



# Adverse Possession

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# Doctrines

- Adverse Possession (a way of acquiring title to real property and, in some states, personal property)
- Prescription (a way of acquiring an easement)
- Estoppel (a way of acquiring an easement)
- Replevin + “Discovery Rule” (in some states, a way of acquiring title to personal property)



# Adverse Possession Requirements

	Consistent requirements	Variations among states	
Hostility & Claim of Right or “color of title”		(a) State of mind irrelevant; (b) Aggressive trespass required; (c) Good faith required	
Actual Use	Physical possession of the premises	Refer to (a) local custom; (b) productivity; +/o (c) notoriety	
Open & Notorious Use	Put reasonable title holder on notice of the claim		
Exclusive Use	Possession cannot be shared with title holder at any time		
Continuous Use	No significant interruptions of use	Variety of positions concerning “tacking”	
Payment of Taxes		Only a few states	
For statutory period		Between 5 and 30 years; Variety of positions concerning “tolling” for “disabilities”	
Burden of proof		“preponderance” vs. “clear and convincing” standard	



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New Colorado Statute

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Judge has discretion to require successful adverse occupant to compensate original title holder



# Prescription Requirements

	Consistent features	Variations	
Hostility & Claim of Right	Use cannot be permissive	Minority of states require good faith	
Actual Use	Occasional use is sufficient	Some disagreement concerning bare minimum of frequency	
Open & Notorious Use	Put reasonable title holder on notice of the claim	Some jurisdictions require awareness and acquiescence by title holder	
[Exclusive Use]	No requirement of exclusivity		
Continuous Use	Usage need only be as frequent as the nature of the easement claimed		
[Taxes]	No requirement that claimant pay taxes		
For statutory period		Between 5 and 30 years	
Burden of proof		“preponderance” vs. “clear and convincing”	



# Alternative Views of the Policy Basis

- 1) Labor Theory [Locke] →
  - Investment of labor gives rise to a natural right to the thing labored upon – a right that the law should recognize and enforce.
- 2) Personality Theory [Holmes]
- 3) Utilitarian Theory [Bentham; Mill; Ellickson]
  - a) Security of titles facilitates commerce
  - b) Incentive for productivity
  - c) Laches
  - d) Avoid fights
  - e) Endowment effects
- 4) Evidentiary Theory [Mill]
- 5) Intuition and Convention [Hume]



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- “I say that truth, friendship, and the statute of limitations have a common root in time. The true explanation of title by prescription seems to me to be that man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life. The law used to look with disfavor on the statute of limitations, but I've been in the habit of saying it is the one of the most sacred and indubitable principles that we have, which used to lead my predecessor Field to say that Holmes didn't value any title that was not based on fraud or force.”  
Holmes, Letter to William James (1907)



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- 1) Labor Theory [Locke]
- 2) Personality Theory [Holmes]
- 3) Utilitarian Theory [Bentham; Mill; Ellickson]
  - a) Security of titles facilitates commerce → • Inability to assert defects in title older than the statutory period will increase certainty in conveyancing
  - b) Incentive for productivity
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- 3) Utilitarian Theory [Bentham; Mill; Ellickson]
  - a) Security of titles facilitates commerce
  - b) Incentive for productivity → • The prospect of obtaining title will encourage occupants to put land to productive use
  - c) Laches
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- We should punish title holders who “sleep on their rights,” prompting them to bring suits while the evidence is fresh and to monitor their property



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- “A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.” Holmes, “The Path of the Law” (1897)



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• “According to the fundamental idea of property, indeed, nothing ought to be treated as such, which has been acquired by force or fraud, or appropriated in ignorance of a prior title vested in some other person; but it is necessary to the security of rightful possessors, that they should not be molested by charges of wrongful acquisition, when by the lapse of time witnesses must have perished or been lost sight of, and the real character of the transaction can no longer be cleared up. Possession which has not been legally questioned within a moderate number of years ought to be, as by the laws of all nations it is, a complete title.” Mill, *Principles of Political Economy* (1848)



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- “Any considerable space of time sets objects at such a distance, that they seem, in a manner, to lose their reality, and have as little influence on the mind, as if they had never been in being. A man's title, that is clear and certain at present, will seem obscure and doubtful fifty years hence, even tho’ the facts, on which it is founded, shou’d be prov’d with the greatest evidence and certainty. The same facts have not the same influence after so long an interval of time. And this may be receiv’d as a convincing argument for our preceding doctrine with regard to property and justice. Possession during a long tract of time conveys a title to any object. But as ‘tis certain, that, however everything be produc’d in time, there is nothing real, that is produc’d by time; it follows that property being produc’d by time is not any thing real in the objects, but is the offspring of the sentiments, on which alone time is found to have any influence.” Hume, *A Treatise of Human Nature* (1740)