

## 19.4: Adverse Possession

### Learning Objectives

By the end of this section, you will be able to:

- Explain how it is possible to own land without paying for it.

In some instances, real property can be acquired for free—or at least without paying the original owner anything. (Considerable cost may be involved in meeting the requisite conditions.) This method of acquisition—known as adverse possession—is effective when five conditions are met: (1) the person claiming title by adverse possession must assert that he has a right to possession hostile to the interest of the original owner, (2) he must actually possess the property, (3) his possession must be “open and notorious,” (4) the possession must be continuous, and (5) the possession must be exclusive.

### Hostile Possession

Suppose Jean and Jacques are tenants in common of a farm. Jean announces that he no longer intends to pursue agricultural habits and leaves for the city. Jacques continues to work on the land, making improvements and paying taxes and the mortgage. Years later, Jacques files suit for title, claiming that he now owns the land outright by adverse possession. He would lose, since his possession was not hostile to Jacques. To be hostile, possession of the land must be without permission and with the intention to claim ownership. Possession by one cotenant is deemed permissive, since either or both are legally entitled to possession. Suppose, instead, that Jean and Jacques are neighboring farmers, each with title to his own acreage, and that Jean decides to fence in his property. Just to be on the safe side, he knowingly constructs the fence twenty feet over on Jacques’s side. This is adverse possession, since it is clearly hostile to Jacques’s possession of the land.

### Actual Possession

Not only must the possession be hostile but it must also be actual. The possessor must enter onto the land and make some use of it. Many state statutes define the permissible type of possession—for example, substantial enclosure or cultivation and improvement. In other states, the courts will look to the circumstances of each case to determine whether the claimant had in fact possessed the land (e.g., by grazing cattle on the land each summer).

### Open and Notorious Possession

The possessor must use the land in an open way, so that the original owner could determine by looking that his land was being claimed and so that people in the area would know that it was being used by the adverse possessor. In the melodramatic words of one court, the adverse possessor “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 domains, and planted the standard of conquest.” *Robin v. Brown*, 162 A. 161 (Pa. 1932). Construction of a building on the owner’s property would be open and notorious; development of a cave or tunnel under the owner’s property would not be.

### Continuous Possession

The adverse possessor must use the land continuously, not intermittently. In most states, this continuous period must last for at least twenty years. If the adverse possession is passed on to heirs or the interest is sold, the successor adverse possessors may tack on the time they claim possession to reach the twenty years. Should the original owner sell his land, the time needed to prove continuous possession will not lapse. Of course, the original owner may interrupt the period—indeed, may terminate it—by moving to eject the adverse possessor any time before the twenty years has elapsed.

### Exclusive Possession

The adverse possessor must claim exclusive possession of the land. Sharing the land with the owner is insufficient to ground a claim of legal entitlement based on adverse possession, since the sharing is not fully adverse or hostile. Jean finds a nice wooded lot to enjoy weekly picnics. The lot belongs to Jacques, who also uses it for picnics. This use would be insufficient to claim adverse possession because it is neither continuous nor exclusive.

If the five tests are met, then the adverse possessor is entitled to legal title. If any one of the tests is missing, the adverse possession claim will fail.

## Key Takeaway

Real property can be acquired without paying the lawful owner if five conditions of adverse possession are met: (1) the person claiming title by adverse possession must assert that he has a right to possession hostile to the interest of the original owner, (2) he must actually possess the property, (3) his possession must be “open and notorious,” (4) the possession must be continuous, and (5) the possession must be exclusive.

## Exercises

1. Tyler decides to camp out on a sandy beach lot near Isle of Palms, South Carolina. The owner, who had hoped to build a large house there, lived out of state. Tyler made no secret of his comings and goings, and after several weeks, when no one challenged his right to be there, he built a sturdy lean-to. After a while, he built a “micro house” and put a propane tank next to it. Although there was no running water, Tyler was plenty comfortable. His friends came often, they partied on the beach, and life was good. Five years after he first started camping out there, an agent of the owner came and told him to deconstruct his shelter and “move on.” Does Tyler have any rights in the property? Why or why not?

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