

Stuff across a boundary: Adverse possession & lasting improvements

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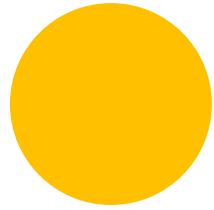
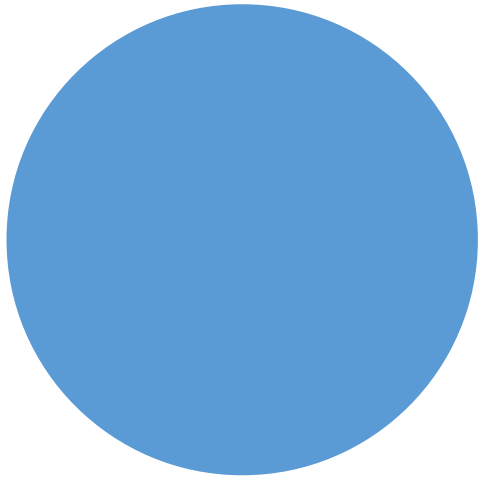
Adverse possession: Say what?

- If Person A (trespasser) has open, continuous, exclusive possession of part of Person B's parcel (true owner) for 10 years, then Person A can claim part (Person B cannot evict Person A).
- If Person B (true owner) sells parcel to Person C (true owner) before being dispossessed, then clock is re-set (10-year period begins anew).
- Result:
 - Person C always gets indefeasible title to land (with some exceptions/reservations).
 - Inapplicable to public lands (provincial, municipal, irrigation), to sub-surface, to First Nation Reserves.
 - Landowners must be vigilant.

Structure of today's chat

- Original quest: ALSA study methodology (February 2019)
- AB's legacy of squatting
- Hansard kerfuffle re: Adverse possession
- Case law principles
- Views of:
 - Alberta Land Surveyors
 - Landowners
 - Lawyers
- Eight findings (May 2019)
- Overtaken by events: ALRI Report (July 2019)
- ALRI proposal re: Lasting improvements
- Views of Alberta Land Surveyors
- Nine recommendations (January 2020)





Fundamental

A boundary exists!

Original quest
re: Adv poss

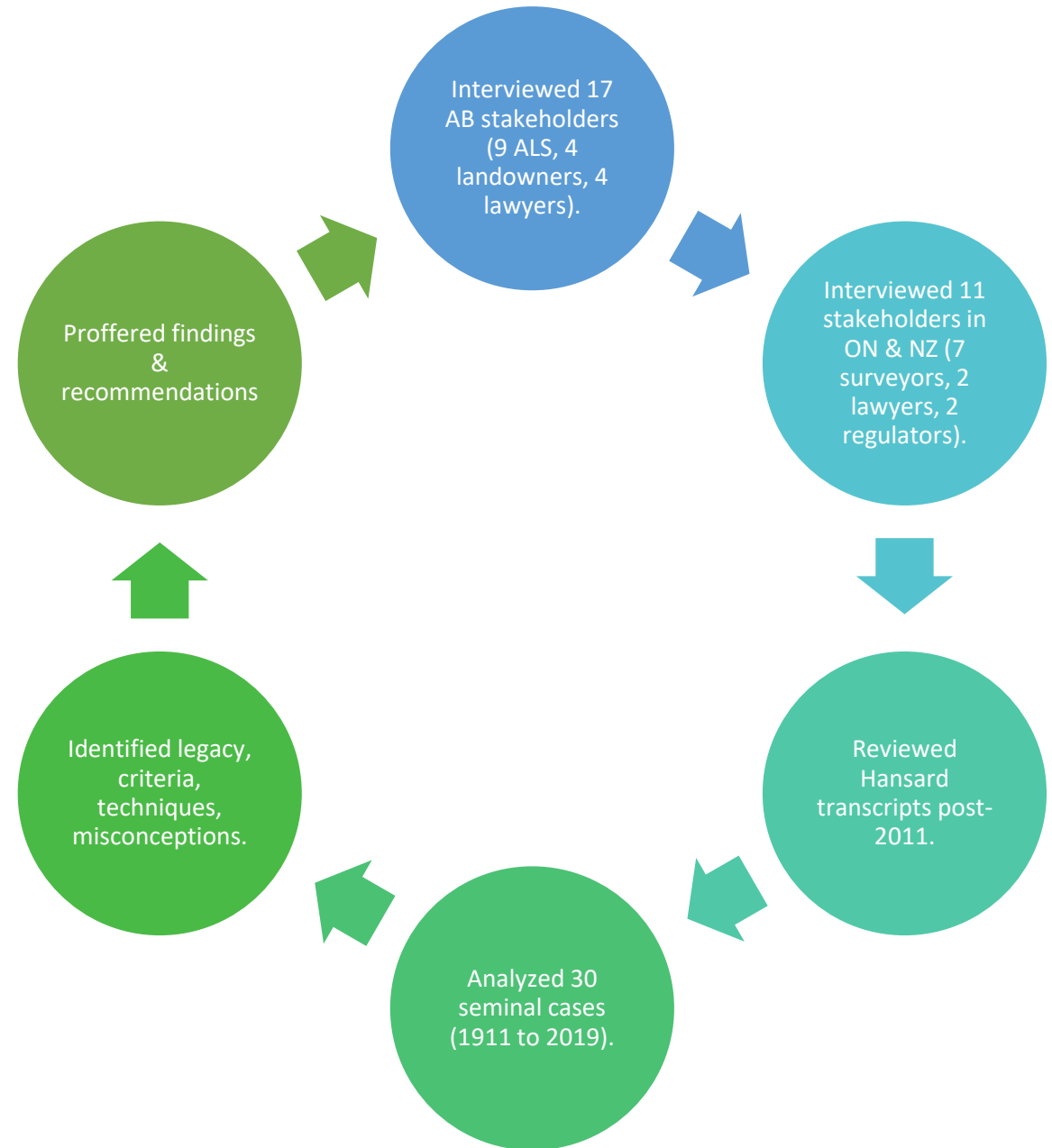
ALSA asked us to disentangle two themes:

- Is it theft of land from true owners OR Does it respect those who possess land?
- Does it upset indefeasibility of title OR Quiet title?

It's a binary choice, but it bedevils some

- Lawyer
 - 1918: It's title by theft (bad!)
 - 1919: It manifests a claim of title (good!)
- ALS
 - 1983: It "brought justice to reign" (good!)
 - 2011: "Antiquated custom of legalized land theft" (bad!)

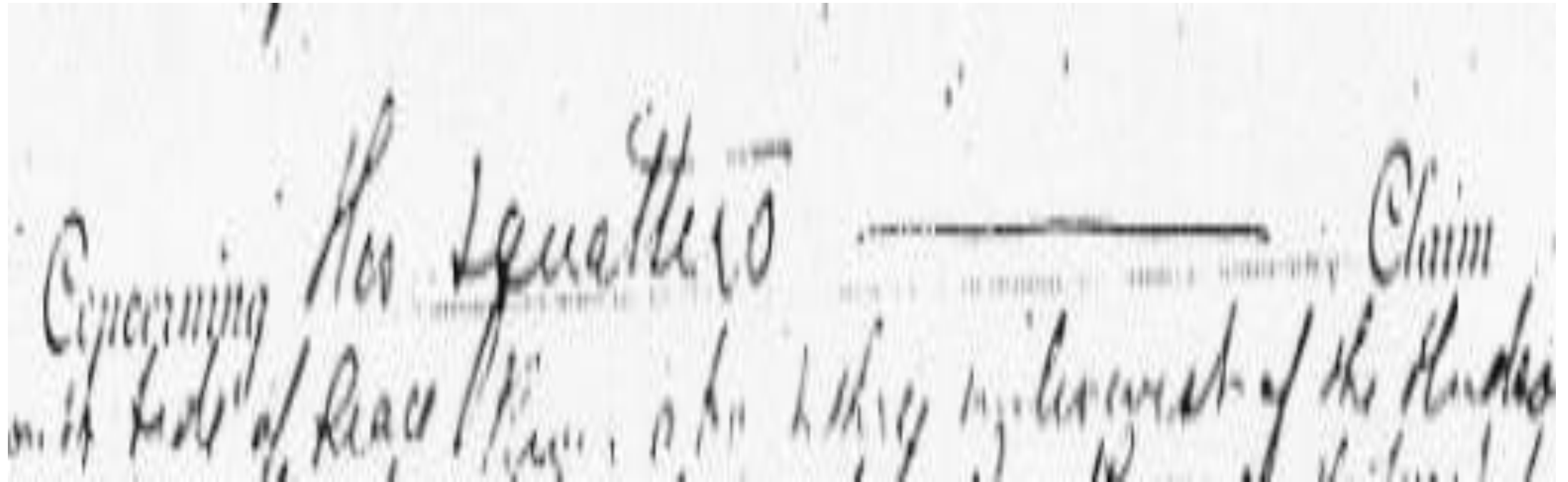
Methodology



Is there a rich heritage of squatting in AB?

- *Dominion Lands Act (1872)*: Recognized claims of occupants of unsurveyed lands (Occupancy Declaration = 22 questions).
- Edmonton (Deane DLS, 1882): Mostly squatters (*Re: Jackson, 1925 - ABCA*).
- 30 river communities along N SK, Peace, Athabasca, ... that pre-dated survey/patent.
- Deputy Minister (1886): “In no case where settlers have been found on a river front in advance of a survey ... has the privilege been refused.”
- Peace River district (Topo Survey Branch, 1930): 19 townships were subdivided “to provide for the needs of squatters.”

Occupancy declaration: Squatter in Peace River District, 1899

A snippet of a handwritten document in cursive script. The text is partially obscured by a horizontal line. The visible words include 'Concerning the Squatters', 'Claim', and 'on the side of Peace River'.

Concerning the Squatters _____ Claim
on the side of Peace River, about thirty miles west of the Hudson

2003 ALRI Report re: adv poss

- Adv poss balanced limitation period (*Limitations Act* extinguishing true owner's rights) with guaranty of title (*Land Titles Act*):
 - **74(1)** Any person recovering against a registered owner of land a judgment declaring that the person recovering the judgment ... be quieted in the exclusive possession of the land ... may file a certified copy of the judgment in the Land Titles Office.
- Not inconsistent with land titles system; buyer gets indefeasible title.
- Not land theft; adv poss generally represents the *status quo*.
- Usually results from an honest/mistaken belief (e.g. fence = bound).

Hansard debates

– Bill 204



- 2011/12: MLA Allred moved to abolish adv poss:
 - Outdated; impediment; “boundaries are guaranteed by monuments.”
- 2017: MLA Stier moved to abolish adv poss:
 - “One of the most archaic rules that’s been around in Canada.”
 - “When the rubber hit the road, [government] drove straight into the ditch.”
- 2018: MLA Gotfried moved to abolish adv poss:
 - “If somebody moved into your backyard in the city and squatted there in a tent and stayed there for 10 years and all of a sudden said that it was their land ... that’s what’s happening in rural Alberta. It doesn’t make sense.”
- 2018:
 - An all-party Committee recommended that adv poss be abolished.
 - Minister of Justice Ganley: Asked ALRI to look at effects of abolishing adv poss and awaited ALRI’s recommendations.
 - ALRI: “To exempt claims to recover possession of land from ... the *Limitations Act* would be a significant change to Alberta law [requiring] significant review.”

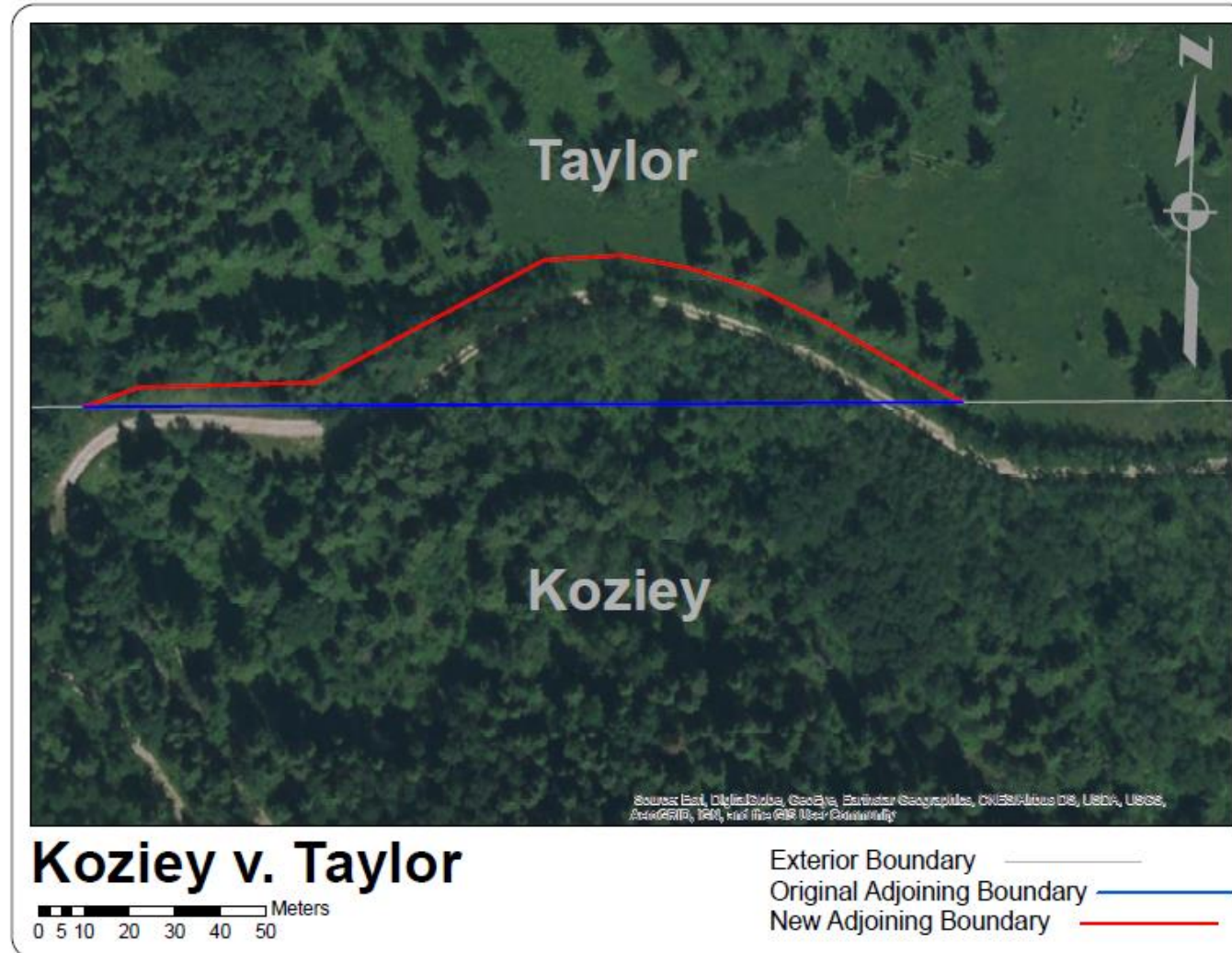
Case law findings (N= 30)

- Adv poss not a “land grab.” The term has been used to describe malicious, indecent, inexcusable, aggressive, false and greedy trespass elsewhere in Canada.
- 30% of claims succeed.
- Pre-1994, winning claims = large rural, farmed parcels.
- Post-2012, most winning claims = small, urban parcels.
- 70% of claims fail because:
 - Parcel was transferred, meaning that the new owner received indefeasible title and the 10-year limitation period began anew.
 - True owner consented to possession (e.g. tenancy), thus not adverse.
 - Possession not exclusive (i.e. parcel also used by others).
- Only one claim failed because the true owner re-entered parcel within 10 years.

More case law findings

- Most possessors lived up to road/fence/wall feature, across a boundary.
- New survey often disclosed that feature being lived up to was not the bound.
- True owner must be unequivocal about recovering the land through re-entry; measuring bounds is not re-entry (i.e. neither unequivocal nor overt).
- There is risk in acquiescence by the true owner; boundary vigilance is key.
- Adv poss can be equitable, if:
 - Significant to possessor,
 - Insignificant to true owner, and
 - Long-continued.
- Adv poss claims seem to be more frequent (e.g. three CA appeals in eight years).

0.8 ac semi-ellipse = access road (ABCA – 2019)



1.2 m wide triangle = fence (ABQB – 2018)



AB surveyors & owners



- Most opposed to adv poss.
- ALSs are proud of survey system integrity and of the boundaries that they survey: “Landowners rely on the Torrens system to protect them from loss of title to any portion of their lands.”
- Most wish to abolish adv poss.
- If retained, most wish for an efficient (faster, cheaper) alternative to the courts to resolve bound disputes (e.g. a tribunal with survey expertise).

AB lawyers:
Whose ox is
being gored?



- Acquiescence should = Implied licence (i.e. not adverse).
- Adv poss mocked the subdivision approval process.
- Allowed for access in rural setting & formalized maintenance up to fences/walls in urban setting.
- Factual bar that possessor must clear is high (open, continuous, exclusive, ...).
- ALSA study was welcomed to address rhetoric that was:
 - “Ill-considered, inconsistent bombast with little grounding in the facts”
 - “Soapbox politics.”

8 findings

- ALSs play a role in preventing & identifying adv poss.
- AB Legislature all-party Committee in 2017/18:
 - Recommended that adv poss be abolished;
 - Asked ALRI to look at effect of abolishing adv poss.
- Adv poss (future claim) co-exists with indefeasibility of title (immunity against past claim).
- ALSs are opposed to adv poss.
- Others are ambivalent about adv poss = f(ox-goring).
- Adv poss = Mechanism for settling a boundary dispute (i.e. boundary not lived up to vs. fence/wall lived up to).
- Only 30% of adv poss claims are successful (failures = re-setting clock, consent, not exclusive).
- Adv poss claims are increasing in frequency.

Overtaken by events: ALRI Report (July 2019)

- 2019 recommendations differ from 1989/2003 “owing to updated research and policy considerations [and] consultation with ... stakeholders.”
- ALRI sensitive to *Bill 204* (2012, 2017, 2018); to all-party Committee (2018); to *Moore v McIndoe* decision (2018): Deliberate trespasser gained land through adv poss.
- ALRI principle: “Disputes should be resolved equitably.”
- So, abolish adv poss because it is inequitable in rewarding:
 - Deliberate trespass (not merely honest mistakes); and
 - Mere use of land.

No to adv poss
&
yes to lasting
improvements

Law of Property Act, s69: Improvements made on wrong land through error:

- (1) When a person ... has made **lasting improvements** on land under the **belief** that the land was the person's own, the person or the person's assigns:
 - (a) are entitled to a **lien on the land** to the extent of the amount by which the value of the land is enhanced by the improvements, or
 - (b) are entitled to ... **retain the land** if the Court is of the opinion ... that this should be done having regard to what is just
- (2) The person entitled ... to retain the land shall pay any **compensation** that the Court may direct.

Lasting improvements

- If claim successful:
 - Lands transferred to possessor from true owner for value (\$),
 - Lien placed on true owner's parcel to the value (\$) of the improvement, or
 - Easement granted.
- Transfer = Possessor buys land!
- Lien = Possessor sells improvement!
- Higher threshold than for adv poss:
 - Improvement must be **lasting**:
 - Yes = Modular home/cottage foundations, 260ft deep well, concrete sidewalks.
 - No = Cookhouse sitting on ties, dogpen, trees, fences, gravel driveway repairs.
 - Possessor must build the improvement **innocently**, with the honest but mistaken belief that the improvement is on the possessor's land (not across a boundary).

Most lasting improvement claims fail

- Inapplicable to Crown land and municipal land.
- Only three successful claims:
 - Freehold strip (1976).
 - Lien (1994).
 - Easement (2012)
- So, ALRI recommends clarifying that:
 - The clock does not re-set (no limitations period) upon:
 - True Owner A selling parcel to True Owner B, nor
 - Possessor/neighbour C selling parcel to Possessor/neighbour D.
 - Possessor/neighbour D (buyer of lasting improvement) need not prove that Possessor/neighbour C (seller of lasting improvement) was honestly mistaken.

Feedback (N = 12 ALS)

- None had used (or recommended using) s69.
- Most were unaware of s69 as a potential remedy:
 - “I find it hard to believe that this is what you are referring to.”
 - “It always struck me as a bit off, but hey, ...”
- Most had confronted improvements across bounds.
- Two suggestions for ALRI:
 - Clarify the range of solutions allowed by s69, because the courts are inconsistent re: easements (*Watchorn v Brouse*, ABQB – 2019).
 - Incorporate the reality of fences (i.e. what of land innocently enclosed by a fence?): BC *Property Law Act*, s36.



9 recommendations (truncated)

- Work with ALRI to:
 - Respond to ALRI Report
 - Clarify boundary principles (particularly riparian stuff)
 - Expand on lasting improvements proposal
- Inform ALSs through webinars re:
 - Adverse possession findings
 - Lasting improvement recommendations
 - Feedback
- Liaise with LSA, ALI and LTO re: boundaries, resolving boundary disputes, and adverse possession/lasting improvements