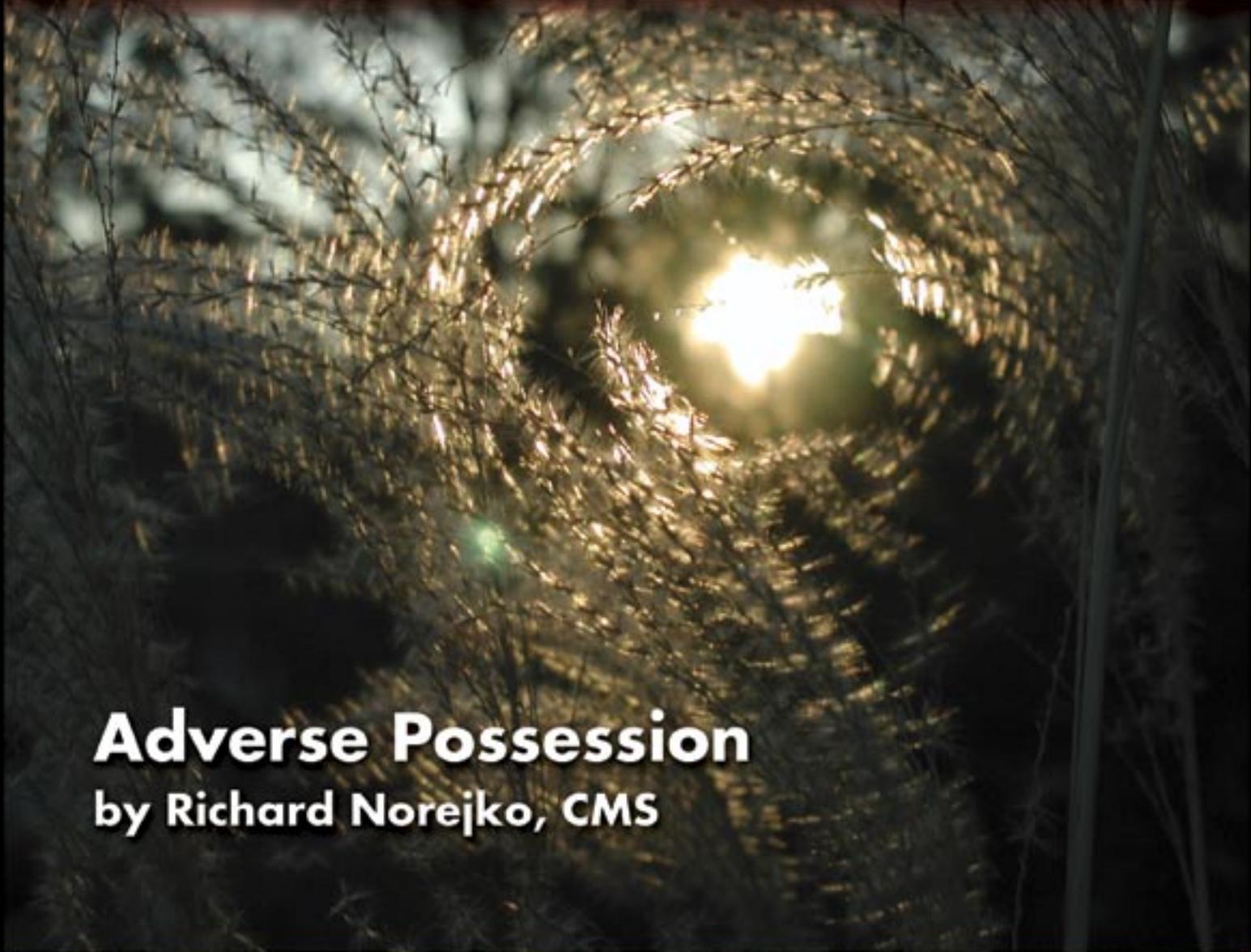


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# **FAIR** *&* **equitable**

MAGAZINE OF THE INTERNATIONAL ASSOCIATION OF ASSESSING OFFICERS

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# Adverse Possession

by Richard J. Norejko, CMS

The principle for establishing land ownership, both in common law and by statute in the United States, is based upon the *Statute of Frauds* which was first enacted in England in 1677. The statute required that ownership of real property be demonstrated by some form of written evidence. To prove a legal right to possession, a written document needed to be produced witnessing such right.

After passage of the *Statute of Frauds*, English courts of the time found that the requirement for written deeds sometimes caused long-time property holders to commit fraud to establish their claims. Thus, English Courts began to recognize a method which allowed title to land to pass without it being in writing. This concept, rooted in earlier Roman law, was called adverse possession or unwritten title.

It is interesting to note that a legally created unwritten title can be historically and legally superior to a written title. The written title becomes secondary and is eventually extinguished. Unwritten ownership can be created in two ways: 1) by agreement or acquiescence or 2) by hostile creation (e.g., adverse possession). The second method is viewed by some as legalized theft of land and by others as an appropriate penalty for landowners who were not good stewards of their land rights.

Unwritten rights, like all property rights, are always questions of law. However, because of this concept's impact on property ownership records, it is important for assessment office personnel to understand the potential for discrepancies between rights recorded by written conveyance and unwritten rights based on property use and possession. Property mappers in particular, as collectors and maintainers of the county cadastre, should be aware of the impact unwritten rights have on the interpretation and accurate recording of real property boundaries. If there is a con-

flict, such as an unintentional encroachment on another's property, or land that is being actively utilized by someone other than the owner of written record, then the mapper must consider whether the property boundaries in question have been affected by adverse possession.

## History

The concept of adverse possession can be traced back to one of the first sets of written laws—the *Code of Hammurabi* from the 18th century BC. Hammurabi was a Babylonian king who felt he was called upon “to cause justice to prevail in the land and to destroy the wicked.” Law 30 of the Code states: “if a chieftain or a man leave his home, garden, or field...and someone else takes possession of his house, garden, and field and uses it for three years: if the first owner returns 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.”

The ancient Romans believed that the land had a spirit that was nurtured by its possession and use. For this reason, the possessor or user of the land was considered to have greater “ownership” than an absentee titled owner. This Roman concept of adverse possession is credited as the origin for the familiar saying, “possession is nine-tenths of the law.”

## Practice

There are four main doctrinal areas that are key to the concept of adverse possession.

### Doctrine of Limitation

Limiting the time in which legal action may be brought to recover land protects possessory interests in the land. Statutes of Limitations benefit society by allowing the “true owner” sufficient time to recover the land while providing certainty of ownership once land has been acquired

adversely. Title insurance and mortgage funding would be very risky indeed if it were possible, for example, for a claim to property dating back more than 50 years to be legally recognized. Memories grow dim and evidence becomes unclear. Without a time limitation on a former property holder's ability to bring suit for recovery, land ownership as we know it today would not exist.

## Doctrine of Administration

The statutes concerning adverse possession provide a reasonable method for curing minor title defects by protecting the rights of the possessor. Adverse possession can be an effective and efficient means to remove clouds of title where boundary lines may be vague, in error, or simply forgotten.

## Doctrine of Development

In the days of the American frontier, adverse possession statutes promoted rapid development of "wild" land with weak or indeterminate title. Early settlers would not have built their farms on land they could never own. Adverse possession provided a mechanism for pioneers to obtain title to the land that they had worked so hard to improve.

## Doctrine of Efficiency

This doctrine attempts to measure the strength of a person's "attachment" to the land and awards title to the claimant with the strongest attachment. The theory is that the possessor who maintains and improves the land has a more valid claim to it than the owner who never visits or cares for the land.

## Requirements

State statutes and local courts compel claimants to meet stringent requirements in order to perfect title to real property through adverse possession. The claimant must provide "clear and positive" or "clear and convincing" proof of the following 11 elements:

1. Actual possession
2. Open possession
3. Notorious possession
4. Claim of title
5. Continuous possession

6. Hostile or adverse possession
7. Exclusive possession
8. Possession for Statute of Limitations period
9. In some states, possession under color of title
10. In some states, payment of all county taxes
11. In some states, possession in good faith

These terms have special meanings as legal "terms of art," that is, their definition for purposes of adverse possession law may be different from a definition found in a standard dictionary. It should be noted as well that real estate laws can vary significantly from state to state, just as statutes governing the conditions necessary for adverse possession, definition of terms, and the applicable statute of limitations can differ among jurisdictions.

## Actual Possession

To acquire land by adverse occupancy, actual possession by some act such as fencing, cultivating, or making improvements is a fundamental requirement. The possession must be such that the true owner would notice it on occasional visits. The facts necessary to prove actual possession may vary, depending on the circumstances. The intention of possession, however, must be carried out by such open, unequivocal, and notorious acts of dominion as to plainly indicate to the public that the person who performs them has appropriated the land and claims exclusive dominion over it. In other words, a person acts in the manner of an owner of the property. Anything short of this is not what the law accepts as possession.

## Open and Notorious Possession

Though these elements appear to overlap the element of actual possession, they actually serve to extend the definition. Most courts view "open and notorious" as a single concept, but in reality, each term should be considered as separate and distinct. For possession to be open, it must be sufficiently obvious so that the true owner by occasional visits could have observed the acts of possession. Thus,

occupancy carried out in secret would not qualify as adverse possession. To be considered notorious, the possession must be generally known and talked about in such a way that the immediate public is aware of it. It must be presumed as well that the true owner is aware of the occupancy's adverse nature.

The law does not require a property owner to act to protect his holdings until he is aware or ought to be aware that he needs to. Hence, evidence that an adverse possession is under way must be exhibited by such acts of possession as construction of buildings, visible use and occupation, payment of county property taxes, fencing, or cultivation.

## Claim of Title

Also known as "claim of right" or "claim of ownership," this term means to hold something for oneself. By making a claim of title, the intention is to claim property in hostility to the true owner. Some state courts have ruled that the initial right to possession of land must be in writing, but after the title is acquired, land may be added to or subtracted from by adverse possession. The claim of title may be defective and constitute what is known as color of title, but there nonetheless must be some claim of title. What is absolutely necessary varies from state to state.

## Continuous Possession

For possession to be considered continuous, it must be maintained for the period required by statute without interruption. Interruption occurs when there is a break in the occupancy by the possessor. Any interruption causes possession to immediately restore to the true owner since it is a presumption of law that possession resides with the owner of record. If there is an interruption in an adverse possession, no matter how brief, the limitation period required by statute must start over.

It may be possible through the use of a technique known as "tacking" for an occupier to claim land through adverse possession even if he did not personally possess the property for the entire statutory period. For example, if a person who has been occupying a property in adverse possession for 12 years allows someone else to take over the property in his

place, after 8 years, the second occupier can qualify for legal possession under a 20-year statute of limitations by “tacking” his 8 years of adverse occupancy to the 12 years maintained by the previous inhabitant. Likewise, tacking can enable someone to maintain an adverse possession without interruption when the legal titleholder changes.

### Hostile or Adverse Possession

Hostile possession, in most states, must be occupancy against the interests of the fee owner without an admission by the adverse claimant that the land is not his. Hostile possession does not imply ill will but does present a claim to the land to the exclusion of all others. If an occupant is on the land with the permission of the owner, adverse possession is not possible. Therefore, a relationship between a landlord and a tenant cannot be considered hostile.

Although hostile possession is almost uniformly required, differences of opinion exist about what is meant by “hostile.” Occasionally, mere recognition and acquiescence for the statutory period is defined by statute as sufficient. An “intent to take title” and “intent to deliberately take land” are some of the variations in interpretation.

Most authorities hold that hostility does not need to be present at the inception of possession, but must be present for a statutory period that may commence either at or after inception. For instance, if a property owner extends his fence and encloses land belonging to his neighbor in ignorance of the true boundary line between the two properties and with no intention of claiming the extension area, then the possession of the land so enclosed is *not* considered adverse or hostile to the true owner. However, if the fence so extended is *believed to be the true boundary line, and one claims ownership to the fence line*, even though the established division is erroneous, such possession will be adverse and hostile to the true owner.

The rule is that there must not only be a certain period of continuous uninterrupted possession, but such possession must be hostile in its inception and must continue as such for the entire period. It

must be visible, exclusive, and notorious; and it must be acquired and retained under claim of title inconsistent with that of the true owner. Courts have ruled that all of these elements must concur.

### Acquiescence

It is not always necessary to resolve a boundary dispute through a claim of adverse possession and its requirement of a hostile taking. If a possession is not considered hostile, it may be possible to advance a claim of ownership under a theory known as “acquiescence.”



Application of the law of acquiescence was very common in the early settlement days of the United States. For example, two adjoining property owners, *both of whom are mistaken* about where the line between their properties is located, treat a boundary line, a fence, a hedge, or some man-made feature as the property line. If that line is not the recorded line, it results in one neighbor possessing what is actually the other’s land. Regardless of the innocent nature of the mistake, the property owner whose land is being possessed by his neighbor must initiate an action to correct the mistake. Otherwise, if the doctrine of acquiescence applies, the owner of record may lose the land to his neighbor if the incorrect boundary has been in existence for the required statutory period of time.

Acquiescence to a boundary line may change ownership in three ways:

**Dispute and Agreement**—The neighboring landowners have an actual disagreement as to the location of the boundary line, and ultimately agree upon a bound-

ary line which is not consistent with that set forth in the deeds.

**Acquiescence for a Statutory Period**—The neighboring landowners treat a particular boundary line as the dividing line between their properties for a statutory period, *even though* it differs from the boundary line defined by their deeds.

**Acquiescence Arising from Intention to Deed to a Marked Boundary**—A grantor intends to deed property to a physical boundary but mistakenly uses an incorrect legal description in the actual deed.

As stated, the difference between “land acquiescence” and “adverse possession” is the “hostility” of the taking of the title landowner’s interest. A claim in an acquiescence case cannot be “hostile” if both neighbors believe they are observing the true boundary line. They cannot simultaneously claim that they are holding the property of another without regard to the true boundary line.

Some states view hostility as a question of mental attitude of the claimant in that adverse possessors must believe that their right of possession is valid and that they are entitled to it. This could then be extended to a claim of right. In other words, the individuals must believe they have the right to be there, because it is their land.

### Exclusive Possession

To have exclusive possession for the purpose of adverse possession, the occupier must show an exclusive dominion over the land and an appropriation of it to his own use and benefit. The land cannot be shared with the rightful owner, because then the rightful owner will not be deprived of possession. Exclusive possession can be proved by exclusion of the legal owner by threat of force or legal action, by declaration of the possessor to hold land exclusively, or by refusal to permit the legal owner or his agents to enter the property.

One does not have to exclude non-owners from the land in order to establish “exclusive” use. However, during the statutory period, the person claiming title by adverse possession must have been the only person to treat the land in the

manner of an owner. This is important because the requirement of exclusivity not only applies to the rightful owner and adverse possessor, but it also has been applied by the courts to an interest claimed by individual possessors.

## Possession for Statute of Limitations Period

To obtain legal title to land by adverse rights, possession must be maintained for the length of time required by state statute. To retain ownership, a titleholder can oust a claimant even one day prior to the expiration of the statute of limitations. This ouster can be effected either by a physical ouster or by a legal ouster in the form of filing a motion for removal. Originally, the common law of England required that possession extend to time immemorial, or beyond memory. Over the years, this period has gradually been shortened. Today, almost all states have statutes of limitations with time periods that vary from 7 to 20 years.

The statute of limitations for adverse possession does not operate against the federal government; and, unless there is a state statute to the contrary, the same is true for states. By the right of eminent domain, the United States is the absolute and exclusive owner of all public lands. No adverse possession can be created by entry onto its lands. However, there has been a case where “public” lands have been lost in Texas through adverse means because the land was not being used for the benefit of the general public.

## Possession under Color of Title

Color of title means that the title document under which property is claimed is somehow defective, possibly because of a formal defect in the deed or will, or because the grantor was not competent to execute the instrument or did not own the property at the time of execution. The title may appear to be good, but in reality it is not.

## Payment of All County Taxes

In some states, county property taxes must be paid on land adversely held. This requirement greatly reduces the possibility of gaining land by adverse means. Because it is believed that people do not pay taxes willingly, payment of taxes has been

recognized as an indication of a claim to a property. While payment of taxes is not proof of possession; it does provide evidence of a claim of right. Failure to pay taxes, on the other hand, is not a necessary element of adverse possession unless required by law.

## Possession in Good Faith

In some states, adverse possession must have been taken and maintained in good faith and with respect to constructive possession. Good faith, if required, means that a person believes that he has good title, and takes title in accordance with his belief. A person deliberately taking land, knowing that the title is defective, is not acting in good faith. Therefore, where good faith is required, such action is not recognized.

## Practice

As the previous discussion shows, acquiring land via the unwritten conveyance of adverse possession is quite difficult. However, as unusual as it seems, if someone is successful in acquiring property in this manner, their rights are *superior* to any later re-establishment of the true boundaries. For instance, if a new survey relocates the original property lines created by the original surveyor or if it properly and correctly monuments the property lines as described in the written conveyance, it does not restore the rights to the land to the original property holder that were lost through adverse possession. Therefore, a survey setting a line between adjacent properties will *not* change the ownership of land that was determined by another boundary because the survey only establishes the line and not the title.

On the other hand, adverse possession cannot change the fixed original survey lines which determined section and quarter section boundaries. This is far more prevalent in Government Survey States. Adverse possession may change the title to real property, but it cannot alter the location of these lines.

## Purpose

Early land surveys were often of poor quality. They were run with a compass, often measured distances on the ground

(not horizontally), and were conducted by mostly unskilled operators. Boundaries were poorly marked and frequently encroached upon by an adjacent owner. Given the lack of exactness of this original conveyancing method, it is easy to see why laws were enacted to give occupants a system of clearing title by evidence of possession.

As strange as it may seem, statutes regarding adverse possession actually served to strengthen and prove title to land. By limiting the time in which action to recover may be brought, title to land is protected from spurious lawsuits based upon possible interests from many years ago. Because of the way the United States was founded and grew, the initial legal title to real property may not be entirely clear or even properly valid. This is particularly true with many titles to land in the original colonies which used the metes and bounds system. Even in the parts of the country covered by the Public Lands Survey System, the original pioneers often created ranches and farms by “squatting” on tracts of land. If a method were not in place for perfecting these claims through adverse possession or for preventing claims arising from a murky possibility of ownership from many years before, validating and insuring title would be a nightmare.

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Richard J. Norejko, CMS is a planner for the Buncombe County Planning Department in Asheville, North Carolina. He is currently a member of the IAAO Executive Board and an IAAO senior instructor. He is also a member of TEAM Consulting. He is a past contributor of articles to *Fair & Equitable* magazine.