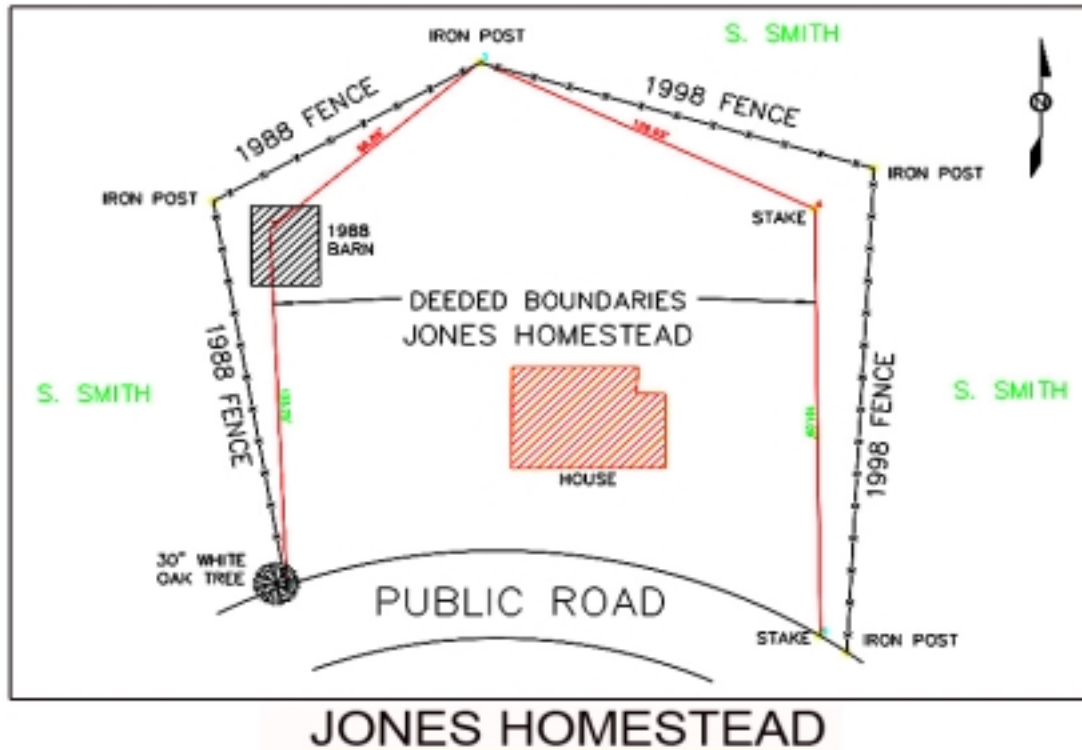


1878 survey. Recreating ancient lines and following original footsteps is often a challenge.

As an aside, this course is not long enough to incorporate discussions of whether surveyors may monument boundaries of possession that conflict with written conveyances. Statutes of states and the federal government neither authorize nor bar a surveyor from “monumenting boundaries in accordance with unwritten rights” (see Brown, *Boundary Control*). Most professional surveyor associations are critical of “fence surveyors,” while approving of surveyors who follow in the footsteps of an original surveyor. Clearly, a surveyor who monuments relatively recent lines of possession--versus lines defined by deed--and who plats said lines as accurate boundaries, becomes responsible for defending such claims in court. If he/she fails in a defensive of these decisions, there is potential exposure to multiple liabilities for damages caused to interested parties, including banks, lien holders, title companies and abutters.

### **An Example of Adverse Possession**

In a hypothetical example (see the plan below entitled “Jones Homestead”), Jones acquires a parcel from Smith in 1987 and builds a house in the middle of his new lot. Beforehand, Jones hires a surveyor to mark his property, and the surveyor sets oak stakes at all corners except the southwest front corner, which is a gnarly 30” white oak tree that is also called out in the deed. Jones decides to wait a year before erecting fences down his lines. During that year, evidence of the survey (such as flagging and tall witness stakes) disappears.



[Sketch illustration by the author indicating factors discussed in the example.]

In 1988, Jones decides to fence the western part of his property. He chooses a 4-foot high wire fence and sets steel support posts every eight feet. Instead of following his staked corners, Jones wanders off into Smith's land by up to 30 feet. He also sets an iron post at the western point of turn in the new fence, and replaces the oak stake at the rear northern corner with a similar iron post. When Jones next sees Smith at the local newsstand, he says, "I just fenced part of my property. Nice looking fence, huh?" Smith nods and agrees. They then go on to discuss the latest baseball game at the local school.

A week later, Mrs. Green who lives across the street from Jones crosses the street and compliments Jones on his new fence. He says, "'Took a chunk of Smith's property. He'll never know!'" Whenever Jones sees Mrs. Green, who is often accompanied by Mr. Green, he says the same thing. "'Yup. 'Took a chunk of Smith's property!'" She finally says to him, "Mr. Jones, I don't believe a word you're saying!" He laughs along with her..

In 1988 after six months have passed--and Smith has said nothing negative to Jones--Jones decides to build a barn. He sets part of the barn into Smith's land, and landscapes the area with six foot maple trees. Jones and Smith see each other periodically, but Smith never speaks to Jones about the barn's location.

In 1998, Jones decides to complete his fencing. He sets a similar wire fence near his eastern property line, once again taking a portion of Smith's land. He also sets an iron post at a mid point of turn in the fence, and replaces the front oak stake with a similar iron post, though he sets it

easterly into Smith's land by ten feet. As before, he mentions the new fence to Smith, who only says, "Came into an inheritance, did you?"

Years pass and in 2006, Smith decides to refinance his property. The bank requires a survey. Smith hires City Slicker Surveyors (CSS). CSS immediately conducts research, including a title search, and reviews old deeds to Smith, Jones and other abutters in the area.

Upon arriving at the site to do the field work, the CSS crew notes the white oak tree which is referenced in the deed from Smith to Jones, and also finds iron posts at every fence corner. Jones sees the field crew and asks them what they are doing. When they tell him, he insists on showing them his deed, which turns out to be an original of the one they obtained at the registrar. Jones also insists on showing his property corners--the iron posts--and says, "I had these points surveyed back in '87, boys. Darn good surveyor who did that work, too! 'Can't remember his name. Maybe it was Meehan. Or Turner. I put up the fences the next year. And the barn too. Let's see—1988? That was 18 years ago. 'Long time ago. They still look shiny, don't they? By the way, any idea of what the weather'll be on Tuesday?" He continues speaking, rambling on without apparent purpose.

The CSS field crew concludes that Jones is likable, but a bit of a character. They run a traverse, locating all the improvements and corners. The party chief is troubled though; nothing seems to fit the Smith/Jones deed. He decides to complete his analysis back at the office, sensing that this survey may not be routine.

Our hypothetical example has several issues running in parallel. Has adverse possession occurred on this site against Smith? And where?

To arrive at a conclusion, we have to initially apply the fundamental elements of adverse possession. For instance, has open and notorious possession occurred? Has hostile possession occurred?

The taking has certainly been continuous, although even this element has varying time periods (1988 and 1998). If we assume the state Jones lives in requires 15 years for a claim to ripen, only part of the taking—the area of western fencing with the barn--has exceeded the mandatory 15 year period. The eastern taking is less than 10 years old.

We can conclude that the iron post "corners" are not accurate boundary corners. Or can we? Does their apparent age give them legal weight? Jones claims a surveyor set those 18 years before, yet their location differs markedly in course and distance from the Smith/Jones deed. Should we honor these as marking "lines of possession?" As a basic duty, CSS makes an immediate decision and alerts Smith.

When Smith is told about the discrepancies, he reacts with anger. Upon questioning, he admits that Jones told him years ago about the fencing, and that he could obviously see it when he drove by. He admits that it never occurred to him that the fences might not follow the deed lines. He is shocked to learn that even the barn may sit on his land. When CSS tries to pin Smith down about

the year Jones spoke to him, he can't remember beyond, "It was years ago. Maybe 15 or 20." Before the meeting with CSS concludes, Smith calls his attorney. He also finds the original invoice from the 1987 survey and gives CSS the surveyor's phone number.

The attorney meets the following week with CSS's registered surveyor. They place a conference call to the original surveyor, who pulls his field notes and states he set 24" oak stakes. By the time they finish reviewing the survey results, Smith's attorney and CSS have reached the following conclusions:

- Smith cannot recall the exact year, or years, when Jones spoke of the fencing. He is certain, though, that the fences were erected at different times, maybe as far apart as a decade.
- Jones claims that the fencing was erected in its entirety 18 years ago.
- The iron post corners do not match deed descriptions. Jones claims the original surveyor set them in 1988. The CSS surveyor admits the posts are rusty, and could be quite old.
- There are no issues of "prescription" in this matter.
- The Jones barn looks like it has some age. Jones claims it was built in 1988.
- Adverse possession in this state ripens in 15 years.
- The trespass, or possession, against Smith has probably been continuous, exclusive and open.
- There is uncertainty about whether the one or two discussions between Smith and Jones constitute a public claim.
- Jones has been paying taxes only on the land he originally acquired from Smith.
- No good faith has taken place, as Jones has no deed or documents other than his original conveyance from Smith.
- The attorney notes that "hostile" possession may not have occurred, unaware of Jones' many conversations with Mrs. Green and her husband.
- Landscaping and other minor improvements have also been made by Jones into the Smith property.

The attorney suggests that CSS acquire as many aerials photographs as possible of the area, going back to at least 1988; maybe the fences will be evident. He also asks them to return to the site and search for the original oak stakes; CSS agrees that there is a chance they still exist. He asks them to examine the fences for any commercial identification. If a company logo exists on the fences, perhaps the company, if still in business, can search its records to determine when the fence was built. He tells CSS he wants their expert opinion on the age of the iron corner posts, as well as the barn. He expects the country assessor records to reflect the date of the barn's construction. The attorney also notes that, as a matter of course, he plans on sending Jones a certified letter of notification ordering Jones to vacate the areas of "trespass."

In summary, this example describes many typical occurrences, and subsequent problems, encountered during claims of adverse possession. How this particular case might be resolved depends on many undetermined factors, including,

- Whether Jones can prove hostile and notorious possession.
- Whether Jones can prevail on his claim that the fences were erected at the same time, and when.
- Whether Mr. and Mrs. Green will testify about their conversations with Jones.
- Whether a court would consider the two conversations between Smith and Jones to constitute sufficient notice of adverse claim. After all, Jones never said to Smith, “I placed fences into your property, and you better not try to take the land back.” Rather, he simply mentioned he had built fences.
- Whether Jones can prove the age of the barn.

Note that the burden of proof lies on the claimant, Jones, and not on the original land owner (although Smith is motivated to find evidence *against* Jones to disprove the taking). Yet Smith must defend himself against possible claims of negligence, e.g. he has neglected to defend his property from taking. In addition, a team approach between the CSS surveyor and Smith’s attorney is essential. The surveyor is an expert in boundaries and measurements; the attorney in matters of law, court procedures and legal notifications. In matters of adverse possession, the two are dependent on each other for differing forms of expertise, yet each plays a vital role in the analysis and final determination.

The probable outcome? Jones v. Smith advances into Superior Court. Jones prevails, at least to the extent that his barn and westerly fence are allowed to remain. He is able to prove, through town tax assessor records and testimony, that both were built more than 15 years before CSS discovered them. In court, over a week long trial, Smith’s attorney is able to extract testimony from Jones that he planned these events well in advance. Jones knew “the score” because he had a brother-in-law who had been involved in 1984 in a notorious adverse possession case in a nearby town. So through his testimony it becomes clear that he planned his steps when he bought the tract from Smith, including incessantly repeating, “Took a chunk of Smith’s property!” to the Greens. Jones also blurts out during testimony that the easterly fence may not be as old as the westerly one.

Smith himself admits under oath that he “never dreamed for a minute that I had to pay attention to things like that,” setting in motion a finding of abandonment against him. Regardless, the court finds that the easterly fence does not meet the statutory period, and orders Jones to vacate that area and return it to its original condition. Last, the court rules that Jones meets the multiple tests of open, notorious and continuous possession for his adverse claims on the westerly “improvements.” His testimony that his actions were all planned fails to sway the judge against him--after all, courts acknowledge that adverse possession is, essentially, theft.

## Summary

Adverse possession is a complex, legally defined means of taking title to property by physical occupation. Its definitions vary from state to state. Possession must run for a statutory period, again defined by different states. The adverse claimant is charged with the burden of proof. A survey by itself of original property lines cannot revive the rights to land lost in adverse

possession. In all states and jurisdictions, adverse possession requires: occupation for the *full* statutory period, actual physical occupation, open and notorious occupation, and *exclusive* and adverse occupation for a statutorily prescribed period.

There are basic elements of adverse possession which are necessary for a claim to “ripen” into clear title. Those elements include actual possession, open and notorious possession, continuous possession, hostile possession and exclusive possession. In some states, other elements are required as well.

There are also well-established exemptions to claims of adverse possession. These exemptions include adverse claims against the federal government, states, and municipalities. Some individuals are exempt, but only in special cases.

Because issues of adverse possession often revolve around court decisions that are subject to legal interpretation, contacting an attorney when encountering adverse possession is smart, and implementing a “team approach” to solving disputed boundaries is prudent.

Last, there are well established principles that dictate a surveyor’s duties to a court when encountering adverse possession. Those duties are predominately to one’s client, entail using good sense, and lean on time honored principles of following in the original surveyor’s footsteps.

\* \* \* \* \*

Note that the following bibliography lists a number of essential texts that are classic guides for any land surveyor conducting boundary surveys. All have been used repeatedly in court as expert documents, and are highly recommended for further reading on adverse possession, as well as other complex boundary-related subjects. The first text, *Evidence and Procedures for Boundary Location*, by Brown, Robillard & Wilson, should, without exception, be in every surveyor’s library.

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