

A Reprint from *Tierra Grande*

# Use it or Lose it

By Judon Fambrough



**R**eal estate practitioners may not be well versed in one of the most talked about but unconventional means of acquiring or losing land. Adverse possession undermines all other traditional means of changing ownership. No contract exists, no consideration changes hands and title insurance will not cover the transaction.

Adverse possession is statutorily defined as “an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person” [Section 16.021 of the Texas Civil Practices and Remedies Code (CP&RC)].

This means if someone enters the real property of another without consent (as a trespasser) and uses the property in such a manner that clearly demonstrates the trespasser’s claim to the property contrary to the rights of the true owner, the land becomes the trespasser’s property if certain other conditions are met. The “other conditions” depend on how the entry occurred, how the property was used and the duration of possession.

In Texas, the statute of limitations forms the basis for adverse possession. If the property owner does not file a suit or otherwise remove the trespasser within a certain period, the possessor receives “full title, precluding all claims” (Section 16.030 of the CP&RC). Oddly enough, four statutes of limitation govern adverse possession.

### Three-Year Statute

The three-year statute bars the rightful owner from filing a lawsuit to recover possession when the adverse possessor has

been in peaceable possession under title or color of title for three years (Section 16.024).

*Peaceable possession* means continuous and uninterrupted possession. In other words, the adverse possessor's claim to the property was not challenged nor was the possessor removed during the three years.

*Title* means the adverse possessor entered with a deed that traces its origin back to the patent, the time the State of Texas or the Republic of Mexico transferred its rights to private ownership.

*Color of title* means the chain of title has some irregularities, but it still stands the test of fairness and honesty. The term also means that the chain of title could originate from a certificate of headright, a land warrant or a land scrip. The definition of these terms is beyond the scope of this article.

This statute is rarely called into question because the adverse possessor receives a deed from someone who owns the property according to some chain of title. Adverse possession is rarely a factor. To date, only five appellate cases have arisen under this statute. In all but one, the case was dismissed for lack of evidence.

### Five-Year Statute

Section 16.025 bars the owner from filing a lawsuit to recover possession when the property has been held continuously and adversely for five years by someone who:

- cultivated, used or enjoyed the property,
- paid the property taxes before delinquency and
- entered the property under a duly registered deed.

The statute specifically excludes entry under a forged deed or a forged power of attorney.

Texas appellate case law sheds additional light on the requirements. For example, a *duly registered deed* means a recorded warranty deed. A quitclaim deed, one that simply releases (does not grant or convey) the grantor's right, title or interest in the property, does not suffice.

Unlike the three-year statute, only the deed, not the chain of title, is relevant. Basically, the adverse possessor must secure a warranty deed from someone who has the legal capacity to sign. The deed must be recorded when possession begins. Thereafter, the adverse possessor must pay the property taxes for five consecutive years.

### Ten-Year Statute

The ten-year statute is used more often than any of the others (Section 16.026). The statute bars the owner from filing a lawsuit to recover possession when the property has been held continuously and adversely for ten years by someone who cultivates, uses or enjoys it.

The statute requires no deed for entry and no payment of property taxes. The primary issue is the amount of land the possessor may claim. Different rules apply depending on whether the land was enclosed (fenced) and whether the

adverse possessor entered under a recorded deed or memorandum of title.

If the adverse possessor enters without a deed or memorandum of title and the land is not fenced, the possessor may claim no more than 160 acres. If the land is fenced, the adverse possessor may claim all the land under fence if the entire fenced tract is held peaceably and adversely.

Different rules apply when the possessor enters under a recorded (registered) deed or a memorandum of title that contains a legal description of the property. The possessor may claim the entire described tract even though only a part was actually possessed. Possession of part extends the claim to the whole. Fencing plays no role.

*Memorandum of title* is not defined in the statute. Basically, it is a written document reflecting a transfer of title. A will meets the requirement as does a tax deed issued by the sheriff at a tax sale.

Entry under a forged deed, while excluded under the five-year statute, is recognized under the ten-year statute. Likewise, the ten-year statute recognizes entry under a quitclaim deed while the five-year statute does not.

### Twenty-Five-Year Statutes

Three statutes address adverse possession when the land is held peaceably and adversely for 25 years. Two are discussed here; the other is covered later under the topic of tolling.

The first statute prohibits the owner from filing a lawsuit to recover possession from anyone who has possessed the property continuously, adversely, in good faith and under a recorded deed or other instrument of conveyance for 25 years (Section 16.028). The possessor receives good and marketable title to the property. Possession of a part of the land described in the deed extends the possession to the entire tract even though the deed is void.

The second statute addresses title claims against an apparent record owner (Section 16.029). *Prima facie* evidence exists that the apparent record holder lost title when the:

- apparent record holder did not exercise dominion over the property or pay the property taxes for one or more years during the preceding 25 years, and
- possessor (opposing party) openly exercised dominion over the property, asserted a claim to the property and paid the property taxes annually before delinquency for as long as 25 years.

The term *apparent record title* is not defined in the statute or in the case law.

Evidently, the apparent record title holder is the person who owns the property according to the chain of title.

### Tacking

The same person need not physically adversely possess the property for the entire duration of the three, five, ten or 25

*If someone enters a property as a trespasser and uses the property in a way that clearly demonstrates his or her claim to the property contrary to the rights of the true owner, the land becomes the trespasser's if certain other conditions are met.*

years. Subsequent possessors may add (or tack) their possession periods together to reach the required period. The periods of peaceable, adverse possession need not commence and continue in the same person as long as privity of estate exists between (or among) the possessors (Section 16.023).

The term *privity of estate* is not defined by statute but by case law, which mandates that:

- each predecessor have the same type of possession and/or use required by the statute,
- no interruption in possession occurs when one possessor leaves and another enters and
- transfer between the possessors is by agreement, gift, will or inheritance. A quitclaim between the possessors suffices.

## Tolling

Sometimes the time spent physically possessing the property does not count toward adverse possession. Both Texas law and federal law affect the issue.

Under Texas law, if the owner suffers from a legal disability at the time the adverse possessor enters (Section 16.027), the statute tolls (suspends or stops) the countdown until the disability is removed. Texas tolling laws apply only to the three-, five- and ten-year statutes.

A person with a *legal disability* is defined (Section 16.022) as anyone:

- younger than 18 years old, regardless of whether the person is married;
- of unsound mind; or
- serving in the U.S. Armed Forces during time of war.

If the owner suffers from more than one disability when the adverse possessor enters, tolling ceases and the countdown begins when one (not all) of the disabilities is removed.

Texas law puts an end to tolling after 25 years. An owner suffering from a legal disability is barred from filing a lawsuit to recover property when the property has been held continuously and adversely by someone who cultivates, uses or enjoys it for 25 years.

Federal law, which supersedes Texas law, differs in several ways (50 USCA Section 501). First, it tolls all four statutes, not just the first three. Second, military service tolls the statutes whether or not the country is at war. Third, it absolutely tolls the statutes regardless of when the owner enters the military service. Tolling ceases six months after the owner is discharged.

## Adverse Possession and Minerals

With the value of minerals exceeding the value of the surface in many areas of Texas, how does adverse possession of the surface interact with mineral rights? According to Texas case law, the possessor acquires all the mineral interest owned by the surface owner at the time the adverse possession begins. If the surface owners owned half the minerals when the adverse possessor enters, then the adverse possessor acquires the surface and half the minerals when the adverse possession ends.

## Update Effective Sept. 1, 2009

The 81st Legislators changed the law effective Sept. 1, 2009, regarding the award of attorney fees in a suit involving adverse possession. Prior to this date, Section 16.034 of the Texas Civil Practices and Remedies Code provided that the court may award costs and reasonable attorney's fees to the prevailing party who recovers possession of the property from a person unlawfully in actual possession.

After this date, the statute now provides that the court shall award costs and reasonable attorney's fees to the prevailing party who recovers possession of the property from a person unlawfully in possession when the court finds that the person unlawfully in possession made a claim of adverse possession that was groundless and made in bad faith.

The statute goes on to say that the court may award costs and reasonable attorney's fees to the prevailing party in the same circumstances even though the claim was not groundless and made in bad faith. ♣

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# Adverse Possession Factoids

- A private individual may not acquire public land through adverse possession. Lands owned by a public entity, such as the state or federal government, cannot be adversely possessed.
- “Casual enclosures” and “convenient fences” do not necessarily establish adverse possession to property within the fence lines. A casual fence is either one built by a former property owner or one designed to fence out livestock, not to enclose the property. A fence of convenience varies from the true property line because topographical features such as

creeks, gullies or cliffs make it physically impossible to do otherwise. In such cases, the owner on the other side cannot claim adverse possession to the property between the true boundary line and the fence location.

- At the conclusion of adverse possession, record title to the property still rests with the former owner. To get record title, the possessor may either file a lawsuit known as “trespass to try title” or file an affidavit of quiet enjoyment. The affidavit sets forth the facts establishing the possessor’s rights to the property under the three-, five-, ten-, or 25-year statute.



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