

Adverse Possession

Principles

- **Possession** of land gives right to proprietary **interest** > [Perry v Clissold \[1907\] AC](#)
- Possession title against whole world except those w' **superior prior claim** > [Asher v Whitlock \(1865\) QB](#) (heir entitled to AP ∴ successfully ejected D)
- Title (and AP title) can be **inherited, entitled, conveyed** > [Asher v Whitlock \(1865\) QB](#)
- AP entitles to all pos **rights** ie. Compensation from compulsory expulsion > [Perry v Clissold \[1907\] AC](#) (Act applied for compensation – PC allowed compensation for Crown resumed land for school – TO not known)

Limitation Act 2005

s.19(1) Recover of Land – 12 yrs

s.3(6) + s.65(1) Cause of action deemed to have accrued

s.75 Extinguishes title after 12 yrs

s.19(2) Cannot AP crown land – **s.76**

Elements

**Cannot set up jus tertii arg.

1. **Dispossession?** (driving out); or **Discontinuance** (A followed by B)
2. Has there been **actual possession** by one **not entitled** to possession? (**s.5 Limitation Act**)

1) **Factual** Possession

- **1) Single/continuous 2) appropriate degree of control 3) clear** intention to deal as owner > [Powell v McFarlane \(1979\)](#)
- No consent; adverse; open/not secret; peaceful/not by force; continuous > [Mulchahy v Curramore \[1974\] NSW](#) per Bowen CJ (20 yrs aggregated between G & H to est AP)
- Appropriate Degree of **physical control**: Depends on circs > [Petkov v Lucerne Nominees \(1992\) WAR](#)
[Clement v Jones \[1909\] CLR](#): 2+ properties fenced in presumed separately owned unless proved otherwise, grazing cow not enough by C, use of timber, talk of rent/sale & fence by J (TO)
[Whittlesea v Abatangelo \(2009\) ALR](#): removing dividing fence, playground, feeding trough
[Riley v Pentila \[1974\]](#): enclosing land (tennis court then garden w' **easement** already granted) not AP
[Red House Farms](#): firing over swampy lands w' no agricultural use = enough for AP
[Buckingham City Council v Moran \(1989\) UK](#): lock, key, gates, garden, taxes
**Nature of Land & Manner in which commonly used/enjoyed > [Powell v McFarlane](#) per Slade J

2) **Intention** to possess (*Animus possidendi*)

- Clear intention to **possess exclusively** > [Perry v Clissold](#); [Petkov v Lucerne](#) (AP portion of neighbours land WA following [Powell](#))
 - ** Enclosure best sign > [Buckingham CC; Seddon v Smith](#)
 - ** padlock, key = keeping others out > [Buckingham CC](#)
 - ** conscious intention to exclude TO no nec, just intention to possess exclusively > [Petkov](#)
- Intention to **exclude not own** > [Whittlesea v Abatangelo \(2009\) ALR](#) (planning application acknowledged 'not in title'); [JA Pye v Graham \(2003\) AC](#) (grazing lease)
- Acknowledgment of future plans doesn't negate intention to exclude > [Buckingham CC](#) (council plans to build road)

3. Has this AP **continued** for **12 yrs** (clock) (**Limitation Act s.19(1)**)

- 1) Has AP **abandoned**? ***"Abandonment leaves no cloud on the true owner's title"*** > [Mulchahy v Curramore](#)
 - **Physical AND intentional**
 - **Non-use** not nec abandonment > [Nicholas v Andrews \(1920\) NSW](#)
- 2) Has **12 yrs** passed? > (**Limitation Act s.75**)
- 3) **Series** of AP?