Adverse Possession – Early History

Code of Hammurabi – circa 1720 B.C.

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

Adverse Possession – Early History

12 Tables – Imperial Rome

› Table VI, Usucapio of movable things requires one year’s possession for its completion; but usucapio of an estate and buildings two years.

› (note: usucapione remains the technical term for adverse possession in current Italian civil code.)
Adverse Possession: Early English Statutes

- Statute of Westminster I, 3 Edward I, c. 39 (1275)
- Statute of 32 Henry VIII, c. 2-3 “fixed a statutory period of limitations for the issuance of writs of right, [and] sixty years' possession was considered sufficient evidence of enjoyment from the time of Richard I to raise a presumption of a grant…

- Statute 21 James I, c. 16 (1623). adopts the modern method of limiting the right of entry, and so the action of ejectment, to within twenty years next after the right of entry accrues. The right of entry does not accrue until someone initiates an adverse possession.

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Not the same as agreement

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

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Adverse Possession (General)

- Remember “OCEANS”
  - Occupation,
  - Continuous,
  - Exclusive,
  - Adverse (to the true owner)
  - Notorious (open and),
  - for the Statutory Period.

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Relevant Statutes: New York
(1st 7 Bullets prefaced RPAPL)

- 501 –
- 511 – 10 years adverse possession w/ color of title
- 512 – Constructive notice: enclosure, wood, farm
- 521 – 10 years possession lacking color of title
- 522 – Constructive notice by actions or enclosure
- 531 – Adverse possession of tenant against landlord
- 541 – Adverse possession and tenants in common
- 543 – De Minimis Encroachments
- CPLR – 211 – Statute of limitations against the state
- CPLR – 212 – Statute of limitations for real property
Statute of Limitations has changed twice:

- New York provides an excellent study of the effects of changes to the statute of limitations.
- The statutory time requirement has been reduced twice since the state was originally formed.
- From the original 20-year common law standard, the timespan was reduced to 15 years in 1935 and finally to the current requirement of 10 years in 1963.

Adverse Basics: New York (1)
Schoenfield v. Chapman:
200 Misc. 444; 102 N.Y.S.2d 235; 1950

- "There are five essential elements necessary to constitute an effective adverse possession:
  - first, the possession must be hostile and under claim of right;
  - second, it must be actual;
  - third, it must be open and notorious;
  - fourth, it must be exclusive; and
  - fifth, it must be continuous. If any of these constituents is wanting, the possession will not effect a bar of the legal title.

Recent Ruling: New York (1)
Ammirati v. Wicklen:
16 Misc. 3d 952; 839 N.Y.S.2d 685; 2007

- A party seeking to obtain title by adverse possession on a claim not based upon a written instrument must show that the parcel was either 'usually cultivated or improved' (RPAPL 522 [1]) or 'protected by a substantial inclosure.' In addition, the party must prove by clear and convincing evidence the common-law requirements of adverse possession, to wit:

  (1) that the possession was hostile and under claim of right;
  (2) that it was actual;
  (3) that it was open and notorious;
  (4) that it was exclusive; and
  (5) that it was continuous for the statutory period of 10 years.

Basic Requirements: New York (2)
Ammirati v. Wicklen:
16 Misc. 3d 952; 839 N.Y.S.2d 685; 2007

- (1) that the possession was hostile and under claim of right;
- (2) that it was actual;
- (3) that it was open and notorious;
- (4) that it was exclusive; and
- (5) that it was continuous for the...
Reduced to its essentials, this means nothing more than that there must be possession in fact of a type that would give the owner a cause of action in ejectment against the occupier throughout the prescriptive period.

The ultimate element in the rise of a title through adverse possession is the acquiescence of the real owner in the exercise of an obvious adverse or hostile ownership through the statutory period.

The first element of adverse possession, that the occupation of property must be “hostile and under a claim of right,” is satisfied where an individual asserts a right to the property that is “adverse to the title owner and also in opposition to the rights of the true owner.”

In addition, where the claim of right is not founded upon a written instrument, the party asserting title by adverse possession must establish that the land was “usually cultivated or improved” or “protected by a substantial inclosure.”

Respondent also established the second element of adverse possession, which is “actual” possession of the land. When she enclosed the premises with a fence in 1997, the 84 lot completely merged with the 86 lot and gave her exclusive control of the joint properties.

Petitioner’s photographs depict the fence enclosing the two contiguous lots... The witness asserted that she then began to take care of the land and use it as a playground for her children. Cultivating, improving and enclosing property are acts deemed by statute to be acts of “possession and occupancy” of land.
The third element of adverse possession is that the use of the land must be "open and notorious." Respondent Velez testified that no one prevented her from placing a fence around 84 and 86 although she did so openly. She further stated that none of her neighbors complained about the fence, in the years after she erected it, because she was considered the owner of the premises. Respondent's use of 84 Visitation Place was open and notorious, in that she treated that land as her own, and was recognized by her neighbors and friends as the owner.

The fourth element of adverse possession is "exclusive" use of the land. To establish the "exclusivity" element, the adverse possessor must alone care for or improve the disputed property as if it were his/her own. Respondent Velez's testimony establishes that she has cared for 84 Visitation Place as if it were own. Ms. Velez testified that she contacted HPD to remove the deteriorating house on 84 Visitation Place and since its removal had exclusive control over the property.

The fifth element required to satisfy a defense of adverse possession is that the land must be used continuously for a period of at least 10 years. Respondent demonstrates the continuous use element as she testified credibly that she has used the land continuously since erecting the fence in 1997. Respondent explained that her family continuously used the land as a playground, for barbeques, and later to park their cars on the land.

Historically, there are several policy reasons used to justify adverse possession, such as:

1. the stabilization of uncertain boundaries through the passage of time;
2. a respect for the apparent ownership of the adverse possessor who transfers his interest; and
3. assurance of the long-term productivity of the land.
O’Dell v. Stegall: 226 W. Va. 590; 703 S.E.2d 561; 2010

- Prescription doctrine rewards the long-time user of property and penalizes the property owner who sleeps on his or her rights. In its positive aspect, the rationale for prescription is that it rewards the person who has made productive use of the land, it fulfills expectations fostered by long use, and it conforms titles to actual use of the property. The doctrine protects the expectations of purchasers and creditors who act on the basis of the apparent ownerships suggested by the actual uses of the land.
- “[I]ts underlying philosophy is basically that land use has historically been favored over disuse, and that therefore he who uses land is preferred in the law to he who does not, even though the latter is the rightful owner.”

O’Dell v. Stegall: 226 W. Va. 590; 703 S.E.2d 561; 2010

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

D.C. – Adverse Possession Theory: (1)

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

D.C. – Adverse Possession Theory: (2)

- Also under the mistaken impression that about 3 acres, constituting the eastern part of the middle tract, which had been allotted by the will and the executor’s deed to the heirs of George Butler, was part of her tract of 8 acres, she occupied this part also, has cultivated it, or part of it, from year to year in a fashion, and has continued to hold it in that way from the year 1862 to the present time.
The complainant is ...so ignorant, indeed, that she does not seem to appreciate even now that she has taken possession of any more property than she was entitled to do under the will of Elizabeth Butler. Under that will she was entitled to 8 acres; she is in possession or claims to be in possession of 11 acres; and yet she protests that she does not want more than she was entitled to have under the will, but she claims that she was entitled under the will to all the property which she claims now, notwithstanding repeated surveys to the contrary.

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

The tenant manifested her intent to maintain possession of the locus, even if she did it under a mistaken description.

Proxentia corporis tollit errorem nominis. Identification by the senses overrides description, as in many other cases in the law. ... We interpret the finding and ruling as meaning that the tenant in actual fact occupied the premises adversely during the whole twenty years,

When used in the context of adverse possession, "hostile" is a term of art. It does not imply ill will. In order to establish adverse possession, the possession must be openly hostile. "Hostile" possession has been defined as possession that is opposed and antagonistic to all other claims, and which conveys the clear message that the possessor intends to possess the land as his own. It is not necessary that he intend to take away from the owner something which he knows to belong to another or even that he be indifferent concerning the legal title. "It is the intent to possess, and not the intent to take irrespective of his right, which governs.
"the tenant must unfurl his flag on the land, and keep it flying so that the owner may see, if he will, that an enemy has invaded his dominions and planted his standard of conquest."

PEGG v. JONES - NO. COA07–147 Filed: 4 December 2007 (N.C.)

Additionally, the trial court made a finding of fact that there was no adverse possession after the incident in which Cecil pointed a loaded shotgun at Carl Pegg in 1965. Specifically, the trial court stated that it did not infer that the act of pointing a gun and telling Carl Pegg to get out means that Cecil Jones considered that he owned any property in fee simple or that that message was communicated to Dr. Pegg.

Where the relation of tenants in common has existed, the occupancy of one tenant, personally or by his servant or by his tenant, is deemed to have been the possession of the other, notwithstanding that the tenant so occupying the premises has acquired another title or has claimed to hold adversely to the other.

But this presumption shall cease after the expiration of ten years of continuous exclusive occupancy by such tenant, personally or by his servant or by his tenant, or immediately upon an ouster by one tenant of the other and such occupying tenant may then commence to hold adversely to his cotenant.
In opposing plaintiffs' claim, the County relies on the principle that a municipality cannot lose title to real property by adverse possession when it holds the property in its "governmental" capacity...

The County further asserts that property which the government acquired by tax deed and was held by the County for the eventual collection of real estate taxes is property taken by the County in its governmental capacity as a direct result of its powers to collect taxes.

Defendant County's contentions are without merit.

While immunity will generally attach to property held in a "governmental" capacity, such as a highway, public stream, canal and public fairground, there is no immunity available for property held in a so-called "proprietary" capacity.

That a municipality takes land for tax collection purposes does not defeat an adverse possession claim if the subsequent purpose is merely resale, which is proprietary in nature and not a true governmental use.

Thus, it has been observed that "[t]here is a well-recognized distinction between lands held by the State as sovereign in trust for the public and lands held as proprietor only, for the purpose of "sale or other disposition"... such lands only as the State holds as a proprietor may be lost to the State:

... it cannot lose such lands as it holds for the public, in trust for a public purpose [such] as highways, public streams, canals, [and] public fairgrounds"

The general rule as to alienability of municipally held property was clearly stated in Montgomery County v. Maryland–Washington Metropolitan District, 202 Md. 293, 96 A. 2d 353 (1953), where it was said at p. 303:

"A distinction is frequently drawn between property held by a county in its proprietary [or business] capacity and that held by it in its governmental capacity. Property which is held in a governmental capacity or is impressed with a public trust, cannot be disposed of without special statutory authority."
To constitute an adverse possession, it is not necessary that there should be a rightful title. All that is necessary is, that it should be a possession taken and held in good faith under claim and color of title, and exclusive of any other right. The defense of adverse possession assumes that the defendant has not a valid legal paper title; if he had, he need not rely upon the length of his possession. The fact of possession, and the quo animo, it was commenced and continued, are the only tests.

A conveyance by an attorney or agent, professing to convey the whole and absolute title, is a good foundation for an adverse possession; and it is perfectly immaterial for that purpose whether he had the requisite authority to convey or not, for, although a deed professedly executed under a power will not pass the estate, if the power did not in fact exist, yet it is sufficient to give color to the grantee’s claim of title, and stands upon the same footing with any other deed, which, for the want of title in the grantor, or for any other defect, does not actually pass the estate.

At common law actual seisin was, undoubtedly, necessary to maintain a writ of right. There is no discrepancy in the authorities upon this point. …

“So the seizin which is requisite in a writ of right of land ought to be actual, and not seizin in law.”

For the purpose of constituting an adverse possession [fig 1], founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in [fig 2] any of the following cases:
1. Where [fig 1] there has been acts sufficiently open to put a reasonably diligent owner on notice.
2. Where it has been protected by a substantial [fig 1] enclosure, except as provided in subdivision one of section five hundred forty–three of this article.
3. Where, although not [fig 1] enclosed, it has been used for the supply of fuel or of fencing timber, either for the purposes of husbandry or for the ordinary use of the occupant.
RPAPL 532 Possession w/out Color

§ 522. Essentials of adverse possession [fig 1] not under written instrument or judgment

For the purpose of constituting an adverse possession [fig 1] not founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases, and no others:

1. Where [fig 1] there have been acts sufficiently open to put a reasonably diligent owner on notice.
2. Where it has been protected by a substantial [fig 1] enclosure, except as provided in subdivision one of section five hundred forty-three of this article.

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

Plat not Color of Title: Virginia
Sulphur Mines Co. of Va. v. Thompson: 93 Va. 293; 25 S.E. 232; 1896

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Plat not Color of Title: Virginia
Baber v. Baber: 121 Va. 740; 94 S.E. 209; 1917

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

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

But the color of title is not title. It is only a shadow, and not a substance; but for the purpose of quieting titles and to prevent litigation about State claims, the law has provided that where one enters into the open, notorious possession of land, under color of title--this shadow--and remains continuously in said adverse possession for seven years, claiming it as his own, the law will protect such possession; that such long possession under color of title, in the eyes of the law, ripens such color into title.
But that shadow, or color, only extends to the boundaries marked by the color—the deed—and can extend no further, though they may be circumscribed, as they will not even cross another line, unless there is actual possession across that line, or lappage, as it is called.

Notwithstanding any other provision of this article, the existence of de minimus non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse.

The acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse.

Therefore, to permit a presumption of notice to arise in the case of minor border encroachments not exceeding several feet would fly in the face of reality and require the true owner to be on constant alert for possible small encroachments. The only method of certain determination would be by obtaining a survey each time the adjacent owner undertook any improvement at or near the boundary, and this would place an undue and inequitable burden upon the true owner. Accordingly we hereby hold that no presumption of knowledge arises from a minor encroachment along a common boundary. In such a case, only where the true owner has actual knowledge thereof may it be said that the possession is open and notorious.

The law is well established that merely mowing grass, regardless of the intent of the claimant, is insufficient as a matter of law to amount to the required possession, and is therefore insufficient to commence the running of the statute of limitations upon which adverse possession can be founded.
Adverse: Incidental uses: Ohio (1)

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

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

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

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

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

D.C. Adverse Possession: Berlin Wall

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

Accordingly, we discard the requirement that the entry and continued possession must be accompanied by a knowing intentional hostility and hold that any entry and possession for the required time which is exclusive, continuous, uninterrupted, visible and notorious, even though under mistaken claim of title, is sufficient to support a claim of title by adverse possession.

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

The majority or Connecticut rule, see French v. Pearce, 8 Conn. 439 (1831), which recognizes adverse possession even where the occupancy began as a result of a mistaken trespass rather than an intentional one, rests on sound reasoning...

In any case in which title by adverse possession is claimed, the initial possession must have come about either by mistake or by deliberate intrusion.

"To limit the doctrine of adverse possession to the latter type places a premium on intentional wrongdoing, contrary to fundamental justice and policy."

The minority or Maine rule, based on Preble v. Maine Central Railroad Co., 85 Me. 260, 27 A. 149 (1893), has received extensive criticism because it is historically unsound, practically inexpedient, and results in better treatment for intentional wrongdoers.

Courts in the District of Columbia have long subscribed to the majority rule described above, and have held that adverse possession has been established in cases in which the claimant’s occupancy resulted from a mistake.
D.C. Adverse Possession: Case 1. (14)
- Title to property acquired by adverse possession matures into an absolute fee interest after the statutory prescriptive period has expired."
- The Supreme Court has held that the lapse of time provided by the statute of limitations not only bars the original owner’s remedy, but also extinguishes his right, and vests a perfect title in the adverse holder.
- Title to land acquired by adverse possession is as perfect as title acquired by deed from the record owner.

Mistake, Tacking: New York (1)
Effert v. Greim: 15 N.Y.S.2d 935; 1939
- Adverse possession, even under a mistake or through inadvertence may ripen into a prescriptive right.
- and actual physical occupation is sufficient evidence of the intention to hold adversely.
- But in order to tack the possession of Iler to her own possession, the plaintiff must establish privity between herself and Iler, and this she has not done.

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D.C.–Adverse Possession & Party Walls: (1)
- alleging primarily that GWU had (1) trespassed on his property by building a ten-story residence hall that cantilevered — or extended — over a party wall that has supported Dr. Kreuzer’s house since it was built in the 1800’s
- This case focused primarily on Lot 7. The only other property in Square 43, besides Dr. Kreuzer’s lots and a large property known as the Remington Condominium, is current Lot 26 owned by GWU; it includes the property formerly known as Lot 6 that abuts Dr. Kreuzer’s Lot 7 on the north side.
The primary source of contention here (or at least a key one among Dr. Kreuzer’s multiple grievances) is that, although the first three floors on the south wall of the dormitory are built straight up on GWU’s Lot 6 about an inch from the north side of the party wall, ... when the south wall reaches the height of the party wall, the concrete floor slab cantilevers to the south over the top of the shared wall up to GWU’s property line and ascends upward from there. (The residence hall does not rest on or touch the party wall; separating them is a two inch gap between the concrete floor slab and the top of the party wall.)

...the party wall is situated wholly on GWU’s property. The respective rights of adjoining property owners concerning a wall that has this unusual feature — lying entirely on one owner’s property — have not been spelled out by a court decision in this jurisdiction.

Nevertheless, in Fowler v. Koehler, 43 App. D.C. 349 (1915), the Circuit Court long ago recognized that “the erection of a party wall by one of the two adjoining owners ... amounts only to the establishment of a mutual easement or servitude and benefit” and “does not change the boundaries nor affect the title of the respective properties.”

"rights of way [and] rights to use party walls ... are acquired by prescription” rather than “adverse possession,” the key difference being that while “successful adverse possession results in acquisition of a possessor estate,” “the owner of a servitude is only entitled to the particular use authorized by the servitude.”

A party wall, as it is generally defined and understood, is a wall erected and standing on the line between two estates. ... owned by different persons for the use in common of both estates.” Moore v. Shoemaker, 10 App. D.C. 6, 14 (1897)

Where he (the adverse possessor) wants to acquire any part of the mineral, he must make his entry on, and maintain his position within, the limits of the mineral estate for the requisite of time in an open, notorious, and exclusive manner. As one of the essential elements to be shown where parties rely on their adversary possession of the premises they must show that their possession has been continuous during a period necessary to give title under the statute of limitation (10 years). A break in the possession restores the seizin of the true owner.
Adverse use and Mineral Rights: Ohio (1)
Gill v. Fletcher: 74 Ohio St. 295; 78 N.E. 433 (1906)
- Title to a mine which has been severed from the title to the surface may be acquired by adverse possession;
- but this can take place only when the possession is actual, continuous, open, notorious and hostile.
- It cannot be accomplished by secret trespass upon the owner's rights and it has been held in many cases that, where there has been a severance of estates,
- neither the owner of the surface nor the owner of the mine can claim the other estate merely by force of the possession of his own estate.

Adverse use and Mineral Rights: Ohio (2)
Gill v. Fletcher: 74 Ohio St. 295; 78 N.E. 433 (1906)
- Nor does the mine owner lose his rights by mere nonuser. His title can be defeated only by acts which actually take the mineral out of his possession.
- A tenant in common cannot assert title by adverse possession against his cotenant unless he shows a definite and continuous assertion of adverse right by overt acts of unequivocal character clearly indicating an assertion of ownership of the premises to the exclusion of the right of the co-tenant.

Adverse to Mineral Estate: New York (1)
Couch v. Armory Commission: 91 Misc. 445; 154 N.Y.S. 945; 1915
- ...conveyed the whole of such property to his son Colonel Pierre Van Cortlandt, whereupon the latter recorded his deed and took possession of the entire property, and by himself and his successors in title have continued in...
- ...possession thereof under such claim of title, exclusive of any other right, for over seventy years, and, for more than twenty years prior to the petitioner's acquisition of title, operated the only known mine upon such property.
- Under such circumstances the petitioner's title to the whole of the premises in question is perfect; title by adverse possession being as good as by grant.

Adverse to Mineral Estate: New York (2)
Couch v. Armory Commission: 91 Misc. 445; 154 N.Y.S. 945; 1915
- Title to mines and minerals may be acquired by adverse possession not only by the owner of the surface but by a person having no interest in the surface.
- ... and may thus be acquired when a person operates a mine or carries on mining operations continuously for twenty years adversely to the rights of others.
- In Armstrong v. Caldwell, 53 Penn. St. 284, it was held that if the owner of the mine is not in actual possession and a person operates such mine continuously for twenty-one years (the statutory period in Pennsylvania) adversely to the right of such owner he acquires the ownership thereof.
Adverse use and Mineral Rights: Ohio (1)
Yoss v. Markley: 68 N.E.2d 399; 1946

- It is well settled that the surface of the land and the minerals underlying it may belong to different owners.
- The ownership of the minerals after severance is to all intents and purposes the same as the ownership of the land and is attended with all the attributes and incidents peculiar thereto.

Adverse use and Mineral Rights: Ohio (2)
Yoss v. Markley: 68 N.E.2d 399; 1946

- Each stratum or kind of minerals in turn may be the subject of a grant, and there may be as many different owners of the minerals as there are different kinds or strata.
- Severance of the minerals may be accomplished by a conveyance of the minerals only, or by a conveyance of the land with a reservation or exception as to the minerals.

Claim Underground: Indiana quotes Pa.(1)
Marengo Cave Co. v. Ross:
212 Ind. 624; 10 N.E.2d 917; 1937

- "The title of the plaintiff extends from the surface to the center, but actual possession is confined to the surface. Upon the surface he must be held to know all that the most careful observation by himself and his employees could reveal, unless his ignorance is induced by the fraudulent conduct of the wrongdoer. But in the coal veins deep down in the earth he cannot see. Neither in person nor by his servants nor employees can he explore their recesses in search for an intruder. If an adjoining owner goes beyond his own boundaries in the course of his mining operations the owner on whom he enters has no means of knowledge within his reach.

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- ...Nothing short of an accurate survey of the interior of his neighbor's mines would enable him to ascertain the fact. This would require the services of a competent mining engineer and his assistants, inside the mines of another, which he would have no right to insist upon. To require an owner under such circumstances to take notice of a trespass upon his underlying coal at the time it takes place is to require an impossibility; and to hold that the statute begins to run at the date of the trespass is in most cases to take away the remedy of the injured party before he can know that an injury has been done him. A result so absurd and so unjust ought not to be possible.
"If there is no severance an entry upon the surface will extend downward and draw to it a title to the underlying minerals; so that he who disseizes another and acquires title by the statute of limitation will succeed to the estate of him upon whose possession he has entered." Pres. & Mgrs. of the Delaware & Hudson Canal Company v. Hughes et al. (1897), 183 Pa. 66, 73, 38 A. 568, 63 Am. St. Rep. 743.

Generally, proof that use of a property was open, notorious continuous and undisputed will give rise to a presumption that the use was hostile and under a claim of right...

The burden is then shifted to the party denying the existence of an easement to establish that the use of the subject land was, indeed, permissive...

Exceptions to the rule that the presumption of hostility will arise exist

(1) when the relationship between the parties is one of neighborly accommodation and cooperation...and

(2) when the subject area is used by the general public... It then becomes incumbent on the user to come forward with affirmative facts to establish that the use was, indeed, adverse to the interests of the landowner.

A party claiming title by adverse possession "is not required to show enmity or specific acts of hostility in order to establish the element of hostility"

This element is satisfied where an individual asserts a right to the property that is "adverse to the title owner and also in opposition to the rights of the true owner"

The ultimate element in the rise of a title through adverse possession is the acquiescence of the real owner in the exercise of an obvious adverse or hostile ownership through the statutory period.
A rebuttable presumption of hostility arises from possession accompanied by the usual acts of ownership, and this presumption continues until the possession is shown to be subservient to the title of.

"Where all the elements of adverse possession are established a presumption of hostility arises and the burden shifts to the record owner to produce evidence rebutting the presumption".

However, hostility is negated by "[s]eeking permission for use from the record owner".

Further, where there is a close and cooperative relationship between the record owner and the person claiming title through adverse possession, the presumption of hostility may not apply...

"the neighborly relationship between plaintiffs, their predecessors in title and defendants' predecessors in title, created an implication that the use of the disputed roadway was permissive"). Thus, in order to establish the hostility element, the party asserting the adverse possession claim must "come forward with affirmative facts to establish that the use [of the property] was under a claim of right and adverse to the interests.

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

In Rosencrantz, the Maryland Court of Special Appeals expressed doubts that entry upon disputed land by a true owner’s agents, merely to conduct a survey, would sufficiently disrupt the continuity of adverse possession as a matter of law...

Instead, the Rosencrantz court stated that whether a survey, without more, is sufficient to disrupt continuity of adverse possession must be evaluated on a case-by-case basis to discern whether the entry to conduct a survey was "accompanied by a purpose to take possession."
Thus, we do not accept Crown’s argument that Montieth stands for the proposition that a record titleholder’s entry, by an agent or otherwise, upon disputed land to conduct a survey, by itself, disrupts the continuity of adverse possession as a matter of law.

Rather, we hold that the conducting of the survey must be accompanied by an intent to recover possession or exercise dominion over the property. Whether the making of a survey will interrupt the continuity of adverse possession sufficiently to toll the running of limitations must necessarily be decided in each case according to the circumstances.

A survey, unaccompanied by any other act of user and occupation, is not such a distinct and notorious act of possession as will justify the reasonable presumption of an ouster or that the party went upon the land with a palpable intent to claim the possession as his own.

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

A mere survey of land for the purpose of ascertaining its locality, is not a sufficient entry to interrupt the statute. There must be in addition something to show that the survey was made with a purpose of resuming possession, and the purpose must be unequivocally manifested.
We are of the opinion, however, that the survey made by John Harris, and the appointment of Bushnell as his agent and the acts of Bushnell in pursuance of the agency, did not constitute such possession as the law requires.

A mere survey of land is not sufficient to establish possession. … Adverse possession of unenclosed, uncultivated, unimproved, and unoccupied land is not shown by evidence, that one had it surveyed and its boundaries marked by monuments, paid taxes on it for a few years, and from time to time cut trees on it for use on other land.

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

We agree the iron rebar markers were insufficient to constitute an enclosure within the meaning of SDCL 15-3-13. An enclosure need not be absolutely secure to satisfy the “substantial enclosure” statutory requirement.

…While we have held a fence or natural barrier such as a tree line is sufficient, we have never held something as meager as two 5/8th inch iron rebar denoting lot corners as sufficient to satisfy the enclosure requirement under a claim of adverse possession.

In its final two contentions, appellant claims that certain provisions of the County Code effectively limit the doctrine of adverse possession with respect to property such as the Community Beach. On this basis, appellant claims that neither appellees nor anyone else can ever claim title to a portion of such land by adverse possession.

Hillsmere cites no case law in support of its contentions.

In Maryland, the original source of the adverse possession doctrine was the Limitation Act of 1623, 21 James I, c.16, an English statute.
Our research has disclosed no Maryland cases, and only one decision of a foreign jurisdiction, Wanha v. Long, 255 Neb. 849, 587 N.W.2d 531 (Neb. 1998), in which arguments similar to appellant’s were addressed.

In Wanha, the Supreme Court of Nebraska considered whether "platted and subdivided land within a municipality cannot be adversely possessed," under a Nebraska statute which forbade certain owners of real estate "to subdivide, plat, or lay out said real estate…

The Nebraska court rejected the argument, determining that the statute had "no application to the doctrine of adverse possession and is not in conflict with it."

The court reasoned that the source of an adverse possessor’s title is "[h]is own possession," rather than "a transfer or grant by operation of law from the former title holder."

… and thus that, once the statutory period has run, "there is nothing left for the adverse possessor to do to gain title, i.e., no application to . . . any . . . authority need be made. . . ."

Moreover, the court observed that, "by its own language, [the state statute] applies only to the subdivision of property by its owner."

In rejecting appellant’s contention, the circuit court opined:

"[A]dverse possession does not meet the definition of subdivision found in Article 17 § 1–101(60) of the Anne Arundel County Code because it does not divide land by deed as defined in Article 17 § 1–101(43)." We agree with the circuit court.

Adverse possession of real property is achieved by occupying it for the statutory period, not by the recordation of a deed or plat in the County land records.
Maryland Example – Overlapping Claims
Goen v. Sansbury: 219 Md. 289; 149 A.2d 17 (1959)

- The holder of the older and better title has constructive possession of all his land; and the holder of the junior and inferior title that overlaps it must, if he is to acquire good title, enter upon and actually hold adversely and continuously for the requisite period the actual boundary claimed by the older and better title...

Claims where overlap exists: W.Va.
Garrett v. Ramsey: 26 W. Va. 345; 1885

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

Claims where overlap exists: W.Va.
Garrett v. Ramsey: 26 W. Va. 345; 1885

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

Adverse Claims under RPAPL 501
Sawyer v. Prusky: (1)
71 A.D.3d 1325; 896 N.Y.S.2d 536; 2010

- To prevail on this adverse possession cause of action, commenced in September 2008, plaintiffs would be required to demonstrate that their possession of the disputed strip was adverse, exclusive, under a claim of right, open and notorious, actual and continuous for a period of 10 years
- (see RPAPL 501 [2] [as amended eff July 7, 2008]; see also CPLR 212 [a]; accord Walling v Przybylo, 7 NY3d 228, 232, 851 NE2d 1167, 818 NYS2d 816 [2006]).
Under 2008 legislative enactments, a "claim of right" now requires "a reasonable basis for the belief that the property belongs to the adverse possessor or property owner" (RPAPL 501 [3] [amended eff July 7, 2008]). Supreme Court found that plaintiffs stated such a claim of right by alleging that both parties believed that the boundary line was marked by the old survey pipes, and that element is not in issue on appeal.

The Kirks intended to only hold property that they owned, but they actually thought they put the fence on their property line, and they intended to hold all the property that was enclosed in the fence as their own. The fact that they later discovered their error in putting the fence on someone else's property in no way changes their intention at the time the fence was erected.

The Johnsons' grantor might well have had a cause of action and recovered the land in dispute had he sued in ejectment. But he did not do so, and the law is well-settled that one cannot sell a lawsuit.

We hold that a conveyance of land is void to the extent it includes land held by one other than the grantor, in such a manner that if held for the statutory period the holding would ripen into title, even though the adverse holding originated because of a mistaken belief by the adverse holder as to the true location of the boundary line.

The mere fact that he (the defendant) said he did not want any of his neighbor's land, when at all times he was claiming this was not his neighbor's, did not affect his adverse possession.

To state that the doctrine of adverse possession is firmly established in our law is a mere truism and, yet, when one attempts an orderly assessment of the doctrine through the cases, it is at best an arduous task.
When, therefore, possession and use are long continued, they create a presumption of lawful origin, that is, that they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property. It may be, in point of fact, that permission to occupy and use was given orally, or upon a contract of sale, with promise of a future conveyance, which parties have subsequently neglected to obtain, or the conveyance executed may not have been acknowledged, so as to be recorded, or may have been mislaid or lost. Many circumstances may prevent the execution of a deed of conveyance, to which the occupant of land is entitled, or may lead to its loss after being executed.

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

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

How long a period must elapse after the date of the supposed conveyance before it may be presumed to have existed has not always been a matter of easy determination. "In general," said this court, speaking by Mr. Justice Story, "it is the policy of courts of law to limit the presumption of grants to periods analogous to those of the statute of limitations in cases where the statute does not apply."
"Where one uses an easement whenever he sees fit, without asking leave and without objection," says the Supreme Court of Pennsylvania, "it is adverse and an interrupted adverse enjoyment for twenty-one years is a title which cannot afterward be disputed. The same presumption will arise whether the grant relate to corporeal or incorporeal hereditaments. A grant of land may as well be presumed as a grant of a fishery, or of common, or of a way... Lake George, at its foot, empties into Ticonderoga River, and at that point there is a 400-foot long natural rock formation known as Natural Dam beyond which there is a relatively level stretch of river. About three fourths of a mile further down is the so-called Upper Falls. Without flashboards, Dam A, of masonry construction about 83 feet long and built on the brink of Upper Falls, is about one foot higher than Natural Dam.

The Trustees of Dartmouth College do not own record title or title by grant to the river-bed lands under the dam. The question is different from that of navigability since under New York law the bed of such a stream as the Ticonderoga River is subject to private ownership regardless of navigability. However, Trustees of Dartmouth College do have title by prescription or adverse possession. It has been found as a fact that dams have stood at the present site of Dam A for 160 years.
The rule, appropriate to some situations, that a grant to a private individual may not be presumed or adverse possession adjudicated as to lands theretofore appropriated to a public use by the State since such lands are inalienable, is not applicable here because this dam is at a place where its existence, as distinguished from its operation, interferes with no public use, and the State itself in 1789 conveyed part of the Ticonderoga River bed north of this dam site to Philip Schuyler, by express description.

These facts, plus the maintenance for much over a century of several dams preceding and including Dam A, show that for that long period of time neither the State nor its grantees considered that the State held sovereign trust title to the bed of this river. Adverse possession rests on the presumption of a lost grant, and the grant of these underwater lands to Stoughton would not have been illegal. Adverse possession by Stoughton's successors commenced soon thereafter and continued. Accordingly, we hold that title by adverse possession was established here.

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

The elements of a claim for an easement by prescription are similar to those of a claim for adverse possession, except that demonstration of exclusivity is not essential to a claim for easement by prescription. Thus, to establish an easement by prescription, plaintiffs must establish by clear and convincing evidence possession that was hostile and under a claim of right; actual; open and notorious; and continuous for the required period.
A review of our prescriptive easement cases reveals that courts in the District of Columbia have sometimes included exclusivity in the list of elements of a prescriptive easement, and sometimes not. And even when this court has included exclusivity in our list, it has never garnered separate attention, much less been the reason why a claim to a prescriptive easement failed. It seems exclusivity has been recited with the other elements of prescriptive easements that have been imported from adverse possession cases, but it is a layabout; it has never done any work.

The rationale for a showing of exclusivity in the context of adverse possession simply does not intelligibly transfer to prescriptive easements and only causes confusion. We now clarify that a plaintiff need not show exclusivity to make out a claim of a prescriptive easement.

For the foregoing reasons, we hold that the trial court erred in granting the motion to dismiss. The judgment of the trial court is reversed and we remand for proceedings consistent with this opinion.

It is undisputed that the 2008 amendments to RPAPL 501 providing, inter alia, that "[a] claim of right means a reasonable basis for the belief that the property belongs to the adverse possessor" (RPAPL 501 [3]), do not apply here. Thus, plaintiffs' "actual knowledge of the true owner is not fatal" to their claim for an easement by prescription

Following a nonjury trial, Supreme Court rendered a written decision finding that plaintiffs had established a prescriptive easement in a walkway from the front of their house to the driveway, a prescriptive easement to access the driveway over two walkways in the back of the house, but had failed to prove a prescriptive easement to park on the driveway or in a rear parking area on defendants' property.
The findings of prescriptive easements must be reversed. As for the access to the driveway from the front walkway, both parties acknowledge that there is no prescriptive easement since the front walkway and the area of the driveway accessed thereby are entirely in areas already owned by plaintiffs. "a person cannot have an easement in his or her own land"

With regard to the alleged prescriptive easements in the rear walkways, one of the elements of a prescriptive easement is hostile use, which does not arise when the use is permissive, and "permission can be inferred where . . . the relationship between the parties is one of neighborly cooperation and accommodation" see Estate of Becker v Murtagh.

"Where one has a right to put up a building on the spot where he erects it, and to continue it there, and the adjoining owner can do nothing to prevent its erection there, and can do nothing to prevent its remaining there, it is absurd to say that the latter can, by lapse of time, lose his right to build up to his line.

A person, by making an erection on his own property, which he has a right to make and continue there, and which the adjoining owner has no means of preventing, can thereby acquire no right injurious to his neighbor." The same view, in a much more amplified form, will be found expressed in Parker v. Foote, 19 Wend. 309.

Plaintiffs Landgray Associates ("Landgray") and Graybar Building Company ("Graybar") seek an injunction compelling defendants 450 Lexington Venture, L.P. ("450 Lexington"), the Turner Corporation ("Turner"), and the United States Postal Service (the "Postal Service") to remove water cooling towers from a roof courtyard on the second story of a building located at 450 Lexington Avenue, New York, New York.

While these cases support the proposition that easements of light and air cannot be created by adverse use, they do not support plaintiffs' contention that they cannot be extinguished by adverse use.

Negative easements, such as easements of light and air, generally cannot be acquired by prescription because the use required for creation of a prescriptive easement must be wrongful with respect to the property burdened by the easement, that is, adverse.

Adverse use of an affirmative easement, such as a right-of-way through an adjacent property, is an invasion of the adjacent property, gives notice of the user's claim, and injures the owner by making the owner's interest in the property less valuable.

By contrast, access to the surrounding air and use of light from the sun does not diminish these benefits to the adjacent property owner or give notice of any claim antagonistic to the burdened property.

With respect to negative easements such as light from "windows overlooking the land of another, the injury, if any, is merely ideal or imaginary."

There is "no adverse user, nor indeed any use whatever of another's property; and no foundation is laid for indulging any presumption against the rightful owner." Id. (emphasis in original). Thus, an easement of light and air cannot be acquired by adverse use because one can never adversely use the light and air from an adjacent property.
This principle, however, has no application to extinguishment or diminution of an existing easement of light and air. In contrast to mere use of light and air, which confers no notice of claim against or harm to the adjacent property, obstruction of an existing light and air easement immediately causes injury as well as notice of adverse claim.

In *Lewis v. New York & Harlem Railroad*, 162 N.Y. 202, 222, 56 N.E. 540 (1900), the New York Court of Appeals held that where a railroad structure had impaired a light and air easement for the prescriptive period, ...

...the owner of the easement could no longer object to the presence of the original structure or to any new structure erected in the same place which inflicted no more injury than the old.

This implied easement is based upon the equitable right to reform the grant. Hence, such an equitable right should not be enforceable against a bona fide purchaser for value who has no notice of such easement.

Since defendants purchased their property in good faith without notice of any right of adjoining property owners to sewer or water lines under their property, plaintiffs here have no such right enforceable against defendants.

Courts of other states have reached the same result on the same or substantially similar reasoning. 

- *Hannah v. Daniel* (1952), 221 Ark. 105, 252 S. W. 2d 548 (alleged oral promise by grantor to permit encroachment);
- *Blake v. Boye* (1906), 38 Colo. 55, 8 L. R. A. (N. S.) 418 (abandoned irrigation ditch);
- *Robinson v. Clapp* (1895), 65 Conn. 365, 32 A. 939 (light and air);
- *Puerto v. Chieppa* (1905), 78 Conn. 401, 62 A. 664 (light and air)
In short, the owner of adjoining lands has submitted to nothing which actually encroached upon his rights, and cannot therefore be presumed to have assented to any such encroachment.

The use and enjoyment of the adjoining lands are certainly no more subordinate to those of the house where both are owned by one man, than where the owners are different. The reasons, upon which it has been held that no grant of a right to air and light can be implied from any length of continuous enjoyment, are equally strong against implying a grant of such a right from the mere conveyance of a house with windows overlooking the land of the grantor.

Furthermore, "the concept of adverse use includes . . . the ingredient that the conduct is either inherently wrongful or wrongful at the election of such potential servient owner"—in this case, Stiglitz.

As such, "American courts have refused to allow the acquisition by prescription of easements of light and air."

This rule flows from the basic principle that the "actual enjoyment of the air and light by the owner of the house is upon his own land only," and that "the owner of the adjoining lands has submitted to nothing which actually encroached upon his rights.

As a general principle, a property owner cannot hold an adverse interest against him or herself.

... ("No easement by prescription can commence or exist while the dominant and servient estates are held by one and the same person.");

However, a use cannot be adverse where the user has full legal title to the underlying property, and consequently, the ability to use the land in whatever legal fashion he or she sees fit.

To fall within the province of prescriptive easement law, the "dominant and servient tenements must, therefore, belong to different persons."
Adverse use extinguishes easement: NY (1)

- Where an easement has been definitively located and developed through use, there is no requirement that its owner demand the removal of obstructions blocking the easement before it may be extinguished by adverse possession.
- A use of an easement which is exclusive, open and notoriously hostile to the interests of the owner commences the running of the prescriptive period and the user may extinguish the easement if that use continues uninterrupted for a period of 10 years.

Adverse use extinguishes easement: NY (2)

- Before 1958, a solid chain link fence was erected along the common boundary line between the two parcels and plaintiff installed a gate at the point where the easement abuts his property.
- ...in 1966, however, Ernie's installed two gates at various points over the easement and held the only keys to the gates. Ernie's also ...had guard dogs patrol its premises (including the easement) at night.
- Additionally, from 1966 to the present, Ernie's has parked wrecked cars over the easement and, as Supreme Court found, plaintiff has not driven a car over the easement since that time.

Adverse use extinguishes easement: NY (3)

- A narrow exception to this general rule has evolved with regard to the extinguishment of easements that have not been definitively located through use.
- ...we held that an easement that was not so definitively located through use and which lead to a "wild and unoccupied" parcel, was not extinguished by adverse possession because the owner of the easement had had no occasion to assert the right of way during part of the prescriptive period.
- ...Appellate Division has held that such "paper" easements may not be extinguished by adverse possession absent a demand by the owner that the easement be opened and a refusal by the party in adverse possession

Scope of Prescriptive Easement: New Jersey:

- The club has shown that it has used the bridle trail without permission since November 1, 1945. The daily riding of individuals and groups mounted on horseback is an open use. Plaintiffs admit knowledge of the activity. Mayfair is chargeable with knowledge of the activity because of the knowledge of the Horns. There is no evidence that plaintiffs or their predecessors in title attempted to interrupt the use of the bridle trail after November 1, 1945, until the filing of the complaint in this action.
- The court concludes that the club has established a prescriptive easement for the bridle trail.
Prescriptive Easement by beavers:
Dawson V. Wade: 257 Ga. 552; 361 S.E.2d 181; 1987

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

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

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

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

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

- This map is so far from concluding, that it cannot be admitted in evidence to the prejudice of strangers to the transaction.
- But a uniform and long continued acquiescence, as well on the part of the parties making it as on those intrusted in repelling encroachments on the adjoining tracts, might have stamped it with a higher degree of verisimilitude.
The line run by Jacob G. Klock forty years ago, was run at the instance of the then proprietors of lots No. 12 and 18, by a person acting under their mutual employ. This line was assented to at the time, and, independent of the subsequent acts of the parties, would, in my opinion, be conclusive upon them, after such a lapse of time, and possessions of such antiquity.

The acquiescence in such cases affords ground not merely for an inference of fact, to go to the jury as evidence of an original parol agreement, but for a direct legal inference as to the true boundary line. It is held to be proof of so conclusive a nature that the party is precluded from offering any evidence to the contrary. Unless the acquiescence has continued for a sufficient length of time to become thus conclusive, it is of no importance.

The rule seems to have been adopted as a rule of repose, with a view to the quieting of titles; and rests upon the same reason as our statute prohibiting the disturbance of an adverse possession which has continued for twenty years.

These facts would seem to bring the case clearly within the settled rule in this state, which forbids the disturbance of a practical location which has been acquiesced in for a long series of years.

The counsel for the appellant takes the ground that the rule in question is based upon the idea of an agreement, either express or implied, as to the location of the line, and he cites numerous cases to show that an agreement which is founded upon a mutual mistake of facts is not obligatory upon the parties. But I apprehend the counsel is in error in assuming that a parol agreement, either actual or supposed, fixing the boundaries, lies at the foundation of the rule.

However, as parol evidence is unavailable for that purpose, the alternate theory of acquiescence may be employed (see, Sarfaty v. Evangelist, supra, at 996; see also, Allen v Cross, 64 AD2d 288, 292).

Acquiescence in the boundary line for the statutory period required for adverse possession is sufficient to establish ownership marked by that line...

Where the statutory period has not been established, acquiescence for *a considerable period of time* provides conclusive evidence as to the true location of the boundary.