

# Adverse possession: law and effect



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To adequately address the controversy between whether or not adverse possession in England/Wales and positive prescription in Scotland are similar in effect, the law in both jurisdictions must first be discussed. Only then can the effects of same can be established and compared.

When a property owner fails (within a specified time frame) to evict a squatter<sup>[1]</sup> from their property their title is extinguished, as a result they cannot recover possession. This is the essence of the doctrine of adverse possession. Adverse possession is by no means a novel or modern idea. Traces of this doctrine can be found back as far as Roman law with *uscapio* and *longi temporis praescriptio*, with common law roots dating to the feudal times.<sup>[2]</sup> As with all law, it has evolved and advanced through the use of both statute and case law. Thus a doctrine permitting the acquisition of one's land by another has long since been created.

Perhaps one of the most interesting aspects of this doctrine is the rationale behind it. One such notion is that there is a pragmatic expectation that any property owner will assert their title against any and all intruders.<sup>[3]</sup> The argument goes that if property owners fail to affirm their rights against the trespasser then they are not a responsible owner, thus are not entitled to own the property. This echoes the legal maxim *vigilantibus ton dormientibus lex succrit* - the law will only assist those who remain alert, not those who sleep. Additionally the policy considerations<sup>[4]</sup>, the quieting of title<sup>[5]</sup>, are adhered to. Some commentators have noted that this doctrine mutates a squatter's initial wrong (theft) into an eventual right (land title).<sup>[6]</sup> Thus, it

must be questioned whether there is value in upholding such a doctrine, due to its somewhat controversial nature, which notably evokes a strong emotional response due to the misconception of it as little more than legal theft.[7]As a result of avoiding the obligation of payment for land, by engaging in this more primitive acquisition of it[8], squatters are often portrayed in a negative light such that they are stealing the 'patch' of another.[9]This highlights the inevitable debate of the validity of such a doctrine for why should a person not be free to do whatever they so please with their property, even if that means doing nothing? Nevertheless such discussion for present purposes will not be furthered.

The present law on adverse possession in England was initially formalised in common law in 1962.[10]In spite of this, as noted earlier, the law has been subject to alterations and evolutions through a number of leading cases. [11]As a result, although the current law does fall within the doctrine of general limitations, the infamously flexible judge-made law must be consulted for the relevant principles.

In a sense the law of adverse possession is similar to that of criminal law - there are two fundamental requirements, one physical and one mental. In adverse possession there must be factual possession and *animus possedendi*, the latter being the more contested issue in practice. As commentators have noted, " much academic and judicial ink has been spilt in trying to determine in what circumstances possession could be deemed to have taken place and when it was also 'adverse'".[12]

In the case of *McFarlane* [13], Mr Justice Slade spoke about what is necessitated by the requirement of *animus possedendi*. Ostensibly it was

noted that the squatter must possess the intention to exclude the world at large, which inevitably includes the true owner, so far as the law will allow and is reasonably practicable.[14]It should be noted that for a significant length of time, what exactly the squatter had to intend was quite unclear. It is evident from the case law that different judgments purported differing requirements. For example it had been held that a squatter couldn't simply intend to possess the land, this of course was a requirement but, they must also intend to exclude all others from it (including the paper owner).

[15]Subsequently it was emphasised that the requisite intention was simply that the squatter intended to possess the land.[16]Thus the question arose as to whether or not intention to exclude, in addition to the intention to possess, was an aspect of the *animus possidendi* requirement. Recently the House of Lords clarified the matter wherein it was held that the requisite intention was simply the intention to possess.[17]

The courts must consider several factors in order to establish *animus possidendi*. These factors go beyond simply the nature of the actions undertaken by the squatter and the evidence as to their intention. The courts must identify whether the possession was adverse, as well as whether the acts of the squatter were such that the intention to possess was unequivocal and that this intention was made clear to the world. If the courts establish that these actions were in fact equivocal, that the intention was ambiguous or simply not made 'plain' then the claim for adverse possession will fail.

[18]The squatter must be in possession of the land in a manner inconsistent with the true owner before the time period will run.[19]It has been noted that possession with consent of the paper owner will not usually give rise to

adverse possession[20] and prior consent will prevent the limitation period from running[21]. Nevertheless, there are certain contestable situations that may occur in practice. The issue of implied consent[22], and whether or not there was a granting of a license[23] are just two examples of how consent can affect the outcome of the individual case.

In order to substantiate a claim for adverse possession the squatter must, in satisfying the requirement of possession[24], establish a sufficient degree of physical control over the property.[25] The notion of a 'sufficient degree'[26] evolved throughout the case law, similarly to the test to establish it. Interestingly these disputes can occur in a wide variety of circumstances. For example there have been cases indicating the possibility of adversely possessing a specific portion of a house[27]. The courts apply an objective test relating to the nature and quality of the property, seemingly however no consideration or variation will be afforded by virtue of the status of the parties to the case.[28]

Evidently any possession must be open[29], actual, continuous and exclusive[30]. In applying the objective standard to exclusivity the physical enclosure of land is relevant but not determinative[31]. Generally fencing will satisfy the requirements of factual possession. However, the purpose of the fencing will be taken into account. For instance if the fencing was in place to enclose livestock, as opposed to preventing access to the property, it will not satisfy the prerequisite for a claim of adverse possession[32]. In the *Adams* [33] case Mr Justice Laddie delved into the nature and purpose of fencing. This discussion can be interpreted as meaning both entry and exit from the property. Notably the squatter need not maintain the fencing for

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the purposes of both. Nevertheless, fencing is presumably the most self-evident form of factual possession[34]. It is clear that although no variation is given in accordance with the situation of the parties, there is variance dependent upon the nature of the property being possessed[35].

Consequently a person can be held to be in possession of property by cultivating land[36], shooting over it[37] or by simply leaving it vacant[38].

Thus it is clear the finding of adverse possession is circumstantial. As a result the main issues in practice is the determination of whether the acts undertaken are sufficient to constitute possession[39]. Additionally, in accordance with common sense, it must be noted that the acts of possession need not necessarily inconvenience the true owner[40]. To mandate such a requirement would potentially, and it is submitted most likely, result in an action being brought against the squatter much sooner. Therefore a lot, if not the vast majority, of cases of adverse possession would be prevented from ever reaching fruition. Following from this it is clear that a mere act of trespass will, notwithstanding the variance depending upon the nature of the land, be insufficient to warrant an adverse possession claim[41].

The doctrine of adverse possession gained much clarity with the *Pye* [42] decision in 2006. Herein Lord Browne-Wilkinson purported that reference to adverse possession should be avoided as much as possible. The rationale being that by doing so, a lot of the confusion and complication that arises would be avoided. It was submitted that in such cases there is a simple question. The court, it was asserted, need only answer whether the squatter 'dispossessed' the true owner by being in ordinary possession of the property, without consent, for the required time period. Throughout his

judgment Lord Browne-Wilkinson seemingly claimed there was an over conceptualisation of the doctrine of adverse possession. In relation to the debate as to what constitutes 'adverse' possession, he suggested that what needs to be established is whether the possession is without the owner's consent. This case adopted the approach in *McFarlane* [43] wherein the nature and use of the property was the key test. Thus to satisfy factual possession one seemingly need only have "sufficient custody and control for ones own use"[44].

As noted earlier, the effect of the doctrine is governed by both statute and case law. Although the precedent set out above plays an important role in the deciding of cases, new statutory changes[45] have significantly limited the scope of this doctrine. It has been suggested that this restriction is to be commended for creating a more rational and secure footing for the law. [46] The new law provides for circumstances consistent with the system of land registry wherein titles can be abandoned or registered under certain acts. The 2002 Act[47] addressed concerns regarding the ease at which an individual's property could be adversely possessed[48]. Thus with the enactment of the legislation came a significant change such that the burden shifted from the true owner[49]. Prior to this reform, the paper owner had been required to remain alert and ensure their land was not being adversely possessed. As per the 2002 Act[50] however the squatter now bears the burden such that they must have adverse possessed the property for a minimum of ten years before making an application.[51] The true owner can, of course, protect their title by objecting to the application. This objection will render the application incomplete. If the squatters' application is rendered

incomplete, they need only remain in possession for a period of two years before they can re-apply. There are different options available to the true owner in the event of an application[52]. If the paper owner chooses to ignore or confirm[53]the application then the squatter will be registered as the proprietor. The 2002 Act[54]also provides for serving counter-notice[55]. This requires the registrar to operate under paragraph 5 of Schedule 6. As a result a squatter may not be registered in place of the true owner irrespective of whether they have established factual possession or not. However his is subject to three exceptions[56]which highlight not only the equitable principles intrinsic to the doctrine but also the policy considerations upon which it is premised.

Although possible to identify numerous categories within the doctrine itself[57], it is clear that the requirements of factual possession and intent are at the heart of understanding its effect. The fact the squatter must show that they had the intention to possess the land and put it to their own use, as well as proof of physical possession illuminates both the equitable and legal transfer of property rights by the creation of an added dimension. The aspects present in establishing adverse possession, as discussed earlier[58], are of utmost importance regarding the effect of this doctrine. As seen throughout the case law, in reality it is these elements which determine the outcome of the case. Thus they dictate the effect upon the individual and the disputed property.

Positive Prescription: Law and Effect



Positive prescription is the existing system of land acquisition under 'Scots law', the name given to the hybrid legal system in Scotland. There is an interesting difference in development between Scots Law and the English common law system. Scots law does not simply follow suit as so many other jurisdictions do, rather they created principles consequential to the work of French and Italian scholars, with Roman law proving particularly influential[59].

Whilst some commentators have noted the similarities between the nature of Scots law and that of other jurisdictions (namely Sri Lanka and South Africa) [60], it did in fact develop, as part of the *ius commune* [61], with influences from both civil and Canon law. Unsurprisingly, due to both proximity and relationship, Scots law has inevitably also been affected by the influence of common law[62]. Therefore certain similarities may be drawn. Nevertheless it must be noted that Scots law is a very unique, distinct native system wherein legislation is 'king'. Interestingly the first of the legislation governing positive prescription, a creature of Scots law, is from the sixteenth century. [63]

Similarly to adverse possession, prescription has roots in Roman law wherein it played an important role regarding property law. Here title was acquired through possession, or where an individual failed to meet the formalities which would deny such appropriation[64]. Initially the rationale was established to distinguish between prescription granting title and that preventing a claim of title against the squatter.

As noted, positive prescription had many muses - one of which was Canon law. Herein a great deal of importance was given to the *bone fide* [65]possession of the property. Positive prescription is unlike adverse possession in the sense that historically its role was one of conveyancing, not a method self-acquisition or 'legal theft'.

Initially the legislation[66]simply had the effect of restricting the right to " call on a possessor to produce his full progress of titles"[67]. Effectively once the period of possession[68]was completed this was seen to be confirmation of title. If the period of possession was unfulfilled, the progression of derivative titles was incomplete. Subsequently the transfer of title would have been denied.

Continuous, open, peaceable possession of a registered title (which is reflective of a real right) for 10 consecutive years (devoid of judicial interruption) will result in the indicated real right and this right will be free from challenge[69]. This exemption from challenge has been subject to much debate, nevertheless the *modus operandi* is to ensure secure title. [70]Notably in a discussion paper the Scottish Law Commission purported that " a positive system of registration of title is no substitute for positive prescription".[71]They continued, focusing on the exemption from challenge. It was noted how registration of title simply makes a void title good but is subject to challenges, whereas prescription makes title good without recourse to challenge. Although the central ideology of system of positive prescription is to serve public interest[72]it may be viewed as a means of deprivation of property.

Thus positive prescription, like the doctrine of adverse possession in England and Wales, has an important role regarding property ownership. That said, in Scotland by virtue of acquisition by prescription as per the 1973 Act[73], both possession and title are required. Contrarily the doctrine of adverse possession is such that the title of the true owner is lost via limitation. The Act further provides for circumstances wherein the title is registered in the land register or the register of deeds[74], or where it is not recorded[75]. The first of these situations mandates possession for a period of ten years, whilst the second holds a requisite period of possession of twenty years.

The rationale, or objective, for the registry is similar to that of the model in England. Nevertheless there is a stark difference in the length of time mandated for possession. That said, in establishing either adverse possession or positive prescription what the court looks to is very similar - if not identical.

#### A Comparative Analysis of Effect

In order to adequately assess the effect of both adverse possession and positive prescription we must first look to their justifications. Commentators have often noted that adverse possession simply executes what is deemed to be a " pragmatic expectation" which came into existence during a time where an individual would have to forcefully assert their title against intruders[76]. However this may be seen to be quite an archaic justification, and that in modern times the only purpose of such doctrines is to provide a legal form of theft. Additionally it has been purported that the law in this area is too harsh, especially in considering the human rights

implications[77]. Nonetheless, there are in fact many valid considerations in favour of such laws, which in turn highlight the effect of the doctrines.

The first justification to discuss is the infamous Lockean 'labour- desert' theory. Locke asserted that an individual has a natural entitlement to land if it is used productively. In today's world, it is increasingly clear that land is a finite resource. Thus it is difficult to argue against the notion that property ought be granted to the 'useful labourer' as opposed to the incompetent fainéant. Although the context with which Lockes theory was concerned was unowned property, it seems to present a logical justification to the doctrines at hand.

As briefly alluded to in the discussion of adverse possession, one justification for such a doctrine is in relation to the 'quieting of title'. The policy concern is the continuation of markets, as well as the desire to minimise tensions and conflicts. Courts have held that the objective of any statutes of limitation is to prevent claims from arising after unreasonable amounts of time have passed[78]. If causes of action were unlimited by time restraints it would breach the basic rules of fair procedures and justice - evidence could and would become lost, and memory by its very nature deteriorates with age. It could be said that this justifications retains elements of capitalism, however it serves to protect the innocent third party who purchases property whilst also providing pragmatic benefits (such as efficiency, registration and land use)[79].

Notably other countries, for example the United States or even Brazil, cite grounds including protecting development and initiative of the individual as

justification.[80]As such it is important to note that in England and Scotland by the 18<sup>th</sup> Century most land had been enclosed[81]thus the concerns were in relation to the clarification of boundaries and titles. Which perhaps surprisingly, due to the reputation of the doctrines legalising theft, are in actuality the areas within which most cases fall.

Interestingly in Scotland a landowners power is seen as intrinsic to the interrelationship with cultural symbols related to the land[82]. The notion of symbols having a sociohistorical significance (with it being connected to social standing and groupings) offers a different view to the effect of the doctrines. This understanding highlights that any decision made can and will have significant social consequences for the parties involved.

In common law the doctrine of adverse possession was originally premised upon customs and traditions. Thus the systems of acquisition date back to the introduction of personal property. That said, they have since become more regulated and civilised. Although some commentators argue that the doctrine became ubiquitous only after the Norman conquest, with others stating its prevalence dates simply to British feudalism[83], it is self-evident that the possession of vacant land was an intrinsic part of the global development of civilisations. Likewise title to land can be gleamed though the open, peaceable possession of land (provided there has been no judicial intervention) via the doctrine of prescription in Scotland.

Whilst comparing the doctrines of adverse possession and positive prescription, differences are apparent - for example the specific time periods required for possession, the consequence of enforcing the expiration date, or

even simply the basis of the doctrine itself. Nevertheless, in reality the application of the rules to factual scenarios leads to results and effects of great similarity such that they are often identical.

### Conclusion

It is clear that courts have been faced with similar issues when dealing with cases of adverse possession and positive prescription. For example, issues arise in attempting to ascertain which acts of possession should be afforded the greater weight, or in establishing exclusion. As highlighted throughout the discussion, cases of positive prescription will not necessarily be determined using the same methodology as adverse possession. Adverse possession and positive prescription were established and have developed in very different forms nevertheless the effect of each remains the same. Positive prescription relies heavily upon the legislation, consistent with the approach of its native system, whilst adverse possession although makes use of legislation[84], relies to a large extent (as per the nature of common law) on case law.

At first the doctrines seem to be completely distinct, however in reality the justifications and effects are of such similarity that in practice the doctrines could be interchanged without altering the result of the cases. Notably both doctrines have, at some point at least, taken the role of a guide for the other and it is submitted this will probably continue to be the case.

Having evaluated the development, rationale and effect of the laws relating to adverse prescription in England/Wales and positive prescription in

Scotland it is purported that, notwithstanding the difference in method and development, the effects of both are nigh on identical.

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