California Adverse Possession

People have the right to keep unwanted intruders off their property. They do this all the time, sometimes with fences or with signs, sometimes just by asking trespassers to please stay away. In cases of serious, repeated annoyance or threatened harm, landowners can call the police. They will usually warn the person to stay away and, if necessary, make an arrest. Trespass is a minor criminal offense, and someone convicted of criminal trespass can be fined and jailed.

Another kind of trespass is more permanent: using another's property as an owner would use it. If someone drives across a neighbor's land every day, it is a trespass unless the owner has granted permission or the driver has a legal right, called an easement, to use that part of the neighbor's property (see "Easements," below.) The other neighbor who just put up a fence two feet over the boundary line is trespassing, as is the one whose garage has been in the wrong place on the neighbor's property for several years.

These trespassers can also be asked to leave or warned away. But there's a chance that any of them may in fact have a legal claim to the property.

ADVERSE POSSESSION

Many landowners are surprised to learn that under certain circumstances, a trespasser can come onto land, occupy it and gain legal ownership of it. The trespasser may acquire a few feet of property or whole acres in this way. If someone is using your property, even a small strip on the edge, you should be alert to the risk.

A trespasser may also gain a legal right to use part of someone else's property; this is called a prescriptive easement. (See "Easements," below.)

The legal doctrine that allows trespassers to become owners is called "adverse possession." Although the name sounds nasty (and the results can be), the trespasser is not necessarily an intentional evildoer—far from it. The trespasser may simply have made a mistake--relying on a faulty property description in a deed, for example. In rural areas, the person who moves in and occupies several acres may believe he owned it, having purchased it from a scoundrel who sold someone else part of the Brooklyn Bridge. Questions about ownership often wind up in court after an absent owner of rural property discovers that someone is living on his land or, when a piece of urban property is sold, a title insurance company refuses to issue insurance because the neighbor's garage is found to be standing squarely on the property. If the people involved can't work something out, the property owner may sue the trespasser, or the trespasser may bring a lawsuit to quiet title--a request for the court to settle who owns what.

REQUIREMENTS FOR OBTAINING LAND BY ADVERSE POSSESSION

A trespasser is entitled to legal ownership of property if his occupation of the property is hostile, actual, open and notorious, exclusive and continuous for a period of years set by state statute. (We explain each of these terms below.) Some states, such as California, also require the trespasser to have paid the local property taxes on the land.(1) The time required, which varies from state to state, is usually twenty years. It can be as short as five years when the trespasser pays the property taxes.

HOSTILE CLAIM

The word "hostile" does not mean that the trespasser barricades himself on the land with a shotgun. Most courts follow one of two legal definitions of hostile. One is called the "Maine rule" and requires that the person be aware that he is trespassing.(2) For example, a man in Nebraska,

a state which follows this rule, gained ownership of the neighboring eight acres by using them for years. He knew the property was not his, and a court characterized his action as hostile.(3)

The other popular definition, the "Connecticut rule," defines hostile simply as occupation of the land.(4) The trespasser doesn't have to know that the land belongs to someone else. The Connecticut rule, kinder to the innocent trespasser, is followed by most states today.(5)

Example: Jesse isn't sure where his property line is, but he thinks an old fence marks the boundary. When he builds his new garage, he builds up to the fence line, which is actually ten feet over on his neighbor's property. Under the Connecticut rule, Jesse's intention doesn't matter, and his occupation is hostile even though he thinks he is on his own land.

A few states follow a third rule, which is directly opposite the Maine rule of requiring intentional trespass. The trespasser must be completely innocent and must have made a good faith mistake, such as relying on an invalid or incorrect deed. For example, in Iowa, which follows this good faith rule, a woman attempted to claim a strip of her neighbor's land by adverse possession. The court denied her claim because she knew it was not her property, eve n though she had treated the property as her own for thirty years.(6)

ACTUAL, OPEN AND NOTORIOUS POSSESSION

The trespasser must actually be in possession of the property and treat it as if he were an owner. This means there must be a physical presence on the land. It's not enough for someone just to make a claim, orally or in writing, of ownership.

The words "open and notorious" simply mean that it must be obvious to anyone, including an owner who investigates, that a trespasser is on the land. Actual (physical) possession is usually open and notorious. Someone out in the field harvesting crops is obvious, as is a person pruning the rose garden that she planted on a strip of the neighbor's back yard. Similarly, a neighbor who just put a fence up slightly on the next-door property is obvious. So is the one who just poured a concrete driveway two feet over the boundary line.

The point of this requirement is to let the owner know someone is occupying the land, so something can be done about it. An owner who allows someone to trespass for years without giving permission, complaining or taking action, the theory goes, loses the rights to the land.

EXCLUSIVE AND CONTINUOUS POSSESSION

The trespasser must possess the land exclusively and without interruption for the statutory time period. You can find how many years are required in your state from the chart below.

A trespasser can't give up the use of the property in such a way that he no longer acts as an owner, and then return to it and count the time that it was abandoned - that wouldn't be continuous possession for the whole time.

The person trespassing must be the only one occupying the property – he can't share possession with strangers or the owner. (By contrast, a trespasser can gain the right to use a certain part of another's property, a prescriptive easement, even if possession or use is shared with others. See "Easements," below.)

If one person uses the property for a while and leaves, and another shows up for a while, the times can't be combined - the possession hasn't been exclusive by one person.

If, however, the trespasser actually sells or gives the property to someone else, the recipient becomes the adverse possessor and the years that the first trespasser spent occupying the land

count for the new one's claim. This is called "tacking." When one trespasser passes the land to the next, then that person's claim is tacked on to the previous one.

Example: Joe occupied part of someone else's land for ten years. He then sold his land (including the part that was not legally his) to Adam, who stayed for ten years. If his state's adverse possession statute requires twenty years of occupancy, Adam has met the twenty-year requirement through tacking. On the other hand, if Joe stopped trespassing before Adam bought the property and started his own trespassing, the ten years of Joe's trespass don't count for Adam.

PAYMENT OF PROPERTY TAXES

Some states require the trespasser to have paid the taxes on the property for the statutory time period. If all the other requirements are met except the tax payment, a court will usually grant a prescriptive easement to use the property to the trespasser, instead of ownership through adverse possession. (See "Easements," below).

WHAT CAN THE OWNER DO?

A landowner who doesn't keep an eye on his property can lose it. Nobody should allow the boundaries to be redrawn by inattention and inaction -- in a city, a loss of even twenty feet could be devastating to a property investment.

If you become seriously concerned that someone has a possible claim to your land, check the local property tax records to see if anyone has made tax payments for the property. Paying taxes always bolsters an adverse possession claim, even when it is not required for a successful claim.

There are several steps an owner can take to prevent a trespasser from gaining a legal claim to the ownership.

POST SIGNS AND BLOCK ENTRY

Some people put up "Posted" or "No Trespassing" signs to keep people off their properties. Signs can alert a trespasser that the land belongs to someone else, but are not protection against adverse possession unless state law requires the trespasser to believe that he is on his own land to make a claim (see "Hostile Claim," above). Signs are never a substitute for periodic inspection of the property. It is easy to imagine someone tacking up a few signs and returning 25 years later -- or never, a new buyer returning instead. By that time, the signs are long gone and a neighbor may have shifted over onto the land.

Signs that don't tell trespassers to stay off, but instead grant permission to use the property may actually protect an owner from losing a property interest to the public as a whole (see "Easements," below).

Locked gates at entry points to the property when the land is enclosed, or across an access that is being used, will stop most trespassers. But you should routinely check to be sure someone is not ignoring them, or worse, removing them.

GIVE WRITTEN PERMISSION

One effective way to thwart a possible claim is by giving permission to use your land. If Norma is out planting a garden in your backyard, treating it as her own land, step over and say "Hello, you are on my property by a few feet, but that's okay." You don't have to throw her off your property; simply claim it. Then put the permission in writing and obtain an acknowledgment from Norma. The chain has been broken. She

can tend that garden for forty years and still never acquire a legal claim to your property if she has your permission.

An example of written permission is shown below.

Agreement Granting Permission to Use Property

I, Frank Feldman, owner of the property located at 356 Hill Drive, Sunset, California, give my permission to Norma Neal to plant and tend a garden located on a five-foot strip of my property bordering the west side of the property line. I reserve the right to revoke this permission at any time.

_____ _____
Frank Feldman date

I, Norma Neal, acknowledge that my use of this strip of land belonging to Frank Feldman is by permission only, and that the permission may be revoked at any time.

_____ _____
Norma Neal date

This type of agreement can be used to grant permission for parking, using a shortcut across property or even growing crops. It not only can defeat adverse possession claims, but also a claim to an easement across your property (see "Easements," below). When you use such a written permission, be absolutely sure that the portion of your land being used is described in enough detail so that it is easily identifiable.

If your neighbor is upset or insulted by the idea of a written permission, show her this book. Explain that while you have no objection to her use of your land, you must protect your interest for later years.

If the neighbor refuses to acknowledge the permissive use, you are then on the alert of a possible claim that is adverse to your interest, and you should take steps to prevent further use of your property.

OFFER TO RENT THE PROPERTY TO THE TRESPASSER

If someone wants to remain on your property, you can always offer to rent it to them. In fact, the presentation of a rental agreement can be very effective in getting some trespassers to immediately leave on their own.

Any time it appears that a trespasser may be entertaining the idea of claiming your property under an adverse possession theory, see a lawyer. You may need to file a lawsuit to eject the trespasser from the land. Or you may want to ask a court to order a structure removed or a person to stay away. You must act before the trespasser has been on your land long enough, under your state's law, to make a successful adverse possession claim.

(1) Cal. Civ. Proc. Code Section 749.
(2) Preble v. Maine Cent. R.R., 85 Me. 260, 27 A. 149 (1893).
(3) Pettis v. Lozier, 205 Neb. 802, 290 N.W.2d 215 (1980).

(4) French v. Pierce, 8 Conn. 439 (1831).
(5) Helmholz, Adverse Possession and Subjective Intent, 61 Wash. U.L.Q. 331, at 339 (1983).
(6) Carpenter v. Ruperto, 315 N.W.2d 782 (Iowa 1982).

EASEMENTS

EASEMENTS BY NECESSITY

Even if it isn't written down, a legal easement usually exists if it's absolutely necessary to cross someone's land for a legitimate purpose. The law grants people a right of access to their homes, for example. So if the only access to a piece of land is by crossing through a neighbor's property, the law recognizes an easement allowing access over the neighbor's land. This is called an "easement by necessity." When land is subject to such an easement, the landowner may not interfere with the neighbor's legal right.

It's easy for a dispute to arise between neighbors when someone buys property without knowing about this kind of easement across it. For example, a new owner may discover that the neighbor is using his private drive for access to her own property. The new buyer puts up a locked gate and soon finds himself in court. If you find yourself in such a dispute, either as the neighbor with the private drive or the one who needs it, and you can't work out some sort of agreement between you, see a local property lawyer.

In fact, if you become embroiled in any escalating easement problem that appears to be headed for the courthouse, consult a local attorney who has experience with real estate problems. The doctrines of unwritten easements that are created by people's actions and certain circumstances can be very complicated. The laws vary slightly from state to state, and you may need more tailor-made advice than can be given here.

EASEMENTS ACQUIRED BY USE OF PROPERTY

Someone can acquire an easement over another's land for a particular purpose if he uses the land hostilely, openly, and continuously for a set period of time. These terms are explained in "Requirements for Obtaining Land by Adverse Possession," above. The length of use required varies from state to state and is often the same--ten or twenty years--as that for adverse possession (acquiring ownership of land by occupying it). An easement acquired in this way is called a "prescriptive easement."

COMPARING PRESCRIPTIVE EASEMENTS AND ADVERSE POSSESSION

Depending on the circumstances and on state law, someone who uses another's property may eventually gain ownership of the property (by adverse possession) or gain the right to use part of the proprety for a particular purpose (prescriptive easement).

To gain ownership of someone else's land, a trespasser must occupy it hostilely, openly, exclusively and continuously for a certain period of time set by state law. Some states require that the trespasser also pay the property taxes on the land during the period.

The requirements are much the same for a prescriptive easement: For instance, if the trespasser abandons the use for several years and then goes back to it, the element of continuity is missing, and no easement will have been created. If a prescriptive easement is challenged in court, and one of the elements is missing, there is no easement.

But there are also important differences. First, payment of property taxes is never necessary for a successful prescriptive easement claim. In states that require the payment of property taxes to obtain ownership by a trespasser, courts will grant the trespasser a prescriptive easement, but not ownership, when all requirements have been met except paying the taxes.

Also, to acquire a prescriptive easement a trespasser does not need to be the only one using the land. A trespasser can gain the easement when others are also using the property--even the owner. It follows that more than one person can acquire a prescriptive easement in the same portion of land.

Example: One of the most common ways in which several neighbors gain a prescriptive easement is by using a driveway or road on another's land for many years without being challenged by the owner. This was the result in a Washington state case when neighbors treated a driveway as their own for 40 years, finally expanding it into a road. When the owner tried to reclaim the area, the court ruled in favor of the neighbors--they had established a legal right to the road by prescriptive easement.(9)

Courts sometimes appear more willing to grant a prescriptive easement than actual ownership (through adverse possession) to a trespasser. The results are far less drastic for the owner. The easement does not take away the ownership of the property; it only requires the owner to allow the particular use of the property by somebody else.

ESTABLISHING A PRESCRIPTIVE EASEMENT

Typically, a prescriptive easement is created when someone uses land for access, such as a driveway or beach path or shortcut. But many times, a neighbor has simply begun using a part of the adjoining property. He may have farmed it or even have built on it. After the time requirement is met, the trespasser gains a legal right to use the property.

When the trespassing is done by the public, a public right to use property can be created. It is often called an "implied dedication" instead of a prescriptive easement. A public dedication is often created if an owner allows the city or county to make improvements or maintain a portion of his land.(10) For example, the owner of beachfront property may let the county pave her private drive, which is used by many people for access to the beach. The public would then gain a right to use the drive.

When disputes over prescriptive easements find their way into court, judges vary on what kind of use of someone's property justifies creation of an easement. Some courts find that simply using a strip of land regularly for a shortcut is enough for a prescriptive easement. But some

are very reluctant to grant rights on someone else's land and require the use to be substantial.

Example: In a lawsuit over a garage built partly on a neighbor's land in Indiana, a court gave the garage owner a prescriptive easement allowing him to use the three feet of garage on the neighbor's property. But it denied one for the grass and strip beside it, even though the trespasser had mowed it and treated it as his own for over forty years.(11) The building of a structure, in this case the garage, was a substantial enough use to create a prescriptive easement, but just mowing the strip of grass was not.

BLOCKING ACQUISITION OF A PRESCRIPTIVE EASEMENT

Methods of removing intruders from property are discussed above. But if you don't mind someone using part of your property, the simplest way to prevent a prescriptive easement is to grant the person permission to use the property.

Permission of the owner to use property cancels a trespasser's claim to a prescriptive easement. If your neighbor is parking his car on a small strip of your property and you give him permission to do so, he is no longer a trespasser, and he can't try to claim an easement by prescription. Giving permission to a current user also prevents neighbors who move in later from claiming they have inherited a prescriptive easement.

Sometimes, your permission can even be implied. For example, if you allow a neighbor to use your property because you are on friendly terms, your implied permission is called "neighborly accommodation." This implied consent based on a friendly relationship is only between you and that neighbor--not anyone else, including later owners.

For example, a new owner of property in Washington, D.C. went to court and tried to claim an easement across a neighbor's yard because the former owner had been allowed to cross the property. The court ruled that he had no right to use the property because the friendship between the previous owner and the neighbor created a limited implied permission.(12)

Another court in Ohio found an implied permission from neighborly accommodation when the neighbor had used a private road for access for over 40 years. When the property was sold, the new owner had no right to the road.

Depending on implied permission, or even oral permission, however, is not a wise idea for protection in the future. You could still end up in court having to let a judge interpret your intentions.

The safest way to protect your property interest when you do give someone permission is to put the terms in writing. The sample agreement above can be used for easements. If several neighbors use a strip of your property, you should draw up an permission agreement for each one to sign.

When the public is using a private strip, you can post signs granting

permission. In some states, such as California, posting these signs at every entrance and at certain intervals protects the owner from claims of a prescriptive easement.(13)

Depending on posted signs alone for protection, however, is always risky. If possible, take a further step, putting your permission for the public in writing, taking it down to the courthouse and recording it (filing a copy) in the county land records. California has a statute providing for this procedure;(14) check at your local courthouse to see it's allowed in your area. Recording it makes the permission part of the public record and available for anyone to check.

(7) Norwood v. City of New York, 95 Misc. 2d 55, 406 N.Y.S.2d 256 (1978).
(8) McCann v. City of Los Angeles, 79 Cal. 3d 112, 144 Cal. Rptr. 696 (1978).
(9) Curtis v. Zuch, 829 P.2d 187 (Wash. App. 1992).
(10) For examples of the public gaining a right to use private property, see Gion v. City of Santa Cruz, 2 Cal. 3d 29, 84 Cal. Rptr. 162, 465 P.2d 50 (1970); County of Los Angeles v. Berk, 26 Cal. 3d 201, 161 Cal. Rptr. 742, 605 P.2d 381, cert. denied, 101 S. Ct. 111, 449 U.S. 836, 66 L. Ed. 2d 43 (1980); Brumbaugh v. Imperial County, 134 Cal. 3d 556, 184 Cal. Rptr. 11 (1982).
(11) McCarty v. Sheets, 423 N.E.2d 297 (Ind. 1981).
(12) Chaconas v. Meyers, 465 A.2d 379 (D.C. App. 1983).
(13) McCune v. Brandon, 621 N.E.2d 434 (Ohio App. 1993).
(14) Cal. Civ. Code Section 813. The California statutes encourage owners of beach-front property to allow others access to the beach, without fear of claims of a prescriptive easement.

CALIFORNIA CODES
CODE OF CIVIL PROCEDURE
SECTION 315-330

315. The people of this State will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless:
1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or,
2. The people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of ten years.

316. No action can be brought for or in respect to real property by any person claiming under letters patent or grants from this State, unless the same might have been commenced by the people as herein specified, in case such patent had not been issued or grant made.

(317.) Section Three Hundred and Seventeen. When letters patent or grants of real property issued or made by the people of this State, are declared void by the determination of a competent Court, an action for the recovery of the property so conveyed may be brought, either by the people of the State, or by any subsequent patentee or grantee of the property, his heirs or assigns, within five years after such determination, but not after that period.

318. No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action.

319. No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted, or the defense is made, or the ancestor, predecessor, or grantor of such person was seized or possessed of the premises in question within five years before the commencement of the Act in respect to which such action is prosecuted or defense made.

320. No entry upon real estate is deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after making such entry, and within five years from the time when the right to make it descended or accrued.

321. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for five years before the commencement of the action.

322. When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent Court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely, except that when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract.

323. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved;
2. Where it has been protected by a substantial inclosure;
3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant;
4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

324. Where it appears that there has been an actual continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment, or decree, the land so actually occupied, and no other, is deemed to have been held adversely.

325. For the purpose of constituting an **adverse possession** by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:

First--Where it has been protected by a substantial inclosure.

Second--Where it has been usually cultivated or improved.

Provided, however, that in no case shall adverse possession be considered established under the provision of any section or sections of this **Code**, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, State, county, or municipal, which have been levied and assessed upon such land.

326. When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of five years from the termination of the tenancy, or, where there has been no written lease, until the expiration of five years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions cannot be made after the periods herein limited.

327. The right of a person to the possession of real property is not impaired or affected by a descent cast in consequence of the death of a person in possession of such property.

328. If a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof, or to make any entry or defense founded on the title to real property, or to rents or services out of the property, is at the time title first descends or accrues either under the age of majority or insane, the time, not exceeding 20 years, during which the disability continues is not deemed any portion of the time in this chapter limited for the commencement of the action, or the making of the entry or defense, but the action may be commenced, or entry or defense made, within the period of five years after the disability shall cease, or after the death of the person entitled, who shall die under the disability; but the action shall not be commenced, or entry or defense made, after that period.

328.5. If a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof, or to make any entry or defense founded on the title to real property, or to rents or services out of the property, is, at the time the title first descends or accrues, imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than life, the time, not exceeding two years, during which imprisonment continues is not deemed any portion of the time in this chapter limited for the commencement of the action, or the making of the entry or defense, but the action may be commenced, or entry or defense made, within the period of five years after the imprisonment ceases, or after the death of the person entitled, who dies while imprisoned; but the action shall not be commenced, or entry or defense made, after that period.

329. The time within which an action for the foreclosure of a lien securing an assessment against real property for street improvements, the proceedings for which are prescribed by legislation of any political unit other than the state, may be commenced, shall be two years from and after the date on which the assessment, or any bond secured thereby, or the last installment of the assessment or bond, shall be due, or, as to existing rights of action not heretofore barred, one year after the effective date hereof, whichever time is later. After that time, if the lien has not been otherwise removed, the lien ceases to exist and the assessment is conclusively presumed to be paid. The official having charge of the records of the assessment shall mark it "Conclusively presumed paid," if, at the expiration of the time within which such action might be brought he has received no written notice of the pendency of the action.

329.5. The validity of an assessment or supplemental assessment against real property for public improvements, the proceedings for which are prescribed by the legislative body of any chartered city, shall not be contested in any action or proceeding unless the action or proceeding is commenced within 30 days after the assessment is levied, or such longer period as the legislative body may provide. Any appeal from a final judgment in such an action or proceeding shall be perfected within 30 days after the entry of judgment.

330. In all cases in which there is now vested or there shall hereafter be vested in a treasurer, street superintendent, or other public official the power to sell at public auction, after demand upon him by the holder of any public improvement bond, any lot or parcel of land upon which exists or which shall hereafter exist a lien to secure the payment of a public improvement assessment represented by said bond, and the act or law establishing such power fails to prescribe the time within which such official may act, said official may sell at any time prior to the expiration of four years after the due date of said bond or of the last installment thereof or of the last principal coupon attached thereto, or prior to January 1, 1947, whichever is later, but not thereafter. This section is not intended to extend, enlarge or revive any power of sale which has heretofore been lost by reason of lapse of time or otherwise.